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August 29, 2011

**By Hand Delivery and First Class Mail**

Matthew Shannon
Office of the Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.
Washington, DC 20419

**Re: Amicus Brief in James C. Latham et al v. U.S. Postal Service, MSPB Docket Number DA-0353-10-0408-I-1**

Dear Mr. Shannon:

Enclosed for filing in the above-referenced matter is the original and two copies of an amicus brief on behalf of the National Postal Mail Handlers Union ("NPMHU"), a labor union that represents more than 47,000 mail handler craft members in postal facilities across the United States.

Due to the circumstances related to last week's earthquake and hurricane, and as explained in my prior letters of August 24 and August 26, 2011, we were not able to submit the brief until today. Should a formal Motion for Leave to File this brief beyond the deadline be necessary, please do not hesitate to contact me.

Thank you for your attention and consideration in this matter.

Hand delivered
8-29-11

Sincerely,

Bruce R. Lerner

**BEFORE THE**
**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

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Docket No. DA-0353-10-0408-I-1

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JAMES C. LATHAM, et al.
Appellant,

v.

United States Postal Service,
Agency.

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# AMICUS BRIEF ON BEHALF OF THE NATIONAL POSTAL MAIL HANDLERS UNION


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## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Postal Mail Handlers Union (NPMHU) is a national labor organization that serves as the exclusive bargaining representative for more than 47,000 mail handlers employed by the U.S. Postal Service ("Postal Service" or "USPS"). Because the issues presented by these cases are of importance to many of its members, the NPMHU has a vital interest in the outcome of this case.

## STATEMENT OF ISSUES

1. May a denial of restoration be "arbitrary and capricious" within the meaning of 5 C.F.R. § 353.304(c) solely for being in violation of the Postal Service's Employee and Labor Relations Manual ("ELM"), i.e., may the Merit Systems Protection Board (the "Board") assert jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules?

2. What is the extent of the Postal Service's restoration obligation under the ELM, i.e., under what circumstances does the ELM require the Postal Service to offer a given task to a given partially recovered employee as limited duty work?

## INTRODUCTION

Federal agencies are required pursuant to regulations issued by the Office of Personnel Management ("OPM") to "make every effort" to restore civil service employees who have partially recovered from compensable injuries to limited duty within the "local commuting area." 5 C.F.R. § 353.301(d). The Board has held that this regulation does not require an agency to assign a partially recovered employee to limited duties that do not comprise the essential functions of a complete and separate position. *Taber v. Department of Air Force*, 112 M.S.P.R. 124, ¶ 14 (2009).

The Postal Service, however, has adopted more robust restoration rights, as set forth in Section 546.142(a) of its Employee and Labor Relations Manual ("ELM"), requiring the agency to "make every effort toward assigning [a partially recovered current employee] to limited duty consistent with the employee's medically defined work limitation tolerance." This provision under some circumstances requires that the Postal Service restore a partially recovered employee to a position that may not comprise the essential functions of a complete and separate position within the scope of 5 C.F.R. § 353.301(d).

Civil services employees may appeal an agency's denial of restoration rights to the Board. OPM regulations provide that "[a]n individual who is partially recovered from a compensable injury may appeal to [the Board] for a

determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). And, it bears noting, the ELM itself, in Section 546.4 entitled "Employee Appeal Rights," provides that "[c]urrent or former employees who believe they did not receive the proper consideration for restoration, or were improperly restored, may appeal to the Merit Systems Protection Board under the entitlements set forth in 5 CFR 353."

Accordingly, to establish Board jurisdiction for an appeal of a restoration claim, the Board has held that an appellant must allege facts that, if proven, would show that: (1) the appellant was absent from her position due to a compensable injury; (2) the appellant recovered sufficiently to return to duty in a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied the appellant's request for restoration; and (4) the denial was arbitrary and capricious. *White v. United States Postal Service*, 114 M.S.P.R. 386, ¶8 (2010).

## ARGUMENT

### 1. A failure by the Postal Service to provide restoration rights in accordance with Section 546.142(a) of the ELM provides a basis for Board jurisdiction under 5 C.F.R. § 353.304(c).

The Board has not yet addressed the issue whether the failure of the Postal Service to apply a provision of the ELM may qualify as "arbitrary and capricious"

conduct sufficient to establish Board jurisdiction under 5 C.F.R. § 353.304(c). There is a long line of Board authority, however, holding that the Board will enforce employee rights derived from agency rules, regulations, and collective bargaining agreements. *See Campbell v. United States Postal Service,* 75 M.S.P.R. 273, 279 (1997); *Giesler v. Department of Transportation,* 3 M.S.P.R. 277 (1980).

This principle has been applied to enforce ELM provisions that go beyond the rights to which an employee would be entitled by statute. For example, in *Miller v. United States Postal Service,* 105 M.S.P.R. 89 (2007), the Board held that it had jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") to consider an employee's appeal concerning his entitlement to military leave under the ELM, even though the employee in question, as a Postal Service employee, did not qualify for military leave rights under USERRA. The Board explained that "[t]he fact that the appellant in this case is not covered by 5 U.S.C. § 6323, but is instead covered by an agency rule, does not affect our authority to consider this case under USERRA." *Miller,* 105 M.S.P.R. 89, at ¶ 11. *See also Welshans v. United States Postal Service,* 107 M.S.P.R. 110, at ¶ 7 (2007) (same) , *aff'd* 550 F.3d 1100 (Fed. Cir. 2008); *Plezia v. Department of Veterans Affairs,* 102 M.S.P.R. 125 (2006) (reaching the same conclusion in applying the military leave policies of the Department of Veterans Affairs).

Similarly, the Board "will treat the provisions of a collective bargaining agreement to which the agency is a party in the same manner as it treats the provisions of the agency's regulations." *Ricketts v. United States Postal Service,* 94 M.S.P.R. 257, 260 (2003) (applying back pay provisions of a collective bargaining agreement with Postal Service employees). *See also Rosenberg v. Department of Transportation,* 105 M.S.P.R. 130 (2007) (applying travel reimbursement provisions of collective bargaining agreement with Department of Transportation employees); *Hamilton v. Department of Labor*, 96 M.S.P.R. 25 (2004) (applying the reassignment provisions of a memorandum of understanding with employees of a Department of Labor office).

These cases provide clear authority for the proposition that the Board will assert jurisdiction to enforce agency rules, regulations, and collective bargaining agreements, even when such provisions afford rights to employees that are more robust than the protections provided under the statute or regulation on which the Board's jurisdiction is based. 105 M.S.P.R. 89, at ¶ 11. Moreover, it is clear that the provisions found in the Postal Service's ELM that directly relate to wages, hours, and other terms and conditions of employment are collectively bargained, and thus should be enforced by the Board in the same manner as agency regulations. *Ricketts,* 94 M.S.P.R. at 260. *See also In re National Arbitration Between U.S. Postal Service and American Postal Workers Union* , Case No. H1C-

3T-C-18210 (June 25, 1984) (Arbitrator Richard Mittenthal) at 7 ("There are other contractual requirements as well. Article 19 [of the collective bargaining agreement] incorporates the ELM, Section 546.141 which imposes additional responsibilities upon the Postal Service with respect to 'employees with job-related disabilities.'"). Accordingly, the Board's own precedent compels the Board to enforce the restoration rights set forth in the ELM, notwithstanding that these rights are not based in, and go beyond, OPM regulations.

Further, there can be no question that the Postal Service's failure to comply with the ELM would be "arbitrary and capricious" conduct within the meaning of 5 C.F.R. § 353.304(c). In similar settings involving review of agency action by federal courts, Section 706 of the Administrative Procedure Act requires that a court hold agency actions unlawful if such actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 760. Moreover, it is a well-established principle of administrative law that an agency is required to follow the rules it adopts, particularly when those rules are more rigorous than would otherwise be required. *See Service v. Dulles,* 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton,* 359 U.S. 535, 539-540 (1959); *Senior v. United States Postal Service,* 85 M.S.P.R. 283, 288 (2000). The Postal Service's failure to comply with the restoration rules that are set forth in the ELM therefore would be clear evidence of "arbitrary and capricious" agency conduct.

**2. Section 546.142(a) of the ELM requires the Postal Service to restore a partially recovered employee to limited duty work beyond that required by OPM regulations.**

By its own terms, Section 546.142(a) of the ELM provides that, when faced with a current or former employee who has partially overcome a compensable injury or disability, the Postal Service is required to "make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance." In assigning such limited duty, the ELM also directs the Postal Service to minimize any adverse or disruptive impact on the employee, and sets forth a series of factors that must be considered by the Postal Service when effecting such limited duty assignments. These factors are further explained in the Postal Service's Handbook EL-505 on Injury Compensation, in particular in Exhibits 7.1 and 7.2 of that handbook,

The plain language contained in this ELM provision and the EL-505 handbook have been confirmed in a long line of National arbitration decisions between the Postal Service and its major employee unions, including the NPMHU. These decisions are binding on the Postal Service, on a nationwide basis, unless overruled or distinguished by a subsequent National arbitration award or by changes to the ELM or the collective bargaining agreements negotiated by the Postal Service and its unions.

To begin with, the origin of the language now contained in ELM Section 546.142(a) dates back to 1979. Before that year, the Postal Service's ELM provisions only required the Service to restore injured workers into "established jobs." Indeed, ELM Section 546 prior to 1979 specifically stated that "maximum efforts shall be given toward assignments for employees with occupational related illnesses or injuries to established jobs which are not medically contraindicated." These provisions were changed in 1979, as has been explained in a 1982 decision issued by National Arbitrator Benjamin Aaron:

> In . . . 1979, . . . [i]n settlement of a NALC [or National Association of Letter Carriers] grievance, the Postal Service and the NALC executed a letter agreement from William E. Henry of the Postal Service to Vincent R. Sombrotto, President of NALC, dated 26 October 1979, adopting a new part of the ELM, reading in part:
>
> > .142 When a former employee has partially recovered from a compensable injury or disability, the USPS must make every effort toward reemployment consistent with medically defined work limitation tolerances. Such an employee may be returned to any position for which qualified, including a lower grade position than that held when compensation began.
> >
> > This language, to which you indicated you and other Unions with whom you discussed it are amenable, incorporates procedures relative to the assignment of employees to limited duty that you proposed. Subchapter 540 of the Employee and Labor Relations Manual was published on October 22, 1979, as a Special Postal Bulletin. It is the intent of the Postal Service to publish Part 546.14 with the language set forth in this letter, separately, after transmitting it to the Unions under Article XIX of the National Agreement. Part 546.14

> subsequently will be published along with the rest of Subchapter 540 in the Employee and Labor Relations Manual.
>
> The approved language was subsequently incorporated in subchapter 540 and published in PB21230, dated 31 January 1980.

Subsequent national arbitration decisions have given additional meaning to these revised provisions of ELM Section 546.142(a). In 2002, most notably, National Arbitrator Shyam Das upheld a limited-duty assignment that was "uniquely created as a rehabilitation assignment," and thus was an assignment that "would not have existed, but for the obligation [of the Postal Service] to find work for the injured employee." *In re National Arbitration Between U.S. Postal Service and American Postal Workers Union and National Association of Letter Carriers (Intervenor)*, Case No. E90C-4E-C-95076238 (Oct. 31, 2002) (Arbitrator Shyam Das) at 19. As Arbitrator Das summarized, "In this case, the rehabilitation assignment in question was not created to meet the operational needs of the Postal Service, but to fit the medical restrictions of the injured employee with minimum disruptive impact on the employee." *Id.* at 20.

Moreover, the paragraphs contained in ELM Section 546.142(b) set forth a specific order in which "adequate work" must be identified, provided that such work falls within the employee's medical tolerances, as defined by ELM Section 546.611 based either on the findings of the employee's treating physician or the findings of an OWCP physician. Indeed, such medical restrictions may include

limitations on the type of duties and the amount of work that can be performed by the ill or injured employee.

The examples could continue, but there is no reason to belabor the point. The Postal Service has a complex set of rules, found in both ELM Section 546 and its Handbook EL-505, that govern the work assignments that must be made available to postal employees injured on the job, and those rules are fully enforceable before the Board.

Respectfully submitted,

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