United States of America
Merit System Protection Board

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Amicus Brief

James C. Latham, et al. v. U.S. Postal Service

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Filed by: George Reyes
USPS/NALC
Dispute Resolution Team Representative
1 St. Ann Drive
Mandeville, LA 70471

I. INTRODUCTORY

The subject amicus brief before the Board is filed in an attempt to determine and address the implications of ELM § 546.142(a) on restoration appeals of partially recovered U.S. Postal Service employees under 5 CFR 353.304(c). In order to do so in this amicus brief the following will be addressed:

(1) May a denial of restoration be "arbitrary and capricious" within the meaning 5 CFR 353.304(c) solely for being in violation of the ELM?

(2) May the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules?

(3) What is the extent of the agency's restoration obligation under the ELM?

(4) Under what circumstances does the ELM require the agency to offer a given task to a given partially recovered employee as limited duty work?

II. OPINION

(1) May a denial of restoration be "arbitrary and capricious" within the meaning 5 CFR 353.304(c) solely for being in violation of the ELM?

5 CFR 353.304(c).

> An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.

To answer this question, one must consider the source from which the United States Postal Service (USPS) derived its regulations which are contained in the Employee and Labor Relations Manual (ELM).

The following is the heading on ELM 546:

Reassignment or Reemployment of Employees Injured on Duty

546.1 Law

546.11 General

The Postal Service has legal responsibilities to employees with job–related disabilities under 5 U.S.C. 8151 and the OPM regulations as outlined below.

It is well established that agencies must follow their own regulations.

In Drumheller v. Department of the Army, 49 F.3d 1566, 1574 (Fed. Cir. 1995) the Board held that "The agency must comply with its own procedural regulations." The board went further to state:

> "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."

Even though agencies must follow their own regulations, even though the USPS has the authority create its own regulations, it can not violate federal or OPM minimum

requirements. For example the USPS cannot create a regulation in which it would be permissible to limit letter carrier jobs to men only, or create a policy which would allow for the discrimination against handicapped personnel.

Based on the above the USPS must adhere to federal as well as OPM regulations which include 5 CFR 353.304(c).

ELM 546.142 is the USPS own regulation based on 5 U.S.C. 8151 and the OPM regulation 5 CFR 353. The USPS regulation affords employees greater restorations benefits in some aspects, but it lacks in others.

Being the case that the Merit System Protection Board (MSPB) has jurisdiction on cases involving 5 CFR 353.304, and that the USPS must follow the same federal and OPM regulations which the Board has jurisdiction over, the board should be able to deem arbitrary and capricious the USPS denial of restoration rights to its employees when the USPS violates it own regulations.

(2) May the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules?

To place things into perspective, the following is the contractual basis relied upon when dealing with the grievances borne out of disagreements relating to Postal Management's application of ELM 546. The National Parties agreed to the following clauses in collective bargaining:

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

15.1 Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Broad Grievance Clause. *Article 15.1 sets forth a broad definition of a grievance. This means that most work related disputes may be pursued through the grievance/arbitration procedure. The language recognizes that most grievances will involve the National Agreement or a Local Memorandum of Understanding. Other types of disputes that may be handled within the grievance procedure may include:*

• *Alleged violations of postal handbooks or manuals (see Article 19);*

• *Alleged violations of other enforceable agreements between NALC and the Postal Service, such as Building Our Future by Working Together, and the Joint Statement on Violence and Behavior in the Workplace. In his award in national case Q90N-4F-C 94024977, August 16, 1996 (C-15697) Arbitrator Snow found that the Joint Statement constitutes a contractually enforceable agreement between the parties and that the union has access to the grievance procedure to resolve disputes arising under it. Additionally, in his discussion of the case, Snow writes that arbitrators have the flexibility in formulating remedies to consider removing a supervisor from his or her "administrative duties," if a violation is found. (Note: The National parties disagree over the meaning of "administrative duties.")*

• *Disputes concerning the rights of ill or injured employees, such as claims concerning fitness-for-duty exams, first aid treatment, compliance with the provisions of ELM Section 540 and other regulations concerning OWCP claims. See Step 4 Settlement G90N-4G-C 95026885, January 28, 1997, M-01264. However, decisions of the Office of Workers' Compensation Programs (OWCP) are not grievable matters. OWCP has the exclusive authority to adjudicate compensation claims, and to determine the medical suitability of proposed limited duty assignments.*

• *Alleged violations of law (see Article 5);*

• *Other complaints relating to wages, hours or conditions of employment.*

ARTICLE 2 NON-DISCRIMINATION AND CIVIL RIGHTS

Section 1. Statement of Principle

The Employer and the Union agree that there shall be no discrimination by the Employer or the Union against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

ARTICLE 17 REPRESENTATION

Contractual Authorization for Stewards. *Although shop stewards are union representatives and NALC officials chosen according to NALC rules, stewards are also given important rights and responsibilities by the National Labor Relations Act and by the National Agreement.*

ARTICLE 31 UNION-MANAGEMENT COOPERATION

Information. *Article 31.3 provides that the Postal Service will make available to the union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the Agreement, including information necessary to determine whether to file or to continue the processing of a grievance. It also recognizes the union's legal right to employer information under the National Labor Relations Act.*

ARTICLE 19 HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions. Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance. Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to

handbooks, manuals and published regulations as they relate to transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement.

OSHA. *The Postal Employees' Safety Enhancement Act of 1998 (PESEA) changed the status of the Postal Service as an employer under the Occupational Safety and Health Act (OSHA). Previously, the Postal Service, as a federal agency, was exempt from the private sector provisions of the OSHA and was covered only by Section 19 of the Act and Executive Order 12196. When PESEA became effective, the Postal Service, unlike other federal agencies, became fully subject to the OSHA. This means that OSHA has jurisdiction over the Postal Service in matters relating to employee safety and health.*

The National parties via Article 19 incorporated the provisions of ELM 546 into the National Agreement.

ELM 546.142 Obligation

When an employee has partially overcome the injury or disability, the Postal Service has the following obligation:

a. *Current Employees. When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance (see 546.611). In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee. The following considerations must be made in effecting such limited duty assignments:*

b.

1. *To the extent that there is adequate work available within the employee's work limitation tolerances, within the employee's craft, in the work facility to which the employee is regularly assigned, and during the hours when the employee regularly works, that work constitutes the limited duty to which the employee is assigned.*
2. *If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.*
3. *If adequate work is not available at the facility within the employee's regular hours of duty, work outside the employee's regular schedule may be assigned as limited duty. However, all reasonable efforts must be made to assign the employee to limited duty within the employee's craft and to keep the hours of limited duty as close as possible to the employee's regular schedule.*
4. *An employee may be assigned limited duty outside of the work facility to which the employee is normally assigned only if there is not adequate work available within the employee's work limitation tolerances at the employee's facility. In such instances, every effort must be made to assign the employee to work within the employee's craft within the employee's*

regular schedule and as near as possible to the regular work facility to which the employee is normally assigned.

The USPS committed to providing medically suitable work to partially recovered employees. Through collective bargaining labor and management in the USPS negotiate, even at the local level, which sets of duties would be considered light or limited duty regardless of whether that work comprises the essential functions of a complete and separate position.

The duties which comprise light and limited duties are negotiated in the Local Memorandum of Understanding which is governed by Article 30 of the Collective Bargaining Agreement (CBA).

ARTICLE 30 LOCAL IMPLEMENTATION

Local Implementation. *Article 30 of the National Agreement enables the local parties to negotiate over certain work rules and other terms and conditions of employment. Since the start of full postal collective bargaining in 1971, most of letter carriers' contractual rights and benefits have been negotiated at the national level. However, some subjects have been left to the local parties to work out according to their own preferences and particular circumstances. A period of "local implementation," has followed the completion of each National Agreement.*

30.A *A. Presently effective local memoranda of understanding not inconsistent or in conflict with the* ***2006*** *National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below or, as a result of an arbitration award or settlement arising from either party's impasse of an item from the presently effective local memorandum of understanding (LMOU).*

Local Memorandums of Understanding (LMOU). *Local Implementation procedures result in the execution of a Local Memorandum of Understanding—a local, enforceable agreement between the NALC and the Postal Service.*

The 22 Items. *Article 30.B lists 22 Items which the parties may discuss during the period of local implementation. The local parties are required to discuss any of these items if they are raised by either party.*

This means that if one party raises one of the listed items, the other must discuss it in good faith. These are "mandatory subjects" of discussion if raised during the period of local implementation.

15. The number of light duty assignments within each craft or occupational group to be reserved for temporary or permanent light duty assignment.

16. The method to be used in reserving light duty assignments so that no regularly assigned member of the regular work force will be adversely affected.

17. The identification of assignments that are to be considered light duty within each craft represented in the office.

Based on the above the USPS incorporated ELM 546 into the National Agreement through Article 19 and the limited duty assignments can be negotiated at the local level.

In reading ELM 546 it is easily understood that the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work tolerances. Making every effort includes, but not limited to, restoring the injured employee to limited duty within the local commuting area. The limited duty need not be a job which has essential functions of a complete and separate position or core functions. This is evident in ELM 546.142.b.2 when it is stated that "other work may be assigned within that facility." If it were case that limited duty has to be a complete position then other employees would have the right to bid on these assignments. Limited duty assignments are jobs created to accommodate injured employees. The limited duty assignment can consist of bits and pieces of duty assignments that are not assigned to a position, such as answering phones, answering customer's complaints, recycling, etc... these duties while not comprising the essential functions of a complete and separate position, are essential to the Agency.

When the employee fully recovers, he/she is restored to their former or equal position. The limited duty assignment then disappears.

The questions of jurisdiction on issues which violate internal USPS policies and regulations have been addressed in many forums by outside entities. This is a common occurrence. Labor employees within the USPS have the right to file grievances for disputes through internal means as well as outside sources, such as appropriate courts.

The USPS adheres to federal laws for issues such as Federal Employee Retirement System which is regulated by the Office of Personnel Management (OPM), its employees participate in the Thrift Savings Plan (TSP), it must follow the CFR, to include opinion letters, when dealing with the Family Medical Leave Act (FMLA), when postal employees are injured they benefit from the Federal Employee's Compensation Act (FECA) and Office of Workers' Compensation Programs (OWCP). The USPS must adhere by Occupational Safety and Health Act (OSHA), even though it has its own safety regulations. The USPS must also adhere to title VII when dealing with issues of Equal Opportunity and it is bound by the regulations form the National Labor Relations Board (NLRB). Each of the federal laws mentioned in this paragraph are incorporated into the National Agreement in some form; they are also under the jurisdiction of other agencies.

Article 2 of the National Agreement covers discrimination. An employee who feels discriminated against may file a grievance through the Grievance and Arbitration Process, as well as through the Equal Employment Opportunity Commission.

Under Alexander vs. Gardner Denver, supra, The United States Supreme Court held that an employee retained his statutory rights under Title VII to file a claim for discrimination even though that identical claim had been decided by an Arbitrator under the Company-Union Collective Bargaining Agreement. After the

Arbitrator's decision was rendered, the employee processed a complaint with the Equal Employment Opportunity Commission. The company then filed a motion to dismiss the EEO complaint on the basis that an Arbitrator's decision had already been rendered precluding any further adjudication in the matter. When the case reached the United States Supreme court, the court held that there was significant difference between the employee's statutory rights under Title VII and the employee's rights under the Collective Bargaining Agreement. Exhausting the rights under the grievance/arbitration procedure did not preclude that employee from exercising rights granted under title VII...

The Court's rationale was stated as follows:

"The federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."

In this case of EEO the US Supreme Court rendered a decision on Title VII even though the aggrieved filed a grievance through the Company-Union Collective Bargaining Agreement.

The National Labor Relations Board (NLRB), an outside entity, also intervenes when the USPS violates its internal policies. In order to determine if a grievance exists or whether or not to file a grievance the Union files for requests for information pursuant to Articles 17 and 31 of the National Agreement. When the USPS refuses to provide the information, the Union can file grievances through the Grievance and Arbitration Process via Article 15 of the National Agreement. In some Installations these violations are common and repetitive. The Union then files charges with the NLRB for relief.

<u>In Case 5-CA-36088 the NLRB</u> held the following:

Based on the above findings of fact, the Formal Settlement Stipulation, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that:

The Respondent, United States Postal Service, its officers, agents, successors and assigns, shall:

1. Cease and desist from
(a) Failing and refusing to bargain collectively in good faith with the National Association of Letter Carriers, Local 326, AFL-CIO, as the exclusive collective bargaining representative of employees in the unit as described in Article I of the collective-bargaining agreement by refusing to provide and/or provide in a timely manner information relevant to the processing of grievances or the administration of the collective-bargaining agreement between the Respondent and the Charging Party.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the National Association of Letter Carriers, Local 326, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

Another example of outside entities intervening in internal USPS policies is when the Agency improperly applies the provisions of ELM 513.361 requiring medical documentation for absences of three (3) days or less, and employees file suit through court under the Debt Collection Act.

ELM 513.361 states:

513.361 Three Days or Less

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service. Substantiation of the family relationship must be provided if requested.

Even after hundreds of arbitrations in this matter where Postal Management has been found to be capricious in their requests for information, the rule is still violated. Because of the improper application of ELM 513.361 employees are charged with AWOL for failing to

produce the medical information; the Agency knows full well that employees might not always go to their doctor for a common cold. When the Agency charges the employees with AWOL retroactively the Agency issues the employee a Letter of Demand to collect monies already paid to the grievant for sick leave.

The Union can file a grievance under Article 28 of the National Agreement, Employer Claims, which states in part:

> **Section 4. Collection Procedure**
>
> *A. If a grievance is initiated and advanced through the grievance/arbitration procedure or a petition has been filed pursuant to the Debt Collection Act, regardless of the amount and type of debt, collection of the debt will be delayed until disposition of the grievance and/or petition has (have) been had, either through settlement or exhaustion of contractual and/or administrative remedies.*

Even with this clause the USPS at times begin collection.

In P.S. Docket No. DCA 03-125 the Administrative judge issued the following decision:

DECISION

Respondent contends that Petitioner was properly charged with being AWOL (or was properly charged Leave Without Pay[3]) based solely on his failure to follow the directions of his supervisor to provide medical documentation of his illness. Respondent does not argue that Petitioner was not actually ill and incapable of working on the days in question.[4] Rather, Respondent argues that, having been directed by his supervisor to provide medical documentation, Petitioner was not entitled to determine on his own whether the request was legitimate or not. Rather, Respondent argues, Petitioner was obligated to provide the documentation, and his failure to do so entitled his supervisor to change his sick leave to LWOP.

Petitioner makes a number of technical arguments that need not be addressed in detail.[5] Petitioner also argues that there was no cause for Respondent to have asked for documentation from Petitioner for this absence; inasmuch as there had been no similar, previous incidents involving his use of sick leave.

The general scheme of the ELM with regard to sick leave documentation (Finding 10) is that employees are required to provide medical documentation for absences of more than three days, but that documentation is generally not required for absences of three days or less unless the employee is on restricted sick leave. The ELM does give supervisor discretion to require medical documentation, even for short absences, if he or she deems documentation desirable for the protection of the interests of the Postal Service. Contrary

to the position taken by Respondent, however, that discretion is not unlimited. Further, the supervisor may not exercise that discretion unreasonably.

In this instance, Mr. Brown's articulated basis for deciding to ask for medical documentation was that Petitioner had left on January 9 without first filling out a Form 3971, that Petitioner had left without informing any supervisor (a belief that turned out to be incorrect), and because Petitioner was scheduled to be on vacation beginning on January 11. Respondent has not demonstrated that the circumstances of this case are sufficiently different from any other short-duration sick leave situation to justify requiring medical documentation, given the language of the ELM that clearly provides that medical documentation is not ordinarily to be required for absences of three days or less. This is particularly true where, as here, there is no evidence or any allegation that Petitioner had abused the use of sick leave in the past. Respondent has not shown that requiring Petitioner to provide medical documentation was necessary to protect the interests of the Postal Service or that it was a reasonable exercise of the supervisor's discretion.

Accordingly, the Petition is granted. Respondent may not withhold the $301.49 from Petitioner's pay.

The Merit System Protection Board already has jurisdiction in Postal Service matters related to enforced leave. The following is a Step 4 Settlement, which is binding, in which the postal service acknowledges the MSPB's jurisdiction in constructive suspensions.

M-01154 states in relevant part:

> *"In Pittman v. Merit Systems Protection Board, 832 F. 2d 598 (Fed. Cir. 1987), 87FMSR 7054, the Federal Circuit held that the placement of an employee on enforced leave for more than 14 days (even in situations where the agency has medical documentation stating that the employee is physically unable to carry the duties of his or her position) is inherently disciplinary and is tantamount to an appealable suspension. The court held that "indefinite enforced leave is tantamount to depriving the worker of his job--without any review other that by the agency itself changes its mind and decides that he can perform his job." Id., at 600."*
>
> *"The MSPB follows the precedent of the Federal Circuit, and considers the court's Pittman decision binding in regard to claims of constructive suspension arising from periods of enforced leave which exceed 14 calendar days."*
>
> *Implications of the Pittman Decision*
>
> *The result of this decision is that for postal employees who are entitled to appeal to the MSPB, indefinite periods of enforced leave, as well as specific periods of enforced leave over 14 days, must be considered to be constructive suspensions falling within the MSPB's jurisdiction. Consequently, if an employee is involuntary placed on sick leave, annual leave, or leave without pay receiving all*

of the procedural guarantees of 5 U.S.C. 7513, and that employee appeals to the MSPB based on Pittman, the MSPB will find that it has jurisdiction

Often times the language reached through collective bargaining is non specific or ambiguous. Disputes arise when the parties disagree on the interpretation of the language. Since labor and management negotiate through collective bargaining, and in the case of the USPS, all postal regulations through Article 19 of the National Agreement above become part of the contract.

Since the CBA is a contract, when the USPS fails to abide by its contract clauses it is no different than a breach of contract for which relief is sought.

ELM 546 is a contract between management and labor, however, the language while good intended, does not encompass the language of 5 CFR 353.301(d) in relation to "commuting area." In fact the words "commuting area" do not appear anywhere in ELM 546. ELM 546 does, however, state that an employee should be assigned to a work facility "as near as possible" to the employee's duty station.

In almost all grievances filed pertaining to restoration of partially recovered injured employees, management believes it has a duty to search for limited duty work only within a 15 mile radius from the employees work facility. The 15 mile radius is arbitrary and in contravention to the description of "commuting area" as stated in CFR 353:

> *Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.*

The Merit System Protection Board has on numerous occasions stated:

> *"For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back*

and forth daily to his usual duty station." Hicks v U.S. Postal Service, 83 M.S.P.R. 599 9 (1999). "It includes any population center, or two or more neighboring ones, and the surrounding localities. Sapp, 73 M.S.P.R. at 193. The question of what constitutes a local commuting area is one of fact. The extent of a commuting area is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and travel time required to go back and forth to work."

In New Orleans, Louisiana for example, management contends it seeks limited duty throughout the installation, within a 15 mile radius. The flaw with this is that across the lake, on the Northshore which is just 27 miles away, are other post offices that management never attempt to utilize to restore an employee, even though many employees in limited duty in New Orleans reside on the Northshore.

In this case, the Agency's ELM 546.142 (4) "as near as possible" clause is being constantly violated. If there is no limited duty in New Orleans, then the Northshore is "as near as possible."

In the same case the Agency is in violation of at least the minimum requirement established in 5 CFR 353 to make every effort to restore an employee within the local commuting area.

The Merit System Protection Board should have jurisdiction in the matter of restoration when the USPS fails to comply with its own regulations <u>and</u> the minimum standards of 5 CFR 353 have not been met.

If the denial of restoration to limited duty within the local commuting area was a breach of any other contract, the employees could sue in civil court for resolution.

In the instant case, the MSPB becomes the civil court of sorts; the overseer of the postal service's requirement to restore employees.

Just as other courts have jurisdiction to enforce internal USPS regulations, so should the Merit System Protection Board in cases when the denial of restoration violates the agency's own internal rules.

(3) What is the extent of the agency's restoration obligation under the ELM?

The Agency has an obligation through 5CFR 353 to provide limited duty to injured employees who have partially recovered. This obligation is enhanced through the agency's internal regulation, ELM 546.142.

The agency agreed to make every effort to restore employees to adequate work within their medical tolerances, if possible within their craft, work location and regular schedule. The Agency also agreed to provide "other work" within the facility or at a location as near as possible to the employee's duty station.

The Agency, being that it does not have the authority to ignore OPM regulations also has an obligation to restore employees within the "commuting area."

In addition to the OPM regulations and the Agency's own internal regulations, the USPS has an obligation to restore employees, based on Executive Order 13548, signed by President of the United States, Barack Obama on July 26, 2010

Executive Order 13548 states in relevant part:

> *Agencies shall make special efforts, to the extent permissible by law, to ensure the retention of those who are injured on the job. Agencies shall work to improve, expand, and increase successful return-to-work outcomes for those of their employees who sustain work-related injuries and illnesses, as defined under the Federal Employees' Compensation Act (FECA), by increasing the availability of*

job accommodations and light or limited duty jobs, removing disincentives for FECA claimants to return to work, and taking other appropriate measures.

(4) Under what circumstances does the ELM require the agency to offer a given task to a given partially recovered employee as limited duty work?

The ELM requires the Agency to offer a given task to partially recovered employees, who have been injured in the line of duty, as limited duty work whenever the employee's medical tolerances prevent the employee from performing the core functions of his position. The employee is "limited"; this does not mean the employee is useless. The employee should be allowed to perform as many functions from his own position as medically permitted and then based on ELM 546.142.b.2 the employee may be assigned "other work" within his facility.

If adequate duties are not available within the employee's work limitation tolerances in the craft and work facility to which the employee is regularly assigned within the employee's regular hours of duty, other work may be assigned within that facility.

Closing Statement

In closing, the jurisdiction of Merit System Protection Board in cases relating to restoration rights of partially recovered Postal Service employees when the USPS fails to abide by its internal regulations and applicable Codes of Federal Regulations is a necessity. The USPS, like any other federal agency must have an external institution that oversees the proper application of its own regulations; just as OSHA oversees safety programs in the USPS, the NLRB oversees bargaining rights and courts handle the proper application of the Debt Collection Act. Can a powerful organization like the USPS be left to audit its application

of the regulations that affect hundreds of thousands of employees? In other words: *quis custodiet ipsos custodes?*

It must be the Merit System Protection Board.

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