Case Title : JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE

Docket Number : DA-0353-10-0408-I-1

Pleading Title : Response to Consolidation Order and Request for Briefing dated 7/25/2011

Filer's Name : Marcella Albright

Filer's Pleading Role : Secondary Appellant

Details about the supporting documentation

N/A

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JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE
Docket # DA-0353-10-0408-I-1
Response to Consolidation Order and Request for Briefing dated 7/25/2011
Online Interview

1. Would you like to enter the text online or upload the file containing the pleading?

See attached pleading text document

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2. Does your pleading assert facts that you know from your personal knowledge?

Yes

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3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

JAMES C. LATHAM, RUBY N. TURNER, ARLEATHER REAVES, CYNTHIA E. LUNDY, AND MARCELLA ALBRIGHT, Appellants,	DOCKET NUMBERS DA-0353-10-0408-I-1 SF-0353-10-0329-I-1 CH-0353-10-0823-I-1 AT-0353-11-0369-I-1 DC-0752-11-0196-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: August 18, 2011

James A. Penna, Amarillo, Texas, for appellant Latham.

Geraldine Manzo, Oakland, California, for appellant Turner.

J.R. Pritchett, Esquire, McCammon, Idaho, for appellant Reaves.

Cynthia E. Lundy, Lithonia, Georgia, pro se.

Thomas William Albright, Garner, North Carolina, for appellant Albright.

Theresa M. Gegen, Esquire, Dallas, Texas, Joshua T. Klipp, Esquire, San Francisco, California, Andrew C. Friedman, Esquire, Chicago, Illinois, Earl L. Cotton, Sr., Esquire, Atlanta, Georgia, and Ayoka Campbell, Esquire, Charlotte, North Carolina, for the agency.

ANSWER TO THE REQUEST FOR BRIEFING

The Board has asked for briefs to help answer two questions. The first question is:

> (1) May a denial of restoration be "arbitrary and capricious" within the meaning 5 C.F.R. § 353.304(c) solely for being in violation of the ELM, i.e., 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?

The answer to the first question asked by the Board is emphatically "Yes, the Board can find that it has jurisdiction under 5 C.F.R. § 353.304(c) solely because the United States

Postal Service (USPS) is in violation of the ELM". As noted by the Board in the Request for Briefing, the ELM is a Postal regulation (39 C.F.R. § 211.2(a)(2) (1988)) and, as also noted by the Board, the USPS must follow its own regulations. In fact, the USPS must follow their own regulations even if the particular USPS regulation has more requirements or is more onerous than the requirements of any similar Federal Statute. In United States of America v. Clark Heffner (420 F.2d 809 (1969)), the United States Court of Appeals, Fourth Circuit, noted that

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. This doctrine was announced in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). There, the Supreme Court vacated a deportation order of the Board of Immigration because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of due process. The Accardi doctrine was subsequently applied by the Supreme Court in Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1959), and Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959), to vacate the discharges of government employees.

Clearly, the USPS must follow its own rules; for the USPS to do otherwise is arbitrary and capricious and its decision runs counter to well-established law. When the USPS ignores any Postal regulation, because such an "action cannot stand and courts will strike it down", the Board must decide that the USPS is acting arbitrarily and capriciously when the USPS violates its own rules. Therefore, the Board has jurisdiction within the meaning of 5 C.F.R. § 353.304(c).

The second question asked by the board is:

> What is the extent of the agency's restoration obligation under the ELM, i.e., under what circumstances does the ELM require the agency

> to offer a given task to a given partially recovered employee as limited duty work?

Well, the exact wording of the relevant part of the ELM § 546.142(a) is:

> *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.

Notice that the actual language does not include *any* qualifiers about the work that the USPS must find for its injured workers other than the work must be within "the employee's medically defined work limitation tolerance". The language in ELM § 546.142(a) is clear and unambiguous; the USPS must make "every effort" to find work. In order for the USPS to make every effort, the USPS must consider any work available.

In the Postal Handbook EL-505, in section 11.7 entitled "Identifying a Modified Job Assignment", is the following:

> Assist management in identifying a suitable modified job assignment. Review the injured employee's medically defined work restrictions. Each task within the identified assignment must comply with the employee's medical limitation.
>
> Consider the following possible placements:
> — *Employee's current position.* If the employee is a current employee (was never separated from the USPS rolls) and is capable of performing his or her core duties with only minor modification, assignment to the current position may be feasible. This type of accommodation is not considered a modified assignment, and the workhours are charged to the regular operation LDC.
> — *Reassignment to an existing position.* If a current employee can no longer perform the core duties of his or her position but is capable of performing the core duties of another authorized position for which he or she is qualified, reassignment may be offered. Since the employee is performing the core duties of the position, the workhours are charged to the regular operation LDC.
> — *Residual vacancy.* If a vacancy has been posted for bid or application and there are no successful bidders or applicants, both

current and former employees may be offered a residual vacancy if they can perform the core duties of the position with only minor modification. Again, since the core duties are being performed, this is not considered a modified assignment and the workhours are charged to the regular operation LDC.

— ***Modified assignment.*** **If a current or former employee's restrictions prohibit accommodation as described in the categories above, individual tasks must be identified and combined to develop a modified assignment consistent with the employee's medical restrictions. These tasks are usually subfunctions and may be from multiple positions. The workhours for employees accommodated in modified assignments are charged to LDC 69.** (emphasis added)

_ Ensure that:

— Any adverse or disruptive influence on the employee is minimized (see Exhibit 11.7b, Rehabilitation Assignment Priority).

— Contractual obligations are honored (Exhibit 11.7c, Contractual Obligations for Rehabilitation Positions).

Furthermore, in EL 505, in Exhibit 11.7b (Rehabilitation Assignment Priority) is the following: "Whenever possible, assign qualified employees to rehabilitation job assignments duty in *their regular craft, during regular tour of duty, and in their regular work facility"* (emphasis in the original text) and "all reasonable efforts must be made to assign the employee to a rehabilitation job assignment within the employee's craft and to keep the hours of the rehabilitation job assignment as close as possible to the employee's regular schedule". In Exhibit 11.7c (Contractual Obligations for Rehabilitation Positions) is: "However, the USPS guarantees that these employees do not lose pay as a result of the assignment. Because they are entitled to at least the number of workhours (sic) earned at the time of injury, it would benefit the USPS to schedule the employee the same number of hours as his or her former assignment …" According to the EL 505, if the USPS cannot find a free-standing assignment for injured workers that provides enough hours to keep the employee employed for the same number of hours the employee work before they were injured, the USPS is required to look at existing positions to see if parts of the

existing assignments contains subtasks that can be assigned to injured workers so that the injured worker does not lose any pay or hours. Keep in mind that the EL 505 is a Postal regulation (39 C.F.R. § 211.2(a)(2) (1988)) and, therefore, the USPS must follow the rules and regulation contained in EL 505 (Accardi v. Shaughnessy (cited above)). Under EL 505, the USPS must find any work available for workers who have suffered compensateable injuries when the employee is at least partially recovered, the work found must contain the same number of hours, the same start and end times (i.e., same tour) and same days off as the employee was being assigned before their injury. That is, if the Office of Workers Compensation Programs (OWCP) finds that a Postal employee has, through no fault of their own, been injured while working for the USPS, and the employee is at least partially recovered, the USPS is obligated to find work for the employee within the employee's restrictions, during the employee's original tour, and without a loss in pay. (Once a Postal work is fully recovered, they are returned to service under different parts of the ELM)

For years, the USPS has found work for injured Postal employees within the employee's restrictions without requiring that the work found being strictly "necessary". In fact, on CA-17 forms, the USPS told examining physicians that the USPS "can accommodate all restriction with the exception of total bedrest(sic)" (see USPS original filing to the Board in Albright v USPS Tab 4(c) Exhibit 5, Tab 4(d) pp. 1469 and pp 1492). Some of the work found has been work that includes some type of accommodation to reduce the physical effort required to complete the work. In some cases, the USPS found work that it wouldn't necessarily assign to healthy employees because the work isn't strictly "necessary". In some other cases, the USPS would split-up one or more

regular job assignments so that the less strenuous parts of the assignment(s) could be done by injured employee(s) while the more strenuous work is completed by a different employee(s) who can do the more strenuous part of the assignments(s). The USPS did not find work for its injured employees through the goodness of its ice-cold corporate heart. The reason that the USPS found some type of work for its injured employees for years is because the USPS knew that finding work for injured USPS employees is required under the EL 505 §11 and the ELM § 546.142(a).

The USPS cannot unilaterally re-define the ELM § 546.142(a) or the EL 505 to include the terms "necessary work" or "operationally necessary". Article 19 of the Collective Bargaining Agreement (CBA) between the USPS and its various unions, both in the previous Agreement as well as in the current Agreement, states:

> Section 1. General
> 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.
>
> 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. The Employer shall furnish the Union with the following information about each proposed change: a narrative explanation of the purpose and impact on employees and any documentation concerning the proposed change from the manager(s) who requested the change addressing its purpose and effect. Proposed changes will be furnished to the Union by hard copy or, if available, by electronic file. At the request of the Union, the parties shall meet concerning such changes. If the Union requests a meeting concerning proposed changes, the meeting will be attended by manager(s) who are

> knowledgeable about the purpose of the proposed change and its impact on employees. 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 ninety (90) days after receipt of the notice of proposed change. Within fifteen (15) days after the issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues.

ELM § 546 and the EL 505 both affects hours and working conditions, therefore, the ELM § 546 and the EL 505 cannot be changed without Union approval or through arbitration because doing so would violate Article 19 of the CBA. It is worth noting that the USPS has not even proposed, much less implemented, any changes to ELM § 546. The MSPB has already determined that the language in the CBA is an "established nondiscretionary policy under which the [agency] operates" (Giesler v DOT, 3 M.S.P.B. 367 (1980)), therefore, the USPS has no choice but to adhere to the both the ELM and the EL 505.

Under the NRP, the USPS has tried to use the deference afforded to agencies when agencies are interpreting their own rules to insert the terms "necessary work" and "operationally necessary" into the EL 505 §11 and the ELM § 546.142(a). This new interpretation of the EL 505 §11 and the ELM § 546.142(a) by the USPS is not entitled too much deference for two reasons. First, the language in the EL 505 §11 and the ELM § 546.142(a) is not ambiguous. In Christensen v. Harris County, 529 U.S. 576, 590-91 (2000) the Supreme Court noted that the "deference is warranted only when the language of the regulation is ambiguous." *Id.* at 588. Secondly, an agency cannot change their interpretation of a regulation from an interpretation the agency has been using for years because "an agency's interpretation of a statute or regulation that conflicts with a prior

interpretation is `entitled to considerably less deference' than a consistently held agency view . . . ." *Thomas Jefferson Univ.*, 512 U.S. at 515, 114 S.Ct. 2381. As noted above, for years, the USPS has used the criteria of "any work available" when the USPS interpreted the EL 505 §11 and the ELM § 546.142(a). Therefore, the proper interpretation of the EL 505 §11 and the ELM § 546.142(a) is "any work available" and not "necessary work" or "operationally necessary".

This interpretation of "any work available" for the EL 505 § 11 and the ELM § 546 is the basis for the arbitration decisions listed by Marcella Albright in her appeal to the Board. This interpretation of "any work available" for the EL 505 § 11 and the ELM § 546 is the basis for each and every one of the arbitration decisions listed by the Board. In each and every one of these arbitration decisions, along with many more not listed, the arbitrators have found that the USPS *must* assign *any* available work that an injured employee can perform to that employee, *regardless of whether or not the work is "necessary"* as long as the assigned work doesn't violate the CBA.

While there is no rule or law that requires that the decisions made by the MSPB and the decisions made by the arbitrators be consistent, there is the expectation of consistency. In Local 2578, American Federation of Government Employees v. General Services Administration 711 F.2d 261 (1983) the United States Court of Appeals, District of Columbia Circuit, noted that "Congress intended that there be some symmetry between the arbitration and MSPB processes in order '[t]o promote consistency and to discourage forum shopping.'" (Devine v. White, 697 F.2d at 428). Not only does the Congress expect consistency, so do the USPS, other Federal agencies, Postal employees, and every single Federal employee. In this case, we are not talking about a single, or even

a few, arbitration decision(s). There are a "large number of arbitration decisions" (to quote the Board), and more are being decided with the same conclusion everyday, and all of these arbitration decisions are consistent with the EL 505 § 11 and the ELM § 546 and with each other. Unless here is some serious flaw in each and every one of these arbitration decisions, the MSPB should interpret the EL 505 § 11 and the ELM § 546 to require "any work available" in the same vein as the arbitration decisions. Only an interpretation of "any work available" will insure consistency between the MSPB and the arbitration decisions.

For Marcella Albright

Thomas Albright

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

Name & Address	Documents	Method of Service
MSPB: Office of the Clerk of the Board	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail
Thomas William Albright Appellant Representative	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail
Earl L. Cotton, Sr., Esq. Agency Representative	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail
Joshua T. Klipp, Esq. Agency Representative	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail
Andrew C. Friedman, Esq. Agency Representative	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail
Theresa M. Gegen Agency Representative	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail
Ayoka Campbell Agency Representative	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail
William D. Bubb, Esq. Agency Representative	Response to Consolidation Order and Request for Briefing dated 7/25/2011	e-Appeal / e-Mail

I agree to send a printed copy of the electronic pleading with attachments to non-efilers by the end of next business day, as follows:

Name & Address	Documents	Method of Service
James C. Latham Appellant [redacted]il	Response to Consolidation Order and Request for Briefing dated 7/25/2011	US Postal Mail

[redacted]		
Ruby N. Turner Appellant [redacted]	Response to Consolidation Order and Request for Briefing dated 7/25/2011	US Postal Mail
Arleather Reaves Appellant [redacted]	Response to Consolidation Order and Request for Briefing dated 7/25/2011	US Postal Mail
Cynthia E. Lundy Appellant [redacted]	Response to Consolidation Order and Request for Briefing dated 7/25/2011	US Postal Mail
J.R. Pritchett Appellant Representative Postal Employee Advocates 86 East Merrill Road McCammon, ID 83250 USA	Response to Consolidation Order and Request for Briefing dated 7/25/2011	US Postal Mail
Geraldine Manzo Appellant Representative 7700 Edgewater Drive Suite 656 Oakland, CA 94621 USA	Response to Consolidation Order and Request for Briefing dated 7/25/2011	US Postal Mail
James A. Penna Appellant Representative 3212 Villa Pl. Amarillo, TX 79106 USA	Response to Consolidation Order and Request for Briefing dated 7/25/2011	US Postal Mail