UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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: July 25, 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.

CONSOLIDATION ORDER AND REQUEST FOR BRIEFING

The above-captioned appeals pertaining to alleged denials of restoration pursuant to the agency's National Reassessment Process (NRP) involve a common issue that the Board has not yet addressed. We therefore CONSOLIDATE the above-captioned appeals for purposes of this request for briefing.

The Office of Personnel Management's regulation at 5 C.F.R. § 353.301(d) requires the agency to "make every effort" to restore a partially recovered employee to limited duty within the local commuting area. The regulation explains that "[a]t a minimum, this would mean treating these employees substantially the same as other [disabled] individuals under the Rehabilitation Act of 1973." The Board has interpreted this regulation as requiring agencies to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider the employee for any such vacancies. *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 12 (2010) (citing *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997)). Conversely, the Board has found that this regulation does not require an agency to assign a partially recovered employee limited duties that do not comprise the essential functions of a complete and separate position. *Brunton v. U.S. Postal Service*, 114 M.S.P.R. 365, ¶ 14 (2010) (citing *Taber v. Department of the Air Force*, 112 M.S.P.R. 124, ¶ 14 (2009)).

However, it appears that the U.S. Postal Service may have established an agency-specific rule providing partially recovered employees with greater restoration rights than the "minimum" rights described in 5 C.F.R. § 353.301(d). *See generally Drumheller v. Department of the Army*, 49 F.3d 1566, 1574 (Fed. Cir. 1995) (agencies are required to follow their own regulations). Specifically, the Employee and Labor Relations Manual (ELM) § 546.142(a) requires 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." One of the appellants has submitted evidence to show that Postal Service Handbook EL-505, Injury Compensation §§ 7.1-7.2 provides that limited duty assignments "are designed to accommodate injured employees who are temporarily unable to perform their regular functions" and consist of whatever available tasks the agency can identify for partially recovered individuals to perform consistent with their medical restrictions. *Latham v. U.S.*

Postal Service, MSPB Docket No. DA-0353-10-0408-I-1, Initial Appeal File, Tab 21, Subtab 7. It therefore appears that the agency may have committed to providing medically suitable work to partially recovered employees regardless of whether that work comprises the essential functions of a complete and separate position. Indeed, the Board is aware of one arbitration decision explaining that, as a product of collective bargaining, the agency revised the ELM in 1979 to afford partially recovered employees the right to restoration to "limited duty" rather than to "established jobs." *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. E06N-4E-C 09370199, 16 (2010) (Eisenmenger, Arb.). The Board is also aware of a large number of other recent cases challenging the discontinuation of limited duty assignments under the NRP in which the arbitrators ruled in favor of the grievants on the basis that the agency's actions violated the ELM. *E.g., In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. G06N-4G-C 10205542 (2011) (Sherman, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. E06N-4E-C 09419348 (2010) (Duffy, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. F06N-4F-C 09221797 (2010) (Monat, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. B01N-4B-C 06189348 (2010) (LaLonde, Arb.). The appellants in the above-captioned appeals have all raised similar arguments before the Board pertaining to alleged violations of their restoration rights under the ELM.

The Board has not yet addressed the implications of ELM § 546.142(a) on restoration appeals of partially recovered U.S. Postal Service employees under 5 C.F.R. § 353.304(c). The Board's resolution of this issue will affect the outcome of a large number of restoration appeals arising under the NRP. Therefore, in the interest of justice, we wish to afford the parties a full and fair opportunity to brief the following issues:

(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?

(2) 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?

BRIEFING SCHEDULE

The parties are requested to file briefs addressing the issues identified above. Briefs shall not exceed 30 double-spaced pages in length and must be filed no later than August 17, 2011. Reply briefs shall not exceed 20 double-spaced pages, and must be filed by September 6, 2011.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellants

U.S. Mail — Arleather Reaves
[redacted]

U.S. Mail — Cynthia E. Lundy
[redacted]

U.S. Mail — James C. Latham
[redacted]

Electronic Mail — Marcella Albright
[redacted]

U.S. Mail — Ruby N. Turner
[redacted]

Appellant Representative

U.S. Mail — Geraldine Manzo
7700 Edgewater Drive
Suite 656
Oakland, CA 94621

U.S. Mail — J.R. Pritchett
Postal Employee Advocates
86 East Merrill Road
McCammon, ID 83250

July 25, 2011
(Date)

Dinh Chung
Case Management Specialist