U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board
1615 M Street, NW
Washington, DC 20419-0002

Phone: (202) 653-6772 Ext. 4478 ; Fax: (202) 653-7130; E-Mail: william.spencer@mspb.gov

July 25, 2011

The Honorable John Berry
Director
Office of Personnel Management
1900 E Street, NW.
Washington, DC 20415

Re: *James C. Latham v. U.S. Postal Service*,
MSPB Docket No. DA-0353-10-0408-I-1,
Ruby N. Turner v. U.S. Postal Service,
MSPB Docket No. SF-0353-10-0329-I-1,
Arleather Reaves v. U.S. Postal Service,
MSPB Docket No. CH-0353-10-0823-I-1,
Cynthia E. Lundy v. U.S. Postal Service,
MSPB Docket No. AT-0353-11-0369-I-1, and
Marcella Albright v. U.S. Postal Service,
MSPB Docket No. DC-0752-11-0196-I-1.

Dear Director Berry:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of rules, regulations, or policy directives promulgated by the Office of Personnel Management (OPM).

Background

Recently, the U.S. Postal Service has implemented a program known as the National Reassessment Process (NRP), the goal of which is to evaluate the assignments of compensably injured employees working in a limited duty status in order to ensure that the assignments consist only of "operationally necessary tasks" consistent with the employees' medical restrictions. As a result, the Postal Service has either discontinued or reduced the working hours of many limited duty assignments. A large number of affected employees have filed Board appeals under 5 C.F.R. § 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." 5 C.F.R. § 353.304(c). The Board has found that, to establish jurisdiction over a restoration claim under that subsection, an appellant must make a nonfrivolous allegation that: (1) He was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of him; (3) the agency denied his request for restoration;* and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

OPM has established substantive restoration obligations that an agency must satisfy in relation to its partially recovered employees. 5 C.F.R. § 353.301(d). The Board has found that a nonfrivolous allegation that the agency failed to satisfy its obligations under that subsection constitutes a nonfrivolous allegation that the denial of restoration was arbitrary and capricious. *See, e.g.*, *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009). In describing an agency's restoration obligations, section 353.301(d) explains that they require the agency, "[a]t a minimum," to "treat[] these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended." Based on this explanation, the Board has found that the regulation requires an agency 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, ¶ 11 (2010) (citing *Taber v. Department of the Air Force*, 112 M.S.P.R. 124, ¶ 14 (2009)); *see also Green v. U.S. Postal Service*, 47 M.S.P.R. 661, 668 (1991) (an agency need not accommodate a disabled employee by permanently assigning him to light duty tasks when those tasks do not comprise a complete and separate position).

However, it appears that the 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). 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

---

* The Board has found that the discontinuation of a previously afforded limited duty assignment may constitute a denial of restoration for purposes of Board jurisdiction. *Sanchez v. U.S. Postal Service*, 14 M.S.P.R. 345, ¶ 11 (2010) (citing *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007)).

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.

Matters regarding an agency's violations of its own internal rules normally do not fall within the Board's subject matter jurisdiction. Although an agency must abide by its own rules and regulations, *see Drumheller v. Department of the Army*, 49 F.3d 1566, 1574 (Fed. Cir. 1995), there is no general right of appeal to the Board from an agency's failure to comply with its own internal rules, *see Cowen v. Department of Agriculture*, 13 M.S.P.R. 196, 198-99 (1982), *aff'd*, 710 F.2d 803, 805 (Fed. Cir. 1983). Therefore, the Board is presented with an issue of first impression: 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 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 Postal Service's own internal rules?

As a final matter of background, we note that the Postal Service is not a typical title 5 agency. The Postal Employees Appeal Rights Act has made applicable to Postal Service employees only a few, limited provisions of title 5 civil service law. *See* 39 U.S.C. § 1005. The Postal Service has autonomy over its own personnel management system, and there are, therefore, no OPM standards or requirements for Postal Service positions. *Manescalchi v. U.S. Postal Service*, 74 M.S.P.R. 479, 487 n.2 (1997). We request that OPM take these and similar considerations into account to the extent that they will have any bearing on its response to this request for an advisory opinion.

Question to be Resolved

Does an agency act arbitrarily and capriciously under 5 C.F.R. § 353.301(d) in denying restoration to a partially recovered individual when such denial violates the agency's internal rules, such as the ELM?

Request for an Advisory Opinion

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by August 17, 2011, responding to the question raised above. The Board further requests that you serve the parties listed below with a copy of your advisory opinion. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than September 6, 2011.

Sincerely,

William D. Spencer

cc: James C. Latham
[redacted]

James A. Penna
3212 Villa Place
Amarillo, TX 79106

Theresa M. Gegen, Esq.
P.O. Box 227078
Dallas, TX 75222

Ruby N. Turner
[redacted]

J.R. Pritchett, Esq.
86 East Merrill Road
McCammon, ID 83250

Andrew C. Friedman, Esq.
222 South Riverside Plaza
Suite 1200
Chicago, IL 60606

Cynthia E. Lundy
[redacted]

Earl L. Cotton, Sr., Esq.
3980 Dekalb Technology Parkway
Suite 840
Atlanta, GA 30340

Geraldine Manzo
7700 Edgewater Drive
Suite 656
Oakland, CA 94621

Joshua T. Klipp, Esq.
P.O. Box 883790
San Francisco, CA 94188

Arleather Reaves
[redacted]

Marcella Albright,
[redacted]

Thomas William Albright
[redacted]

Ayoka Campbell, Esq.
2901 Scott Futrell Drive
Charlotte, NC 28228