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CLERK OF THE BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRIEF AND OBJECTION OF APPEALANT

	Docket Numbers
James C. Latham	**DA-0353-10-0408-I-1**
Ruby N. Turner	SF-0353-10-0329-I-1
Arleather Reaves	CH-0353-10-0823-I-1
Cynthia E. Lundy, and	AT-0353-11-0369-I-1
Marcella Albright,	DC-0752-11-0196-I-1
Appellants,	
v.	
United States Postal Service,	
Agency	Date: August 8, 2011

BRIEF

On appeal from a lower MSPB hearing, for Dallas District, and the Clerk of the Board requesting Advisory Opinion from OPM (John Berry).

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TABLE OF AUTHORITIES

ELM's 546.142

Rehabilitation Act of 1973

ADAAA

Executive Order 13548

Arbitrations Cases

MSPB Cases

Barrett v. United States Postal Service

All have been submitted into record.

STATEMENT OF THE ISSUES

1. May denial of restoration be "arbitrary and capricious" within the meaning of 5 CFR 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 violated the Agency's own internal rules?
2. What is the extent of the Agency's restoration obligation under the
3. ELM, i.e. under what circumstances does the ELM require the
4. Agency to offer a given task to a given partially recovered employee

as limited duty work?

CASES

Enclosed is a copy of an OPM letter received by another appellant who has a pending petition for review. Her name is Kathy Davis, docket number: DA-0752-10-0393-I-1. I, James Latham am the representative on this case.

STATEMENT OF FACTS

Before the early 1980,s the Agency had placed employees "injured on the job" back to work as soon as possible as partially recovered individuals with Disabilities and made job offers.

i.e. Limited duty essential function work or permanent rehabilitation job offers were given after forcing the employee to give up their bid positions they were hired to perform through the competitive bidding process. We are qualified individuals as defined earlier and most are partially recovered and returned to essential jobs with less demanding physical requirements than prior to our on the job injury. The Agency express/blamed its manmade economical crisis on mail volume while the Postmaster Generals (past and present) are testifying before Congress that the Agency would be

operating at a profit if they did not have to Prefund the retirement accounts. The Agency has acted like a bailout party when the Postmaster General Potter retired; he was given a 5.5 million dollars retirement package and an incentive bonus Of 223, 000 dollars. The Agency reports and submits to the Government Accounting Office The savings they are making with NRP.

The Agency is trying to show that by implementing NRP they are profitable. The Agency does not however report the cost of implementing the NRP which includes the cost for grievances, EEO's, MSPB's and any other forums available. The Agency also does not report the costs of all remedies for cases that have been previously settled. The Agency was ordered to return eighty (80) NRP letter carriers at a cost of nearly 2,000,000 million dollars, only to put these employees were put off the clock again two (2) weeks later. We have brought up the Executive Order 13548 to the Agency only to be told by the Agency Law Department, the Agency does not have to honor the Executive Order 13548. One attorney said " it does apply to the Agency".

All the duties that I performed are still a vital function of the Agency.

ARGUMENT

1. Did the MSPB, lower hearing, error in the denial for not proving the 4th Element of the Barrett vs. United States Postal Service, (2008 MSPB 19) i.e. "arbitrary and Capricious"?

2. Did the MSPB, lower hearing, error in that NRP did not violate the Rehabilitation Act of 1973, ADAAA of 2008, ELM and the National Bargaining Agreement between NALC and APWU?

The NRP erred in making guidelines that violated its contractual obligations, ELM obligations, ADAAA, Executive Order 13548, the EEOC final rule of reasonable accommodations with a compliance date of May 24, 2011 by placing employees "injured on the job" off the clock, "no work available" or reduced in work hours.

A. Qualified Individuals with Disability

1. a physical or mental impairment that substantially limits one or more major life functions of such individual

Limits one or more major life activities of such individual

2. have a record of such impairment

3. being regarded as having such an impairment

I. "Injured on the job" employees have rights through these rules, laws, regulations and contracts.

The Agency has abided by these rules, laws, regulations and contracts for many years before NRP was set up to do harm to these postal employees.

II. 1. The Agency erred in the search for work per the ELM'S 546 in its own pecking order and the local commuting area of fifty (50) mile radius of Amarillo TX which includes the following Zip Codes: 79101, 79102, 79103, 79104, 79105, 79106, 79107, 79108, 79109, 79110, 79111, 79114, 79116, 79117, 79118, 79119, 79120, 79121, 79124 and 79159.

2. The NRP violated each individuals ***Dignity, Respect, Integrity***, ***Humiliated*** and ***Belittled*** each.

3. The NRP violated our protection as creditable employees and tax payers to our troubled economy.

4. The NRP violated our skills to perform our duties while not having to replace us with other employees, i.e. we were not taken off other jobs to do our essential functions of a complete and separate positions. These duties have been done since April 27, 2010.

III. The Agency and MSPB hearing erred in the NRP guidelines by taking away injured on the job employees rights by placing several of the employees off the clock with no work available.

2. The injured employees have contributed to the well fare of the Agency for many years. These employees have been productive employees, not as implied thru NRP and some supervisors sick, lame and lazy.
3. Working with permanent disabilities at the Agency has been a key way for the Agency to discriminate and harass injured employees while while implying this is legal.

B. Injured employees have been the backbone, not the scapegoat, of the Agency. Although, there has been an employee that did take advantage of the situation, I find it hard to believe that employees would literally go out to inflict injures on themselves to recover 100 % better or end up with permanent disabilities.

While some court (hearings) are seeking to make the moral and ethical decisions, other are Finding loop holes i.e. (arbitrary and capricious) causing harm to individuals with disabilities, who are striving to be productive members of society.

The injured on the job employees choose to be productive for the Agency even though some could have medically retired at any point in their career. The Agency seems to think they are following the FECA laws, the ADAAA, the Rehabilitation Act and others not mentioned, but are they really going by these laws?

C. At this point, no one has adopted the NRP guidelines as a legal process, to make informed decisions, rulings, etc. NRP is not the solution to the downsizing of the man made economical crisis of the Agency. Article

6, the layoff clause, of the National Bargaining Agreement (NALC and APWU) and other unions is the legal, non harming procedure to justify downsizing.

CONCLUSION

For the foregoing reason, the decision of the MSPB lower hearing should be reversed. Even for the lack of arguing the laws, a violation of their own Handbooks and Manuals, it is a violation. There may be no limit to their number of violations but for one violation it is wrong whether it is one employee or 120,000 employees nationwide.

Respectfully submitted,

James C. Latham

James C. Latham

Appellant & Non-Attorney

Representative

Date: August 8, 2011

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

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OBJECTION TO AMENDED BRIEFING SCHEDULE
AND DESIGNATION OF ADDITIONAL AGENCY
REPRESENTATIVE IN CONSOLIDATED APPEALS

I am objecting to William D. Bubb's motion to extend the schedule and additional Agency Representative for the following reasons:

1. I have waited since August of 2010 (hearing) and September of 2010 (petition

for review) for an amicable decision. I am not an attorney, but have volunteered my time for most of my career to represent grievant, appellants and others to the best of my ability.

2. The Agency is notorious for asking for extensions of the time in the gist for settlement, only to have no settlement offers or counter offers, even after agreeing to extent.

3. My opening brief will be ready on or before as the clerk of the board orders as August 17, 2011 and my reply brief on Advisory Opinion will be as schedule by September 6, 2011.

4. The Agency knew when they initiated the NRP guideline, it would overload all available systems such as MSPB, grievances, EEO's and other forums. Most have been successful.

5. I have not received the "Boards Notice of Opportunity to file Amicus Briefs" in their consolidated appeals.

6. I have no problem with the Boards consolidation rights and is a common practice with other forums. The time limits are reasonable for attorneys, appellants and non attorney representatives

7. Improving the quality of the legal presentation to the Board would be in the interest of Mr. Bubb as he is an attorney.

8. The Agency uses form letters and could synthesize the record in this manner for these five (5) appeals as such. They could internally coordinate its briefs also.

9. The Agency has been given an express opportunity since 2006 to reply

to their guidelines. The Board has given us ample opportunity to respond to this advisory opinion issued by OPM.

10. The briefing schedule is already streamlined in that it is a brief and a reasonable person could be expected to answer the Board in the time frame given. The Agency already has the advantage over me, as they have field law department's district wide and now the law department in Washington DC.

11. It would be hard for me to really understand the relationship and theoretical interplay of the documents in weeks. Yet, the one week Mr. Bubb is asking for.

12. This extension would only improve the quality and efficiency of the legal department. My brief stays in laymen terms to the best of my ability. Setting September 13, 2011 as the date would give the Agency an unequal opportunity to consider and reply to all briefs. The Agency should have a complete picture of the analytical landscape and fallout prior to 2006.

13. Expanding the page limit of the parties reply briefs to 30 pages would only produce replications, be overly burdensome and unduly cumbersome verbiage to briefs and advisory opinion. The Agency should have reasonably estimated the volume of briefs they created. This is not a complex case, it just has multiple appellants which should have been expected.

14. Mr. Bubb had plenty of time to submit this motion and designation of

representation (order dated July 25, 2011) and thru e-file, received on the same date. He responded on July 29, 2011 with 10 pages.

I also object to Mr. Bubb's simultaneously adding himself to this instant case as an Agency representative within the same envelope as an "Order Amending Briefing Schedule" that was not signed by the clerk of the board and his motion of Amended Briefing Schedule.

For these reasons, I James C. Latham, one of the five (5) appellants request that this motion not be granted.

Respectfully submitted,

James C. Latham

Appellant & Non-Attorney

Representative

Date: August 8, 2011

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES C. LATHAM,
RUBY N. TURNER,
ARLEATHER REAVES,
CYNTHIA E. LUNDY, and
MARCELLA ALBRIGHT,

Appellants,

v.

UNITED STATES POSTAL SERVICE,

Agency.

DOCKET NUMBERS
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AT-0353-11-0369-I-1
DC-0752-11-0196-I-1

DATE:

ORDER AMENDING BRIEFING SCHDULE

Having considered the motion of the United States Postal Service for an Order amending the briefing schedule in these consolidated appeals and otherwise regulating the parties' briefs, it is hereby ordered as follows:

1. Opening briefs must be filed no later than August 24, 2011 and reply briefs must be filed no later than September 13, 2011.

2. Both opening briefs and reply briefs filed by the parties shall not exceed 30 double-spaced pages.

3. The parties' reply briefs may reply to any or all amicus briefs submitted in response to the Board's Notice of Opportunity to File Amicus Briefs in these consolidated appeals.

4. The time permitted the parties to reply to any advisory opinion of the Office of Personnel Management ("OPM") issued in response to the Board's July 25, 2011 letter to the Director of OPM shall be extended to September 13, 2011 to coincide with the date

the parties' reply briefs are due, and the parties are free to incorporate their response to any OPM advisory opinion into their reply briefs.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Employee Services

Ms. Kathy Davis
[redacted]

Dear Ms. Davis:

This is in response to your August 19, 2010 letter to Director John Berry regarding the U.S. Postal Service (USPS) allegedly informing you that no work is available to you per the USPS' National Reassessment Process (NRP). Your letter has been referred to the U.S. Office of Personnel Management's (OPM) Agency and Veterans Support for review and response. I am pleased to provide you with the following information.

We regret to hear that you are unable to find employment with the USPS while you are on Worker's Compensation. According to your letter, the NRP is a national program administered by USPS with the intent to target individuals who have on-the-job injuries, disabled veterans, and disabled persons over the age of 40. You were informed by USPS' NRP that no further work was available.

The USPS is an independent executive agency. OPM does not have jurisdiction over the agency's employment or hiring practices. Allegations of employment or hiring violations should be directed to the USPS Office of Inspector General (OIG). You may access the USPS OIG Web site at: http://www.uspsoig.gov for more information on how to report alleged acts of abuse of authority.

In addition, as a USPS employee, you are covered by a USPS collective bargaining agreement (CBA). The CBA documents the agency's obligation to place you in another USPS position. You may contact your applicable Human Resources Office on (505) 294-2204 or (877) 477-3273 to clarify what steps the USPS must follow in placing you in another position.

Exhibit
HH 1-2

Further, you may also contact the Department of Labor's Office of Worker's Compensation Program who may advise you of your rights under Worker's Compensation. You may contact them at www.dol.gov\owcp or toll free at 1-866-487-2365.

We appreciate the opportunity to respond to your inquiry and hope this information is helpful.

Sincerely,

Joseph S. Kennedy
Deputy Associate Director
Agency and Veterans Support

Exhibit
HH 2-2

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent First Class mail this day to each of the following:

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James Latham

August 8, 2011