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CLERK OF THE BOARD

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

SEP 2 2011

Mr. William Spencer
Clerk of the Board
Office of the Clerk
1615 M Street, NW
Washington, DC 20410-0002

Re: Advisory Opinion regarding:
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
Marcella Albright v. U.S. Postal Service,
MSPB Docket No. DC-0752-11-0196-I-1

Dear Mr. Spencer:

This letter is in response to the Merit System Protection Board's (Board or MSPB) letter, dated July 25, 2011, to Director John Berry, United States Office of Personnel Management (OPM) requesting an advisory opinion. Your letter was forwarded to my office for a response. OPM was asked:

> 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 [U.S. Postal Service's Employee and Labor Relations Manual]?

For the reasons explained in detail below, it is OPM's opinion that an agency would act arbitrarily and capriciously under 5 C.F.R. § 353.301(d) if it failed to comply with the agency's own internal rules in connection with denying restoration to a partially recovered individual.

Background

The MSPB's jurisdiction is not plenary, but is limited to those matters over which it has been given jurisdiction by statute, rule or regulation. *Meeker v. Merit Systems Protection Board,*

319 F.3d 1368, 1374 (Fed. Cir. 2003), cert. denied, 540 U.S. 1218 (2004); *Prewitt v. Merit Sys. Prot. Bd.*, 133 F.3d 885, 886 (Fed. Cir. 1998), *citing* 5 U.S.C. § 7701(a); *Redditt v. Department of the Army*, 88 M.S.P.R. 41, 44 (2001). Pursuant to its statutory authority under 5 U.S.C. § 1103(a)(5) to execute, administer, and enforce civil service rules and regulations, OPM has the authority to create a right of appeal to the Board by regulation and to limit the scope of such a right. *Maule v. OPM*, 40 M.S.P.R. 388, 392-93 (1989).

Chapter 81 of title 5 of the United States Code addresses matters related to compensation for work injuries. Subchapter I contains the general statutory provisions, including restoration to duty. Specifically, 5 U.S.C. § 8151 establishes the civil service retention rights for employees who resume employment with the Federal government. The statute directs OPM to issue regulations related to resuming work following a compensable injury. 5 U.S.C. § 8151(b). Those regulations are published at 5 CFR § 353, Subpart C, "Restoration to Duty from Compensable Injury."

As the MSPB noted in its letter to OPM, the Postal Service is "not a typical title 5 agency." July 25, 2011 Letter at 3. In fact, under the Postal Employees Appeal Rights Act of 1987, the Postal Service "has autonomy over its personnel management" and only a few of the provisions of title 5 apply to the Postal Service. 39 U.S.C. § 1005; *Manescalchi v. U.S. Postal Service*, 74 M.S.P.R. 479, 487 n.2 (1997) (there are no OPM standards or requirements for the Postal Service positions). One of the few title 5 provisions that remain applicable to the Postal Service, however, includes the provision related to compensation for work injuries. That is, 39 U.S.C. § 1005 specifically recognizes that "[o]fficers and employees of the Postal Service shall be covered by subchapter I of chapter 81 of title 5," which relates to compensation for work injuries. 39 U.S.C. § 1005(c).

The specific regulation at issue in the above-captioned matters is 5 CFR § 353.301(d), which states, in relevant part:

> (d) *Partially recovered.* 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 [disabled][1] individuals under the Rehabilitation Act of 1973, as amended. . . . A partially recovered employee is expected to seek reemployment as soon as he or she is able.

OPM has exercised its authority to create appeal rights for allegations of improper restoration under 5 CFR § 353.301(d) by promulgating 5 CFR § 353.304, which permits appeals to the Board for, among other things, "a determination of whether the agency is acting arbitrarily or capriciously in denying restoration" to an individual who is partially recovered from a compensable injury. 5 CFR § 353.304(c); *see also* USAJOBS FAQ – 40 (Attachment 1). This

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[1] In 1998, the Rehabilitation Act of 1973 was amended and changed the term "handicapped" to "disabled."

provision specifically notes that the appeal rights apply to any employee of an agency in the executive branch, including the U. S. Postal Service and the Postal Rate Commission. 5 CFR § 353.304(a). Thus, although there are no OPM standards or requirements for Postal Service positions, *see Manescalchi, supra*, the Postal Service's own authority has made 5 U.S.C. § 8151 and its related regulations in 5 CFR § 353, Subpart C, applicable to the Postal Service staff.

As noted in the Board's letter, the "Postal Service may have established an agency-specific rule providing partially recovered employees with greater restoration rights that the 'minimum' rights described in 5 C.F.R. § 353.301(d)." July 25, 2011 Letter at 2. As the Board also noted, however, the MSPB generally does not intercede in matters related to an agency's violation of its own internal rules. July 25, 2011 Letter at 3.

Analysis

In a different context, the Supreme Court has recognized that an agency can use its discretion to adopt procedures and standards to govern the exercise of an underlying legal authority, including adopting more rigorous substantive and procedural standards than required by the authority. *Service v. Dulles*, 354 U.S. 363, 373-76 and 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959). The Court also stated that once an agency implements such procedures, however, they are binding and must be followed. *Service*, 354 U.S. at 388; *Vitarelli*, 359 U.S. at 540.

Specifically, in *Service, supra*, the Department of State implemented regulations related to "loyalty and security" that applied to certain types of employee discharge actions. Those regulations imposed limits on the Secretary's discretion to discharge certain employees without stating grounds for the dismissal. The district and appeals courts held that the Secretary could not bind his authority under the regulations, but the Supreme Court disagreed. The Court concluded that, because the dismissal from employment was based on a defined procedure, and even though the procedures in the regulations placed limits on the Secretary's discretion and were generous beyond the original requirements binding the agency, that procedure had to be carefully observed. *Service*, 354 U.S. at 380.[2]

In *Vitarelli, supra*, the Department of the Interior discharged a Schedule A employee for national security reasons. The Secretary had the power to summarily discharge the Schedule A employee without stating any reason. Once the Secretary decided to give a reason and that reason was national security, however, the procedures for dismissal of employees on security grounds were triggered. Consequently, the Secretary "was bound by the regulations which he himself had promulgated for dealing with such cases . . . ." 359 U.S. at 539-40. As the Court also noted, "scrupulous observance of departmental procedural safeguards is clearly of particular importance." *Id.* at 540.

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[2] In *Service*, after determining the discharge was not consistent with the procedures in place, the Court reversed the court of appeals and remanded the case to the district court. 354 U.S. at 389.

In considering internal agency rules, the Supreme Court also has distinguished between cases where internal agency rules are designed primarily to benefit the agency, which are generally unreviewable, and internal agency rules that primarily confer important procedural benefits upon individuals, which are reviewable. *Lopez v. Federal Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003) citing, *inter alia, Service*, 354 U.S. at 373-76, and *Vitarelli*, 359 U.S. at 538-39. In *Lopez*, the Circuit concluded that the procedures at issue were "aimed at protecting the [employee in the dispute] from the Administrator's otherwise unlimited discretion," and thus was reviewable by the court. *Lopez*, 318 F.3d at 248. The D.C. Circuit also noted that other "circuits have similarly required agencies to follow procedural rules 'designed to benefit aggrieved parties during [employment] proceedings.'" *Id.* at 247 citing *Bates v. Sponberg*, 547 F.2d 325, 330 nn 6-7 (6th Cir. 1976) and *Gaballah v. Johnson*, 629 F.2d 1191, 1202-3 (7th Cir. 1980).

Although, absent an OPM regulation conferring jurisdiction on the Board, the precedents cited above confer no rights in the comprehensive scheme created by the Civil Service Reform Act, *see generally, Fausto v. United States*, 484 U.S. 439 (1988), OPM finds their reasoning instructive in interpreting its own regulations. Accordingly, OPM interprets its regulation at 5 CFR § 353.301(d) to require compliance with an agency's own rules as well as the provisions of OPM regulation, at least where they confer additional protections or benefits on the employee. Section 353.301(d) states that "[a]gencies must make every effort to restore in the local commuting area, according to the circumstances of each case," and that *"[a]t a minimum*, this would mean treating these employees substantially the same as other handicapped individuals . . . ." (Emphasis supplied). The use of the phrase, "at a minimum" appears to anticipate that more might be required if an agency adopts agency-specific regulations that provide additional protections. And, in any event, an agency's failure to follow additional safeguards for employees that it chose to adopt, while applying OPM's substantive regulation would constitute conduct that is arbitrary and capricious within the ordinary meaning of those terms. OPM's interpretation of its own rules is entitled to substantial deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

Conclusion

The issue in this appeal is whether the Postal Service properly applied the Employee and Labor Relations Manual (ELM) § 546.142(a), which appears to provide greater restoration rights to the Postal Service employees than provided in 5 CFR § 353.301(d). This is a procedure that benefits the partially recovered employees. It is OPM's opinion that if the Postal Service established a rule that provided the partially recovered employees with greater restoration rights than the "minimum" described in the OPM regulations, the Postal Service is required to meticulously follow that rule. To do otherwise would be arbitrary and capricious within the meaning of OPM's regulation conferring jurisdiction on the Board at section 353.304(c).

Sincerely,

Elaine Kaplan
General Counsel

cc: James C. Latham
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