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CLERK OF THE BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

	Docket Numbers
James C. Latham	**DA-0353-10-0408-1-1**
Ruby N. Turner	SF-0353-10-0329-1-1
Arleather Reaves	CH-0353-10-0823-1-1
Cynthia E. Lundy, and	AT-0353-11-0369-1-1
Marcella Albright,	DC-0752-11-0196-1-1
Appellants,	

v.
United States Postal Service,

Date: September 13, 2011

APPELLANTS CLOSING/REPLY BRIEF

STATEMENT OF TH E CASE

On July 25, 2011, The Clerk of the Board, William D. Spencer, respectfully requested from the Honorable John Berry (Director of OPM) to submit an advisory opinion to answer two (2) questions.

On August 17, 2011, Elanie Kaplan (General Counsel) responded to Mr. Spencer request for the advisory opinion. This being three (3) weeks of

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elapsed time. Ms. Kaplan explained that OPM would write the opinion at the earliest possible time, anticipating that would occur within the next week. I have already submitted the letter to Kathy Davis from OPM, explaining that the Agency does have an obligation to find work per the Collective Bargaining Agreement (CBA).

As of today, September 8, 2011, I have not received a response from OPM concerning the advisory opinion. As for the amicus brief from Mr. Bubb (Agency representative) he is saying even though there have been laws, rules and regulations; etc. that have been in place for more than three (3) decades, that some of these laws, rules; etc have over extended their authority. This is not the first time these laws, rules; etc have been brought up in various forums and decisions were made. The Agency has had more than thirty (30) years to decide if one or more of their policies have extended their authority and chose not to do so. Now in a last ditch effort, the Agency is drawing straws and gasping for air.

To make this point in more detail, please consider the following analysis of the Postal Service's position.

Under current MSPB precedent, agencies are required "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" but are not required to assemble available tasks from multiple positions to create a unique appropriate assignment. In order to address whether Postal Service regulations create additional restoration rights for Postal employees appealing to the MSPB, the Board asked the parties to the conjoined case to address the following issues:

1) *May a 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 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 as limited duty work?*

Let's look at how the Postal Service addressed these issues in its brief in reverse order.

Isuue #2: The Postal Service fully acknowledges in its brief that the ELM obligation goes beyond the 5 CFR 353 restoration obligation.

There should be no doubt that the Postal Service's obligation under the ELM and its own internal rules goes beyond the 5 CFR 353 restoration obligation. The Postal Service fully acknowledges this in its brief.

On pages 4 and 5 of its brief it writes

The provisions of ELM 546 and Handbook EL-505 afford FECA claimants the right to be considered for assignments other than assignments to regular positions. ***In doing so, they exceed FECA's promise of restoration*** *– or priority consideration for restoration* ***– only to regular positions.*** *They are also incorporated into the Postal Service's collective-bargaining agreements, agreements that cover the overwhelming majority of the Postal Service's workforce. ELM 546 and Handbook EL-505 are integral to the Postal Service's collective-bargaining agreements as a substantive... Depending on the circumstances,* ***ELM 546 and Handbook EL-505 obligate the Postal Service to search for work that is not a regular position and offer work if it is found.*** (emphasis added)

Later in its brief, the Postal Service cites Handbook EL-505 to make the point that limited duty assignments "*are comprised, not of regular positions in the workforce, but of duties assembled to match the employee's temporary need.*" (p. 21) And "*Handbook EL-505 authorizes the creation of a new position in the workforce to which the employee can be permanently assigned.*" (p. 23)

Clearly, the Postal Service concedes in its brief that its obligations under the ELM and EL-505 go beyond the 5 CFR 353 restoration obligation.

Issue #1: The Postal Service erroneously argues that OPM exceeded its authority when it promulgated 5 CFR 353.304(c).

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In response to Issue #1, the Postal Service argues that the Board does not have jurisdiction over 5 CFR 353.304(c) appeals on the basis of agency denial of restoration in violation of the agency's own internal rules (e.g., ELM 546). According the Postal Service, this is because the Board should have no jurisdiction over 5 CFR 353.304(c) at all. In making this argument, the Postal Service attacks the very foundation of the 5 CFR 353 language regarding partially recovered employees.

The Postal Service argues in its brief that 5 USC 8151 unambiguously limits OPM to promulgation of regulations providing for restoration only of fully recovered employees, and therefore the regulations in 5 CFR 353 regarding partially recovered employees *"is beyond the regulatory authority granted OPM by FECA and cannot form the basis of Board jurisdiction."* (p. 3). It argues that 5 CFR 353.301(d) is therefore unenforceable.

The Postal Service acknowledges that the legislative history of 5 USC 8151 (see page 9 – 10 & 13) supports that its intent included promulgation of regulations (i.e. 5 CFR 353) protecting the rights of partially as well as fully recovered employees. But the Postal Service argues that legislative history should be disregarded because the language of 8151 is unambiguously limited to fully recovered employees.

Analysis of Postal Service Position on 5 CFR 353

1. 5 USC 8151 does not unambiguously limit the OPM to promulgation of regulations regarding fully recovered employees only.

    a. Consider the various legal and regulatory iterations of the key concept:
        i. The operative phrase in 5 USC 8151: *if the injury or disability is overcome.*
        ii. The implementing regulations at 5 CFR 353 use the synonymous concept *recovered*, and dissect it to include *fully recovered* and *partially recovered* (see 5 CFR 353.102 *Definitions*).
        iii. The FECA itself at 5 USC 8105 and 8106 employs the same concept using the terms *total disability* and *partial disability* as the headings of subsections 5 USC 8105 and 5 USC 8106 respectively.
        iv. Implementing regulations at 20 CFR 10.5(f) define "disability": *Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.*

    While the terms differ, the concept is the same. The concept concerns the ability to do work to earn wages. It is fundamentally an economic, not a medical concept.

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100% Disability fully overcome	Disability partially overcome	Disability
→→→→

statute envisions assignments to jobs other than the pre-injury position.

Conclusion

Since the language of 5 USC 8151 is ambiguous regarding application to all degrees of "*disability overcome*", it should be construed consistent with the stated intent of its drafters. It should also be construed in a broad manner to effect the remedial intent of the FECA.

Additional Note

In a secondary argument (that expanding the Board's jurisdiction would inappropriately involve the Board in the activities of OWCP) the Postal Service incorrectly asserts that OWCP regulations provide that job offers of less than 4 hours and/or to temporary positions are unsuitable, and that an employee's decision to refuse such an unsuitable job does not impact the receipt of compensation. (See pages 17 & 30)

In support of that argument, the Postal Service claimed that OWCP regulations provide that job offers of less than 4 hours and/or to temporary positions are unsuitable, and that an employee's decision to refuse such an unsuitable job does not impact the receipt of compensation. (See pages 17 & 30)

The Postal Service is wrong when it claims that an injured employee who refuses a temporary (or less than 4 hour) job offer will not have his or her compensation.
In fact, OWCP holds that while a job offer that is medically unsuitable need not be accepted, and wage-loss compensation will be paid. However, OWCP holds that if a job offer is medically suitable, but not otherwise (temporary, less than 4 hors) suitable, it must be accepted - and that wage-loss compensation is not payable if the job offer is not accepted. OWCP recently amended 20 CFR 10.500 to reinforce the above (the newly added language is italicized):

> **§ 10.500 What are the basic rules governing continuing receipt of compensation benefits and return to work?**
>
> (a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. *For example, an employee is not entitled to compensation for any wage-loss claimed on a CA–7 to the extent that evidence contemporaneous with the period claimed on a CA–7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available.*

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As for the APWU amicus brief, Mr. Darryl J. Anderson, either received some wrong information or did not read the case thoroughly. He states that I would have made a non-frivolous allegation had I shown other employees were still doing the duties I was performing, which in fact is the case. All the effected employees in my local area did just that. Uniquely created jobs for injured-on-duty employees were taken away and given to younger and less qualified employees. Doing this has created more overtime, shifting employees from their bid positions. A clerk covered by APWU was put off the clock, no work available from one of the facilities. She was a boxing clerk. Boxing mail for customers is a must do job daily for the nation as a whole. Letter Carriers, custodian and management are still doing her duties daily. APWU has filed one (1) grievance on the NRP for this employee since or after April 27, 2010. The APWU lacks much as to its representation for its membership. The fact is their amicus brief deals with their thought that these uniquely created job duties should be placed for bid positions under Article 37 of the CBA. APWU filed a grievance on this very issue stating a uniquely created position for injured on duty employees should be thru seniority and go thru the bidding process first. NALC intervened and agreed with the Agency, stating once the injured employee left that position would no longer exist. APWU lost this

grievance in arbitration. NALC was trying to take care of all injured on the job employees by doing the fair and just remedy. APWU is still trying to piggyback their losses into this instant case. Where APWU fails in their quest, they do not have knowledge of this instant case. I did not fail the jurisdiction process. This Judge dismissed my case because I did not prove arbitrary and capricious in taking away my permanent rehabilitation job offer. The Board has stated that withdrawing job offers is arbitrary and capricious. APWU makes it sound like I would be taking duties away from the clerk craft. At this time, Mr. Anderson is far away from the truth. NALC strives to protect all employees by fair and just laws, rules and regulations; etc without affecting the rights of other employees. I cannot say as much for APWU. They are lost in seniority biding principle, while I am an injured on the job employee that had a permanent Rehabilitation job offer. APWU and the Postal Service should be treating these injured employees with Dignity and Respect, which is what the CBA's are based on.

As for the NALC amicus brief, it is a true and representative brief. This brief is how unions ought to write and defend all employees of the Postal Service. Not all grievances are won, the representation far exceeds that of our sister union. The NALC has for many years worked with the Agency in

reaching decisions or for protecting the work force even if that meant to go to binding arbitration. If we lose a case, NALC strives to correct the problem, not dwell on the issue for years to come. The NALC stands supreme as does the Agency's handbooks and manuals, rules, regulations and policies. If the Agency needs to change a handbook, manual or policy, there is a process that involves all the unions to make the Agency last an eternity. As for the Agency, they are striving to bring down the constitutional monopoly daily. The lose of mail volume is a scapegoat for poor management from top to bottom. You cannot save those who do not want to save themselves.

NALC negotiated with the Agency in 1979 to change some of the wording in the ELM. NALC has introduced all pertinent information to help in the decision of the Board dealing with partially recovered employees. The NRP was/is a discretionary guideline instead of the obligatory situation.

As for Ms. Geraldine L. Manzo, representative for Ruby Turner, she stated positive and correct information dealing with partially recovered employees. Ms. Turner is well represented in her full and fair quest for adjudication. Ms. Manzo is knowledgeable in the rules (internal), laws, etc. of the Postal

Service. She is correct in her conclusion. Ms. Manzo also confirms the NRP is obsolete (January 31, 2011), yet the Postal Service is still not making it right for the harm they have done. I pray the Board take this brief to heart.

As for the brief by J.R. Pritchett, representative for appellant, Arleather Reaves, he defined the words arbitrary and capricious. He is correct in the search for work (50-mile radius) except that twelve (12) zip codes were not searched in the Amarillo city limits. Mr. Pritchett probably does not know my case very well, but theses zip codes were testified to in three (3) hearings for employees in Amarillo TX. He is well versed in the Black Law Dictionary as it helps me in my non-attorney representation for employees of the Postal Service in violation of EEOC, MSPB's and other forums in the past. Ms. Reaves is well represented with Mr. Pritchett. He to is well versed on law, rule, regulations, etc. I pray the Board take this brief to heart.

As for the brief written by Thomas Albright for Marcella Albright. Mr. Albright answers the Boards two (2) questions with strong persuasion. Mr. Albright is also knowledgeable in law, rule, regulations, etc. He is correct

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also in his defense of Ms. Albright and the consolidated cases. I have tried to find attorneys like these for sixteen (16) months but not one would touch my case. It is a thanks from the bottom of my heart that attorneys like these exist and perform a service so needed by Postal employees. I pray the Board take this brief to heart.

These attorneys representation at a time in need is honorable and just. I say little about these attorneys and congratulate them for their service. Few words are needed to commend them. Lots of words were needed for briefs in dispute.

As for the brief by Steven E. Brown for W.I.L.G. Mr. Brown does a great job as well as all writers, to show who, what, where and why the Postal Service is acting arbitrary and capricious in their actions under the NRP process. Mr. Brown not only cites the laws, etc that have been violated but also brings up lower MSPB rulings not in favor of the appellant. This amicus brief as well as the others are a good read. The attorneys are assembling the language for the most part in ways that a layman like me can understand. Although its not simple language and takes me 2 or 3 times to read, it is in my opinion excellent for these attorneys to take time out of their days to investigate the resources and write the facts and

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opinion about applicable laws. Mr. Brown as some of the others uses the Black Law Dictionary. Mr. Brown also brings up "constructively suspended". This is were this case originally started after May 26, 2010. Mr. Brown also footnotes (page 12-8) failure to accommodate in violation of the Rehabilitation Act of 1973 is a Prohibited Personnel Practice under 5 USC 2302(b)(1)(d). Mr. Brown cites (page 13, 1st paragraph) that the appellant argued that the Agency's failure to follow the ELM constituted harmful error. This NRP has not only been harmful to me but to the approximately 120,000 employees that have been injured on the job. Mr. Brown also talks about the AJ appearing to focus on my inability to perform the duties of my position, yet, was improper inquiry when determining whether the Agency violated the relevant ELM provisions. With no disrespect to the AJ this was done and appeared to have my case dismissed before a hearing ever took place. This seemed to be the case in two (2) other hearings that I was a part of. In Mr. Brown's conclusion, he reiterates that the ELM language is supreme and the Agency's action must be considered "arbitrary and capricious". I pray the Board takes this stand and without mention of the man made economic condition rule on the merits and violation of law.

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As for the brief submitted by George Reyes with the Dispute resolution Team for USPS/NALC. , He again complies documents and language in a professional manner. He sets the stage as to answering four (4) questions breaking down the Boards two (2) questions, which I feel was appropriate. Mr. Reyes bases his opinion again off of well-established law and decisions. Mr. Reyes incorporated the CBA into other laws and places articles of contest into proper order and violations into retrospect. Mr. Reyes brings to fact the other forums available such as EEO and the Supreme Court rendering decision even though the aggrieved filed a grievance. Mr. Reyes also brings to the table the NLRB. We have recently won several cases with that Board. We will go to hearing in November for local management refusing to furnish requested information. The NLRB has jurisdiction over these cases. Mr. Reyes brings up the ELM 513.361, which states Documentation for absences for three (3) days or less. Locally we are facing some similar situations. These altered egos that managers have cost the Agency enormous monies that could be applied to its economy in other ways. Altered egos even for the Postmaster General Donahoe need fixed where the Agency can exist into the 22nd century. Even in New Orleans, LA, the inconsistency of the commuting area is present. In Amarillo TX the commuting area consisted of 50 miles and only

1 district. As everyone possibly knows, Texas is wide opened but in some parts of Texas, not many miles have to be traveled to access other districts. Here in Amarillo, I would have to travel many miles to get to another district. The bottom line is the violations of the laws. I proved in all the hearings I was a part of that 12 to 14 zip codes in Amarillo did not respond to the emails that were sent out. These emails were searching for work only in our craft. The use of the pecking order though not needed here was not adhered to. Again here legitimate job offers were taken away and given to non-disabled employees causing excessive overtime and crossing crafts. Mr. Reyes wording "quis custodiet ipsos custodes" from Latin could never be truer. "Who will guard the guards". "Who will watch the watchman"?

As for the brief from Michael Hillings, operator of tractor/trailer. It is a testimonial of situations that are common throughout the Agency. The Agency has a one-tract mind and passes on these injustices nation wide. Mr. Hillings got injured in November 2002 from an accident (not at his fault). He partially overcame this massive injury through a few years. At one point the Agency did away with his job and he transferred to another city. To make this story short (with no disrespect to Mr. Hillings) it seems

he was treated fairly in regards to the laws, rules, regulations, etc. until NRP. Mr. Hillings story is like most others that preceded him or were injured after him. His doctors did the best they could to help him partially recover and assigning him with restrictions. Although his pain was inconceivable, Mr. Hillings tried to continue working to be a productive member of society. But on the other hand the Agency punished him for getting hurt. They even tried several times to get him to go beyond his physical capabilities (with documented proof as to injury) and perform task that were merely, not quite as bad as the Holy cost. I applaud Mr. Hillings doctors and tell them I am sorry for the crap the Agency did him. This ergo links with this Smith lady ought to be closed and the people associated with it not be permitted to be in any kind of medical field. I fell people like Ms. Fitzpatrick and all postal management associated with NRP should be put out on the street. But that's my call and another story. Employees that get injured in any of the special occupations of the Agency are expected to (if carrier) carry the rest of the mail that day and come back to the office. Managers play with the doctors expertise and decide if the injured employee needs treated. If you are a clerk, finish the job at hand and then the Agency will decide if you need to go to the Agency's doctors. If you go that doctor twice, he becomes the doctor of record. The Agency can

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manipulate them to write, say or treat however they deem. Playing doctor by the Agency's management is not covered under the ELM, the Rehab Act, the ADAAA, EL 307, the EL 505 or any other handbook or manual. Although it is covered in the grievance procedure, the EEO process, MSPB process and any other forum where neglect or mismanagement, discrimination and these factors are concerned. I pray in Mr. Hillings case and all other cases unjustly prosecuted by the Agency that the Board will do the right and just rulings.

As for the brief submitted by Harvey Orr, Member of the National Alliance of Postal and Federal Employees. He took the time to research and write this brief with heart felt words and proper documentation pertaining to the unjust treatment by the NRP. Mr. Orr is to be commended for a job well done. Mr. Orr even researched enough to know that the Agency secretly concluded NRP on January 31, 2011. The Agency claims it has renamed NRP to ELM 546. How smart is that? This and other violations of laws, rules, regulations, etc. is why we have got to this point in the process. Mr. Orr is well schooled in these processes that I pray will get justice of all involved.

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As to the brief from Bruce R. Lerner who is with the Mail Handlers Union. Mr. Lerner and others have alluded to a phrase that "the Board has not yet addressed the issue whether the failure of the Agency to apply a provision of the ELM may qualify as arbitrary and capricious conduct sufficient to establish Board jurisdiction under 5 CFR 353.304(c). If this be the case I pray the Board will rule on this issue in my favor, help the Agency start cutting their losses and put an end to this harmful breach. 120,000 employees on the roles of OWCP and not paying taxes is detrimental to our national economy. Make whole to the fullest extent of the laws and return me to my job as I was prior to April 27, 2010 and make whole the employees involved in NRP since its inception. Return us to be productive members of society or a chance to. Others may not want to return and are happy with whatever they are doing. Mr. Lerner again brings to the Board the laws, rules and arbitrations and opinion that "there can be no question that the Agency's failure to comply with the ELM would be "arbitrary and capricious". Mr. Lerner also says the "Agency's failure to comply with the restoration rules that are set forth in the ELM therefore would be clear evidence of "arbitrary and capricious Agency conduct". Mr. Lerner brings up the "make every effort" clause. Every effort is on going and never ends. The Agency's one time effort by doing a few emails does not satisfy the

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"make every effort" clause. NRP is an instrument that tried to get around its legal obligation and the Agency secretly concluded this harmful process on January 31, 2011, unbeknown to masses of employees harmed by this process. Although the Agency says it has done away with NRP, they are still practicing the illegal guideline principle to date. Those with reduced hours are still reduced, those with job offers made April 26, 2010 prior to the April 27, 2010 (No work available) and still working unless retired. Discontinuing, doing away with etc. means in all situations, return as before. Mr. Lerner is correct when he says, "the examples could continue, but there is no reason to belabor the point". I pray the Board take to heart Mr. Lerner's amicus brief.

As for the brief from Mr. Richard M. Gallos with APWU union in Wisconsin. I feel Mr. Gallos brief has the intent of Darryl Anderson's brief that is correct. Refer to the brief from Mr. Anderson. Mr. Gallos brings to the Board the same instruments of legal authority and answers the 1st question as "unequivocally yes". Mr. Gallos answered the 2nd question by using a brief on behalf of NALC advocate, Jeffery Fults. Mr. Fults as is Mr. Gallos brief is completely on point. Mr. Gallos alludes to the Agency trying to suggest that their actions are somehow justified due to some financial

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hardship. Mr. Gallos is on point on this claim. "There is no hard evidence to support that claim". The Agency's financial situation is man made and goes to the credit of the Postmaster General. Potter seemed to have retired at the right time with a 5.5 million dollar retirement package and a bonus of over 270,000 dollars. Postmaster General Donahoe is contributing to the Agency's demise. Mr. Gallos states "the ultimate result of the NRP has been to reduce the number of employees on the Agency's roles at the expense of "only injured employees". Mr. Gallos brings to the Board as I have; the Agency has other non-discriminatory relief at its disposal to accomplish that result. That is the bargaining agreements. Specifically, the lay off provisions of Article 6 says in time of need you lay off what is needed with employees under 6 (six) years of service. Article 12, the Agency can excess positions not bid on if a reduction is needed. These 2 (two) articles agreed upon has a nondiscrimination instrument because everyone knows when hired, they could be involved in a reduction if they have less than 6 (six) years. Mr. Gallos assertion is correct in the Board ruling for me. I have not worked this hard with my counterparts to only include us few in any settlement, rather the laws have been in effect for everyone. It is our research that gives the laws back to the injured on duty employees. Hopefully, most can recover completely, but there had to

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be laws, rules, etc to protect the permanently injured employees as well. I pray the Board take this brief to heart and make the laws supreme as they were for 3 (three) decades. There is no excuse for breaking the laws. There is ways to adjust the laws but these laws were written well and their intentions lasted for 3 (three) decades or until the NRP became Blessed by the Agency's higher authorities to breach the laws in documentation form and others missed through research.

IN CONCLUSION

Words were never spoken more eloquently than by NALC and the attorneys for the appellants. With the advisory opinion not received and unknown when it will be received, these opening briefs should make the decision of the Board an easier one to make. The law, etc, are well represented here and leave nothing to be construed as a gray area. The only interruption here is, the one of the writers of laws, rules, regulations, handbooks and manuals and policies not to be superseded by mere NRP guidelines.

The intent here and all the amicus briefs is but for established laws, rules, regulations, handbooks and manuals, policies and contracts of all involved unions, to be upheld. I have spent my career working and helping others in

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need. I have not written any policies or other binding instruments. I have only tried to enforce the existing ones. When these binding instruments are agreed upon by the Parties, they are not for over zealous management to interrupt them, their selves. Since there has been no answer from OPM to justify their reasoning by answering the Board's 2 (two) questions, it can only be a concession of violation and trying to save face on what would be verbiage as to their answers. If you are caught red handed, there are consequences to your actions. This NRP process is a truly right or wrong doings at the detriment of a protected class of employees. All employees are protected against an alleged incident and have the right for their day in court. This is finally my day in court.

On September 8, 2011, I finally received the Advisory Opinion from OPM. Ms. Kaplan answered the first question from the Board in a truthful, honest and lawful manner. The Agency in its brief answered question 2 (two) in the affirmative. The answer was, the Agency has set to having a higher standard. The 2 (two) questions go hand in hand. If the answer to the first question is the Agency acted "arbitrary and capricious" for having an internal rule they violated, there has to be an obligation to those affected by their acts of harm. For these reasons and the facts of laws, etc., along with

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the amicus briefs submitted, I pray the Board will rule what is right and just for all involved.

Regards,

James Latham _____

Date

CERTIFICATE OF SERVICE

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

FAX:
The Clerk of the Board
U.S. Merit Systems Protection Board
5th Floor Mail Room
1615 M Street, NW
Washington, DC 20419
(202) 653-7130

FAX:
Therese Gegen
USPS
Law Department-SW Office
PO Box 227078
Dallas TX 75222-7078
(214) 252-6169

Ruby Turner
[redacted]

Marcella Albright
[redacted]

Cynthia E. Lundy
[redacted]

Arleather Reaves
[redacted]

Hand delivered:

James A. Penna
3212 Villa Place
Amarillo, TX. 79109

James Latham

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