9 pages

202-653-7130

The Clerk of the Board
Merit Systems Protection Board

RE Cynthia Lundy

RECEIVED MSPB
2011 APR -5 PM 1:23
CLERK OF THE BOARD

OMB NO. 3124-0009

U.S. MERIT SYSTEMS PROTECTION BOARD

APPEAL FORM

INSTRUCTIONS

GENERAL: You do not have to use this form to file an appeal with the Board. However, if you do not, your appeal must still comply with the Board's regulations. 5 C.F.R. Parts 1201 and 1209. Your agency's personnel office will give you access to the regulations, and the Board will expect you to be familiar with them. You also should become familiar with the Board's key case law and controlling court decisions as they may affect your case. **You must tell the Board if you are raising an affirmative defense (see Part IV), and you are responsible for proving each defense you raise.**

WHERE TO FILE AN APPEAL: You must file your appeal with the Board's regional or field office which has responsibility for the geographic area in which you are employed. See 5 C.F.R. Part 1201, Appendix II.

WHEN TO FILE AN APPEAL: Your appeal must be filed during the period beginning with the day after the effective date of the action you are appealing and ending on the 30th day after the effective date. You may not file your appeal before the effective date of the action you are appealing. If you are appealing from a decision which does not set an effective date, you must file within 35 days of the date of the decision you are appealing. If your appeal date your is late, it may be dismissed as untimely. The date of the filing is the appeal is postmarked, the date of the facsimile transmission, the date it is delivered to a commercial overnight delivery service, or the date of receipt if you personally deliver it to the regional or field office.

HOW TO FILE AN APPEAL: You may file your appeal by mail, by facsimile, by commercial overnight delivery, or by personal delivery. You must submit two copies of both your appeal and all attachments. You may supplement your response to any question on separate sheets of paper, but if you do, please put your name and address at the top of each additional page. All of your submissions must be legible and on 8 1/2" x 11" paper. **Your appeal must contain your or your representative's signature in block 6. If it does not, your appeal will be rejected and returned to you. If your representative signs block 6, you must sign block 11 or submit a separate written designation of representative.**

WHISTLEBLOWING APPEAL/STAY REQUEST: If you believe the action you are appealing was threatened, proposed, taken, or not taken because of whistleblowing activities, **you must complete Part VII of this form. If you are requesting a stay, you must complete Part VIII of this form.**

Privacy Act Statement: This form requests personal information which is relevant and necessary to reach a decision in your appeal. The U.S. Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Since your appeal is a voluntary action you are not required to provide any personal information in connection with it. However, failure to supply the U.S. Merit Systems Protection Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.

The U.S. Merit Systems Protection Board is authorized under provisions of Executive Order 9397, dated November 22, 1943, to request your Social Security number, but providing your Social Security number is voluntary and failure to provide it will not result in the rejection of your appeal. Your Social Security number will only be used for identification purposes in the processing of your appeal.

You should know that the decisions of the U.S. Merit Systems Protection Board on appeals are final administrative decisions and, as such, are available to the public under the provisions of the Freedom of Information Act. Additionally, it is possible that information contained in your appeal file may be released as required by the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a data base for program statistics.

Public Reporting Burden: The public reporting burden for this collection of information is estimated to vary from 20 minutes to 1 hour, with an average of 30 minutes per response, including time for reviewing the form, searching existing data sources, gathering the data necessary, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to the Office of Planning and Resource Management Services, Merit Systems Protection Board, 1120 Vermont Ave., NW., Washington, DC 20419.

Part I: Appellant Identification

1. Name *(last, first, middle initial)*: LUNDY, CYNTHIA E.

2. Social Security Number: [redacted]

3. Present address *(number and street, city, state, and ZIP code)* **You must notify the Board of any change of address or telephone number while the appeal is pending with the MSPB.**: [redacted]

4. Home phone *(include area code)*: [redacted]

5. Office phone *(include area code)*: N/A

6. I certify that all of the statements made in this appeal are true, complete, and correct to the best of my knowledge and belief.

Signature of appellant or designated representative: Cynthia E. Lundy

Date signed: 4 Apr '11

Part II Designation of Representative

7. You may represent yourself in this appeal, or you may choose someone to represent you. Your representative does not have to be an attorney. You may change your designation of a representative at a later date, if you so desire, but you must notify the Board promptly of any change. Where circumstances require, a separate designation of representative may be submitted after the original filing. Include the information requested in blocks 7 through 11.

"I hereby designate _____ to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. I understand that any limitation on this settlement authority must be filed in writing with the Board."

8. Representative's address *(number and street, city, state, and ZIP code).*	9. Representative's employer
	10.a) Representative's telephone number *(include area code)*
	10.b) Representative's facsimile number
	11. Appellant's signature Date

Part III Appealed Action

12. Briefly describe the agency action you wish to appeal and attach the proposal letter and decision letter. If you are appealing a decision relating to the denial of retirement benefits, attach a copy of OPM's reconsideration decision. If the relevant SF 50 or its equivalent is available, send it now; however, do NOT delay filing your appeal because of it. You may submit the SF-50 when it becomes available. Later in the proceeding, you will be afforded an opportunity to submit detailed evidence in support of your appeal.

13. Name and address of the agency that took the action you are appealing *(including bureau or other divisions, as well as street address, city, state and ZIP code)*	14. Your position title and duty station at the time of the action appealed
U.S. Postal Svc. 3900 Crown Rd. Atlanta, Ga. 30304	Mail Processing Clerk ATL P&DC Atlanta, Ga. 30304

15. Grade at time of the action appealed	16. Salary at the time of the action appealed	17. Are you a veteran and/or entitled to the employment rights of a veteran?
6.0	$25.53 per HR.	☐ Yes ☒ No

18. Employment status at the time of the action appealed	19. If retired, date of retirement *(month, day, year)*	20. Type of service
☐ Temporary ☐ Applicant ☐ Retired ☒ Permanent ☐ Term ☐ Seasonal		☐ Competitive ☐ SES ☐ Excepted ☒ Postal Service ☐ Foreign Service

21. Length of government service	22. Length of service with acting agency	23. Were you serving a probationary or trial period at the time of the action appealed?
26 yrs.	23 yrs.	☐ Yes ☒ No

24. Date you received written notice of the proposed action *(month, day, year) (attach a copy)*	25. Date you received the final decision notice *(month, day, year) (attach a copy)*	26. Effective date of the action appealed *(month, day, year)*
9.23.10	9.23.10	9.23.10

27. Explain briefly why you think the agency was wrong in taking this action.
I THINK THE AGENCY WAS WRONG IN TAKING THIS ACTION BECAUSE I WAS ACTIVELY WORKING, THEN SENT TO THE STAND-BY ROOM FOR 15 MOS. THEN SENT HOME WITH NO PAY, INVOLUNTHRILY. THERE ARE OTHER EMPLOYEES WHO WERE ALSO SENT HOME AND THEY ARE RECEIVING COMPENSATION.

28. Do you believe the penalty imposed by the agency was too harsh?
☒ Yes ☐ No

29. What action would you like the Board to take on this case (i.e., what remedy are you asking for)? I AM ASKING TO BE COMPENSATED FOR ALL HOURS OF LOST PAY & CONTINUATION OF LOST PAY UNTIL ALL ISSUES HAVE BEEN RESOLVED.

Part IV Appellant's Defenses

30.a) Do you believe the agency committed harmful procedural error(s)?
☒ Yes ☐ No

30.b) If so, what is (are) the error(s)?
I SHOULD RECEIVE COMPENSATION FOR MY INJURY I RECEIVED WHILE ON DUTY FOR THE USPS, ~~ACCORDING~~ TO THE REHAB ACT OF 1973. I HAVE NOT RECEIVED ANY COMPENSATION

30.c) Explain how you were harmed by the error(s).
I AM IN FINANCIAL DISTRESS, DUE TO ME NOT RECEIVING COMPENSATION. I WAS ACTIVELY WORKING BEFORE I WAS SENT HOME AND WAS RECEIVING A PAYCHECK BI-WEEKLY

31.a) Do you believe that the action you are appealing violated the law?
☒ Yes ☐ No

31.b) If so, what law?
THE REHABILITATION ACT OF 1973

31.c) How was it violated?
I AM BEING DENIED BENEFITS AND BEING SUBJECTED TO DISCRIMINATION BECAUSE OF MY DISABLITY. (CTS)

32.a) If you believe you were discriminated against by the agency, in connection with the matter appealed, because of your race, color, religion, sex, national origin, marital status, political affiliation, disability, or age, indicate so and explain why you believe it to be true.
I BELIEVE I WAS DISCRIMINATED AGAINST BY THE AGENCY BECAUSE OF MY DISABILITY. THERE ARE OTHER EMPLOYEES WHO WERE INJURED ON THE JOB WHO WERE SENT HOME AND ARE NOW BACK AT WORK. I HAVE NOT BEEN RESTORED BACK TO WORK. ALSO AS STATED IN #27 THERE ARE OTHER EMPLOYEES WHO WERE SENT HOME AND THEY ARE BEING COMPENSATED.

32.b) Have you filed a formal discrimination complaint with your agency or any other agency concerning the matter which you are seeking to appeal?
☒ Yes (attach a copy) ☐ No

32.c) If yes, place filed (agency, number and street, city, state, and ZIP code)
NEEO150. FORMAL COMPLAINT
U.S. POSTAL SERVICE
P.O. BOX 21979
TAMPA, FL. 33622-1979

32.d) Date filed (month, day, year)
10.15.10

32.e) Has a decision been issued?
☐ Yes (attach a copy) ☒ No

33.a) Have you, or anyone in your behalf, filed a formal grievance with your agency concerning this matter, under a negotiated grievance procedure provided by a collective bargaining agreement? ☒ Yes (attach a copy) ☐ No	33.b) Date filed (month, day, year) 9.23.10
33.c) If yes, place filed (agency, number and street, city, state, and ZIP code) APWU (ATLANTA Local) P.O. Box 3232 Atlanta, GA 30302	33.d) Has a decision been issued? ☐ Yes (attach a copy) ☒ No 33.e) If yes, date issued (month, day, year)

Part V Hearing

34. You may have a right to a hearing on this appeal. If you do not want a hearing, the Board will make its decision on the basis of the documents you and the agency submit, after providing you and the agency with an opportunity to submit additional documents.

Do you want a hearing? ☒ Yes ☐ No

If you choose to have a hearing, the Board will notify you where and when it is to be held.

Part VI Reduction In Force

INSTRUCTIONS

Fill out this part only if you are appealing from a Reduction in Force. Your agency's personnel office can furnish you with most of the information requested below.

35. Retention group and sub-group	36. Service computation date	37.a) Has your agency offered you another position rather than separating you? ☐ Yes ☐ No
37.b) Title of position offered	37.c) Grade of position offered	37.d) Salary of position offered $ per
37.e) Location of position offered		37.f) Did you accept this position? ☐ Yes ☐ No

38. Explain why you think you should not have been affected by the Reduction In Force. *(Explanations could include: you were placed in the wrong retention group or sub-group; an error was made in the computation of your service computation date; competitive area was too narrow; improperly reached for separation from competitive level; an exception was made to the regular order of selection; the required number of days notice was not given; you believe you have assignment [bump or retreat] rights; or any other reasons. Please provide as much information as possible regarding each reason.)*

Part VII Whistleblowing Activity

INSTRUCTIONS

Complete Parts VII and VIII of this form only if you believe the action you are appealing is based on whistleblowing activities.

39.a) Have you disclosed information that evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety? ☐ *Yes (attach a copy or summary of disclosure)* ☐ *No*	39.b) If yes, provide the name, title, and office address of the person to whom the disclosure was made
39.c) Date the disclosure was made *(month, day, year)*	

40. If you believe the action you are appealing was... *(please check appropriate box)*

☐ *Threatened* ☐ *Proposed*

☐ *Taken* ☐ *Not Taken*

...because of a disclosure evidencing a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, provide:

a) a chronology of facts concerning the action appealed; and

b) explain why you believe the action was based on whistleblowing activity and attach a copy of any documentary evidence which supports your statement.

41.a) Have you sought corrective action from the Office of Special Counsel concerning the action which you are appealing? ☐ *Yes (attach a copy of your request to the Office of Special Counsel for corrective action)* ☐ *No*	41.b) If yes, date(s) filed *(month, day, year)*
41.c) Place filed *(location, number and street, city, state, and ZIP code)*	
42. Have you received a written notice of your right to file this appeal from the Office of Special Counsel? ☐ *Yes (attach a copy)* ☐ *No*	
43.a) Have you already requested a stay from the Board of the action you are seeking to appeal? ☐ *Yes (attach a copy)* ☐ *No*	43.b) If yes, date requested *(month, day, year)*
43.c) Place filed *(location, number and street, city, state, and ZIP code)*	43.d) Has there been a decision? ☐ *Yes (attach a copy)* ☐ *No*

Part VIII Stay Request

INSTRUCTIONS

You may request a stay of a personnel action allegedly based on whistleblowing at any time after you become eligible to file an appeal with the Board under 5 C.F.R. 1209.5, but no later than the time limit set for the close of discovery in the appeal. The stay request may be filed prior to, simultaneous with, or after the filing of an appeal. When you file a stay request with the Board, you must simultaneously serve it upon the agency's local servicing personnel office or the agency's designated representative. 5 C.F.R 1209.8.

If your stay request is being filed prior to filing an appeal with the Board, you must complete Parts I and II and items 41 through 43 above.

44. On separate sheets of paper, please provide the following. Please put your name and address at the top of each page.

a. A chronology of facts, including a description of the disclosure and the action taken by the agency (unless you have already supplied this information in Part VII above).

b. Evidence and/or argument demonstrating that the:

(1) action threatened, proposed, taken, or not taken is a personnel action, as defined in 5 C.F.R. 1209.4(a); and

(2) action complained of was based on whistleblowing, as defined in 5 C.F.R. 1209.4(b) (unless you have already supplied this information in Part VII above).

c. Evidence and/or argument demonstrating that there is a substantial likelihood that you will prevail on the merits of your appeal of the personnel action.

d. Documentary evidence that supports your stay request.

e. Evidence and/or argument addressing how long the stay should remain in effect.

f. Certificate of service specifying how and when the stay request was served on the agency.

g. You may provide evidence and/or argument concerning whether a stay would impose extreme hardship on the agency.

EEO ADR SPECIALIST
UNITED STATES
POSTAL SERVICE

12/02/2010

[redacted] PRIORITY SIGNATURE CONFIRMATION

Cynthia Lundy

[redacted]

AS OF 4/1/11

Subject: **Notice of Right to File**
EEO Case No.: 1H-301-0011-11

Dear Ms. Lundy:

This letter is to notify you that I have concluded the processing of your claim of discrimination initiated on 10/15/2010.

In this matter, you claim that you were discriminated against based on physical disability (not listed).

An inquiry was conducted and management responded by stating that under the National Reassessment Process (NRP), assignments of necessary and recurring work were identified for partially recovered employees and job offers were made in accordance with ELM 546 and the employees documented work tolerances and restrictions. Despite the comprehensive effort made, Management was unable to identify work for everyone that was being reassessed under the NRP. In making the determination(s) relative to availability of operationally necessary tasks for the counselee, the Postal Service has remained in full compliance with all applicable laws and all applicable provisions of the National Agreement, to include all Handbooks and Manuals.

Further, Management has stated that the Postal Service is in full compliance with all laws. Chapter 7.1 of the EL-505 does not require assignments be composed of 'make work'. It is a Management function to determine tasks and/or assignments that are necessary and available. The search for work for the counselee was conducted in accordance with our regulations, contractual provisions and the law. Unfortunately, the counselee's restrictions were such that the Agency was unable to find productive work on a full or part time basis (as applicable). Every effort was or will be made in the near future to identify necessary work outside of the facility. Management will fully comply with the "pecking order" of ELM 546 when searching for operationally necessary tasks for the counselee. Ongoing actions, to include a search for work in the entire District and if required a search of other adjacent Districts will be performed.

At this time since there is no resolution to your counseling request. You have two options available to you. You can do nothing at which point your inquiry will expire and no further action will be taken on your counseling request or you can elect to file a formal complaint.

Your case has been identified as a potential "Mixed Case" in accordance with 29 C.F.R. 1614.203(a)(1) of the Equal Employment Opportunity Commission's (EEOC) Regulations. A mixed case is identified as a matter related to or stemming from an action that can/may be appealed to the U.S. Merit Systems Protection Board (MSPB). You have the right to file an appeal to the Merit Systems Protection Board (MSPB). In the alternative, you may file a formal EEO complaint of discrimination with the US Postal Service. Whichever is filed first shall be considered an election to proceed in that forum.

If you opt to file a formal complaint, you have 15 days from the date of receipt of this letter to file a timely formal complaint. Your complaint could be subject to dismissal in accordance with 29 CFR Part 164.107 if not filed within the 15-day time limit. Your complaint will be deemed timely if it is postmarked before the expiration of the 15-day time limit. The Complaint must be specific and contain only those issues either specifically discussed with me or issues that are like or related to the issues that you discussed with me.

Cynthia E. Leandy

Enclosed are the required forms if you wish to pursue your complaint further through the EEO process. If you choose to file a formal complaint, you must complete, sign, and date PS Form 2579C and PS Form 2565 and return them to the following address:

NEEOISO-Formal Complaint
U.S. Postal Service
P.O. Box 21979
Tampa FL 33622-1979

You are not permitted to use a penalty envelope to submit your formal complaint. You will receive written acknowledgment of your formal complaint.

As a reminder, it is your responsibility to immediately notify NEEOISO, U.S. Postal Service, PO Box 21979, Tampa, FL 33622-1979, of any changes to your mailing address. If you designate or change your EEO representative, it is your responsibility to advise NEEOISC, in writing, of that person's name, title, mailing address, and phone number.

Sincerely,

EEO ADR Specialist
Enclosures

Date: 9/23/2010

Subject: Employee Leave Information Letter, Complete Day

Employee Name: Cynthia E. Lundy EID# [redacted]

This informational letter is in regards to the search for a modified assignment relative to your injury-on-duty. Following the guidelines established by the National Reassessment Process (NRP), Phase 2, Limited Duty; the District Assessment Team (DAT) has completed a search for necessary tasks meeting your medical restrictions in all crafts and on all tours within your facility and throughout the Local Commuting Area (LCA) within the District boundaries. Based on this search, we were unable to identify any available necessary tasks within your medical restrictions.

You need to complete a PS Form 3971 for the remainder of the pay period or until your next medical appointment depending on which is sooner. In addition, if this action takes place in week 2 of the pay period, it is recommended that a PS Form 3971 be completed for the next pay period as well. You can select COP (if eligible), leave, or LWOP-IOD. Your selections for leave include LWOP, Sick Leave or Annual Leave.

If you elect to use Annual Leave or Sick Leave, I must inform you that a leave buy-back will not be approved for Sick or Annual Leave used if your claim has already been approved by the Department of Labor, Office of Workers' Compensation Programs (DOL/OWCP).

If you elect LWOP-IOD you should complete a one time only CA2A (Claim for Recurrence). You should also complete a CA-7 on a pay period basis (recommended by the DOL/OWCP to be completed bi-weekly unless otherwise notified by OWCP). Completion of this form is required in order for you to file for compensation. A completed CA7 should be returned to the HRM (Injury Compensation) office at the end of each pay period you are out of work.

You must update your medical documents (e.g.; CA17) on a regular basis or as determined by your treating physician. Upon receipt of all new or updated medical documentation, you are required to immediately provide this documentation for review of the medical restrictions and a new determination of available necessary tasks. Please contact your supervisor or the HRM (Injury Compensation) office if you have any questions, require information, or desire to meet with the District Reasonable Accommodation Committee (DRAC).

If your treating physician has determined you have reached Maximum Medical Improvement (MMI) as a result of your injury, you will continue to be reassessed by the Postal Service following the guidelines established by the National Reassessment Process, Phase 2, for Rehabilitation (MMI) employees; and you will be contacted with the results of that process.

You should not report back for duty unless you are contacted that necessary work tasks have been identified for you within your medical restrictions.

Supervisors Signature [signature]

Date 9-23-2010

GRIEVANCE #: _____

CHECK (one): ☐ Limited Duty Employee ☐ Rehab Employee (MMI)

GRIEVANT: Cynthia Lundy EIN#: [redacted]

FACILITY: Atlanta LOCAL UNION: Atlanta Local 32

DATE (of injury): 12-18-97 DATE (reached MMI): _____

ISSUE: NRP NWA – Grievant sent home. Withdrawal of modified job offer.

ARTICLES: 19 *(ELM 546, Hbk EL-505, EL-307 Sections 131 and 542)*, 13 *(JCIM, Article 13, page 1)*, 1, 21.4, 2, 3, 5, 15, 9, 8, 11, 17, 30 *(Items #15, 16, and 17)*.

SALIENT ISSUE:

Did the employer violate the Collective Bargaining Agreement, Federal Laws, and incorporated USPS handbooks and manuals, as well a national arbitrations and Step 4 decisions when it failed to provide medically suitable work to the grievant, and when they withdrew the grievant's job offer under 546 of the ELM?

And, if so, what shall the remedy be?

BACKGROUND FACTS:

(Note: Strike the language that is not applicable when more than one option is offered)

1. The grievant is a (☐PTR ☐PTR ☐PTF ☐FTF) in the (☒Clerk ☐Maint ☐MVS) craft at the Atlanta P&DC (☒Facility ☐Station ☐Post Office) with a career seniority date of 11-21-87 and a craft/installation seniority date of 1998. (S)he was domiciled at the ~~Brookhaven~~ Northside carrier office/facility when his/her on-the-job injury/illness occurred.

2. The grievant occupies a duty assignment (bid job) that was obtained through the bidding process. *(See Additional Guidelines)*

   OR

   The grievant ***does not*** occupy a duty assignment (bid job), but rather was offered a medically suitable job offer dated JAN '98 at the [redacted] facility, working in the POSTAL STORE section of that facility. (Attach job offer).

3. The grievant reached maximum medical improvement (MMI) on _____ (enter date). See attached documents.

   OR

   The grievant ***has not*** reached MMI and is considered a limited duty employee with a job offer dated _____. *(See Additional Guidelines)*

CYNTHIA E. LEWDY
Grievance#
Grievant Name
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4. On or about 12.19.97, the grievan. reported an on-the-job injury while CASING MAIL & CARRYING (performing duties, etc.). On _____, (s)he completed a Form CA-1. At line #13, the grievant wrote: _____. At line #14, (s)he wrote: _____.

OR

The grievant filed a CA-2 on _____ to report an occupational injury. On that CA-2, the grievant reported that his/her injury was _____.

5. OWCP accepted the grievant's claim (enter claim number), and the grievant continued to see his/her doctor. [redacted]

6. The grievant was placed on medical restrictions and limitations on 12.19.97 (date-ref to CA-17). On this CA-17 his/her restrictions were: NO REPETIVE MOTIONS _____. *(See Additional Guidelines)*

7. The grievant continued working his/her pre-assigned core duty assignments of a _____ (list position) in his/her **bid job** (duty assignment) within his/her medical restrictions and limitations every day for eight (8) hours a day. Such work consisted of: _____.
(See Additional Guidelines)

OR

The grievant continued to work in this modified assignment performing the following tasks ANSWERING PHONE & LOBBY; CUSTOMER QUESTIONS (WORKED) for 8 hours a day. OTHER DUTIES _____. *(See Additional Guidelines)*

8. On or about 9.24.10, the grievant participated in a NRP Limited Duty meeting, conducted by ESDO EARNESTINE GUNN (title) EARNESTINE GREEN (name). Also in attendance was CYNTHIA LEWDY and APWU Union representative KURTIS GRIFFIN. At the conclusion of this meeting, EARNESTINE GUNN stated that there was No Work Available (NWA) for the grievant to continue performing, and that under the NRP Limited Duty process, the grievant was determined by management to be "Complete Day" NRP/NWA. This (was/was not) the first interview under the scope of NRP process. (Or - This was the 2nd interview under the scope of the NRP process. The first interview was conducted on 9.24.10.

9. During the NRP interview, management provided copies of the following to the grievant:
(Check off what was provided and add if other documents were presented to employee.)

☐ OWCP Form CA-17, dated _____
☑ OWCP Form CA-2a
☑ OWCP Form CA-7
☑ OWCP Form CA-7a (Intermittent Pay)

CYNTHIA E. LUNDY
Grievance#
Grievant Name
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- ☑ Employee Resource Guide
- ☐ EL-307 - Request for DRAC
- ☑ PS Form 3971 - Remainder of Day/Pay Period
- ☐ The grievant was/was not provided a copy and/or access to Form SF-8 (unemployment)
- ☐ _____
- ☐ _____
- ☐ _____

10. The grievant was instructed to fill out a PS Form 3971 for the remainder of the Service Week dated 9-27-10 (PP___/10, week ___), as well as for the next Service Week (PP___/10, week ___), and to clock out. It should be noted that the grievant (was/was not) allowed to remain on-the-clock for approximately _____ hour(s) to confer with his/her APWU representative, and to clean out his/her locker. *(Include C/Rings for that day.)*

11. Additional background... *(See Additional Guidelines)*

UNION'S POSITIONS:

1. Following the on-the-job injury, the grievant continued performing medically suitable work within his/her medical restrictions and limitations. Such medically suitable work continues to exist in the Atlanta P&DC facility since the grievant was determined to be NWA. This can be determined by the following: THE ABUNDANCE OF FLATS THAT NEED TO BE REPAIRED STILL HAVE CLERKS REPAIRING THE MAIL.
(See Additional Guidelines)

2. By denying the grievant opportunities to continue performing this medically suitable work, the grievant has had to apply for Annual Leave, Sick Leave, or LWOP to remain in the rolls.

3. By denying the grievant the opportunity to continue performing this medically suitable work, the grievant has had to apply for OWCP benefits through completing forms CA-2a, CA-7, and CA-7a.

4. The actions of management in implementing the MRP/NWA and determining that there was No Work Available for the grievant is harsh, punitive, unilateral, and not in compliance with the established handbooks, manuals and laws as well as past Step 4 decisions and national arbitration awards.

5. Management is in violation of the **ELM**, at **Chapter 540, *Injury Compensation Program***, which establishes the procedures that management must follow when administering the injury compensation program as established by the **Federal Employees' Compensation Act** and the **Code of Federal Regulations**. Specifically, ELM Chapter 546.142 describes the obligation that the Postal Service has when a current employee has partially overcome his or her injury or

In addition, the Union's position is based in part upon the *prima facie* case that management did not follow the pecking order under ELM 546.142, inasmuch as management failed to allow the grievant to perform "other work... within (his/her) facility."

8. **Management's actions are in conflict with their own position,** which has been presented and argued before National arbitrators. Additionally, **management's actions in this case are in conflict with their own position** taken in a recent Step 4 decision in June of 2009 with the NALC, where the Service settled their dispute by claiming and agreeing that the NRP program in no way changed or altered their obligations under ELM 546 and 5 C.F.R. Part 353. In that Step 4, the Service agreed that the agency had *"not redefined the Service's obligation to provide work to limited duty employees."* They also further clarified and agreed that *"the Service has not developed new criteria for assigning limited duty under ELM 546 and 5 C.F.R. Part 353.*

9. By its actions, the Postal Service has demonstrated that the search for work under the 546 pecking order was pretextual in nature and a sham. The worksheets demonstrate that the "necessary and productive work" listed as available to injured employees was not based upon whether or not the work was medically suitable and available, but rather it was based upon post office budgets and Function 4's due to the financial pressures upon the Service.

   This is in violation of 546 of the ELM, applicable laws and regulations as well as national arbitration awards. Arbitrator Das' award (E90C-4E-C 95076238, October 31, 2002) laid to rest what duties can define a rehabilitation job offer for limited duty employees, specifically Arbitrator Das states at page 20:

   > "In this case, the rehabilitation assignment in question was not created to meet the operational needs of the Postal Service, but to fit the medical restrictions of the injured employee with minimum disruptive impact on the employee."

10. Management has further violated the CBA, which clearly establishes that seniority is to be used when filling vacant assignments and for other purposes. However, the Postal Service has stated that they will ignore injured worker's craft seniority when filling the job assignments being made under the NRP, and they have issued instructions to the field to ignore seniority and make all NRP job assignments on a random basis. Such action is in violation of the APWU's seniority provisions and is the subject of a **National Step 4 grievance** (APWU No. HQTG200613/USPS No.Q00C4QC7006778).

11. The actions by management represent further violations, as the search for medically suitable employment for the grievant was limited only to the grievant's commuting area, whereas other partially recovered employees who have reached maximum medical improvement (MMI) within one year of the date of compensation eligibility are afforded agency-wide searches under the NRP. The Union's position is that the ELM does not make these distinctions. As such, it is the Union's position that all partially recovered employees, regardless of the date of MMI, such as the grievant in this instant case, are entitled to an agency wide search for medically suitable employment. In short, the ELM does not limit the job search to a commuting area. It simply states that if there is no adequate work within the work facility to which the employee was normally assigned, then the injured worker may be assigned to a facility as near as possible to their normal assignment. This dispute is also the subject of a **National Step 4 grievance** (APWU No. HQTG200071/USPS No. Q00C4QC07073116).

12. The record establishes that previous to this recent action the Postal Service had been meeting their obligation to provide the grievant with medically suitable employment. However, when their newly created "National Reassessment Process" was unilaterally implemented in the grievant's installation; management withdrew this job, and told the grievant that there was no longer any limited duty work available. By this action, management has "disabled" the grievant, and instructed the grievant to apply for OWCP wage loss compensation.

13. It is clear to the Union that the Step One supervisor was simply following order of the NRP Team and, therefore, failed to investigate and/or have the authority to resolve this grievance at the lowest possible Steps of the grievance procedure. *(See Additional Guidelines)*

14. The grievant was also denied work under Article 13 of the National Agreement and the Service failed to answer the employee's written request for light duty as mandated in Article 13 of the National Agreement.

FURTHER ARGUMENTS AND REFERENCES

ELM 546.11 "The USPS has legal responsibility to employees with job-related disabilities under 5 USC 8151 and the Office of Personnel Management's (OPM) regulations..."

[See CFR 353.306 cited below for OPM regulations.]

ELM 546.142 a. "When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance. In assigning such limited duty the USPS should minimize any adverse or disruptive impact on the employee."

ELM 546.142 a.(4) "An employee may be assigned limited duty (rehabilitation assignment) outside of the work facility... Only when there is not adequate work available... at the employee's facility..."

The ELM does not limit the search to find medically suitable work to the commuting area. Therefore, it is our opinion that the USPS must conduct a search agency-wide when work is not available in the employee's facility, making every effort to assign the employee to work within the employee's craft, schedule, and as near as possible to the regular work facility to which the employee is normally assigned.

ELM 546.65 and EL 505, *Injury Compensation*, Chapters 11-6 Both of these cites establish in detail that if management refuses to accommodate a partially disabled employee, then that employee must be provided with a copy of Postal Service Headquarters' final incurrence of such refusal, be notified in writing of the USPS refusal to accommodate, and also be notified of their right to appeal to the Merit System Protection Board (MSPB). (See also EL 546.3 and 546.4).

EL 505, *Injury Compensation*, Chapter 11, *Procedures* "It is the policy of the USPS to make every effort to reemploy or reassign IOD employees with permanent partial disabilities..."

EL 505, *Injury Compensation*, Chapter 11.7, *Identifying a Modified Job Assignment* A current employee who "is capable of performing his or her core duties with only minor modifications" is not

considered to be in a modified job assignment. Therefore, in our opinion, these employees should not be subject to the Reassessment Process.

CBA, Article 3, *Management Rights* directs that the application of management rights must be "consistent with applicable laws and regulations." The applicable regulation is Part 353.306 of Title 5, Code of Federal Regulations (CFR), which states that "agencies must make every effort to restore, according to the circumstances in each case, an employee or former employee who has partially recovered from a compensable injury and who is able to return to limited duty."

CBA, Article 21.4, *Benefit Plans* establishes that employees are covered by the Federal Employees Compensation Act (i.e., Subchapter I of Chapter 81 of Title 5) and that the USPS will promulgate (publish officially) regulations which comply with the applicable regulations of OWCP.

The applicable regulation is Part 10.505 of Title 20, CFR which states:

> "What actions must the employer take? (a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions."
>
> ...
>
> "(6) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to the injury."

CBA, Article 2, *Non-Discrimination and Civil Rights* states that: "In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act. [See EL 307, *Reasonable Accommodation* (January 2000), which states, for example: "In other words, the Rehabilitation Act requires the employer to look for new or innovative ways to alter, restructure or change the way of doing a job in order to allow a qualified person with a disability to perform the essential functions of a particular job."]

CBA, Article 5, *Prohibition of Unilateral Action* establishes that: "The employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law."

CBA, Article 34, *Work and/or Time Standards* establishes in *Part B* that: "The employer agrees that any work measurement systems or time or work standards shall be fair, reasonable, and equitable." Article 34 then goes on to describe in Parts "B" through "I" the detailed process that must be followed if the USPS intends to change current, or institute new, work measurement systems, or work or time standards. The USPS at the Headquarters level has not given the APWU any notification, nor have they even suggested that they intend to create a specific standard of "productivity" for injured employees in rehab positions.

The current applicable work standard for all employees is cited in *Part A* of Article 34: "The principle of a fair day's work for a fair day's pay is recognized by all parties to this Agreement."

In support of the argument that a partially disabled employee working in a rehabilitation job is in compliance with the principle of "a fair days work," we refer to the **ELM, Chapter 545.21, *Compliance*** which states that: "Reemployment or reassignment under this section must be in compliance with applicable Collective Bargaining Agreements. Individuals so reemployed or reassigned must receive all appropriate rights and protection under the newly applicable Collective Bargaining Agreement."

We argue, then, that just like any other bargaining unit employee, a rehab employee is protected by Article 34 language from arbitrary work measurement systems or work or time standards.

SUMMARY OF ARGUMENTS

When the USPS withdraws a limited duty and/or a permanent rehabilitation job the Union argues, according to the specific fact circumstances of this case, that such action:

1. Violates clear CBA and handbook language;
2. Is inconsistent and noncompliant with USPS obligations under applicable laws and regulations;
3. Contravenes the long standing criteria which has been applied consistently and uniformly by both the USPS and OWCP when making rehabilitation assignments, i.e.; not whether an assignment is "necessary" or "productive" but whether the job assignment is medically suitable or appropriate;
4. Is inconsistent with clear and unambiguous controlling language and a longstanding mutually recognized practice;
5. Is arbitrary and capricious in that "productive" and "necessary" are not contractually established work measurement standards;
6. Violates Article 34 protection against arbitrarily created and selectively applied work measurement systems, or work or time standards;
7. May give the appearance of violating ELM 542.33, "Penalty For Refusal to Process Claim" because if the USPS denies medially suitable employment to partially disabled employees, such behavior may induce and/or compel injured employees to forego filing claims because they observe the employer taking (what appears to be) retaliatory and punitive action against an employee who has an accepted OWCP claim.

As such, the actions of the employer in denying the grievant opportunities to continue performing medically suitable work are harsh, punitive, disparate, and not in compliance with the Collective Bargaining Agreement and all applicable laws and regulations.

SHIFT OF BURDEN

It is the position of the Union that in this case the Union has presented a *prima facie* case in this grievance that management did not follow the provisions of the ELM and applicable laws and regulations in minimizing any adverse or disruptive impact on the employee. Additionally, the Union argues that it has presented a *prima facie* case in that management has put in place new requirements

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and provisions to applicable laws and regulations as well as ELM 546 language, therefore, the burden has now shifted to them to prove otherwise.

REMEDY REQEUSTED

1. That the grievant be immediately restored to medically suitable work at Atlanta P&DC
2. That the grievant be made whole to include, but not limited to, all lost wages, holiday pay, Annual Leave, and Sick Leave accrual that were impacted by management's action on 9-24-10 (enter date).
3. That the grievant be made whole in every way for any and all lost wages and benefits due to this action from the date employee was advised of NWA 9-24-10 (enter date) until the final adjudication of this case.

REQUESTED INFORMATION

1. Copy of all relevant form 50's of employee from date of injury up until date of NWA.
2. Copy of employee's bid history.
3. Copy of employees current job bid (duty assignment), posting and award (if applicable).
4. Copy of the 546 worksheet (if limited duty). *(See Additional Guidelines)*
5. Copy of all relevant OWCP forms, CA-17's, CA-1, CA-2 and accepted claim
6. Copy of all past job offers.
7. Copy of mail volume reports in that facility or office compared to SPLY.
8. C/Rings for grievant for a few pay periods prior to NWA date or stipulation that he/she was working FT and what duties he/she was performing. *(See Additional Guidelines)*
9. Copy of work schedule.
10. Additional requested information... *(See Additional Guidelines)*
11. Additional tips... *(See Additional Guidelines)*