UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
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ARLEATHER REAVES, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	M.S.P.B. Docket Number: CH-0353-10-0823-I-1 Date: 14 February, 2011

APPELLANT'S PETITION FOR REVIEW OF INITIAL DECISION

Pursuant to 5 C.F.R. § 1201.114 & 115, the Appellant, by and through her undersigned representative, Petitions for Review of an Initial Decision[1], which dismissed her appeal for failure to establish Board jurisdiction.

BACKGROUND

As noted in the Initial Decision (I.D.), the appellant is a non-preference-eligible Postal employee who filed a Restoration to Duty appeal with the Board subsequent to being removed from her full-time rehabilitative job in the [redacted] at the Chicago P&DC pursuant to the agency's National Reassessment Program (NRP).

In the I.D. the administrative judge concluded that the appellant had met the first three elements for restoration to duty claims (see e.g. *Chen v. U.S.P.S.*, 114 M.S.P.R. 292; *Vasquez v. U.S.P.S.*, 114 M.S.P.R. 264, etc.). However, the AJ opined that, "(b)ecause the appellant did not meet the fourth element of the jurisdictional test requiring her to make a non-frivolous allegation that the denial of restoration was "arbitrary and capricious", I find that the Board lacks jurisdiction over her restoration appeal."

ARGUMENT

In her I.D. the AJ indicates that "On October 25, 2010, I ordered the appellant to file evidence and argument identifying vacant positions within the local commuting area

[1] The finality date of the Initial Decision is 14 February, 2011.

that she could perform within her medical restrictions." That's not exactly correct. In the 23 September, 2010, Order to Show Cause, the AJ advised the appellant of the four elements to show Board jurisdiction pursuant to *Barrett*. The AJ encapsulated the appellant's requisite response by noting that, "(u)nless the appellant provides a non-frivolous allegation of Board jurisdiction, I will dismiss her appeal without holding a hearing as we have previously discussed." Nowhere in her Order to Show Cause did the AJ specifically instruct or advise the appellant that her burdern was to "file evidence and argument identifying vacant positions".

The AJ however was correct in noting that the appellant was asserting that the agency's NRP process, as well as its use of the term "necessary work"[2] as the standard was arbitrary and capricious."

In *Chen v. U.S.P.S.* the Board had concluded that, "pursuant to a Postal Service Employee and Labor Relations Manual, a limited duty assignment is "determined based on whether adequate 'work' or 'duties' are available" within the employee's restrictions, craft and current facility or at a different facility if there is no work at her own. That is, "limited duty or rehabilitation assignments of current employees are dependent on the extent to which adequate 'work' exists within the employee' work limitation tolerances." *Id. at p. 5*

The Board's conclusions were based on the ELM 546.142, which elucidates the pecking order referenced above. It appears however that the Board **did not** consider ELM 546.222 wherein it states in pertinent part:

> A partially recovered current or former employee reassigned or reemployed to a different craft to provide appropriate work **must be assigned to accommodate the employee's job–related medical restrictions** (emphasis added). Such assignment may be to a residual vacancy **or to a position uniquely created to fit those restrictions** (emphasis added); however, such assignment must not impair seniority rights of PTF employees.

[2] Specifically, the appellant objected to the use and/or implementation of "Operationally Necessary Tasks" (ONT) as a standard in which to determine if work was available for partially-recovered employees.

In the instant matter, the agency is alleging that it has no "operationally necessary tasks" (ONT) that the Appellant could perform. The Appellant asserts that the agency is imposing a standard that does not apply to permanently rehabilitated employees. **If there was a bona fide operational need for certain tasks to be performed, they would have been subsumed into a bid position consistent with the Collective Bargaining Agreement (CBA). These bid assignments are driven solely by management's operational needs. This is not true for rehabilitation assignments.**

Rehab assignments are created as a result of legal, contractual and regulatory mandates, and "every effort" must be extended to find employment consistent with the employee's medical limitations – not whether their limitations allow them to perform ONT.

ELM 546.222 mandates that the employee "**must** be assigned to accommodate the employee's job-related medical restrictions". This is not discretionary on the part of the agency, it is mandatory. The implementation or use of ONT is appropriate only where management wants to identify jobs or duties that can be subsumed into a regular or bid position. But the reliance on ONT to determine whether work is available for employees who have been injured on-the-job is completely contrary to the agency's own regulations. As a result, the reliance on searching for ONT to determine whether to restore an employee to duty is in itself, an arbitrary and capricious standard.

EL-505, Section 11.7, in identifying a Modified Job Assignment it directs that "each task within the identified assignment ***must comply with the employee's medical limitation***" (emphasis added). It then provides additional guidelines for possible placements, which include –

- *Reassignment to an existing position.* If a current employee can no longer perform the core duties of his or her position but is capable of performing the core duties of another authorized position for which he or she is qualified, reassignment may be offered. Since the employee is performing the core duties of the position, the work hours are charged to the regular operation LDC.

- *Residual vacancy.* If a vacancy has been posted for bid or application and there are no successful bidders or applicants, both current and former employees may be offered a residual vacancy if they can perform the core duties of the position

with only minor modification. Again, since the core duties are being performed, this is not considered a modified assignment and the work hours are charged to the regular operation LDC.

- *Modified assignment.* If a current of former employee's restrictions prohibit accommodation as described in the categories above, individual tasks must be identified and combined to develop a modified assignment consistent with the employee's medical restrictions. These **tasks are usually subfunctions** (emphasis added) and may be from multiple positions. The work hours for employees accommodated in modified assignments are charged to LDC-69.

Ensure that:
- Any adverse or disruptive influence on the employee is minimized.

Clearly, the regulation states that if an employee cannot perform the core functions of their position they should be offered reassignment. "Core functions" equate to "operationally necessary tasks", so if the employee can no longer perform those ONT or core functions, they can no longer perform their bid position – unless management is able to provide accommodation or modify methods that achieve accomplishing the core duties of the bid assignment. If the employee is not able to be accommodated in an existing position, then management's obligation **changes** to find tasks that are "subfunctions". In other words, other duties that may not be "core" or operationally necessary in the context of a bid or vacant assignment, are what must be located.

It is a general principle of administrative law that agencies should follow their own procedural rules, even when these rules go beyond the rights afforded by any statute or due process. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

The agency may not modify a rule *sub silentio* in a manner that is inconsistent with the rule as announced and then defending its decision on the basis of a practice inconsistent with the written rule. See *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998).

Finally, the agency may not informally adopt a policy that contradicts the terms of a formally adopted rule. See *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

CONCLUSION

It's been demonstrated through the agency's own regulations and procedures that the use and implementation of "Operationally Necessary Tasks" as it applies to partially-recovered employees, exceeds management's discretion and is therefore an arbitrary and capricious standard. The Board should revise their prior decisions regarding the use of ONT's, and find that the agency cannot implement a policy that is inconsistent with its written rules, specifically with regard to partially-recovered employees.

The Appellant requests that the Board VACATE this Initial Decision and find in her favor. In so doing, she requests that she be restored to duty in her former position in [redacted] or in an equivalent position that accommodates her medical restrictions. She also requests all backpay and benefits, plus interest, encompassing the period of time that the agency did not provide work for her. The Appellant has also raised an affirmative defense of disability discrimination and therefore requests either a finding in her favor, or an opportunity to present evidence and testimony relative to this claim, including her claim for compensatory damages.

For the Appellant:

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Arleather Reaves
M.S.P.B. Docket No. CH-0353-10-0823-I-1

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellant's PETITION FOR REVIEW OF INITIAL DECISION, was (were) sent by regular U.S. mail, unless otherwise indicated below, this date, to each of the following:

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Agency Representative
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Appellant
Ms. Arleather Reaves
[redacted]

Submitted on this 14th day of February, 2011.

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