JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE
Docket # DA-0353-10-0408-I-1
Agency's Post-Argument Brief
Summary Page

Case Title : JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE

Docket Number : DA-0353-10-0408-I-1

Pleading Title : Agency's Post-Argument Brief

Filer's Name : William D. Bubb, Esq.

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

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Yes

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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

Appellants,

v.

UNITED STATES POSTAL SERVICE,

Agency.

DOCKET NUMBERS
DA-0353-10-0408-I-1
SF-0353-10-0329-I-1
CH-0353-10-0823-I-1
AT-0353-11-0369-I-1
DC-0752-11-0196-I-1

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January 6, 2012

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ARGUMENT

A. THE BOARD HAS AUTHORITY TO REACH THE ISSUE OF WHETHER OPM'S RESTORATION REGULATIONS EXCEED OPM'S STATUTORY AUTHORITY

In its Opening and Reply Briefs, the Postal Service argued that OPM's restoration regulations exceed their statutory authority under the Federal Employees Compensation Act ("FECA"). At oral argument, the Board expressed concern that, even if it agreed with the Postal Service's argument, it is without the power to invalidate or refuse to apply OPM regulations under the circumstances in these cases. For example, Vice Chairman Wagner explained:

> I understand the Postal Service argument and I think [at] some level they're well taken. But you're raising an ultra vires argument. You're challenging OPM's authority to issue the regulation and our authority to declare an OPM regulation invalid is really limited to when there is – its under [5 U.S.C. § 1204.] It's when a prohibitive personnel practice would be committed as a result of the regulation or implementation of the regulation. We don't have general APA jurisdiction to declare OPM's action to be ultra vires. So where does that leave you?

Transcript of Oral Argument at 40.[1] Similarly, Chairman Grundmann noted that the Postal Service "argued throughout [its] brief that [5 C.F.R. 353.301(c) and (d)] are ultra vires, which goes back to the vice chair's question of is this a [prohibited] personnel practice, which is where we derive our jurisdiction," *id.* at 42, and later asked "[w]hat [prohibited] personnel practice can be committed or is the OPM reg invalid on its face because it requires someone to commit a [prohibited] personnel practice, which is our granted jurisdiction?" Id. at 46.

It is natural and appropriate for the Board to be cautious in the exercise of jurisdiction, an approach that has been a mainstay of the Board's jurisprudence. The

[1] Obvious transcription errors have been corrected.

Board has stated this principle countless times. *See, e.g., Monser v. Dept of Army*, 67 M.S.P.R. 477, 479 (1995) (the Board's jurisdiction is not "plenary" and is limited to that granted by "statute, rule, or regulation."). In fact, this principle is central to the Postal Service's argument that the Board is without jurisdiction in these cases. However, and as discussed below, the Board always has, and must have, the general authority to determine whether it has jurisdiction or, more to the point, to determine whether a regulatory grant of jurisdiction is valid under the statute that authorized it.

In contrast, 5 U.S.C. § 1204 is not designed to limit the Board's ability generally to scrutinize regulatory grants of jurisdiction for compliance with their statutory authorization. To the contrary, it is, itself, a grant of jurisdiction for a particular purpose; to determine whether a regulation would require or permit the commission of a prohibited personnel practice. Nothing in § 1204 expresses exclusivity of any kind, and nothing in § 1204 addresses the analytically distinct situation where the basis for the Board's examination of a regulation is not to scrutinize it for potential prohibited employment practices, but instead to determine whether the regulation properly grants jurisdiction to the Board. Indeed, in a review under §1204, it is irrelevant whether the regulation being reviewed grants jurisdiction to the Board. This fundamental and meaningful distinction should, by itself, persuade the Board that it is neither constrained by § 1204 in determining its jurisdiction, nor in need of § 1204 in order to apply a critical, jurisdictional eye to the regulations at issue in these cases.

However, and as discussed below, if the Board were to opt to apply § 1204 to OPM's restoration regulations for the purpose for which § 1204 was designed – the detection and invalidation of regulations that permit or require the commission of a

prohibited personnel practice – it would likely conclude that certain portions of the restoration regulations are invalid on their face.

Either way – through its power to determine its own jurisdiction or its power to review the restoration regulations for their potential to require or permit the commission of a prohibited personnel practice – the Board has the power to reach the issues presented by the Postal Service.

1. The Board In All Cases Has Jurisdiction To Determine Its Own Jurisdiction

By far the most prominent and most compelling reason to decline to apply the restoration regulations to other than fully recovered workers or to assignments other than to regular positions is the Board's general authority to determine its own jurisdiction. In a related context, it is so fundamental as to be a truism that, "[o]f course, a federal court always has jurisdiction to determine its own jurisdiction." *Johnston Development Group, Inc. v. Carpenters Local Union No. 1478*, 712 F. Supp. 1174, 1177 n.8 (D.N.J. 1989). *See United States v. Mine Workers*, 330 U.S. 258, 290 (1947). Consider the consequences if this principle were not applicable to the Board. OPM would be free at any time to grant the Board jurisdiction that was clearly beyond OPM's statutory authority, and the Board would be powerless to do anything other than exercise the jurisdiction it had been granted, however improper or improvident the grant of jurisdiction may have been. That is why the Federal Circuit has explained that "[t]he Board has the authority, indeed the obligation, to determine its own jurisdiction over a particular appeal." *Parrish v. Merit Systems Protection Board*, 485 F.3d 1359, 1362 (Fed. Cir. 2007).

In *Parrish*, the petitioner worked for the Southwestern Indian Polytechnic Institute. *Id.* at 1360-61. In 1998, Congress enacted a statute that authorized the Institute to conduct a personnel demonstration project to determine if adopting personnel procedures that would not be covered by Title 5 and, in particular, would eliminate the ability of an employee to appeal to the Board if he or she were removed based on a reduction in force ("RIF"), would serve to improve the Institute's personnel management. *Id.* The Institute adopted such procedures, and the petitioner was subsequently removed in a RIF. Id at. 1361. Instead of challenging his removal under the appeal process contained in the Institute's new procedures, the petitioner appealed to the Board, arguing that the new procedures were ineffective because the Institute failed to comply with the requirements imposed by Congress for adopting them. *Id.*

When the petitioner's appeal reached the Board, the Board determined that it did not have jurisdiction to hear it, explaining that while "'it may well be that the agency did not comply with the [statutory requirements for enacting the new procedure outside of Title 5],'" id. at 1363 (citing *Parrish v. Dep't of Interior*, 99 M.S.P.R. 670, 673 (2005)), it would decline to assert jurisdiction because the enabling statute "'does not provide the Board with authority to enforce the procedural requirements of that statute or to nullify actions taken pursuant to that statutory authority. Nothing in the statute or its legislative history indicates that Congress intended that the Board should have a role in overseeing the agency's exercise of its statutory power to waive provisions of title 5 and OPM . . . regulations.'" *Id.*

The Court of Appeals rejected the Board's reasoning. In so doing, the court explained:

> The right to appeal to the Board is a settled part of the procedures and standards governing RIFs generally. One would expect that, before concluding that an agency had ended Board jurisdiction over a particular category of RIFs, the Board would fully and carefully analyze the agency's action to ensure that the agency had complied with the requirements Congress had imposed as a condition for limiting the Board's jurisdiction. Such an analysis and evaluation would be a necessary and an appropriate part of the Board's determination of its own jurisdiction. . . . The fact that the Institute "develop[ed] its own personnel system," which did not provide for RIF appeals to the Board and which the Board in turn deemed dispositive of its own jurisdiction, does not address or answer the question of whether in taking that action the Institute complied with the requirements Congress imposed as a condition for such action.

Parrish, 485 F.3d at 1363 (emphasis added).

Similar to the reservations expressed by the Board at oral argument concerning the absence of an express authorization to review OPM's restoration regulations, the Board's General Counsel in *Parrish* cited cases for the proposition that there existed no express authority for the Board to review the Institute's compliance with the statute allowing it to adopt its own personnel procedures. *Id.* at 1363-64. However, the Court of Appeals explained that the cases cited in support of the Board's position "involved quite different issues from the question here, which is whether the agency conducting the personnel demonstration project satisfied the conditions Congress imposed for eliminating Board jurisdiction over appeals in a particular category of cases." Id. at 1364 (emphasis added).

The reasoning of the Court of Appeals is compelling and could have been written with the Board's present concerns in mind. The Board has the "authority, indeed the obligation, to determine its own jurisdiction." *Parrish*, 485 F.3d at 1362. It should "carefully analyze [the OPM restoration regulations] to ensure that [OPM] has complied

with the requirements Congress has imposed [in 5 U.S.C. § 8151] as a condition for [establishing] the Board's jurisdiction. Such an analysis and evaluation would be a necessary and an appropriate part of the Board's determination of its own jurisdiction." *Id.* at 1363. The mere fact that OPM has authority as a general matter to grant jurisdiction to the Board "does not address or answer the question of whether in taking that action [OPM] complied with the requirements Congress imposed as a condition for such action [under § 8151]." *Id.*[2]

2. The Board's Ability To Determine Its Jurisdiction Is Complemented, Not Constrained, By 5 U.S.C. § 1204

As for the Board's sense of concern with the effect of 5 U.S.C. § 1204, the principles described above are not supplanted by § 1204, they supersede it. Section 1204 does not circumscribe the Board's general ability to determine its jurisdiction, it merely grants jurisdiction for the particular purpose of determining whether a regulation would require or permit the commission of a prohibited personnel practice, an analytically distinct concept. Moreover, not only does § 1204 not restrict the Board's general ability to determine its jurisdiction, it provides an independent reason to invalidate the restoration regulations.

Section 1204(f) provides that the Board may review regulations promulgated by OPM under § 1103, and that "[i]n reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision . . . invalid on its face,

[2] Indeed, it is just objectionable and should be equally subject to the Board's jurisdictional scrutiny -- to remove jurisdiction that is statutorily authorized as it is to create jurisdiction that is statutorily unauthorized. In a case cited by Appellants at oral argument, Railway Labor Executives' Ass'n v. National Mediation Board, 29 F.3d 655 (D.C. Cir. 1994), *modified*, 38 F.3d 1224 (D.C. Cir. 1994), the court explained the settled principle that judicial review is available to detect agency action "'taken in excess of delegated powers'" Id. at 661 (citing Leedom v. Kyne, 358 U.S. 184, 190), and rejected arguments of implied authority to act and *Chevron* deference in the face of limited statutory authority. Id. at 670-71. *See also*, Kohfield v. Dep't of Navy, 75 M.S.P.R. 1, 5-6 (1997.

if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b)." Section 2302(b), in turn, lists prohibited personnel practices, and § 2302(b)(6) declares that it is impermissible for an agency to "grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment."

OPM issued the restoration regulations pursuant to its § 1103 function of "executing, administering, and enforcing – (A) the civil service rules and regulations of the President and the Office [of the Director of OPM] and the laws governing the civil service; and (B) the other activities of the Office [of the Director of OPM] including retirement and classification activities; except with respect to functions for which the Merit Systems Protection Board or the Special Counsel is primarily responsible." 5 U.S.C. § 1103(a)(5). But § 1103(b) additionally provides and requires that OPM indicate "the legal authority under which the rule is proposed" when it promulgates regulations in the performance of any of its § 1103 functions. OPM's notice in the Federal Register publishing the restoration regulations, and the codified regulations themselves, make it clear that OPM believed that its authority was, and only was, 5 U.S.C. § 8151.[3] As a result, if the Board agrees that portions of OPM's restoration regulations provide a preference to ill or injured workers that is not authorized by 5 U.S.C. § 8151, it should invalidate the regulations under 5 U.S.C. § 1204.

[3] The other reference is to the authority for those portions of the restoration regulations governing restoration to duty from uniformed service and, like the regulations covering FECA-related restoration, is to a source of substantive authority other than 5 U.S.C. § 1103(a). OPM's advisory opinion was materially mistaken when it stated that the authority for its FECA restoration regulations is 5 U.S.C. § 1103(a)(5).

The Board's leading opinion on the application of § 2302(b)(6), *Special Counsel v. Byrd*, 59 M.S.P.R. 561 (1993), *aff'd*, 39 F.3d 1196 (Fed. Cir. 1994), confirms this analysis. After quoting the text of § 2302(b)(6), the Board explained the sort of preferences that are permissible, specifically identifying reemployment rights as among them:

> Thus, an employee with personnel action authority may give only those preferences authorized by law, rule or regulation. For example, preferences in recruitment and selection are given by Congress to veterans, Indians in the Bureau of Indian Affairs, persons with reemployment rights, handicapped individuals, etc. See, e.g., 5 C.F.R. §§ 3 et seq., 307, 352, 353 . . . [The preferred employee] was not a member of any of these groups and respondents have failed to point to any entitlement to a preference in her case. Thus, the preference given to [her] was not authorized by law, rule, or regulation and was violative of § 2302(b)(6).

59 M.S.P.R. 561, 569-70 (1993) (emphasis added). Under *Byrd*, preferences for FECA claimants, if authorized by 5 U.S.C. § 8151, would not violate § 2302(b)(6). But if the Board concludes that OPM's restoration regulations exceed OPM's authority under 5 U.S.C. § 8151, then they necessarily "grant [a] preference or advantage not authorized by law," violate 5 U.S.C. § 2302(b)(6), and should be declared invalid by the Board under 5 U.S.C. § 1204.

Of course, these outcomes – a finding by the Board that it lacks jurisdiction and a finding by the Board that the restoration regulations are invalid under 5 U.S.C. § 1204 – depend on the Board concluding that OPM exceeded its authority under 5 U.S.C. § 8151. The Postal Service believes it has convincingly argued in it briefs that OPM has exceeded its authority. But regardless of how the Board rules on that issue, it is able to reach it either in the exercise of its overarching power to determine its own jurisdiction, through

the application of 5 U.S.C. § 1204, or both – and it should do so with confidence that the hesitation it expressed at oral argument is unwarranted.[4]

B. OPM'S RESTORATION REGULATIONS EXCEED OPM'S STATUTORY AUTHORITY TO REGULATE RESTORATION UNDER 5 U.S.C. § 8151 AND TO GRANT JURISDICTION TO THE BOARD

The Postal Service has in prior briefing described why the intent of Congress as expressed in 5 U.S.C. § 8151 is textually and historically clear. If it is, "that is the end of the matter," *Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842 (1984), and the Board "must give effect to the unambiguously expressed intent of Congress." *Id.* However, because at oral argument the issue of whether § 8151 is ambiguous was raised by the Appellants and by at least one Board member,[5] it is appropriate to briefly review why § 8151 is dispositive and OPM's interpretation should be rejected.

As *Chevron* instructs, it is appropriate to start with the statute. "[T]he department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of

[4] Appellants' counsel suggested at oral argument that the issue of the Board's jurisdiction had either not been properly raised or could not be properly raised because the Postal Service did not raise it in this or any other proceeding. And the Board itself expressed interest in whether the Postal Service had raised its jurisdictional concerns in prior proceedings. Transcript of Oral Argument at 48. First, and as Vice Chairman Wagner suggested at oral argument, Transcript of Oral Argument at 7, the Board itself fairly raised jurisdiction in its Consolidation Order by asking: "[M]ay the Board have jurisdiction over a restoration appeal . . . merely on the basis that the denial of restoration violated the agency's own internal rules?" Consolidation Order at 4. Second, it is axiomatic that "[t]he defense of subject matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction." Augustine v. United States, 704 F. 2d 1074, 1077 (9th Cir. 1983). Finally, the issues raised by the Board in the Consolidation Order focused everyone on the Board's FECA-based jurisdiction in a manner that simply had not arisen in routine cases, a fact recognized by the Board itself. Consolidation Order at 3 ("The Board has not yet addressed the implications of ELM § 546.142(a) on restoration appeals of partially recovered U.S. Postal Service employees under 5 C.F.R. § 353.304(c).)

[5] For example, Vice Chairman Wagner commented: "I do think that -- I do see ambiguity in that language to a certain degree." Transcript of Oral Argument at 40.

commencement of compensation . . . the right to resume his former or an equivalent position. 5 U.S.C. § 8151(b)(1) (emphasis added). "[T]he department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position . . . ." 5 U.S.C. § 8151(b)(2) (emphasis added). Based on the presentation of Appellants' counsel and comments and questions from the Board at oral argument, the emphasized text is the focus of any claim or concern that the provisions of § 8151 are ambiguous.[6]

As the Postal Service has previously described, the only reasonable reading of "overcome" is that Congress intended to grant rights under § 8151 to ill or injured workers who fully recovered. First, the right is to the employee's "former or equivalent" position. As a result, it is unmistakable that "overcome" must mean that an employee has recovered to the point that he or she is able to perform his or her former position, which is precisely the definition of "fully recovered" that has been assigned by OPM itself. *See* 5 C.F.R. § 353.102. The inclusion of "or equivalent" in the description of the position to which an employee who has overcome his or her injury or disability does not alter this meaning. The only reasonable reading of "or equivalent" is that Congress wished to insure that an employee who has overcome his or her injury or disability is reinstated to a position with equivalent status, pay, and benefits if his or her former position is not available. It would be unreasonable to read "or equivalent" to mean that Congress

[6] Appellants' suggestion that Chevron deference should be afforded to the restoration regulations because they address issues on which § 8151 is silent, as opposed to ambiguous, should be rejected. Section 8151 does not give a general grant of authority to OPM to regulate concerning restoration, allowing OPM by regulation to fill in the gaps. It gives only specific authority to regulate the limited substantive rights described by Congress in § 8151(b).

intended to expand the range of positions with respect to which an employee had a right of placement or preference based on his or her degree of recovery. And it is noteworthy on this point that OPM reads "or equivalent" the same way. The restoration regulations define a fully recovered individual as someone who "is able to perform all the duties of the position he or she left or an equivalent one" and defines a physically disqualified individual as someone with an injury or disability that "is considered permanent with little likelihood for improvement or recovery" and who is "unable to perform the duties of the position formerly held or an equivalent one." 5 C.F.R. § 353.102 (emphasis added). OPM itself has recognized that "or equivalent" refers to positions that require the same state of recovery as an employee's former position. On the first issue on which the Postal Service's analysis of the restoration regulations is based -- that Congress only authorized restoration to employees who are fully recovered -- there is no real ambiguity.

On the second issue on which the Postal analysis is based -- that § 8151 only authorizes restoration to a regular position -- there is not even a hint of ambiguity. To the extent the restoration regulations purport to require an agency to install a FECA claimant in an assignment that is other than a regular position, they exceed § 8151's prescription and cannot form the basis of Board jurisdiction.[7]

[7] At oral argument, Appellants' counsel cited Vitarelli v. Seaton, 359 U.S. 535 (1959) and Service v. Dulles, 354 U.S. 363 (1957) for the proposition that an agency is bound by its own rules. These cases do stand for that proposition. But as the Postal Service has explained throughout its briefs, "[t]he question before the Board is not whether the Postal Service rules must be followed or are enforceable. They must be and they are, as evidenced by the arbitration decisions referenced in the Board's Consolidation Order. The Board is concerned with whether it has jurisdiction to enforce the Postal Service's rules under FECA. It does not." Agency's Reply Brief at 2. As described here, enforcement of the Postal Service rules is readily available and vigorously utilized under the Postal Service's collective-bargaining agreements.

C. THE NATIONAL REASSESSMENT PROCESS DID NOT IMPOSE NEW STANDARDS FOR ASSIGNING ILL OR INJURED EMPLOYEES OR FOR DETERMINING THE AVAILABILTY OF WORK. SECTION 546 OF THE EMPLOYEE AND LABOR RELATIONS MANUAL AND HANDBOOK EL-505 APPLIED BEFORE AND DURING THE NATIONAL REASSESSMENT PROCESS, AND THEY CONTINUE TO APPLY TODAY

The oral argument revealed a substantial level of misunderstanding concerning the interplay between the National Reassessment Process ("NRP") and the provisions of § 546 of the Employee and Labor Relations Manual ("ELM"). The NRP was a process implemented by the Postal Service as part of its overall emphasis on managing efficiency, productivity, and the size of its complement that was necessitated by the substantial and enduring declines in mail volume and revenue. It was, as described at oral argument, a means of focusing on assignments that the Postal Service was providing to ill or injured workers. Transcript of Oral Argument at 51. But it did not change the standards the Postal Service used, or uses today, to evaluate those assignments. Those standards always were and continue to be as articulated in ELM § 546 and Handbook EL-505.

When the NRP was announced, several of the Postal Service's unions raised a concern that the NRP altered the rules contained in the ELM and Handbook EL-505. Two unions, the National Association of Letter Carriers ("NALC") and the National Postal Mail Handlers Union ("NPMHU"), filed grievances. In resolution of those disputes, the Postal Service entered into agreements with the NALC and the NPLHU that were substantively identical and contained the following provisions:

> This grievance was filed regarding the Postal Service's application of the National Reassessment Program (NRP). The grievance contained three issues. The first issue involves the Union's contention that through the NRP the Postal Service has implemented a new 'necessary work' standard for the creation and continuation of limited duty and rehabilitation assignments. The

> second issue involves the Union's contention that as part of the NRP the Postal Service has developed new criteria for assigning limited duty. The third issue concerned the potential impact of the NRP on employees assigned to light duty under Article 13 of the Agreement.
>
> In resolution of these issues the parties agree as follows:
>
> 1. The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The ELM 546 has not been amended and remains applicable to all pending grievances.
>
> 2. The Postal Service has not developed new criteria for assigning limited duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of ELM 546 and 5 CFR, Part 353.
>
> 3. Employees on existing non-workers' compensation light duty assignments made pursuant to Article 13 of the National Agreement will not normally be displaced solely to make new limited duty or rehabilitation assignments unless required by law or regulation. The foregoing sentence does not establish any guarantee of daily work hours for employees in a light duty assignment.
>
> All grievances which have been held in abeyance will be processed in accordance with the forgoing.
>
> This settlement is without prejudice to the right of the Postal Service to propose changes to ELM 546 in accordance with the Article 19 process.

Agreement Between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, June 18, 2009.[8] Although the American Postal Workers Union did not reach a similar agreement with the Postal Service, the Postal Service has taken the position expressed in its agreements with the NALC and the NPMHU with respect to all its workers. As a result, any scrutiny of the Postal Service's conduct under its own rules begins and ends with an examination of ELM § 546 and Handbook EL-505,

[8] The Postal Service's agreement with the NALC is in the record. *See U.S. Postal Service v. Nat'l Ass'n of Letter Carriers*, Case No. B01N-4B-C 06189348 (2010) (LaLonde, Arb.)

including its conduct in the cases before the Board. And, as described below, the determination of whether the Postal Service complied with ELM § 546 and Handbook EL-505 in any given case has been assigned through collective-bargaining to contractual grievance procedures and, if necessary, an arbitrator. Focus on terms like "necessary work", "make work," or "available work," or on whether the terms used to describe work have changed, is a matter of semantics and a distraction from the central issue -- whether the Postal Service complied with ELM § 546 and Handbook EL-505.

D. WHETHER THE POSTAL SERVICE COMPLIED WITH SECTION 546 OF THE EMPLOYEE AND LABOR RELATIONS MANUAL IS A MATTER OVER WHICH THE POSTAL SERVICE HAS COLLECTIVELY BARGAINED, BOTH AS TO THE MERITS AND AS TO THE FORUM FOR DISPUTES. THE BOARD MAY NOT INVADE THE PROVINCE OF A POSTAL SERVICE COLLECTIVE-BARGAINING AGREEMENT

The APWU and NALC were unified at oral argument concerning an issue that the Postal Service has consistently urged the Board to consider -- that the interpretation and enforcement of ELM § 546 and Handbook EL-505 are "fundamentally a contract issue," Transcript of Oral Argument at 21, and that violations are "contract violations" because ELM § 546 and Handbook EL-505 are "incorporated by reference into the collective bargaining agreement[s]." *Id.* at 32. The Board's authority to interpret and enforce a Postal Service collective-bargaining agreement or to review the decision of an arbitrator under such an agreement is essentially, even literally, non-existent. There are two reasons. First is the labor relations paradigm Congress selected for the Postal Service, which is based on and enforced by the National Labor Relations Act and the National Labor Relations Board, respectively. *See* 39 U.S.C. §§ 1201-1209. Second is the civil service paradigm Congress selected for the Postal Service, which wrote the Postal

Service out of Title 5 and then selectively applied portions of Title 5 to the Postal Service by incorporating them into Title 39. *See, e.g., Marjie v. U. S. Postal Service*, 70 M.S.P.R. 95 (1996) (5 U.S.C. § 7121(d) does not apply to the Postal Service). Taken together, these Congressional determinations created a labor relationship that is unique in the federal sector and operates outside of traditional executive branch oversight.

The Board seems focused on these circumstances. At oral argument, the Board repeatedly expressed curiosity concerning whether the rules at issue were collectively bargained, presumably in recognition of the fact that its scrutiny of collective-bargaining agreements is constrained. The responses the Board received at oral argument were unclear, due in part to alternating discussion of the NRP, the ELM, and Handbook EL-505. But there is no dispute that ELM § 546 and Handbook EL-505 are, for all intents and purposes, collective-bargaining agreements.

Each of the Postal Service's collective-bargaining agreements contains a version of the following provision:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

Agreement Between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, Article 19 (2006). As a result, ELM § 546 and Handbook EL-505 have been transformed from unilateral policy statements to binding agreements. In fact, the <u>only</u> thing that distinguishes them from a provision actually contained in a collective-bargaining agreement is the fact that the Postal Service has the ability to alter

them during the term of the agreement. But, even then, the Postal Service's ability to do so is significantly restricted. Only changes that are "fair, reasonable, and equitable" and are consistent with each of its collective-bargaining agreements can be made, and only after consultation with the union. And the ability of the Postal Service to make such changes is itself subject to the grievance procedure and binding arbitration. "If the Union . . . believes the proposed changes violate the National Agreement [including Article 19], it may then submit the issue to arbitration in accordance with the arbitration procedure within ninety (90) days after receipt of the notice of proposed change." *Agreement Between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO*, Article 19 (2006).

When it made the policy judgment to apply private sector labor relations principles to the Postal Service, 39 U.S.C. § 1209, Congress necessarily incorporated a strong deference to self-determination.

> Arbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy. The reason for its success is the underlying conviction that the parties to a collective-bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract.

United Technologies Corporation, 268 N.L.R.B. 557, 558 (1984).

It is indisputable, as the Board has recognized in its Consolidation Order, that these very mechanisms have produced conflicting arbitral results concerning the Postal Service's compliance with ELM § 546 and Handbook EL-505. But that, in an essential way, makes the point that the Board should and must avoid involving itself in contract disputes. The arbitration decisions cited by the Board and the Postal Service – the former

going one way and the latter going the other – were all regional arbitration awards with no precedential value beyond the case at hand and, in some cases, the facility or region where the dispute occurred. In time, these issues will make their way to a national arbitration with Postal Service-wide. As a result, anything the Board would say concerning whether the Postal Service complied with ELM § 546 and Handbook EL-505 would necessarily be subject to being incorrect – either in the view of an arbitrator in another regional dispute or in the view of a national arbitrator with authority to determine what is, or is not, a violation of ELM § 546 and Handbook EL-505. Further, were the Board to intrude into this area, the Postal Service would likely be subject to conflicting bodies of law on this topic – one developed by the Board and another by arbitrators.

E. REFRAINING FROM ENFORCING THE RESTORATION REGULATIONS TO THE EXTENT THEY PURPORT TO GOVERN ASSIGNMENTS TO OTHER THAN FULLY RECOVERED WORKERS OR TO OTHER THAN REGULAR POSITIONS WOULD NOT LEAVE ANY GAPS IN FECA-BASED PROTECTION. SUCH ASSIGNMENTS ARE STATUTORILY ASSIGNED TO THE SECRETARY OF LABOR WHO IS EFFICIENTLY AND EFFECTIVELY PROVIDING THEM

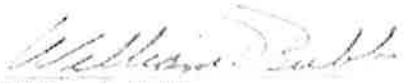
At oral argument, Appellants' counsel suggested that the Postal Service's jurisdictional arguments would result in gaps in the protection afforded to ill or injured workers by FECA. It is worth noting again here that the Secretary of Labor, through the Office of Workers' Compensation Programs, today administers the provision of temporary limited duty and permanent assignments for workers who are still recovering or do not fully recover. *See* Agency's Opening Brief at 29. If the Board concludes on any of the bases urged by the Postal Service that the restoration regulations should or cannot be applied to assignments other than to fully recovered workers or other than to

regular positions, it need not worry that such persons or such assignments will be neglected. In fact, they are the focus of the Secretary of Labor's efforts.

CONCLUSION

For the reasons described here and in the Postal Service's prior briefs, the Board should decline to exercise jurisdiction under FECA to enforce Postal Service rules. The Board's own jurisdiction, the invalidity of the restoration regulations, the supremacy of the Postal Service's collective-bargaining agreements, and the symmetry between the responsibilities of the Secretary of Labor and the Board under FECA, all counsel in favor of declining to act.

Respectfully submitted,



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January 6, 2012

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e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

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MSPB: Office of the Clerk of the Board	Agency's Post-Argument Brief	e-Appeal / e-Mail
Marcella Albright Appellant	Agency's Post-Argument Brief	e-Appeal / e-Mail
Thomas William Albright Appellant Representative	Agency's Post-Argument Brief	e-Appeal / e-Mail
Andrew C. Friedman, Esq. Agency Representative	Agency's Post-Argument Brief	e-Appeal / e-Mail
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I agree to send a printed copy of the electronic pleading with attachments to non-efilers by the end of next business day, as follows:

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