

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 77

Docket No. CH-0353-10-0831-I-2

**Debbie J. Coles,
Appellant,**

v.

**United States Postal Service,
Agency.**

June 29, 2012

Justice W. Vinson, Detroit, Michigan, for the appellant.

Deborah L. Lisy, Esquire, and David F. Wightman, Chicago, Illinois, for
the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

Member Robbins issues a separate concurring opinion.

OPINION AND ORDER

¶1 The agency has filed a petition for review of an initial decision that ordered the agency to retroactively restore the appellant to a position within her medical restrictions. For the following reasons, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still finding that the agency arbitrarily and capriciously denied the appellant restoration.

BACKGROUND

¶2 The appellant, a Small Parcel Bundle Sorter, filed an appeal challenging the agency's determination under the National Reassessment Process (NRP) that there were no available necessary tasks within her medical restrictions and that she should take leave until notified that necessary work tasks had been identified within her medical restrictions. Initial Appeal File (IAF), Tabs 1, 15. The appellant alleged discrimination and retaliation. IAF, Tabs 1, 15; Refiled Appeal File (RAF), Tab 10 at 2.

¶3 After a hearing, the administrative judge granted the appellant's request for restoration. RAF, Tab 15, Initial Decision (ID) at 2. Citing *Chen v. U.S. Postal Service*, [97 M.S.P.R. 527](#), ¶ 13 (2004), the administrative judge found that the Board had jurisdiction over the appeal because the appellant made nonfrivolous allegations that she was absent from her position due to a compensable injury, she recovered sufficiently to return to work in a position with less demanding physical requirements than those previously required of her, the agency denied her request for restoration, and the denial was arbitrary and capricious. ID at 4-7. In finding that the appellant nonfrivolously alleged that the denial was arbitrary and capricious, the administrative judge noted that the appellant alleged that she can perform the majority of the core duties of her position, and that she has performed many duties that are still available and within her medical restrictions, such as Nixie Clerk duties, acting as a General Clerk answering telephone calls, making holiday schedules, typing letters, and Hub Clerk duties, which include retrieving mail from other stations, sorting it, and making labels before dispatching it. ID at 7. The administrative judge further found that the appellant asserted that she had been a Transfer Clerk, in which she would input information into computers related to the receipt and transfer of mail, and submitted letters from co-workers who supported her contention that work she had performed was currently available. *Id.*

¶4 In addressing the merits of the case, the administrative judge found that the appellant proved by preponderant evidence the above jurisdictional criteria. ID at 8-14. In particular, the administrative judge found that there was no evidence that the agency met its obligation to search for work within the appellant's medical restrictions in the entire local commuting area (LCA) before informing her that there was no work available and removing her from the workplace. ID at 10. The administrative judge found that the agency's notes did not indicate that the agency ever searched for available work during all tours, in all crafts, and at all facilities within the LCA, and that the agency, in any event, failed to conduct a search of the entire LCA for available work within the appellant's medical restrictions within a reasonable period of time of the date it terminated her modified assignment. *Id.* at 10-13. Finally, the administrative judge found that the appellant did not prove discrimination based on race, sex, age, and disability, or retaliation for equal employment opportunity (EEO) activity. ID at 14-25. The administrative judge ordered the agency to retroactively restore the appellant to a "position" within her medical restrictions ID at 25.

ANALYSIS

Jurisdiction

¶5 Although the administrative judge found that jurisdiction over a restoration appeal is established by nonfrivolous allegations, ID at 5, the United States Court of Appeals for the Federal Circuit subsequently held that in order to establish jurisdiction over a restoration appeal involving a claim of partial recovery from a compensable injury, an appellant must prove by preponderant evidence that: (1) He was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis or to return to work in a position with less demanding physical requirements than those previously required of him; (3) the agency denied his request for restoration; and (4) the denial was arbitrary

and capricious because of the agency's failure to perform its obligations under [5 C.F.R. § 353.301](#)(d). *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 10 (2012) (citing *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1104 (Fed. Cir. 2011)).

¶6 Here, the administrative judge found that the appellant proved on the merits of her appeal that she met the above requirements by preponderant evidence. As set forth more fully below, the agency has shown no error in those findings. Thus, we find that the appellant has established Board jurisdiction over this appeal under the appropriate standard set forth in *Latham*. See *Bledsoe*, 659 F.3d at 1101-02 (finding that jurisdiction and the merits may overlap).

The Agency's Petition for Review^{*}

¶7 The agency contends that the Board held in *Soto v. U.S. Postal Service*, [115 M.S.P.R. 95](#), ¶ 11 (2010), and *Hunt v. U.S. Postal Service*, [114 M.S.P.R. 379](#), ¶ 11 (2010), that an agency has the authority to economize its operations by consolidating the tasks being performed by limited duty employees and

* Although the appellant did not label her response to the agency's petition for review as a cross petition for review, she does allege that the Board should uphold the initial decision "and go one step further to include retaliation, discrimination as well as some sort of monetary amount." Petition for Review File, Tab 5 at 11. She also claims that the agency retaliated for EEO activity because a manager remarked that she was "writing a lot" when she was filling out an EEO form. *Id.* at 6-7. To the extent that the appellant wants her response to be treated as a cross petition for review, she has shown no error in the initial decision. See *Johnson v. U.S. Postal Service*, [108 M.S.P.R. 502](#), ¶ 1 n.1 (2008) (treating a response to a petition for review as a cross petition for review because it challenged some of the initial decision's findings), *aff'd*, 315 F. App'x 274 (Fed. Cir. 2009). The administrative judge addressed the remark but found no indication that the manager was aware of what the appellant was writing, or that he meant his remark as more than a passing observation. RAF, Tab 15 at 15-16. In addition, the administrative judge found no evidence that the District Assessment Team was aware of the appellant's EEO activity, or that anyone accused in her EEO filings had a motive to retaliate and was involved in the work search or the decision to remove the appellant from the workplace. *Id.* at 16. The appellant has shown no error in these findings, and has not otherwise shown error in the finding that she did not prove her other claims of discrimination. See *id.* at 16-25.

reassigning them to non-limited duty employees who would otherwise be performing them. Petition for Review (PFR) File, Tab 3 at 9. The agency contends that the appellant never submitted evidence showing that the agency's search did not encompass the LCA, that this case is distinguishable from *Sanchez v. U.S. Postal Service*, [114 M.S.P.R. 345](#) (2010), because the record does not include evidence that the agency failed to adequately search the LCA, and that by failing to require the appellant to establish jurisdiction by submitting evidence corroborating her allegations, the administrative judge improperly shifted the jurisdictional burden to the agency. *Id.* at 7-12. The agency claims that here, as in *Boutin v. U.S. Postal Service*, [115 M.S.P.R. 241](#), ¶¶ 16-17 (2010), the appellant neither asserted nor proffered any evidence that the agency's search did not encompass the LCA. *Id.* at 13.

¶8 The Board in *Latham*, [117 M.S.P.R. 400](#), ¶ 31, overruled *Soto* and *Hunt* to the extent that those cases held that the Postal Service had the authority to economize its operations by consolidating the tasks being performed by limited duty employees and reassigning them to non-limited duty employees who would otherwise be performing them. The Board held that, although federal agencies may generally retain such authority, the Postal Service adopted rules that severely constrained its ability in that regard. *Id.* Thus, the agency's argument based on *Soto* and *Hunt* is unavailing.

¶9 Although the agency contends that the appellant never offered any evidence that the agency's search did not encompass the LCA or was otherwise deficient, the administrative judge found that the appellant made a nonfrivolous allegation that the denial of restoration was arbitrary and capricious because she performed many duties at the Detroit Priority Mail Center that were still available and could be performed within her medical restrictions. *ID* at 7. The administrative judge further found on the merits that the agency's actions were arbitrary and capricious because there was no evidence that the agency searched for available work during all tours, in all crafts, and at all facilities within the LCA. *ID* at 10,

14. The administrative judge found that there was no correspondence to or from any facilities or offices within the Ohio zip codes for a search conducted in May 2010, and that searches conducted in August-September 2010 and January 2011 were insufficient. ID at 10-13. The administrative judge found these searches insufficient because there was no evidence that the NRP Coordinator for Cincinnati, Ohio, had personal knowledge of the available work at each facility and station within the zip codes mentioned in his August 2010 e-mail response and the agency presented no evidence that he had access to current worksheets showing work available at each location within the zip codes. *Id.* The administrative judge further found that, although a January 2011 search did include responses from numerous offices in Ohio, that search was conducted more than 7 months after the appellant was told there was no work available within her medical restrictions, which was a significant delay that made it impossible to determine the extent to which work that might have been available was given to other employees or rendered unavailable. ID at 13. We find that the administrative judge applied the proper standard in this case and correctly made findings of fact, based on the entire record, that it was more likely true than untrue that the agency arbitrarily and capriciously denied restoration. *See* [5 C.F.R. § 1201.111](#)(b)(1) (each initial decision will contain findings of fact and conclusions of law upon all the material issues of fact and law presented on the record); *cf.* *Sanchez*, [114 M.S.P.R. 345](#), ¶¶ 12, 14 (the Board may consider the agency's documentary submissions in finding a nonfrivolous allegation of Board jurisdiction).

¶10 Moreover, we disagree with the agency's claim that this case is distinguishable from *Sanchez*. In *Sanchez*, [114 M.S.P.R. 345](#), ¶ 14, the Board reviewed the agency's evidence relating to its job search and held that because the search was apparently limited to a single district, the appellant made a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. Similarly, the administrative judge in this case did not shift

the burden of proof but merely reviewed the evidence of record, including the agency's documentary submissions, and found that the agency acted arbitrarily and capriciously in denying restoration. Although the agency relies on *Boutin*, the Board there found that the appellant's mere assertion that his limited duty work was operationally necessary did not establish a nonfrivolous allegation that the agency acted in an arbitrary and capricious way. In so finding, the Board relied on evidence showing that the agency's search encompassed 500 facilities within a 50-mile radius of his duty station. [115 M.S.P.R. 241](#), ¶¶ 15-16. Here, the administrative judge found that the agency's evidence showed that it did not properly search within the LCA.

¶11 The agency also claims that the administrative judge's challenge to the agency's LCA searches violated the agency's due process rights because "at no point during the processing of Appellant's appeal or during the hearing did either Appellant or the Administrative Judge ever raise any challenge to the LCA searches." PFR File, Tab 3 at 13. The agency asserts that absent any notice that the agency's searches were at issue, the administrative judge deprived the agency of the opportunity to defend against such an issue. *Id.* at 13-14. The agency has provided no support, however, for its apparent contention that it has due process rights. *See, e.g., Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 546 (1985) (an agency's failure to provide a tenured public employee with an opportunity to present a response to an appealable agency action that deprives him of his property right in his employment constitutes an abridgement of his constitutional right to minimum due process of law, i.e., prior notice and an opportunity to respond). In any event, the appellant asserted below that, although the agency informed her that no work was found within her medical restrictions after an extensive search covering a 50-mile radius, there was work she could do that was still available and being done on a daily basis by other personnel. IAF, Tab 1 at 7, Tab 15 at 5. Moreover, the administrative judge notified the parties that one of the issues in the case would be whether the agency's denial of

restoration was arbitrary and capricious, RAF, Tab 10 at 1, and he dismissed the case without prejudice so that the agency could conduct a new search for available work within the appellant's medical restrictions in the LCA, IAF, Tab 17 at 2. Thus, the agency had notice that the propriety of its searches was at issue, and it submitted evidence and testimony regarding that issue, *see, e.g.*, RAF, Tab 14 at 10, which the administrative judge found unpersuasive, ID at 8-14.

¶12 The agency further contends that the administrative judge improperly discredited an e-mail from the NRP Coordinator for the Cincinnati District. PFR File, Tab 3 at 14-15; *see* ID at 12. The agency claims that the NRP Coordinator was entitled to reasonably rely on others in responding to the LCA search request, there was no indicia of unreliability in his response, and the administrative judge should not have relied on written statements from the appellant's co-workers, submitted as exhibits in a prehearing submission, because they were not offered as exhibits at the hearing. PFR File, Tab 3 at 15-16.

¶13 The administrative judge appears to have considered the NRP Coordinator's e-mail as hearsay evidence that was not persuasive, ultimately finding that it was more likely true than untrue that the agency acted arbitrarily and capriciously in denying restoration. ID at 12-13. An assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case. *Borninkhof v. Department of Justice*, [5 M.S.P.R. 77](#), 83-87 (1981). We discern no error in the administrative judge's determination to give little or no weight to the hearsay evidence in the form of the e-mail. The agency does not explain why it did not submit evidence, including signed or sworn statements from the NRP Coordinator and/or the managers and postmasters who were allegedly queried; the e-mail was thus not corroborated by other evidence in the record. *See Borninkhof*, 5 M.S.P.R. at 87. Moreover, the e-mail itself indicates that documentation is required of all reviews conducted for a determination of no available work, IAF, Tab 9, Subtab 4C at 28, yet the agency has shown no error

in the administrative judge's finding that the agency did not present such documentation.

¶14 Although the administrative judge indicated in a summary of a telephonic prehearing conference that “[a]ll documents in the record at this time must be entered into evidence at the hearing,” and that “[d]ocuments not accepted at the hearing will not be considered,” RAF, Tab 10 at 10, it appears that he nevertheless relied upon written statements from the appellant's co-workers in the initial decision, IAF, Tab 15; ID at 7, even though the appellant did not formally enter them into the record at the hearing, *see* Hearing Transcript at 3 (list of exhibits). Thus, the administrative judge may have improperly relied upon those statements in finding that the appellant made a nonfrivolous allegation of jurisdiction. Even assuming, however, that the statements from the appellant's co-workers, indicating that the tasks the appellant performed continued to be performed after the agency told her that no work was available, should not have been considered, the record includes, as set forth more fully below, testimonial evidence supporting the same principle.

¶15 The agency contends that the administrative judge's analysis of the appellant's disability discrimination claim establishes that the Board lacks jurisdiction over this appeal because the administrative judge held that the appellant was incapable of performing any position, including her own, with or without accommodation. PFR File, Tab 3 at 17. Whether there were available “positions” in the LCA, however, is not the key question with respect to the appellant's restoration claim. As set forth above, the administrative judge found that the agency arbitrarily and capriciously denied the appellant restoration by failing to properly search for available “work” within the LCA. ID at 10-14; *see* Hearing Transcript at 65, 71-73 (testimony of a member of the District Assessment Team for the NRP that the “546” process involved looking for “work” for employees within their medical restrictions); *Latham*, [117 M.S.P.R. 400](#), ¶ 41 (the Postal Service's rules obligated it to offer modified assignments

when work is available regardless of whether the duties constitute those of an established position).

¶16 Finally, the agency asserts that the administrative judge improperly ordered the agency to restore the appellant to a “position” within her medical restrictions because the administrative judge found that the appellant had not identified a vacant position the duties of which she could have performed within her restrictions, even with a reasonable accommodation. PFR File, Tab 3 at 18. We agree that the administrative judge should not have ordered restoration to a position under the circumstances of this case. Accordingly, we have modified the order language as it applies to the facts in this case.

The Effect of *Latham* on this Case

¶17 The Board noted in *Latham*, [117 M.S.P.R. 400](#), ¶ 12, that it had held in prior cases that the “minimum” requirement under [5 C.F.R. § 353.301\(d\)](#) is that an agency must search within the LCA for vacant positions to which it can restore a partially recovered employee and to consider the employee for any such vacancies. The Board found in *Latham* that it also has jurisdiction over appeals concerning denials of restoration to partially recovered individuals when the denial results from a violation of the agency’s own internal rules, i.e., when an agency affords greater protections than the “minimum” requirements of section 353.301(d), and that the Postal Service’s failure to adhere to its own regulations in effecting the NRP can be the basis for finding an arbitrary and capricious denial of restoration. *Id.*, ¶¶ 13-14. The Board noted that the Postal Service’s modified duty rules provide that it may not discontinue a modified assignment unless the duties of that assignment go away or need to be transferred to other employees who would otherwise lack sufficient work, and that those rules obligate the agency to offer modified assignments when the work is available regardless of whether the duties constitute those of an established position. *Id.*, ¶¶ 30-31, 41. The Board used the following framework for analyzing cases such as this: (1) Are the tasks of the appellant’s former modified assignment still

being performed by other employees? (2) If so, did those employees lack sufficient work prior to absorbing the appellant's modified duties? (3) If so, did the reassignment of that work violate any other law, rule, or regulation, such as any contractual provisions limiting the Postal Service's authority to combine work in different crafts, occupational groups, or levels into one job. *Id.*, ¶¶ 32-33.

¶18 Here, as in *Latham*, [117 M.S.P.R. 400](#), ¶ 42, the appellant has established that the limited circumstances under which the agency can revoke a modified assignment are not present. There is no evidence that the duties of the appellant's modified assignment have gone away. In fact, the appellant submitted un rebutted evidence and argument below that the work she used to be doing is still being done at her former facility by other employees on an overtime basis. IAF, Tab 15 at 10; *see* RAF, Tab 3 at 9, 11. Testimony provided at the hearing indicated the same. *See* Hearing Transcript at 8 (testimony of a co-worker that there are still jobs being performed at the Priority Mail Center that the appellant could have done), 53, 56-57 (testimony of the appellant), 115-16, 121, 156-57 (testimony of agency managers that assignments previously performed by employees who were told no work was available were "put back" to management or returned to individuals who occupied the prior bid job). We therefore find that the employees who absorbed the appellant's modified duties did not lack sufficient work before absorbing those duties. Thus, we find that the appellant established by preponderant evidence that the discontinuation of her modified assignment violated the agency's rules regarding its modified duty obligations, and that the agency's denial of restoration was arbitrary and capricious. *See Latham*, [117 M.S.P.R. 400](#), ¶¶ 42, 49.

ORDER

¶19 We ORDER the agency to restore the appellant to her former modified assignment effective May 26, 2010, and to otherwise adhere to its restoration

obligations as set forth under its own rules and [5 C.F.R. § 353.301](#)(d). *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984); *Latham*, [117 M.S.P.R. 400](#), ¶¶ 77, 83. The agency must complete this action no later than 20 days after the date of this decision.

¶20 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶21 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

¶22 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182](#)(a).

¶23 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all

documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶24 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703](#)(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5](#)(f) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision

without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

“Guide for Pro Se Petitioners and Appellants,” which is contained within the court’s [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc., with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

CONCURRING OPINION OF MEMBER MARK A. ROBBINS

in

Debbie J. Coles v. United States Postal Service

MSPB Docket No. CH-0353-10-0831-I-2

¶1 I concur with the disposition of this case. The Board's decision in *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#) (2012), decided prior to my appointment to the Board, is controlling and in the present matter I believe is being applied appropriately. I write separately, however, to express some concern at the scope of the Board's *Latham* holding, particularly when applied to agencies such as the Postal Service that are facing potentially existential fiscal, structural and management challenges.

¶2 Historically an employee who has partially recovered from a compensable injury had no right to be restored to limited duties not comprising the essential functions of a complete and separate position. *See Brunton v. U.S. Postal Service*, [114 M.S.P.R. 365](#), ¶ 11 (2010). This is a clear and concise rule, easily understood and applied at the agency level, and presumably still controlling for those agencies that have not granted employees greater substantive rights than those required by law or regulation. Under favorable circumstances, agencies may wish to extend entitlements beyond the required minimum to employees. But when circumstances turn unfavorable, the agency should be allowed to respond appropriately. Whether one accepts the Office of Personnel Management's (OPM) interpretation of its regulations as controlling or not in this instance, I am not completely convinced that absent clear instruction from Congress, the courts above, or OPM through the promulgation of additional regulations, the Board *should* assert authority to adjudicate and enforce a substantive entitlement beyond a statutory or regulatory minimum. An unintended consequence of *Latham* may well be an institutional reluctance on the part of agencies to extend substantive entitlements to employees beyond the regulatory minimum, even when they have the ability to do so.

¶3 On another issue, I also note that the dissenting opinion in *Latham* contains an interesting discussion of whether the determination of an agency's potentially arbitrary

and capricious denial of restoration is properly considered a jurisdictional element rather than a merits issue. But this is a discussion for another day.

Mark A. Robbins
Member