

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

NANCY C. RAY,  
Appellant,

DOCKET NUMBER  
SF-0353-10-0236-B-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: August 23, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Nancy C. Ray, San Jose, California, pro se.

Geraldine O. Rowe, Esquire, Long Beach, California, for the agency.

**BEFORE**

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

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

### **DISCUSSION OF ARGUMENTS ON REVIEW**

In her petition for review, the appellant seems to argue that restoration rights are inapplicable here because she “had already been casing and carrying mail for eight or more hours a day, everyday, carrying complete routes, and thereby had already been restored to the work of a letter carrier prior to the [National Reassessment Process (NRP)] team sending [her] home.” Petition for Review (PFR) File, Tab 1 at 5. There is nothing in the record to suggest that the appellant was *not* working a limited-duty assignment on October 7, 2009, when she was offered work for 1 hour per day pursuant to the NRP. Indeed, evidence in the record indicates that, prior to the October 7, 2009 offer, the appellant accepted a new limited-duty assignment as a City Carrier working 8 hours per day at the Bayside Station on August 26, 2009. Initial Appeal File (IAF), Tab 4 at 8. To the extent the appellant believes she was not working a limited-duty assignment merely because she was working 8 hours per day, she is mistaken, as the evidence in the record establishes her medical restrictions resulting from her work-related injury and her status as a limited-duty employee. *See* IAF, Tab 4 at 8; *id.*, Tab 5, Subtab B at 24. Accordingly, there is nothing in the record to suggest that the appellant was inappropriately targeted by the NRP.<sup>2</sup> With

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<sup>2</sup> To the extent the appellant is asserting that her limited duty assignment was improperly classified and that she was performing the essential functions of her bid position with reasonable accommodations before the NRP, such an assertion constitutes a claim that the agency’s denial of restoration constituted disability discrimination. *See Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 75 (2012). However, to the extent that such a claim bears on the jurisdictional issue, *see id.*, ¶ 76, we have not considered it given the administrative judge’s finding that the appellant established jurisdiction over and the merits of her restoration claim based on the agency’s failure to search for work within the appellant’s medical restrictions beyond her current facility between October 8, 2009, and November 20, 2009. *See* Remand Decision at 8.

respect to the appellant's claim of "involuntary suspension," the Board has held that an appellant's rights and remedies regarding the portion of her workday for which the agency has not assigned her work are subsumed in the restoration appeal process. *See Kinglee v. U.S. Postal Service*, [114 M.S.P.R. 473](#), ¶ 19 (2010).

The appellant also asserts in her petition for review that the administrative judge misstated her medical restrictions as set forth in the September 24, 2009 CA-17 because the listed restrictions were actually job requirements and many did not even apply to the appellant's route. PFR File, Tab 1 at 7. The appellant's assertion is meritless. The purpose of a CA-17, such as the September 24, 2009 CA-17, is to set forth an employee's work restrictions as a result of a compensable injury, not to set forth the physical requirements of any particular position. We discern no error by the administrative judge in characterizing the appellant's work restrictions as of September 24, 2009.

The appellant asserts in her petition for review that the administrative judge instructed her that she could not raise both a disparate treatment claim and a failure to accommodate claim and that she had to abandon one of the bases for her assertion of disability discrimination. PFR File, Tab 1 at 23. There is no evidence to support this argument in the record. In the February 9, 2011 prehearing conference summary, the administrative judge stated that the appellant initially asserted a failure to accommodate claim but that the appellant withdrew her allegation of discrimination on that basis during the prehearing conference. Remand File (RF), Tab 29 at 9; *see Wynn v. U.S. Postal Service*, [115 M.S.P.R. 146](#), ¶ 10 (2010). He explained that the appellant instead claimed discrimination on the basis of disparate treatment, "specifying that she has an actual disability and was perceived as having a disability." *Id.* While the appellant objected to the prehearing conference summary, including by asserting a new affirmative defense of harmful procedural error, which was accepted by the administrative judge, the appellant did not object to the administrative judge's characterization

of her withdrawal of her failure to accommodate claim or her pursuit of her disparate treatment claim. *See* RF, Tabs 30-32, 35. Accordingly, the appellant's assertion that the administrative judge somehow forced her to withdraw her failure to accommodate claim is without merit.

The appellant asserts in her petition for review that the administrative judge abused his discretion in denying ten of her requested witnesses. *See, e.g.*, PFR File, Tab 1 at 39-41. The administrative judge has wide discretion under [5 C.F.R. § 1201.41](#)(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Franco v. U.S. Postal Service*, [27 M.S.P.R. 322](#), 325 (1985). The administrative judge explained each of his rulings regarding the appellant's witness requests in his summary of the prehearing conference, and we discern no abuse of discretion by the administrative judge given the limited scope of the issue before him. *See* RF, Tab 29 at 5-7.

The appellant asserts in her petition for review that the administrative judge abused his discretion in rejecting the introduction of "bid information" related to the route the appellant carried in September 2009 as evidence. PFR File, Tab 1 at 41. The appellant has failed to connect her claim regarding the agency's decision deeming her ineligible for a bid position in September 2009, particularly in light of the September 24, 2009 CA-17 setting forth the appellant's restrictions, with her claim that the agency discriminated against her in its October 7, 2009 job offer under the NRP and its delay in returning her to full duty based on her updated medical documentation. *See Wagner v. Environmental Protection Agency*, [54 M.S.P.R. 447](#), 452 (1992) (the Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table).

The appellant lastly asserts that she should be provided with "relief" for her "expenses from the date of filing to the days of the hearing" because she "spent hundreds of dollars . . . ." PFR File, Tab 1 at 42. Because the appellant

proceeded pro se, there is nothing in the record to support an award of fees, even if the appellant had properly sought them under the Board's regulations. *See* [5 C.F.R. § 1201.203\(a\)](#). Further, to the extent the appellant's reference to "relief" in her petition for review pertains to the administrative judge's failure to order interim relief, we discern no abuse of discretion by the administrative judge in light of the appellant's testimony that she received OWCP payments for the hours that were not compensated by the agency between October 8, 2009, and November 20, 2009. *See Davis v. Department of Justice*, [61 M.S.P.R. 92](#), 95 (interim relief is generally inappropriate in a restoration appeal where the appellant is receiving OWCP benefits because doing so could result in the agency's payment of monies in contravention of [5 U.S.C. § 8116\(a\)](#)), *aff'd*, 43 F.3d 1485 (Fed. Cir. 1994) (Table); Initial Decision at 21; Hearing Compact Disk.

However, despite the agency's concession that it failed to perform a complete search of the local commuting area prior to giving the appellant a partial-day job offer of 1 hour per day, *see* Remand Decision at 8, it has not been established that any tasks were available within the appellant's medical restrictions beyond the work provided to the appellant. The Board will not order the appellant restored to an assignment that was properly discontinued, nor will it order back pay on such an assignment because that would put the appellant in a better position than if the wrongful action had not occurred. Rather, in a case like this one, in which the denial of restoration was arbitrary and capricious for lack of a proper job search, the Board has found that the appropriate remedy is for "the agency to conduct an appropriate search within the local commuting area retroactive to . . . the date of the appellant's request for restoration, and to consider her for any suitable vacancies." *Sapp v. U.S. Postal Service*, [82 M.S.P.R. 411](#), ¶ 21 (1999); *see Scott v. U.S. Postal Service*, 2012 MSPB 93, ¶ 14 (ordering the agency to conduct a proper job search retroactive to the appellant's request for restoration following the agency's reduction of the appellant's work

hours from 8 hours per day to 5 hours per day and then to 2 hours per day pursuant to the NRP). The remedy of a retroactive job search will be sufficient to correct the wrongful action and substitute it with a correct one based on an appropriate search. It will not, however, put the appellant in a better position than she was in before the wrongful action because it leaves open the possibility that the agency might still be unable to find an appropriate assignment available between October 8, 2009, and November 20, 2009. The appellant may be entitled to back pay only if the agency's retroactive job search uncovers available work to which it could have restored her. Therefore, this case is distinguishable from *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶¶ 77, 83 (2012), where the Board ordered the agency to retroactively restore two appellants to their former modified assignments. In those situations, the Board found that the agency had acted arbitrarily and capriciously because the appellants established that the limited circumstances under which the agency could legitimately discontinue their modified assignments were not present. *Latham*, [117 M.S.P.R. 400](#), ¶¶ 42, 49.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

### **ORDER**

We ORDER the agency to conduct a proper job search retroactive to October 8, 2009, through November 20, 2009, and to consider the appellant for any suitable assignments available during that time period consistent with its restoration obligations under [5 C.F.R. § 353.301](#)(d). The agency must complete this action no later than 30 days after the date of this decision.

In the event that the agency's retroactive job search uncovers available work to which it could have restored the appellant, we 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 on which it completes its job search. In such circumstances, 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 the agency's retroactive job search uncovers any suitable assignments and 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 on which it completes its job search.

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 of 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\(b\)](#).

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 on 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\(a\)](#).

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. In the event the appellant is entitled to back pay, as set forth above,

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.

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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\(f\)](#); [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](http://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:

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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.