

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

MARYANN ANDERWALD,
Appellant,

DOCKET NUMBER
DA-0353-12-0021-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: September 14, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Kathy L. Davis, Amarillo, Texas, for the appellant.

Ronnie D. Compton, Esquire, Dallas, Texas, for the agency.

BEFORE

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

REMAND 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

that was not available for consideration earlier or when the administrative judge 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](#)). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

The non-preference eligible appellant is a Mail Processing Clerk at the agency's Processing and Distribution Center in Amarillo, Texas. Initial Appeal File (IAF), Tab 1 at 2; Tab 5 at 5, 23. It is undisputed that the appellant sustained a compensable injury on February 1, 2002, and that she has subsequently been provided with modified duty assignments within her medical restrictions. IAF, Tab 5 at 24, 86-87.

On April 27, 2010, the agency notified the appellant pursuant to its National Reassessment Process (NRP) that there were no operationally necessary tasks within her medical restrictions within her local commuting area, and she was sent home and placed in a leave without pay (LWOP) status. *Id.* at 85. On April 16, 2011, the agency issued the appellant a "Notice of Separation" "On OWCP [Office of Workers' Compensation Programs] Rolls for More Than One Year," which informed her that because she had been absent from duty and receiving OWCP benefits for more than one year, she was being administratively separated from the Postal Service effective September 19, 2011. *Id.* at 24. The notice informed the appellant that, although she was being administratively separated, she retained her restoration rights under [5 U.S.C. § 8151](#), [5 C.F.R. § 353.301](#), and Section 546.1 of the agency's Employee and Labor Relations Manual (ELM). *Id.*

The appellant filed an October 12, 2011 appeal in which she requested a hearing on her challenge to the agency's action in administratively separating her based on the agency's action in revoking her modified duty assignment and placing her in a LWOP status as a result of the NRP, all of which the appellant

asserted to be in violation of the agency's rules, regulations, and policies. IAF, Tab 1 at 3-4, 6; Tab 4 at 2-4. The appellant acknowledged that she is not a preference eligible employee.² IAF, Tab 1 at 2. The agency moved to dismiss the appeal on the ground that the appellant had failed to assert a nonfrivolous allegation that its NRP-based action was arbitrary and capricious. IAF, Tab 5 at 7-10.

After affording the appellant an opportunity to respond to his restoration rights jurisdictional notices, the administrative judge issued an initial decision without holding a hearing and found that the appellant had asserted nonfrivolous allegations of the first three restoration appeal jurisdictional elements, but had failed to assert a nonfrivolous allegation of the fourth element, that the agency's action in denying her restoration was arbitrary or capricious. IAF, Tab 2 at 3; Tabs 4, 6, 8, 9. Accordingly, the administrative judge dismissed the appeal for lack of jurisdiction.³ IAF, Tab 9 at 2, 9. This appeal was decided before the Board issued its guidance in *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#) (2012), and *Latham's* progeny.

Citing *Latham*, the appellant asserts on review that she raised nonfrivolous allegations of the Board's restoration jurisdiction and that she was denied a hearing at which she could have proven jurisdiction. Petition for Review (PFR) File, Tab 1 at 3-4. For the following reasons, we agree.

² Although the appellant subsequently asserted that, in addition to her restoration claim, she was asserting a constructive suspension and involuntary retirement (which we construe to mean an involuntary separation), she did not respond to the administrative judge's show cause order regarding her burden to show that the Board has jurisdiction over her adverse action claims as a non-preference eligible Postal Service employee. IAF, Tab 4 at 1; Tab 6 at 2-4. Thus, we see no error in the administrative judge's finding that the Board does not have jurisdiction over the appellant's adverse action claims. IAF, Tab 9 at 2, n.2.

³ We note that there is a scrivener's error in the date of the initial decision ("Date: February 7, 2011"). The initial decision was actually issued on February 7, 2012, as correctly reflected in the certificate of service. IAF, Tab 9 at 12.

In order to establish jurisdiction over a restoration appeal as a partially recovered individual, an appellant must prove by preponderant evidence that: (1) She was absent from her position due to a compensable injury; (2) she 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 her; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious. *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1104 (Fed. Cir. 2011); *Latham*, [117 M.S.P.R. 400](#), ¶ 10. If the appellant makes nonfrivolous allegations to support jurisdiction, then and only then is she entitled to a jurisdictional hearing at which she must prove jurisdiction by preponderant evidence. *Bledsoe*, 659 F.3d at 1102. It is undisputed that the appellant has satisfied the first three restoration jurisdictional elements. IAF, Tab 1 at 6; Tab 5 at 5-6, 9-10, 85, 87; Tab 9 at 5-6. Thus, the issue on review is whether the appellant raised a nonfrivolous allegation that, if proven, would establish that the denial of restoration was arbitrary and capricious.

The Board has found that, under the agency's ELM, the agency may discontinue a modified assignment consisting of tasks within an employee's medical restrictions only where the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work. *Latham*, [117 M.S.P.R. 400](#), ¶ 31. Accordingly, the following line of inquiry set forth in *Latham* is a relevant framework for analyzing the instant appeal: (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? *Id.*, ¶ 33. The record reflects that the appellant made the following pertinent assertions below:

I was working at least 8 hours every day, and there was always more than enough work available [for] me. The day I was placed off work[] was the day I returned from annual leave. There was 11 days of mail stacked up. No one had worked the mail the entire time I was off on leave, yet I was told there was no work available for me.

...

The Agency's determination that no work was available for me was, and is false due to the fact that co-workers and other employees including managers continue doing the work that I performed since April 27, 2010[,] when I was affected by the illegal process of NRP.

IAF, Tab 1 at 6; Tab 8 at 4. On review, the appellant reiterates that the agency "withdrew my modified job offer and gave those same duties to other employees. It has created overtime and double overtime. Managers have done some of my duties[,] which is a violation of the Collective Bargaining Agreement (CBA) because they are not allowed to cross crafts." PFR File, Tab 1 at 3. We find that the appellant raised nonfrivolous allegations creating a justiciable issue under *Latham's* arbitrary and capricious jurisdictional element three-part inquiry set forth above. *Latham*, [117 M.S.P.R. 400](#), ¶ 66; *see Coles v. U.S. Postal Service*, [118 M.S.P.R. 249](#), ¶ 18 (2012). Thus, we find that the appellant is entitled to a jurisdictional hearing at which she must prove the fourth restoration appeal jurisdictional element by preponderant evidence.⁴ *Penna v. U.S. Postal Service*, [118 M.S.P.R. 355](#), ¶¶ 10-11 (2012); *Coles*, [118 M.S.P.R. 249](#), ¶ 18. We therefore remand this appeal so that the administrative judge can further inform the appellant of what she must prove, allow her to engage in discovery regarding the three part *Latham* inquiry set forth above, and afford her a jurisdictional hearing. If the appellant proves jurisdiction through preponderant evidence, she will have also proven the merits of her restoration appeal. *Penna*, [118 M.S.P.R. 355](#), ¶ 6; *Corum v. U.S. Postal Service*, [118 M.S.P.R. 288](#), ¶ 81 (2012).

⁴ We find that the record already contains undisputed evidence proving the first three restoration appeal jurisdictional elements. IAF, Tab 5 at 85-87. Thus, at the jurisdictional hearing, the parties need only address the fourth jurisdictional element using *Latham's* three-part inquiry set forth above.

Finally, we note that the appellant made general statements that the agency's denial of restoration constituted a prohibited personnel practice and discrimination. IAF, Tab 4 at 1. The Board has held that a denial of restoration based on discrimination or reprisal for protected activity is also arbitrary and capricious and that, in a restoration case, such claims are better understood as independent claims or alternative means to show that the denial of restoration was arbitrary or capricious. *Latham*, [117 M.S.P.R. 400](#), ¶ 58 & n.27. Thus, on remand the administrative judge should also inform the appellant of her burdens of proof regarding her claims of a prohibited personnel practice and discrimination and afford the appellant the opportunity to either abandon those claims or to assert nonfrivolous allegations of fact in support of those claims. IAF, Tab 4 at 1. If the appellant asserts nonfrivolous allegations of discrimination or reprisal for protected activity, the administrative judge should allow the appellant to present evidence and separately consider any such claims in regard to whether the appellant has proven that the agency's denial of restoration was arbitrary and capricious. *Latham*, [117 M.S.P.R. 400](#), ¶¶ 58-59, 65, 75.

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.