

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

2012 MSPB 118

Docket Nos. DA-0752-10-0393-I-1
DA-3443-11-0487-I-1

Kathy L. Davis,

Appellant,

v.

United States Postal Service,

Agency.

October 24, 2012

James C. Latham, Amarillo, Texas, for the appellant.

Paul C. Wolf, Esquire, Dallas, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decisions in these two appeals, which we now JOIN.¹ For the reasons discussed below, we REVERSE IN PART and AFFIRM IN PART the initial decision in *Davis v. U.S. Postal Service*, Docket No. DA-0752-10-0393-I-1. In addition, we VACATE the

¹ Joinder of two or more appeals filed by the same appellant is appropriate where doing so would expedite processing of the cases and will not adversely affect the interests of the parties. *Tarr v. Department of Veterans Affairs*, [115 M.S.P.R. 216](#), ¶ 9 (2010); [5 C.F.R. § 1201.36](#)(a), (b). We find that these appeals meet the regulatory criteria.

initial decision in *Davis v. U.S. Postal Service*, Docket No. DA-3443-11-0487-I-1, and DISMISS the appeal under the doctrine of res judicata.

BACKGROUND

¶2 These cases involve the agency's now discontinued National Reassessment Process (NRP) and are subject to the subsequent guidance provided by the Board in *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#) (2012).² The appellant was a nonpreference eligible Mail Processing Clerk at the agency's Jordan Station Post Office. *Davis v. U.S. Postal Service*, MSPB Docket No. DA-0752-10-0393-I 1, Initial Appeal File (IAF 0393), Tab 1 at 2. The appellant sustained a compensable injury on September 15, 1995, and thereafter worked in a series of modified assignments, most recently in a rehabilitation assignment performing various duties pertaining to Post Office Box mail, Accountable mail, and Postage Due mail. IAF 0393, Tab 19, Subtab SS. On April 27, 2010, the agency notified the appellant that there were no operationally necessary tasks within her local commuting area that she could perform within her medical restrictions and that she was not to return to work unless the agency informed her that work within her medical restrictions had been identified. IAF 0393, Tab 8 at 38.

¶3 The appellant filed a Board appeal, arguing that the agency's action constituted an arbitrary and capricious denial of restoration and that it was the result of disability discrimination, age discrimination, and harmful procedural error. IAF 0393, Tab 26 at 1-2. After a hearing, the administrative judge issued an initial decision denying the appellant's claim. IAF 0393, Tab 31 at 2, 13. He found that the appellant failed to prove that the denial of restoration was arbitrary and capricious, *id.* at 8, and that the appellant failed to prove her claims of

² The stated purpose of the NRP was to review current modified assignments within the agency in order to ensure that the assignments consist only of "operationally necessary tasks" within the employee's medical restrictions. See *Latham*, [117 M.S.P.R. 400](#), ¶ 2 n.4.

discrimination and harmful error, *id.* at 10-12. The appellant filed a petition for review.

¶4 While her petition for review was pending before the Board, the appellant filed another appeal based on the same underlying facts. *Davis v. U.S. Postal Service*, MSPB Docket No. DA-3443-11-0487-I-1, Initial Appeal File (IAF 0487), Tab 1. The appellant reasserted her previous claims and argued more specifically that the agency had failed to comply with the May 24, 2011 Final Rule of the Equal Employment Opportunity Commission implementing the Americans with Disabilities Act Amendments Act of 2008. *Id.* at 3. It appears that the appellant viewed the newly enacted Final Rule as giving rise to a separate cause of action. IAF 0487, Tab 5 at 1, Tab 7 at 1, Tab 9 at 3-4. The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF 0487, Tab 11 at 1, 7. He found that the appellant was collaterally estopped from relitigating the issue of whether the agency arbitrarily and capriciously denied her restoration and that the Board lacks jurisdiction to adjudicate her discrimination claims as separate matters. *Id.* at 6-7. The appellant filed a petition for review in that appeal as well.

ANALYSIS

Davis v. U.S. Postal Service, MSPB Docket No. DA-0752-10-0393-I-1.

¶5 In order to establish Board jurisdiction over a restoration appeal under [5 C.F.R. § 353.304](#)(c), 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 because of the agency's failure to perform its obligations under [5 C.F.R. § 353.301](#)(d). *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1104 (Fed. Cir. 2011); *Latham*, [117 M.S.P.R. 400](#), ¶ 10.

If an appellant establishes jurisdiction over a [5 C.F.R. § 353.304](#)(c) appeal, she automatically prevails on the merits. *Scott v. U.S. Postal Service*, [118 M.S.P.R. 375](#), ¶ 7 (2012). For the reasons explained in the initial decision, the administrative judge correctly found that the appellant satisfied the first three criteria. IAF 0393, Tab 31 at 6-7. Therefore, the only remaining issue is whether the appellant has shown that the denial of restoration was arbitrary and capricious. For the following reasons, we find that she has.

¶6 The administrative judge found below that the agency complied with its minimum obligations under [5 C.F.R. § 353.301](#)(d) by conducting a search of the local commuting area, and we discern no error in that finding. However, the Board has since found in *Latham* that a denial of restoration is per se arbitrary and capricious if the agency violated its own agency-specific restoration rules, even if those rules afford greater protections than the minimum requirements of 5 C.F.R. § 353.301(d). [117 M.S.P.R. 400](#), ¶¶ 12-16.

¶7 Here, the appellant alleged that the agency's denial of restoration was in violation of various agency-specific rules. The administrative judge considered these alleged procedural violations as an "affirmative defense" of harmful error under [5 U.S.C. § 7701](#)(c)(1)(A) and found that the appellant "failed to show how, even if such violations occurred, that the agency would have reached a different conclusion in the absence of the error." IAF 0393, Tab 31 at 11; *see Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681, 685 (1991). However, the concept of an "affirmative defense" does not apply to a restoration appeal. *See Latham*, [117 M.S.P.R. 400](#), ¶ 58 n.27. The appellant's claim that the agency violated its own rules in denying her restoration should instead be considered as an alternative means for establishing that the denial was arbitrary and capricious. *Cf. id.* (appellant's claims of discrimination and reprisal to be understood not as affirmative defenses but rather as independent claims or alternative ways to show that the denial of restoration was arbitrary and capricious). The harmful error test does not govern this inquiry because a denial of restoration may be arbitrary and

capricious even if the agency could have properly denied restoration in the absence or cure of the procedural error. *Cf. Tram v. U.S. Postal Service*, [118 M.S.P.R. 388](#), ¶ (2012) (where denial of restoration was arbitrary and capricious due to a failure to search throughout the local commuting area, the proper remedy was a retroactive job search consistent with the agency's restoration obligations under [5 C.F.R. § 353.301](#)(d)).

¶8 Significantly, the appellant contends that, among other alleged procedural errors, the agency violated its obligations under the Employee and Labor Relations Manual (ELM) § 546 and Handbook EL-505. Pursuant to ELM § 546 and EL-505, chapters 7 and 11, the Postal Service has agreed to restore partially recovered individuals to duty in whatever tasks are available regardless of whether those tasks comprise the essential functions of an established position. *Latham*, [117 M.S.P.R. 400](#), ¶¶ 31-33. 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, and the transfer of work does not violate any other law, rule, or regulation, including any contractual provision limiting the agency's authority to assign work. *Id.*, ¶¶ 31-33.

¶9 The appellant presented preponderant evidence below, and she has reasserted on review, that the tasks she performed as part of her modified assignment are now being performed by other employees on an overtime basis and by managers. Petition for Review (PFR) File 0393, Tab 1 at 7, Tab 19, Exhibit L at L2-2 through L2-8; Hearing Compact Disc (testimonies of Clerk Daniel Boone, Distribution Clerk Robyn Hofmann, Station Manager Cinnamon Lauban, and the appellant).³ Although there was some dispute over whether the

³ The administrative judge admitted into evidence all of the appellant's prehearing submissions, Exhibits A – VV, at the commencement of the hearing. IAF 0393,

Jordan Station Post Office was incurring more overtime than it had prior to the discontinuation of the appellant's modified assignment and over what particular duties employees were performing while accruing their overtime hours, we find that these issues are immaterial. *See Latham*, [117 M.S.P.R. 400](#), ¶ 32 (recognizing the fungibility of work). We therefore find that the appellant established by preponderant evidence that the reassignment of her duties was not necessary to provide sufficient work to previously underburdened employees, and, thus, the discontinuation of her modified duty assignment violated the agency's rules regarding its modified duty obligations. *See id.*, ¶ 33. Because an agency's failure to adhere to the restoration obligations it has voluntarily adopted is per se arbitrary and capricious, we find that the agency's discontinuation of the appellant's modified assignment under the circumstances of this case constitutes an arbitrary and capricious denial of restoration. *See id.*, ¶¶ 16, 42. We therefore REVERSE the initial decision in regard to the appellant's restoration claim.

¶10 This case differs from *Ayers-Kavtaradze v. Office of Personnel Management*, [91 M.S.P.R. 397](#), ¶ 12 (2002), *Pastor v. Department of Veterans Affairs*, [87 M.S.P.R. 609](#) (2001), and similar cases in which the Board announced a new rule after the record had closed and then remanded to allow the parties to submit additional argument and evidence tailored to the new rule. Although *Latham* was not decided until after the appellant herein filed her petition for review, the agency could reasonably have been expected to attempt to rebut her evidence that the tasks making up her modified duty assignment were being performed by other employees on an overtime basis and by managers—evidence she argued showed that the agency's decision to withdraw her assignment was arbitrary and capricious. Accordingly, we can fairly decide this case on the current record.

Volumes 3-5, Tab 19; Volume 6, Tab 32, Hearing Compact Disc (administrative judge's rulings at the start of the hearing).

¶11 Our ruling on the appellant’s restoration claim obviates the need to address further any other claims of error that are related to the restoration claim. We will therefore consider the appellant’s other claims as they may relate to the administrative judge’s rulings on her disability and age discrimination claims.⁴ As with the appellant’s claims of procedural error, the administrative judge should have considered the appellant’s discrimination claims not as affirmative defenses, but rather as alternative means of establishing that the denial of restoration was arbitrary and capricious, or as separate claims. *See Latham*, [117 M.S.P.R. 400](#), ¶ 58 n.27. Nevertheless, for the following reasons, we find that the record is complete with respect to the appellant’s discrimination claims, and we agree with the administrative judge’s ultimate conclusion that the appellant failed to prove those claims

⁴ As a federal employee, the appellant’s claim of disability discrimination arises under the Rehabilitation Act. However, the standards under the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act. [29 U.S.C. § 791\(g\)](#). Further, the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110–325, 122 Stat. 3553 (2008) (codified at [42 U.S.C. §§ 12101](#) et seq.), applies to this appeal because the incidents in question occurred after the January 1, 2009 effective date of the ADAAA. The Equal Employment Opportunity Commission issued amended regulations implementing the ADAAA that became effective May 24, 2011. *See* 76 Fed. Reg. 16,978 (2011) (codified at 29 C.F.R. Part 1630). Those regulations also apply to this appeal, which was pending on May 24, 2011. *See Doe v. Pension Benefit Guaranty Corporation*, [117 M.S.P.R. 579](#), ¶¶ 38-39 (2012); *Southerland v. Department of Defense*, [117 M.S.P.R. 56](#), ¶¶ 25-28 (2011). The initial decision reflects that the administrative judge properly considered the appellant’s disability discrimination claim in accordance with the ADAAA. IAF 0393, Tab 31 at 9. Moreover, if we treat the appellant’s initiation of a second appeal claiming rights under the new regulations as an amendment to her pleadings in this appeal, the appellant has not identified any specific provision of those regulations that would affect the outcome or require a different interpretation of the ADAAA than the one that the administrative judge applied. Notably, the administrative judge assumed for purposes of analysis that the appellant is disabled, so the ADAAA’s liberalization of the definition of “disability” does not help the appellant. Additionally, the ADAAA did not change the rules regarding reasonable accommodation, *Sanchez v. Department of Energy*, [117 M.S.P.R. 155](#), ¶ 16 n.5 (2011), so the new regulations do not affect the administrative judge’s conclusion that the agency did not violate the appellant’s right to reasonable accommodation.

¶12 The appellant argues on review that the administrative judge denied her the ability to call eleven witnesses during the hearing, three of which may be related to her discrimination claims—Martrecia Boone, Malissa Alexander, and Darla Lopez. PFR File 0393, Tab 1 at 3-4. The record reflects that the administrative judge denied the request for these witnesses in the summary of the prehearing conference on the basis that their testimony would have been irrelevant or unduly repetitious. IAF 0393, Tab 26 at 2. The summary informed the parties that, if either of them disagreed with the contents of the summary, a written objection to the summary had to be filed with the administrative judge. *Id.* at 3. Because the appellant did not file a written objection to the exclusions of these witnesses below, she is precluded from doing so on review. *Miller v. U.S. Postal Service*, [117 M.S.P.R. 557](#), ¶ 8 (2012).

¶13 The appellant also generically asserts that she was denied discovery by the agency and that the administrative judge erred in denying her motion to compel discovery. PFR File 0393, Tab 1 at 5. The prehearing summary’s discussion of the appellant’s motion to compel reflects that “[d]uring the status conference on November 2, 2010, the agency confirmed that it had responded to the appellant’s discovery requests. Therefore, no ruling was necessary on the appellant’s motion to compel discovery.” IAF 0393, Tab 26 at 3. Thus, the administrative judge effectively denied the motion on the ground that the agency had shown that it had tendered the discovery requested. Because the summary informed the parties of the need to file written objections to the contents of the summary and the appellant did not file a written objection stating what, if any, discovery she still had not received, she is precluded from doing so on review. *See Miller*, [117 M.S.P.R. 557](#), ¶ 8. Indeed, the appellant has not even stated on review what, if any, discovery she had not received.

¶14 We have considered the appellant’s other arguments regarding the administrative judge’s rulings on her discrimination claims and find that they

show no error in the administrative judge's well-reasoned analysis of and rulings on those claims. PFR File 0393, Tab 1 at 5; IAF 0393, Tab 31 at 9-12.

Davis v. U.S. Postal Service, MSPB Docket No. DA-3443-11-0487-I-1.

¶15 We agree with the administrative judge that this appeal should be dismissed because it pertains to the same underlying matter as the appellant's other appeal, and the Equal Employment Opportunity Commission's issuance of regulations implementing the Americans with Disabilities Act Amendments Act of 2008 does not give rise to a separate cause of action. However, we wish to clarify the legal basis for dismissal.

¶16 Under certain circumstances, an appellant who has failed to establish Board jurisdiction in one appeal may be collaterally estopped from establishing jurisdiction in a second appeal based on the same underlying cause of action. *E.g.*, *Penna v. U.S. Postal Service*, [118 M.S.P.R. 355](#), ¶ 12 (2012). We find, however, that the doctrine of collateral estoppel does not apply in this case. Collateral estoppel bars the relitigation of issues that have previously been fully litigated and made part of a final judgment. *Zgonc v. Department of Defense*, [103 M.S.P.R. 666](#), ¶ 6 (2006), *aff'd*, 230 F. App'x 967 (Fed. Cir. 2007). Because the petition for review in the '0393 appeal was still pending when the appellant filed the '0487 appeal, the administrative judge's previous finding that the denial of restoration was not arbitrary and capricious had not yet been made part of a "final judgment," and therefore the doctrine of collateral estoppel did not apply. *See id.* Rather, the more appropriate disposition for the '0487 appeal at the time would have been dismissal on the grounds of adjudicatory efficiency. *See Zgonc*, [103 M.S.P.R. 666](#), ¶ 6; *McNeil v. Department of Defense*, [100 M.S.P.R. 146](#), ¶ 11 (2005). The instant case is particularly illustrative of the reason for this: The Board has now reversed the administrative judge's finding in the '0393 appeal and found that the denial of restoration was arbitrary and capricious, so the appellant is in fact not precluded from establishing that jurisdictional requirement

in the '0487 appeal. Indeed, we find that the Board does have jurisdiction over the '0487 appeal.

¶17 Nevertheless, we find that it is now appropriate to dismiss the appeal under the doctrine of res judicata.⁵ See *Hicks v. U.S. Postal Service*, [83 M.S.P.R. 599](#), ¶12 (1999) (res judicata is not a basis to dismiss an appeal for lack of jurisdiction, but rather, a basis to dismiss an appeal over which the Board has jurisdiction). Res judicata, or claim preclusion, prevents parties from litigating claims that were brought or could have been brought in a prior action. *Carson v. Department of Energy*, [398 F.3d 1369](#), 1375 (Fed. Cir. 2005). It applies if: (1) The prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Carson*, 398 F.3d at 1375. We find that all three of these criteria are met in the instant appeal. The final decision in the '0393 appeal has been rendered by the Board, which has jurisdiction to decide the appeal under [5 C.F.R. § 353.304\(c\)](#). The outcome of that decision is a judgment on the merits granting the appellant's request for corrective action, and the same cause of action (the April 27, 2010 denial of restoration) and the same parties (Kathy L. Davis and the U.S. Postal Service) are involved in both cases.

¶18 We therefore VACATE the initial decision in the '0487 appeal and DISMISS the appeal under the doctrine of res judicata.

⁵ Although we find that dismissal as res judicata is now the appropriate disposition for the '0487 appeal, it would not have been the appropriate disposition below for the same reason that collateral estoppel did not apply, i.e., the Board had not yet rendered a final decision in the '0393 appeal. See *Holloway v. Department of Veterans Affairs*, [56 M.S.P.R. 422](#), 424-25 (1993).

ORDER IN *DAVIS V. U.S. POSTAL SERVICE*,
MSPB DOCKET NO. DA-0752-10-0393-I-1

¶19 We ORDER the agency to restore the appellant to her former modified assignment effective April 27, 2010. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). 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 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).

¶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 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).

¶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.

ORDER IN *DAVIS V. U.S. POSTAL SERVICE*,
MSPB DOCKET NO. DA-3443-11-0487-I-1

¶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 IN *DAVIS V. U.S. POSTAL SERVICE*, MSPB
DOCKET NO. DA-0752-10-0393-I-1

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 IN *DAVIS V. U.S. POSTAL SERVICE*,
MSPB DOCKET NO. DA-0752-10-0393-I-1

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\(f\)](#) 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.ca9.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.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS IN *DAVIS V. U.S. POSTAL SERVICE*,
MSPB DOCKET NO. DA-3443-11-0487-I-1

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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.ca9.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.