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December 6, 2012

Office of the Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Re: James C. Latham, et al. v. U.S. Postal Service
Docket No. DA-0353-10-04081-1

Dear Sir:

Pursuant to the Board's Order, dated December 13, 2011, we submit for filing in the above matter a post-argument brief on behalf of amicus the National Association of Letter Carriers, along with attachments thereto.

As stated in the Board's Order the Office of the Clerk will serve on the parties copies of this brief.

Sincerely,



Keith E. Secular

Enclosures

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INTRODUCTION

In accordance with the Board's order, dated December 13, 2011, the National Association of Letter Carriers, AFL-CIO (NALC), submits the following brief addressing matters raised during the oral argument in this appeal.

I. Relationship of NRP to the ELM

During the argument, the Board repeatedly inquired as to whether the Postal Service's unilaterally implemented National Reassessment Process (NRP) had superseded the collectively-bargained regulations governing the assignment of limited duty embodied in subchapter 546 of the Employee and Labor Relations Manual (ELM). In fact, this very question was the crux of a national-level grievance initiated by the NALC. The grievance contended, in pertinent part, that the NRP violated the parties' collective bargaining agreement by implementing a new "necessary work" standard for the creation and continuation of limited duty and rehabilitation assignments.

The grievance was resolved by a settlement, dated June 18, 2009, a copy of which is submitted herewith as Attachment A. The settlement expressly provides that "[t]he NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The ELM 546 has not been amended and remains applicable to all pending grievances." The settlement also specifically states that "[t]he Postal Service has not developed new criteria for assigning limited duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of ELM 546 and 5 C.F.R., Part 353."

Appellants are absolutely correct in asserting that the application of the NRP has resulted in widespread violations of the ELM at the local level. However, under the national level settlement, all such violations may be remedied through the grievance

procedure. Individual grievances involving the application of the NRP to particular employees must be resolved in strict conformity with the requirements of ELM 546.

II. The Statutory Term “Overcome” Does Include Partial Recovery

The Postal Service’s principal argument in this case is that OPM’s regulations, 5 C.F.R. 353.301(d) and 304(c), governing restoration of partially recovered employees are inconsistent with the underlying statute. Specifically, the Service contends that 5 USC 8151 applies only to employees who fully recover from injuries.

This argument is simply wrong. The statute does not contain any reference to the concept of “full recovery.” Rather, it grants restoration rights to employees who “overcome” their injuries. An injured employee may never achieve a full medical recovery. But when such an employee can return to work, he/she may reasonably be said to have “overcome” the injury. Legislative history, acknowledged by USPS, supports this interpretation. The Senate Report accompanying the 1974 amendments to the Federal Employees Compensation Act specifically states that the Civil Service Commission (now OPM) “is authorized to promulgate regulations covering the rights of employees whose injuries or disabilities are partially overcome, as well as those who have fully overcome their disabilities.” S. Rep. No. 93-1081 (93d Cong., 2d Sess.)(Aug 8, 1974) at p. 4.

In any event, OPM has been given responsibility for interpreting the statute and, under familiar case law, its reasonable interpretation must be accorded deference. *Chevron, U.S.A., Inc. v Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Brandt v Department of the Air Force*, 103 M.S.P.R. 671 (2006).

III. In the Postal Service, Employees Working Limited Duty Assignments Continue to Occupy Their “Former or Equivalent Positions”

The Postal Service also argues that regulations requiring injured employees to be placed in temporary limited duty or rehabilitation assignments are not subject to enforcement by the Board because those regulations exceed the requirements of the statute. It stresses that 5 U.S.C. §8151(b) speaks of placement of an employee in “his former or equivalent position,” which, according to the Service, means that reinstatement is required only when an employee can be placed in a permanent assignment. By contrast, the Service argues, ELM 546 contemplates the assignment of partially recovered employees to non-permanent limited duty or rehabilitation assignments created solely to accommodate the employee’s medical limitations.

But this argument obfuscates the relevant postal terminology. All career employees in the Postal Service, including injured employees working limited duty, occupy permanent standard “positions,” such as “City Letter Carrier” or “Distribution Clerk.” For example, when an injured letter carrier is given a temporary, limited duty assignment, there is no change in his/her official employment status. The employee is still listed on the Postal Service employment rolls as occupying the permanent position of “City Letter Carrier.” Even when an employee is given a specially created modified assignment in another craft, so that a new “Form 50” must be cut, the Form will still show that the employee assigned to a standard career position.¹ Thus, the reinstatement of

¹ Submitted herewith as Attachment B are four pages from the Postal Service’s Handbook EL-505. The first two pages show that when an injured employee is reassigned, or returned to work after having been off-duty, the Postal Service must make an appropriate entry on a Form 50, Notification of Personnel Action. The last two pages are sample Form 50’s included in the EL-505. These samples clearly show that a current employee reassigned to limited duty, or a former employee reinstated to active employment, will still have a standard position title. (See line 52 of the Forms.)

such an employee is entirely consistent with the statutory concept of placing the employee in his “former or equivalent position.”

The Board has recognized that injured Postal Service employees working temporary assignments are still classified as occupying permanent positions in the *Anchetta* line of cases. In *Anchetta v Office of Personnel Management*, 95 M.S.P.R. 343 (2003), the question presented was whether the appellant was entitled to a disability retirement even though she was physically capable of performing the duties of the modified letter carrier assignment which she had been working after being injured. In answering this question affirmatively, the Board found that because the modified letter carrier duties to which appellant was assigned did not constitute a “position,” it necessarily followed that “the appellant’s position of record, i.e., the relevant position for disability retirement purposes, was the “Carrier (City) position to which she was originally appointed.” *Id.*, at 351.

Since *Anchetta*, the Board has consistently recognized that injured postal employees assigned to temporary limited duties or rehabilitation assignments continue to occupy permanent positions of record. See, *Starks v Office of Personnel Management*, 96 M.S.P.R. 4 (2004); *Bell v Office of Personnel Management*, 95 M.S.P.R. 386 (2004); see also, *Cadman v Office of Personnel Management*, 106 M.S.P.R. 192 (2007) (remand necessary to determine whether injured letter carrier assigned to modified clerk position had been given new position of record in clerk craft); *Hussey v Office of Personnel Management*, 102 M.S.P.R. 324 (2006) (same).

These cases clearly demonstrate that reinstating an injured Postal Service employee to a limited duty or rehabilitation assignment does fall within the scope of

Section 8151's requirement that such an employee be placed "in his former or equivalent position."

IV. OWCP Policy

The Postal Service's opening brief contained an erroneous statement concerning the Office of Workers Compensation Programs (OWCP) position with respect to an injured employee's right to decline offers of work. Although this matter is not strictly relevant to the issues identified by the Board, we are concerned that the Postal Service's misstatement might be reflected in the Board's ruling.

The Postal Service brief (pp. 17 and 30) states that if a job offer was temporary or part-time (where the injured worker was career and full-time) an employee could refuse it without the refusal impacting receipt of OWCP wage-loss compensation. In fact, if the duties of a job offer are within an injured worker's medical restrictions, he/she must accept such work, even if it is temporary or part-time. If an employee refuses such work, OWCP will not pay wage-loss compensation.

The foregoing is confirmed by a letter from OWCP Acting Director Gary Steinberg to NALC, dated December 16, 2011, a copy of which is submitted herewith as Attachment C.

CONCLUSION

The Board should uphold its jurisdiction in the cases under review.

January 6, 2012

Respectfully submitted,



Keith E. Secular, Esq.
Claire Tuck, Esq.
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New York, NY 10036
(212) 563-4100

Attorneys for Amicus National
Association of Letter Carriers, AFL-
CIO

ATTACHMENT A

M-01706

Mr. William H. Young
President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington, DC 20001-2144

Re: Q01N-4Q-C-07190177
Class Action
Washington, DC 20260-4110

Dear Mr. Young:

Recently, our representatives met in prearbitration discussion of the above-referenced grievance.

This grievance was filed regarding the Postal Service's application of the National Reassessment Program (NRP). The grievance contained three issues. The first issue involves the Union's contention that through the NRP the Postal Service has implemented a new 'necessary work' standard for the creation and continuation of limited duty and rehabilitation assignments. The second issue involves the Union's contention that as part of the NRP the Postal Service has developed new criteria for assigning limited duty. The third issue concerned the potential impact of the NRP on employees assigned to light duty under Article 13 of the Agreement.

In resolution of these issues the parties agree as follows:

1. The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The ELM 546 has not been amended and remains applicable to all pending grievances.
2. The Postal Service has not developed new criteria for assigning limited duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of ELM 546 and 5 C.F.R., Part 353.
3. Employees on existing non-workers' compensation light duty assignments made pursuant to Article 13 of the National Agreement will not normally be displaced solely to make new limited duty or rehabilitation assignments unless required by law or regulation. The foregoing sentence does not establish any guarantee of daily work hours for employees in a light duty assignment.

All grievances which have been held in abeyance will be processed in accordance with the foregoing.

This settlement is without prejudice to the right of the Postal Service to propose changes to ELM 546 in accordance with the Article 19 process.

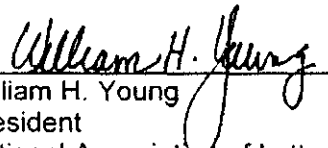
Please sign and return the enclosed copy of this settlement as your acknowledgment that this case is closed, removing it from the national arbitration docket.

Time limits were extended by mutual consent.

Sincerely,



Alan S. Moore
Manager, Labor Relations
Policy and Programs
U.S. Postal Service



William H. Young
President
National Association of Letter
Carriers, AFL-CIO

Date: 6/18/2009

ATTACHMENT B



INJURY COMPENSATION

Handbook EL-505

December 1995

HBK EL-505, INJURY COMPENSATION, DECEMBER 1995
LIMITED DUTY PROGRAM MANAGEMENT

Questions and Answers About Limited Duty

- Q. *What are the differences between limited duty and light duty?*
- A. Limited duty is provided to employees who have partial disabilities which stem from a *job-related* injury or illness.
- Limited duty does not have to be requested, rather it is made available and offered.
- Limited duty comes under the purview of FECA 5 U.S.C. 8101, et. seq.
- Normally, light duty is provided to employees who have partial disabilities from *non-job-related* medical conditions.
- Light duty must be requested in writing.
- Light duty comes under the purview of Article XIII of the National Agreement (including but not limited to American Postal Workers Union (APWU) and National Association of Letter Carriers (NALC).)
- Q. *If a full-time employee's schedule is changed as a result of being placed in a limited duty assignment, is such employee entitled to out-of-schedule premium pay?*
- A. No. Exceptions to the obligation to pay "out-of-schedule premium" to full-time employees for work performed outside of schedule include situations in which the employee's schedule is temporarily changed for a limited duty assignment as required by FECA, as amended (Handbook F-21, *Time and Attendance*, 232.23b).
- Q. *If an eligible employee who is regularly assigned to a night tour of duty is rescheduled to limited duty on the day tour, is the employee entitled to receive an equivalent amount of night differential when rescheduled to day work?*
- A. Yes. COP and compensation payments both include night differential. Thus, if the employee is not compensated for the loss in salary (i.e., night differential), the employee would be entitled to COP (if otherwise eligible) or compensation. If the employee is entitled to COP, night differential can be paid as COP and count as a "COP day," even though the employee works 8 hours of limited duty.
- Q. *If a limited duty employee is found to have permanent partial disabilities resulting from a job injury, can the limited duty assignment be made permanent?*
- A. No. All limited duty assignments are temporary. If medical documentation confirms that an employee has permanent physical restrictions, the employee must be officially reassigned, i.e., a Form 50, *Notification of Personnel Action*, is initiated to show a rehabilitation program classification (see Chapter 11, Rehabilitation Program).
- Q. *To what labor distribution code (LDC) or operation should limited duty hours be charged?*
- A. Generally, limited duty hours are charged to LDC 68, operation 959.

HBK EL-505, INJURY COMPENSATION, DECEMBER 1995
TIMEKEEPING AND ACCOUNTING

13.14 Notifying Personnel of LWOP Status — ICCO or designated control point personnel

- When an employee has been in an LWOP status more than 30 days, notify the personnel services office to prepare Form 50 (see Exhibit 13.14a, Sample Letter: Personnel Notification — Leave Without Pay). The form will be submitted to the Minneapolis Information Systems Service Center (MNISSC) and annotated under item 50, Remarks, "LWOP for the purpose of receiving workers' compensation under PL93-416." The employee LDC should be changed to "67."
- When the employee returns to duty, notify the personnel services office via memo to update Form 50; item 50 to read "Return to duty" (see Exhibit 13.14b, Sample Letter: Personnel Notification — Return to Duty). The LDC must then be changed back to the appropriate LDC.

HBK EL-505, INJURY COMPENSATION, DECEMBER 1995
REHABILITATION PROGRAM

Exhibit 11.11b
Sample Form 50 Actions



NOTIFICATION OF
PERSONNEL ACTION

01 EFFECTIVE DATE
12-23-95

02 SOCIAL SECURITY NUMBER
111-03-1225

EMPLOYEE INFORMATION

03 EMPLOYEE NAME-LAST DOE
04 EMPLOYEE NAME-FIRST JANE
05 EMPLOYEE NAME-MIDDLE
06 MAILING ADDRESS
STREET/BOX/APT 124 FIRST STREET
07 MAILING ADDRESS-CITY BALTIMORE
08 MAILING ADDRESS-STATE MD
09 MAILING ADDRESS-ZIP+4 21231-1234
10 DATE OF BIRTH 07-26-55
11 VETERANS PREFERENCE 2-5 POINTS
12 SEX
13 MINORITY
14 DISABILITY
15 LEAVE COMP DATE 02-05-79
16 ENTER ON DUTY DATE 02-05-79
17 RETIREMENT COMP DATE 02-05-79
18 SERV ANNIVERSARY PPYR 04-79
19 TSP ELIGIBILITY E-ELIGIBLE W/O DEDUCT
20 TSP SERVICE COMP DATE
21 PRIOR CSRS SERVICE
22 FROZEN CSRS TIME
23 LEAVE DATA-CATEGORY 8-HOURS/PP
24 LEAVE DATA-CHG PPYR 04-94
25 LEAVE DATA-TYPE 1-ADVANCED AT BEGINNING
26 CREDIT MILITARY SERV
27 RETIRED MILITARY
28 RETIREMENT PLAN 1-CSRS
29 EMPLOYEE STATUS RD-REINS COMP CURRY EMP
30 LIFE INSURANCE C-BASIC COVERAGE ONLY
31 SPECIAL BENEFITS

POSITION INFORMATION

32 EMPLOY OFFICE-FIN NO 23-0378
33 EMPLOY OFFICE-NAME BALTIMORE/AO'S
34 EMPLOY OFFICE-ADDRESS
BALTIMORE
MD 21233-9998
35 DUTY STATION-FIN NO 23-0378
36 DUTY STATION-NAME BALTIMORE/AO'S
37 APPY EXPIRATION DATE
38 PROBATION EXPIR DATE

39 FLSA STATUS N-NON-EXEMPT
40 PAY LOCATION 001
41 RURAL CARRIER-ROUTE
42 RURAL CARR-L-RTE ID
43 RURAL CARR-PAY TYPE
44 RURAL CARR-TRX-WEEKLY
45 RURAL CARR-FLSA
46 RURAL CARR-COMMIT
47 RURAL CARR-EHA
48 RURAL CARR-HOURS
49 RURAL CARR-MILES
50 JOB SEQUENCE
51 OCCUPATION CODE 2340-01XX
52 POSITION TITLE GEN CLK
53 LABOR DIST CODE 6900
54 DESIGNATION/ACTIVITY 11/0
55 POSITION TYPE 1-FULL TIME
56 LIMIT HOURS
57 ALLOWANCE CODE
58 EMPLOYMENT TYPE

SALARY INFORMATION

59 PAY RATE CODE A-ANNUAL RATE
60 RATE SCHEDULE CODE P-PS
61 GRADE/STEP 05/0
62 SALARY 36,031
63 COLA
64 COLA ROLL-IN IMD
65 NEXT STEP PPYR
66 MERIT ANNIV DATE
67 MERIT LUMP SUM
68 SPECIAL SALARY CODE
69 PROTECTED RSC
70 PROTECTED GRADE/STEP
71 EXPIRATION PPYR
72 PROTECTED RC HOURS
73 PROTECTED RC MILES
74 RC GUARANTEED SALARY
75 ANNUITY AMOUNT
76 RED CIRCLE CODE 0

NATURE OF PERSONNEL ACTION

77 NATURE OF ACTION CODE 721
79 DESCRIPTION REASSIGNMENT
84 REMARKS
78 AUTHORITY 39-USC Sect 1001
80 CODE 81 CODE 82 CODE 83 CODE

85 AUTHORIZATION VICE PRESIDENT, AREA OPERATIONS
86 PROCESSED DATE 12-28-95
87 PERSONNEL OFFICE ID
88 OFF LOCATION

HBK EL-505, INJURY COMPENSATION, DECEMBER 1995
REHABILITATION PROGRAM

Exhibit 11.11b
Sample Form 50 Actions (continued)



01 EFFECTIVE DATE
12-23-95

NOTIFICATION OF
PERSONNEL ACTION

02 SOCIAL SECURITY NUMBER
111-02-1225

EMPLOYEE INFORMATION

03 EMPLOYEE NAME-LAST SMITH
04 EMPLOYEE NAME-FIRST JOHN
05 EMPLOYEE NAME-MIDDLE
06 MAILING ADDRESS 124 FIRST STREET
STREET/BOX/APT
07 MAILING ADDRESS-CITY BALTIMORE
08 MAILING ADDRESS-STATE MD
09 MAILING ADDRESS-ZIP+4 21231-1234
10 DATE OF BIRTH
11 VETERANS PREFERENCE
12 SEX
13 MINORITY
14 DISABILITY
15 LEAVE COMP DATE 02-05-79
16 ENTER ON DUTY DATE 02-05-79
17 RETIREMENT COMP DATE 02-05-79
18 SERV ANNIVERSARY PPYR 04-79
19 TSP ELIGIBILITY E-ELIGIBLE W/O DEDUCT
20 TSP SERVICE COMP DATE 00-00-00
21 PRIOR CSRS SERVICE
22 FROZEN CSRS TIME
23 LEAVE DATA-CATEGORY 8-HOURS/PP
24 LEAVE DATA-CHG PPYR 0A-9A
25 LEAVE DATA-TYPE 1-ADVANCED AT BEGINNING
26 CREDIT MILITARY SERV
27 RETIRED MILITARY
28 RETIREMENT PLAN 1-CSRS
29 EMPLOYEE STATUS RD-REINS COMP CURNT EMP
30 LIFE INSURANCE C-BASIC COVERAGE ONLY
31 SPECIAL BENEFITS

POSITION INFORMATION

32 EMPLOY OFFICE-FIN NO 23-0378
33 EMPLOY OFFICE-NAME BALTIMORE/AO'S
34 EMPLOY OFFICE-ADDRESS BALTIMORE
MD 21231-9998
35 DUTY STATION-FIN NO 23-0378
36 DUTY STATION-NAME BALTIMORE/AO'S
37 APPT EXPIRATION DATE
38 PROBATION EXPIR DATE

39 FLSA STATUS N-NON-EXEMPT
40 PAY LOCATION 001
41 RURAL CARRIER-ROUTE
42 RURAL CARR-L-RTE ID
43 RURAL CARR-PAY TYPE
44 RURAL CARR-TRI-WEEKLY
45 RURAL CARR-FLSA
46 RURAL CARR-COMMIT
47 RURAL CARR-EMA
48 RURAL CARR-HOURS
49 RURAL CARR-MILES
50 JOB SEQUENCE 1
51 OCCUPATION CODE 2315-04xx
52 POSITION TITLE DIST. CLK.
53 LABOR DIST CODE 6900
54 DESIGNATION/ACTIVITY 11/0
55 POSITION TYPE 1-FULL TIME
56 LIMIT HOURS
57 ALLOWANCE CODE
58 EMPLOYMENT TYPE

SALARY INFORMATION

59 PAY RATE CODE A-ANNUAL RATE
60 RATE SCHEDULE CODE P-PS
61 GRADE/STEP 05/0
62 SALARY 36,031
63 COLA
64 COLA ROLL-IN IND
65 NEXT STEP PPYR
66 MERIT ANNIV DATE
67 MERIT LUMP SUM
68 SPECIAL SALARY CODE
69 PROTECTED RSC
70 PROTECTED GRADE/STEP
71 EXPIRATION PPYR
72 PROTECTED RC HOURS
73 PROTECTED RC MILES
74 RC GUARANTEED SALARY
75 ANNUITY AMOUNT
76 RED CIRCLE CODE 0

NATURE OF PERSONNEL ACTION

77 NATURE OF ACTION CODE 292
78 AUTHORITY 39-USC Sect 1001
79 DESCRIPTION RETURN TO DUTY (RTD)
80 CODE 01 CODE 02 CODE 03 CODE
84 REMARKS

85 AUTHORIZATION VICE PRESIDENT, AREA OPERATIONS
86 PROCESSED DATE 12-28-95
87 PERSONNEL OFFICE ID
88 OFF LOCATION

PS FORM 50, MARCH 1990 (EXCEPTION TO STANDARD FORM 50)

ATTACHMENT C

U.S. Department of Labor

Office of Workers' Compensation Programs
Washington, D.C. 20210



DEC 16 2011

File Number:

Ron Watson
National Association of Letter Carriers
100 Indiana Avenue, NW
Washington, DC 20001-2144

Dear Mr. Watson,

I am writing in response to your letter of October 26, 2011. You have asked for clarification of OWCP's policy on light duty work and suitable work determinations.

As noted in your letter, 20 C.F.R. 10.500 was recently updated. While this update did not change our interpretation of the relevant provisions of the Federal Employees' Compensation Act, the update was made to provide clarity with regard to an injured worker's obligation to perform light duty work when the evidence establishes that work is available within the employee's restrictions. This regulation states, in part, that "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury." This is consistent with one of the key program goals to help employees return to work as soon as their medical condition permits them to do so.

There are critical distinctions; however, between this policy and the suitable employment penalty sanction issued under 5 U.S.C. 8106(c).

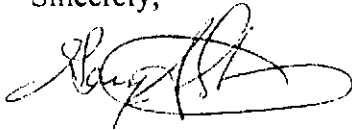
- The general premise regarding light duty assignments discussed in 20 CFR 10.500(a) is that the assignments in these instances are temporary in nature.
- If an assignment is temporary in nature, a formal suitability determination in accordance with 5 U.S.C. 8106(c) cannot be made, unless of course the injured worker was a temporary employee at the time of injury.
- A formal suitability finding terminates a claimant's right to any future wage-loss compensation (as well as schedule award) even if the work-related medical condition worsens.
- A finding that a claimant was not prevented from earning the wages earned before the work-related injury in accordance with 20 CFR 10.500(a) results in a denial of compensation for the period work was available, but does not bar future compensation if a recurrence of disability is established. Entitlement to schedule award is also not affected by this determination, unlike a suitability decision.

From your letter, we understand that you are seeking clarification regarding the impact, if any, on compensation entitlement should an employee refuse an offer of employment and whether a suitability determination is a determining factor. You included the following statement which you indicated was an excerpt from a Postal Service brief to the MSPB: "If an offer is not suitable, an employee's decision to refuse it does not impact the receipt of compensation." This statement is inaccurate as written. We believe our policy is clear that if the evidence establishes

that a light duty assignment within the employee's work restrictions has been offered, compensation for that period is not payable. While a suitability sanction decision under 5 U.S.C. 8106(c) may not be issued if the position cannot be found suitable, a formal decision in accordance with 20 C.F.R. 10.500 can be issued denying compensation on the basis that the claimant was not prevented from earning the wages earned before the work-related injury for the period work was available.

I trust that this response has been helpful in clarifying OWCP's position in regard to light duty work and the payment of compensation. If you believe it would be helpful, OWCP would be happy to discuss this issue further with you and your colleagues as well as the Postal Service, if necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary A. Steinberg", written over a horizontal line.

Gary A. Steinberg
Director