JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE
Docket # DA-0353-10-0408-I-1
Response to Order dated 12/13/2011
Summary Page

Case Title : JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE

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Filer's Name : Matthew J. Dowd, Esq.

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UNITED STATES MERIT SYSTEMS PROTECTION BOARD

JAMES C. LATHAM, RUBY N. TURNER, ARLEATHER REAVES, CYNTHIA E. LUNDY, and MARCELLA ALBRIGHT, Appellants, v. U.S. POSTAL SERVICE, Agency.	Docket Numbers DA-0353-10-0408-I-1 SF-0353-10-0329-I-1 CH-0353-10-0329-I-1 AT-0353-11-0369-I-1 DC-0752-11-0196-I-1

APPELLANTS' JOINT POST-ARGUMENT BRIEF

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The U.S. Postal Service's implementation of and *post hoc* justifications for the National Reassessment Process ("NRP") epitomize arbitrary and capricious conduct by an administrative agency. The NRP violates the Postal Service's long-established rules governing the restoration rights of partially recovered employees. The NRP further disregards standards established in the Employee Labor Manual ("ELM") and other agency rules. The Postal Service has never disputed this conflict—at least until oral argument.

Moreover, during oral argument, the Postal Service's position became a moving target. The Postal Service's counsel asserted, without support, that the restoration standard under the NRP is the same as under the Employee Labor Relations Manual ("ELM"). Yet moments later, agency counsel conceded that "there might be a difference between the ELM and ELM plus NRP." Not only is the latter correct, but the former is a new argument absent from the Postal Service's briefs. The agency's shifting explanations are further evidence of capriciousness.

This case presents a classic agency blunder. Faced with a competitive business environment, the Postal Service sought a new means for eliminating employees. But it failed to consider applicable rules and contractual obligations. The Postal Service instituted the NRP, which imposes a new "operational necessity" standard lacking any basis in the Postal Service's rules and agreements with the unions. Rather than abide by its long-standing rules, the Postal Service targeted loyal employees who had partially recovered from on-the-job injuries. Whatever the financial pressures, the Postal Service should not be permitted to terminate loyal employees in complete disregard of its regulations.

I. THE BOARD HAS JURISDICTION BECAUSE THE NATIONAL REASSESSMENT PROCESS IS ARBITRARY AND CAPRICIOUS

The primary issue before the Board is whether, under 5 C.F.R. §§ 353.301(d) and 353.304(c), the Board has jurisdiction over the present appeals. The answer is yes because the

appellants' removals under the NRP constitute arbitrary and capricious conduct. The NRP itself is arbitrary and capricious because it violates the Postal Service's rules, including ELM § 546.142. Because the NRP is arbitrary and capricious, each appellant has not only satisfied her or his obligation to offer a non-frivolous allegation under 5 C.F.R. § 353.301(d), but each appellant has also proven this element of their claim of restoration denial.

Board jurisdiction lies for a partially recovered employee's restoration claim when the employee non-frivolously alleges that

> (1) [s]he 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 Sys. Prot. Bd., 659 F.3d 1097, 1103 (Fed. Cir. 2011) (quotation omitted). As recently explained by the Federal Circuit, arbitrary and capricious means "agency failure to perform its obligations under 5 C.F.R. 353.301(d)." *Id.* at 1104. Here, if the Postal Service has not made "every effort" to restore the appellants, the Postal Service's restoration denial is arbitrary and capricious. And there is no reasonable dispute that the Postal Service has not made "every effort" because the NRP's "operational necessity" standard conflicts with the ELM and EL-505.

A. An Agency's Conduct Is Arbitrary And Capricious When It Disregards Its Own Rules

A federal agency must follow its own rules. This requirement is no secret and dates back at least some sixty-five years. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), the Court rejected the agency's action based on its "alleged failure to exercise its own discretion, contrary to existing valid regulations." In *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), the Court explained that, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Importantly, this requirement for an agency to abide by its rules "is so even where the internal

procedures are possibly more rigorous than otherwise would be required." *Id.*; *see also Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations.").

The Supreme Court has been particularly cognizant of agency rules protecting employment rights. *See Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959) (reversing removal of employee because agency had not complied with internal rules, even though agency was free to discharge employee); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (same). Agency action amounts to arbitrary and capricious conduct when action contravenes rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in *Vitarelli*." *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970).

The Federal Circuit agrees, observing that "[i]t has long been established that government officials must follow their own regulations, even if they were not compelled to have them at all." *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988); *see also Yuni v. Merit Sys. Prot. Bd.*, 784 F.2d 381, 388 (Fed. Cir. 1986) ("The procedures governing federal employment, by statute and regulation, represent a careful balance of employer and employee needs."); *Dodson v. Dep't of the Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993) ("Although the Secretary was not required to promulgate the . . . regulations, having done so he is bound to follow them.").

Other circuits agree. *See, e.g.*, *Leslie v. Att'y General of the United States*, 611 F.3d 171, 175 (3d Cir. 2010) (noting "the long-settled principle that rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency"); *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004) ("It is an elemental principle of administrative law that agencies are bound to follow their own regulations."); *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003); *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it

promulgates."); *Gaballah v. Johnson*, 629 F.2d 1191, 1202 (7th Cir. 1980) (recognizing that agency rules governing promotions "confer important procedural benefits upon individuals").

Faced with this settled precedent, the Postal Service does not dispute its obligation to follow its rules as set forth in the ELM. Indeed, the Postal Service affirmatively states that requiring an agency to its own rules is "axiomatic and unassailable in general." *See* Agency Reply Br. 4.[1] Therefore, with this agreement, Appellants need only demonstrate a violation of those rules to prove arbitrary and capricious conduct by the Postal Service.

B. The NRP Is Arbitrary And Capricious Because It Violates ELM § 546.142

The agency has explained that the NRP was instituted "to review all rehabilitation and limited duty assignments to ensure that such employees were performing ***operationally necessary*** tasks within their medical restrictions." *Latham v. U.S. Postal Serv.*, No. DA-0752-10-0408-I-1 (Agency's Amended and Supplemental Narrative Response and O[b]jections to Jurisdiction, at 2, filed June 7, 2010) (emphasis added) ("Agency Jurisdiction Brief"). As explained in the multiple briefs to the Board, the NRP violates ELM § 546.142 for several reasons.

First, the NRP's most significant departure from the agency's rules is the "operational necessity" standard. This "operational necessity" standard is not found anywhere in ELM § 546.142. Instead, ELM § 542.142 sets forth the "must make every effort" standard. The Postal Service has not disputed that these two standards are materially different, instead arguing the Board that ELM § 546 provides greater restoration rights. *See* Agency's Opening Br. 4.

[1] The Postal Service inexplicably contends that the issue of whether an agency follows its rules "is unrelated to the issue here." Agency's Reply Br. 4; *cf.* Merit Systems Protection Board, Notice of Opportunity to File Amicus Briefs, 76 Fed. Reg. 44,373, 44,374 (July 25, 2011) (identifying an issue as: "[M]ay the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the agency's own internal rules").

Second, the "operational necessity" standard abolishes restoration rights afforded under the ELM. For example, under ELM § 546.222, "[a] partially recovered current or former employee reassigned or reemployed to a different craft to provide appropriate work must be assigned to accommodate the employee's job-related medical restrictions." The reassignment of the partially recovered employee "may be to a residual vacancy or to a position uniquely created to fit those restrictions." ELM § 546.222.

The new NRP standard has denied restoration to the five appellants—five employees who had been granted restoration pursuant to the Federal Employees' Compensation Act ("FECA"), the ELM, and other applicable Postal Service rules governing restoration. As one example, James. Latham became a casualty of the NRP in April 2010. At that time, Mr. Latham was working at the Armarillo Post Office, maintaining edit books, installing case labels, answering phones, processing address management information, assisting management with reports, and assisting Postal Service customers in the lobby. Agency's Jurisdiction Br. at 4. The Postal Service assigned him this work pursuant to ELM § 546.142 and other applicable agency rules. The Postal Service has not contended that the work Mr. Latham was doing has since disappeared. Instead, under the NRP's new standard, the Postal Service characterized the same work as not "operationally necessary" and thus concluded that Mr. Latham, a partially recovered employee and a preference eligible veteran of the U.S. Army, did not have a right to be restored to perform this work.

In the present appeals, the Postal Service has not disputed the conflicting obligations of ELM § 546.142 and the NRP. Moreover, the Postal Service did not challenge that the NRP is inconsistent with the agency obligations set forth in EL-505. In fact, a fair reading of the Postal Service's briefs establishes the merits of appellants' appeal. First, the Postal Service admits that it is bound to follow its rules, *supra*. Second, the Postal Service in its briefs has never challenged the appellants' assertion that the NRP conflicts with the restoration rights set forth in the ELM. These

two points being established, the appellants have satisfied their obligation to allege arbitrary and capricious agency action. Furthermore, the regulatory and rules violations by the Postal Service are conclusive evidence that the denial of restoration of each of the appellants was arbitrary and capricious within the meaning of § 353.301(d).

During oral argument, and faced with the realization that the "operational necessity" standard is not included in the ELM, agency counsel offered yet another new justification for the NRP—that the "operational necessity" standard was "always an implication under the ELM." Tr. 50:24. When pressed, agency counsel conceded that he did not know of any "objective evidence that the ELM, in fact, incorporates this concept of meaningful work or operational necessity in terms of the modified assignments question." Tr. 57:18-24. The unsupported inherency argument--absent even from the Postal Service's briefs to this Board—does not merit the epithet "attorney argument." It is nothing more than attorney speculation.

Vice Chairman Wagner pinpointed the precise nature of agency counsel's speculation. Responding to counsel's assertion that "operational necessity" was implicitly incorporated into the ELM, Vice Chairman Wagner asked, "But if that were the case, then why did the Postal Service feel the need to create the NRP to begin with?" Tr. 56:20-22. Postal Service counsel had no answer. Tr. 57:2 ("I don't know. I don't know."). The only logical and reasonable answer is that "operational necessity" has never been implicit in the ELM. Instead, the NRP narrowed restoration rights of partially recovered employees by instituting the stricter "operational necessity" standard.

Indeed, the Postal Service's own brief to this Board belies the disingenuous nature of the Postal Service's position at oral argument. The Postal Service has argued that "the provisions of ELM 546 and Handbook EL-505 afford FECA claimants the right to be considered for assignments other than to regular positions. In doing so, they exceed FECA's promise of restoration—or priority consideration for restoration—only to regular positions." Agency's Opening Br. 4. Thus,

the Postal Service has affirmatively argued that ELM provides restoration rights broader than what the agency is obligated to provide.

Aside from this direct analysis, the Postal Service overlooks the deference the Board should afford to the Office of Personnel Management's ("OPM") interpretation of § 353.301(d). Under established precedent, the Board must "defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation[s]'" or there is any other "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Chase Bank USA, N. A. v. McCoy*, 131 S. Ct. 871, 880-81 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)).

Here, OPM concluded that "if the Postal Service established a rule that provided the partially recovered employees with greater restoration rights than the 'minimum' described in the OPM regulations, the Postal Service is required to meticulously follow that rule." OPM Advisory Op. 4. It so concluded because "[t]o do otherwise would be arbitrary and capricious within the meaning of OPM's regulation conferring jurisdiction on the Board at section 353.304(c)." *Id.*

OPM's interpretation of 5 C.F.R. § 353.304(c) must be given deference because it is "the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. OPM's advisory opinion concerning the scope of 5 C.F.R. § 353.304(c) is well-reasoned, and the Postal Service has identified no basis to disagree with OPM's advisory opinion. The Postal Service has not contended that OPM's interpretation of 5 C.F.R. § 353.304(c) is "plainly erroneous or inconsistent with the regulation[s]." *Auer*, 519 U.S. at 461 (quotation omitted). For this reason alone, the Board hold that it has jurisdiction over the present appeals.

At oral argument, counsel for the American Postal Workers Union ("APWU") attempted to limit the scope of restoration rights by suggesting that an agency's violation of its rules is not arbitrary and capricious unless there is some element of bad intent on the part of the agency. This

approach is wrong. It is without any support in the case law. None of the cases discussed above require a showing of malicious intent by the agency in order to prove that an agency's violation of its own rules cannot stand. *See, e.g.*, *Vitarelli*, 359 U.S. at 545; *Service*, 354 U.S. at 388.

Most erroneous with the APWU's approach—and the agency's approach—is the lack of recognition that a violation of ELM § 546.142 is a regulatory violation and not simply a contractual violation. As explained at oral argument, the Postal Service has incorporated the ELM into its regulations, as set forth in the Code of Federal Regulations. *See* 39 C.F.R. § 211.2(a)(2) ("The regulations of the Postal Service consist of: . . . the Employee and Labor Relations Manual . . . ."). Because the ELM is explicitly incorporated into the Postal Services governing regulations, a violation of the ELM is a violation of a Postal Service regulation.

C. The NRP Is Arbitrary and Capricious To The Extent It Violates EL-505, EL-307, And Any Other Applicable Postal Service Rules

The NRP is arbitrary and capricious for similar reasons because it violates restoration rules set forth in EL-505, EL-307, and any other applicable Postal Service rules.

D. Under *State Farm*, The NRP Is Arbitrary And Capricious

In *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), an agency rule is generally arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." The present record suggests that, when instituting NRP, the Postal Service "entirely failed to consider an important aspect of the problem." In fact, the Postal Service has apparently overlooked several important issues.

First, as noted above, the Postal Service has ignored the regulatory significance of the ELM. By express regulation, the ELM is incorporated into the Postal Service's regulations. 39 C.F.R. § 211.2(a)(2). A violation of the ELM is therefore a violation of a Postal Service regulation.

Despite the explicit incorporation, the Postal Service continued to argue that an ELM violation is merely a contractual matter. *See* Tr. 50:10-12.

Second, the Postal Service has overlooked other legal obligations precluding the NRP's implementation. Postal union contracts require enforcement of the various provisions of the ELM and EL-505 and provide reasonable options for addressing reductions in force. For example, Article 13 of one such agreement[2] governs the "assignment of ill or injured regular workforce employees." The Postal Service's violation of contractual agreements renders the NRP even more arbitrary and capricious under a *State Farm* analysis.

Third, the litigation costs for the Postal Service appear to be mounting, and it is unclear whether the Postal Service considered this cost when implementing the NRP. What is plainly obvious is that the Postal Service's increasing costs in defending the NRP in multiple fora. Displaced employees are, to some extent, succeeding in arbitration proceedings based on wrongful denials of restoration. In addition, the Postal Service is defending a class action EEOC complaint based on the NRP and its removal of employees. *McConnell v. Potter*, Appeal No. 0720080054, Agency No. 4B-140-0062-06 (filed Jan. 14, 2010).

Fourth are the unanswered question of how the Postal Service's unique interpretation of § 8151 will affect other federal agencies. Based on the record before the Board, there is no indication that the Postal Service ever considered whether its unique interpretation of § 8151 was contrary to the goals and objectives of other federal agencies. It appears that at least some other federal agencies have adopted the understanding that partially recovered employees have restoration rights under FECA. *See, e.g.*, *New v. Dep't of Veterans Affairs*, 142 F.3d 1259, 1260 (Fed. Cir. 1998).

[2] 2006-2011 National Agreement, between the National Association of Letter Carriers & the United States Postal Service. *See also* Article 6 titled "No Layoffs or Reduction in Force."

Fifth, the Postal Service has provided no explanation as to why the NRP was abruptly halted in January 2011. Such agency flip-flopping is a classic sign of arbitrary and capricious conduct. *See, e.g.*, *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir. 2002) ("While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'"); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 129 (2d Cir. 1993) (noting that, when an agency departs from "its own settled precedent, as here, it must present a 'reasoned analysis' that justifies its change of interpretation so as to permit judicial review of its new policies").

As demonstrated above, the NRP is arbitrary and capricious on its face because it violates the Postal Service's rules and regulations. For that reason, the Board need not address whether the NRP is arbitrary and capricious under *State Farm*. But if it does, the Board should similarly hold that the Postal Service's NRP is arbitrary and capricious because, *inter alia*, the Postal Service entirely failed to consider important aspects of the problem.

II. THE POSTAL SERVICE'S *ULTRA VIRES* ARGUMENT IS NOT PROPERLY BEFORE THE BOARD

In its briefs, the Postal Service's only articulated defense to the NRP's arbitrary and capricious nature is that OPM lacked the statutory authority under 5 U.S.C. § 8151 to promulgate the rules at 5 C.F.R. §§ 353.301(d) and 353.304(c). Aside from the legal error in that argument, *see infra*, the Board should decline to entertain the Postal Service's eleventh-hour *ultra vires* argument. The issue was not raised at any time prior to the Postal Service's brief filed on August 24, 2011. The argument represents nothing more than *post hoc* rationalization by agency counsel. Furthermore, the Postal Service should be judicially estopped, as the agency had affirmatively adopted an opposite stance before the administrative judges. Most importantly, OPM was not asked its opinion on scope of § 8151. As the agency designated by Congress to administer FECA, OPM's interpretation of § 8151 is particularly relevant.

A. The Postal Service's *Ultra Vires* Argument Is New And Should Not Be Considered

First, the Postal Service's *ultra vires* argument should not be considered because the Board will not entertain an argument raised for the first time on appeal absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Dep't of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Without doubt, the Postal Service could have raised its *ultra vires* argument long before August 24, 2011.

Second, the Postal Service's belated *ultra vires* argument is a distinct issue from the question of the scope of the Board's jurisdiction than what the Board raised in its notice of oral argument. The question of the Board's jurisdiction is a question of the scope and meaning of the regulation. And the scope of 5 C.F.R. § 353.301(d) depends only on the meaning of "arbitrary and capricious." On the contrary, the Postal Service's *ultra vires* argument hinges on the statutory interpretation of 5 U.S.C. § 8151 and an analysis of FECA and its legislative history. This issue is, without doubt, different from what the Board identified as the basis for oral argument. *See* 76 Fed. Reg. 44,373. Moreover, the D.C. Circuit has previously explained the distinct nature of these two arguments. In summarizing *Railway Labor Executives Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc), the D.C. Circuit explained that "[t]he issue before the court was not whether the agency's regulations were reasonable—which is a hallmark of traditional arbitrary and capricious review—but rather, whether the agency had any authority to promulgate regulations in the area in which it sought to act." *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995).

Indeed, as noted at oral argument, the Board added two questions to its "issues presented" when the Board issued its order concerning oral argument procedure. The two additional questions

were directed to the *ultra vires* issue, whereas the two original questions focused on the scope of the Board's jurisdiction as defined in 5 C.F.R. §§ 353.301(d) and 353.304(c).[3]

Third, judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Here, the Postal Service is judicially estopped from claiming that § 8151 does not authorize OPM to promulgate the rules. The Postal Service affirmatively adopted during the hearings the position that § 8151 authorizes the rules at issue. *See, e.g.*, Agency Jurisdiction Br. at 8 (Postal Service arguing that "[a]n individual who is physically disqualified from the former position or an equivalent one because of a compensable injury [*i.e.*, is partially recovered] has certain agency-wide placement rights for a one-year period after his eligibility for compensation begins" (citing 5 C.F.R § 353.301(d))). For the Postal Service to make this statement, it must necessarily agree that § 8151 authorizes certain restoration rights for partially recovered employees. To allow the Postal Service the change course and disavow its earlier acceptance of restoration rights for partially recovered employees would cast asunder the doctrine of judicial estoppel.

B. The Postal Service's *Ultra Vires* Argument Is Classic *Post Hoc* Rationalization

"[I]t is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself." *Fort Stewart Schs.*, 495 U.S. at 651-52. Courts may not accept counsel's *post hoc* explanation of agency action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's

[3] At oral argument, the Postal Service's *ultra vires* argument became another moving target. Vice Chairman Wagner pointed out that the Board does not have "the general APA jurisdiction to declare OPM's action to be ultra vires," to which agency counsel replied, "I'm not asking you to do that." Tr. 40:23-41:1. Later, agency counsel conceded that the agency's argument depends on the theory that "OPM doesn't have authority to have issued th[e] substantive regulation creating [the] right." Tr. 44:3-12. As Vice Chairman Wagner explained, the Board does not have "authority to tell OPM whether it could or couldn't create that right." Tr. 44:13-15; *see also* Tr. 46:12-14.

post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.").

When considering an agency's interpretation of a statute:

> the interpretation must truly be one that had been applied by the agency, either prior to or, at the latest, during the exercise of its administrative powers in the present matter. An "interpretation" is therefore not a position advanced by the agency for the first time before the Board or in a court of review. Such an "interpretation" is then no more than a litigation position to which no deference is due.

Gose v. U.S. Postal Serv., 451 F.3d 831, 838 (Fed. Cir. 2006); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971) ("It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.").

Here, the Postal Service ignores settled precedent and asks the Board to condone the Postal Service's NRP based on an argument that epitomizes "*post hoc* rationalization . . . seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462. There is no evidence in the record that a single Postal Service official implemented the NRP because the agency believed that 5 C.F.R. §§ 353.301(d) and 353.304(c) were *ultra vires*. The first time the agency offered this argument in these appeals was on August 24, 2011, when it submitted its brief. At oral argument, when Chairman Grundmann asked whether "the Agency ever made this argument . . . during the several years of litigation that we've had with the National Reassessment Program," the Postal Service responded, "Not as far as I've been able to find . . . ." Tr. 48:7-12.

For this reason, any additional new arguments that the Postal Service submits in its post-argument brief are even more suspect. The Board should carefully scrutinize the Postal Service's post-argument brief. At this late stage, the Postal Service should not be permitted to create yet further explanations for the NRP, and any new rationale must be disregarded.

C. The New *Ultra Vires* Argument Was Not Presented To OPM

Another reason to pass on the *ultra vires* argument is that the issue was not presented to OPM. Prior to briefing, the Board sought the view's of OPM but only on the following question: "Does an agency act arbitrarily and capriciously under 5 C.F.R. § 353.301(d) in denying restoration to a partially recovered individual when such denial violates the agency's internal rules, such as the [U.S. Postal Service's Employee and Labor Relations Manual]?"

OPM had no reason to opine on the interpretation of § 8151 and whether that section authorized the promulgation of 5 C.F.R. §§ 353.301(d) and 353.304(c). And because OPM is the agency delegated the authority to administer § 8151, OPM's interpretation of § 8151 can be particularly relevant and insightful. As explained below, however, OPM's understanding of § 8151 is apparent based on its implementation of § 353.301(d) and 353.304(c) . For this reason, if the Board addresses the Postal Service's *ultra vires* argument, it should consider the only reasonable conclusion from OPM's implementation of § 8151.

III. EVEN IF CONSIDERED, THE POSTAL SERVICE'S *ULTRA VIRES* ARGUMENT REQUIRES A TORTUOUS VIEW OF 5 U.S.C. § 8151

A. Courts Understand That § 8151 Covers Partially Recovered Employees

The Postal Service's *ultra vires* argument ignores the numerous courts that have adjudicated restoration cases for partially recovered employees under 5 U.S.C. § 8151. Most recently, the Federal Circuit decided a case of particular relevance. In *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011), a unanimous panel held that the "arbitrary and capricious" element in 5 C.F.R. § 353.304(c) means that a denial of restoration is "arbitrary and capricious by agency failure to perform its obligations under 5 C.F.R. § 353.301(d)." In *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1014-15 (Fed. Cir. 2002), the Federal Circuit held that a partially recovered employee who was still in the probationary period has restoration rights under FECA. To arrive at this holding, the court must have understood that partially recovered

employees have restoration rights. In *Booker v. Merit Systems Protection Board*, 982 F.2d 517, 519 (Fed. Cir. 1992), the court held that, under 5 C.F.R. § 353.304(a) and (c), an employee, "having been restored to duty after partial recovery, may not appeal the details or circumstances of her restoration to the board." In *Gallo v. United States*, 529 F.3d 1345, 1352 (Fed. Cir. 2008), the court held that Mr. Gallo, a partially recovered FAA employee, could not bring a claim under 5 U.S.C. § 8151(a) in the Court of Federal Claims "[b]ecause an action under section 8151(a) is within the Board's appellate jurisdiction under the [Civil Service Reform Act] and the Board's regulations." In other words, the Court of Federal Claims lacked jurisdiction precisely because the Board had jurisdiction over an appeal involving a partially recovered employee. *See id.*

In *New v. Department of Veterans Affairs*, 142 F.3d 1259 (Fed. Cir. 1998), the court ruled on a denial of restoration claim brought by a partially recovered DVA employee. The court denied the claim because the employee refused to return to work based on the lack of a suitability determination by OWCP. The court stated that "a partially disabled employee who refuses to work after suitable work is offered to her is not entitled to compensation under FECA." *Id.* at 1261-62 (citing 5 U.S.C. § 8106(c)(2)). Inherent in the decision was the understanding that, had she not refused the offer of suitable work, the employee would have been entitled to return to work. *Id.*[4]

The Federal Circuit is not alone in this understanding of the scope of restoration rights for partially recovered employees. For instance, in *Meester v. Runyon*, 149 F.3d 855 (8th Cir. 1998), the Eighth Circuit decided a case involving a partially recovered Postal Service employee with carpal tunnel syndrome. The Postal Service had created several different limited duty positions for Meester. *Id.* at 856. The outcome was premised on the understanding that the partially recovered Postal Service employee had certain restoration rights under FECA. *Id.*

[4] *See also Palmer v. Merit Sys. Prot. Bd.*, 550 F.3d 1380, 1381-82 (Fed. Cir. 2008) (adjudicating appeal of partially recovered Postal Service employee who had accepted an offer of a modified job assignment but finding no jurisdiction because employee was appealing the details of the restoration and not the denial of restoration).

B. OPM Understands That § 8151 Covers Partially Recovered Employees

Although OPM did not directly address the Postal Service's *ultra vires* argument, the only logical conclusion from OPM's advisory opinion is that OPM would disagree with the Postal Service's argument. The Postal Service's argument requires the Board to conclude that § 8151 does not authorize restoration rights for partially recovered employees. OPM, of course, has not come to that conclusion. If it had, OPM would not have issued—and kept in force for until this day—a regulation not authorized by the statute.

OPM's view is of particular importance for interpreting the statute. Congress delegated to OPM the authority to issue regulations implementing the statute. *See* 5 U.S.C. § 8151(b) ("Under regulations issued by the Office of Personnel Management . . . ."); *see also Kachanis v. Dep't of the Treasury*, 212 F.3d 1289, 1295 (Fed. Cir. 2000) (noting that § 8151(b)'s directive "is evidence of Congress's intent to let OPM decide how agencies should satisfy the statute's requirements."). As the agency charged with administering § 8151, OPM's interpretation is entitled to deference. *See, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *accord K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

The Postal Service's error is further underscored by its contention that OPM's opinion "is most deficient because: a) it assumes that 5 C.F.R. 353.301(d)'s coverage of partially recovered employees is authorized by FECA." Agency Reply Br. 7. OPM's "assumption" is best viewed as a manifestation of its reasonable understanding of § 8151, namely that the statute confers restoration rights on partially recovered employees. *Cf. Kester v. Horner*, 778 F.2d 1565, 1569 (Fed. Cir. 1985) ("To sustain an agency's construction of its authority, [a court] need not find that its

construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings.").

C. The Postal Service's New Interpretation Conflicts With Its Own Settled View of § 8151 And Therefore Warrants Little, If Any, Deference

"[A]n agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1993) (quotation omitted)). Even if the Postal Service's unique interpretation of § 8151 were properly at issue, the Board should give it little, if any, consideration because it represents an unexplained, stark departure from the Postal Service's well-settled interpretation of § 8151.

The record is unambiguous: The Postal Service has long considered § 8151 as authorizing the restoration rights embodied in 5 C.F.R. §§ 353.301(d) and 353.304(c). *See, e.g.*, *Rolland v. Potter*, 492 F.3d 45, 46 (1st Cir. 2007) (noting that appellant had been awarded a rehabilitation position, which is "one that the [Postal Service] provides to an employee who has permanent restrictions resulting from an on-the-job injury"); *Palmer v. Merit Sys. Prot. Bd.*, 550 F.3d 1380, 1381 (Fed. Cir. 2008) (describing how Postal Service had offered modified job assignment for partially recovered Postal Service employee); *Meester v. Runyon*, 149 F.3d 855, 856 (8th Cir. 1998) (describing how Postal Service "offered to create several different limited duty positions" for partially recovered employee).

Putting aside the fact that Postal Service's current interpretation of § 8151 does not warrant any deference because the Postal Service is not the administering agency of the statute, the Postal Service's new interpretation should be disregarded because it is an unexplained departure from the agency's decades-long understanding of restoration rights for partially recovered employees. *See Nat'l Treasury Employees Union v. FLRA*, 404 F.3d 454, 457 (D.C. Cir. 2005) ("Any agency's

unexplained departure from prior agency determinations is inherently arbitrary and capricious in violation of APA § 706(2)(A)." (quotation and citation omitted)).

D. Congress Has Ratified The Long-Accepted Understanding of § 8151

Yet another reason to reject the Postal Service's new interpretation is the doctrine of congressional ratification. That is, an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation. *E.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Section 8151 has been in force for over thirty years. During that time, the consistent understanding of both courts and federal agencies, including the Postal Service, has been that § 8151 covers partially recovered employees. Congress has accepted this understanding. There is no reason for the Board to upset this settled law.

E. Under *Chevron*, The Common Understanding of § 8151 Is Reasonable

The Postal Service makes no attempt to conduct a proper analysis under the controlling paradigm. *See Chevron U.S.A. Inc. v Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Under the two-step *Chevron* process, the first step is to determine if "Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, the unambiguous text of the statute controls. *Id.* at 842-43. If, however, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

"The objective of *Chevron* step one is not to interpret and apply the statute to resolve a claim, but to determine whether Congress's intent in enacting it was so clear as to foreclose any other interpretation." *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1377 (Fed. Cir. 2011); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency

construction."). "If room exists for more than one reasonable interpretation of Congress's intent, then the agency, not the judiciary, has the interpretive mandate." *Grapevine Imports*, 636 F.3d at 1378.

Here, during oral argument, the ambiguity and silence in § 8151 became self-evident. For instance, the statute does not define the term "overcome." The statute also does not define "equivalent position." As counsel for NALC noted, the statute does not explicitly refer to "full recovery." Tr. 22:6-13. Vice Chairman Rose identified yet another ambiguity: the difference between the phrase "if the injury or disability is overcome," 5 U.S.C. § 8151(b)(2), compared to the phrase "where the injury or disability has been overcome," *id.* § 8151(b)(1). Tr. 12:24-13:8. Of course, identifying all the relevant statutory ambiguities is difficult because the Postal Service did not raise its *ultra vires* argument prior to August 24, 2011. There may exist other relevant ambiguities which the parties and perhaps the agency have not yet identified.

Tellingly, the Postal Service does not address *Chevron* step two, *i.e.*, whether the agency's interpretation of § 8151 is reasonable. The Postal Service limited its *ultra vires* argument to contending that the statue is unambiguous. But that position is wrong because the statute is undoubtedly ambiguous and silent on the question of whether § 8151 grants restoration rights for partially recovered employees.

F. The Legislative History Confirms The Error In The *Ultra Vires* Argument

Finally, FECA's legislative history is yet a further reason to reject the Postal Service's belated *ultra vires* argument. The legislative history of § 8151 confirms Congress's intent:

> The Committee does not intend to lessen any protection now available to injured or disabled Federal employees with regard to their reemployment rights.
>
> The Committee also wishes to make clear that the Civil Service Commission 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, at 4 (1974), reprinted in 1974 U.S.C.C.A.N. 5341, 5344.

One would be hard-pressed to find a more explicit expression of Congress's intent—in this case, to provide restoration rights to partially recovered employees. When textual ambiguity is viewed in the context of Congress's express purpose of the 1974 amendments to FECA, OPM was well within its statutory mandate to promulgate 5 C.F.R. §§ 353.301(d) and 353.304(c).

The Postal Service errs in contending that, "as a matter of law," the legislative history must be ignored. Even if a unambiguous statute, a court "look[s] to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987). Courts should reject a statute's literal interpretation "demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

CONCLUSION

For at least the above reasons, the Board has jurisdiction over the appeals because the Postal Service's NRP is arbitrary and capricious. The decisions of the administrative judges should be reversed.

January 6, 2012

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