JAMES C. LATHAM v. UNITED STATES POSTAL SERVICE
Docket # DA-0353-10-0408-I-1
Agency's Opening Brief
Summary Page

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

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Filer's Name : William D. Bubb, Esq.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES C. LATHAM,
RUBY N. TURNER,
ARLEATHER REAVES,
CYNTHIA E. LUNDY, and
MARCELLA ALBRIGHT,

Appellants,

v.

UNITED STATES POSTAL SERVICE,

Agency.

DOCKET NUMBERS
DA-0353-10-0408-I-1
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AGENCY'S OPENING BRIEF

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I. STATEMENT OF THE CASE

On July 25, 2001, the Merit Systems Protection Board ("the Board") consolidated these appeals in order to allow briefing on "a common issue the Board has not yet addressed." Consolidation Order 1.

The issue identified by the Board centers on the application of 5 C.F.R. § 353.301(d), a section of the regulations promulgated by the Office of Personnel Management ("OPM") to administer the restoration rights granted by the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8151(b). 5 C.F.R. § 353.301(b) provides:

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.) If the individual fully recovers, he or she is entitled to be considered for the position held at the time of injury, or an equivalent one. A partially recovered employee is expected to seek reemployment as soon as he or she is able.

5 C.F.R. § 353.301(d).[1] The Board explained that its current law under § 353.301(d) requires agencies to "search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider the employee for any such vacancies. [Citations omitted]," Consolidation Order 2, and further explained that "[c]onversely, the Board has found that this regulation does not require an agency to assign a partially recovered employee limited duties that do not comprise the essential functions of a complete and separate position. [Citations omitted]." *Id.*

[1] 5 C.F.R. § 353.304(c) provides that a "partially recovered" employee may appeal to the Board "for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration."

However, the Board made the following observations it believed to be applicable to the consolidated cases.

> [I]t appears that the U.S. Postal Service may have established an agency-specific rule providing partially recovered employees with greater restoration rights than the "minimum" rights described in 5 C.F.R. § 353.301(d). [Citation omitted]. Specifically, the Employee and Labor Relations Manual (ELM) § 546.142(a) requires the agency to "make every effort toward assigning [a partially recovered current employee] to limited duty consistent with the employee's medically defined work limitation tolerance." One of the appellants has submitted evidence to show that Postal Service Handbook EL-505, Injury Compensation §§ 7.1-7.2 provides that limited duty assignments "are designated to accommodate injured employees who are temporarily unable to perform their regular functions" and consist of whatever available tasks the agency can identify for partially recovered individuals to perform consistent with their medical restrictions. [Citation omitted]. It therefore appears that the agency may have committed to providing medically suitable work to partially recovered employees regardless of whether that work comprises the essential functions of a complete and separate position.

Consolidation Order 2-3.

Based upon these observations, the Board posited two questions for briefing:

> (1) May a denial of restoration be "arbitrary and capricious" within the meaning of 5 C.F.R. § 353.304(c) solely for being in violation of the ELM, i.e., may 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?
>
> (2) What is the extent of the agency's restoration obligation under the ELM, i.e., under what circumstances does the ELM require the agency to offer a given task to a given partially recovered employee as limited duty work?

Consolidation Order 4.

This is the opening brief of the United States Postal Service in response to the Board's Consolidation Order.

II. SUMMARY OF ARGUMENT

A. The answer to the Board's first question is: "No."

1. Assuming the Postal Service, or any agency, has adopted agency-specific rules designed to "provid[e] medically suitable work to partially recovered employees regardless of whether that work comprises the essential functions of a complete and separate position," Consolidation Order 3, such rules do not create FECA restoration rights because neither the employees nor the work assignments covered by such rules fall within the delineation of restoration rights under FECA. To the extent 5 C.F.R. § 353.304(c) purports to regulate an agency's efforts under such agency rules, it is beyond the regulatory authority granted OPM by FECA and cannot form the basis of Board jurisdiction.

a. FECA grants restoration rights only into regular positions in the agency's workforce. To the extent 5 C.F.R. § 353.304(c), in conjunction with the definition of "partially recovered" contained in 5 C.F.R. § 353.102, is read to require that partially recovered employees are entitled under FECA to anything beyond assignment to a regular position, the regulation exceeds OPM's statutory authority to adopt regulations under FECA, is unenforceable, and cannot form the basis for Board jurisdiction. As a result, an agency's "every effort" under § 353.302(c) can never be deemed to include efforts to employ a FECA claimant, other than efforts to identify and assign an employee to a regular position. It is irrelevant whether an agency's efforts to employ a FECA claimant in an assignment other than a regular position are conducted informally, are mandatory or precatory, or are subject to an enforcement mechanism other than an appeal to

the Board. There simply is no basis under FECA to consider or enforce those efforts.

b. FECA grants restoration rights only to fully recovered employees. Because 5 C.F.R. § 353.304(c) is exclusively devoted to purported restoration rights of "partially recovered" employees, it exceeds OPM's statutory authority to adopt regulations under FECA, is unenforceable, and cannot form the basis for Board jurisdiction. In the case of a partially recovered employee, any agency reemployment efforts, whether or not to a regular position in its workforce, do not comprise restoration under FECA.

c. The provisions of ELM § 546 and Handbook EL-505 afford FECA claimants the right to be considered for assignments other than assignments to regular positions. In doing so, they exceed FECA's promise of restoration – or priority consideration for restoration – only to regular positions. They also are incorporated into the Postal Service's collective-bargaining agreements, agreements that cover the overwhelming majority of the Postal Service's workforce. ELM § 546 and Handbook EL-505 are integral to the Postal Service's collective-bargaining agreements as a substantive matter. But beyond the contractual nature of ELM § 546 and Handbook EL-505, the procedures for resolving disputes under the Postal Service's collective-bargaining agreements comprise a fundamental feature of the Postal Service's relationships with its employees and their unions, and they provide an effective means of enforcing ELM § 546 and EL-505. The Board's jurisdiction does not permit it to invade

these fundamental substantive and procedural features of the Postal Service's collective-bargaining relationships.

B. The Board's second question cannot be answered succinctly because it proceeds from a false assumption. It equates an agency rule that grants limited work (not a regular position) with a "restoration obligation" under FECA. As described in Argument A, such a rule can never comprise a restoration obligation under FECA because the rule's subject matter is not within the limitations of the restoration rights FECA specifies.

Depending on the circumstances, ELM § 546 and Handbook EL-505 obligate the Postal Service to search for work that is not a regular position and offer work if it is found. These provisions were motivated by a desire to allow workers to enjoy the salutary effect of returning to work as soon as possible and by a desire to reduce workers' compensation expense. And they are in keeping with the Office of Workers' Compensation Programs' ("OWCP") approach to the administration of FECA, which encourages employment and rehabilitation, independent of FECA's restoration provisions. The expansion of jurisdiction being considered by the Board in these consolidated appeals would transform such voluntary programs to provide employment into mandatory components of required restoration under FECA. Such a result is unsupported by FECA's restoration provisions, is inconsistent with OWCP's approach to the administration of FECA, and would encourage agencies to discontinue such programs.

III. STATEMENT OF FACTS

a. The Statutory Framework for FECA Reemployment Rights

Federal employees have enjoyed comprehensive, statutory-based compensation and other benefits relating to work-related injuries and illnesses for nearly 100 years. *See generally* Willis J. Nordlund, A History of the Federal Employees' Compensation Act (1992). But FECA and its predecessors did not always contain reemployment rights as they exist today. Indeed, whether they are called reemployment rights, civil service retention rights, or restoration rights, Congress has been deliberate in granting them and specific in their reach. The development of the statutory bases for FECA reemployment rights and the regulations that rely on them – including the provisions of 5 C.F.R. §§ 353.101 - .304 that are seminal to these consolidated appeals – is both revealing and instructive.

In the modern era, reemployment rights emerged in the Federal Employees' Compensation Act Amendments of 1966, Pub. L. No. 89-488, 80 Stat.252 (1966), which contained the following provision amending FECA (then codified at 5 U.S.C. §§ 751 - 803a (1964)).

> Section 9 of the Federal Employees' Compensation Act [5 U.S.C. § 759 (1964)] is amended by adding at the end thereof the following new subsection:
>
> "(c) Upon the application of any employee or former employee in receipt of compensation under this Act to the United States Civil Service Commission, said Commission shall enter his name on each appropriate register or employment list, or both, maintained by the Commission, for certification for appointment to any vacant position for which he is physically and otherwise qualified, in accordance with regulations of the Commission. Employees or former employees with career or career-conditional status shall be entitled to the same priority in certification which the Commission accords a career or career-conditional employee

> who has been involuntarily displaced from his position through no fault of his own. . . .

Pub. L. No. 89-488, § 6. *See also* S. Rep. No. 1285 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2430, 2433.

The same year, Congress substantially reorganized title 5, moving FECA to its current location in chapter 81. Act of September 6, 1966, Pub. L. No. 898-554, 80 Stat. 531 (1966). However, the newly-minted reemployment rights described above were omitted (presumably unintentionally) from the restated and relocated version of FECA. In any event, Congress took additional action related to the reorganization of title 5, *see* Act of Aug. 24, 1967, Pub. L. No. 90-83, 81 Stat. 195 (1967), but, in doing so, decided to reestablish FECA reemployment rights in a location remote from FECA itself. Instead of including them in chapter 81, Congress reinserted the reemployment rights provisions in the subsection of chapter 33 governing selection and appointment, presumably because the essential obligation to place FECA claimants on registers and consider them for vacant positions was akin to similar personnel procedures located in chapter 33. The substance of the right remained the same.

> Chapter 33 is amended by inserting the following new section after section 3315:
>
> **"3315a. Registers; individuals receiving compensation for work injuries**
>
> . . . .
>
> "(b) The Civil Service Commission, on application by an employee or former employee receiving compensation under subchapter I of chapter 81 of this title, shall enter his name on each appropriate register or employment list, or both, maintained by the Commission, for certification for appointment to a vacant position for which he is physically and otherwise qualified, under regulations of the Commission. An employee or former employee with career or career-conditional status is entitled to

> the same priority in certification that the Commission accords a career or career-conditional employee who has been involuntarily displaced from his position through no fault of his own."

Pub. L. No. 90-83, § 1(9). *See also* S. Rep. No. 482 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1538, 1543; 5 U.S.C. § 3315(a)(1970).

In summary, the reemployment rights originally prescribed in 5 U.S.C. § 759(c) and transferred to 5 U.S.C. § 3315(a) did not grant an absolute right to be appointed to a vacant position. Instead, they granted a right to preferential consideration for appointment to vacant positions as part of the general selection process. By necessary inference, they granted the right to preferential consideration for appointment to vacant positions not only to employees who had fully recovered, but also to employees who had partially recovered. The reference in § 3315(a) to "a vacant position for which he is physically and otherwise qualified" cannot be read any other way.

Section 3315(a) established a FECA restoration right that was limited to priority consideration to regular positions in the agencies' workforces. And it remained the sole authority for reemployment rights under FECA until 1974. In that year, Congress opted to once again reexamine FECA, motivated at least in part by a study of state workers' compensation laws commissioned under the federal Occupational Safety and Health Act of 1970. That study was critical of the states' workers' compensation laws. Believing that the study's critique of state law was applicable to FECA, *see* S. Rep. 93-1081 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5341, and striving to establish the federal government as a "model employer," S. Rep. 93-1081 at 1, 1974 U.S.C.C.A.N. at 5341, Congress adopted a variety of amendments, including an amendment to FECA's reemployment provisions. The results were: a) a more specific and limited statement of FECA reemployment rights;

and b) relocation of FECA reemployment rights to their original 1966 code location along side FECA's other substantive provisions – this time in FECA's new home in chapter 81 of title 5.

> Subchapter I of chapter 81 of the Act is amended by adding the following new section:
>
> "**§ 8151. Civil service retention rights**
>
> "(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.
>
> "(b) Under regulations issued by the Civil Service Commission –
>
> > "(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and
> >
> > "(2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, within any other department or agency."
>
> "(c) Section 3315a of title 5, United States Code, is repealed upon the effective date of this section.

Pub. L. No. 93-416, § 22. *But see* S. Rep. 93-1081 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5341 ("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. 93-1081 at 4, 1974 U.S.C.C.A.N. at 5344.) These amendments established FECA reemployment rights in their current statutory form, with the exception of the replacement of "Civil Service Commission" with "Office of Personnel Management" by virtue of the changes occasioned by the Civil Service Reform Act of 1978. *See* Pub. L. No. 95-454, § 906(a)(2), 92 Stat. 1111, 1224 (1978).

The distinctions between § 8151(b) and the provision it repealed, 5 U.S.C. § 3315a, are noteworthy. First, § 8151(b) established an absolute right to reinstatement to the employee's former position or an equivalent one if he or she recovers sufficiently to be able to perform the former position in less than a year. While this feature of § 8151(b) retained § 3315a's limitation on the nature of an assignment to which an employee is entitled under FECA – an existing position in the workforce – it transformed the right for employees who fully recover within a year from priority consideration to an entitlement.

Second, the rights granted by § 8151(b) themselves established a new and more limited class of eligible employees. Under § 8151(b), "overcoming" a disability can only mean that the ill or injured employee has recovered to the point that the original position can again be performed – in other words, that he or she is fully recovered – since the entitlement is only to the original position or its equivalent. The provision it replaced, § 3315a, granted rights – although limited to priority consideration for vacant positions – to employees who had recovered sufficiently to perform the position for which consideration was sought, not only to employees who had recovered sufficiently to

perform their former position. Under § 8151(b), rights are granted only to employees who have recovered sufficiently to perform their pre-injury or illness position.[2]

There is some evidence that Congress did not intend this result. *See* S. Rep. 93-1081 at 4, 1974 U.S.C.C.A.N. at 5344 ("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."). But putting aside the argument that the Senate Report should be ignored as a matter of law, it is impossible as a matter of fact to determine what the Committee meant. It could have intended to allow partially recovered employees to receive priority consideration for positions they could perform. Given the existing law at the time §8151(d) was enacted, that would be a reasonable guess as to the statement's meaning – but it is only a guess.

Even with its rough edges, this statutory history is helpful in resolving several issues presented in these consolidated appeals. While there are some ambiguities that likely cannot be resolved as matters of fact, the recognition of their existence will help guide the Board. But there is one unmistakable principle that emerges from Congress' historical treatment of reemployment rights under FECA. Congress has only established – and has only ever established – a right to reemployment in existing positions in the agencies' workforces. This feature of Congressional intent is both explicit (the right was described as "appointment" to a "vacant position" when reemployment rights were

[2] Notably, and as discussed below, while the current regulations may be consistent with prior law – 5 U.S.C. § 3315a – they are inconsistent with current law – 5 U.S.C. § 8151(b). Flashing forward to the terminology employed in the current restoration regulations on which this matter is focused, physically disqualified and partially recovered employees (in today's regulatory parlance) had rights to priority consideration for vacant positions that were eliminated by § 8151(d).

contained in 5 U.S.C. § 759(c) and 5 U.S.C. § 3315a) and implicit (by reference to registers, employment lists and placement in former or equivalent positions).

b. The Regulatory Framework for FECA Reemployment Rights

Another feature of the 1974 amendments to FECA's reemployment rights was the authorization of regulations governing them. 5 U.S.C. § 8151(b). Originally operating in tandem with corresponding provisions in the Federal Personnel Manual,[3] regulations governing "restoration to duty" under FECA first seemed to appear in the Code of Federal Regulations in 1989. These regulations obviously foreshadowed the current OPM regulations, but their substantive provisions are worth reviewing.

First, the 1989 regulations provided that

> an individual who fully recovers[4] from a compensable injury within 1 year of the date compensation begins, or from the time compensable disability recurs if the recurrence begins after the employee resumes regular employment with the United States. . . . must be restored immediately and unconditionally [to their former position or an equivalent one].

5 C.F.R. § 353.301 (1989). This provision was consistent with 5 U.S.C. § 8151(b), the statute that authorized it.

Second, the 1989 regulations provided that an employee

> whose recovery takes longer than 1 year from the date compensation began . . . . is entitled to priority consideration for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of cessation of compensation. (See Parts 302 and 330 of this chapter

[3] Effective January 13, 1995, the OPM regulations governing FECA reemployment rights were no longer tied to the Federal Personnel Manual. The final operative provisions of the Federal Personnel Manual were abolished on December 31, 1994. *See* 60 Fed. Reg. 3055 (January 13, 1995).

[4] The 1989 regulations define "fully recovered" to mean "compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he left or an equivalent one." 5 C.F.R. § 353.102 (1989). The current definition of "fully recovered" is identical. However, the 1989 regulations do not define "partially recovered," although, as described herein, the 1989 regulations used that term. Similarly, "physically disqualified" is used but not defined in the 1989 regulations.

> for more information on how this may be accomplished for the excepted and competitive services, respectively.)

5 C.F.R. § 353.303 (1989). Again, this provision was consistent with regulatory authority granted by 5 U.S.C. § 8151(b).

Third, the 1989 regulations provided that an employee

> who is physically disqualified for the former position or equivalent because . . . of compensable injury shall be placed in the agency in another position for which qualified that will provide the employee with the same seniority, status, and pay, or the nearest approximation consistent with the circumstances in each case. . . . [T]his right applies for a period of 1 year from the date compensation begins.

5 C.F.R. § 353.302 (1989). This provision is inconsistent with the regulatory authority granted by 5 U.S.C. § 8151(b). The only way to deem this regulation to have been statutorily authorized (and therefore enforceable) is to ignore the stated limits of § 8151(b) and accept and apply the explanation in the legislative history that the government 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. 93-1081 at 4, 1974 U.S.C.C.A.N. at 5344.

Finally, the 1989 regulations provided that "[a]gencies must make every effort to restore, according to the circumstances in each case, an employee or former employee who has partially recovered from a compensable injury and who is able to return to limited duty." 5 C.F.R. § 353.304 (1989).[5] Viewed in context, this provision of the 1989 regulations is perplexing. For example, it is subject to the same analytical fault as 5 C.F.R. § 353.302 (1989) because it exceeds the statute's grant of reemployment rights

[5] The provisions in the 1989 regulations granting jurisdiction to the Board are essentially identical to those contained in the current regulations, including the arbitrary and capricious standard of review for partially recovered employees.

only to employees who fully recover. But another distinct analytical difficulty is apparent, depending on the meaning of "limited duty." If the drafters intend limited duty to refer to something other than an assigmnent to a vacant position, the regulation exceeds the one fixed star in Congress' historical grant of reemployment rights under FECA – that those rights, regardless of the category or categories of employees to which they are granted, only convey the right to assume or be considered for a regular position in the agency's workforce. Finally, it is difficult in any event to understand 5 C.F.R. § 353.304 (1989), and its relationship to its companion provisions because of the lack of definitions of the terms "partially recovered" and "physically disqualified."

Unfortunately for the Board's efforts to sort out the meaning of the "every effort" standard in this case, the current regulations suffer even more from ambiguity and potentially unenforceable content. The current regulations replaced the 1989 version on January 13, 1995. The relevant changes may be summarized as follows.

First, two new definitions were added. "Physically disqualified" is now defined to mean that:

> (1) (i) For medical reasons the employee is unable to perform the duties of the position formerly held or an equivalent one, or
> (ii) There is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation (for example, a seizure) or because of risk of health impairment (such as further exposure to a toxic substance for an individual who has already shown the effects of such exposure).
>
> (2) the condition is considered permanent with little likelihood for improvement or recovery.

5 C.F.R. § 353.102 (2011). And of particular note, "partially recovered" is defined to mean

> an injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually.

Id. (emphasis added).

Second, the current regulations restated the rights of physically disqualified and partially recovered employees. For the (newly defined) physically disqualified employee, the existing rights under the regulations remained unchanged, but they were expanded to extend beyond 1 year for the date of compensation eligibility under FECA. The new regulations added this provision: "After 1 year, the individual is entitled to the rights accorded individuals who fully or partially recover, as applicable." 5 C.F.R. § 353.301(c). But for the (newly defined) partially recovered employee, the changes were more substantial. Much like the provision affecting physically disqualified employees, the existing provision was maintained. But, unlike the physically disqualified changes, the additional material in the partially recovered provision significantly affected the meaning of the retained content. The full text of the current version is set forth below. The first sentence comprised the prior regulation in its entirety, except that the local commuting area limitation did not exist in the prior regulation; it was, however, a feature of the accompanying provisions of the Federal Personnel Manual:

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.) If the individual fully recovers, he or she is entitled to be considered for the position held at the time of injury, or an equivalent one. A partially recovered

> employee is expected to seek reemployment as soon as he or she is able.

5 C.F.R. § 353.301(d).

The overall effect of the 1995 amendments was to make even more plain that they exceed their statutory authorization. The current regulations imply that a return to "part-time or light duty" is included in FECA's restoration obligation, something FECA itself has never authorized.[6] And the regulations emphasize that they intend to provide restoration rights to person who are not fully recovered, again exceeding FECA's plain language. The only factor that at least partially saves these regulations today is the fact that the Board currently reads them to only afford restoration rights to regular positions.

c. Other Provisions of FECA That Affect the Return to Work of FECA Claimants

Other provisions of FECA, administered by the Secretary of Labor through the Office of Workers' Compensation Programs ("OWCP"), provide valuable context to the Board consideration of the issues in this case.

OWCP has the authority to withhold compensation from partially disabled employees who refuse to seek or accept "suitable work." 5 U.S.C. § 8106(c). But it also encourages the return to work of FECA claimants, regardless of whether the work offered is a regular position in the agency's workforce and without regard to whether the offer is required under FECA's reemployment rights provisions. OWCP regulations explain that "where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee's limitations due to

[6] 5 C.F.R. § 353.102 provides: "Partially recovered means an injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements."

the injury." 20 C.F.R. § 10.505(b). And in a set of questions and answers it has published about FECA, OWCP explained:

> Employees who are disabled from their regular jobs are expected to return to suitable light or limited duty identified by their employers. If such work is not available, OWCP provides nurse and vocational rehabilitation services to help employees return to work, either with the original Federal employer, another Federal employer, or in the private sector.
>
> OWCP considers return to work a benefit both to the injured employee, who once again becomes a productive member of society, and to the employer, who retains (or obtains) the services of a skilled and knowledgeable individual.
>
> . . . .

Questions and Answers about the Federal Employees' Compensation Act (FECA), H-1 (U.S. Department of Labor, Employment Standards Administration, (Sept. 25, 2007). But while OWCP encourages employees and agencies to informally reengage their relationship after an illness or injury as soon as possible, it will not penalize an employee's failure to accept a limited or light duty offer from his or her agency unless the offer was for suitable work. Notably for the Board's purposes in this case, employment offers of less than four hours of work per day when the employee is capable of working four or more hours, or employment offers that are for temporary jobs (except for temporary employees) are generally considered unsuitable. *See* FECA Procedure Manual – Part 2, Claims, at 2-0814-4(b). If an offer is not suitable, an employee's decision to refuse it does not impact the receipt of compensation.

d. The Postal Service's Rules and Processes Benefiting FECA Claimants

As the Board's Consolidation Order in the case recognizes, the Postal Service addresses the employment of FECA claimants in two locations: § 546 of the Postal

Service Employee and Labor Relations Manual ("ELM"); and Handbook EL-505 – Injury Compensation. Both are "regulations of the Postal Service." 39 C.F.R. §§ 211.2(a)(2)-(3). It is also the case, as the Consolidation Order implicitly recognizes, that the Postal Service's rules and regulations are enforceable under the grievance procedures in the several collective-bargaining agreements covering its workforce. While the following example is from the Postal Service's agreement with the National Association of Letter Carriers, it is illustrative of provisions that appear in each of the Postal Service's collective-bargaining agreements.

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

Agreement Between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, Article 19 (2006). So, while the Postal Service could make changes to the ELM and its Handbooks if the changes were "fair, reasonable, and equitable" and were consistent with each of its collective-bargaining agreements (and complied with some related procedural requirements relating to notice and consultation with the unions), ELM § 546 and Handbook EL-505 are in the meantime enforceable against the Postal Service as a matter of contract.

Both Limited Duty and Rehabilitation Assignments are not automatic under ELM § 546 and Handbook EL-505. While the attempt to identify Limited Duty and Rehabilitation Assignments is guaranteed, an assignment is not. While it is true, as the Board's Consolidation Order points out, the Postal Service has often been ordered by an

arbitrator to provide Limited Duty, it is also true that arbitrators have frequently declined to do so. *See, e.g., In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. J06N-4J-C 09115744 (May 25, 2010) (Jacobs, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. H06N-4H-C 11015197 (Apr. 21, 2011) (Bahakel, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. F06N-4F-L 09256652 (Feb. 2, 2011) (Ames, Arb.). These cases turn on case-specific facts concerning the ability of the grievant, the availability of work, the type of work that the Postal Service must offer, and whether the Postal Service's search for work was adequate.

In terms of the substance of ELM § 546 and Handbook EL-505, the starting point is the ELM provision governing employees who have partially overcome a work-related illness or injury. It provides that "[w]hen an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance." ELM § 546.142(a).[7] There is a fundamental aspect of this provision that bears emphasis both because it is relevant to the Board's deliberations and because it revolves around a concept that is distinct from a similar concept in the FECA reemployment regulations. In the ELM, "partially overcome" is not synonymous with "partially recovered" in 5 C.F.R. § 353.102. It instead intends to encompass both "partially recovered" and "physically disqualified" employees as defined under part 353. The ELM describes the meaning of "partially overcome" as follows:

[7] Section 546.142 goes on to list the order in which the Postal Service should search specific locations – worksites, shifts, and crafts – for appropriate work. The section of the ELM is colloquially referred to as the "pecking order."

> The procedures [in ELM § 546.142] for current employees cover both limited duty and rehabilitation assignments. Limited duty assignments are provided to employees during the recovery process when the effects of the injury are considered temporary. A rehabilitation assignment is provided when the effects of the injury are considered permanent and/or the employee has reached maximum medical improvement.

ELM § 546.141 (emphasis added). This temporary/permanent dichotomy and the Postal Service's approach to each category are incorporated and illuminated in Handbook EL-505.

The Postal Service's Limited Duty program is described in chapter 7 of Handbook EL-505. Expressing a philosophy reminiscent of OWCP's approach to the administration of FECA, Handbook EL-505 explains:

> This chapter addresses limited duty provided to an employee who has physical limitations identified by a qualified treating physician stemming from an on-the-job injury or illness. The limited duty program is designed to accommodate injured employees who are temporarily unable to perform their regular functions. Effective utilization and management of limited duty assignments benefits the USPS as well as the injured employee. These assignments permit employees to work within their medically prescribed physical restrictions. Limited duty often accelerates recuperation as employees generally recuperate faster if they are as active as possible. Moreover, limited duty employees retain the discipline of going to work every day, continue their contribution to the USPS, and are regarded as productive workers. Finally, since limited duty employees work at the job site, they are often motivated to return to their regular job as soon as possible rather than continue doing a lesser skilled limited duty assignment. Early return to the regular job is the ultimate objective of the limited duty program.
>
> Limited duty is an integral aspect of injury compensation program administration and, if managed effectively, makes a significant contribution to cost containment and control initiatives.

Handbook EL-505 at 157. In keeping with these principles, chapter 7 establishes guidelines for both informal and formal Limited Duty programs, but they each have two

essential characteristics – the assignments are temporary, and they are comprised, not of regular positions in the workforce, but of duties assembled to match the employee's temporary need. The informal Limited Duty program provisions describe a search for "appropriate duty," Handbook EL-505 at 158, and the formal Limited Duty program provisions call for the establishment of a "special job bank . . . [consisting] of limited duty tasks that are filled only by injured employees" from which Limited Duty assignments may be assembled. *Id.* at 159.[8] Finally, Handbook EL-505 includes guidelines for managers in considering Limited Duty assignments:

> The USPS should minimize any adverse or disruptive impact on the employee in assigning limited duty. (ELM 546.141)
>
> Consider the following when making limited duty assignments:
>
> — Match the limited duty job as closely as possible to the regular job. Do not make the limited duty job more desirable than the employee's regular job.
>
> — The limited duty work environment should be similar to that of the regular job. If the limited duty environment is more attractive, it may seem like a reward. If the environment is less attractive, it may seem like a punishment.
>
> — The limited duty job should have similar pay. To put an injured employee in a job that pays more than the regular job creates a problem, especially if the employee performs well. To put an injured employee in a lower paying job (i.e., a job that requires less skill) makes poor use of resources.
>
> — Little or no training should be required. Don't expect supervisors to train someone in a skilled assignment when they know he or she will only be there a short time.
>
> — The assignment should result in a tangible product and should not be a "make work" job.

[8] The Handbook notes that the formal Limited Duty program procedures are "[n]ormally . . . most effective in large installations." *Id.*

— The assignment should be a function where temporary additional help is useful. This will help ensure that injured employees make a useful contribution to the organization.

Handbook EL-505 at 163.

In contrast, Handbook EL-505 takes a different approach to Rehabilitation Assignments. The overview to chapter 11 describes the Rehabilitation Program this way:

> The Joint DOL-USPS Rehabilitation Program was developed to fulfill the USPS legal obligation to provide work for injured-on-duty (IOD) employees. Providing gainful employment within medically defined work restrictions has proven to be in the best interest of both the employee and the USPS. In many cases, returning to work has aided the employee in reaching maximum recovery. This program is also one of the most viable means of controlling workers' compensation costs.
>
> Over the years, an in-house rehabilitation program has evolved and has been incorporated into the Rehabilitation Program as a means of facilitating the proper placement and accommodation of current employees with permanent partial disabilities resulting from injuries on duty. This program is also appropriate for reassigning to permanent modified positions employees who have not received compensation but have been in temporary limited duty assignments for an extended period of time.
>
> From December 1978 to May 1979, DOL and the USPS conducted a pilot program for the rehabilitation of injured USPS workers through reemployment. From that pilot program, procedures and forms were developed that provided the basis for the original guidelines issued in October 1979 and for Handbook EL-515, *Joint Rehabilitation Guidelines* (issued in May 1992), now being made a part of this handbook. The Rehabilitation Program is applicable for both former and current USPS employees on OWCP rolls.

Handbook EL-505 at 259. As for identifying Rehabilitation Assignments, Handbook EL-505 focuses on permanent assignments to existing positions in the workforce – to the employee's current position if it can be performed with minor modifications;[9]

[9] The Postal Service reads "minor modification" to mean the elimination of non-essential duties within the meaning of a reasonable accommodation under the Rehabilitation Act.

assignments to another existing position, or assignments to residual vacancies in the organized workforce.[10] Handbook EL-505 at 269. If none of these options produce an assignment, Handbook EL-505 authorizes the creation of a new position in the workforce to which the employee can be permanently assigned. *Id.*

* * *

III. ARGUMENT

A. THE BOARD LACKS JURISDICTION UNDER 5 C.F.R. § 353.301(d) BECAUSE THE REGULATION EXCEEDS ITS STATUTORY AUTHORITY

1. The Object Of A Restoration Under FECA May Only Be A Regular Workforce Position

The history of FECA's reemployment provisions demonstrates that Congress never granted a restoration right to any assignment other than to a recognized position in the Agency's workforce. 5 U.S.C. § 759(c) provided a right for a FECA claimant to "enter his name on each appropriate register or employment list, or both, maintained by the Commission, for certification for appointment to any vacant position for which he is physically and otherwise qualified, . . ." 5 U.S.C. § 759(c)(1964) (emphasis added). When Congress transferred reemployment rights to 5 U.S.C. § 3315a a year later, it restated the identical right.

> The Civil Service Commission, on application by an employee or former employee receiving compensation under subchapter I of chapter 81 of this title, shall enter his name on each appropriate register or employment list, or both, maintained by the Commission, for certification for appointment to a vacant position for which he is physically and otherwise qualified, . . .

[10] A residual vacancy is a position that remains vacant after any employee with contract-based seniority rights has been given the opportunity to bid for, assume, etc. the position.

5 U.S.C. § 3315a(b) (1967) (emphasis added). And when FECA reemployment rights were amended and returned to the body of FECA in 1974, Congress once again limited reemployment rights to existing positions, a restriction made inescapable by Congress' references to the employee's "former position" and to the "attendant rights" it promised reemployed claimants.

> (1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and
>
> (2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, within any other department or agency.

5 U.S.C. § 8151(b) (emphasis added).

Given this consistent and current statutory restraint, the OPM regulations may not be read to require an agency to provide anything other than an assignment to a regular position. If 5 C.F.R. § 353.301(d) is to survive, its command that "[a]gencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty" must be read only to require placement in a regular position in the workforce. Such a reading would, as the Board has noted, be consistent with its current authority. *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 12 (2010)

(citing *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997); *Brunton v. U.S. Postal Service*, 114 M.S.P.R. 365, ¶ 14 (2010) (citing *Taber v. Department of the Air Force*, 112 M.S.P.R. 124, ¶ 14 (2009). But if § 353.301(d) means something else – for example if it is read to require the kind of assignments provided by the Postal Service under chapter 7 of Handbook EL-505 – it is unenforceable.

In its Consolidation Order, the Board commented that "it appears that the U.S. Postal Service may have established an agency-specific rule providing partially recovered employees with greater restoration rights than the "minimum" rights described in 5 C.F.R. § 353.301(d)." The statutory history of FECA reemployment rights discloses that this issue as stated presents a red herring. Assuming the Postal Service has established an agency-specific rule providing partially recovered FECA claimants with rights to Limited Duty assignments as defined in the ELM and Handbook EL-505, that cannot be deemed to be an extension of "restoration rights" under FECA for the reasons described here; i.e., FECA restoration rights apply only with regard to existing regular positions. Postal Service employees may have rights under the ELM and Handbook EL-505 to Limited Duty. Postal Service employees who are covered by collective-bargaining agreements may have the ability to enforce those rights though the grievance procedures. But those facts do not transform those rights into restoration rights covered by FECA. Congress has consistently limited FECA reemployment rights to existing positions in the workforce.

2. The Subject of A Restoration Under FECA May Only Be A Fully Recovered Worker

Similarly, Congress has restricted FECA reemployment rights to fully recovered employees.

> (1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and
>
> (2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, within any other department or agency.

5 U.S.C. § 8151(b) (emphasis added). In the context of § 8151(b), overcoming a disability must mean regaining the ability to "resume [the employee's] former or . . . equivalent position," which in turn corresponds exactly to the definition of "fully recovered" under the regulations. As a result, the reemployment rights granted by Congress in § 8151(b) flow only to fully recovered employees. Any provisions in the regulations that purport to provide reemployment rights under FECA to an employee other than a fully recovered employee exceed the authority granted by the statute and are unenforceable.

Of course, unlike the preceding argument concerning FECA's limitation to regular positions, there is a basis in FECA legislative history to read FECA to authorize regulations granting reemployment rights to employees whose work-related illness or injury has been partially overcome. *See* S. Rep. 93-1081 at 4, 1974 U.S.C.C.A.N. at 5344. But putting aside the inherent ambiguity of the Senate Report's statement, it would be improper for the Board to rely on the Senate Report to confound the clear meaning of

the statute. "The preeminent canon of statutory interpretation requires [the Board] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there' . . . . Thus, [the Board's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183-84 (2004). Given the clarity of § 8151(b), i.e., the repeated references to an employee's having "overcome" an injury or disability, that language must be enforced as Congress adopted it.

As a result, 5 C.F.R. § 353.301(d) is unenforceable in any context, and should not be applied by the Board to obtain jurisdiction over the Postal Service's employment efforts under the ELM and Handbook EL-505.

3. The Postal Service's Rules Are Established Elements of Its Collective-Bargaining Agreements

The provisions of ELM § 546 and Handbook EL-505 are incorporated into the Postal Service's collective-bargaining agreements, agreements that cover the overwhelming majority of the Postal Service's workforce.

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

See, e.g., Agreement Between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, Article 19 (2006). *See also, Harrell v. U.S. Postal Service*, 445 F.3d 913, 922-23 (7th Cir. 2006) ("postal handbooks and manuals affecting working conditions are incorporated by reference" into collective bargaining agreements). The rights provided by these agreements are ultimately protected by labor

arbitrators, and not the Board. While the Board may review decisions of federal-sector arbitrators, it may not review those of Postal Service arbitrators. *See,* e.g., *Anderson v. U.S. Postal Service*, 109 MSPR 558 (2008); *Marjie v. U.S. Postal Service*, 70 M.S.P.R. 95 (1996).

But beyond the contractual nature of ELM § 546 and Handbook EL-505, the procedures for resolving disputes under the Postal Service's collective-bargaining agreements comprise a fundamental feature of the Postal Service's relationships with its employees and their unions, and they provide an effective means of enforcing ELM § 546 and EL-505. Postal Service collective bargaining agreements all provide, in their respective versions of Article 15, that alleged contractual violations may be pursued through a grievance process culminating in binding arbitration. *See*, 39 U.S.C. § 1206(b) (Postal Service collective bargaining agreements "may include any procedures for resolution by the parties of grievances, including procedures culminating in binding third-party arbitration . . . .").

There is no reason for the Board to invade these fundamental and substantive features of the Postal Service's collective-bargaining relationships, and there is every reason not to do so. As described above, the contours of ELM § 546 and Handbook EL-505 are complex, their application is extraordinarily fact-specific, and the final word on their meaning and application is contractually reserved to the grievance procedure, and ultimately an arbitrator. As the arbitration authority described above indicates, there is complexity – and some controversy – concerning the meaning of ELM § 546 and Handbook EL-505, particularly when they are applied to the myriad factual situations that necessarily arise in an organization of the size and organizational diversity of the

Postal Service. For the Board to make a determination under the "every effort" standard of 5 C.F.R. § 353.301(d) in these circumstances would be jurisdictionally inappropriate, but would also be substantially upsetting to the Postal Service's collective-bargaining relationships and would, as a practical matter, involve the Board in determinations that are better handled by the grievance procedures, where experience and expertise provide a substantially better forum for all the participants – the Postal Service and its employees, alike.

B. EXPANDING THE BOARDS JURISDICTION UNDER 5 C.F.R. § 353.301(d) WOULD INAPPROPRIATELY INVOLVE THE BOARD IN THE ACTIVITIES OF OWCP

ELM § 546 and Handbook EL-505 obligate the Postal Service to search for work that is not a regular position and offer work if it is found. These provisions were motivated by a desire to allow workers to enjoy the salutary effect of returning to work as soon as possible and by a desire to reduce workers' compensation expense. And they are in keeping with the Office of Workers' Compensation Programs' ("OWCP") approach to the administration of FECA, which encourages employment and rehabilitation, independent of FECA's restoration provisions.

"OWCP considers return to work a benefit both to the injured employee, who once again becomes a productive member of society, and to the employer, who retains (or obtains) the services of a skilled and knowledgeable individual." Questions and Answers about the Federal Employees' Compensation Act (FECA), H-1 (U.S. Department of Labor, Employment Standards Administration, (Sept. 25, 2007).

The Board as a matter of public policy should respect OWCP's role and responsibility in the administration of FECA and certainly should do nothing that

interferes with OWCP functions or conflicts with the OWCP's enforcement philosophy. For example, while OWCP encourages employees and agencies to informally resume their relationship as soon as possible after an illness or injury, it will not penalize an employee's failure to accept a limited or light duty offer from his or her agency unless the offer was for "suitable work" under OWCP rules. *See* FECA Procedure Manual – Part 2, Claims, at 2-0814-4(b). Under the suitable work rules, employment offers of less than four hours of work per day when the employee is capable of working four or more hours, or employment offers that are for temporary jobs (except for temporary employees) are generally considered unsuitable. If an offer is not suitable, an employee's decision to refuse it does not impact the receipt of compensation. Yet, should the Board expand its jurisdiction under 5 C.F.R. § 353.301(d), it would likely find that agencies are required to make "every effort" to offer work that employees are entitled to refuse under FECA. That sort of administrative inconsistency should be avoided.

CONCLUSION

For the reasons described here, the Board should, at a minimum, follow its existing authority and read 5 C.F.R. § 353.301(d) to only require an effort to place FECA claimants in regular positions in the agencies' workforces.

Respectfully submitted,

William D. Bubb
Agency Representative

August 24, 2011

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

Name & Address	Documents	Method of Service
MSPB: Office of the Clerk of the Board	Agency's Opening Brief	e-Appeal / e-Mail
Marcella Albright Appellant	Agency's Opening Brief	e-Appeal / e-Mail
Thomas William Albright Appellant Representative	Agency's Opening Brief	e-Appeal / e-Mail
Earl L. Cotton, Sr., Esq. Agency Representative	Agency's Opening Brief	e-Appeal / e-Mail
Joshua T. Klipp, Esq. Agency Representative	Agency's Opening Brief	e-Appeal / e-Mail
Andrew C. Friedman, Esq. Agency Representative	Agency's Opening Brief	e-Appeal / e-Mail
Theresa M. Gegen Agency Representative	Agency's Opening Brief	e-Appeal / e-Mail
Ayoka Campbell Agency Representative	Agency's Opening Brief	e-Appeal / e-Mail

I agree to send a printed copy of the electronic pleading with attachments to non-efilers by the end of next business day, as follows:

Name & Address	Documents	Method of Service
James C. Latham Appellant [redacted]	Agency's Opening Brief	US Postal Mail
Ruby N. Turner Appellant [redacted]	Agency's Opening Brief	US Postal Mail

Arleather Reaves Appellant [redacted]	Agency's Opening Brief	US Postal Mail
Cynthia E. Lundy Appellant [redacted]	Agency's Opening Brief	US Postal Mail
J.R. Pritchett Appellant Representative Postal Employee Advocates 86 East Merrill Road McCammon, ID 83250 USA	Agency's Opening Brief	US Postal Mail
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