UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 20

Docket Nos. DA-0353-10-0408-I-1
SF-0353-10-0329-I-1
CH-0353-10-0823-I-1
AT-0353-11-0369-I-1
DC-0752-11-0196-I-1

James C. Latham, ET AL.

Appellants,[1]

v.

United States Postal Service,

Agency.

February 24, 2012

James A. Penna, Amarillo, Texas, for appellant Latham.

Geraldine Manzo, Oakland, California, for appellant Turner.

J.R. Pritchett, McCammon, Idaho, for appellant Reaves.

Thomas William Albright, Garner, North Carolina, for appellant Albright.

Matthew J. Dowd, Esquire, Washington, D.C., for the appellants.

Andrew C. Friedman, Esquire, Chicago, Illinois, Ayoka Campbell, Esquire, Charlotte, North Carolina, Earl L. Cotton, Sr., Esquire, Atlanta, Georgia, Joshua T. Klipp, Esquire, San Francisco, California, Theresa M. Gegen, Esquire, Dallas, Texas, and William D. Bubb, Esquire, Washington, D.C., for the agency.

[1] The other appellants named in these appeals are Ruby N. Turner, Arleather Reaves, Cynthia E. Lundy, and Marcella Albright.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a separate dissenting opinion.

OPINION AND ORDER

¶1 These appeals present the question of whether the agency's own internal rules regarding the return to duty in modified assignments of compensably injured individuals[2] are enforceable by the Board in a restoration appeal under 5 C.F.R. § 353.304(c). For the reasons set forth below, we answer in the affirmative. We REVERSE the initial decisions in *Latham v. U.S. Postal Service*, MSPB Docket No. DA-0353-10-0408-I-1, and *Turner v. U.S. Postal Service*, MSPB Docket No. SF-0353-10-0329-I-1, AFFIRM the dismissal of *Reaves v. U.S. Postal Service*, MSPB Docket No. CH-0353-10-0823-I-1, as MODIFIED by this Opinion and Order, and REMAND *Lundy v. U.S. Postal Service*, MSPB Docket No. AT-0353-11-0369-I-1, and *Albright v. U.S. Postal Service*, MSPB Docket No. DC-0752-11-0196-I-1, for further adjudication consistent with this Opinion and Order.

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[2] The term "compensably injured individual" refers to an employee who incurs an injury in the performance of his duties, or suffers a disease proximately caused by his employment, which is covered under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq*. *See* 5 C.F.R. § 353.102. The Federal Employees' Compensation Act is a comprehensive statutory scheme which provides federal and Postal Service employees who are injured in the performance of their duties, including those who suffer from occupational disease, with workers' compensation benefits, including wage and medical benefits, as well as with rights to job restoration under certain circumstances. These appeals concern only the appellants' employment restoration claims.

BACKGROUND

¶2 The appellants are employees of the agency encumbering various positions of record in their respective crafts. Latham Initial Appeal File (IAF), Tab 8 at 87; Turner IAF, Tab 6, Subtab E; Reaves IAF, Tab 12 at 172; Lundy IAF, Tab 6 at 38; Albright IAF, Tab 4, Subtab 4A. The appellants suffered compensable injuries that rendered them unable to perform the essential functions of their positions. The agency subsequently returned the appellants to duty in modified assignments in which they performed tasks less physically demanding than those previously required of them.[3] Latham IAF, Tab 8 at 45-47, 73, 109; Turner IAF, Tab 6, Subtabs 4K, 4M; Reaves IAF, Tab 12 at 174; Lundy IAF, Tab 6 at 57, 65; Albright IAF, Tab 4, Subtab 4G at 1461, 1477, 1488. Between November 30, 2009, and September 23, 2010, the agency discontinued the appellants' limited duty assignments pursuant to its National Reassessment Process (NRP), informing them that there were no operationally necessary tasks available for them to perform within their medical restrictions, and directing them to request leave and not to report again for duty unless they were informed that such work is available.[4] Latham IAF, Tab 8 at 39; Turner IAF, Tab 6, Subtab 4B; Reaves IAF, Tab 12 at 60; Lundy IAF, Tab 6 at 34; Albright IAF, Tab 4, Subtab 4B.

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[3] "Modified assignments" are assignments afforded to individuals who, because of compensable injury, are unable to perform the essential functions of their positions. They consist of tasks that do not necessarily comprise the essential functions of any established position. U.S. Postal Service Handbook EL-505, Injury Compensation, app. C (1995). Modified assignments are divided between "rehabilitation" assignments for employees whose work limitations are expected to be permanent and "limited duty" assignments for employees whose work limitations are not expected to be permanent. *Id.*, ch. 7, 11.

[4] The stated purpose of the NRP was to review current modified assignments within the agency in order to ensure that they consist only of "operationally necessary tasks" within the employees' medical restrictions. Latham IAF, Tab 8 at 119. The agency has since discontinued the NRP. Oral Argument Transcript at 18, 49.

¶3 Each of the five appellants filed a Board appeal and requested a hearing. Latham IAF, Tab 1 at 3-4; Turner IAF, Tab 1 at 3; Reaves IAF, Tab 1 at 2, 4; Lundy IAF, Tab 1 at 2; Albright IAF, Tab 1 at 3-4. They argued, among other things, that the discontinuation of their modified assignments violated the agency's own internal rules, specifically the Employee and Labor Relations Manual (ELM) and Injury Compensation Handbook EL-505 (EL-505). Latham IAF, Tab 1 at 6; Turner IAF, Tab 8 at 6; Reaves IAF, Tab 13 at 4-5; Lundy IAF, Tab 1 at 7-12; Albright IAF, Tab 1 at 6. They requested that the Board order them restored to their modified assignments with back pay. Latham IAF, Tab 1 at 4; Turner IAF, Tab 1 at 5; Reaves IAF, Tab 15 at 4; Lundy IAF, Tab 1 at 13; Albright IAF, Tab 1 at 7.

¶4 The administrative judges issued initial decisions that did not grant the appellants their requested relief. Appellants Reaves, Lundy, and Albright had their appeals dismissed for lack of jurisdiction without a hearing upon findings that they failed to make nonfrivolous allegations that the discontinuation of their modified assignments was arbitrary and capricious. Reaves IAF, Tab 30 at 1-2, 6; Lundy IAF, Tab 9 at 1, 5-6; Albright IAF, Tab 14 at 1, 12-13. Appellants Latham and Turner had their claims denied, after a hearing, on the basis that they failed to prove that the discontinuation of their modified assignments was arbitrary and capricious. Latham IAF, Tab 26 at 1, 4-9, 16; Turner IAF, Tab 23 at 2, 27, 32.

¶5 The appellants filed petitions for review, arguing again, among other things, that the discontinuation of their modified assignments violated the agency's own internal rules, including the ELM.[5] Latham Petition for Review

[5] The ELM has been incorporated by reference into the applicable collective bargaining agreements. National Agreement between the National Association of Letter Carriers and the U.S. Postal Service, Article 19; National Agreement Between the American Postal Workers Union and the U.S. Postal Service, Article 19. It has also been incorporated into the regulations governing the Postal Service. 39 C.F.R. § 211.2.

File (PFR File), Tab 1 at 6; Turner PFR File, Tab 1 at 3; Reaves PFR File, Tab 1 at 2-5; Lundy PFR File, Tab 1 at 13-18; Albright PFR File, Tab 1 at 6-7. The Board consolidated the appeals for briefing. Latham PFR File, Tab 8 at 1. In its request for briefing, the Board asked the parties to address: (1) whether a denial of restoration may be "arbitrary and capricious" within the meaning of 5 C.F.R. § 353.304(c) solely for being in violation of the ELM; and (2) the extent of the agency's restoration obligation under the ELM. *Id*. at 4. The Board issued a Federal Register notice offering amici curiae the opportunity to comment on these matters as well. 76 Fed. Reg. 44,373-74 (July 25, 2011).

¶6 The appellants and several amici responded, arguing that the agency is required to follow its own rules, including the ELM, and that the agency acts arbitrarily and capriciously when it fails to do so. Latham PFR File, Tabs 14, 19-23, 25-28, 33. They maintained that the agency's rules require that it provide partially recovered individuals with any available work within their medical restrictions, but they generally conceded that the agency is not required to provide them with busy work, "make work," or work for the sake of work.[6] *Id*. The agency responded, arguing among other things that the Office of Personnel Management's (OPM) regulations governing the restoration of partially recovered individuals are, for two reasons, ultra vires and therefore invalid: (1) The statute authorizing OPM to issue the regulations, 5 U.S.C. § 8151(b), provides restoration rights only to fully recovered individuals; and (2) the statute provides only for restoration to work that comprises the essential functions of an established position. Latham PFR File, Tabs 18, 31. The agency requested oral argument in these appeals, and the Board granted the agency's request. Latham PFR File, Tabs 32, 40.

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[6] Amicus American Postal Workers Union argues that a denial of restoration that violates the agency's own rules may not be arbitrary and capricious to the extent that the violation was the product of a good faith dispute about the meaning or application of the rules.

¶7 Finding that the issues presented in these appeals directly concern the interpretation of an OPM regulation, the Board also requested that OPM provide an advisory opinion addressing the question of whether an agency acts arbitrarily and capriciously in denying restoration to a partially recovered individual when such denial violates the agency's own internal rules, such as the ELM. Latham PFR File, Tab 7; *see* 5 U.S.C. § 1204(e)(1)(A). OPM responded in the affirmative, explaining that agencies are required to follow their own rules, and that section 353.304(c) contemplates that an agency's failure to follow its own rules concerning the restoration of a partially recovered individual would be arbitrary and capricious even if those rules go beyond the "minimum" restoration obligation set forth in section 353.301(d). Latham PFR File, Tab 30.

¶8 On December 13, 2011, the Board held oral argument in these appeals. The Board heard argument from the appellants' representative, the agency's representative, and representatives for the amici from the American Postal Workers Union (APWU) and the National Association of Letter Carriers (NALC). The Board allowed the parties and amici to submit written closing briefs. Latham PFR File, Tab 43. All but the APWU, which affirmatively declined, submitted closing briefs by January 6, 2012, the date the record closed. Latham PFR File, Tabs 44, 45, 47. The Board has considered the entire record in ruling on these appeals.

ANALYSIS

To establish jurisdiction over a restoration appeal under 5 C.F.R. § 353.304(c), an appellant must, among other things, prove by preponderant evidence that the denial of restoration was "arbitrary and capricious."

¶9 As previously noted, the Federal Employees' Compensation Act (FECA) provides, inter alia, that federal employees who suffer compensable injuries enjoy

certain rights to be restored to their previous or comparable positions.[7] 5 U.S.C. § 8151(b); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). Congress has explicitly granted OPM the authority to issue regulations governing agencies' obligations in this regard. 5 U.S.C. § 8151(b). Pursuant to this authority, OPM has issued regulations requiring agencies to make certain efforts toward restoring compensably injured individuals to duty, depending on the timing and extent of their recovery. 5 C.F.R. § 353.301; *see Smith v. U.S. Postal Service*, 81 M.S.P.R. 92, ¶ 6 (1999). With respect to "partially recovered" individuals, defined in the regulations as those who, though not ready to resume the full range of their regular duties have recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, OPM's regulations require agencies to "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." 5 C.F.R. §§ 353.102, .301(d).

¶10 OPM's regulations also provide Board appeal rights to individuals affected by restoration decisions under 5 C.F.R. § 353.301. 5 C.F.R. § 353.304. With respect to partially recovered individuals, these regulations provide as follows:

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[7] The statute itself uses the term "retention rights" rather than "restoration rights." 5 U.S.C. § 8151. It seems that OPM's predecessor agency, the Civil Service Commission, applied the term "restoration" to the retention of compensably injured individuals because Congress had previously applied it to the similar rights that it afforded to individuals released from military duty, *see* 5 U.S.C. § 3551 (1966), and the Commission desired to treat both statutory schemes with the same set of official guidance, *see* Employee and Labor Relations Manual, chapter 353 (1975). In other words, the term "restoration" was already in established use in a similar context at the time that Congress first afforded retention rights to compensably injured individuals. Since "restoration" has been used synonymously with "retention" for over 40 years by the agency charged with administering the statute, there should be no confusion on the matter at this point despite the disconnect between the language in the statute and in the implementing regulations.

"An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). The United States Court of Appeals for the Federal Circuit recently issued a decision holding that, in order to establish jurisdiction over a restoration appeal under that section, an appellant must prove by preponderant evidence that: (1) He was absent from his position due to a compensable injury; (2) he 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 him; (3) the agency denied his request for restoration;[8] and (4) the denial was arbitrary and capricious because of the agency's failure to perform its obligations under 5 C.F.R. § 353.301(d). *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011). The court's decision in *Bledsoe* is inconsistent with the line of Board cases stating that an appellant establishes jurisdiction by making nonfrivolous allegations as to these elements. *E.g.*, *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004). The court was explicit that jurisdiction is established by preponderant evidence and not by nonfrivolous allegations. *Bledsoe*, 659 F.3d at 1101-02 (citing *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006) (en banc)). Accordingly, to the extent that *Chen* and any other Board decisions state that Board jurisdiction is established by making nonfrivolous allegations, they are hereby overruled.[9]

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[8] Discontinuation of a modified assignment may constitute a denial of restoration for purposes of Board jurisdiction. *Sanchez v. U.S. Postal Service*, 114 M.S.P.R. 345, ¶ 11 (2010) (citing *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007)).

[9] As a consequence of Federal Circuit's decision in *Bledsoe*, an appellant who establishes jurisdiction over a 5 C.F.R. § 353.301(c) appeal automatically prevails on the merits. There is no separate jurisdictional analysis. Despite the peculiarity of this outcome, however, we are bound to follow our reviewing court's precedential decision. *See Schibik v. Department of Veterans Affairs*, 98 M.S.P.R. 591, ¶ 8 (2005). Moreover, the Board is in no position to criticize *Bledsoe* because that decision is based entirely on the Board's own regulations. 659 F.3d at 1101; *see* 5 C.F.R. § 1201.56(a)(2).

¶11 It is undisputed that the appellants here have all satisfied the first three jurisdictional elements. Latham IAF, Tab 26 at 4; Turner IAF, Tab 23 at 6-7; Reaves IAF, Tab 30 at 3; Lundy IAF, Tab 9 at 4; Albright IAF, Tab 14 at 6. Thus, the ultimate issue is whether the appellants have proven by preponderant evidence that the denials of restoration were arbitrary and capricious. *See Carlos v. U.S. Postal Service*, 114 M.S.P.R. 553, ¶ 7 (2010) (the Board will determine whether a denial of restoration was arbitrary and capricious). However, resolving that issue requires, as a threshold matter, answering the fundamental question of law presented in these appeals, i.e., whether the Board's jurisdiction under 5 C.F.R. § 353.304(c) may encompass a claim that an agency's violation of its internal rules resulted in an arbitrary and capricious denial of restoration. For the following reasons, we answer that question in the affirmative.

The Office of Personnel Management's regulations provide that a denial of restoration is per se arbitrary and capricious when it is the result of the agency's violation of its own agency-specific restoration rules.

¶12 The Board's jurisdiction over restoration appeals derives entirely from a regulation promulgated by OPM at 5 C.F.R. § 353.304. As explained above, our jurisdiction in the case of partially recovered individuals extends only to cases in which the denial of restoration was arbitrary and capricious.[10] *Supra* ¶ 10; *Bledsoe*, 659 F.3d at 1103-04; *see Chen*, 97 M.S.P.R. 527, ¶¶ 17-18. Under OPM's regulations, a partially recovered individual's substantive rights with regard to restoration are set forth at 5 C.F.R. § 353.301(d), which provides as follows:

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[10] Even if, as the dissent argues, "arbitrary and capricious" is better understood as a standard of review than as a jurisdictional element, we find that *Bledsoe*, 659 F.3d at 1104, precludes us from making such a determination. Moreover, even if the Board were not constrained by *Bledsoe* from revisiting this issue, we would still decline to do so here. To follow the dissent's approach would require overturning 15 years of Board case law on the matter, *see, e.g.*, *Allen v. U.S. Postal Service*, 73 M.S.P.R. 73, 77 (1997), without the parties having had any opportunity to brief it.

> 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.[11]

The Board has previously found that the "minimum" requirement of this section is that an agency must search within the local commuting area for vacant positions to which it can restore a partially recovered employee and to consider him for any such vacancies. *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)); *see also Green v. U.S. Postal Service*, 47 M.S.P.R. 661, 668 (1991) (the Rehabilitation Act does not require an agency to accommodate a disabled employee by permanently assigning him to light duty tasks when those tasks do not comprise a complete and separate position); *Hawkins v. U.S. Postal Service*, EEOC Docket No. 03990006, 1999 WL 91429 at *3 (Feb. 11, 1999) (an agency is not required to create a new position to accommodate an employee's disability). However, section 353.301(d) does not state whether an agency may voluntarily assume greater obligations vis-à-vis restoring partially recovered individuals beyond the "minimum" requirements of that section, and if it does so, whether such obligations are enforceable by the Board under 5 C.F.R. § 353.304(c). Because of the potentially significant impact of these appeals, the Board sought an advisory opinion from OPM as to the meaning of 5 C.F.R. §§ 353.301(d) and .304(c). Latham PFR File, Tab 7; *see* 5 U.S.C. § 1204(e)(1)(A).

¶13 OPM's advisory opinion addresses this matter unequivocally, stating that the phrase "at a minimum" in 5 C.F.R. § 353.301(d) anticipates that an agency

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[11] The regulatory standards for the Americans with Disabilities Act have been incorporated by reference into the Rehabilitation Act, and the Board applies them to determine whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b).

may adopt additional agency-specific requirements pertaining to the restoration of partially recovered individuals and that the regulation requires "compliance with an agency's own rules as well as the provisions of OPM regulation, at least where they confer additional protections or benefits on the employee." Latham PFR File, Tab 30 at 5. OPM further advised as follows:

> It is OPM's opinion 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. To 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. We find that OPM's interpretation of its own regulation is controlling because it is consistent with the plain language of the regulation and is not clearly erroneous.[12] *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009). None of the parties or amici dispute OPM's interpretation of its regulations. We therefore find that, under the terms of OPM's regulations, the Board has jurisdiction over appeals concerning denials of restoration to partially recovered individuals where the denial results from a violation of the agency's own internal rules.

¶14 As the Federal Circuit recently recognized, a denial of restoration is rendered arbitrary and capricious (and hence a matter over which the Board has jurisdiction) by an agency's failure to perform its obligations under 5 C.F.R. § 353.301(d). *Bledsoe*, 659 F.3d at 1104. OPM has clearly and unequivocally expressed its view that an agency's obligations under 5 C.F.R. § 353.301(d) include those which it voluntarily assumes even if they afford greater protections

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[12] This is not a case where OPM's advisory opinion concerns the "construction of a statutory scheme" and is therefore entitled to consideration commensurate only with its persuasiveness. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). Rather, the advisory opinion concerns OPM's interpretation of its own ambiguous regulations. *See American Express Co. v. United States*, 262 F.3d 1376, 382-83 (Fed. Cir. 2001) (citing *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997)).

than the "minimum" requirements of that regulation. Latham PFR File, Tab 30 at 5; *see Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959); *Dodson v. Department of the Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993); *Plezia v. Department of Veterans Affairs*, 102 M.S.P.R. 125, ¶ 10 (2006). We therefore have no difficulty concluding that the Postal Service's alleged failure to adhere to its own regulations in effecting the NRP as to these appellants can be the basis for finding an arbitrary and capricious denial of restoration for purposes of establishing Board jurisdiction under the terms of 5 C.F.R. § 353.304(c).

¶15 As a final matter regarding the meaning of OPM's restoration regulations, we must address the issue of whether OPM's use of the term "arbitrary and capricious" was meant to exclude certain types of erroneous denials of restoration from the Board's jurisdiction. OPM's predecessor agency, the Civil Service Commission, introduced the term "arbitrarily and capriciously" into the governing regulations in 1978 as part of a new section intended to "clarify[] the appeal rights of employees who are not entitled to mandatory restoration": "Injured employees who partially recover within 1 year of the date they begin receiving compensation may appeal to the Commission for a determination of whether their agencies are acting arbitrarily and capriciously in denying them restoration." 43 Fed. Reg. 2,379 (Jan. 17, 1978) (codified in 5 C.F.R. § 353.401(a)(3) (1979)). These appeal rights differed from those that the Commission afforded to fully recovered individuals to the extent that they did not offer appeal rights regarding allegedly improper restorations. *See Johnson v. U.S. Postal Service*, 6 M.S.P.R. 242, 244 (1981); 5 C.F.R. § 353.401(a)(1)(iv), (3) (1979). The Commission, however, does not appear to have explained whether the term "arbitrarily and capriciously" was meant to limit such individuals' appeal rights even further, as amicus APWU argues, to situations in which the denial of restoration resulted from an utter disregard for or intentional violation of the agency's restoration obligations. Latham PFR File, Tab 21 at 6-8, 17; Oral Argument Transcript (Tr.) at 32-38.

¶16 For the following reasons, we do not believe that the "arbitrary and capricious" standard was meant to impose such limitations. First, we find that the APWU's proposed interpretation would undermine the coherency of the regulatory scheme as a whole. *See generally Lengerich v. Department of the Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) (a regulatory provision is interpreted in the context of the regulation as a whole, reconciling the section in question with sections related to it). Specifically, the APWU's proposed reading of the language would relieve agencies of the consequences of good faith violations of their substantive restoration obligations in 5 C.F.R. § 353.301(d) itself. *See Sanchez*, 114 M.S.P.R. 345, ¶¶ 12, 16-18 (describing an agency's minimum restoration obligations under 5 C.F.R. §353.301(d)). We find it unlikely that OPM would have imposed these obligations on agencies without the intention that they be enforced.[13] Second, we are unaware of any practical or policy purpose that such a restrictive provision might serve. It would decrease protections for compensably injured individuals without decreasing the administrative burden for agencies, and it would likely complicate litigation significantly by injecting agency intent as an additional element of proof. Third, OPM stated in its advisory opinion that, in order to avoid acting arbitrarily and capriciously, an agency must adhere to its substantive restoration obligations and do so "meticulously." Latham PFR File, Tab 30 at 6. OPM's description of its

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[13] We are unpersuaded by the APWU's argument that the term "arbitrary and capricious" suggests that the Board's standard should be analogous to that of the National Labor Relations Board in deciding whether there has been an unfair labor practice, i.e., not every violation of contract or the Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938), amounts to an unfair labor practice. Tr. at 37-38; *see* 29 U.S.C. § 158. The analogy breaks down because a labor dispute that does not rise to the level of an unfair labor practice may still be resolved through grievance and arbitration; there is, in civil service law, no alternative forum to the Board for the resolution of restoration disputes. Certain employees may be able to pursue a remedy through negotiated grievance procedures, but this right is only incidental and is far from universal, even within the Postal Service.

regulation does not permit an agency to deny restoration to a partially recovered individual through good faith errors. We find that OPM's interpretation of its own regulation in this regard is consistent with the language of the regulation and is not plainly erroneous; we therefore defer to it. *See Seminole Rock*, 325 U.S. at 414; *White v. United States*, 543 F.3d 1330, 1333-34 (Fed. Cir. 2008); *Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 15 (2005). For all these reasons, we agree with the appellants that an agency's failure to adhere to its substantive restoration obligations under 5 C.F.R. § 353.301(d), including any restoration obligations that it has voluntarily adopted, is per se "arbitrary and capricious" within the meaning of 5 C.F.R. § 353.304(c).

The Office of Personnel Management's regulations concerning the restoration of partially recovered individuals do not conflict with statute.

¶17 The agency, however, raises a more fundamental challenge to the Board's jurisdiction in these cases. Specifically, it argues that the regulations conferring jurisdiction should be declared invalid as ultra vires for two reasons: (1) The governing statute provides restoration rights only to fully recovered individuals and does not authorize OPM to provide restoration rights to partially recovered individuals; and (2) the governing statute provides restoration rights only to established "positions" and does not authorize OPM to provide restoration rights to modified assignments. Latham PFR File, Tab 18 at 28-32; Tab 31 at 8-15, 17-20; Tab 44 at 14-16; Tr. at 39-48, 52-56; *see Bracey v. Office of Personnel Management*, 236 F.3d 1356, 1358-62 (Fed. Cir. 2001) (modified assignments in the Postal Service do not constitute "positions" for disability retirement purposes); *Ancheta v. Office of Personnel Management*, 95 M.S.P.R. 343, ¶¶ 12-13 (2003) (same).

¶18 The Civil Service Reform Act gives the Board original jurisdiction to review OPM regulations and declare them invalid if their application requires the

commission of a prohibited personnel practice.[14] 5 U.S.C. § 1204(f). However, unlike federal district courts, the Board does not have jurisdiction under the Administrative Procedure Act (APA) to review OPM regulations for the purpose of determining whether they exceed the statutory grant of authority. *Compare* 5 U.S.C. § 706(2)(C) (under the APA, a court may hold unlawful and set aside an agency regulation on the basis that it exceeds statutory jurisdiction, authority, or limitations) *with Thompson v. Office of Personnel Management*, 87 M.S.P.R. 184, 189 n.3 (2000) (the Board's authority to declare a regulation invalid does not extend to challenges to OPM regulations that could be made on grounds other than those identified in 5 U.S.C. § 1204).

¶19 Nevertheless, we agree with the agency that the issue of the Board's jurisdiction is always before it and that the Board has the authority to determine its own jurisdiction.[15] Latham PFR File, Tab 44 at 8-11; *see Parrish v. Merit Systems Protection Board*, 485 F.3d 1359, 1362 (Fed. Cir. 2007). Moreover, it is

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[14] For the first time in its post-argument briefing, the agency argues that OPM's regulations are invalid because they require the commission of a prohibited personnel practice under 5 U.S.C. § 2302(b)(6), i.e., the granting of an unauthorized preference to partially recovered individuals for the purpose of improving their prospects for employment. Latham PFR File, Tab 44 at 11-13. Out of fairness to the parties, the Board will generally not consider arguments advanced for the first time in a post hearing brief. *Cf. Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence). Furthermore, even if the Board were to consider the argument, it lacks merit because the Board has interpreted 5 U.S.C. § 2303(b)(6) to cover situations where the prospects of a specific person – not a class – are injured or improved by an unauthorized preference. *Avery v. Office of Personnel Management*, 94 M.S.P.R. 212, ¶ 5 (2003). We therefore find no basis for the Board to declare OPM's regulations invalid under 5 U.S.C. § 1204(f).

[15] For this reason, we are unpersuaded by the appellants' argument that the Board should not consider the agency's late-raised challenge to OPM's regulations. Latham PFR File, Tab 47 at 10-14; Tr. at 6-9. "[T]he Board must satisfy itself that it has authority to adjudicate the matter before it and may raise the issue of its own jurisdiction *sua sponte* at any time." *Metzenbaum v. General Services Administration*, 96 M.S.P.R. 104, ¶ 15 (2004).

likewise true that the Board has adopted a rule of adjudication that the provisions of a statute will prevail where there is a conflict between the statute and a regulation. *See Johnson v. Department of Justice*, 71 M.S.P.R. 59, 67 (1996). We discern no reason to forego application of that rule, and its ensuing analysis, when the issue concerns the Board's jurisdiction. Thus, we agree with the agency that if an OPM regulation purporting to confer jurisdiction on the Board conflicts with a statutory prohibition against such jurisdiction, then the Board must defer to the statute in making its jurisdictional determination and decline to exercise jurisdiction over the appeal regardless of whether the regulation is valid under 5 U.S.C. § 1204(f). Latham PFR File, Tab 44 at 11-13. The Board, however, will apply this rule of adjudication narrowly, limiting its inquiry in such cases to whether there is an affirmative conflict between the statute and the regulation, regardless of whether the regulation might otherwise have exceeded the statutory grant of authority. *See, e.g., Aguzie v. Office of Personnel Management*, 116 M.S.P.R. 64, ¶ 20 (2011) (while not invalidating OPM's regulations at 5 C.F.R. §§ 731.203(f) and 752.401(b)(10), the Board "decline[d] to follow them" to the extent that they conflicted with the Board's statutory obligation to hear appeals under 5 U.S.C. § 7513(d)). The Board's jurisdiction is not defined by statute only, but by regulation as well. *See* 5 U.S.C. §§ 1204(a)(1), 7701(a).

¶20 Consequently, we will examine whether 5 U.S.C. § 8151 precludes Board jurisdiction over restoration claims of partially recovered individuals such as to render unenforceable OPM's regulatory grant of jurisdiction to the Board at 5 C.F.R. § 353.304(c). As always, we begin with the plain language of the statute:

> Under regulations issued by the Office of Personnel Management –
>
> (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, or within any other department or agency.

5 U.S.C. § 8151(b); *see Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985) (the starting point for statutory interpretation is the text of the statute itself). The agency argues that the statute unambiguously limits restoration rights to fully recovered individuals because it provides for restoration to the "former" or "equivalent" position for employees who have "overcome" their disabilities. Latham PFR File, Tab 18 at 30-32. The agency contends that "it is unmistakable that 'overcome' must mean that an employee has recovered to the point that he or she is able to perform his or her former position," and that the statute's inclusion of "or equivalent" does not alter this meaning because the only reasonable reading of the statute is that Congress intended that an employee be restored "to a position with equivalent status, pay, and benefits [only] if his or her former position is not available." Latham PFR File, Tab 44 at 15. According to the agency, it would be unreasonable to interpret the term "or equivalent" "to expand the range of positions with respect to which an employee had a right of placement based on his or her degree of recovery." *Id*. at 15-16.

¶21 We agree with the agency that the statute does not, on its face, provide restoration rights to partially recovered individuals. Latham PFR File, Tab 18 at 31. The Civil Service Commission appears to have recognized this when issuing its official guidance:

> Public Law 93-416 (the 1974 amendments to the Federal Employees Compensation Act) directs the Commission to issue regulations governing the civil service retention rights of employees who sustain a compensable injury or disability. Although employees' right to restoration under Public Law 93-416 does not vest until they have fully recovered, the legislative history of this law makes clear that Congress intended the Commission to provide certain restoration rights for employees who are partially recovered and who are able to resume limited duty.

Federal Personnel Manual (FPM), Chapter 353, § 1-3(b) (Mar. 6, 1978). In addition, we note that a prior version of OPM's restoration regulations distinguished between partially recovered individuals and individuals "with a right to restoration under 5 U.S.C. § 8151," 5 C.F.R. §353.401(a)(1), (3) (1981), thereby implying that partially recovered individuals have no restoration rights under 5 U.S.C. § 8151 per se, *see Johnson*, 6 M.S.P.R. at 244.

¶22 However, the fact that the statute does not explicitly define the rights of partially recovered individuals does not necessarily mean that Congress intended to preclude OPM from doing so by regulation. In *American Trucking Associations v. United States*, 344 U.S. 298, 309-10 (1953), the Supreme Court eloquently explained why the absence of statutory language addressing a particular concern does not necessarily indicate congressional intent to limit a regulating agency's authority to address it:

> As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the [Interstate Commerce Commission] are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.

(citations omitted); *see also Clifton v. Federal Election Commission*, 114 F.3d 1309, 1312 (1st Cir. 1997) (agencies often are allowed through rulemaking to regulate beyond the express substantive directives of the statute, so long as the statute is not contradicted).

¶23 We find nothing in 5 U.S.C. § 8151 explicitly prohibiting the provision of restoration rights to partially recovered individuals, and we disagree with the agency's argument that statutory language regarding restoration to the "former" or "equivalent" position must be read to preclude OPM from affording restoration rights to individuals who are unable to perform the essential functions of their former positions. Latham PFR File, Tab 44 at 15-16. Section 8151(b)(2) itself provides for restoration through a reemployment priority mechanism – a process which may result in restoration to a position that is not even arguably "equivalent" to the former one. *See generally* 5 C.F.R. §§ 302.303, 330.202 (regulations governing reemployment priority in the excepted and competitive services respectively).[16] We cannot find OPM's regulations contrary to statute on the basis that they provide restoration rights to individuals who have not recovered sufficiently to perform in their former positions where the statute itself provides for restoration through a mechanism that does not necessarily require recovery to such an extent. *See* 5 U.S.C. § 8151(b). It would make little sense to require an injured employee to have recovered sufficiently to perform the duties of his former position in order to be eligible for restoration to a position that might have different physical requirements. In any event, although 5 U.S.C. § 8151 does not expressly mention partially recovered individuals, we find it significant that Congress has not amended FECA in light of OPM's (and the Civil Service Commission's) longstanding extensions of rights to partially recovered

[16] Even at the time 5 U.S.C. § 8151 was enacted, placement on a reemployment priority list could have resulted in an appointment to a position that was lower graded or otherwise not strictly "equivalent" to the former one. *See* 5 C.F.R. §§ 302.303, 302.304, 330.201 (1968).

individuals, thereby indicating Congressional approval of OPM's interpretation of the statute. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (a longstanding and consistent administrative interpretation is entitled to considerable weight).

¶24 Furthermore, the statute's legislative history supports our conclusion that FECA does not preclude OPM's regulatory extension of Board appeal rights to partially recovered individuals. In particular, it provides that "the Civil Service Commission is authorized to promulgate regulations covering the rights of employees whos[e] 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. That history further confirms that OPM's regulations are consistent with the purpose of 5 U.S.C. § 8151, i.e., to ensure that "injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner." S. Rep. No. 93-1081 at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5341. Our holding also comports with the well-established canon of statutory construction that remedial statutes should be broadly construed in favor of those whom they are meant to protect. *See Weed v. Social Security Administration*, 107 M.S.P.R. 142, ¶ 8 (2007).

¶25 The agency also contends that the statute prohibits OPM from requiring agencies to restore compensably injured individuals to anything other than a vacant funded position. Latham PFR File, Tab 18 at 28-30. We recognize that the statute speaks in terms of restoration to a "position," and although the Postal Service is not subject to the Civil Service position classification system found in 5 U.S.C. chapter 51, for the reasons explained above, modified assignments are not the equivalent of title 5 "positions." *Supra* ¶ 17. Nevertheless, notwithstanding its litigation position in this case, we find that the agency itself has considered such return to work "restoration" within the meaning of 5 U.S.C. § 8151. *See* ELM § 546.11 ("The Postal Service has legal responsibilities to

employees with job-related disabilities under 5 U.S.C. 8151 and the OPM regulations as outlined below."). Furthermore, OPM has indicated in its advisory opinion that it interprets "restoration" under FECA to include return to duty in a modified assignment. Latham PFR File, Tab 30 at 5; *see also* 5 C.F.R. § 353.301(d) ("light duty" work constitutes restoration). Considering that FECA does not affirmatively prohibit restoration to work that does not comprise the essential functions of a complete and separate position, and the term "position" is not defined anywhere in 5 U.S.C. § 8151(b), we will not second-guess OPM's decision to interpret the term more broadly than it is used in 5 U.S.C. chapter 51.

¶26 Moreover, we find that this argument poses something of a red herring. As explained above, *supra* ¶ 12, the Board has never interpreted 5 C.F.R. § 353.301(d) itself to *require* restoration to anything other than a vacant funded position. The regulation does, however, as confirmed in OPM's advisory opinion, *permit* an agency to restore a partially recovered individual to work in tasks that do not comprise the essential functions of an established position. Latham PFR File, Tab 30 at 5; *see* 5 C.F.R. § 353.301(d) (describing the restoration obligations set forth therein as "minimum" obligations). Pursuant to ELM § 546 and EL-505, chapters 7 and 11, the agency has agreed to restore partially recovered individuals to duty in whatever tasks are available regardless of whether those tasks comprise the essential functions of an established position. An agency is required to follow its own rules regardless of whether those rules go beyond the requirements of government-wide statutes and regulations. *See, e.g.*, *Vitarelli*, 359 U.S. at 545 (1959). OPM has merely given the Board jurisdiction to enforce those rules in the context of a restoration appeal.

¶27 We must disagree with the dissent's approach to the issue because even if the agency's modified duty provisions could be characterized as "substantive" rather than "procedural" in nature, our authority to review the agency's compliance with them stems not from 5 U.S.C. § 7701(c)(2)(A) but from 5 C.F.R. §§ 353.301(d) and .304(c) themselves. As OPM explained in its advisory

opinion, section 353.301(d) was intended to require an agency's adherence to its own restoration rules, and section 353.304(c) was intended to vest the Board with jurisdiction over appeals in which agencies have been alleged to violate those rules. *See supra* ¶ 13. We see nothing to prevent the Board from taking jurisdiction over an appeal on this basis.[17]

¶28 For these reasons, we find that OPM's regulations regarding the restoration of partially recovered individuals do not conflict with statute. We are therefore not compelled by statute to refrain from exercising jurisdiction over appeals brought under those regulations.

¶29 The agency and some of the amici argue, however, that even if the Board has jurisdiction as a legal matter over restoration appeals concerning violations of the agency's modified duty rules, the Board should still decline to exercise such jurisdiction. They argue that matters related to violations of the ELM and the EL-505 are essentially contract disputes, which are better handled through negotiated grievance procedures, and that the Board should avoid the possibility

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[17] Moreover, even if the Board were to decide that it lacks the authority to review alleged violations of the agency's modified duty rules under 5 C.F.R. § 353.304(c), such review could nonetheless occur under a constructive suspension theory of the case. *See McLain v. U.S. Postal Service*, 82 M.S.P.R. 526, ¶ 7 (1999) (when an employee requests work within his medical restrictions and the agency is bound by policy, regulation, or contractual provision to offer available work to the employee but fails to do so, his continued absence constitutes a constructive suspension appealable to the Board). Although many Postal Service employees lack the right to appeal a constructive suspension to the Board, others, such as appellant Latham, who is a preference eligible veteran, do have the right to appeal a constructive suspension. Latham IAF, Tab 1 at 2; Tab 8 at 125; *see generally McCandless v. Merit Systems Protection Board*, 996 F.2d 1193, 1199 (Fed. Cir. 1993) (describing the categories of Postal Service employees who have the right to appeal an adverse action to the Board under 5 U.S.C. chapter 75). Of course, in *Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 19-22 (2010), we found that the better approach is to adjudicate such constructive suspension claims in the context of the comprehensive scheme of restoration rights. *See United States v. Fausto*, 484 U.S. 439 (1988). However, our decision in *Kinglee* does not necessarily foreclose the possibility of a constructive suspension claim if the Board is precluded from considering the full scope of an appellant's restoration claim.

of issuing decisions that might conflict with arbitration decisions concerning the same issues. Latham PFR File, Tab 18 at 32-34, Tab 44 at 19-22, Tab 45, NALC Post-Argument Brief at 2-3; Tr. at 21, 36-38. However, as the agency itself points out, Congress established a personnel system for the Postal Service that is unique among federal agencies. Latham PFR File, Tab 31 at 16; *see generally* Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719. Among other things, Postal Service employees are not covered by the election of remedies provisions of 5 U.S.C. § 7121(d), and they have the right to file both a grievance and a Board appeal concerning the same agency action. *Hall v. U.S. Postal Service*, 26 M.S.P.R. 233, 236 (1985); *see also Anderson v. U.S. Postal Service*, 109 M.S.P.R. 558, ¶ 4 (2008) (unlike federal employees in title 5 agencies, a Postal Service employee does not have a right to Board review of an arbitration decision because 5 U.S.C. § 7121 does not apply to the Postal Service). We do not have discretion to decline consideration of a live controversy that is timely filed and within our jurisdiction. Although the possibility of inconsistent decisions is heightened by the parallel remedies available to Postal Service employees, this concern does not empower us simply to summarily refuse to consider appeals from Postal Service employees.[18] *See U.S. Postal Service v. Gregory*, 534 U.S. 1, 10 (2001) (although the Board may sometimes reach a different conclusion than an arbitrator, this possibility is the result of the parallel review structures set forth by statute). We also note that the right to a Board appeal is personal to an appellant, whereas the right to grievance and arbitration belongs to the union, and the union's decision on whether to pursue a grievance to its conclusion is not entirely within the grievant's control. For the same reasons, we disagree with the agency's argument that the Board

[18] Rather, the Board has historically sought to minimize the possibility of inconsistent decisions by deferring to arbitral interpretations of the collective bargaining agreements at issue in appeals. *See, e.g., Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 47 (2007).

should decline to exercise jurisdiction over these appeals out of concern for interfering with the related functions of the Office of Workers' Compensation Programs. Latham PFR File, Tab 18 at 34-35, Tab 44 at 22-23.

The agency's modified duty rules provide that it may not discontinue a modified assignment unless the duties of that assignment go away or need to be transferred to other employees who would otherwise lack sufficient work.

¶30 In order to determine whether the agency has violated its internal restoration rules in a given case, we must first determine what those rules provide. It appears to be undisputed that the agency's rules require it to offer modified assignments to partially recovered individuals whenever work is available and within their medical restrictions. The issue of when work is "available," however, is not entirely clear. It appears that the agency's practice for decades has been to make work available to partially recovered individuals under practically all circumstances, even though the plain language of the ELM suggests that the right to a modified assignment is not absolute. *Compare* Latham PFR File, Tab 1 at 10 (April 17, 2009 letter from an agency human resources official advising a physician that "the Postal Service has limited duty available to accommodate **ALL RESTRICTIONS**, except for total bed rest") *with* ELM § 546.142(a) ("The Postal Service must make every *effort* toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance.") (emphasis added). After reviewing the extensive evidence and argument that we have received in these appeals, it appears to us that the issue of when a given task is "available" to a partially recovered individual who is currently out of work remains unsettled.

¶31 None of these appeals, however, concerns an individual who was out of work at the time the agency denied him restoration. They all concern employees who were performing in modified assignments up until the time that the agency discontinued them based on the alleged lack of available work. The applicability of the agency's rules in this situation is clear, and they have been applied

consistently in all of the arbitration decisions that we have reviewed. Looking to these decisions as guidance, *see Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 47 (2007), we find that, under the ELM and the EL-505, the agency may discontinue a modified assignment consisting of tasks within an employee's medical restrictions only where the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work, Tr. at 25-27, 32-33, 51-52, 57; *see In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. E06N-4E-C 09370199, 32, 35 (2010) (Eisenmenger, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. E06N-4E-C 09419348, 6 (2010) (Duffy, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. B01N-4B-C 06189348, 17-18 (2010) (LaLonde, Arb.); *In re Arbitration between U.S. Postal Service and American Postal Workers Union*, Case No. E06TG-1E-C 07186076, 7 (2010) (Monat, Arb.). We therefore overrule *Soto v. U.S. Postal Service*, 115 M.S.P.R. 95, ¶ 11 (2010), and *Hunt v. U.S. Postal Service*, 114 M.S.P.R. 379, ¶ 11 (2010), to the extent that we found that the Postal Service "has the authority to economize its operations by consolidating the tasks being performed by limited duty employees and reassigning them to the non-limited duty employees who would be otherwise performing them." Although federal agencies may generally retain such authority, we find that the Postal Service has adopted rules that severely constrain its ability in this regard. Tr. at 24.

¶32 Given that work is generally fungible, in any particular case, there may be some practical problems involved in determining whether the work of a particular limited duty assignment has actually "gone away." For example, there may be 80 hours worth of rewrapping damaged mail that needs to be performed every week at a given facility and divided between two modified duty employees. If 40 hours worth of that work goes away, this may require the agency to eliminate one

limited duty assignment.[19] OPM's regulations do not address the issue of how the agency must deal with competing restoration rights in this situation, and we find that the agency is free to handle the matter as it sees fit as long as it does not violate any law, rule, or regulation in doing so.[20] There may also arise a situation in which some of the work previously performed by non-modified duty employees has gone away but the work being performed by modified duty employees has not. When faced with the choice between transferring the work of modified duty employees to non-modified duty employees or reducing the non-modified duty employees' work hours, the agency will likely be authorized to transfer the work as long as it does not, for example, violate any contractual provisions limiting its authority to combine work in different crafts, occupational groups, or levels into one job. *See* Case No. E06TG-1E-C 07186076, 7 (2010) (the agency did not violate the ELM when it discontinued the appellant's modified assignment and assigned his former duties to full-time employees who were underburdened because of a decreasing workload); ELM § 546.222 (modified assignments must not impair the seniority rights of part-time flexible employees).

¶33 Based on the evidence and argument that we have received, we agree with the parties and amici that the "availability" of modified work for a given partially

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[19] It is undisputed that the agency is not required to restore partially recovered individuals to "make work" assignments, to featherbedding jobs, or to work performing tasks that do not actually need to be done. Tr. at 15. There has been much argument from the appellants that the agency is not entitled to require that the work they perform be "operationally necessary," but none of them concedes that the work that they were performing was not operationally necessary. The dispute about operational necessity, rather than pertaining to whether the agency is required to assign partially recovered individuals to unnecessary work, appears to pertain to the issue of whether the agency is entitled to economize its operations by taking the appellants' allegedly necessary work and assigning it to other employees. *See supra* ¶ 31.

[20] There used to be a regulatory provision addressing this issue, but OPM eliminated that section on the basis that "conflicting restoration rights should rarely be an issue." 5 C.F.R. § 353.305 (1978); 53 Fed. Reg. 857 (Jan. 14, 1988).

recovered individual will be entirely dependant upon the facts and circumstances of his particular case, Tr. at 16, 22-23, and we will not attempt to address how the agency's modified duty rules might apply in every possible scenario. Nevertheless, based on our understanding of the agency's rules as described above, we find that the following line of inquiry provides an appropriate framework for analyzing the instant appeals: (1) Are the tasks of the appellant's former modified assignment still being performed by other employees? (2) If so, did those employees lack sufficient work prior to absorbing the appellant's modified duties? (3) If so, did the reassignment of that work violate any other law, rule, or regulation, such as the examples explained in paragraph 32 above? In this regard, evidence pertaining to general declines in mail volume and displacement of non-injured workers will likely be immaterial in the absence of a connection between these matters and the availability of the appellant's former job duties or the duties of the employees who absorbed the appellant's former tasks.

¶34 Although we have looked to arbitration decisions for the purpose of interpreting the agency's modified duty rules, we wish to emphasize that the Board is not an arbitrator. When we apply the agency's modified duty rules, we will do so in the context of the procedural and evidentiary framework established by our regulations and precedential case law, and we will not enforce these rules except as specifically authorized by statute and regulation. For example, arbitrators have employed a burden-shifting framework to decide modified duty cases. *See*, *e.g.* Case No. E06N-4E-C 09370199 at 26-29. The Board does not use a burden-shifting approach. In a 5 C.F.R. § 353.304(c) Board appeal, the burden of proof remains always with the appellant. *See Carlos*, 114 M.S.P.R. 553, ¶ 7. In addition, the Board will not examine whether the agency followed

the "pecking order" for job assignments set forth at ELM § 546.142(a),[21] or whether the agency minimized "any adverse or disruptive impact" in assigning modified duty as required by that section because these matters pertain to the details and circumstances of a restoration actually accomplished and are therefore outside the Board's jurisdiction.[22] *See Booker v. Merit Systems Protection Board*, 982 F.2d 517, 519 (Fed. Cir. 1992); 5 C.F.R. § 353.304(c); *cf. In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. E06N-4E-C 10001623, 8 (2010) (Monat, Arb.).

¶35 We will now apply the law as set forth above to the facts of each particular case.[23]

Latham v. U.S. Postal Service, MSPB Docket No. DA-0353-10-0408-I-1

¶36 Appellant Latham is a City Carrier for the agency. IAF, Tab 8 at 87. He suffered a compensable injury on September 28, 1998, and thereafter worked in a modified capacity, most recently in a rehabilitation assignment consisting of various supervisory, clerical, and customer service duties. *Id*. at 45-47, 73, 109. On April 27, 2010, the agency discontinued that assignment pursuant to the NRP. *Id*. at 39.

¶37 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 3-4. He argued that his modified assignment is still available and that he remains capable of performing its duties. IAF, Tab 1 at 4, 6, 9, Tab 4 at 1. The appellant

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[21] As one arbitrator correctly noted, the term "pecking order" is a rather odd misnomer for the process by which the agency must search for work for an individual partially recovered employee. *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. G06N-4G-C 10205542, 24 (2011) (Sherman, Arb.). It has nothing to do with resolving competing claims for work. *Id*.

[22] The Board is only concerned with whether the agency actually *denied* an appellant restoration following partial recovery from a compensable injury and whether that denial was arbitrary and capricious.

[23] All subsequent record citations in this Opinion and Order refer to the records in the appeals indicated in the subheadings.

argued that in discontinuing his modified assignment, the agency violated the ELM and committed various prohibited personnel practices. IAF, Tab 1 at 6, Tab 4 at 1-2, Tab 15 at 2.

¶38 After a hearing, the administrative judge issued an initial decision denying the appellant's restoration claim on the basis that he failed to prove that the denial of restoration was arbitrary and capricious. IAF, Tab 26, Initial Decision (ID) at 1, 4-9, 16. Specifically, the administrative judge found the appellant's modified assignment was temporary in nature and that the appellant was not entitled to encumber it as a permanent rehabilitation assignment. ID at 9. She further found that the appellant failed to identify any vacant positions within the local commuting area that comport with his medical restrictions. *Id*. The administrative judge also found that the appellant failed to proffer sufficient evidence to support his prohibited personnel practice claims. ID at 9-16.

¶39 The appellant filed a petition for review, arguing, among other things, that the administrative judge erred in failing to consider the materials that he submitted regarding the agency's modified duty obligations under the ELM and EL-505. PFR File, Tab 1 at 6; IAF, Tab 20, Ex. O-R, T-U, Z-AA, CC-II. The agency has filed a response, addressing the appellant's arguments and arguing that the petition should be denied for failure to meet the Board's review criteria. PFR File, Tab 4 at 11-21.

¶40 In this appeal, the record shows that the appellant's most recent modified assignment was classified "204b Closing Supervisor," although he could not perform all of the functions of such an assignment.[24] Hearing Compact Disc (HCD) (testimony of the appellant), (testimony of Customer Service Manager Jay Lewter). Assignments under the agency's "204b" program are not intended to be

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[24] It appears that the "204b" designation comes from section 204(b) of the Postal Field Service Compensation Act of 1955, Pub. L. No. 84-68, 69 Stat. 88, which authorized the agency to temporarily assign its employees, without a change in compensation, duties and responsibilities other than those of their official positions.

permanent; they are temporary assignments designed to introduce craft employees to supervisory and management opportunities. HCD (testimony of Mr. Lewter); National Agreement between the National Association of Letter Carriers and the U.S. Postal Service, Article 41.1.A.2. There was conflicting testimony as to whether the appellant's modified assignment consisted of duties sufficient to occupy him for all of the hours that he was working. HCD (testimony of the appellant), (testimony of Postmaster James Chambers). There was also conflicting testimony as to who took over the appellant's former duties when the agency discontinued his assignment. The appellant testified that the agency replaced him with another newly minted 204b employee, but Mr. Lewter testified that the appellant's duties were absorbed by the existing supervisors who would otherwise have been performing them. HCD.

¶41 As an initial matter, we find it immaterial that the appellant's modified assignment did not consist of the essential functions of an established position. The agency's rules obligate it to offer modified assignments when the work is available regardless of whether the duties constitute those of an established position. Case No. E06N-4E-C 09370199 at 16; ELM § 546.222; EL-505 § 11.7; *see supra* ¶ 26. We also find it immaterial that 204b assignments are intended to be temporary in nature. The authority that the agency invoked in order to afford the appellant his modified assignment does not change the fact that it was, indeed, a modified assignment afforded under the provisions of ELM § 546 and EL-505, ch. 11. IAF, Tab 8 at 73. The agency can revoke such an assignment only under limited circumstances. *See supra* ¶¶ 31-32.

¶42 In this case, we find that the appellant has established that those circumstances are not present. There is no evidence to show that the duties of the appellant's modified assignment have gone away. In fact, the record shows that those duties are still being performed by other employees. HCD (testimony of the appellant), (testimony of Mr. Lewter). There is some evidence that there was a lack of work for Clerk Craft employees at the time the agency discontinued the

appellant's modified assignment, as these employees were undergoing "excessing" pursuant to Article 12 of the National Agreement Between the American Postal Workers Union and the U.S. Postal Service. HCD (testimony of Health and Resource Management Specialist Denise Lisenbe). However, there is no evidence that any of the appellant's duties were absorbed by Clerk Craft employees or that the lack of work in the Clerk Craft otherwise affected the availability of work for the appellant. Rather, as explained above, the record shows that the appellant's former duties were absorbed by supervisory employees, and there is no evidence that these employees otherwise lacked sufficient work. For these reasons, we find that the appellant has established by preponderant evidence the discontinuation of his modified assignment violated the agency's rules regarding its modified duty obligations. We therefore find that the denial of restoration was arbitrary and capricious.

¶43 Regarding the appellant's claims of disability discrimination, age discrimination, discrimination under the Uniformed Services Employment and Reemployment Rights Act of 1994, and violations of his veterans' preference rights, for the reasons explained in the initial decision, we agree with the administrative judge that the appellant failed to prove these claims.[25] ID at 9-16. We have reviewed the remainder of the appellant's arguments on petition for review regarding the administrative judge's evidentiary rulings and handling of the appeal, and we find them to be without merit. PFR File, Tab 1 at 3, 6.

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[25] Although the agency's basic restoration obligation under 5 C.F.R. § 353.304(c) is more or less coextensive with the Rehabilitation Act, it is not entirely the same. *See Sanchez*, 114 M.S.P.R. 345, ¶¶ 16-18. Therefore, a violation of one does not necessarily entail a violation of the other. This is particularly true in the case of the Postal Service, whose restoration obligations go beyond the requirements of the Rehabilitation Act to the extent that they mandate the creation of modified assignments. *Cf. Marino v. Office of Personnel Management*, 243 F.3d 1375, 1377 (Fed. Cir. 2001) (permanent assignment to light duties is not an accommodation allowing an employee to perform the essential functions of his position).

Turner v. U.S. Postal Service, MSPB Docket No. SF-0353-10-0329-I-1

¶44 Appellant Turner is a Mail Processing Clerk for the agency. IAF, Tab 6, Subtab E. She suffered a compensable injury on February 22, 2000, and thereafter began working in a modified capacity, most recently in a limited duty assignment performing various mail scanning duties. *Id.*, Subtabs 4K, 4M. On November 30, 2009, the agency discontinued that assignment pursuant to the NRP. *Id.*, Subtab 4B.

¶45 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 3. She alleged, among other things, that her former duties are still being performed by other employees and that the agency committed disability discrimination. IAF, Tab 1 at 5, Tab 8 at 5, Tab 21 at 4-5.

¶46 After a hearing, the administrative judge issued an initial decision denying the appellant's restoration claim on the basis that the appellant failed to establish that the agency's action was arbitrary and capricious. IAF, Tab 23 (ID) at 2, 27, 32. The administrative judge found that there was nothing in the ELM to prohibit the agency from assigning the appellant's former tasks to other employees as part of their regular bid positions and that the agency did not act arbitrarily and capriciously in doing so. ID at 22-27. He also found that the appellant failed to prove her disability discrimination claim. ID at 27-31.

¶47 The appellant has filed a petition for review, among other things repeating her argument that the agency offered modified assignments to other injured employees in the same section after sending her home. PFR File, Tab 1 at 1-3. The agency has filed a response, arguing that the petition should be denied for failure to meet the Board's review criteria. PFR File, Tab 3.

¶48 The record in this case shows that the appellant's modified duty tasks included casing mail and scanning mail container tracking labels in the Automation unit. IAF, Tab 6, Subtab K; Hearing Transcript (Tr.) at 6-13 (testimony of the appellant). These, however, were sub-duties of the appellant's Automation bid assignment. Tr. at 78-79 (testimony of agency employee

Deborah Mealy), 106, 118-19 (testimony of Manager of Distribution Operations Glenn Gray). The appellant's core duties involved operating mail processing equipment, and it is undisputed that she was unable to perform those duties. IAF, Tab 18 at 8; Tr. at 27-28 (testimony of the appellant), 119 (testimony of Mr. Gray). After the agency discontinued the appellant's modified assignment, other employees in the Automation unit began performing her former tasks as part of their bid assignments. Tr. at 9, 42 (testimony of the appellant), 56-57 (testimony of Ms. Mealy), 91 (testimony of Manager of Distribution Operations Michael McDaniel).

¶49 As with appellant Latham, we find it immaterial that appellant Turner's modified assignment did not consist of the essential functions of an established position. *See supra* ¶¶ 26, 41. We also find that there is no evidence to show that the duties of the appellant's modified assignment have gone away. Although there was testimony to show that mail volume in the appellant's facility has declined in general, Tr. at 88, 96-97 (testimony of Mr. McDaniel), 119-20 (testimony of Mr. Gray), there is no evidence that there is insufficient work for the employees who would normally be performing the tasks of the appellant's limited duty assignment. In fact, the record shows that those duties are still being performed by other employees and that those employees are not even able to cover all of the work during their regular tours of duty. ID at 26; Tr. at 59 (testimony of Ms. Mealy), 83-87, 92, 97-98 (testimony of Mr. McDaniel), 103-04 (testimony of Mr. Gray). For these reasons, we find that the appellant has established that the discontinuation of her modified assignment violated the agency's rules regarding its modified duty obligations. We therefore find that the denial of restoration was arbitrary and capricious.

¶50 For the reasons explained in the initial decision, we agree with the administrative judge that the appellant failed to prove her disability discrimination claim. ID at 27-31. In particular, we agree with the administrative judge that the creation of a unique position to fit an individual's

medical restrictions is not a reasonable accommodation required by the Rehabilitation Act. ID at 29-30; *see Green*, 47 M.S.P.R. at 668. We have reviewed the remainder of the appellant's arguments on review regarding the administrative judge's rulings on witnesses and the NRP in general, and we find nothing in them to show that the administrative judge erred in his ruling on the disability discrimination claim. PFR File, Tab 1 at 1-3.

Reaves v. U.S. Postal Service, MSPB Docket No. CH-0353-10-0823-I-1

¶51 Appellant Reaves is a Mail Processing Clerk for the agency. IAF, Tab 12 at 172. She suffered a compensable injury on February 10, 1990, and thereafter began working in a modified capacity, most recently in a rehabilitation assignment repairing damaged mail and processing mail to be returned to sender. *Id*. at 174. On June 25, 2010, the agency discontinued that assignment pursuant to the NRP. *Id*. at 60.

¶52 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 2, 4. She alleged that the agency failed to follow the NRP's procedures correctly, *id*. at 3-4, and that the agency failed to conduct a sufficient job search, IAF, Tab 6 at 2-3, Tab 15 at 1-2, Tab 20 at 1-2, 6. The appellant also alleged that the agency's action was based on disability discrimination and retaliation for protected equal employment opportunity activity, IAF, Tab 1 at 3-4, Tab 13 at 1-4, Tab 20 at 2-6, and that the NRP is invalid per se, IAF, Tab 13 at 4-5, Tab 15 at 2, Tab 20 at 5-7.

¶53 Having afforded the appellant proper notice of her jurisdictional burden and of the need to make nonfrivolous allegations in order to receive her requested hearing, IAF, Tab 2 at 2-3, Tab 19 at 3-4, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing on the basis that the appellant failed to make a nonfrivolous allegation that the denial of restoration was arbitrary and capricious, IAF, Tab 30 (ID) at 1-2, 6. The administrative judge found that the appellant did not have an unconditional right to remain in her modified assignment, ID at 4-5, that the agency conducted a

sufficient search for alternative work when it discontinued the assignment, and that the appellant failed to identify any vacant funded positions in the local commuting area within her medical restrictions, ID at 5-6. Having found that the appellant failed to establish jurisdiction over her appeal, the administrative judge declined to consider her retaliation and disability discrimination claims. ID at 6.

¶54 The appellant filed a petition for review, challenging the validity of the NRP per se and arguing that the administrative judge erred in finding that her right to restoration was limited to vacant funded positions. PFR File, Tab 1. The agency filed no response apart from the briefing relating to the legal issues in the consolidated appeals.

¶55 For the reasons explained above, we agree with the appellant that her restoration right is not limited to vacant funded positions. *Supra* ¶ 26. However, we also agree with the administrative judge that the appellant's right to a modified assignment is not absolute but is conditioned on the availability of work within her medical restrictions. ID at 4-5; *see supra* ¶¶ 31-32. The appellant in this case made no allegation that the tasks of her modified assignment are still being performed by other employees or that they have otherwise not gone away. The appellant also failed to identify any other tasks within her medical restrictions that might have been available for her to perform either inside or outside the context of a vacant funded position. As explained above, the appellant bears the burden of proof on this matter. *Supra* ¶ 34.

¶56 As for the sufficiency of the agency's job search, we agree with the administrative judge's finding that there is no indication in the record that the search was insufficient geographically.[26] ID at 5-6; IAF, Tab 17*; cf. Urena v.*

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[26] The agency stated in the letter discontinuing the appellant's rehabilitation assignment that it had conducted a job search "throughout the Local Commuting Area . . . within the District Boundaries." IAF, Tab 12 at 60. Based on this statement, the appellant alleged that the agency's search was insufficient geographically, IAF, Tab 6 at 2; *see Sanchez*, 114 M.S.P.R. 345, ¶ 14 (evidence that the agency's job search was limited to a single Postal district constituted a nonfrivolous allegation that the denial of restoration

U.S. Postal Service, 113 M.S.P.R. 6, ¶ 13 (2009) (evidence that the agency failed to search the commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration). We have considered the appellant's argument that the job search was illusory in light of the large number of job searches that the agency was conducting simultaneously. IAF, Tab 15 at 2. However, we find that there is nothing to prevent the agency from conducting its job searches in such a manner, and we are not convinced that conducting job searches one at a time would increase the likelihood of locating available work for partially recovered individuals in the aggregate.

¶57 We have also considered the appellant's challenges to the validity of the NRP per se, and we find that they do not constitute a nonfrivolous allegation that the denial of restoration in this case was arbitrary and capricious. The issue before the Board is not whether the NRP itself was arbitrary and capricious or otherwise invalid. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009) (the appellant's challenge to the NRP in general did not constitute a nonfrivolous allegation that the agency acted arbitrarily and capriciously in her particular case). The Board decides particular cases and controversies; we are not a review panel to sit in judgment of the validity of agency programs and initiatives. *See* 5 U.S.C. § 1204(a)(1). We therefore make no finding on the validity of the NRP as written or as applied. Our decision is limited to the question of whether the agency's application of the NRP resulted in an arbitrary

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was arbitrary and capricious), but she later appeared to abandon this position based on the agency's subsequent submissions, IAF, Tab 15 at 1-2. The administrative judge appears to have found no dispute of material fact regarding the geographical sufficiency of the job search, ID at 5-6 & n.2., and the appellant has not challenged this finding on petition for review. We therefore find no basis to conclude that the administrative judge impermissibly weighed conflicting evidence on this matter in finding that the appellant failed to make a nonfrivolous allegation that the job search was deficient. *Cf. Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

and capricious denial of restoration in the instant appeal. For the reasons explained above, we find that the appellant has failed to make a nonfrivolous allegation that it has.

¶58 As for the appellant's allegations of disability discrimination and retaliation for prior equal employment opportunity activity, we agree with the administrative judge that the Board lacks jurisdiction over such claims per se in the absence of an otherwise appealable action. ID at 6; *see McDonnell v. Department of the Navy*, 84 M.S.P.R. 380, ¶ 11 (1999). However, we find that the administrative judge should have considered the appellant's claims in this regard to the extent that they pertain to the jurisdictional issue. *Cf. Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1341 (Fed. Cir. 2006) (at the jurisdictional stage of an involuntary retirement appeal, the Board will consider allegations of discrimination to the extent that they bear on the issue of voluntariness); *Markon v. Department of State*, 71 M.S.P.R. 574, 578 (1996) (same). For the same reason that a denial of restoration based on a violation of an agency's own restoration rules is arbitrary and capricious within the meaning of 5 C.F.R. § 353.304(c), we find that a denial of restoration based on prohibited discrimination or reprisal for protected activity is also arbitrary and capricious.[27]

¶59 Nevertheless, we find that the appellant in this case failed to make a nonfrivolous allegation that the denial of restoration was based on discrimination or reprisal. Specifically, the fact that the appellant had equal employment opportunity complaints pending when the agency discontinued her assignment does not give rise to an inference of retaliatory motive in light of the fact that

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[27] The administrative judge characterized the appellant's disability discrimination claim as an "affirmative defense." IAF, Tab 10 at 1. We think that the concept of an "affirmative defense" fits better in matters such as adverse action appeals where the agency bears the burden of proof on the merits. In restoration appeals, claims of discrimination and reprisal are better understood as independent claims or alternative ways for an appellant to show that the denial of restoration was arbitrary and capricious.

"almost all" similarly situated individuals were subjected to similar actions, as the appellant herself stated. IAF, Tab 15 at 2. In addition, the agency's decision not to accommodate the appellant's medical condition by creating a unique position for her does not give rise to an inference of disability discrimination because the Rehabilitation Act does not require such accommodations. *See Green*, 47 M.S.P.R. at 668. Therefore, even considering the appellant's allegations of disability discrimination and reprisal for protected equal employment opportunity activity, we find that she has failed to make a nonfrivolous allegation that the denial of restoration was arbitrary and capricious so as to entitle her to a jurisdictional hearing. *See Bledsoe*, 659 F.3d at 1106.

Lundy v. U.S. Postal Service, MSPB Docket No. AT-0353-11-0369-I-1

¶60 Appellant Lundy is a Mail Processing Clerk for the agency. IAF, Tab 6 at 38. She suffered a compensable injury on December 19, 1997, and thereafter began working in a modified capacity, most recently in a limited duty assignment in the "Resource Activation Room," apparently performing a number of customer service functions. IAF, Tab 1 at 6, Tab 6 at 57, 65. On September 23, 2010, the agency discontinued that assignment pursuant to the NRP. IAF, Tab 6 at 34.

¶61 On January 26, 2011, the appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 2. She appeared to indicate that she was challenging an Office of Workers' Compensation Programs (OWCP) determination not to award her benefits for the period that she was out of work pursuant to the agency's NRP determination. *Id*. at 3. The appellant also indicated on her appeal form that she had filed a grievance on the matter, and she attached a copy of the grievance, which pertained to the agency's decision to discontinue her limited duty assignment. *Id*. at 3, 5-13. As reflected in the grievance, the union alleged that there is still work available for the appellant to do, including repairing damaged mail and flats. *Id*. at 7. The union also challenged the validity of the NRP in general and argued that the agency's action constituted disability discrimination. *Id*. at 7-12.

¶62 The agency moved to dismiss the appeal for lack of jurisdiction on the basis that it had conducted a proper job search and the appellant failed to identify any vacant funded positions within her medical restrictions. IAF, Tab 6 at 13-18, Tab 8 at 4-5. The administrative judge issued a show cause order, notifying the appellant of her burden of establishing jurisdiction over a restoration appeal as a partially recovered individual and ordering her to file evidence and argument on the issue. IAF, Tab 7. The appellant did not file a response.

¶63 The administrative judge then issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing. IAF, Tab 9 (ID) at 1, 6. The administrative judge found that the appellant failed to make a nonfrivolous allegation that the denial of restoration was arbitrary and capricious because she failed to allege that the agency's job search was inadequate or did not encompass the local commuting area. ID at 5-6.

¶64 The appellant filed another initial appeal form, which the Board docketed as a petition for review in the instant appeal. PFR File, Tab 1 at 2-5. The appellant again challenges OWCP's determination not to award her compensation and argues that the agency committed disability discrimination. *Id*. at 4. She has filed another copy of the grievance form that she filed below. *Id*. at 11-19. The agency has filed a response, arguing that the appellant lacks support for her case and that the petition should be denied for failure to meet the Board's review criteria. PFR File, Tab 3.

¶65 In this case, we agree with the administrative judge that there is no indication in the record that the agency's job search was inadequate geographically. ID at 5-6; *cf. Urena*, 113 M.S.P.R. 6, ¶ 13 (evidence that the agency failed to search the local commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration). We also find nothing in the record to show that the appellant's former Resource Activation Room duties continue to be performed by other employees or that the agency otherwise acted

improperly in discontinuing the appellant's modified assignment. We further find that the appellant's challenges to the NRP in general do not constitute a nonfrivolous allegation that the agency's application of the NRP resulted in an arbitrary and capricious denial of restoration in her particular case. *See supra* ¶ 57. We have reviewed the appellant's rather conclusory allegations of disability discrimination, and we find that they do not constitute a nonfrivolous allegation that the denial of restoration was arbitrary and capricious for being discriminatory in nature. To the extent that the appellant is challenging OWCP's determination not to award her compensation, we find that the Board lacks jurisdiction over this claim. *See Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 4 (2005).

¶66 However, we find that the appellant made a nonfrivolous allegation that the denial of restoration was arbitrary and capricious when she identified particular tasks within her medical restrictions and alleged that they are available for her to perform. IAF, Tab 1 at 7. It is immaterial that these tasks do not comprise the essential functions of a vacant funded position. The agency is obligated to provide the appellant with work in the form of a modified assignment as long as that work is available and within her medical restrictions, regardless of whether it comprises the essential functions of any established position. *See supra* ¶ 26; *cf. Gilbert v. Department of Justice*, 100 M.S.P.R. 375, ¶ 16 (2005) (the appellant made a nonfrivolous allegation that the denial of restoration was arbitrary and capricious when he identified vacant funded positions, the tasks of which he alleged he could perform). Although the appellant presented scant evidence in support of her claim, she is not required to make her entire case at the nonfrivolous allegation stage, and we find that her pleadings are sufficient to establish a justiciable issue of material fact that can only be resolved after a jurisdictional hearing.

¶67 We note that there appears to be an issue of timeliness in this appeal. Specifically, the agency action at issue took place on September 23, 2010, and the

appellant received notice of the action on the same day. IAF, Tab 6 at 34. Therefore, her January 26, 2011 appeal appears to have been filed outside the 30-day filing period set forth in 5 C.F.R. § 1201.22(b). Nevertheless, there is no indication in the record that the agency notified her of her Board appeal rights and the time limit for filing as required by 5 C.F.R. § 1201.21(a). *See Hudson v. Office of Personnel Management*, 114 M.S.P.R. 669, ¶ 8 (2010) (if an agency failed to notify an appellant of her Board appeal rights when it should have done so, the appellant must show that she was diligent in filing her appeal after she actually learned of her Board appeal rights). In addition, it appears that the appellant timely requested equal employment opportunity counseling after the agency discontinued her limited duty assignment, and on December 2, 2010, the agency notified her that there was no resolution and that she could either file a formal equal employment opportunity complaint or a Board appeal.[28] PFR File, Tab 1 at 8. This document, however, likewise failed to apprise the appellant of the applicable time limit for filing with the Board. *Id*. Because we are unable to resolve the timeliness issue on the existing record, the administrative judge should address the matter on remand after affording the appellant the required notice and an opportunity to file evidence and argument on the issue. *See Wright v. Department of Transportation*, 99 M.S.P.R. 112, ¶ 12 (2005) (an appellant is entitled to clear notice of the precise timeliness issue and a full and fair opportunity to litigate it).

Albright v. U.S. Postal Service, MSPB Docket No. DC-0752-11-0196-I-1

¶68 Appellant Albright is a Custodial Laborer for the agency. IAF, Tab 4, Subtab 4A. She suffered compensable injuries on April 17, 1996, and September 27, 2004, and thereafter worked in a modified capacity, most recently

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[28] Because this document is not a "final decision" pursuant to a "formal complaint of discrimination," the filing provisions of 5 C.F.R. § 1201.154(b) are not implicated. PFR File, Tab 1 at 8-9.

in a limited duty assignment performing the usual tasks of her official position, but with certain restrictions. *Id.*, Subtab 4G at 1461, 1477, 1488. On September 23, 2010, the agency discontinued that assignment pursuant to the NRP. IAF, Tab 4, Subtab 4B.

¶69 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 3-4. She argued that the NRP is invalid per se, IAF, Tab 1 at 6, Tab 7 at 5-7, Tab 10 at 7, and that the agency's action constituted disability discrimination, IAF, Tab 1 at 8-9, Tab 7 at 5-7, Tab 10 at 6, 8-9. The appellant also alleged that she was able to work her bid job with only minor accommodations, that there is plenty of work for her to do, that other employees are now performing the tasks of her former limited duty assignment, and that those employees now need to work overtime in order to complete their own work plus the work that the appellant used to do. IAF, Tab 1 at 9, Tab 7 at 6-7, Tab 10 at 5-7.

¶70 The appellant filed a motion to compel, seeking, among other things, evidence that her duty station is currently understaffed with custodial workers and that the tasks of her former limited duty assignment are now being performed by others. IAF, Tab 11 at 4-9. The administrative judge denied the appellant's motion on the bases that it sought information that is already in the record or is immaterial to the jurisdictional issue and that it failed to meet the Board's regulatory requirements. IAF, Tab 13.

¶71 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing on the basis that the appellant failed to make a nonfrivolous allegation that the denial of restoration was arbitrary and capricious.[29] IAF, Tab 14 (ID) at 1, 12-13. The administrative judge rejected the

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[29] The administrative judge afforded the appellant inadequate jurisdictional notice. The order on jurisdiction apprised the appellant of the jurisdictional standard set forth in *As'Salaam v. U.S. Postal Service*, 85 M.S.P.R. 76, ¶ 14 (2000), and *Besemer v. U.S. Postal Service*, 77 M.S.P.R. 260, 264 (1998), which standard does not include the jurisdictional element that the administrative judge found to be dispositive in this appeal. Although the Board never explicitly overruled *As' Salaam* and *Bessemer*, it has

appellant's challenges to the validity of the NRP per se. ID at 7-8. She found that the appellant failed to put forth specific evidence regarding her former job duties and what happened to them, and relying on *Soto*, 115 M.S.P.R. 95, ¶ 11 and *Hunt*, 115 M.S.P.R. 379, ¶ 11, she found that there was nothing to prevent the agency from eliminating the appellant's modified assignment and allocating her former tasks to other employees. ID at 8-9. The administrative judge also found that the appellant failed to identify a vacant funded position to which she could have been restored, ID at 9-11, and that there was no indication that the agency's job search was inadequate, ID at 11-12. Having found that the appellant failed to establish jurisdiction over the appeal, the administrative judge declined to consider the appellant's disability discrimination claim. ID at 12.

¶72 The appellant has filed a petition for review, arguing that she was in a permanent encumbered bid position when the agency sent her home and that her so-called limited duty assignment actually required her to perform the essential functions of her position. PFR File, Tab 1 at 4-7. The appellant also disputes the administrative judge's finding that she presented no evidence regarding the specific duties of her limited duty assignment and the employees who are now performing those duties, and she argues that to the extent that the administrative judge required additional proof, she should not have denied her motion to compel. PFR File, Tab 1 at 5-6; ID at 8-9; IAF, Tab 10 at 13-19. The agency has filed a response, arguing that the appellant is contradicting herself by arguing for the first time on review that she was not in a modified assignment. PFR File, Tab 3 at 13. The agency also argues the administrative judge correctly found that the

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overruled other cases for setting forth that same jurisdictional standard. *Chen*, 97 M.S.P.R. 527, ¶ 18 (overruling *Bennett v. U.S. Postal Service*, 94 M.S.P.R. 443 (2003), and *Chism v. U.S. Postal Service*, 85 M.S.P.R. 436 (2000)). On remand, the administrative judge should afford the appellant jurisdictional notice as set forth in paragraph 10 of this Opinion and Order. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue).

agency is not obligated to offer the appellant work when none exists and that it is not obligated to restore the appellant to anything other than a vacant funded position. *Id*. at 14-16.

¶73 Regarding the motion to compel, we agree with the appellant that at least some of the items listed therein appear to be relevant to her case and not included elsewhere in the record – particularly items twelve through fifteen. IAF, Tab 11 at 8-9. However, we also agree with the administrative judge that the appellant's motion does not meet the requirements of 5 C.F.R. § 1201.73(e)(1) because it does not contain a statement that the parties have made a good faith effort to resolve the discovery dispute on their own or a sworn statement in support of the appellant's assertion that the agency failed to respond to her discovery request. IAF, Tab 13 at 2. Therefore, the administrative judge did not abuse her discretion in denying the motion even though the appellant was seeking discoverable information. *See* 5 C.F.R. § 1201.74(a) (an administrative judge may deny a motion to compel discovery if a party fails to comply with the requirements of 5 C.F.R. § 1201.73(e)(1)).

¶74 We agree with the administrative judge that there is nothing in the record to suggest that the agency's job search was insufficient and that the appellant has not challenged the sufficiency of the search. ID at 11-12; IAF, Tab 10 at 8, 11. We also agree with the administrative judge that the appellant's challenges to the NRP per se do not constitute a nonfrivolous allegation that the denial of restoration was arbitrary and capricious in her particular case. ID at 7-8; *see Barachina*, 113 M.S.P.R. 12, ¶ 7. However, we disagree that the appellant failed to present any specific evidence regarding her former job duties and what happened to them. ID at 8. The appellant made specific factual allegations that she used to work routes 202 and 203 at her facility, that other employees are now covering those routes, and that those employees are requiring overtime to do so. IAF, Tab 7 at 6-7, Tab 10 at 5-7. She also supported her factual allegations with documentary evidence showing that routes 202 and 203 continue to be worked

and that her former duties have therefore not gone away. IAF, Tab 10 at 13-19. That these duties might not have constituted the essential functions of any established position is immaterial. *See supra* ¶ 26. We find that the appellant's specific factual allegations regarding the continued availability of her former tasks constitute nonfrivolous allegations that the agency arbitrarily and capriciously denied her request for restoration. The appellant is therefore entitled to the jurisdictional hearing that she requested.

¶75 We also find that the appellant has made allegations of fact that, if proven, could establish that the denial of restoration constituted disability discrimination. Specifically, the appellant alleges on petition for review that her "limited duty" assignment was improperly classified as such because she was actually performing the essential functions of her Custodial Laborer position and that the modifications to her assignment were actually reasonable accommodations allowing her to perform those functions. PFR File, Tab 1 at 4-7; *De John v. U.S. Postal Service*, EEOC DOC 07A20030, 2004 WL 1084818 at *5 (May 10, 2004) (the agency committed disability discrimination when it withdrew the reasonable accommodation that allowed the appellant to perform the essential functions of his position). In order to make a finding on this issue, the administrative judge would need to determine what the essential functions of the Custodial Laborer position actually are and whether the appellant was performing those functions when the agency sent her home. We note that the documentary evidence of record concerning the appellant's modified duty assignment is not necessarily inconsistent with her disability discrimination claim. IAF, Tab 4, Subtab 4G at 1477.

¶76 We have considered the agency's argument that the appellant has changed her theory of the case on petition for review by arguing for the first time that her "modified assignment" consisted of the essential functions of an established position. PFR File, Tab 3 at 13; *see Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for

the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence). However, we find that the submissions that the appellant filed below, while she lacked attorney representation, can be fairly construed to have raised this issue, albeit somewhat inartfully. IAF, Tab 7 at 6-7; *cf. Smart v. Department of the Army*, 105 M.S.P.R. 475, ¶ 10 (2007) (a pro se appellant is not required to plead the issues with the precision of an attorney). In addition, we find nothing "contradictory" about the appellant making arguments in the alternative. *See Driscoll v. U.S. Postal Service*, 116 M.S.P.R. 662, ¶ 26 (2011) (an appellant may legitimately raise alternative arguments in support of a single claim). Therefore, the administrative judge should consider the appellant's disability discrimination claim on remand insofar as it bears on the jurisdictional issue and allow the appellant to present relevant evidence and argument at a jurisdictional hearing.[30]

ORDER IN LATHAM V. U.S. POSTAL SERVICE, DA-0353-10-0408-I-1

¶77 We ORDER the agency to restore the appellant to his former modified assignment effective April 27, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶78 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry

[30] If the administrative judge finds that the appellant was actually performing the essential functions of an established position in the context of her modified assignment, she should consider whether the appellant is entitled to the restoration rights of a "fully recovered" individual. *See* 5 C.F.R. §§ 353.102, .301(a)-(b).

out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶79 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶80 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶81 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶82 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

ORDER IN TURNER V. U.S. POSTAL SERVICE, SF-0353-10-0329-I-1

¶83 We ORDER the agency to restore the appellant to her former modified assignment effective November 30, 2009. *See Kerr*, 726 F.2d 730. The agency must complete this action no later than 20 days after the date of this decision.

¶84 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶85 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶86 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶87 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all

documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶88 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO APPELLANTS LATHAM AND TURNER
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO APPELLANTS LATHAM AND TURNER
REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in these matters. 5 C.F.R. § 1201.113. You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

ORDER IN REAVES V. U.S. POSTAL SERVICE, CH-0353-10-0823-I-1

¶89 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO APPELLANT REAVES REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat*, 931 F.2d 1544.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

ORDER IN LUNDY V. U.S. POSTAL SERVICE, AT-0353-11-0369-I-1

¶90 We remand this appeal to the regional office for further proceedings consistent with this Opinion and Order, including the jurisdictional hearing that the appellant requested.

ORDER IN ALBRIGHT V. U.S. POSTAL SERVICE, DC-0752-11-0196-I-1

¶91 We remand this appeal to the regional office for further proceedings consistent with this Opinion and Order, including the jurisdictional hearing that the appellant requested.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.

DISSENTING OPINION OF MARY M. ROSE

in

James C. Latham, et al. v. United States Postal Service

MSPB Docket Nos. DA-0353-10-0408-I-1, et al.

¶1 I respectfully dissent. As discussed below, I conclude that a postal employee who has partially recovered from a compensable injury and who claims entitlement to be restored to limited duties that do not comprise the essential functions of a complete and separate position has failed to state a claim upon which the Board can grant relief. Because none of the appellants in this consolidation sought restoration to duties that comprise the essential functions of a complete and separate position, all of these appeals should be dismissed for failure to state a claim upon which relief can be granted. I also write to disagree with the majority's findings regarding jurisdiction and to explain why I believe that the majority has misinterpreted the phrase "arbitrary and capricious" to mean something almost directly contrary to its actual meaning.

A postal employee who has partially recovered from a compensable injury and who claims entitlement to be restored to limited duties that do not comprise the essential functions of a complete and separate position has failed to state a claim upon which the Board can grant relief.

¶2 Under well-established Board precedent construing 5 C.F.R. part 353, which the majority does not dispute, an employee who has partially recovered from a compensable injury has no right to be restored to limited duties that do not comprise the essential functions of a complete and separate position. Under the Postal Service's Employee and Labor Relations Manual (ELM) and other internal rules, an employee who has partially recovered from a compensable injury does have a right to be restored to limited duties that do not comprise the essential functions of a complete and separate position. Accordingly, the issue is as stated in the Board's Federal Register notice inviting amicus briefs: whether a denial of restoration may be "arbitrary and capricious" within the meaning of 5 C.F.R.

§ 353.304(c) solely for being in violation of the agency's ELM and other internal rules.

The Board has no independent authority to enforce internal agency rules that provide substantive rights or entitlements.

¶3 Although the majority opinion disclaims reliance on the position taken by the Office of Personnel Management (OPM) in its advisory opinion, OPM argued that the Board has a generalized authority to enforce substantive as well as procedural internal agency rules:

> The Supreme Court has recognized that an agency can use its discretion to adopt procedures and standards to govern the exercise of an underlying legal authority, including adopting more rigorous *substantive* and procedural standards than required by the authority. The Court also stated that once an agency implements such procedures, however, they are binding and must be followed.

OPM Advisory Opinion at 3 (citations deleted and emphasis added).

¶4 All five of the court decisions cited by OPM for these propositions involved procedural rules; none involved substantive entitlements or rights.[1] In its amicus brief, the National Postal Mail Handlers Union (NPMHU) similarly stated that there is a "long line of Board authority . . . holding that the Board will enforce employee rights derived from agency rules, regulations, and collective bargaining agreements." As with the cases cited by OPM for this proposition, most of the cases cited by the NPMHU involved either procedural rules, *e.g.*, *Giesler v. Department of Transportation*, 3 M.S.P.R. 277, 280 (1980) (procedures

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[1] *See Service v. Dulles*, 354 U.S. 363, 373-76, 388 (1957) (procedures to remove an employee for disloyalty); *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959) (procedural standards for dismissing employees on security grounds); *Lopez v. Federal Aviation Administration*, 318 F.3d 242, 247 (D.C. Cir. 2003) (claim that the FAA failed to follow its procedures in determining whether to renew an employee's appointment); *Gaballah v. Johnson*, 629 F.2d 1191, 1202-03 (7th Cir. 1980) (the court addressed whether the agency complied with its internal rules to determine whether the employee had the requisite property interest to protect in connection with a due process claim); *Bates v. Sponberg*, 547 F.2d 325, 329-30 & nn.6-7 (6th Cir. 1976) (whether a state university complied with its procedures in terminating tenured faculty member).

required for meetings between employees and supervisors that may result in discipline), *aff'd*, 686 F.2d 844 (10th Cir. 1982), or available remedies, *e.g.*, *Campbell v. U.S. Postal Service*, 75 M.S.P.R. 273, 279 (1997) (holding that back pay is an appropriate remedy).[2]

¶5 The distinction between procedural rights on the one hand and substantive rights on the other is an important one. When the subject is procedural rights, the Board does not need the guidance or authority of federal court decisions. A provision enacted as part of the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(c)(2)(A), provides that the Board cannot sustain an agency decision if the employee "shows harmful error in the application of the agency's *procedures* in arriving at such decision." (emphasis added). The "harmful procedural error" rule of section 7701(c)(2)(A) describes a situation in which the Board cannot sustain an agency action or decision over which it has jurisdiction. When we turn our attention from enforcement of agency procedural rules to the substantive rights to which employees are entitled, those rights are coterminous with, and cannot be extended beyond, matters within the Board's subject matter jurisdiction. Both the Board and its reviewing court have emphasized that the

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[2] The NPMHU did cite cases that might be read as treating internal agency rules as equivalent to a statutory provision that the Board had jurisdiction to enforce. In *Miller v. U.S. Postal Service*, 105 M.S.P.R. 89, ¶ 11 (2007), *Welshans v. U.S. Postal Service*, 107 M.S.P.R. 110, ¶ 7 (2007), *aff'd*, 550 F.3d 1100 (Fed. Cir. 2008), and *Plezia v. Department of Veterans Affairs*, 102 M.S.P.R. 125, ¶ 10 (2006), the Board stated that it will enforce employee rights derived from agency rules, regulations, procedures, and collective bargaining agreements, and that the fact that the appellants were not covered by 5 U.S.C. § 6323(a), but instead by an equivalent agency rule, did not affect the Board's authority under the Uniformed Services Employment and Reemployment Rights Act. The Board was not, however, enforcing a substantive agency rule as if it were a statute over which the Board had been given jurisdiction. The substantive rule in each of these cases was 38 U.S.C. § 4311(a), which provides that an employer may not deny a "benefit of employment" on account of an employee's obligation to perform uniformed service. Section 6323 was relevant only to determine whether the appellant had been denied a "benefit of employment" under section 4311. An agency can deny an employee a benefit of employment by violating an internal agency rule as well as by violating a statute.

Board's legal authority to review and resolve employment disputes is limited to those matters specifically entrusted to it by law, rule, or regulation. *E.g. Schmittling v. Department of the Army*, 219 F.3d 1332, 1136 (Fed. Cir. 2000); *Caracciolo v. Department of the Treasury*, 105 M.S.P.R. 663, ¶ 7 (2007). Unlike federal courts, which have ancillary or pendent jurisdiction to hear and decide various claims that would not themselves provide a basis for the court to exercise jurisdiction, the Board has no ancillary or pendent jurisdiction other than what is provided in 5 U.S.C. §§ 7702 (to adjudicate discrimination claims) and 7701(c)(2) (claims of harmful procedural error, that a decision was based on a prohibited personnel practice, or that a decision was not in accordance with law).

¶6 In an early decision, the Board explained that its jurisdiction cannot be enlarged to encompass the adjudication of internal agency rules:

> In the instant case, appellant's allegation of procedural error was based on an alleged violation of a negotiated agreement rather than the provisions of 5 C.F.R. § 315.805. In fact, the record reflects that the agency has complied with all the procedural requirements imposed by that section. While a collective bargaining agreement can increase the procedural entitlements of a probationary employee terminated for pre-employment (or post-employment) reasons beyond those found in 5 C.F.R., Part 315, those additional safeguards do not become organic extensions of those regulations but, rather, additional benefits which accrue outside of the appeal right provided by 5 C.F.R. § 315.806. Compliance with such additional procedural entitlements can only be enforced through the negotiated grievance procedure.

Pogarsky v. Department of the Treasury, 7 M.S.P.R. 196, 198 (1981) (citation deleted).

¶7 Although the current appeals present a fact pattern that is almost the exact opposite of what was involved in *Pogarsky*, the reasoning of that decision applies. Pogarsky was a probationary employee who was terminated during her probationary period for pre-appointment reasons. Then, as now, the only ground for appeal in that situation, and the only matter that could be adjudicated by the Board, was whether the agency complied with the procedural requirements of

OPM's regulation. Accordingly, the merits of the appeal were strictly procedural in nature, and the Board rejected the appellant's attempt to expand the Board's jurisdiction to include additional procedural rights derived from a collective bargaining agreement. In the present appeals, by contrast, OPM's regulations provide substantive rights for partially recovered employees, and the agency's internal rules confer additional substantive rights to such employees. The governing principle is the same in both situations; the matter entrusted to the Board for adjudication—whether procedural or substantive in nature—cannot be expanded to include additional matters not provided by federal law or regulation. As in *Pogarsky*, the Postal Service's additional "restoration" rights "do not become organic extensions of [5 C.F.R. § 353.301(d)] but, rather, additional benefits which accrue outside of the appeal right provided by [5 C.F.R. § 353.304(c)]. Compliance with such additional [] entitlements can only be enforced through the negotiated grievance procedure."

> *OPM's regulations cannot reasonably be interpreted as including a grant of jurisdiction to the Board to adjudicate substantive entitlements conferred by internal agency rules.*

¶8 Unlike OPM and the NPMHU, the majority opinion does not claim that the Board has any generalized or inherent authority to adjudicate and enforce internal agency rules that confer substantive entitlements. The majority instead contends that OPM's regulations, as interpreted by OPM, contain such a grant of jurisdiction to the Board to adjudicate and enforce the intra-agency substantive entitlements included in the ELM. OPM's advisory opinion does "interpret" its regulations in this manner. The question is whether the Board must or should defer to OPM's interpretation.

¶9 An agency's interpretation of its own regulations is entitled to "controlling weight unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). As a later Supreme Court decision clarified,

however, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). To defer to the agency's interpretation when the regulation is not ambiguous "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*

¶10 In determining whether a regulation is ambiguous, the starting point is to examine the text of the regulation to ascertain its plain meaning; a regulation can only be said to be ambiguous if the text is "susceptible to more than one plausible reading." *American Airlines, Inc. v. United States*, 551 F.3d 1294, 1299-1300 (Fed. Cir. 2008); *see also Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1346 (Fed. Cir. 2005) ("[w]e construe a regulation in the same manner as we construe a statute, by ascertaining its plain meaning"). The agency's interpretation of its regulation "must be fairly supported by the text of the regulation itself, so as to ensure that adequate notice of that interpretation is contained within the rule itself." *Drake v. Federal Aviation Administration*, 291 F.3d 59, 68 (D.C. Cir. 2002). "Stated another way, the dispositive question is whether imposition of the [] rule is a *new* rule, in which case the agency may not give it binding effect in the absence of compliance with [Administrative Procedure Act] notice and comment procedures, or an *interpretation* of an existing rule, in which case it is binding precisely because it has, in effect, already been subject to the necessary procedural protections." *Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 782 (10th Cir. 1998).

¶11 What is the text of the existing regulations that supports OPM's interpretation that the Board has jurisdiction to adjudicate and enforce internal agency rules that confer substantive entitlements that go beyond the substantive entitlements provided by OPM's government-wide regulations? The majority does not contend that the text of a single regulation supports this interpretation; it instead contends that the text of 5 C.F.R. sections 353.101(d) and 353.304(c),

when read in conjunction with one another, support such an interpretation. Section 353.301(d) provides as follows:

> *Partially recovered*. 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.) . . . .

(emphasis added).

¶12 Without question, this language permits agencies to promulgate rules that confer greater substantive rights than those provided under part 353 and the Rehabilitation Act. That agencies have this permissive authority was never in question, however; the issue in this case is whether the MSPB has jurisdiction to adjudicate and enforce these intra-agency substantive entitlements. There is nothing in the language of section 353.301(d) that states, or even implies, that OPM is authorizing the MSPB to adjudicate and enforce any such permissive entitlements. Indeed, the majority concedes that this regulation, standing alone, cannot be interpreted as containing any such grant of jurisdiction. Majority Opinion, ¶ 12. The majority contends, however, that when section 353.301(d) is read in conjunction with section 353.304(c), which provides that "[a]n individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration," the interpretation of an additional grant of jurisdiction becomes a reasonable one.

¶13 When one considers the chronology of the promulgation of the regulatory language in these two regulations, the implausibility of such an interpretation becomes manifest. As the majority opinion recounts, the grant of authority to the Board to determine whether a denial of restoration to a partially recovered employee was arbitrary and capricious was promulgated by the Civil Service Commission in 1978, and the wording of this regulation has not changed

materially since that time. OPM did not promulgate its regulation stating that agencies must comply with the Rehabilitation Act "at a minimum" until 1995. 60 Fed. Reg. 45,650, 45,657 (1995).[3] A "determination of whether" an agency has acted "arbitrarily and capriciously" in denying restoration cannot mean something different in 1995 or 2012 than it did in 1978 unless the addition of the "at a minimum" provision in 1995 was intended to affect the meaning of the "arbitrary and capricious" provision. The record is totally devoid of any evidence of such intent. Both OPM and the majority essentially contend that section 353.301(d) should be interpreted as if it had an extra sentence: "If an agency provides more generous substantive rights than are required by this part and the Rehabilitation Act, the MSPB shall have jurisdiction to adjudicate and enforce such additional rights and entitlements to the same extent as if they were contained in a statute or government-wide regulation." The problem, of course, is that the regulation does not say anything like this, nor is such an interpretation "fairly supported by the text of the regulation itself." *See Drake*, 291 F.3d at 68.

¶14 The majority frames the issue as "whether OPM's use of the term 'arbitrary and capricious' was meant to exclude certain types of erroneous denials of restoration from the Board's jurisdiction." Majority Opinion, ¶ 15. This formulation simply assumes as proven the very matter that is at issue in this case: whether a denial of limited duties that do not comprise a complete and separate

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[3] OPM's Federal Register notice did not say anything about why it was adding this language to its part 353 regulations. I note that OPM added this "at a minimum" provision to its guidance in the Federal Personnel Manual (FPM) much earlier, in 1988. *See Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 195 (1997); *Leach v. Department of Commerce*, 61 M.S.P.R. 8, 20 (1994). Informal guidance like the FPM is not entitled to *Auer* deference because it has not been subjected to notice-and-comment rulemaking. *See Christensen*, 529 U.S. at 587. OPM has not provided any evidence to indicate that there was any "legislative history" associated with the promulgation of the FPM provision in 1988 to indicate that it was added to the FPM for the purpose of granting the MSPB jurisdiction to adjudicate and enforce permissive substantive entitlements such as those in the ELM.

position constitutes a denial of "restoration" within the meaning of part 353 and a matter over which the MSPB has been given jurisdiction. Without question, some denials of limited duty assignments under the ELM might be characterized as "arbitrary and capricious" in some sense, but the question before us is whether a denial of limited duties that do not constitute a complete and separate position is a denial of restoration over which the Board has jurisdiction.[4]

¶15 Even if OPM's regulatory interpretation was otherwise a plausible one, i.e., OPM intended to authorize the Board to adjudicate and enforce internal agency entitlements that go beyond the requirements of federal law and regulation, this cannot be a reasonable interpretation if OPM would have lacked legal authority to issue such a regulation in express terms. The reason the question arises is that such a regulation would necessarily entail a redelegation of the authority granted by Congress to OPM. OPM, after all, did not itself promulgate a rule that requires agencies to restore partially recovered employees to duties that do not comprise the essential functions of a complete and separate position; that rule was promulgated by the Postal Service. The statute, 5 U.S.C. § 8151(b), authorizes "regulations issued by the Office of Personnel Management," and says nothing about redelegation of that authority. Although courts have recognized the validity of redelegations or subdelegations of rulemaking authority to subordinate offices or officials within an agency, they do not generally recognize redelegations or subdelegations of authority to persons or entities outside the agency:

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[4] As discussed more fully below (¶¶ 26-30), the "determination of whether the agency is acting arbitrarily and capriciously in denying restoration" cannot reasonably be read as being a jurisdictional element at all; it is the dispositive merits issue in a partial recovery restoration appeal. The term "arbitrary and capricious" also reflects a deferential standard of review when evaluating the agency's denial of restoration. The Board has jurisdiction when an employee who has partially recovered from a compensable injury has been denied restoration to duties. That jurisdiction extends, however, only to duties that comprise a complete and separate position.

> When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent. But the cases recognize an important distinction between subdelegation to a subordinate and subdelegation to an outside party. The presumption that subdelegations are valid absent a showing of contrary congressional intent applies only to the former. There is no such presumption covering subdelegations to outside parties. Indeed, if anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.

United States Telcom Ass'n v. Federal Communications Commission, 359 F.3d 554, 565 (D.C. Cir. 2004) (citations deleted).[5]

¶16 Absent express authorization in the relevant statute, I am unaware of any authority that would authorize one federal agency, and in particular the agency that has primary responsibility for promulgating government-wide rules governing federal employment, to redelegate its substantive rulemaking authority to other agencies, especially where this would result in the Board taking jurisdiction of and adjudicating substantive entitlements that vary from agency to agency within the federal government, and where doing so would intrude upon the proper sphere of negotiated grievance procedures. *Cf.* 5 U.S.C. § 1104(a)(2) (authorizing the OPM Director to delegate his authority for personnel management functions to agency heads in the executive service). Accordingly, interpreting the regulations to include a redelegation of substantive rulemaking authority that is beyond OPM's legal authority cannot be a reasonable interpretation of the regulations.[6]

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[5] Although a number of statutory provisions give OPM the authority to promulgate regulations that apply throughout the federal government, the agencies to whom those rules apply are in no sense subordinate divisions of OPM.

[6] The majority notes that the Board's authority to review and declare an agency's regulation invalid is limited to situations in which complying with the regulation would require the commission of a prohibited personnel practice. Majority Opinion, ¶ 18. This is not an appeal under 5 U.S.C. § 1204(f), and I am not proposing that we find the

¶17 For all the above reasons, if ever there were a case in which it could be said that deferring to OPM's "interpretation" of its regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation," this is such a case.

The appeals must be dismissed for failure to state a claim upon which the Board can grant relief.

¶18 As discussed above, I conclude that the Board lacks the authority to adjudicate and enforce a substantive entitlement created by a particular agency that applies solely to employees of that agency. The Board has no inherent or independent authority to enforce an internal agency rule that confers substantive entitlements; OPM's substantive rule for partially recovered employees applies only to duties that comprise the essential functions of a complete and separate position; and OPM's regulations cannot reasonably be interpreted as including a grant of jurisdiction to the Board to adjudicate substantive entitlements conferred by internal agency rules. Because none of the appellants has claimed entitlement to duties that constitute the essential functions of a complete and separate position, they have failed to state a claim upon which the Board can grant relief, and all of the appeals should be dismissed on that basis. I note that dismissal for failure to state a claim is a disposition on the merits. *See Alford v. Department of Defense*, 113 M.S.P.R. 263, ¶ 13 (2010), *aff'd*, 407 F. App'x 458 (Fed. Cir. 2011).

An agency need not be "meticulous" in its decision-making process to avoid being "arbitrary and capricious."

¶19 OPM stated in its advisory opinion that, in order to avoid acting arbitrarily and capriciously, an agency must adhere to its substantive restoration obligations

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regulation as written to be invalid. It cannot be outside of the Board's proper sphere to ask whether an interpretation of OPM's regulation would entail a delegation of rulemaking authority that is not within OPM's legal authority, when the purpose of the inquiry is to make a determination whether the interpretation is a reasonable one.

and do so "meticulously." The majority opinion finds that OPM's interpretation of its regulation is consistent with the language of the regulation and is not plainly erroneous, and that the Board must therefore defer to it. Majority Opinion, ¶ 13.

¶20 Even under *Auer*/*Seminole Rock* deference, we need not give effect to an interpretation that is "unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning." *Midwest Crane and Rigging, Inc. v. Federal Motor Carrier Safety Admin.*, 603 F.3d 837, 840 (10th Cir. 2010) (quoting *Lewis v. Babbitt*, 998 F.2d 880, 882 (10th Cir. 1993)). Each of those terms applies to OPM's interpretation of "arbitrary and capricious."

¶21 The dictionary defines "arbitrary" as "arising from unrestrained exercise of the will, caprice, or personal preference." *Webster's Third New International Dictionary* 110 (1976). It similarly defines "capricious" as "marked or guided by caprice: given to changes of interest or attitude according to whim or passing fancies: not guided by steady judgment, intent, or purpose." *Id.* at 333. By contrast, "meticulous" means "marked by extreme painstaking care in the consideration or treatment of details." *Id.* at 1424.

¶22 Beyond the ordinary meaning of the individual words, "arbitrary and capricious" is a legal term of art in the Administrative Procedure Act, 5 U.S.C. § 706(2).[7] The Supreme Court has stated that an agency action is arbitrary and capricious under that Act

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

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[7] This law authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1983).

¶23 Nothing about either the dictionary definitions of the individual words or the definition of the phrase as a legal term of art connotes a requirement that an agency "meticulously" adhere to its internal rules. To the contrary, these definitions convey nearly the opposite meaning as "meticulous adherence." I note in this regard that courts have used the terms "arbitrary and capricious" and "abuse of authority" interchangeably, and both terms require a deferential standard of review. *See United States v. Lewis*, 594 F.3d 1270, 1277 (10th Cir.) (a court "abuses its discretion when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable"), *cert. denied*, 130 S. Ct. 3441 (2010); *Howley v. Mellon Financial Corp.*, 625 F.3d 788, 793 n.6 (3d Cir. 2010) ("We have described the deferential standard of review . . . as both an 'arbitrary and capricious' standard of review, and a review for 'abuse of discretion.' We use these characterizations interchangeably in this opinion."); *Wagener v. SBC Pension Benefit Plan-Non Bargained Program*, 407 F.3d 395, 402 (D.C. Cir. 2005) ("the standard of review—variously described by the Court as 'arbitrary and capricious' and 'abuse of discretion' review—is plainly deferential").

¶24 How "arbitrary and capricious" should be interpreted in the context of these appeals is difficult to say, but it cannot mean what OPM and the majority say it means. When the Board makes a determination whether an employer has complied with its duty to accommodate employees' disabilities, its standard of review is typically de novo, i.e., whether a party proved the requisite matter by the appropriate burden of proof, which is by preponderant evidence. If the Board is to apply an "arbitrary and capricious" standard of review to the question whether the agency complied with its duty to restore partially recovered employees under the ELM and other internal rules, it must be deferential review as described above; it cannot be a review that focuses on whether the agency has "meticulously" adhered to its obligations. One way of giving the requisite

deference might be to ask whether there was substantial evidence to support the agency's denial of restoration.

¶25 Not only must the Board's review of the agency's determination be deferential in nature, it must focus on the correct point in time. The majority has essentially ruled that, once the Postal Service has provided a limited duty assignment to a partially recovered employee, the employee "owns" those duties unless and until the agency determines that the duties no longer need to be performed by anyone. Majority Opinion, ¶ 31. It is important to remember that we are not dealing with new requests for restoration by employees newly able to return to productive work; we are dealing with employees who were given limited duty assignments in the past (sometimes the long-ago past), but where those assignments were recently terminated. The majority acknowledges that it "appears that the agency's practice for decades has been to make work available to partially recovered individuals under all circumstances, even though the plain language of the ELM suggests that the right to a modified assignment is not absolute." *Id.*, ¶ 30. If it would not have been "arbitrary and capricious" for the agency to have denied the original request for restoration, it cannot be said to be "arbitrary and capricious" to terminate the limited duty assignment at a later point in time. Accordingly, even if I were to agree that it was appropriate for the Board to enforce substantive entitlements conferred by internal agency rule, I would conclude that the Board must inquire whether the agency was required by the ELM to provide the original limited duty assignment. Moreover, in making that inquiry, the Board must adopt a deferential standard of review in which the agency's determination that it was not required by the ELM to grant the limited duty assignment must be affirmed if it is supported by substantial evidence.

Whether a denial of restoration was arbitrary and capricious is purely a merits issue.

¶26 I agree with the majority that, in light of the Federal Circuit's decision in *Bledsoe v. U.S. Postal Service*, 659 F.3d 1097, 1104 (Fed. Cir. 2011), and

particularly in light of its en banc decision in *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006), the jurisdictional elements in a partial recovery restoration appeal must be proven by preponderant evidence, as required by 5 C.F.R. § 1201.56(a)(2)(i). I disagree, however, with the majority's conclusion that any of these appeals must be remanded for a jurisdictional hearing. The majority concludes that, although some appellants proved the first three jurisdictional elements by preponderant evidence, they have not so proved the last element—whether the denial of restoration was arbitrary and capricious. The majority finds, however, that the appellants have made nonfrivolous allegations regarding this final element, which entitles them to a jurisdictional hearing.

¶27 Although the four-part listing of jurisdictional elements in partial recovery restoration appeals is of long standing, I believe it is incorrect. Whether a denial of restoration was arbitrary and capricious is purely and exclusively a merits issue. The regulation giving the Board jurisdiction over partial recovery restoration appeals is 5 C.F.R. § 353.304(c): "An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration."[8] The first three jurisdictional elements—that the appellant was absent from his position due to a compensable injury, that he recovered sufficiently to return to duty on a part-time or limited duty basis, and that the agency denied his request for restoration to duty—are properly grounded in the first part of the first sentence of this regulation, "[a]n individual who is partially recovered from a compensable injury," together with the reference to "denying restoration." The wording of the remainder of this sentence—"may appeal to MSPB *for a*

[8] The relevant statute, 5 U.S.C. § 8151, says nothing about a forum for vindicating the restoration rights provided by the law. Accordingly, OPM's regulation is the Board's sole source of jurisdiction.

determination of whether the agency is acting arbitrarily and capriciously in denying restoration"—makes clear that the issue of whether the agency acted arbitrarily and capriciously in denying restoration is not only *a* merits issue, it is *the* dispositive merits issue.

¶28 The Supreme Court has stated that "the term 'jurisdictional' properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating that authority."[9] *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *see Kirkendall v. Department of the Army*, 479 F.3d 830, 842 (Fed. Cir. 2007) (en banc). Any ambiguity as to whether an element of a claim should be viewed as jurisdictional or merits in nature should be resolved in favor of the latter. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). Nothing about the phrase "for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration" sounds jurisdictional in nature, i.e., that OPM was delineating a class of cases over which the Board would exercise jurisdiction. To the contrary, this choice of words connotes merits only.

¶29 The fact that *Bledsoe* described the determination of whether a denial of restoration was arbitrary and capricious as a jurisdictional issue does not bind the Board as a matter of precedent. The primary jurisdictional issue before the court in that case was the burden of proof, not the elements of jurisdiction. More importantly, the court did not engage in any analysis to ascertain and declare the

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[9] Unlike federal courts, the Board does not inquire whether it has "personal jurisdiction" over a party. *See Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶ 6 & n.2 (2009). Whether an appellant is someone covered by the grant of authority to adjudicate a class of cases is a question of subject matter jurisdiction. The first two elements of the traditional test—whether the appellant was absent from his position due to a compensable injury and whether he recovered sufficiently to return to duty—address the "who are you?" aspect of the Board's subject matter jurisdiction that is similar to the concepts of personal jurisdiction and standing. The third element—a denial of restoration—addresses the "what action or decision are you challenging?" element of subject matter jurisdiction that is present in all Board appeals.

jurisdictional elements in a partial recovery restoration appeal. The court instead deferred to Board precedent construing the jurisdictional requirements of partial recovery restoration appeals.[10] In such circumstances, the existence of the Federal Circuit decision does not prevent the Board from revisiting and revising its interpretation of the regulation. *Cf. Tunik v. Merit Systems Protection Board*, 407 F.3d 1326, 1336-39 (Fed. Cir. 2005) (where panel decisions of the Federal Circuit have deferred to the Board's interpretation of an ambiguous statute that the Board is authorized to administer, a later court panel is free to determine whether the Board's new interpretation is reasonable).

¶30 Jurisdiction has been established in all of these appeals. All of the appellants have proven by preponderant evidence that they were absent from their positions due to a compensable injury, that they recovered sufficiently to return to duty on a part-time or limited duty basis, and that the agency denied their

[10] The court cited *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004), for the applicable jurisdictional elements. *Bledsoe*, 659 F.3d at 1103. The first decision in which the Board articulated the present four-part jurisdictional test appears to have been *Allen v. U.S. Postal Service*, 73 M.S.P.R. 73, 77 (1997). That decision did not include any analysis supporting its conclusion that the determination of whether a denial of restoration was arbitrary and capricious is jurisdictional in nature. Instead, it contained a citation to *Taylor v. U.S. Postal Service*, 69 M.S.P.R. 479, 482 (1996). *Taylor* did not even contain a clear statement that the question whether a denial of restoration was arbitrary and capricious is a jurisdictional issue, much less any reasoning to support such a proposition. *See id.* at 482-83.

request for restoration to duty.[11] As discussed above, however, none of the appellants has stated a claim upon which the Board could grant relief.

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Mary M. Rose
Member

[11] Strictly speaking, the agency did not deny requests for restoration made by employees who were not working; it instead discontinued existing limited duty assignments. Under the circumstances of these cases, however, I agree with Board precedent holding that the discontinuance of existing limited duty assignments is comparable to denying requests for restoration made by individuals who are not working.