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U.S. Merit Systems Protection Board

Office of the Clerk of the Board
1615 M Street, NW, 5th Floor
Washington, DC 20419
Phone: 202 653 7200, Fax: 202 653 7130, E-Mail: MSPB@MSPB.gov

Clerk of the Board

September 23, 2013

FOIA Tracking No: MSPB-OCB-2013-000244

This is in response to your Freedom of Information Act (FOIA) request dated August 26, 2013. You are requesting the following:

> " is requesting "a copy of each MSPB Board Member request for an advisory opinion from the OPM Director in 2010, 2011, 2012 and 2013 to date."

Your request has been processed in accordance with the Merit Systems Protection Board (MSPB) regulation at 5 CFR Part 1204 that implements the FOIA.

We have conducted a thorough search of our records and found documents responsive to your request. Some information is withheld in accordance with exemption (b)(6) of FOIA, information that, if released, would constitute an unwarranted invasion of personal privacy.

You have the right to appeal this determination. If you decide to do so, address your appeal to the Chairman, Merit Systems Protection Board, 1615 M Street, NW, Suite 500, Washington, DC 20419. Your appeal should be identified as a "FOIA Appeal" on both the letter and the envelope. It should include a copy of your original request, a copy of this letter, and your reasons for appealing this decision. The MSPB also accepts email and fax submissions at foia@mspb.gov and 202-653-7130, respectively. The MSPB must receive your appeal within 10 working days from the date of this letter.

Sincerely

Darryl R. Aaron
Director, Information Services Team

Enclosures: Documents (52 Pages)

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U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

July 25, 2013

Honorable Elaine Kaplan
Acting Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Re: *Linda Guess v. District of Columbia Public Schools*
MSPB Docket No. DC-0839-12-0634-I-1

Dear Acting Director Kaplan:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of a policy directive/rule promulgated by the Office of Personnel Management (OPM).

Background:

The appellant is a former employee of the District of Columbia Public Schools (DCPS) who was initially appointed to her position in 1995 and erroneously placed in the Social Security-only retirement system from 1998 through 2008. As such, the appellant made payments only under the Federal Insurance Contributions Act (FICA) and not under the Civil Service Retirement System (CSRS), the retirement system in which she should have been placed. Upon correction of the error in 2011, the DCPS agreed to pay into the Civil Service Retirement and Disability Fund (CSRDF) $34,119.91 in agency contributions. In addition, the DCPS arranged the transfer of $1,312.78 from FICA to the "correct retirement vehicle." The appellant also requested that the DCPS pay into the CSRDF an additional $32,301.18 reflecting the amount that should have been deducted from her paychecks and contributed to her civil service retirement account as employee contributions. The DCPS refused to do so. Instead, it informed her that she had the option of paying that amount herself if she so choose. The appellant was separated by reduction in force from the DCPS in November 2009.

The appellant asserts on appeal to the Board that under section 2206(b) of the Federal Employee Retirement Coverage Correction Act (FERCCA), and 5 C.F.R.

§ 839.801, the DCPS was required to pay into the CSRDF the $32,301.18 that represented the amount of employee contributions that should have been deducted.

Section 2206(b) of FERCCA provides as follows:

> **Additional employee retirement deductions to be paid by agency.** – If a correction in a retirement coverage error results in an increase in employee deductions under section 8334 or 8422 of title 5, United States Code, that cannot be fully paid by a reallocation of otherwise available amounts previously deducted from the employee's pay as employment taxes or retirement contributions, the employing agency – (1) shall pay the required additional amount into the CSRDF; and (2) shall not seek repayment of that amount from the employee, former employee, annuitant, or survivor.

OPM's regulations provide, under Subpart H, Adjusting Retirement Deductions and Contributions:

> **§839.801 Do I owe more money if I had a qualifying retirement coverage error and the employee retirement deductions for the new retirement plan are more than what I already paid?** (a) No, your employer is responsible for paying any additional amount to the Fund. Your employer will not bill you for any additional retirement deductions. (b) For qualifying retirement coverage errors corrected under this part, the rules at §831.111(b) of this chapter (pertaining to employee options when the employer fails to withhold CSRS or CSRS Offset retirement deductions) do not apply.
>
> **§839.903 What happens to the Social Security taxes I erroneously paid when my employer corrects my retirement coverage to CSRS?** (a) Except for the last 3 years, the money you erroneously paid into Social Security will remain to your credit in the Social Security fund. The Social Security Administration will include all but those last 3 years in determining your eligibility for, and the amount of, future benefits. (b) The amount you paid into Social Security for the last 3 years will be used to help pay your CSRS retirement deductions.

OPM's retirement FAQs on its website provides as follows:

> **I should have been CSRS. Instead, I paid into Social Security. What happens to the Social Security taxes I paid when my agency corrects my retirement coverage to CSRS?**
>
> Except for the last 3 years, the money you erroneously paid into Social Security will remain to your credit in the Social Security fund.

The Social Security Administration will include all but those last 3 years in determining your eligibility for, and the amount of, future benefits. The amount you paid into Social Security for the last 3 years will be transferred to your account in the Civil Service Retirement fund. Your employing agency will pay all additional retirement contributions owed for your CSRS time. It may not go back and bill you for additional retirement deductions when it corrects the error.

Questions to be resolved:

1. Does section 2206(b) of FERCCA require an agency to pay into the CSRDF all of the remaining employee retirement deductions, even if the "increase" in the employee's required deductions occurs once the coverage error is found and corrected after the employee has separated from the agency?
2. Does 5 C.F.R. § 839.801(a) require an agency to pay into the CSRDF all of the remaining employee retirement deductions even if the employee has not made *any* such payments through deductions during her employment? In other words, does the "question" part of section 839.801 imply that an employee must have made some payments, such as those that would have been made if she had been erroneously placed in the FERS, CSRS, or CSRS-Offset, such that employees who made no payments as a result of having been erroneously placed in the Social Security-only plan are not covered by section 839.801?

Request for an advisory opinion:

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by August 24, 2013, regarding the questions raised above. The Board further requests that you serve the parties listed below with a copy of your advisory opinion as well. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than September 23, 2013.

Sincerely,

William D. Spencer
Clerk of the Board

cc: Linda Guess
[redacted]

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July 25, 2011

The Honorable John Berry
Director
Office of Personnel Management
1900 E Street, NW.
Washington, DC 20415

Re: *James C. Latham v. U.S. Postal Service*,
MSPB Docket No. DA-0353-10-0408-I-1,
Ruby N. Turner v. U.S. Postal Service,
MSPB Docket No. SF-0353-10-0329-I-1,
Arleather Reaves v. U.S. Postal Service,
MSPB Docket No. CH-0353-10-0823-I-1,
Cynthia E. Lundy v. U.S. Postal Service,
MSPB Docket No. AT-0353-11-0369-I-1, and
Marcella Albright v. U.S. Postal Service,
MSPB Docket No. DC-0752-11-0196-I-1.

Dear Director Berry:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of rules, regulations, or policy directives promulgated by the Office of Personnel Management (OPM).

Background

Recently, the U.S. Postal Service has implemented a program known as the National Reassessment Process (NRP), the goal of which is to evaluate the assignments of compensably injured employees working in a limited duty status in order to ensure that the assignments consist only of "operationally necessary tasks" consistent with the employees' medical restrictions. As a result, the Postal Service has either discontinued or reduced the working hours of many limited duty assignments. A large number of affected employees have filed Board appeals under 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." 5 C.F.R. § 353.304(c). The Board has found that, to establish jurisdiction over a restoration claim under that subsection, an appellant must make a nonfrivolous allegation 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;* and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

OPM has established substantive restoration obligations that an agency must satisfy in relation to its partially recovered employees. 5 C.F.R. § 353.301(d). The Board has found that a nonfrivolous allegation that the agency failed to satisfy its obligations under that subsection constitutes a nonfrivolous allegation that the denial of restoration was arbitrary and capricious. *See, e.g., Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009). In describing an agency's restoration obligations, section 353.301(d) explains that they require the agency, "[a]t a minimum," to "treat[] these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended." Based on this explanation, the Board has found that the regulation requires an agency to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider the employee for any such vacancies. *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)). Conversely, the Board has found that this regulation does not require an agency to assign a partially recovered employee limited duties that do not comprise the essential functions of a complete and separate position. *Brunton v. U.S. Postal Service*, 114 M.S.P.R. 365, ¶ 11 (2010) (citing *Taber v. Department of the Air Force*, 112 M.S.P.R. 124, ¶ 14 (2009)); *see also Green v. U.S. Postal Service*, 47 M.S.P.R. 661, 668 (1991) (an agency need not accommodate a disabled employee by permanently assigning him to light duty tasks when those tasks do not comprise a complete and separate position).

However, it appears that the Postal Service may have established an agency-specific rule providing partially recovered employees with greater restoration rights than the "minimum" rights described in 5 C.F.R. § 353.301(d). Specifically, the Employee and Labor Relations Manual (ELM) § 546.142(a) requires the agency to "make every effort toward assigning [a partially recovered current employee] to limited duty consistent with the employee's medically defined work limitation tolerance." One of the appellants has submitted evidence to show that Postal Service Handbook EL-505, Injury Compensation §§ 7.1-7.2 provides that limited duty assignments "are designed to accommodate injured employees who are temporarily unable to perform their regular functions" and consist of whatever available tasks the agency can identify for partially

* The Board has found that the discontinuation of a previously afforded limited duty assignment may constitute a denial of restoration for purposes of Board jurisdiction. *Sanchez v. U.S. Postal Service*, 14 M.S.P.R. 345, ¶ 11 (2010) (citing *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007)).

recovered individuals to perform consistent with their medical restrictions. *Latham v. U.S. Postal Service*, MSPB Docket No. DA-0353-10-0408-I-1, Initial Appeal File, Tab 21, Subtab 7. It therefore appears that the agency may have committed to providing medically suitable work to partially recovered employees regardless of whether that work comprises the essential functions of a complete and separate position. Indeed, the Board is aware of one arbitration decision explaining that, as a product of collective bargaining, the agency revised the ELM in 1979 to afford partially recovered employees the right to restoration to "limited duty" rather than to "established jobs." *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. E06N-4E-C 09370199, 16 (2010) (Eisenmenger, Arb.). The Board is also aware of a large number of other recent cases challenging the discontinuation of limited duty assignments under the NRP in which the arbitrators ruled in favor of the grievants on the basis that the agency's actions violated the ELM. *E.g., In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. G06N-4G-C 10205542 (2011) (Sherman, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. E06N-4E-C 09419348 (2010) (Duffy, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. F06N-4F-C 09221797 (2010) (Monat, Arb.); *In re Arbitration between U.S. Postal Service and National Association of Letter Carriers*, Case No. B01N-4B-C 06189348 (2010) (LaLonde, Arb.). The appellants in the above-captioned appeals have all raised similar arguments before the Board pertaining to alleged violations of their restoration rights under the ELM.

Matters regarding an agency's violations of its own internal rules normally do not fall within the Board's subject matter jurisdiction. Although an agency must abide by its own rules and regulations, *see Drumheller v. Department of the Army*, 49 F.3d 1566, 1574 (Fed. Cir. 1995), there is no general right of appeal to the Board from an agency's failure to comply with its own internal rules, *see Cowen v. Department of Agriculture*, 13 M.S.P.R. 196, 198-99 (1982), *aff'd*, 710 F.2d 803, 805 (Fed. Cir. 1983). Therefore, the Board is presented with an issue of first impression: May a denial of restoration be "arbitrary and capricious" within the meaning of 5 C.F.R. § 353.304(c) solely for being in violation of the ELM, i.e., may the Board have jurisdiction over a restoration appeal under that section merely on the basis that the denial of restoration violated the Postal Service's own internal rules?

As a final matter of background, we note that the Postal Service is not a typical title 5 agency. The Postal Employees Appeal Rights Act has made applicable to Postal Service employees only a few, limited provisions of title 5 civil service law. *See* 39 U.S.C. § 1005. The Postal Service has autonomy over its own personnel management system, and there are, therefore, no OPM standards or requirements for Postal Service positions. *Manescalchi v. U.S. Postal Service*, 74 M.S.P.R. 479, 487 n.2 (1997). We request that OPM take these and similar considerations into account to the extent that they will have any bearing on its response to this request for an advisory opinion.

Question to be Resolved

Does an agency act arbitrarily and capriciously under 5 C.F.R. § 353.301(d) in denying restoration to a partially recovered individual when such denial violates the agency's internal rules, such as the ELM?

Request for an Advisory Opinion

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by August 17, 2011, responding to the question raised above. The Board further requests that you serve the parties listed below with a copy of your advisory opinion. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than September 6, 2011.

Sincerely,

William D. Spencer

cc: James C. Latham
[redacted]

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Re: James C. Latham v. USPS CC:

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THANKS!

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CLERK OF THE BOARD

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

SEP 2 2011

Mr. William Spencer
Clerk of the Board
Office of the Clerk
1615 M Street, NW
Washington, DC 20410-0002

Re: Advisory Opinion regarding:
James C. Latham v. U.S. Postal Service,
MSPB Docket No. DA-0353-10-0408-I-1
Ruby N. Turner v. U.S. Postal Service,
MSPB Docket No. SF-0353-10-0329-I-1
Arleather Reaves v. U.S. Postal Service,
MSPB Docket No. CH-0353-10-0823-I-1
Cynthia E. Lundy v. U.S. Postal Service,
MSPB Docket No. AT-0353-11-0369-I-1
Marcella Albright v. U.S. Postal Service,
MSPB Docket No. DC-0752-11-0196-I-1

Dear Mr. Spencer:

This letter is in response to the Merit System Protection Board's (Board or MSPB) letter, dated July 25, 2011, to Director John Berry, United States Office of Personnel Management (OPM) requesting an advisory opinion. Your letter was forwarded to my office for a response. OPM was asked:

> Does an agency act arbitrarily and capriciously under 5 C.F.R. § 353.301(d) in denying restoration to a partially recovered individual when such denial violates the agency's internal rules, such as the [U.S. Postal Service's Employee and Labor Relations Manual]?

For the reasons explained in detail below, it is OPM's opinion that an agency would act arbitrarily and capriciously under 5 C.F.R. § 353.301(d) if it failed to comply with the agency's own internal rules in connection with denying restoration to a partially recovered individual.

Background

The MSPB's jurisdiction is not plenary, but is limited to those matters over which it has been given jurisdiction by statute, rule or regulation. *Meeker v. Merit Systems Protection Board,*

319 F.3d 1368, 1374 (Fed. Cir. 2003), cert. denied, 540 U.S. 1218 (2004); *Prewitt v. Merit Sys. Prot. Bd.*, 133 F.3d 885, 886 (Fed. Cir. 1998), *citing* 5 U.S.C. § 7701(a); *Redditt v. Department of the Army*, 88 M.S.P.R. 41, 44 (2001). Pursuant to its statutory authority under 5 U.S.C. § 1103(a)(5) to execute, administer, and enforce civil service rules and regulations, OPM has the authority to create a right of appeal to the Board by regulation and to limit the scope of such a right. *Maule v. OPM*, 40 M.S.P.R. 388, 392-93 (1989).

Chapter 81 of title 5 of the United States Code addresses matters related to compensation for work injuries. Subchapter I contains the general statutory provisions, including restoration to duty. Specifically, 5 U.S.C. § 8151 establishes the civil service retention rights for employees who resume employment with the Federal government. The statute directs OPM to issue regulations related to resuming work following a compensable injury. 5 U.S.C. § 8151(b). Those regulations are published at 5 CFR § 353, Subpart C, "Restoration to Duty from Compensable Injury."

As the MSPB noted in its letter to OPM, the Postal Service is "not a typical title 5 agency." July 25, 2011 Letter at 3. In fact, under the Postal Employees Appeal Rights Act of 1987, the Postal Service "has autonomy over its personnel management" and only a few of the provisions of title 5 apply to the Postal Service. 39 U.S.C. § 1005; *Manescalchi v. U.S. Postal Service*, 74 M.S.P.R. 479, 487 n.2 (1997) (there are no OPM standards or requirements for the Postal Service positions). One of the few title 5 provisions that remain applicable to the Postal Service, however, includes the provision related to compensation for work injuries. That is, 39 U.S.C. § 1005 specifically recognizes that "[o]fficers and employees of the Postal Service shall be covered by subchapter I of chapter 81 of title 5," which relates to compensation for work injuries. 39 U.S.C. § 1005(c).

The specific regulation at issue in the above-captioned matters is 5 CFR § 353.301(d), which states, in relevant part:

> (d) *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 [disabled][1] individuals under the Rehabilitation Act of 1973, as amended. . . . A partially recovered employee is expected to seek reemployment as soon as he or she is able.

OPM has exercised its authority to create appeal rights for allegations of improper restoration under 5 CFR § 353.301(d) by promulgating 5 CFR § 353.304, which permits appeals to the Board for, among other things, "a determination of whether the agency is acting arbitrarily or capriciously in denying restoration" to an individual who is partially recovered from a compensable injury. 5 CFR § 353.304(c); *see also* USAJOBS FAQ – 40 (Attachment 1). This

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[1] In 1998, the Rehabilitation Act of 1973 was amended and changed the term "handicapped" to "disabled."

provision specifically notes that the appeal rights apply to any employee of an agency in the executive branch, including the U. S. Postal Service and the Postal Rate Commission. 5 CFR § 353.304(a). Thus, although there are no OPM standards or requirements for Postal Service positions, *see Manescalchi, supra*, the Postal Service's own authority has made 5 U.S.C. § 8151 and its related regulations in 5 CFR § 353, Subpart C, applicable to the Postal Service staff.

As noted in the Board's letter, the "Postal Service may have established an agency-specific rule providing partially recovered employees with greater restoration rights that the 'minimum' rights described in 5 C.F.R. § 353.301(d)." July 25, 2011 Letter at 2. As the Board also noted, however, the MSPB generally does not intercede in matters related to an agency's violation of its own internal rules. July 25, 2011 Letter at 3.

Analysis

In a different context, 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. *Service v. Dulles*, 354 U.S. 363, 373-76 and 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959). The Court also stated that once an agency implements such procedures, however, they are binding and must be followed. *Service*, 354 U.S. at 388; *Vitarelli*, 359 U.S. at 540.

Specifically, in *Service, supra*, the Department of State implemented regulations related to "loyalty and security" that applied to certain types of employee discharge actions. Those regulations imposed limits on the Secretary's discretion to discharge certain employees without stating grounds for the dismissal. The district and appeals courts held that the Secretary could not bind his authority under the regulations, but the Supreme Court disagreed. The Court concluded that, because the dismissal from employment was based on a defined procedure, and even though the procedures in the regulations placed limits on the Secretary's discretion and were generous beyond the original requirements binding the agency, that procedure had to be carefully observed. *Service*, 354 U.S. at 380.[2]

In *Vitarelli, supra*, the Department of the Interior discharged a Schedule A employee for national security reasons. The Secretary had the power to summarily discharge the Schedule A employee without stating any reason. Once the Secretary decided to give a reason and that reason was national security, however, the procedures for dismissal of employees on security grounds were triggered. Consequently, the Secretary "was bound by the regulations which he himself had promulgated for dealing with such cases . . . ." 359 U.S. at 539-40. As the Court also noted, "scrupulous observance of departmental procedural safeguards is clearly of particular importance." *Id.* at 540.

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[2] In *Service*, after determining the discharge was not consistent with the procedures in place, the Court reversed the court of appeals and remanded the case to the district court. 354 U.S. at 389.

In considering internal agency rules, the Supreme Court also has distinguished between cases where internal agency rules are designed primarily to benefit the agency, which are generally unreviewable, and internal agency rules that primarily confer important procedural benefits upon individuals, which are reviewable. *Lopez v. Federal Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003) citing, *inter alia, Service*, 354 U.S. at 373-76, and *Vitarelli*, 359 U.S. at 538-39. In *Lopez*, the Circuit concluded that the procedures at issue were "aimed at protecting the [employee in the dispute] from the Administrator's otherwise unlimited discretion," and thus was reviewable by the court. *Lopez*, 318 F.3d at 248. The D.C. Circuit also noted that other "circuits have similarly required agencies to follow procedural rules 'designed to benefit aggrieved parties during [employment] proceedings.'" *Id.* at 247 citing *Bates v. Sponberg*, 547 F.2d 325, 330 nn 6-7 (6th Cir. 1976) and *Gaballah v. Johnson*, 629 F.2d 1191, 1202-3 (7th Cir. 1980).

Although, absent an OPM regulation conferring jurisdiction on the Board, the precedents cited above confer no rights in the comprehensive scheme created by the Civil Service Reform Act, *see generally, Fausto v. United States*, 484 U.S. 439 (1988), OPM finds their reasoning instructive in interpreting its own regulations. Accordingly, OPM interprets its regulation at 5 CFR § 353.301(d) to require 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. Section 353.301(d) states that "[a]gencies must make every effort to restore in the local commuting area, according to the circumstances of each case," and that *"[a]t a minimum*, this would mean treating these employees substantially the same as other handicapped individuals . . . ." (Emphasis supplied). The use of the phrase, "at a minimum" appears to anticipate that more might be required if an agency adopts agency-specific regulations that provide additional protections. And, in any event, an agency's failure to follow additional safeguards for employees that it chose to adopt, while applying OPM's substantive regulation would constitute conduct that is arbitrary and capricious within the ordinary meaning of those terms. OPM's interpretation of its own rules is entitled to substantial deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

Conclusion

The issue in this appeal is whether the Postal Service properly applied the Employee and Labor Relations Manual (ELM) § 546.142(a), which appears to provide greater restoration rights to the Postal Service employees than provided in 5 CFR § 353.301(d). This is a procedure that benefits the partially recovered employees. 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).

Sincerely,

Elaine Kaplan
General Counsel

cc: James C. Latham
[redacted]

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U.S. MERIT SYSTEMS PROTECTION BOARD

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Washington, D.C. 20419-0002

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May 26, 2011

The Honorable John Berry
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Re: *Michael B. Graves v. Department of Veterans Affairs*,
MSPB Docket Nos. SF-3330-09-0570-B-1 and SF-3330-09-0725-B-1

Dear Director Berry:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of rules, regulations, or policy directives promulgated by the Office of Personnel Management (OPM).

Background

In *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 245 (2010), and *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 209 (2010), appeals filed under the Veterans Employment Opportunities Act of 1998 (VEOA), the Board held that the agency's use of veterans' preference status as a "tie-breaker" in making selections for excepted service "hybrid" positions under 38 U.S.C. § 7401(3) was inadequate, and that the agency must comply with the competitive service veterans' preference requirements set forth in title 5 of the United States Code. The Board reasoned that although title 5 provisions such as those relating to veterans' preference rights do not apply to appointments listed under 38 U.S.C. § 7401(1) (physicians, dentists, etc.) because those appointments are made "without regard to civil-service requirements," hybrid employees retain many title 5 rights, including the adverse action and reduction in force (RIF) rights mentioned in 38 U.S.C. § 7403(f)(3). The Board noted that section 7403(f)(2) provides that "[i]n using such authority to appoint individuals to such positions, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5," and that section 7403(f)(3) provides that "the

applicability of the principles of preference referred to in paragraph (2) . . . shall be resolved under the provisions of title 5 as though such individuals had been appointed under that title." Based on its reading of these two provisions, the Board concluded that title 5 competitive service veterans' preference requirements, including regulations promulgated by OPM such as 5 C.F.R. § 332.311(a) and 5 C.F.R. § 332.406(a), apply to appointments made under 38 U.S.C. § 7401(3). The Board also suggested in *Graves*, 114 M.S.P.R. 209, ¶¶ 12-15, that the agency violated veterans' preference requirements set forth in OPM's Delegated Examining Operations Handbook and VetGuide, and that corrective action was therefore warranted.

The *Graves* cases are now before the Board on petition for review after remand. The agency has raised several arguments regarding the above findings. The agency asserts that 38 U.S.C. § 7403(f)(3) does not address the *appointment* of individuals because its plain language refers multiple times to individuals who have already been *appointed.* Thus, the agency contends that the Board's *Graves* decisions do not give effect to the word "appointed" in section 7403(f)(3), and under the statutory construction maxim *noscitur a sociis* (a word is defined by the company it keeps), the reference in section 7403(f)(3) to "matters relating to . . . the applicability of the principles of preference referred to in paragraph (2)" should mean matters relating to veterans' preference principles that apply to individuals who have already been appointed, like "matters relating to" adverse actions, RIFs, part-time employees, disciplinary actions, and grievance procedures. The agency also contends that the legislative history for 5 U.S.C. § 7403(f)(2)-(3) indicates that a Senate committee specifically intended for the agency to apply a tie-breaker principle to "hybrid" applicants, and that Congress did not intend to require the agency to apply title 5 rights to applicants for employment. The agency further asserts that in 1984 it provided notice in the Federal Register that it would implement the "principles of preference" requirement in the statute through an internal circular that called for use of the "tie-breaker" principle that has been in effect from 1984 through the Board's *Graves* decisions.

We also note that while section 7403(f)(2) calls for applying "the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5," such application appears to relate to the use of "such authority," i.e., the "authority" mentioned in 38 U.S.C. § 7403(a), which in turn calls for appointments to be made "without regard to civil-service requirements." *See Scarnati v. Department of Veterans Affairs*, 344 F.3d 1246, 1248 (Fed. Cir. 2003) (under 38 U.S.C. § 7403(a), title 5 provisions, including those regarding veterans' preference rights, do not apply to appointments made "without regard to civil service requirements"). Further, deference is generally given to an agency's consistent, long-standing regulatory interpretation of an ambiguous statute as long as it is reasonable, *Rosete v. Office of Personnel Management*, 48 F.3d 514, 518-19 (Fed. Cir. 1995), and Congress is presumed to be aware of an administrative interpretation of a statute and to adopt that interpretation when it adopts a

new law incorporating sections of a prior law without change, *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 14 (1998).

Questions to be Resolved

1. Does 38 U.S.C. § 7403(f)(2) require the agency to apply title 5 veterans' preference provisions, including but not limited to 5 U.S.C. § 3305(b) and 5 C.F.R. § 332.311(a), which the Board found the agency violated in not accepting the appellant's late-filed application, *see Graves*, 114 M.S.P.R. 245, ¶¶ 12-15, in filling "hybrid" positions under 38 U.S.C. § 7401(3)?

2. Does the legislative history for the applicable statutory provisions offer guidance regarding how those provisions should be interpreted?

3. Do the veterans' preference provisions set forth at 5 C.F.R. part 332 apply to applicants for "hybrid" positions under 38 U.S.C. § 7401(3)?

4. Are the Delegated Examining Operations Handbook and VetGuide "statute[s] or regulation[s]" relating to veterans' preference within the meaning of 5 U.S.C. § 3330a(a)(1)(A), such that a violation of a provision in those documents would constitute a violation under VEOA?

Request for an Advisory Opinion

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by June 27, 2011, responding to the questions raised above. The Board further requests that you serve the parties listed below with a copy of your advisory opinion. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than July 18, 2011.

Sincerely,

William D. Spencer
Clerk of the Board

cc: Michael B. Graves

Evan Stein, Esq.
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UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

AUG 8 2011

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CLERK OF THE BOARD

Mr. William D. Spencer
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United States Merit System Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

RE: *Michael B. Graves SF3330-09-0725-B-1, SF3330-09-0570-B-1*

Dear Mr. Spencer:

Thank you for your request for an advisory opinion in these cases and the record that OPM requested, which was received on July 18, 2011.

We have carefully reviewed the Board's request for an advisory opinion on the important issues at stake in this case, which, for the most part, seeks OPM's interpretation of provisions of Chapter 38, title 5, United States Code, a chapter that OPM does not administer or regulate. Following this review and our review of the record, including the Board's previous decision in this matter, as well as the Board's Federal Register notice of June 2, 2011, OPM has decided that it would not be appropriate at this time to provide an opinion as to the questions that the Board has posed in the context of 5 U.S.C. § 1204(e)(1)(A). It is possible that, at a later date, the Director of OPM may intervene in the proceedings or seek reconsideration of a decision by the Board.

Once again, we appreciate the Board's expression of interest in OPM's views.

Sincerely,

Elaine Kaplan
General Counsel

CERTIFICATE OF SERVICE

I certify that this document, and its enclosures, if any, were sent by the means so indicated to the below named individual(s) on the date as attested by my signature.

Michael B. Graves
[redacted]
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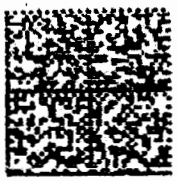

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May 24, 2012

Honorable John Berry
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, DC 20415

Re: *Gary M. Solamon v. Department of Commerce*
MSPB Docket No. DC-0752-11-0807-I-1

Dear Director Berry:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of a policy directive/rule promulgated by the Office of Personnel Management (OPM).

Background:

In this appeal, the appellant, an employee of the Department of Commerce, has filed an appeal alleging a reduction in pay or grade and a violation of merit system principles based on the agency's action reassigning him from a supervisory position to a non-supervisory position in April 2011. The agency competitively selected the appellant for reassignment to a supervisory position in its Bureau of Economic Analysis (BEA) in August 2005. The BEA uses a pay for performance management system referred to as the Commerce Alternative Personnel System (CAPS). Under CAPS, the appellant received supervisory performance pay, as a part of his basic pay, in an amount up to six percent above the maximum rate of his pay band. When the agency reassigned the appellant to the non-supervisory position, his rate of basic pay was reduced from $145,100.00 to $135,771.00.

For purposes of 5 U.S.C. chapter 75, "pay" is defined as the basic rate of pay fixed by law or administrative action for the position held by the employee. 5 U.S.C. § 7511(a)(4). An agency action that results in a reduction in an employee's basic rate of pay is appealable to the Board as an adverse action under 5 U.S.C. § 7512(4). *Kinnamon v. Department of Defense,* 53 M.S.P.R. 274, 278 (1992). In this appeal, the agency argued that, in approving CAPS as a demonstration project in December 1997, OPM promulgated a rule that while supervisory performance pay under that system is part of basic pay, cancellation of such pay does not constitute an adverse action under 5 U.S.C. chapter 75. 62 Fed. Reg. 67,452. Finding that cancellation of the appellant's supervisory performance pay was therefore not an adverse action appealable to the Board, the administrative judge dismissed the appeal for lack of jurisdiction.

It appears that CAPS was created pursuant to OPM's authority to conduct demonstration projects under 5 U.S.C. § 4703,* which states in part:

> Subject to the provisions of this section, the conducting of demonstration projects shall not be limited by any lack of specific authority under this title to take the action contemplated, or by any provision of this title or any rule or regulation prescribed under this title which is inconsistent with the action, including any law or regulation relating to –
>
> (1) the methods of establishing qualification requirements for, recruitment for, and appointments to positions;
>
> (2) the methods of classifying positions and compensating employees;
>
> (3) the methods of assigning, reassigning, or promoting employees;
>
> (4) the methods of disciplining employees;
>
> (5) the methods of providing incentives to employees, including the provision of group or individual incentive bonuses or pay;
>
> (6) the hours of work per day or per week;
>
> (7) the methods of involving employees, labor organizations, and employee organizations in personnel decisions; and
>
> (8) the methods of reducing overall agency staff and grade levels.

5 U.S.C. § 4703(a). The provision also states that no demonstration project may "provide for a waiver of any provision of chapter 23 of title 5 or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision relating to prohibited personnel practices." 5 U.S.C. § 4703(c)(5).

Questions to be resolved:

1. Does the Board have jurisdiction under 5 U.S.C. § 7512(4) to review the appellant's reduction in pay?
2. Does 5 U.S.C. § 4703 authorize the exclusion of the appellant's reduction in pay from Board jurisdiction? In addressing this question, we request OPM's interpretation as to what Congress intended in exempting demonstration projects from "any law or regulation relating to...*the methods of disciplining employees*" and whether such "methods of disciplining employees" include

* We note that in 2007, Congress authorized the expansion and indefinite extension of the CAPS project. *See* the Consolidated Appropriations Act of 2008, Public Law 110-161, 121 Stat 1844.

the statutory remedial process available to employees subject to disciplinary action?

3. Whether and to what extent does the Board have jurisdiction to review the appellant's reduction in pay because it is inconsistent with merit system principles under 5 U.S.C § 2301 or constitutes a prohibited personnel practice under 5 U.S.C. § 2302?

Request for an advisory opinion:

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by June 25, 2012, regarding the questions raised above. The Board further requests that you serve the parties listed below with a copy of your advisory opinion as well. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than July 5, 2012.

Sincerely,

William D. Spencer
Clerk of the Board

cc: Gary M. Solamon
[redacted]

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Advisory Opinion re:
Gary M. Solamon v. Department of Commerce

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

AUG 16 2012

Mr. William Spencer
Clerk of the Board
1615 M Street, NW
Washington, DC 20410-0002

Re: Advisory Opinion regarding:
Gary M. Solamon v. Department of Commerce,
MSPB Docket No. DC-0752-11-0807-I-1

Dear Mr. Spencer:

This letter is in response to the Merit System Protection Board's (Board or MSPB) request for an advisory opinion, dated May 24, 2012. Your letter was forwarded to my office for a response on behalf of the Office of Personnel Management (OPM).

For the reasons explained in detail below, it is OPM's opinion that the Board does not have jurisdiction over the Appellant's claims.

Background

The Board requested an advisory opinion in connection with the appeal of Gary M. Solamon (Appellant), an employee at the Department of Commerce, Bureau of Economic Analysis (Agency). That Agency uses a pay for performance management system, referred to as the Commerce Alternative Personnel System (CAPS). CAPS was created by OPM as a demonstration project pursuant to 5 U.S.C. § 4703. It involved several objectives effecting recruitment and appointment, classification and pay, and performance management.

This case involves the pay provisions of CAPS, which provide that employees who meet the definition of "supervisor" are eligible for supervisory performance pay. 62 Fed. Reg. 67, 452. Under CAPS, supervisors are eligible for salaries up to 6 percent higher than the maximum rate of their pay bands. *Id.* The Federal Register notice implementing CAPS specifically stated that payment of supervisory performance pay is not considered a promotion or a competitive action, that supervisory performance pay will be canceled when an employee's supervisory responsibilities are discontinued, and that cancellation of supervisory performance pay does not constitute an adverse action, so that there is no right of appeal under 5 U.S.C. Chapter 75. *Id.*

Prior to 2005, the Appellant had reached the full non-supervisory performance potential for his position. See Administrative Record, Volume 1 (AR), Tab 12 (MSPB Initial Decision). In an effort to earn additional compensation under CAPS, the Appellant requested and was assigned

to a supervisory position in 2005, entitling him to supervisory performance pay of 6% above the maximum rate of his pay band. *Id.* When the Agency reassigned the Appellant to a non-supervisory position in 2011, his pay was reduced under CAPS. *Id.*

Following his reassignment, the Appellant filed an appeal with the Board, alleging that "without any prior overt indications of performance deficiencies, [he] was advised that [he] was to be removed from the [supervisory] role as the 'agency needed to head in a different direction' with the position." AR, Tab (Appellant's Initial Appeal). The Appellant also claimed that the cancelation of his supervisory pay and reassignment were made contrary to "Merit Principles." AR, Tab 1 (Appellant – Initial Appeal).

On October 3, 2011, the Administrative Judge (AJ) issued an initial decision dismissing the appeal for lack of jurisdiction. The AJ found that the Appellant's supervisory performance pay under CAPS was "supervisory premium pay" and, as such, the Board did not have jurisdiction over the Agency's action cancelling such pay when his supervisory duties were cancelled. AR, Tab 12. In addition, the AJ declined to address the Appellant's allegations that "Merit Principles were ignored in reassignment," finding that the Board lacked jurisdiction over such claims unless the allegations were raised in conjunction with an otherwise appealable action. *Id.*

On November 7, 2011, the Appellant filed a Petition for Review (PFR) with the Board, alleging that the Board has jurisdiction because under CAPS his salary was characterized as base pay, not premium pay. AR, Petition for Review, Tab 1. In addition, the Appellant stated that he believed the Agency's actions in reassigning him "constitute a violation of Merit Principles and are specifically addressed under the auspices of Prohibited Personnel Practice Action #12 which notes that a federal employee who has authority over personnel decisions may not take or fail to take a personnel action, if taking the action would violate any law, rule, or regulation implementing or directly concerning merit system principles at 5 U.S.C. § 2301." *Id.*

On December 2, 2011, the Agency filed a response to the PFR. It contended that the AJ properly concluded that the Appellant did not suffer an appealable reduction in pay or grade and properly declined to address Appellant's claims regarding merit principles. AR, Petition for Review, Tab 2.

On May 24, 2012, the Board issued an Order requesting a response from the parties on the same issues posed to OPM, namely: (1) whether the Board has jurisdiction under 5 U.S.C. §7512(4) to review the appellant's reduction in pay; (2) whether 5 U.S.C. §4703 authorizes the exclusion of the appellant's reduction in pay from Board jurisdiction; and (3) whether and to what extent the Board has jurisdiction to review the appellant's reduction in pay because it is inconsistent with merit system principles under 5 U.S.C. §2301 or constitutes a prohibited personnel practice under 5 U.S.C §2302. AR, Petition for Review, Tab 4 (MSPB – Show Cause Order) (emphasis in original).

Analysis

The Board Lacks Jurisdiction Over this Appeal Because OPM Lawfully Authorized a Waiver of the Provisions of Chapter 75 for the Purposes of this Demonstration Project

A. Under 5 U.S.C. § 4703, OPM May Authorize the Waiver of Any Rule or Regulation Prescribed Under Title 5, Except for Those Specifically Enumerated in Subsection (c)

Under section 4703(a) of the United States Code, OPM is authorized to "conduct and evaluate demonstration projects." Section 4703(a) bestows broad authority upon OPM to conduct demonstration projects that include features that are either not authorized by Title 5 or that are inconsistent with its provisions. It states that:

> Subject to the provisions of this section, the conducting of demonstration projects *shall not be limited by any lack of specific authority under this title* to take the action contemplated, *or by any provision of this title or any rule or regulation prescribed under this title* which is inconsistent with the action, *including* any law or regulation relating to—
>
> (1) the methods of establishing qualification requirements for, recruitment for, and appointment to positions;
> (2) the methods of classifying positions and compensating employees;
> (3) the methods of assigning, reassigning, or promoting employees;
> (4) the methods of disciplining employees;
> (5) the methods of providing incentives to employees, including the provision of group or individual incentive bonuses or pay;
> (6) the hours of work per day or per week;
> (7) the methods of involving employees, labor organizations, and employee organizations in personnel decisions; and
> (8) the methods of reducing overall agency staff and grade levels.
>
> (Emphasis supplied).

While OPM's authority to depart from Title 5 is broad under section 4703(a), it is not unlimited.. In addition to the extensive public notice that is required under section 4703(b) before a project may be launched (including a public hearing, individual notification of affected employees and 90 days notice to Congress) OPM's exercise of its authority to depart from Title 5 is expressly made "subject to" the other provisions of section 4703. Section 4703(c), title 5, United States Code, in turn, specifically prescribes those provisions of title 5 that may not be waived. It states that [n]o demonstration project may provide for a waiver of:

- (2)(A) any provision of law referred to in section 2302 (b)(1) of this title; or
- (B) any provision of law implementing any provision of law referred to in section 2302 (b)(1) of this title by—
- (i) providing for equal employment opportunity through affirmative action; or
- (ii) providing any right or remedy available to any employee or applicant for employment in the civil service;
- (3) any provision of chapter 15 or subchapter III of chapter 73 of this title;
- (4) any rule or regulation prescribed under any provision of law referred to in paragraph (1), (2), or (3) of this subsection; or
- (5) any provision of chapter 23 of this title, or any rule or regulation prescribed under this title, if such waiver is inconsistent with any merit system principle or any provision thereof relating to prohibited personnel practices.

As the plain language of sections 4703(a) and (c) establish, demonstration projects may not be limited in any way by *any* lack of specific authority in title 5 "to take the action contemplated" by OPM. Further, they provide that OPM's authority is not curtailed or restricted by *any* provision of title 5 (other than those enumerated in section 4703(c) to which its authority is made "subject" by section 4703(a)). Third, OPM's authority is not impinged by *any* rule or regulation prescribed under title 5 that "is inconsistent with [OPM's] action" (again, other than those enumerated in section 4703(c)). In short, in section 5703, Congress clearly intended to provide OPM with very significant flexibility to allow it to "test new approaches to personnel management."[1]

B. 5 U.S.C. § 7512(4) is Subject to Waiver Under Section 4703(a) Regardless of Whether or Not it is a Law Related to "the Methods of Disciplining Employees" Within the Meaning of 5 U.S.C. § 4703(a)(4)

In its request for an advisory opinion, the Board has asked whether it has jurisdiction under 5 U.S.C. § 7512(4) to review the appellant's reduction in pay, or whether 5 U.S.C. § 4703 authorizes the exclusion of that action from Board jurisdiction. The Board has also asked that OPM provide its interpretation of what Congress intended in exempting demonstration projects from "any law or regulation relating to . . .the methods of disciplining employees" and whether such "methods of disciplining employees" include the statutory remedial process available to employees subject to disciplinary action.

The answer to the Board's first question is that the provisions of Chapter 75 establishing the Board's jurisdiction over appeals of disciplinary actions, are clearly subject to waiver under the broad language of section 4703(a). That provision, as noted above, is broadly written to

[1] *See* S. Rep. 95-989, 95th Cong., 2d Sess. (1978) at 12 (also noting that "among the possible projects are appeals mechanisms, alternative forms of discipline, security and suitability investigations, labor-management relations, pay systems, productivity, performance evaluation, and employee development and training").

allow OPM to establish demonstration projects that *shall not be limited . . . by any provision of this title or any rule or regulation prescribed under this title*. Thus, the Board does not have jurisdiction over the appellant's reduction in pay under section 7512(4), because OPM explicitly waived the applicability of that provision in its Federal Register notice.

As noted, the Board has also asked OPM whether the statutory remedial process is a "law or regulation relating to. . .the methods of disciplining employees" within the meaning of 5 U.S.C. § 4703(a)(4). While we believe that it is such a law or regulation (since the procedures that must be followed when disciplining employees are certainly a subset of the broader category of the "methods" that must be employed), we also believe that the resolution of that question is beside the point because the categories listed in subsection (a) were illustrative, not exhaustive.

Thus, the Board's question suggest that it believes that the waiver provisions of section 4703(a) only apply to laws that relate to the topics set forth at subsection (a)(1)-(a)(8), including among them "the methods of disciplining employees." Well established canons of statutory construction, however, dictate that the use of the word "*including*" when coupled with the broad waiver language (which applies to "*any*" provision of Title 5 or its implementing regulations) means that the enumerated subjects at subsection (a)(1) – (a)(8) are exemplary, and not exhaustive or exclusive. *See Christopher v. SmithKline Beecham Corp*, 132 S. Ct. 2156, 2170 (2012)("a definition introduced with the verb 'includes' instead of 'means' is significant because it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive"), citing *Burgess v. United States*, 553 U.S. 124, 131, n. 3 (2008); *see also, Crawford v. Department of the Army*, 117 M.S.P.R. 38, 44 (2011)(acknowledging the "canon of statutory construction that when the word 'includes' is followed by a list of examples, that list is generally considered non-exhaustive") (citations omitted). The application of this canon of statutory construction is particularly compelling here, given that section 4703 includes a separate statutory subsection (c) that sets forth specific exceptions to the waiver authority provided in subsection (a).

As written, therefore, the congressional grant of authority to OPM admits of no limitations on OPM's authority regarding demonstration projects other than those statutory provisions specifically enumerated in subsection (c). It is irrelevant, therefore, whether the provisions waived are considered laws relating to "the methods of disciplining employees" (although, as noted above, we believe that they clearly are).

C. The Board Lacks Jurisdiction to Review Appellants' Claims Under Sections 2301 and 2302

The Board does not have jurisdiction to review the appellant's reduction-in-pay because, as discussed above, the agency's action in this case, which was taken under an OPM-approved demonstration project, is beyond the Board's jurisdictional reach. The fact that the appellant has alleged a general claim alleging a departure from merit system principles, does not bestow jurisdiction on the Board. Such principles are not self-executing and do not provide an independent source of Board jurisdiction. *See e.g., Phillips v. General Services Administration*, 917 F.2d 1297; *Wells v. Harris*, 1 MSPB 199, 1 M.S.P.R. 208, 211 (1979). Likewise, absent an

otherwise appealable action, prohibited personnel practice claims like the one raised in this case may not be considered by the Board on appeal. See, *e.g. Davis v. Department of Defense*, 105 M.S.P.R. 604, 610 (2007); *Fogerty v. Department of the Treasury*, 53 M.S.P.R. 168, 170 (1992); *Wren v. Department of the Army*, 2 M.S.P.R. 1,2 (1980), aff'd sub nom. *Wren v. Merit Systems Protection Board*, 681 F.2d 871-73 (1982).[2]

Finally, while subsection (c) of section 4703 preserves the applicability of Chapter 23 of title 5, that Chapter itself does not bestow jurisdiction on the Board to hear claims alleging the violation of merit systems principles or the commission of prohibited personnel practices. In that regard, it is worth noting that where Congress intended to preserve rights or remedies under section 4703(c) for employees who alleged the commission of prohibited personnel practices, it did so explicitly. Thus, section 4703(c)(2)(B)(ii), explicitly singles out as non-waivable "any provision of law implementing any provision of law referred to in section 2302(b)(1) by . . . providing any right or remedy available to any employee or applicant for employment in the civil service." This provision demonstrates that—where Congress intended to preserve particular rights of appeal for employees participating in demonstration projects—it did so explicitly. Congress made a deliberate choice not to preserve rights of appeal to the Board that do not involve the anti-discrimination provisions enumerated at section 2302(b)(1). Therefore, the Board lacks jurisdiction in this case.

Conclusion

As set forth above, the CAPS demonstration project was conducted pursuant to the statutory authority granted OPM by 5 U.S.C. § 4703(a). As such, the Board does not have jurisdiction over the Appellant's claims related to the reduction of supervisory performance pay under CAPS or that his reassignment to non-supervisory duties violated merit system principles.

Sincerely,

Elaine Kaplan
General Counsel

[2] The only exception is when an employee claims retaliation for whistleblowing in violation of 5 U.S.C. § 2302(b)(8), and even then, the employee must first file his or her claim with the Office of Special Counsel.

U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board
1615 M Street, NW
Washington, DC 20419-0002

Phone: (202) 653-7200; Fax: (202) 653-7130; E-Mail: mspb@mspb.gov

January 5, 2011

The Honorable John Berry
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Re: *Denton v. Department of Agriculture*, DC-3330-09-0696-I-1

Dear Director Berry:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of regulations promulgated by the Office of Personnel Management (OPM).

Background

The agency employs the appellant in the position of Animal Health Program Assistant, GS-5. The agency announced the position of Veterinary Program Assistant ("VPA"), GS-0303-5/6/7, under both case exam (announcement 24VS-2009-0130) and merit promotion (announcement 6VS-2009-0132) procedures. The appellant applied under both vacancy announcements and submitted his DD-214, showing his eligibility for veterans' preference. The appellant made the certificate at the GS-7 level on the case exam announcement. The maximum score an applicant could receive is 100, except when veterans' preference points are added. The appellant had 10 points added to his score of 99.68 to reflect his veterans' preference, and he was thus listed on the top of the certificate of 6 candidates with a score of 109.68 as "CPS," which is a 30% or more disabled veteran. The appellant also made the GS-6 level on the merit promotion certificate, and he was referred to the selecting official. The agency made no selection from either the case exam or merit promotion certificate. Rather, the agency cancelled both vacancy announcements and filled the VPA position through an alternative hiring authority, the Student Career Experience Program (SCEP).

The appellant filed a complaint with the Department of Labor (DOL) alleging that his rights to veterans' preference as a 30% disabled veteran were violated because the agency filled the position through SCEP instead of filling the position from either the

merit promotion or case exam certificate. DOL informed the appellant that it had completed its investigation into the appellant's claim and had determined that the evidence did not support a finding that the appellant's veterans' preference rights were violated. DOL provided the appellant with notice of appeal rights to the Board.

After exhausting his remedy with DOL, the appellant timely filed an appeal with the Board pursuant to the Veterans Employment Opportunities Act (VEOA) alleging that his veterans' preference rights were violated when the agency used the SCEP to fill the VPA position and did not select him for that position. The appellant essentially argued that the agency had engaged in a sham. The assigned administrative judge determined that the Board has VEOA jurisdiction over the appeal, but issued an initial decision on the merits finding that the appellant did not establish a VEOA violation.

The appellant filed a petition for review with the Board challenging the initial decision of the administrative judge. This appeal raises significant issues regarding whether the agency's use of the SCEP improperly circumvented the competitive examination process, allowing the agency to avoid its obligations regarding veterans' preference and a veteran's right to compete for positions. The material issues are similar in many respects to the issues raised regarding the Federal Career Intern Program (FCIP) in the Board's recent decisions in the appeals of *Dean v. Office of Personnel Management*, AT-3330-10-0534-I-1 and *Evans v. Department of Veterans Affairs*, AT-3330-09-0953-I-1, 2010 MSPB 213 (November 2, 2010). You will recall the Board determined that appellants Dean and Evans had established the FCIP program as conducted violated their veterans' preference rights because FCIP was inconsistent with 5 U.S.C. § 3302(1) by: (1) Allowing agencies to invoke an appointing authority reserved for positions for which it is not practicable to hold a competitive examination after holding a competitive examination yielding highly-qualified preference-eligible candidates; (2) not requiring agencies to justify placement of positions in the excepted service.

The SCEP program is covered by OPM's regulations at 5 C.F.R. § 213.3202(b) and is authorized by Executive Order 12015 (as amended by Executive Order 13024) (FCIP positions are also Schedule B, excepted-service positions but are addressed at 5 C.F.R. § 213.3202(o) and Executive Order 13,162). SCEP allows agencies to hire students currently enrolled in specified educational programs in Schedule B, excepted-service positions, and noncompetitively convert them to term, career or career-conditional appointments upon satisfactory completion of the educational program and accumulation of 640 hours of agency work experience.

Questions to be resolved:

1. Does the SCEP program violate veterans' preference rights because it allows agencies to invoke an appointing authority reserved for positions for which it is

not practicable to hold a competitive examination after holding a competitive examination yielding highly-qualified preference-eligible candidates?

2. Does the SCEP program violate veterans' preference rights because it does not require agencies to justify placement of positions in Schedule B of the excepted service?

3. What impact, if any, does the Executive Order dated December 27, 2010, entitled "Recruiting and Hiring Students and Recent Graduates," have on the appellant's appeal or any other appeals based on SCEP hiring occurring before Executive Order 12015 is revoked?

Request for an advisory opinion:

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by February 7, 2011, responding to the questions raised above. The Board further requests that you serve the parties listed below with a copy of your advisory opinion as well. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than February 25, 2011.

Sincerely,

William D. Spencer
Clerk of the Board

cc: Jeffrey T. Denton
[redacted]

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Fax

To: William Spencer, Clerk of the Board
From: Elaine Kaplan, General Counsel
Fax: 653-7130
Pages: Three
Phone:
Date: June 15, 2011
Re: Denton v. USDA
CC:

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UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

JUN 15 2011

Mr. William D. Spencer
Clerk of the Board
Office of the Clerk
United States Merit System Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

Re: *Denton v. Department of Agriculture, DC-3330-09-0696-I-1*

Dear Mr. Spencer:

Thank you for your February 9, 2011, letter affording the Office of Personnel Management (OPM) additional time in which to provide an advisory opinion in the above-referenced appeal before the Board. The Director of OPM has requested that I respond on his behalf.

Since the date on which you corresponded with us, there have been significant developments in the underlying matter. On February 22, 2011, the Department of Agriculture, the respondent in the matter, submitted a filing encaptioned "Agency's Response To Order To Show Cause" that represents that the Department has acted unilaterally to offer appellant Denton full relief with respect to the matter underlying his appeal. *See Agency Response To Order To Show Cause*, at pages 12-15. We are informed that the parties are in the process of working out the details of the relief, with input from Mr. Denton. Accordingly, OPM believes this matter is now moot.

Because the offer of full relief has rendered this appeal moot, OPM has concluded that it would be best not to respond to the January 5 request for an advisory opinion. At this point, it would appear that OPM's opinion will be of no assistance, in light of the Board's adherence to the mootness doctrine. *See, e.g., Coffey v. United States Postal Service*, 77 M.S.P.R. 281, 286 (1998); *Gonzalez v. Department of Justice*, 68 M.S.P.R. 439, 441 (1995). *See also* 5 U.S.C. § 1204(h) (prohibition against Board issuance of advisory opinions).

In the event that the appeal is found not to be moot for some unanticipated reason, OPM would respectfully request notification and an opportunity to consider whether an advisory opinion might still be appropriate. OPM remains willing to provide an advisory opinion interpreting a law, rule, or regulation as provided under 5 U.S.C. 1204(e)(1)(A) in any live case or controversy.

Again, we appreciate the Board's interest in receiving our views in this case.

Sincerely,

Elaine Kaplan
General Counsel

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

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MAR 4 2011

Mr. William D. Spencer
Clerk of the Board
Office of the Clerk
United States Merit System Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

Re: *Denton v. Department of Agriculture, DC-3330-09-0696*-I-1

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Again, we appreciate the Board's interest in receiving our views in this case.

Sincerely,

Elaine Kaplan
General Counsel

CERTIFICATE OF SERVICE

I certify that this document, and its enclosures, if any, were sent by the means so indicated to the below named individual(s) on the date as attested by my signature.

William D. Spencer
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United States Merit System Protection Board
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March 4 2011

DATE

Antonio A San Martin Esq

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Mr. William D. Spencer
Clerk of the Board
Office of the Clerk
United States Merit System Protection Board
1615 M Street, N.W.
Washington, DC 20419

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U.S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk
1615 M Street, N.W.
Washington, D.C. 20419

February 4, 2010

Honorable John Berry
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Re: *Rhonda K. Conyers v. Department of Defense*,
MSPB Docket No. CH-0752-09-0925-I-1, and
Devon Haughton Northover v. Department of Defense,
MSPB Docket No. AT-0752-10-0184-I-1

Dear Director Berry:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of regulations promulgated by the Office of Personnel Management (OPM).

Background:

Devon Haughton Northover was a GS-7 Commissary Management Specialist with the Defense Commissary Agency. He occupied a position that was designated non-critical sensitive by that agency pursuant to 5 C.F.R. § 732.201(a). That agency demoted him to a non-sensitive position based on its decision to deny him eligibility for access to classified information and/or occupancy of a sensitive position. Mr. Northover contends that he was never required to hold a security clearance or to access classified information.

Rhonda Conyers is a GS-5 Accounting Technician with the Defense Finance and Accounting Service in Columbus, Ohio. She occupies a position that was designated non-critical sensitive by that agency pursuant to 5 C.F.R. § 732.201(a). That agency has indefinitely suspended Ms. Conyers based upon a determination

to deny her eligibility for access to classified or sensitive information. Ms. Conyers has filed an appeal of her indefinite suspension with the Board.

Both cases involve the question of whether an adverse action based on the denial or revocation of a security clearance is sufficiently analogous to an adverse action due to revocation of an employee's ability to occupy a sensitive position that case law applicable to adverse actions based on security clearance denials, such as *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), should apply in these matters. Pursuant to *Egan*, in an appeal under 5 U.S.C. § 7513 based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination. *Egan*, 484 U.S. at 530-31. Rather, the Board may only decide whether the employee's position required a security clearance, whether the security clearance was denied, whether transfer to a non-sensitive position was feasible, and whether the agency followed the procedural requirements of 5 U.S.C. § 7513. *Id.* We anticipate that the parties will be asked to submit oral argument in these cases, and procedures for that process will follow.

Question to be resolved:

Both *Conyers* and *Northover* raise the question of whether, pursuant to 5 C.F.R., Part 732, National Security Positions, the rule in *Egan* also applies to an adverse action concerning a "non-critical sensitive" position due to the employee having been denied continued eligibility for employment in a sensitive position. As set forth above, *Egan*, 484 U.S. at 530-31, holds that the scope of Board review of an adverse action based on the revocation of a security clearance is limited.

The Board requests that you provide an advisory opinion on this question and, in doing so, address the particular issues presented in these cases, as well as any other issues you deem pertinent. We note that while we are seeking OPM's interpretation of the regulations it has promulgated, ultimately, these cases present a question of Board jurisdiction that will be determined by the Board.

Policy considerations:

National security positions include those that involve Government activities "that are concerned with the protection of the nation from foreign aggression or espionage, including the development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States." 5 C.F.R. § 732.102(a)(1). By designating a position as sensitive under 5 C.F.R. § 732.201(a), an agency has made a judgment that "the . . . occupant could bring about, by virtue of the nature of the position, a material adverse effect on national

security." Therefore, an agency's determination that an individual is not eligible to hold a sensitive position is a serious matter.

Conversely, to construe OPM's National Security Position regulations as meaning that an employee occupying a sensitive position can only obtain limited Board review of an adverse action taken against him based on an agency's determination to deny him continued eligibility for employment in a sensitive position would place a major restriction on the basic procedural rights of untold numbers of employees in the Department of Defense, Department of Homeland Security, and elsewhere in the Federal workforce whose work does not involve access to classified information. It appears that at the Department of Defense, for example, the "sensitive" position designation is not specific to a certain level or type of position, which is why the impact of limiting Board review in this manner could be so far-reaching. *See Crumpler v. Department of Defense*, 2009 MSPR 224, ¶ 2 (the appellant in a case with the same legal issue was removed from a GS-4 Store Associate position); *Brown v. Department of Defense*, 110 M.S.P.R. 593, Separate Opinion of Mary M. Rose, ¶ 1 (2009) (the appellant in a case with the same legal issue was removed from a GS-5 Commissary Contractor Monitor position).

Request for an advisory opinion:

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by April 5, 2010 regarding the correct application of the National Security Position regulations, and the propriety of the actions taken by the agency toward the appellants in these matters. The Board further requests that you please serve the parties listed below with a copy of your advisory opinion as well. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than May 5, 2010.

Sincerely,

William D. Spencer
Clerk of the Board

cc: Rhonda K. Conyers
[redacted]

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UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

MAR 31 2010

Honorable William D. Spencer
Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Re: OPM Advisory Opinion in Conyers v. Department of Defense, No. CH-0752-09-0925-I-1, and Northover v. Department of Defense, No. AT-0752-10-0184-I-1.

Dear Mr. Spencer:

The Merit Systems Protection Board (MSPB or Board) has requested an advisory opinion, pursuant to 5 U.S.C. § 1204(e)(1)(A), concerning the Office of Personnel Management's (OPM's) interpretation of part 732 of Title 5, Code of Federal Regulations, to assist the Board in adjudicating the above-referenced appeals. OPM Director John Berry has asked me to reply on his behalf.

The Board has specifically requested OPM's opinion on "whether, pursuant to 5 C.F.R., Part 732, National Security Positions, the rule in Egan[1] . . . applies to an adverse action concerning a 'non-critical sensitive' position due to the employee having been denied continued eligibility for employment in a sensitive position." As noted in your letter of February 4, 2010, under Egan "the scope of Board review of an adverse action based on the revocation of a security clearance is limited." The Board has asked whether, under OPM's regulations, the Board's review of an agency's denial of an employee's eligibility to occupy a sensitive position is limited to the same extent as an agency's denial of an employee's eligibility for access to classified information.

As an initial matter, we agree with amicus American Federation of Government Employees that the Conyers and Northover appeals are not ripe for consideration by the full Board. The Office of the Clerk of the Board distributed the case records of both appeals to OPM on March 3, 2010. The record in Northover includes no initial decision, no referral for interlocutory review, and no order joining or consolidating the appeal to any other appeal already before the full Board. In Conyers, which was apparently certified for interlocutory review by the administrative judge sua sponte, it is unclear from the record whether the appellant was in a position requiring eligibility for access to classified information. This is a critical issue for if the appellant did require such access then there would be no question regarding the applicability of Egan. For these reasons it

[1] Department of the Navy v. Egan, 484 U.S. 518, 530-31 (1988).

would be premature for the Board to address the breadth of Egan's rationale in the context of these particular appeals.

If the full Board nonetheless decides to consider these appeals in their current posture, OPM's regulations in 5 C.F.R. Part 732 are silent on the scope of an employee's rights to Board review when an agency deems the employee ineligible to occupy a sensitive position. The regulations do not independently confer any appeal right or affect any appeal right under law.

OPM's Part 732 regulations have their genesis in Executive Order 10450, as amended (hereinafter E.O. 10450), reprinted in 5 U.S.C. 7311. Section 3(b) of that Order requires each agency head to "designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position." The Executive Order delegates to OPM the responsibility to conduct investigations "of persons entering or employed in the competitive service" with a "scope . . . determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security." E.O. 10450, §§ 3(a), 8(b).

Based on the criteria contained in the E.O., OPM's regulations at 5 C.F.R. § 732.102(a) provide examples of the kinds of duties that might be discharged by persons in national security positions. These examples are not intended to be exhaustive. Rather they are illustrative of the kinds of duties that would support an agency's conclusion that a position is sensitive within the meaning of the Executive Order.

Under the E.O. and OPM regulations, a background investigation must be conducted whenever an appointment is made to a sensitive position, with limited opportunity for waivers and exceptions. See E.O. 10450, §§ 3(a), 3(b); 5 C.F.R. § 732.202. The background investigation for sensitive positions is initiated by the applicant's completion of a Standard Form (SF) 86, Questionnaire for National Security Positions.[2] OPM's requirement that the SF 86 must be used for investigations for sensitive positions has been in place for over 20 years. See, e.g., 55 Fed. Reg. 45809 (Oct. 31, 1990).

OPM's regulation at 5 C.F.R. § 732.201(a) further requires the agency's sensitivity designation for national security positions to be made "at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive." The purpose of making

[2] Every position in the competitive service must also be designated for public trust risk under OPM's suitability regulations in 5 C.F.R. § 731.106. When a position is not designated as "sensitive," but is designated as "low risk," the background investigation is conducted using the SF 85. When the position is not designated as "sensitive," but is designated as a "moderate" or "high risk" public trust position, the background investigation is conducted using the SF 85P. Neither the SF 85, nor the SF 85P are intended to be used for national security positions.

the distinction among the three sensitivity levels is to determine the scope of the background investigation OPM will conduct upon receipt of the SF 86. OPM's regulations do not furnish a procedure for appealing an agency's designation of a position as "sensitive" at one of the three prescribed levels.

OPM's regulations in 5 C.F.R. § 732.301 require agencies making determinations based upon OPM investigations to adequately document their decisions; to comply with applicable procedural requirements under law, rule, and regulation; to provide minimum procedural rights; and to consider all available information in reaching a final decision. These regulations serve to ensure that appropriate use is being made of OPM's reports of investigation, which remain OPM's property even after the investigation has ended under section 9(c) of E.O. 10450. The regulations also help OPM evaluate, under section 14(a) of E.O. 10450, "[d]eficiencies in the department and agency security programs" and "[t]endencies in such programs to deny . . . fair, impartial and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order."[3]

While OPM's regulations at Part 732 address the procedures to be followed by agencies in rendering a decision based on an OPM investigation, they do not address the scope of the Board's review when an agency takes an adverse action against an employee under 5 U.S.C. § 7513(a) following an unfavorable security determination. Likewise, OPM's adverse action regulations in 5 C.F.R. Part 752 do not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position.

In short, the resolution of the issue before the Board regarding the scope of the Egan decision cannot be determined by reference to OPM's regulations. OPM nonetheless appreciates the opportunity to provide this advisory opinion, to ensure that the Board has an accurate understanding of OPM's regulations regarding national security positions to serve as the context for its decision on these appeals.

Respectfully,

Elaine Kaplan
General Counsel

[3] Further, the requirement in 5 C.F.R. § 732.301(a) that "the agency must . . . [i]nsure that the records used in making the decision are accurate, relevant, timely, and complete to the extent reasonably necessary to assure fairness to the individual in the determination," is mandated by the Privacy Act of 1974, as amended, 5 U.S.C. § 552a(e)(5).