

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4107

MAR 28 1988

Dear Mr. Burrus:

This is in response to your letter of March 15 regarding an Equal Employment Opportunity Commission ruling on partially handicapped employees and their placement in the proper level and step they would have attained had they not had an on-the-job injury.

It is my understanding that the Office of Personnel Management has issued a revision to 5 CFR, Part 353, which concerns restoration rights of employees injured on the job which was effective February 16. Furthermore, the revision only affects those employees who return to employment on or after February 16.

As a result of the OPM revisions, the U.S. Postal Service issued directives to the field advising them of the changes to the law (copy attached). The issue of placement into the proper level and step is appropriately addressed in the directive.

As noted in the directive, subsequent changes will be made to the Employee and Labor Relations Manual, Chapter 546.142, reflecting these revisions in the near future.

Should you have any further questions regarding the foregoing, please contact Harvey White at 268-3831.

Sincerely,

(signed) Joseph J. Mahon, Jr.

Joseph J. Mahon, Jr.
Assistant Postmaster General

Attachment

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

March 15, 1988

William Burrus
Executive Vice President
(202) 842-4246

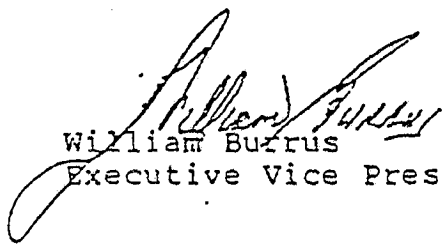
Dear Mr. Mahon:

The Equal Employment Opportunity Commission has ruled in Case No. 101-84-X-0020 (Agency No. 5-1-0691-3) that partially handicapped employees returning to duty are entitled to placement in the step and level they would have obtained, but for the on-the-job injury.

This communication is to inquire as to the Postal Service's intent to amend its regulations on this subject to conform with the Decision and to adjust the pay of similarly situated employees who have not presently reached the top step and are being compensated at a salary below that which is required by law.

Please advise as to the intent of the Postal Service.

Sincerely,


William Burrus
Executive Vice President

Joseph Mahon
Asst. Postmaster General
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

WB:rb

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

RECEIVED

Robert H. Jorgensen,
Appellant,

v.

United States Postal Service,
Agency.

FFR 29 1988

APWU
CLERK DIVISION

Appeal No. 01852973
Agency No. 5-1-0691-3
Hearing No. 101-84-X-0020

DECISION

INTRODUCTION

On July 30, 1985, Robert H. Jorgensen (hereinafter referred to as appellant) initiated an appeal to the Equal Employment Opportunity Commission from the final decision of the United States Postal Service (hereinafter referred to as the agency) issued July 10, 1985 concerning appellant's equal opportunity complaint based on physical handicap (back injury) in violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791. The appeal is accepted by this Commission in accordance with the provisions of EEOC Order No. 960, as amended.

¹Appellant initially raised this allegation before the Merit Systems Protection Board (MSPB). In Robert Jorgensen v. U.S. Postal Service, MSPB No. SE03538110038 (October 26, 1981) the Board found that it did not have jurisdiction over appellant's allegations. The Board further commented that while the agency fulfilled its obligation to restore appellant, his claim did not address the issue of restoration, per se. In his appeal to the MSPB, appellant contended that he was entitled to a higher salary and that he was better suited to a letter carrier position. On October 25, 1982 the Commission denied consideration of a petition for review of the MSPB decision. However, the Commission noted, in part, that appellant was not foreclosed from raising the allegation in a complaint of discrimination under 29 C.F.R. §1613.201 et seq. See Robert Jorgensen v. U.S. Postal Service, EEOC Petition No. 03820029 (October 25, 1982).

ISSUES PRESENTED

Whether appellant, an injured Distribution Clerk who received compensation benefits for more than one year, was a "qualified handicapped person" when he was reemployed by the agency in a modified Distribution Clerk position which accommodated the lingering effects of his on-the-job injury.

Whether appellant was entitled to be reinstated at the step level he would have attained in the absence of his on-the-job injury.

BACKGROUND

In December 1975, appellant, a Distribution Clerk with the agency, sustained an on-the-job injury to his lower back. As a result of the injury, on May 20, 1976 appellant was awarded compensation by the Office of Workers' Compensation Programs (OWCP), Department of Labor, and was placed on Leave Without Pay (LWOP) status by the agency. Agency records reflect that on September 28, 1977 appellant was awarded disability retirement and separated from the agency. At the hearing before the Complaints Examiner, appellant testified that he was required to apply for disability retirement. However, appellant elected to stay on the OWCP rolls. (Tr. 62).²

In 1980 the OWCP referred appellant to the agency for possible reemployment. In October 1980 an agency medical officer examined appellant and pronounced appellant capable of returning to work with several specific restrictions designed to avoid further back injuries. An October 30, 1980 job offer was later withdrawn by the agency. However, on March 5, 1981 the agency reissued its job offer for a Distribution Clerk position, modified to fit appellant's work restrictions. Appellant's duties were divided between two stations and included timekeeping duties. Although appellant accepted the offer, he contended that the agency discriminated against him based on his physical handicap in that the agency refused to reinstate appellant at the step level he would have held but for the on-the-job injury.

Following investigation and issuance of a notice of proposed disposition, appellant requested a hearing before a Complaints Examiner. In a January 24, 1985 prehearing statement the agency noted that the Postal Service ultimately pays the OWCP benefits or retirement benefits of partially-recovered employees. Thus, it is in the best interest of the Postal Service to return partially recovered employees to work even if they may be working at considerably less than 100% efficiency.

²See generally Federal Personnel Manual Supplement 831-1, Subchapter S7 (Election Between Retirement Annuity and Compensation for Work Injuries).

At the April 10, 1985 hearing, the agency stipulated that if appellant had returned to work fully-recovered after being off work for more than one year, appellant would have been given credit for the intervening period -- i.e.,³ appellant would have been reinstated at a higher step level. (Tr. 8-9).³ An Injury Compensation Specialist testified that appellant performed the duties set forth in the job description which was designed to accommodate his physical restrictions. However, the Specialist testified that appellant did not perform the duties of a "regular Distribution Clerk." (Tr. 29). An MSC Safety Specialist testified that appellant performed timekeeping duties approximately six hours per day and clerk duties in the Box Section for approximately two hours. (Tr. 51). In the opinion of the Specialist, appellant's medical restrictions would not limit the performance of the timekeeping duties. (Tr. 50). Appellant's supervisor in the Box Section testified that appellant was unable to perform several duties of a Box Section clerk. The supervisor recalled that appellant was unable to perform "all the extemporaneous duties which made up that job, other than boxing mail." (Tr. 81). "

At the hearing, the agency contended that although appellant was "handicapped" he was not a "qualified handicapped person" in that appellant was unable to perform the essential functions of a regular Distribution Clerk. See EEOC Regulation 29 C.F.R. §1613.702(f). Thus, in the opinion of the agency, appellant was not entitled to the protection of⁵ the Rehabilitation Act. The agency further contended that its regulations, which distinguished between fully recovered employees and partially recovered employees with respect to the step level to which an employee is reinstated, are consistent with the

³ See also agency's Prehearing Statement dated January 24, 1985. The agency stated in part: "If [appellant] had been rehired as a fully recovered employee he would have been given credit for the intervening period, and thus would have had a higher in-grade step level."

⁴ The Complaints Examiner excluded testimony concerning appellant's physical condition subsequent to March 1981. (Tr. 23-24). However, the record reflects that beginning in June 1981, appellant complained of back pain. In August 1981, appellant's duties were changed to eight hours per day of desk work. A fitness-for-duty examination performed in January 1982 disclosed that appellant was physically able to perform the duties assigned to him. A subsequent claim by appellant for compensation was rejected by OWCP in December 1982.

⁵ See Employee and Labor Relations Manual, Subchapter 540, Injury Compensation Program. Sections 546.41 and 546.42 ("OPM Regulations" and "Rights and Benefits upon Partial Recovery") EEO Investigative Report, Exhibit #21c.

requirements of 5 U.S.C. §8151.⁶ Specifically, the agency relied on the Office of Personnel Management's March 6, 1979 answer to a question posed by the agency:

⁶Chapter 81-Compensation for Work Injuries

/ 5 U.S.C. §8151. Civil service retention rights

(a) In the event the individual resumes employment with the Federal Government the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) 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.

⁷The Office of Personnel Management, successor to the Civil Service Commission, was assigned the duty to promulgate rules and regulations implementing 5 U.S.C. §8151.

Question 7:

When a partially injured former employee is restored more than one year after the commencement of compensation benefits, must that employee be placed in the pay grade and step that he would have attained without injury, or is it sufficient to restore the employee to the pay grade and step that he had when he was injured where the pay for that grade and level exceeds what it was at the time of the injury?

Although the agency's question was posed in the alternative, OPM provided the following response:

Answer 7:

No. The employee may be restored to any position--even one at a lower pay and grade than the one he or she left. However, if and when the employee fully recovers, he or she is entitled to be considered for the position originally held or an equivalent one as prescribed by [5 C.F.R.] Part 353.

The record reflects that in 1980 the Office of Workers' Compensation Programs in the Department of Labor issued a revised edition of a pamphlet entitled Federal Injury Compensation: Questions and Answers About the Federal Employees' Compensation Act. While the agency contends that OWCP's answers to Questions 72 and 73 are relevant, the Commission notes that OWCP's answer to Question 77 is directly on point.

⁸Federal Injury Compensation: Questions and Answers About the Federal Employees' Compensation Act, U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, Pamphlet CA-550 (Rev. Feb. 1980):

72. If, as a result of an on-the-job injury, an employee returns to work at a lower rate of pay, is he or she entitled to compensation?

Yes. The employee may receive compensation for the loss of earning capacity resulting from the injury. The compensation rate is two-thirds of the loss of earning capacity if there are no dependents; or three-fourths of the loss if the employee has one or more dependents.

73. How is the wage-earning capacity of a partially disabled employee determined?

(Footnote Continued)

In his Recommended Decision, the Complaints Examiner rejected the agency's argument that appellant was not a "qualified" handicapped employee entitled to the protections of the Rehabilitation Act and applicable EEOC Regulations. Since 75% of appellant's time was devoted to timekeeping duties which appellant was fully able to perform, the Complaints Examiner concluded that appellant was able to perform the essential functions of his position. Assuming, arguendo, that the Box Section clerk position was appellant's "position in question," the Complaints Examiner found that appellant could perform the essential function of a Box Section clerk -- that is, appellant could box mail. Since appellant could perform the essential functions of his position, the Complaints Examiner found that appellant was a "qualified handicapped person" within the meaning of the Rehabilitation Act and applicable regulations.

The Complaints Examiner examined appellant's complaint of handicap discrimination under a disparate treatment analysis. Since it was not disputed

(Footnote Continued)

The employee's actual earnings, if any, are studied to see if they fairly and reasonably represent the individual's wage-earning capacity. If they do not, or if the employee has no actual earnings, the OWCP must determine such earning capacity taking into consideration the nature of the injury, the degree of physical impairment, the employee's age, employment qualifications, the availability of suitable employment, and any other factors or circumstances in the employee's case which may affect the capacity to earn wages in his or her disabled condition.

77. Does an injured employee have Civil Service retention rights when injured on the job?

Yes. The provisions of 5 U.S.C. 8151, administered by the Office of Personnel Management, assure Federal employees, including those of the U.S. Postal Service, who are injured on the job and who have received, or are receiving compensation, that upon their return to Federal employment they will incur no loss of benefits which they would have received but for the injury (or disease). It also permits an injured employee to return to his/her former or equivalent position if recovery occurs within 1 year from the date compensation begins or 1 year from recurrence of that same injury. For those employees whose disability extends beyond 1 year, the employing agency or department is to grant priority in employment to the injured worker, provided application for reappointment is made within 30 days of the date of cessation of compensation.

that partially recovered injured employees were treated differently from fully recovered injured employees with regard to step increases, the Complaints Examiner focussed on the agency's justification for its action. The agency contended that 5 U.S.C. §8151 permitted the disparate treatment in that partially recovered injured employees worked at less than 100 percent efficiency. In considering whether the agency correctly interpreted 5 U.S.C. §8151, the Complaints Examiner considered OPM's March 6, 1979 response to Question 3 posed by the agency. At Question 3 the agency inquired whether 5 U.S.C. §8151(a) applied to "a former employee whose disability is partially overcome more than one year after the commencement of compensation, and who is restored to duty by the employing agency?" OPM responded that "Section 8151(a) provides that an employee who resumes employment with the Federal Government is to be credited with the time during which compensation was received for purposes of rights and benefits based upon length of service. This section applies if the individual is reemployed regardless of whether the employee is fully recovered or partially recovered." (emphasis added). "

The agency further relied on a decision by an Arbitrator in U.S. Postal Service v. American Postal Service Union, Grievance Nos. H8C-4A-C-11834, 11772 and 11832 (September 3, 1982) and a dismissal by the MSPB, James Blackburn v. U.S. Postal Service, MSPB No. SF035381104476 (July 30, 1982) (dismissal for lack of jurisdiction). Finally, the agency argued that step increases are not automatic but are based on merit.

In view of the language in 5 U.S.C. §8151(a) to the effect that the entire time during which the employee received workers' compensation benefits shall be credited to the employee for the purpose of within-grade step increases and the OPM's March 6, 1979 interpretation of §8151(a) as applying to partially recovered employees as well as fully recovered employees, the Complaints Examiner recommended a finding that agency regulations which denied step increases to partially recovered employees were in conflict with 5 U.S.C. §8151(a). The Complaints Examiner further recommended a finding that the agency's denial of within-grade step increases for partially recovered employees constituted disparate treatment of a subclass of handicapped persons to which appellant belonged.¹⁰

⁹ See also September 8, 1987 letter from the Acting Assistant Director for Staffing Policy and Operations, Office of Personnel Management to Director, Office of Safety and Health, United States Postal Service (no basis under 5 U.S.C. §8151 and implementing OPM regulations for denying partially recovered employees within-grade increases).

¹⁰ Relying on EEOC Regulation 29 C.F.R. §1613.604(i) the Complaints Examiner erroneously stated that the Recommended Decision would become a final decision (Footnote Continued)

The final decision of the agency rejected the Complaints Examiner's recommended finding that appellant was a "qualified handicapped person." Relying on Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985), the agency stated that reasonable accommodation does not include the elimination of essential functions of a position. Since appellant was unable to perform the normal duties or essential functions of a regular Distribution Clerk, the agency concluded that appellant was not a "qualified handicapped person" as that term is defined in EEOC Regulation 29 C.F.R. §1613.702(f). In the agency's opinion the Complaints Examiner's recommended finding that the appellant could perform the essential functions of a Time and Attendance Clerk position ignored the fact that appellant was reemployed as a Distribution Clerk. Assuming, arguendo, that appellant was a qualified handicapped person, the agency found that the differing treatment accorded fully-recovered employees and partially-recovered employees in terms of within-grade step increases was consistent with 5 U.S.C. §8151. Accordingly, the agency rejected the recommendation of the Complaints Examiner and found that appellant had not been discriminated against based on physical handicap in violation of the Rehabilitation Act.

ANALYSIS AND FINDINGS

The first issue to be addressed is whether appellant is entitled to the protections of the Rehabilitation Act. It is not disputed that appellant is a "handicapped person" as that term is defined in EEOC Regulation 29 C.F.R. §1613.702(a). However, relying on Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir., 1985), the agency contends that appellant is not a "qualified handicapped person" in that, with or without accommodation, appellant cannot perform the essential functions of a regular Distribution Clerk position without endangering his health and safety. In Jasany, the plaintiff was hired primarily to operate the LSM-ZMT machine. Because of a mild case of strabismus, the plaintiff was unable to operate the machine. The Court held that the "post office was not required to accommodate Jasany by eliminating one of the essential functions of his job." Jasany, supra at 1250 (emphasis in original).

The holding of Jasany, supra, is consistent with EEOC Regulation 29 C.F.R. §1613.704(b) in that the "job restructuring" permitted by the regulation does not require the elimination of essential functions of the employee's position. However, Jasany and EEOC Regulation 29 C.F.R. §1613.704(b) are of limited applicability in the instant case in light of the agency's voluntary restructuring of appellant's position.

(Footnote Continued)

calendar days. However, EEOC Regulation 29 C.F.R. §1613.604(i) is only applicable to class action complaints. Pursuant to EEOC Regulation 29 C.F.R. §1613.220(d), the agency had 30 calendar days from date of receipt to reject or modify the Recommended Decision of the Complaints Examiner.

Here, the agency's voluntary offer of reemployment recognized appellant's physical restrictions. Further, the agency agreed to assign duties to appellant which were within his physical limitations. At the hearing, witnesses testified that appellant spent about six hours a day on timekeeping duties. Said duties were within appellant's physical limitations. Appellant was assigned to the Box Section for approximately two hours a day. While he was unable to perform some duties, he was able to box mail, a principal function of the Box Section. While appellant's physical restrictions prevented him from performing all of the the essential functions of a regular Distribution Clerk, the agency's voluntary offer of reemployment modified the duties of a Distribution Clerk position so as to accommodate appellant's physical restrictions. Evidence that appellant's job title was "Distribution Clerk" and that appellant was unable to perform the regular duties of a Distribution Clerk does not remove appellant from the protections of the Rehabilitation Act. In view of the agency's voluntary commitment to assign duties to appellant which were within his physical restrictions as well as appellant's performance of the essential functions of his timekeeping duties and his ability to box mail, the Commission finds that appellant is a "qualified handicapped person" entitled to the protection of the Rehabilitation Act.

In the context of injured employees returning to work more than one year after commencement of compensation, it is not disputed that the agency treats fully-recovered employees more favorably than partially-recovered employees. Thus, the Commission finds that appellant has established a prima facie case of disparate treatment based on physical handicap. Prewitt v. U.S. Postal Service, 662 F.2d 292, 305, n. 19 (5th Cir. 1981). The agency contends that 5 U.S.C. §8151(a), as interpreted by the Office of Personnel Management, authorizes this disparate treatment. Thus, the next issue to be addressed is essentially an issue of law -- namely, whether 5 U.S.C. §8151(a) authorizes the disparate treatment of partially recovered injured employees, thereby limiting the scope of the Rehabilitation Act.

The Federal Employees Compensation Act (FECA), as amended, 5 U.S.C. §8151, sets forth the retention rights of injured or disabled employees of certain Federal government departments and agencies, including the United States Postal Service.¹² The statute provides, in relevant part, that in "the event the

¹¹The agency stipulated that, had appellant returned to work fully-recovered after being off work for over a year, appellant would have received the step increases for the period he was receiving compensation.

¹²The legislative history of FECA reflects that 5 U.S.C. §8151 was added to the Act in 1974. In Senate Report No. 93-1081, the Labor and Public Welfare Committee stated that the amendment made by Section 22 (§8151) assured "injured employees who are able to return to work at some later date that, during their

(Footnote Continued)

individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases..." (emphasis added). By letter dated March 6, 1979, OPM advised the agency that 5 U.S.C. §8151(a) applied to a former employee whose disability is partially overcome more than one year after the commencement of compensation benefits.

The agency relies on OPM's opinion that a partially recovered employee, who is restored more than one year after the commencement of compensation benefits, "may be restored to any position -- even one at a lower pay and grade than the one he or she left." However, OPM's opinion that a partially recovered employee may be restored to any position, even one that is at a lower pay and grade, is not applicable to the instant case. The record reflects that appellant was restored to the position he previously held, namely, Distribution Clerk, albeit the duties were modified to accommodate appellant's handicap.

Similarly, the agency argues that its interpretation of 5 U.S.C. §8151(a) is consistent with the interpretation given by the Office of Workers' Compensation Programs of the Department of Labor. In a pamphlet entitled "Federal Injury Compensation," OWCP answered questions about FECA. Specifically, the agency relies on OWCP's answers to Questions 72 and 73. The agency appears to argue that since it is theoretically possible to rehire an injured employee at a lower rate of pay, then 5 U.S.C. §8151(a) cannot be interpreted as requiring that a partially-recovered employee be given credit for time on compensation for the purpose of within-grade step increases. However, the Commission notes that OWCP's response to Question 77 is not in conflict with OPM's statement that 5 U.S.C. §8151(a) is applicable to partially recovered employees. OWCP explained that the provision assures Federal employees injured on-the-job that "upon their return to Federal employment they will incur no loss of benefits which they would have received but for the injury (or disease)."

In the agency's January 24, 1985 prehearing statement, the agency represented that the MSPB had determined the Postal Service's actions were in accordance with 5 U.S.C. §8151 and applicable regulations. The Commission notes that the Board's October 26, 1981 Decision found that the agency had fulfilled its obligation to restore appellant. The Board further noted that "[a]ppellant's claims do not go to the issue of restoration, per se, but to his apparent belief that he should have been restored to a wholly different position [Letter Carrier] at a different rate of pay from the one he had held. The Board does not have jurisdiction to consider this aspect of appellant's claim." (emphasis added). Thus, it is evident that the MSPB decision did not address appellant's

(Footnote Continued)

period of disability, they will incur no loss of benefits that they would have received were they not injured." The Senate Report does not distinguish between fully-recovered employees and partially-recovered employees.

contention as to his within-grade step level. See Robert Jorgensen v. U.S. Postal Service, MSPB No. SE03538110038, October 26, 1981.

In addition, the agency directs the Commission's attention to the decision of an Arbitrator in U.S. Postal Service v. American Postal Service Union, Grievance Nos. H8C-4A-C-11834, 11772 and 11832, dated September 3, 1982. The union claimed that the two grievants should have been reinstated at the salary levels they would have occupied had they not been injured on-the-job. However, the Arbitrator's decision focused on the union agreement. The Arbitrator noted that, pursuant to a provision of the union agreement, the union had the opportunity to challenge Postal Service regulations which denied step increases to partially recovered employees. However, in the opinion of the Arbitrator the union failed to challenge the regulation at the appropriate time. Accordingly, the Arbitrator denied the grievances. Since the focus of the Arbitrator was whether the agency had violated the union contract and whether the union had timely challenged the alleged violation, the Arbitrator's decision is of limited relevance to the instant case.

Finally, the agency argues that step increases are not automatic. Rather, they are based on merit. However, the agency concedes that had appellant returned as a fully recovered employee, appellant would have been given credit for step increases to which he would have been entitled but for the injury. Thus, in some instances employees are given credit for time on workers' compensation without regard to merit.

In view of the purpose of the legislation, OPM's interpretation of 5 U.S.C. §8151(a) as applying to partially recovered employees, and the specific reference in 5 U.S.C. §8151(a) to within-grade step increases, the Commission finds that the agency erred in interpreting 5 U.S.C. §8151(a) as permitting disparate treatment between partially recovered and fully recovered injured employees. In summary, 5 U.S.C. §8151 and the Rehabilitation Act are complementary. The minimum restoration rights and benefits due former civil servants who sustain on-the-job injuries are set forth in 5 U.S.C. §8151. The Rehabilitation Act provides, in part, that "handicapped" persons (including former federal employees who have partially recovered from on-the-job injuries) are not subjected to discrimination in the form of disparate treatment because of their handicaps.

¹³ Similarly, in James Blackburn v. U.S. Postal Service, MSPB No. SF03538110476, July 30, 1982, the Board on its own motion vacated an Initial Decision in favor of the appellant therein and dismissed the appeal for lack of jurisdiction. The Initial Decision in Blackburn had held that the appellant was entitled to be rehired at the step level he would have held in the absence of the injury.

Having given within-grade step increases to fully recovered injured employees who resume employment more than one year after commencement of compensation, the agency is required by §501 of the Rehabilitation Act, as amended, to give within-grade step increases to similarly situated partially recovered injured employees. Accordingly, the Commission finds that the agency violated the Rehabilitation Act by denying appellant, a qualified handicapped person, the within-grade step increases to which he would have been entitled had he fully recovered from his on-the-job injury. Accordingly, the final agency decision is REVERSED.

CONCLUSION

Based upon a review of the record, the decision of the Equal Employment Opportunity Commission is to reverse the agency's finding of no discrimination based on handicap and to enter a finding of discrimination based on handicap. In order to remedy its past discrimination against appellant, the agency shall comply with the directions of the following Order:

ORDER

- A. Since the record establishes that appellant would have been rehired at a higher step level but for the discrimination herein, the agency is directed to immediately and retroactively amend personnel records to reflect that appellant was rehired on November 24, 1980 and March 31 1981 at the appropriate within-grade step level with backpay and all other benefits which would have accrued in the absence of discrimination. Backpay shall be computed in the same manner as prescribed by 5 C.F.R. §550.805.
- B. The agency is directed to ensure that appellant and similarly situated handicapped employees are not subjected to discrimination in the future.
- C. The agency is directed to post at its facility in Eugene, Oregon, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency immediately upon receipt, and be maintained by it for 60 consecutive days, in conspicuous places, including all places where notices to employees and applicants for employment are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC regulations, compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within thirty (30) calendar days of receipt of the decision, that corrective action has been taken. The agency's report should be forwarded to the Compliance Officer, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Falls Church, Virginia, 22041. A copy of the report should be sent to the appellant.

ATTORNEY'S FEES

If appellant has been represented by a member of the Bar, appellant shall be awarded attorney's fees under 29 C.F.R. §1613.271(c). The attorney shall submit to the agency within twenty (20) days of receipt of this decision, the documentation required by 29 C.F.R. §1613.271(c)(2). The agency shall process the claim within the time frames set forth in §1613.271(c)(2).

A statement of appellant's rights (R-1) is attached to this decision.

FOR THE COMMISSION:

January 20, 1988
Date

Hilda Rodriguez
Executive Officer (Acting)
Executive Secretariat



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

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NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order dated _____ by the United States Equal Employment Opportunity Commission which found that a violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791 had occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE or PHYSICAL or MENTAL HANDICAP with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The United States Postal Service supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The United States Postal Service has retroactively amended its personnel records to reflect that the employee was rehired at the appropriate within-grade step level. The United States Postal Service will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not treat partially recovered injured employees who are reemployed more than one year after the commencement of compensation less favorably than similarly situated fully recovered injured employees.

The United States Postal Service will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

Date Posted: _____

Posting Expires: _____

29 C.F.R. Part 1613