



# American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

March 15, 1988

**William Burrus**  
Executive Vice President  
(202) 842-4246

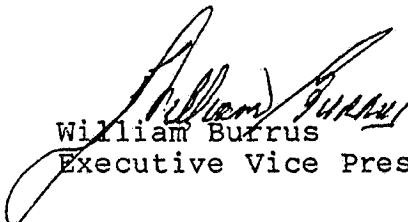
Dear Mr. Mahon:

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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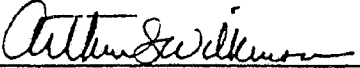
Mr. Lawrence G. Hutchins


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Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,

  
\_\_\_\_\_  
Arthur S. Wilkinson  
Grievance & Arbitration  
Division

  
\_\_\_\_\_  
Lawrence G. Hutchins  
Vice President  
National Association of  
Letter Carriers, AFL-CIO

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.

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calendar days. However, EEOC Regulation 29 C.F.R. §1613.604(1) 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.<sup>11</sup> 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.<sup>12</sup> The statute provides, in relevant part, that in "the event the

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<sup>11</sup>The 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.

<sup>12</sup>The 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

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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.

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<sup>13</sup> 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.