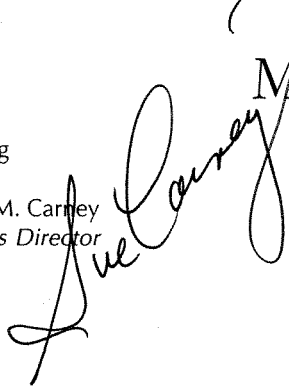


# American Postal Workers Union, AFL-CIO

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From the Office of Susan M. Carney  
Human Relations Director



## Memorandum

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### INFORMATION REGARDING THE MERIT SYSTEMS PROTECTION BOARD

If the Postal Service fails to restore an individual to employment because of compensable injury, that employee may file a grievance and also appeal to the Merit Systems Protection Board (MSPB). An employee does not have to be "preference eligible" to go to MSPB on the issue of restoration rights. An employee who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the Postal Service is acting arbitrarily and capriciously in denying restoration.

In the opinion of the APWU, an employee with a compensable injury who appeals to MSPB does not fall under the CBA language found in Article 16.9, "Veterans' Preference". Therefore, the employee does not have to make a choice between MSPB and the grievance process after Step 3. Such an employee may pursue both avenues of appeal without contractual limit.

An employee making an appeal to MSPB should become thoroughly familiar with the procedures as explained on their website: [www.mspb.gov](http://www.mspb.gov). This website provides the appeal form (MSPB FORM 185) and contact information for their regional offices and the areas of jurisdiction. It also provides access to MSPB's "Judges' Handbook", a very technical, but necessary, guide to MSPB procedures.

MSPB has strict time limits! An appeal must be filed before the end of the 30<sup>th</sup> calendar day after the effective date of the action or decision being appealed, or on the 30<sup>th</sup> calendar after the date the employee received the decision, whichever is later. A late appeal may be dismissed as untimely.

*(THIS IS NOT AN OFFICIAL DOCUMENT. IT IS OFFERED AS A POSSIBLE GUIDE TO BE USED BY A PARTIALLY RECOVERED EMPLOYEE WHO IS APPEALLING TO MSPB THE POSTAL SERVICE'S FAILURE TO PROVIDE RESTORATION RIGHTS)*

**PROCEEDINGS BEFORE**  
*(name of administrative judge)*  
**of**  
**THE MERIT SYSTEMS PROTECTION BOARD**  
\_\_\_\_\_ **REGION, in the matter of:**  
*(appellant's name)* v. **United States Postal Service**  
**MSPB Docket Number:** \_\_\_\_\_

**Appellant's Statement of Facts and Issues**  
**and**  
**Offer of Exhibits**

**Factual Background**

My name is \_\_\_\_\_. I am currently a *(career full time regular/part time flexible/fulltime flexible)* bargaining unit employee of the United States Postal Service (USPS). The American Postal Workers' Union (APWU) is my exclusive bargaining representative. My service seniority date is \_\_\_\_\_. I am a member of the \_\_\_\_\_ craft, and I am assigned to the *(USPS installation)*. **Exhibit A.** (Form 50)

The medical condition which the Office of Workers' Compensation Programs (OWCP) accepted as having been *(caused, or aggravated, or accelerated, or precipitated)* by my work activity is \_\_\_\_\_. **Exhibit B.** (OWCP acceptance letter)

I accepted my most recent medically suitable (limited duty) Postal Service job offer on \_\_\_\_\_. **Exhibit C.** *(written job offer)*

On *(date of the first USPS National Reassessment Process (NRP) interview)*, the Postal Service notified me that they were withdrawing my medically suitable job. On *(date of second NRP interview)*, I was required to surrender my Postal Service identification, was escorted from the facility, and placed in a leave without pay (LWOP) status without time limitation. **Exhibit D.** *("Notice of No Work Available" letter)*

I completed and submitted to the USPS OWCP Form **CA-2a**, “Notice of Recurrence” and OWCP Form **CA-7**, “Claim for Compensation”. **Exhibit E.** and **Exhibit F.**

### Applicable Rules and Regulations

The Postal Service’s personnel manual, the *Employee and Labor Relations Manual (ELM)* at Chapter 540, *Injury Compensation Program*, establishes the procedures that they must follow when administering the injury compensation program as established by the Federal Employees’ Compensation Act and the Code of Federal Regulations.

Specifically, ELM Chapter 546.142 describes the obligation that the Postal Service has when a current employee has partially overcome his or her injury or disability:

When an employee has partially overcome a compensable disability, the Postal Service must make every effort toward assigning the employee to limited duty consistent with the employee’s medically defined work limitation tolerance... In assigning such limited duty, the Postal Service should minimize any adverse or disruptive impact on the employee.

It is worth noting that, in effect, Article 19 of the Collective Bargaining Agreement (CBA) between the APWU and the USPS gives the ELM language the same weight as contract language. Article 19 states that:

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

Title 5, Part 353 of the Code of Federal Regulations establishes the procedures to be followed for restoration to duty from a compensable injury.

With regard to employees who have partially recovered, Part 353.301(d) states that:

Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

### Argument

The record establishes that previous to this recent action the Postal Service had been meeting their obligation to provide me with medically suitable employment. However, when their newly created "National Reassessment Process" was implemented in my Postal Service installation, they withdrew this job from me, and told me that they no longer had any limited duty work available for me. Since by this action they have "disabled" me, I (*have applied for/am receiving*) OWCP wage loss compensation.

As part of the NRP the Postal Service has made a unilateral decision that all restoration assignments (limited duty/permanent rehabilitation) may now consist only of work which they have identified as "necessary and productive", "operationally necessary", and/or meeting the Postal Service's "operational needs".

The creation and application of these new criteria are inconsistent not only with the Postal Service's long standing practice of creating limited duty assignments based simply on the employee's work limitation tolerances, but also contravene the clear language of ELM 546.142(a) and 5 CFR 103(d).

This controlling language does not grant the Postal Service the discretion to limit restoration only to jobs that are "necessary and productive", etc. In their use of these new and unilaterally created criteria the Postal Service has materially altered the meaning and effect of the above cited language.

By limiting their restoration obligation to jobs that fit their self-serving criteria, they have not only violated their own personnel policy, but they have also violated both my contractual and legal rights. They have improperly denied my restoration rights and have failed to "minimize any adverse or disruptive impact".

It is my understanding that the Board has previously held that when an agency is bound by agency policy, regulation, or contractual provision requiring them to offer limited duty, but they fail to do so, such action constitutes a *prima facie* demonstration of an “arbitrary and capricious” denial of the employee’s restoration rights.

### Conclusion

It is my belief that the facts of my case establish that the Postal Service violated their own personnel policy, violated federal regulations, and violated the CBA when they refused to provide me with medically suitable employment. Therefore, their failure to restore me to employment as a partially recovered employee with a compensable injury is “arbitrary and capricious”, and I request that you order the Postal Service to restore me to medically suitable employment.

Respectfully submitted,

*(appellant’s name)*

*(date)*