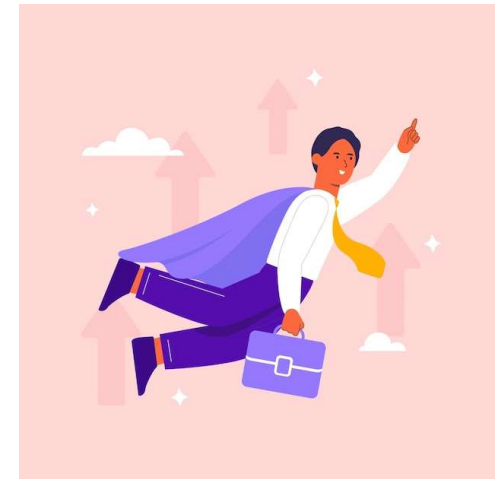

RESTORATION TO DUTY FOLLOWING RECOVERY OF A COMPENSABLE INJURY

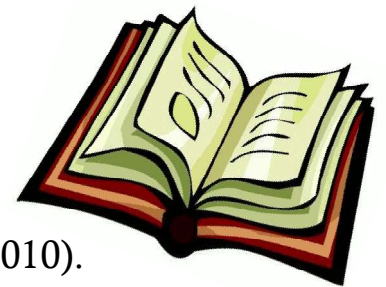


August 7, 2024

THOMAS J. LANPHEAR, CHIEF ADMINISTRATIVE JUDGE WORKMENS' CONFERENCE

A GENERAL OVERVIEW:

- The nature of an individual's restoration rights depends on the extent of recovery and the time it took to recover from the date eligibility for compensation began, and will fall into one of the following categories:
 - Fully recovered within 1 year
 - Fully recovered after 1 year
 - Partially recovered
 - Physically disqualified -- *Payton v. Department of Homeland Sec.*, 113 M.S.P.R. 463 (2010).



THE ROLE OF MSPB AND OWCP

- *Cox v. Merit Systems Protection Board*, 817 F.2d 100 (Fed. Cir. 1987).
 - The granting of OWCP benefits is not conclusive proof of a compensable injury
- *Camenisch-Felts v. U.S. Department of Agric.*, 47 M.S.P.R. 493 (1991).
 - Nonbinding effect of OWCP determination where there was a suggestion that the appellant intentionally injured herself.
- *Minor v. Merit Systems Protection Board*, 819 F.2d 280 (Fed. Cir. 1987).
 - Obtained benefits by fraud
- *Manning v. U.S. Postal Service*, 118 M.S.P.R. 313 (2012).
 - Allegation that appellant obstructed OWCP's efforts found not valid

BALANCING THE SCALES OF JUSTICE



- How to balance the conflicts between fact and fraud?
- How do you ensure that benefits don't turn into entitlements?

Who, what, where, when, and why

--CREDIBILITY DETERMINATIONS -- factual questions in dispute, evidence to support, version accepted, and WHY

CASES DEALING WITH OWCP CLAIMS

- Adverse actions
 - Removal, demotion, reduction in pay and suspensions in excess of 14 days
- Retirement
- Reduction in Force
- Discrimination
- Whistleblower allegations
- Restoration after injury



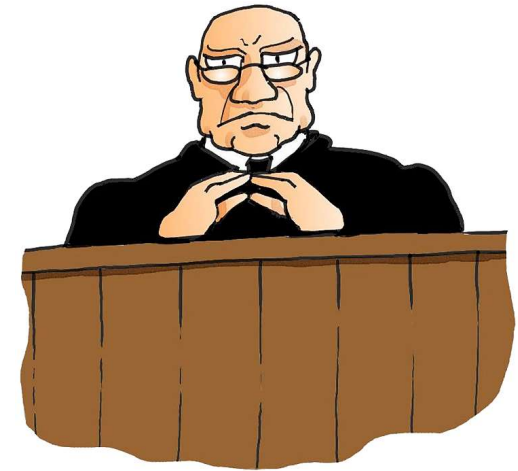
SITUATIONS/EVENTS

- Falsification
- Failure to follow instructions
- T&A problems
- Misrepresentation
- Lack of Candor
- Performance problems
- Fraud
- Hostile work environment
- Physical or mental inability to perform
- Drugs



CASE EXAMPLES

- *Malloy v. U.S. Postal Service*, 578 F.3d 1351 (Fed. Cir. 2009).
- *Kerrigan v. Department of Labor*, 122 M.S.P.R. 545 (2015).
- *Miller v. U.S. Postal Service*, 26 M.S.P.R. 210 (1985).
- *Brooks v. U.S. Postal Service*, 14 M.S.P.R. 305 (1983).
- *Department of Health and Human Services v. Jarboe*, 2023 MSPB 22.
- *Smart v. Department of the Navy*, 92 M.S.P.R. 120 (2002).



FULLY RECOVERED WITHIN 1 YEAR

- Entitled to be restored immediately and unconditionally to the former position or an equivalent one. Although, the right is agencywide, the basic entitlement is to the former position or equivalent in the local commuting area.

5 U.S.C. § 8151(b)(1); 5 C.F.R. § 353.301(a)

See Young v. U.S. Postal Service, 115

M.S.P.R. 424 (2010).



FULLY RECOVERED AFTER 1 YEAR

- Entitled to priority consideration, agency wide, for restoration to the position he or she left or an equivalent one, provided he or she applies for reappointment within 30 days of cessation of compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service or reemployment list for the expected service.

5 U.S.C. § 8151(b)(2); 5 C.F.R. § 353.301(b)

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 means treating these employees substantially the same as other handicapped individuals under the Rehab. Act of 1973, as amended.



5 C.F.R. § 353.301(d)

PHYSICALLY DISQUALIFIED

- Entitled to be placed in another position for which qualified that will provide the same status and pay, or the nearest approximation thereof, consistent with the circumstances in each case. This right is agencywide and applies for 1 year from the date of eligibility for compensation begins. After 1 year, the individual is entitled to the rights accorded individuals who fully or partially recover, as applicable.

5 C.F.R. § 353.301(c)

HOW DO YOU KNOW WHICH CATEGORY APPLIES

- **Fully Recovered:**

- Compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one. 5 C.F.R. § 353.102
- *Nixon v. Treasury*, 104 M.S.P.R. 189 (2006) (because OWCP's regulations do not provide for terminating benefits on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one, the Board will extrapolate from the language actually used by OWCP to determine whether an appellant meets the definition)

PARTIALLY RECOVERED

- An injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually. 5 C.F.R. . § 353.102

Hicks v. U.S. Postal Service, 114 M.S.P.R. 232 (2010).

Barrett v. U.S. Postal Service, 107 M.S.P.R. 688 (2008).



PHYSICALLY DISQUALIFIED:

- (1)(i) For medical reasons the employee is unable to perform the duties of the position formerly held or an equivalent one or
- (ii) There is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation or risk of health impairment; and
- (2) The condition is considered permanent with little likelihood for improvement or recovery

5 C.F.R. § 353.102

Heidel v. U.S. Postal Service, 112 M.S.P.R. 100 (2009).

Gallo v. Department of Transp., 116 M.S.P.R. 1, *overruled by*

Gallo v. Department of Transp., 689 F.3d 1294 (Fed. Cir. 2012).

TIMELINESS

- As with any Board appeal, a restoration appeal must be filed with the Board no later than 30 days after the effective date, if any, of the action, or 30 days after the date of receipt of the agency's decision whichever is later.

Fisher v. U.S. Postal Service, 100 M.S.P.R. 94 ¶ 12 (2005),
aff'd, 184 F.App'x 969 (Fed. Cir. 2006).



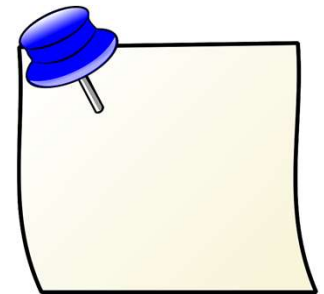
WHAT IF THE AGENCY HAS NOT PROVIDED NOTICE OF BOARD APPEAL RIGHTS?

- The underlying obligation in restoration cases is that the agency must give notice to the employee of Board appeal rights when it decides a matter appealable to the Board. An agency's flagrant disregard of the notice requirement under 5 C.F.R. §1201.21 is still the critical fact. "It is, we find, fundamentally unfair for an employee to be obligated to find out about appeal rights when the agency has failed to notify him that the denial of restoration is an appealable action."

Dunkleberger v. Navy, 67 M.S.P.R. 607, 612-13 (1995);

Shiflett v. U.S. Postal Service, 839 F.2d 669, 673-74 (Fed. Cir. 1988)

Kirkland v. Department of Homeland Sec., 119 M.S.P.R. 74 (2013).



NO NOTICE OF APPEAL RIGHTS CONTINUED

- The Board will ordinarily find good cause for an untimely PFA if an agency should have given notice of appeal rights but did not, as long as the appellant acted promptly and within the allowable time limits once he was aware of the "basis of his claim."
Nixon v. Treasury, 104 M.S.P.R. 189, 195 n.3 (2006).
- However, notice from a source other than the agency of a general appeal right does not excuse a failure to inform when the notice does not include the time limit for filing an appeal, and lacks other information on where and how to file an appeal.

Shafford v. U.S. Postal Service, 103 M.S.P.R. 657 ¶ 13 n.2 (2006);

Nicoletti v. Department of Just., 55 M.S.P.R. 557, 559-560 (1992).



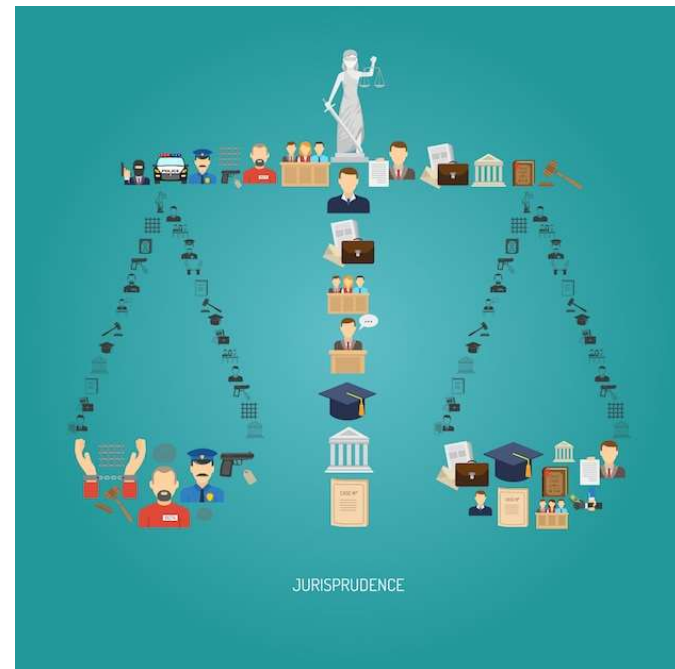
NO NOTICE OF APPEAL RIGHTS CONTINUED

- *Lohf v. U.S. Postal Service*, 72 M.S.P.R. 597, 598 (1996).
- An appeal may be dismissed as untimely filed, despite a lack of required notice, when the appellant knew of where, when, and how to file an appeal but did not show that he was diligent in doing so.



NO NOTICE OF APPEAL RIGHTS CONTINUED

- *Green v. U.S. Postal Service*, 103 M.S.P.R. 278 ¶ 15 (2005) (under 5 C.F.R. § 353.104, regardless of notification, an employee is required to exercise due diligence in ascertaining his restoration and appeal rights)
- *See Kirkland v. Department of Homeland Sec.*, 119 M.S.P.R. 74 (2013).



WHAT IF TIMELINESS AND JURISDICTION ARE INTERTWINED

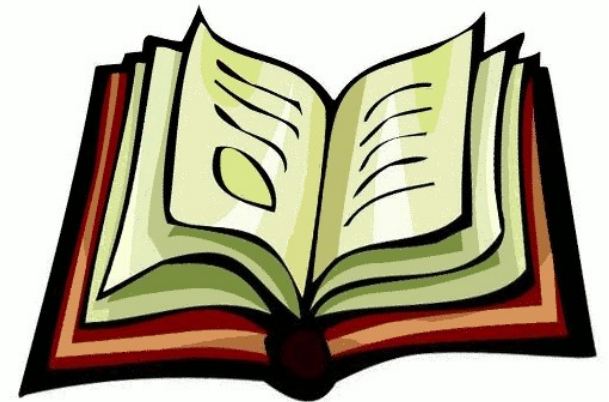
- When a restoration appeal is untimely filed, and it is unclear whether the agency took an appealable action, it also becomes unclear whether the agency was obligated to provide notice of appeal rights under 5 C.F.R. § 1201.21. In that situation, timeliness and jurisdiction are intertwined, and the jurisdictional issue must be addressed first.

Delalat v. Department of Air Force, 103 M.S.P.R. 448 ¶ 9 (2006).



JURISDICTION STANDARD OF PROOF

- Does an appellant have to prove the jurisdictional elements in a restoration appeal by preponderant evidence, or merely make nonfrivolous allegations of those jurisdictional elements?

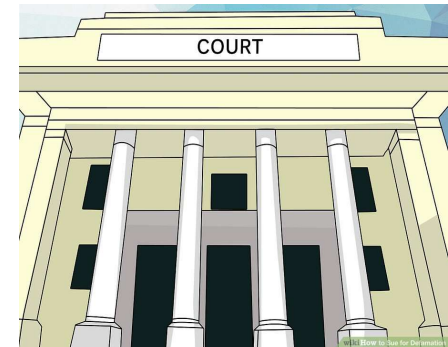


OLDER "FULLY-RECOVERED WITHIN 1 YEAR" CASES

- **Jurisdiction must be proven by preponderant evidence.**
- *Denny v. Navy*, 43 M.S.P.R. 123, 127 (1990) (relies on 5 C.F.R. § 1201.56(a)(2) and *Cox v. MSPB*, 817 F.2d 100, 101 (Fed. Cir. 1987)).
- *Kravitz v. Navy*, 98 M.S.P.R. 443, ¶ 8 (2005) (relies on *Smith v. U.S. Postal Service*, 81 M.S.P.R. 92 (1999), which cites to *Denny*).
- *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097 (2011).

MORE RECENT "FULLY-RECOVERED WITHIN 1 YEAR" CASES

- Nonfrivolous allegations are enough to establish jurisdiction.
- *Burgess v. Interior*, 95 M.S.P.R. 134 ¶ 8 (2003) (relies on *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1019 (Fed. Cir. 2002)).
- *Frye v. U.S. Postal Service*, 102 M.S.P.R. 695, ¶ 9 (2006).
- Not So -- *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097 (2011) (Board may only reach the merits of an appeals if the appellant has proven jurisdiction by a preponderant evidence).



OTHER TYPES OF RESTORATION APPEALS

- **Nonfrivolous allegations are enough to establish jurisdiction?**
- *Welby v. USDA*, 101 M.S.P.R. 17, ¶ 15 (2006) (fully recovered after one year).
- *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 12 (2004) (partially recovered).
- *Kingsley v. U.S. Postal Service*, 123 M.S.P.R. 365 (2016).



OTHER TYPES OF RESTORATION APPEALS

- "Physically Disqualified" Cases
- *Kravitz v. Navy*, 98 M.S.P.R. 443 ¶ 18 (2005), and *Hall v. Army*, 94 M.S.P.R. 262 ¶¶ 16, 23, 27, (2003), suggests that nonfrivolous allegations entitle an appellant to a "jurisdictional hearing," and that jurisdiction must be proven by preponderant evidence.
- However, *Welby*, 101 M.S.P.R. 17 ¶¶ 14-15, a fully-recovered-after-1-year case, modified *Hall*, a case involving claims of both "fully recovered after 1 year" and "physically disqualified," to hold that nonfrivolous allegations entitle the appellant to a hearing on the merits, not a jurisdictional hearing.

"WILDCARD"

- *Garcia v. DHS*, 437 F.3d 1322 (Fed. Cir. 2006) (en banc)
- Although *Garcia* is a constructive adverse action case holding that appellants must prove jurisdiction over such cases by preponderant evidence, the court also "rejected" *Walley*, a restoration case, to the extent that *Walley* found jurisdiction based simply on a nonfrivolous allegation. Westlaw describes *Walley* as having been "abrogated" by *Garcia*.



WHAT ARE THE JURISDICTIONAL ELEMENTS?

- **Fully Recovered Within 1-Year:**

- The Board has jurisdiction if the appellant nonfrivolously alleges that: (1) He is an employee of an executive branch agency (including the Postal Service and Postal Rate Commission); (2) he fully recovered from a compensable injury within 1 year from the date his eligibility for compensation began; (3) the agency failed to restore him or improperly restored him; and (4) if he was separated from his position prior to the alleged failure to restore or improper restoration, his separation was from a position without time limitation and substantially related to the compensable injury.

5 C.F.R. §353.304(a); *Frye v. U.S. Postal Service*, 102 M.S.P.R. 695 ¶ 9 (2006);

Burgess v. Interior, 95 M.S.P.R. 134 ¶ 8 (2003);

Sullivan v. DOT, 59 M.S.P.R. 18, 19 (1993).

JURISDICTIONAL ELEMENTS



- **Fully Recovered after 1 Year:**

- The board has jurisdiction if the appellant makes nonfrivolous allegations that: (1) He was separated because of a compensable injury; (2) he fully recovered more than 1 year after the date he became eligible for OWCP benefits; (3) he requested restoration after the cessation of OWCP compensation; and (4) he believes the agency violated his reemployment priority rights.

Welby v. USDA, 101 M.S.P.R. 17 ¶ 16 (2006).

Gallo v. DOT, 116 M.S.P.R. 1 (2011).

Smith v. U.S. Postal Service, 113 M.S.P.R. 1 (2009).

JURISDICTIONAL ELEMENTS

- **Fully Recovered after 1 Year:**
- An appellant may appeal to the Board if he believes that his reemployment priority rights have been violated because of the employment of another person who otherwise could not have been appointed properly.
 - 5 C.F.R. § 302.501, 330.209, 353.304(b)
- However, the Board has held that the issue of whether the agency appointed "another person" in derogation of the appellant's reemployment priority rights is one of production that goes to the merits of the appeal.
 - *Welby v. USDA*, 101 M.S.P.R. 17, ¶ 16 (2006).

JURISDICTIONAL ELEMENTS

- **Partially Recovered:**

- The appellant must allege facts that would show, if proven, 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 denial was "arbitrary and capricious."

Chen v. U.S. Postal Service, 97 M.S.P.R. 527, ¶ 13 (2004);

Hardy v. U.S. Postal Service, 104 M.S.P.R. 387, ¶ 17 (2007)

Chang v. U.S. Postal Service, 114 M.S.P.R. 258 (2010)

Corum v. U.S. Postal Service, 118 M.S.P.R. 288 (2012)

Paszko v. U.S. Postal Service, 119 M.S.P.R. 207 (2013).



PARTIALLY-RECOVERED - CONTINUED

- An employee who has been restored to duty after a partial recovery may not appeal the details or circumstances of the restoration and may only appeal a denial of restoration for a determination of whether it was arbitrary or capricious. Thus, where restoration was not denied, but has been accomplished, the Board lacks jurisdiction to respond to complaints about the particulars of the restoration.
- Nevertheless, a restoration may be so unreasonable as to amount to a denial of restoration within the Board's jurisdiction. Such a claim may involve a partially recovered employee who alleges an inability to perform the duties of the position to which he or she was restored.

Foley v. U.S. Postal Service, 90 M.S.P.R. 206, ¶ 6 (2001); *Sandoval v. U.S. Postal Service*, 114 M.S.P.R. 302 (2010).

Manning v. U.S. Postal Service, 118 M.S.P.R. 313 (2012); *Corum v. U.S. Postal Service*, 118 M.S.P.R. 288 (2012).

Scott v. U.S. Postal Service, 118 M.S.P.R. 375 (2012).

PARTIALLY-RECOVERED - CONTINUED

- Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service. 5 C.F.R. § 353.304(c)
- To establish jurisdiction over such an appeal, the appellant must allege facts showing that: (1) He was absent from his position due to a compensable injury; (2) the agency restored him to duty on a part-time basis, to light duty, or to a position with less demanding physical requirements; and (3) the agency failed to credit time spent on compensation for purposes of rights and benefits based upon length of service.

Smith v. U.S. Postal Service, 113 M.S.P.R. 1 (2009).

Mims v. SSA, 120 M.S.P.R. 213 (2013).

Tram v. U.S. Postal Service, 120 M.S.P.R. 208 (2013).

THE SCOPE OF BOARD REVIEW

Cronin v. U.S. Postal Service, 2022 MSPB 13.

- The Board held that section 353.301(d) does not require an agency to provide restoration rights beyond the minimum requires of the regulations.
- Cronin also held that claims of prohibited discrimination or reprisal for protected activity do not serve as an independent means of showing that a denial of restoration was arbitrary and capricious for purposes of a Board appeal pursuant to section 353.304(c).



THE MILLION-DOLLAR QUESTION....

What constitutes a nonfrivolous allegation of arbitrariness and capriciousness?



ANSWER.....

There are many flavors, each one more subtle and delicious than the last!

And now, in order of appearance....



NONFRIVOLOUS ALLEGATIONS:

- 1) The appellant identifies a vacant funded position, the essential functions of which he could perform with or without reasonable accommodation.

Gilbert v. Department of Justice, 100 M.S.P.R. 375, ¶ 16 (2005).

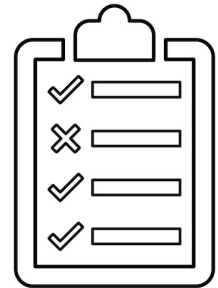
NONFRIVOLOUS ALLEGATIONS CONTINUED:

2) The appellant nonfrivolously alleges (or the record suggests) that the agency did not search for work throughout the entire local commuting area.

Urena v. U.S. Postal Service, 113 M.S.P.R. 6 ¶ 13 (2009).

THE FOLLOWING DO NOT CONSTITUTE NONFRIVOLOUS ALLEGATIONS THAT THE DENIAL OF RESTORATION WAS ARBITRARY AND CAPRICIOUS

- The NRP is discriminatory in and of itself. ¶ 57
- Other employees are now performing the tasks of my former modified assignment (in the absence of any allegation that those employees were not previously under burdened or that the reassignment was otherwise somehow contrary to law, rule, or regulation). ¶ ¶ 30-33



-
- The Postal Service's action constituted disability discrimination because the agency took away my modified assignment, which was a reasonable accommodation. ¶ 50.
 - The Postal Service failed to follow the "pecking order" or failed to minimize "any adverse or disruptive impact." ¶ 34



MERITS BURDEN OF PROOF

- Which party has the burden of proof on the merits in a restoration appeal?
- New: *Kingsley v. U.S. Postal Service*, 123 M.S.P.R. 365 (2016).



BURDEN OF PROOF

- Walley v. DVA, 279 F.3d 1010, 1019 (Fed. Cir. 2002).

Under 5 C.F.R. § 1201.56, the appellant has the burden of proof on merits issues that are also "jurisdictional issues," such as whether the employee was terminated because of a compensable injury.

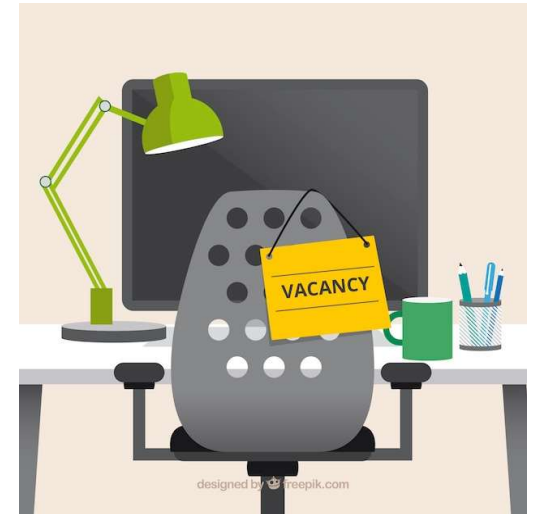
- Welby v. USDA, 101 M.S.P.R. 17 ¶ 16 (2006)

If the appellant establishes jurisdiction over his reemployment priority claim under 5 C.F.R. § 330.209, the agency has the burden, on the merits, of proving by preponderent evidence that it did not violate the appellant's reemployment priority rights, including proof that it did not appoint another person who could not have been appointed properly. See also *Foley v. U.S. Postal Service*, MSPB Docket No. PH-0353-06-0222-I-1, ¶ 12 (Mar. 26, 2007).

- **But:** *Burgess v. Interior*, 95 M.S.P.R. 134, ¶ ¶ 11-17 (2003), places the burden on the appellant to prove on the merits an improper restoration.

OTHER ISSUES

- Restoration rights accrue only to employees who were separated or furloughed from a position without time limitation as a result of a compensable injury. 5 C.F.R. § 353.103(b)
- A furlough means the placement of an employee in a nonduty, nonpay status for non-disciplinary reasons. *Artis v. U.S. Postal Service*, 88 M.S.P.R. 309, ¶ 5 (2001)
- However, an employee need not show a separation from duty, but merely an absence from the position, such as placement on sick leave or LWOP, due to a compensable injury. *Rumph v. U.S. Postal Service*, 101 M.S.P.R. 243, ¶ 6 (2006); *Payton v. DHS*, 113 M.S.P.R. 463.



OTHER ISSUES

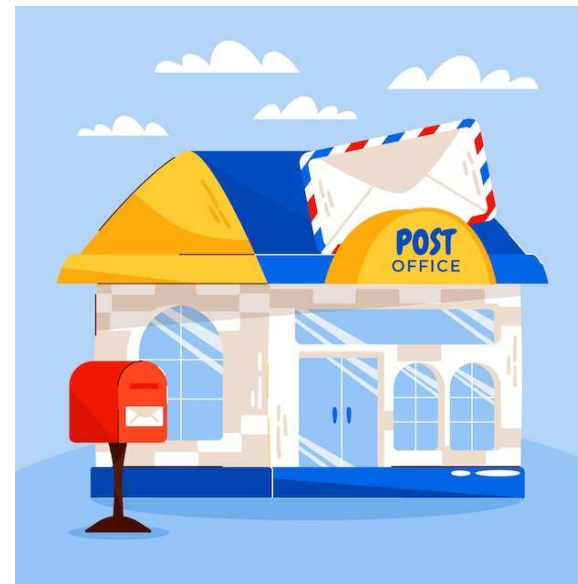
- While only some Postal Service employees have the right to appeal an adverse action, the Board may exercise jurisdiction over a Postal Service employee's claim that the agency violated his restoration rights regardless of whether the employee is a preference eligible or a supervisory or managerial employee.

Rumph v. U.S. Postal Service, 101 M.S.P.R. 243, ¶ 9 (2006)

Owens v. DHS, 2023 MSPB 7

Jenkins v. U.S. Postal Service, 2023 MSPB 8

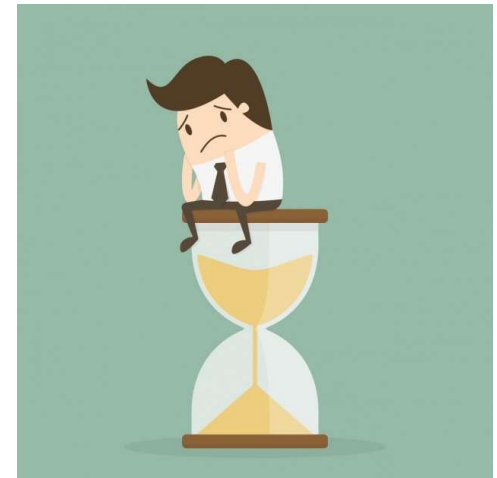
Desjardin v. U.S. Postal Service, 2023 MSPB 6



OTHER ISSUES

- Restoration provisions only cover employees separated or furloughed from a position without time limitation. 5 C.F.R. § 353.103(b)
- The Board lacks jurisdiction over restoration appeals filed by employees serving under term or time-limited appointments. *Law v. Navy*, 77 M.S.P.R. 474, 476-77 (1998); *Sullivan v. DOT*, 59 M.S.P.R. 18, 19 (1993).
- Employees serving under Federal Career Intern Program (FCIP) appointments do not have restoration appeal rights because they serve in positions with a time limitation (2 years).

Jain v. DHS, MSPB Docket No. AT-0353-06-1029-I-1 (Non-published Short Form Denial)



OTHER ISSUES

- A request for light or limited duty is not a request for restoration. Also, a request for restoration need not be in writing.

Bell v. U.S. Postal Service, 66 M.S.P.R. 32, 35 (1994)

- A denial of restoration need not be formal or in writing. An agency's delay in restoring a partially recovered employee may constitute a denial in restoration.

Chism v. U.S. Postal Service, 85 M.S.P.R. 436, ¶ 16 (2000), *overruled on other grounds by Chen v. U.S. Postal Service*, 97 M.S.P.R. 527 ¶ 18 (2004); *Kerrigan v. Labor*, 2015 MSPB 42.

QUESTIONS?



