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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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LOUISE C. RISHAVY, Appellant,	DOCKET NUMBER CH07528610082-1
v.	
U.S. POSTAL SERVICE, Agency.	DATE: NOV 19 1987

Douglas A. Hedin, Esquire, Minneapolis, Minnesota, for the appellant.

Patricia A. Heath, St. Paul, Minnesota, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

This case is before the Board pursuant to appellant's petition for review of the September 26, 1986, remand initial decision that sustained the agency's refusal to restore her to her position following her recovery within one year from a compensable injury. For the reasons set forth below, appellant's petition for review is GRANTED and the remand initial decision is REVERSED.

BACKGROUND

On March 30, 1985, appellant was appointed to the position of City Letter Carrier, subject to the completion of a ninety-day probationary period. Before she had completed this probationary period, she suffered two on-the-job accidents which she duly reported. The first resulted in no injury, but because the second rendered her temporarily disabled, she applied for, and received, benefits from the Office of Workers' Compensation Programs. On the day after the second accident, and just prior to the completion of her probationary period, the agency notified appellant that she was to be terminated effective June 19, 1985, because she had failed to perform her duties in a safe and satisfactory manner. On July 26, 1985, based on her physician's statement that she had recovered, appellant requested that she be restored to duty, effective August 2, 1985. The agency did not respond.

Appellant's appeal to the Board's Chicago Regional Office was dismissed for lack of jurisdiction. The administrative judge found that appellant had no right to be restored because she had been terminated for cause. On petition for review, however, the Board vacated that decision, *see Rishavy v. United States Postal Service*, 30 M.S.P.R. 632 (1986), remanding the case so that the administrative judge could determine whether appellant's termination was substantially related to her compensable

injury and if so, whether her reemployment rights had been violated such that she could appeal to the Board.

Following a hearing, the administrative judge issued a remand initial decision. He found, based on the evidence, that appellant's termination was substantially related to her compensable injury, and therefore the Board had jurisdiction over her appeal. *See* Remand Initial Decision (R.I.D.) at 5. However the administrative judge found that an agency has discretion to decide what reasons will serve to disqualify an individual from consideration for restoration, and that, in this case, the agency did not abuse that discretion when it considered appellant's record of accidents during her probationary period. *Id.* at 8. Accordingly, the administrative judge sustained the agency's action.

ANALYSIS

Appellant argues in her petition for review that the administrative judge's finding of a causal connection between appellant's termination and her compensable injury entitled her to be unconditionally restored, and that the agency lacked discretion to deny her such restoration, despite her probationary status. We agree.

An employee is entitled under 5 C.F.R. Part 353 to restoration where his or her separation either resulted from or was substantially related to compensable injury. *See* 5 C.F.R. § 353.301(c); *Ruppert v. U.S. Postal Service*,

8 M.S.P.R. 593, 596 (1981). In this case, the administrative judge found that a causal connection existed between appellant's termination and her compensable injury, and we see no reason to disturb that finding.[1] Since appellant had a right to restoration, she has a right to appeal to the Board from the agency's failure to restore her, *see* 5 C.F.R. § 353.401(a), and the administrative judge's jurisdictional finding was proper.

However, subject to the above limitation imposed by Office of Personnel Management regulation, 5 U.S.C. § 8151(b)(1) provides that, with respect to an individual who suffers a compensable injury, the agency that was the last employer shall immediately and unconditionally accord the employee, if the injury is overcome within one year after the date of commencement of compensation, the right to resume his former or an equivalent position.[2]

As support for his position that the agency has discretion to decide what factors will be considered in determining whether to disqualify an individual from consideration for restoration, the administrative judge relied on an early Board case, *Anderson v. U.S. Postal Service*, 8 M.S.P.R. 708 (1981), and a court case, *Raicovich v. United States Postal Service*, 675 F.2d 417 (D.C. Cir.

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[1] For this reason, we need not address appellant's allegation that the agency has an unwritten policy of terminating probationary employees if they file two accident reports.

[2] *See* 39 U.S.C. § 1005(c) (5 U.S.C. § 7501 *et seq.* made generally applicable to Postal Service employees).

1982). The administrative judge's direct reliance on these cases is misplaced, however, because both involved employees whose recoveries took longer than one year. Such individuals are only entitled to priority consideration under 5 U.S.C. § 8151(b)(2), and agencies do have the discretion to disqualify applicants from restoration for conduct that would have justified their discharge if they were continuously employed. *Raicovich*, 675 F.2d at 425. No such discretion is authorized in the case of an employee who, like appellant, recovers from a compensable injury within one year of the commencement of compensation.[3]

The issue presented by this case, however, is whether these statutory restoration rights, particularly those afforded individuals who recover within one year, are applicable to employees serving in a probationary-type status.[4] The Court of Appeals for the Federal Circuit has recently answered this question in the affirmative. *See Roche v. United States Postal Service*, No. 87-3178, slip op. at 5 (Fed. Cir. Sept. 15, 1987). Like the appellant in this case, Roche, who was serving a trial period, had worked only

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[3] In this case, appellant recovered within six weeks of the date she began to receive compensation. *See* Agency File, Tab 11g.

[4] In addressing this issue, we first note that, as a Postal Service employee, appellant is not covered by 5 C.F.R. Part 315, Subpart H, which relates to probation on initial appointment to a competitive position. *See Shobe v. United States Postal Service*, 5 M.S.P.R. 466, 470 (1981). Thus, we confine our discussion to employees who, like appellant, are serving a trial period in an excepted service position.

a short period of time when he suffered a compensable injury for which he received benefits from the Office of Workers' Compensation Programs. He returned to work briefly on light-duty status but was terminated during his probationary period. Before the Board, he alleged, inter alia, that although he fully recovered within a year, the agency failed to restore him. The court concluded that, while appellant could not appeal his removal to the Board because of his probationary and non-veteran status, he could appeal the denial of restoration despite those factors, so long as he could show that his removal was the result of, or was substantially related to, the compensable injury. *Id.* Thus, appellant's probationary status has no bearing on her restoration rights.

Such a conclusion is further supported by a close reading of the pertinent statutory and regulatory provisions, and by the tenets of statutory construction. We note that a list of those persons covered by the restoration-to-duty regulations is set out at 5 C.F.R. § 353.103. As relates to appellant, coverage extends to "a civil officer or employee of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States, who was separated or furloughed from a position without time limitation as a result of a compensable injury." *See* 5

C.F.R. § 353.103(c)(1).[5] The statute itself, 5 U.S.C. § 8151, does not include or exclude any particular class of employees, but 5 U.S.C. § 8101, which sets out the definitions applicable to the subchapter that includes 5 U.S.C. § 8151, contains a definition of "employee" consistent with the regulatory definition quoted above. *See* 5 U.S.C. § 8101(1)(A). Thus, neither the statute pertaining to restoration rights, nor the implementing regulations, carve out an exception for employees serving a trial period. Under the circumstances, it cannot be assumed that Congress intended for such employees to be excluded from restoration-type protections. It is well settled that where statutory language and objective are clear,[6] the implication of situations not covered by the clear language of the statute, and contrary to the objective of the clear language, is not permissible. *See Cox v. International Trade Commission*, 6 M.S.P.R. 336, 337-38 (1981). Moreover, it is an established principle of statutory construction that implied exceptions

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[5] Other classes of employees covered by the regulation have no bearing on this case. *See* 5 C.F.R. § 353.103(c)(2)-(7).

[6] It appears in general that by enacting the 1974 Amendments to the Federal Employees' Compensation Act, Congress sought to do everything feasible to compensate and reinstate federal employees injured in the line of duty, and to accord them treatment equal to that which they would have received but for their injury. *See Raicovich v. U.S. Postal Service*, 675 F.2d 417, 424 (D.C. Cir. 1982). The amendments were designed "to modernize and update" the federal compensation system so that it would continue to serve as "a model of efficient and equitable compensation for workers injured in the performance of their duties." 120 Cong. Rec. 13399 (1974) (remarks of Rep. Daniels).

See 2A N. Singer, Sutherland Statutory Construction § 47.11 (4th ed. 1986).

We find, therefore, that because appellant recovered from her injury within one year of the commencement of compensation, she had an unconditional right to be restored to her former or an equivalent position, notwithstanding her status as an employee serving a trial period. *Roche*, slip op. at 5.

ORDER

The agency is ORDERED to restore appellant to her former or an equivalent position, effective August 2, 1985. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date of this decision.

The agency is also ORDERED to award back pay and benefits in accordance with its regulations. *See Spezzaferro v. Federal Aviation Administration*, 24 M.S.P.R. 25 (1984); *Robinson v. Department of the Army*, 21 M.S.P.R. 270 (1984).

The agency is ORDERED to complete all computations and issue a check to the appellant for the appropriate amount of back pay within sixty days of the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay due.

If there is a dispute as to the amount of back pay due, the agency shall issue a check to the appellant for the

amount not in dispute within the above time frame. The appellant may then file a petition for enforcement concerning the disputed amount.

The agency is hereby ORDERED to inform the appellant of all actions being taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). The appellant is ORDERED to provide all necessary information requested by the agency in furtherance of compliance and should, if not notified, inquire as to the agency's progress from time to time. *See id.*

The appellant is hereby notified that if, after being informed by the agency that it has complied with the Board's order, she believes that there has not been full compliance, she may file a petition for enforcement with the Chicago Regional Office within thirty days of the agency's notification of compliance. *See* 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons why the appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. *See id.*

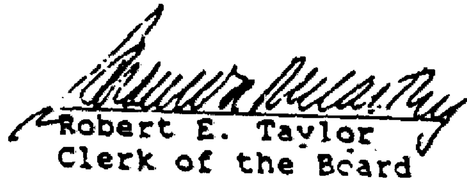
This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your

appeal, if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.

M-01008

CERTIFICATE OF SERVICE

I certify that this OPINION AND ORDER was sent today:

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11/19/87
(Date)

Washington, D.C.

[signature] for
Robert E. Taylor
Clerk of the Board