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Grant MSPB Appeal Rights to Postal Employees Covered by the USPS Executive and Administrative Schedule

Approximately 7,500 mid-level management employees within the U.S. Postal Service do not possess the right to appeal adverse personnel actions to the U.S. Merit System Protection Board, despite the intent of Congress to confer such rights to most USPS management personnel through legislation passed in 1987. Federal Circuit appellate court and MSPB interpretations of the language used by Congress in passing the 1987 law have narrowly and consistently limited the coverage of MSPB appeal rights.

As a result, 7,500 employees lack the right of appeal to the MSPB to challenge adverse actions (removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less). They are covered by the Executive and Administrative Schedule, are not covered by collective bargaining and are represented by the National Association of Postal Supervisors. Most other supervisors, postmasters and management personnel in the Executive and Administrative Schedule (approximately 70,000 employees) possess MSPB appeal rights. Nearly a half-million Postal Service employees who are covered by collective bargaining agreements maintain some form of third party appeal rights over adverse actions.

The Solution Is Simple

Congress should correct this anomaly by revising the statutory language within Title 39 to confer MSPB appeal rights to all Postal Service employees covered by the Executive and Administrative Schedule. This would be consistent with the spirit of the 1987 law. The Executive and Administrative Schedule is a statutorily authorized pay schedule of the U.S. Postal Service intended to cover all "nonbargaining unit career and noncareer employees in supervisory, professional, technical, clerical, administrative, and managerial positions." United States Postal Service, ELM 33, Employee and Labor Relations Manual, Part 411.1 (Dec. 2012).

How the Problem Arose

In 1987, Congress approved the statutory language providing the right of MSPB appeal to supervisors, postmasters and managers, in the Postal Employee Appeal Rights Act of 1987, P.L. 100-90 (August 18, 1987). The current law is codified in 39 U.S.C. 1005(a)(4)(A), which extends the right of MSPB appeal of adverse personnel actions to any Postal Service employee who:

"is in the position of a supervisor or a management employee in the Postal Service, or is an employee of the Postal Service engaged in personnel work in other than a purely nonconfidential clerical capacity; and has completed 1 year of current continuous service in the same or similar positions."

The 1987 law, P.L. 100-90, was the product of bipartisan effort approved in the Senate (S. 541) and the House (H.R. 2854) in 1987. The legislation originally had been introduced in the 99th Congress and was first approved by the House in 1985. Prior to 1987, only veteran preference-eligible postal supervisors, postmasters and managers had possessed the right of appeal to the MSPB.

Since 1987, Section 1005(a)(4)(A) has been interpreted by the Federal Circuit Court of Appeals and the Merit Systems Protection Board to exclude employees who do not perform supervisory or management-related responsibilities, even if they are unrepresented by a labor union and are outside the protection of the collective bargaining unit. See *McCandless v. Merit Systems Protection Board*, 996 F.2d 1193 (Fed. Cir. 1993); *Coursen v. U.S. Postal Service*, 256 F.3d 1353 (2001). In reaching that conclusion, the Federal Circuit and the MSPB have relied upon the interpretation of "supervisor or a management employee" as crafted by the National Labor Relations Board.

This restrictive interpretation prevents approximately 7,500 employees within the Postal Service from enjoying the right of appeal to the Merit Systems Protection Board over adverse personnel actions, despite their presence outside collective bargaining. As a result, the appeal rights of these employees are limited to an internal grievance, governed by provisions of the Postal Service Employee and Labor Relations Manual (ELM) Section 650. This group of employees filed approximately 50 grievances in 2012. A postal executive appointed to serve as a hearing officer heard their grievances. This has resulted in unfairness in some instances to the underlying employee.

A Fairer System of Due Process

A fairer, easily administered remedy to the situation would amend 39 U.S.C. 1005 to extend MSPB appeal rights over adverse actions to any employee covered by the Executive and Administrative Schedule of the U.S. Postal Service. This approach would not impose greater costs upon the Postal Service, but would assure a fairer system of due process for all mid-level management employees in their appeal of adverse actions taken against them. NAPS supports this approach.