

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3271

MARTA FABISIAK,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

Petition for review of the Merit Systems Protection Board in
SF0353090224-I-1.

ON MOTION

Before LOURIE, Circuit Judge.

ORDER

The Merit Systems Protection Board moves for leave to intervene for purposes of filing a motion for leave to reform the caption to name the Board as respondent. The United States Postal Service (USPS) opposes.

Pursuant to 5 U.S.C. § 7703(a)(2), the Board is designated as the respondent when the Board's decision concerns the procedure or jurisdiction of the Board. The employing agency is designated as the respondent when the Board reaches the merits of the underlying case.

Marta Fabisiak filed an appeal challenging USPS's denial of her request to be restored to duty. The administrative judge (AJ) determined that she had not sufficiently recovered to return to duty on a part-time basis, on light duty, or to return to work in a position with less demanding physical requirements than those of her letter carrier

position and dismissed for lack of jurisdiction.

The AJ's determination that the Fabisiak had not sufficiently recovered was a decision on the merits. Schall v. United States Postal Service, 73 F.3d 341 (Fed. Cir. 1996). Thus, USPS is the proper respondent in this petition for review.

Accordingly,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

NOV 13 2009

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

cc: Marta Fabisiak
Daniel Rabinowitz, Esq.
Michael A. Carney, Esq.

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FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

NOV 13 2009

**JAN HORBALY
CLERK**