

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

MARY J. STEPHEN,  
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DOCKET NUMBER  
BN315H8710028

DATE: APR 26 1991

Walter E. Greene, Revere, Massachusetts, for the  
appellant.

John G. Abizaid, Esquire, Hanscom Air Force Base,  
Massachusetts, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The agency has filed a petition for review of an initial decision that reversed the agency's action separating the appellant from the position of Clerk-Typist, GS-0322-04. For the reasons set forth below, the Board GRANTS the agency's petition for review under 5 C.F.R. § 1201.115, AFFIRMS the initial decision in its determinations on the issues of jurisdiction and timeliness, REVERSES the initial decision in its determination to reverse the agency's action for harmful error, and REMANDS

the appeal for further proceedings consistent with this Opinion and Order.

#### BACKGROUND

The appellant received a career-conditional appointment to the GS-0322-04 position of Clerk-Typist effective July 29, 1985, subject to the completion of a 1-year probationary period.<sup>1</sup> The agency thereafter terminated the appellant from her position under the procedures of 5 C.F.R. § 315.804, based on her alleged unsatisfactory performance during her probationary period, effective July 28, 1986.<sup>2</sup> In effecting her separation, the agency provided the appellant prior written notice of her proposed separation and an opportunity, which she did not exercise, to reply to the proposed action.

On December 3, 1986, the appellant filed an apparently untimely petition for appeal of the agency's action with the Board's Boston Regional Office, claiming that she was terminated while serving a probationary period and that her termination was based on her marital status.<sup>3</sup>

The administrative judge issued orders directing the appellant to submit evidence and argument showing that her appeal was within the Board's jurisdiction, and that her appeal was timely filed or that good cause existed for the

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<sup>1</sup> See Initial Appeal File (IAF), Tab 3, Attachment a.

<sup>2</sup> See IAF, Tab 3, Attachments b, c, d.

<sup>3</sup> See IAF, Tab 1.

delay.<sup>4</sup> The appellant responded to the administrative judge's orders, and both parties submitted pleadings on these issues.<sup>5</sup>

The administrative judge thereafter issued an initial decision reversing the agency's action. The administrative judge found sua sponte that: (1) The Board has jurisdiction over the appeal because the appellant had completed her probationary period at the time of her separation; and (2) the agency's action constituted harmful error because the agency did not afford the appellant the procedural protections of 5 U.S.C. §§ 4301-4305 or §§ 7511-7513 in effecting her separation. The administrative judge also found that the appeal was timely filed under 5 C.F.R. § 1201.154(a)(2), because the appellant had previously filed a formal complaint of discrimination with the agency concerning her separation and the agency had not resolved the matter or issued a final decision on the complaint within 120 days.<sup>6</sup> Therefore, the administrative judge reversed the agency's action separating the appellant because of the agency's harmful error in effecting the action.

The agency has filed a timely petition for review contending, inter alia, that: (1) The administrative judge erred by closing the record without notice to the agency and

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<sup>4</sup> See IAF, Tabs 2, 5.

<sup>5</sup> See IAF, Tabs 3, 4, 6.

<sup>6</sup> See IAF, Tab 6, and Tab 3, Attachment f.

without affording the agency an opportunity to address the issue of harmful error; (2) the administrative judge erred by finding that the appellant had completed her probationary period at the time her separation was effected; and (3) the administrative judge erred by finding sua sponte that the agency committed harmful error. The appellant has responded in opposition to the agency's petition for review.

#### ANALYSIS

The administrative judge did not commit procedural error regarding the closure of the record.

The Board's then-effective regulations at 5 C.F.R. § 1201.57(b) placed the matter of closing the record within the discretion of the administrative judge when an appeal was decided without a hearing.<sup>7</sup> See, e.g., *Groux v. Department of the Army*, 14 M.S.P.R. 288, 290 (1983). Contrary to the argument of the agency, the administrative judge did not close the record without notice to the parties. By orders dated December 4, 1986, and January 13, 1987, the administrative judge advised the parties of the dates that the record would close for the receipt of evidence, arguments and any responses concerning the jurisdiction of the Board over the appeal and the timeliness

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<sup>7</sup> The Board's present regulations have revised the procedure for closing the record, but they leave the closing of the record within the discretion of the administrative judge when an appeal is decided without a hearing. See 5 C.F.R. § 1201.58.

of the appeal.<sup>8</sup> The initial decision, dated January 28, 1987, was issued after the close of the record. Thus, the agency was afforded a full opportunity to address the issue of the Board's jurisdiction over the appeal and to respond to the submissions of the appellant. See *Groux*, 14 M.S.P.R. at 290.

Even assuming *arguendo* that the administrative judge erred by not affording the agency a specific opportunity to address the issues of the appellant's probationary status and the agency's procedural error in effecting her separation, that error would be nonprejudicial because the Board has now considered the parties' arguments and submissions on petition for review. See *Dagstani v. Department of Housing and Urban Development*, 15 M.S.P.R. 700, 701-02 (1983).

The administrative judge did not err by addressing sua sponte the issues of jurisdiction and harmful error.

The agency's assertions that the administrative judge erred by raising the issue of the appellant's probationary status and the issue of harmful error lack merit.

The issue of whether the appellant was a probationary employee is quasi-jurisdictional in that it determines the scope of the Board's authority to review the appeal. Thus, it was incumbent upon the administrative judge to address the issue of the Board's jurisdiction over the appeal. See, e.g., *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 593-

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<sup>8</sup> See IAF, Tabs 2, 5.

94 (1989) (an administrative judge must determine the Board's jurisdiction over an appeal before accepting a settlement agreement of an appeal); *Morgan v. Department of the Navy*, 28 M.S.P.R. 477, 478 (1985) (the issue of the Board's jurisdiction may be raised at any time during a proceeding).

The administrative judge, furthermore, did not err by sua sponte raising the issue of harmful error in this appeal under the Board's precedent, which permits such action by an administrative judge when an agency's error affected an employee's basic procedural rights and cognizance of the error is necessary to prevent manifest injustice. See, e.g., *Mouser v. Department of Health and Human Services*, 30 M.S.P.R. 619, 622 (1986); *Chance v. Department of Transportation*, 16 M.S.P.R. 583, 588 (1983); *Dagstani*, 15 M.S.P.R. at 702. Here, moreover, the true nature of the agency's separation action, whether under 5 U.S.C. Chapter 43 or 75, determines the scope of the Board's review of the agency's procedures in this appeal. Of course, under the Board's current practices, the administrative judge would have notified the parties that the matter of harmful error was at issue, informed them of the burden of proof and the Board's definition of harmful error, and afforded them the opportunity to present evidence and argument on the matter. Thus, as stated above, we have considered the parties' harmful error arguments on petition for review. See *Dagstani*, 15 M.S.P.R. at 701-02.

The administrative judge did not err by finding that the appellant completed her probationary period.

The administrative judge found that the appellant had completed her probationary period because she was not separated before the end of her tour of duty on Monday, July 28, 1986, the last day before her anniversary date. We agree.

The Office of Personnel Management's official guidance to agencies, Federal Personnel Manual (FPM), Ch. 315, subch. 8-4(d) (Apr. 27, 1982), provides that an effective pre-probationary period separation must occur prior to the end of the tour of duty on the last day before the anniversary date, since separations are otherwise effective at midnight.<sup>9</sup> The agency's advance notice of termination and the Standard Form 50-B documenting the action in this case stated that the appellant's termination was effective July 28, 1986, but the documents did not specify that the action was effective at a time prior to the completion of her tour of duty on that day.<sup>10</sup> See *Jeffery v. Department of the Treasury*, 3 M.S.P.R. 402, 404-05 (1980); FPM, Ch. 315, subch. 8-4(d). The agency contends that the advance notice of termination should be construed to provide that the termination was effective at the beginning of the

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<sup>9</sup> See *Hannon v. Department of the Air Force*, 19 M.S.P.R. 510, 511 (1984); *Johnston v. Small Business Administration*, 15 M.S.P.R. 709, 710 (1983); *Ahmed v. Environmental Protection Agency*, 11 M.S.P.R. 548, 550 (1982); *Jeffery v. Department of the Treasury*, 3 M.S.P.R. 402, 403 (1980).

<sup>10</sup> See IAF, Tab 3, Attachments b, c.

day on Monday, July 28, 1986. When read as a whole, however, the agency's advance notice of termination and the Standard Form 50-B documenting the action support the administrative judge's conclusion that the appellant's separation was not effected before the end of her probationary period. See *Dagstani*, 15 M.S.P.R. at 701-02; *Jeffery*, 3 M.S.P.R. at 403. Therefore, the Board finds that the administrative judge correctly found that the appellant was separated after she completed her probationary period.

The Board is constrained to reexamine and modify its application of the statutory "harmful error" standard.

Upon completing her probationary period, the appellant was no longer a probationary employee and was entitled to the procedural safeguards guaranteed employees who are separated under 5 U.S.C. §§ 4301-4305 and §§ 7511-7513. See *Lovshin v. Department of the Navy*, 767 F.2d 826, 833-35 (Fed. Cir. 1985), cert. denied, 475 U.S. 1111 (1986); *Johnston*, 15 M.S.P.R. at 711. The agency contends that reversal of its action is not warranted for not following those procedures in separating the appellant because the probationary termination procedures it afforded her comported with the "essential requirements of due process" -- notice of the charges, an explanation of the agency's evidence, and an opportunity to respond -- under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The agency asserts further that the administrative judge erred under *Handy v. U.S. Postal Service*, 754 F.2d 335, 338 (Fed.

Cir. 1985), by finding that the agency's procedural error was harmful without determining how the agency's error could likely have affected the outcome before the agency. We conclude, for the reasons below, that the agency's arguments are meritorious.

The application of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

The United States Supreme Court held in *Loudermill*, 470 U.S. 532, that the government's failure to provide a tenured public employee with an opportunity to present a response, either in person or in writing, to an action that deprives him of his property right in his employment constitutes an abridgement of his constitutional right to due process of law. The Court stated the minimum requirements as follows:

The essential requirements of due process... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

470 U.S. at 546. (Citations omitted.)

Thus, under *Loudermill*, an agency's failure to provide a nonprobationary Federal employee with prior notice and an opportunity to present a response, either in person or in writing, to an agency action appealable to the Board that deprives him of his property right in his employment constitutes an abridgement of his constitutional right to minimum due process of law. See *Darnell v. Department of*

*Transportation*, 807 F.2d 943, 945-46 (Fed. Cir. 1986), cert. denied, 484 U.S. 817 (1987); *Smith v. U.S. Postal Service*, 789 F.2d 1540, 1543 (Fed. Cir. 1986); *Mercer v. Department of Health and Human Services*, 772 F.2d 856, 859 (Fed. Cir. 1985); *Desarno v. Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985). See also *Darnell*, 807 F.2d at 949-50 (Cowen, J., dissenting) (the harmful error rule does not apply to the denial of due process).

A competitive service employee who has completed his probationary period, like the appellant in the instant appeal, has a constitutionally protected property interest in his employment. See *Loudermill*, 470 U.S. at 546; *Johnson v. United States*, 628 F.2d 187, 192, 194 (D.C. Cir. 1980). When such an employee is being deprived of a constitutionally protected property interest, the right to minimum due process is "absolute" in the sense that it does not depend on the merits of his claim. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Thus, we conclude that an appealable agency action taken without affording an appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, must be reversed because such action violates his constitutional right to minimum due process under *Loudermill*.

The application of "harmful error" under 5 U.S.C. § 7701(c)(2)(A).

Under 5 U.S.C. § 7701(c)(2)(A), the Board cannot sustain an agency's decision in any case if the employee

"shows harmful error in the application of the agency's procedures in arriving at such decision." Reversal of an action for harmful error is warranted where the procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency. *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied sub nom. Schapansky v. Department of Transportation*, 469 U.S. 1018 (1984). See 5 C.F.R. § 1201.56(c)(3). In order to show harmful error under the statute and the Board's regulations, an appellant must "prove that any procedural errors substantially prejudiced his rights by possibly affecting the agency's decision." *Cornelius v. Nutt*, 472 U.S. 648, 651 (1985). Harmful error cannot be presumed. See 5 C.F.R. § 1201.56(c)(3). As the United States Court of Appeals for the Federal Circuit stated in *Handy*, 754 F.2d at 338, in finding that the agency's denial of the employee's right to make an oral reply to a removal action was not harmful error, "[t]he harmful error provision is part of the law and, thus, negates a *per se* rule with respect to any procedural error." (Emphasis supplied.)

The administrative judge's treatment of the issue of harmful error in this appeal was consistent with a line of Board precedent in which the Board held that an agency's application of merely the procedural protections of 5 C.F.R. Part 315, Subpart H, in separating an employee who has completed his probationary period, rather than the greater

procedural protections guaranteed under 5 U.S.C. Chapters 43 and 75, constitutes harmful error. See *Hannon*, 19 M.S.P.R. at 512; *Lavelle v. Department of Transportation*, 17 M.S.P.R. 8, 13-14 (1983); *Johnston*, 15 M.S.P.R. at 711; *Dagstani*, 15 M.S.P.R. at 702; Initial Decision at 3. This line of Board decisions is in accord with an even longer line of decisions in which the Board held that an agency's complete failure to provide any of the procedural protections guaranteed under 5 U.S.C. Chapters 43 and 75 in separating a nonprobationary employee constitutes harmful error. See, e.g., *Kerr v. National Endowment for the Humanities*, 5 M.S.P.R. 260, 262 (1981); *Morrow v. Department of the Army*, 4 M.S.P.R. 443, 447 (1980); *White v. Department of the Treasury*, 3 M.S.P.R. 488, 491 (1980).

None of these Board decisions provided a rationale for the harmful error conclusion reached. In dicta in *Baracco*, 15 M.S.P.R. at 124 n.9, the Board offered a rationale for finding harmful error in cases when an agency fails to afford any Chapter 75 procedures "because an agency's total failure to provide any of the procedures of section 7513 impairs an employee's ability to defend against an adverse action and otherwise affects the outcome before the agency."<sup>11</sup> (Emphasis supplied.)

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<sup>11</sup> Of course, however, if a nonprobationary employee, who has a constitutionally protected property interest in his employment, has not received minimum due process, then *Loudermill*, 470 U.S. 532, applies to require reversal of the agency's action, as noted above. Thus, an agency action effected without affording an employee any of the procedures provided by statute or regulation does not constitute

No doubt, in many cases where employees are given neither full Chapter 43 or 75 procedural rights, particularly the right to present both a written and an oral reply, there would be grounds for finding harmful error simply because many employees would have colorable defenses or claims. Many other employees would not have colorable defenses or claims, however, in light of the Federal Circuit's holding in *Smith*, 789 F.2d at 1546, that harmful error requires more than the possibility that "the same evidence presented to the [B]oard might have been viewed differently by the agency." Cf. *Mercer*, 772 F.2d at 856 (harmful error found where the employee produced undisputed evidence of conflicting views within the agency as to the appropriate penalty). The Board's approach, up to this time, to harmful error, which the administrative judge applied in issuing the initial decision, thus creates considerable risk of doing exactly what Congress sought to avoid in enacting the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (the Reform Act), i.e., reversing agency actions for procedural violations that did not cause harm to the employee. Moreover, the Board's previous approach, as discussed above, is inconsistent with the precedent of the Supreme Court and of the Court of Appeals for the Federal Circuit that existed at the time that the initial decision in this appeal was issued. The

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harmful error under 5 U.S.C. § 7701(c)(2)(A), but rather constitutes a violation of constitutional minimum due process under *Loudermill*.

courts require proof of actual harm resulting from any agency procedural error before an agency's action will be reversed. See, e.g., *Nutt*, 472 U.S. at 651; *Handy*, 754 F.2d at 338. See also *Mercer*, 772 F.2d at 859 ("a federal employee must prove that his rights were substantially prejudiced by the procedural error so that the outcome was possibly thereby affected"); *Schapansky v. Department of Transportation*, 735 F.2d 477, 486 (Fed. Cir.) ("only harmful procedural errors may vitiate an agency action"), cert. denied, 469 U.S. 1018 (1984).

Application of "not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C).

In addition to harmful error under 5 U.S.C. § 7701(c)(2)(A), the Board cannot sustain an agency action if the appellant "shows that the decision was not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C). The legislative history of the Reform Act does not shed any light on the meaning of this provision. See *Baracco*, 15 M.S.P.R. at 120.

The Board first applied the "not in accordance with law" standard in *Cuellar v. United States Postal Service*, 8 M.S.P.R. 624 (1981). In *Cuellar*, the Board held that an Office of Personnel Management regulation, which permitted an agency to place an employee on "emergency suspension" without any procedural rights during the advance notice period of a removal action, was invalid and thus the "suspension" was "not in accordance with law" and must also

be reversed for "harmful error." See *id.* at 632. Thereafter, in *Baracco*, 15 M.S.P.R. 112, the Board distinguished the concept of "harmful error" from "not in accordance with law." The Board stated that "harmful error" applies to "all procedural errors," whereas the "not in accordance with law" standard applies "to other unlawful actions." *Id.* at 120. The Federal Circuit subsequently provided additional guidance on the "not in accordance with law" standard in *Handy*, 754 F.2d 335. The court stated that the "not in accordance with law" standard "is directed to the decision itself. Was the decision in its entirety in accordance with law?" *Id.* at 337-38 (original emphasis).

Consistent with *Handy* and *Baracco*, we find that an appealable action should also be reversed as "not in accordance with law," even if minimum constitutional due process consistent with *Loudermill* was afforded to an appellant and he has not shown harmful error under 5 U.S.C. § 7701(c)(2)(A), if the action is unlawful in its entirety, i.e., if there is no legal authority for the agency's action.<sup>12</sup> See *Handy*, 754 F.2d at 337-38; *Baracco*, 15

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<sup>12</sup> We conclude that a violation of constitutional minimum due process under *Loudermill* is not subject to a "not in accordance with law" analysis under 5 U.S.C. § 7701(c)(2)(C). The Board has previously recognized that, although it lacks the authority to determine the constitutionality of a statute, it has the authority to adjudicate a constitutional challenge to an agency's application of a statute. E.g., *Bayly v. Office of Personnel Management*, 42 M.S.P.R. 524, 525-26 (1990); *May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988). Thus, the Board has adjudicated, as an independent affirmative defense, nonprobationary employees' constitutional challenges to appealable actions effected

M.S.P.R. at 120. Thus, when an agency has no legal authority for taking an action, such as an "emergency suspension" effected during the advance notice period of a removal action, that action is "not in accordance with law" and must be reversed under 5 U.S.C. § 7701(c)(2)(C). *Cuellar*, 8 M.S.P.R. at 632. See, e.g., *Littlejohn v. U.S. Postal Service*, 25 M.S.P.R. 478, 481-82 (1984).

The Board's holdings on *Loudermill*, not in accordance with law, and harmful error.

Accordingly, the Board holds that, when an appealable action against a nonprobationary Federal employee has not been effected in accordance with the minimum procedures that satisfy the constitutional requirements of due process of the law under *Loudermill*, 470 U.S. 532, the action must be reversed because it cannot withstand constitutional scrutiny.

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under statute or regulation. See, e.g., *Cooper v. U.S. Postal Service*, 42 M.S.P.R. 174, 178 (1989) (the Board will accept statements given by an employee while in custodial detention if he has been advised of his *Miranda* rights and has signed a waiver of those rights), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990) (Table); *Sternberg v. Department of Defense*, 41 M.S.P.R. 46, 51 (1989) (even if the Fourth Amendment's prohibition applied, the agency did not engage in an illegal search of the employee in violation of the Fourth Amendment); *Wenzel v. Department of the Interior*, 33 M.S.P.R. 344, 352-53 (the Board will determine whether the employee's speech was protected by the First Amendment), *aff'd*, 837 F.2d 1097 (Fed. Cir. 1987) (Table); *Svejda v. Department of the Interior*, 7 M.S.P.R. 108, 111 (1981) (the constitutional guarantee of procedural due process applies to a nonprobationary employee's removal from Federal employment). Therefore, regardless of the statutory prohibition of 5 U.S.C. § 7701(c)(2)(C) against actions "not in accordance with law," the Board will not sustain an otherwise authorized action that is taken in violation of a nonprobationary employee's constitutional rights.

We further hold that when an appealable action is unlawful in its entirety, i.e., there is no legal authority for the agency's action, the Board will reverse such an action as "not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C). The burden of showing that an action is not in accordance with law lies with the appellant. 5 U.S.C. § 7701(c)(2)(C).

Moreover, we hold that, when an appealable action against a nonprobationary Federal employee meets the minimum requirements of due process of law under *Loudermill* and the action is lawful in its entirety under 5 U.S.C. § 7701(c)(2)(C), the Board will reverse the action for "harmful error" under 5 U.S.C. § 7701(c)(2)(A) for failure to provide statutory or regulatory procedures, or alternative procedures provided under a collective bargaining agreement, only when the evidence and argument of record shows that the procedural error was "likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error." 5 C.F.R. § 1201.56(c)(3). The burden of showing harmful error also lies with the appellant. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). The Board's prior decisions reversing agency actions for "harmful error" based solely on an agency's failure to afford employees their statutory or regulatory procedural rights are modified consistent with these holdings.

In reviewing an appellant's allegations of agency procedural error, administrative judges shall determine whether the agency's action comported with the minimum procedures that satisfy the constitutional requirements of due process of law under *Loudermill*, and whether the action is lawful in its entirety under 5 U.S.C. § 7701(c)(2)(C). If the action does not meet these requirements, then it must be reversed. Administrative judges shall reverse an action for "harmful error" under 5 U.S.C. § 7701(c)(2)(A) only when the appellant alleges that the agency committed procedural error, even though the procedures afforded by the agency satisfy the constitutional requirements of due process of law and the action is otherwise lawful in its entirety. Reversal of an action for "harmful error" under 5 U.S.C. § 7701(c)(2)(A) is warranted only where the procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency. See, e.g., *Baracco*, 15 M.S.P.R. at 123.

This appeal must be remanded for further proceedings.

The record shows that the appellant received prior written notice of her proposed separation for alleged unacceptable performance on July 15, 1986, and that she was afforded an opportunity to reply in writing within 5 work days. A July 15, 1986 memorandum signed by the proposing official also states that he advised the appellant on that day that "she would be allowed ample time away from the work

center to discuss her situation with appropriate advisors of her choosing." The record reflects that the appellant did not submit a reply, and she was separated on July 28, 1986, 13 days after the issuance of the proposal notice.<sup>13</sup>

We find that the agency's procedures for effecting the appellant's separation for alleged unacceptable performance comported with her constitutional right to minimum due process of law under *Loudermill* because she received notice of the action against her, an explanation of the reasons for the action, and an opportunity to present her response. See *Loudermill*, 470 U.S. at 546.

We further find that the agency has the legal authority under 5 U.S.C. Chapters 43 and 75 to effect the appellant's separation for unacceptable performance. We conclude, therefore, that the agency's action cannot be reversed as "not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C).

Reversal of the agency's action in this appeal is thus warranted for the agency's procedural error only if the appellant shows that the agency's error likely had a harmful effect upon the outcome of the case before the agency so as to constitute "harmful error" under 5 U.S.C. § 7701(c)(2)(A). The appellant's failure below to avail herself of the opportunity to submit a written response to the agency's action, and the lack of evidence in the record with regard to the effect of the agency's error upon the

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<sup>13</sup> See IAF, Tab 3.

outcome of the case before the agency, necessitate a remand for the presentation of evidence and argument on this issue.

In order to prove harmful error on remand, the appellant must show that she could not have submitted a written reply in the abbreviated period of time afforded by the agency and that the agency's error likely had a harmful effect upon the outcome of the case before the agency. Alternatively, she must show that the agency's failure to afford her an opportunity to submit an oral reply, or that any failure to obtain representation by an attorney or other representative in the abbreviated period of time afforded by the agency, likely had a harmful effect upon the outcome of the case before the agency. The agency, of course, must carry its burden of proof on the merits of its alleged performance-based action under 5 U.S.C. Chapters 43 or 75. See 5 U.S.C. § 7701(c)(1); *Ortiz v. United States Marine Corps*, 37 M.S.P.R. 359, 361-63 (1988).

We note that the appellant requested a hearing in her petition for appeal.<sup>14</sup> Because the appeal is within the Board's jurisdiction, she is entitled to her requested hearing on the merits of her appeal. See, e.g., 5 U.S.C. § 7701(a); *Bommer v. Department of the Navy*, 34 M.S.P.R. 543, 546-52 (1987). On remand, the administrative judge shall afford the appellant a hearing, if she so desires, and shall afford the parties the opportunity to submit additional relevant and material evidence and argument on

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<sup>14</sup> See IAF, Tab 1.

the merits of the appeal, the appellant's affirmative defense of harmful error, and any other affirmative defenses that she may raise.

The appellant is entitled to back pay for the 30-day advance notice period that the agency should have provided her in effecting its action.

Because the agency in this appeal did not afford the appellant the full 30-day advance notice required by 5 U.S.C. § § 4303(b)(1)(A) or 7513(b)(1), we have also considered whether her consequent loss of pay for that time period should be deemed "harmful" within the meaning of 5 U.S.C. § 7701(c)(2)(A). Our review of the judicial and administrative interpretations of the notice requirement in section 14 of the Veterans' Preference Act of 1944, Pub. L. No. 78-539, 58 Stat. 387, 390 (1944), the predecessor to the Reform Act, provides support for the conclusion that Congress intended in the Reform Act to confer on employees a right to pay during the 30-day advance notice period.

In *Stringer v. United States*, 90 F. Supp. 375, 378-79 (Ct. Cl. 1950), the United States Court of Claims, citing Civil Service Commission regulations issued shortly after the enactment of the Veterans' Preference Act, held that the statute required not merely that there be time to answer but that there be 30 full days of notice. Moreover, the 30-day period ran from the date of the notice of adverse action to the date the action was effected, not to the date the decision to take the action was issued. See *Palmer v. United States*, 121 Ct. Cl. 415, 419-21, cert. denied, 344

U.S. 842 (1952). This requirement has continued to be the rule under the Reform Act. See, e.g., *Moore v. Defense Logistics Agency*, 670 F. Supp. 800, 807 n.10 (N.D. Ill. 1987); *Rasheed v. Department of the Air Force*, 7 M.S.P.R. 585, 587 (1981). The requirement of a 30-day advance notice period in the Reform Act suggests that its purpose is more than to ensure fairness through a meaningful opportunity to be heard. It indicates that the intention of the Congress was to confer upon employees in all cases not subject to the crime exception of 5 U.S.C. § 7513(b)(1), or to a valid regulatory exception, a right to pay for 30 days.

In *Cade v. United States Postal Service*, 8 M.S.P.R. 717 (1981), the Board implicitly recognized that the 30-day advance notice period creates a right to pay for the notice period. In that case, the agency mistakenly shortened the advance notice period to 26 days. The Board agreed with the administrative judge that the appellant was not entitled to reversal of his removal because he was not prejudiced in his opportunity to defend against the proposed charges by the agency's procedural error. The appellant, in fact, replied to the charges within the time he did receive, and he offered no evidence that the additional 4 days would have allowed him to prepare a more persuasive reply. *Id.* at 718 n.1. The Board also agreed with the administrative judge, however, that the appellant was prejudiced because he was deprived of his entitlement to be retained in duty status with compensation for a full 30 days, and it ordered the

agency to provide relief accordingly. In reaching this determination, the Board cited a Comptroller General's decision, 38 Comp. Gen. 203 (1958), discussing decisions of the Court of Claims concerning entitlement to pay during the 30-day advance notice period established by the Veterans' Preference Act.

The first of the decisions cited by the Comptroller General, *Taylor v. United States*, 131 Ct. Cl. 387 (1955), involved an employee whose removal was sustained by the Civil Service Commission despite the fact that he was placed on enforced annual leave during the 30-day advance notice period. The Court of Claims sustained the removal action because the procedural requirements of the Veterans' Preference Act were substantially complied with by the agency in that the employee's right to respond to the action was safeguarded. *Id.* at 391. The court held, however, that the enforced leave unlawfully deprived the employee of his pay during the advance notice period and that he was entitled to recover for it. *Id.* The court reached the same result in *Armand v. United States*, 136 Ct. Cl. 339 (1956), and *Kenny v. United States*, 134 Ct. Cl. 442, cert. denied, 353 U.S. 893 (1956), the other cases discussed in the Comptroller General decision cited by the Board in *Cade*, and these cases were followed by the court in *Hart v. United States*, 284 F.2d 682 (Ct. Cl. 1960).

In awarding back pay in these cases, the Court of Claims did not identify the statutory basis for the

employee's recovery. The court's opinion in *Armand* suggests that recovery of back pay would be under the Act of June 10, 1948, Pub. L. No. 80-623, 62 Stat. 447, a predecessor to the Back Pay Act of 1966. The opinion of the court discusses the 1948 law only in connection with another back pay claim which the court rejected. However, because the failure to afford an employee 30 days' advance notice constitutes a suspension, see *Hart*, 284 F.2d at 686-87, the recovery of pay due for a wrongful suspension during the advance notice period of the removal action would also have been within the terms of the 1948 law.

The Court of Claims decisions discussed above treat the 30-day notice provision of the Veterans' Preference Act as conferring a right to receive pay during the notice period, and provide a precedent for awarding back pay to remedy a deficiency in the notice period without reversing the agency's action when the employee has not shown prejudice to his defense of the action as a result of the agency's procedural error. Although we have found no cases expressly interpreting the advance notice provisions of the Reform Act as creating a right to pay, statements in some judicial opinions interpret the notice requirement of 5 U.S.C. § 7513(b)(1) as establishing such a right. See *Oliver v. U.S. Postal Service*, 696 F.2d 1129, 1131 (5th Cir. 1983). See also *Horner v. Andrzejewski*, 311 F.2d 571, 579 (Fed. Cir.) (Nichols, J., dissenting) (the right to pay during the

advance notice period cannot be defeated by the mere failure to appropriate funds), *cert. denied*, 484 U.S. 912 (1987).

Accordingly, we conclude that the advance notice provisions of the Reform Act confer a right upon employees to pay for 30 days in all cases not subject to the crime exception of 5 U.S.C. § 7513(b)(1) or to a valid regulatory exception. We also conclude that the Back Pay Act, 5 U.S.C. § 5596(b), authorizes the Board to order an agency to compensate an employee for any loss of pay due to an unwarranted suspension during the advance notice period of an appealable action even when the Board sustains the action appealed. Administrative judges in all future cases in which an agency has not afforded an employee with 30-days' advance notice of an action under the applicable provisions of the Reform Act must direct the agency to amend its records so as to retroactively afford the employee 30 days of back pay regardless of whether the appealed action is sustained. See *Cade*, 8 M.S.P.R. at 718 n.1. The Board's prior decisions that sustained an agency's action on the ground that the shortening of the 30-day notice period was not harmful error without ordering the agency to compensate the employee for the lost pay are overruled consistent with this holding.

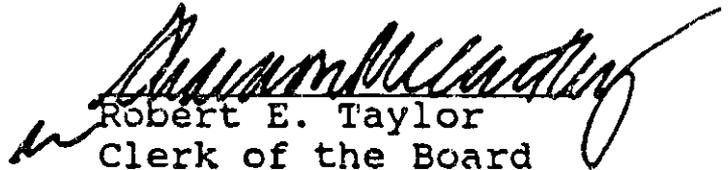
In the present appeal, the appellant was separated on July 28, 1986, 13 days after she received advance notice of her proposed separation for alleged unacceptable performance, although she was entitled to be retained in a

pay status for 30 days regardless of whether the agency took the action under 5 U.S.C. Chapter 43 or 75. See 5 U.S.C. §§ 4303(b)(1)(A) and 7513(b)(1). In issuing a new initial decision on remand consistent with this Opinion and Order, the administrative judge shall order the agency to amend its records so as to afford the appellant an additional 17 days of back pay retroactively.

ORDER

Accordingly, we remand this appeal for further adjudication consistent with this Opinion. On remand, the administrative judge shall afford the appellant her requested hearing, and shall provide the agency the opportunity to show that its alleged performance-based action meets the substantive requirements of 5 U.S.C. Chapters 43 or 75. The administrative judge shall also provide the appellant with the opportunity to reply to the agency's showing and to present any affirmative defenses that she may have to the action before issuing a new initial decision resolving the material issues of fact and law in this appeal and ordering the agency to retroactively award 17-days' back pay to the appellant.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.