

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

63 M.S.P.R. 165

Docket Number DC075292070811

WILLIAM J. FLETCHER, Appellant,

v.

DEPARTMENT OF AGRICULTURE, Agency.

Date: June 17, 1994

Peter B. Broida, Esquire, Arlington, Virginia, for the appellant.

Sandra K. Herring, Greenbelt, Maryland, For the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The agency has petitioned for review, and the appellant has cross petitioned for review, of an initial decision, issued on December 23, 1992, which mitigated the appellant's removal to a demotion. For the reasons described below, we DISMISS the petition for review for failure to comply with the administrative judge's interim relief order. We GRANT the cross petition for review under 5 C.F.R. § 1201.115, but still SUSTAIN the penalty of demotion.

BACKGROUND

The agency removed the appellant from his position of Water Treatment Plant Operator Foreman, WS-5409-08, a supervisory position, based on the following charges: (1) Discharging a firearm on agency property, (2) operating government-owned vehicles with an invalid and/or suspended driver's license, (3) making false oral statements to agency police, and (4) displaying unacceptable behavior in front of a subordinate employee. Initial Appeal File, (IAF), Tab 3, Subtabs 4o, 4r. The administrative judge sustained the first three charges, but not the charge that the appellant displayed unacceptable behavior in front of a subordinate. He also found the penalty of removal unreasonable under the circumstances, and he ordered the agency to cancel the action and to "place appellant in a nonsupervisory position with the least reduction in grade and pay, retroactive to ... the effective date of the removal action." Initial Decision (ID) at 16. In addition, he ordered the agency, if it filed a petition for

review, to provide interim relief in accordance with section 6 of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, 33 (codified at 5 U.S.C. § 7701(b)(2)(A)). ID at 17.

The agency's petition for review is timely and includes documents purportedly showing compliance with the administrative judge's interim relief order. The appellant argues, however, that the agency has not complied with that order. He also has filed a timely cross petition for review challenging certain findings the administrative judge made regarding two of the sustained charges.

ANALYSIS

The agency is not in compliance with the administrative judge's interim relief order.

In his response to the agency's petition for review, the appellant asserts that the agency has not complied with the administrative judge's interim relief order.¹ Specifically, he argues that the administrative judge ordered his demotion to WG-13, and that, by placing him in a WG-9 position and paying him at a rate applicable to certain WG-9 employees, the agency has violated the administrative judge's order.² See Petition for Review (PFR) File, Tab 5. The agency does not deny that it paid the appellant at the WG-9 level but states that it did so because no other nonsupervisory

¹ In addition to presenting the arguments described below, the appellant argues that the "evidence required of the Agency as to interim relief must be in affidavit form or under the penalty of perjury," and that the agency's submission of "Notification of Personnel Action" form (SF- 50B) and a copy of a letter regarding the agency's compliance therefore are insufficient. PFR File, Tab 5 at 1-2. None of the four Board decisions the appellant cites in connection with this matter supports his argument, however. In the three cited cases in which the Board dismissed the agency petitions for review, the agencies evidently had failed to submit any documentary evidence of compliance. See *Anderson v. Department of Justice*, 55 M.S.P.R. 61, 62-63 (1992); *Labatte v. Department of the Air Force*, 55 M.S.P.R. 37, 38 (1992); *Allen v. Department of the Interior*, 54 M.S.P.R. 116, 118 (1992). In the fourth cited case, the Board found the agency's submission of an SF-50 sufficient to show compliance with the interim relief order despite the appellant's assertion -- unsupported by an affidavit or other statement signed under penalty of perjury -- that the agency had assigned him inappropriate duties. See *Wayne v. Department of the Navy*, 55 M.S.P.R. 322, 326-27 (1992). More recently, the Board has specifically held that the filing of an SF-50 is proof of compliance. See, e.g., *Reid v. U.S. Postal Service*, MSPB Docket No. NY0752920562I1, slip op. at 6 (Feb. 24, 1994).

² The appellant also argues that the SF-50B the agency has submitted is insufficient evidence of compliance because it lacks an approval date and because of "the lack of any apparent authority of the individual who signed the form." PFR File, Tab 5 at 2. Although block 50 on the form -- the block reserved for the "Signature/Authentication and Title of Approving Official" -- is signed by an official other than the one whose name is typed in the block, there is no indication that the former official lacked the authority to approve the action (or sign the form) for the latter. Furthermore, we see no basis for finding that the absence of an approval date has the significance attributed to it by the appellant. Because the form was filed with the Board in a timely manner, see PFR File, Tab 5 at 2, the action must have been approved in a timely manner.

position was available. It further asserts that its action was in accordance with agency policy and that no nonsupervisory WG-13 positions exist at the appellant's installation. PFR File, Tab 8. For the reasons stated below, we agree with the appellant that the interim relief order required the agency to pay him at a higher grade level than it has, and therefore find the agency not in compliance on this matter.

In *Hawkins v. United States Postal Service*, 35 M.S.P.R. 549, 553 (1987), the Board ordered the agency to cancel the employee's removal and "to replace it with a demotion to the next lower-grade level nonsupervisory position." In adjudicating the employee's subsequent petition for enforcement of that order, the Board interpreted its order as requiring the employee's placement at the highest nonsupervisory grade level below her previous, supervisory position. *Hawkins v. United States Postal Service*, 56 M.S.P.R. 633, 637-38 (1993). It ordered the agency to pay her at the higher level, even though it could place the employee temporarily in a position at a lower level if a suitable position at the grade level indicated in the Board's earlier order was not currently available. *Id.* at 640-41.

We see no material difference between the language of the *Hawkins* order, i.e., to demote the employee to "the next lower-grade level nonsupervisory position," and the language of the order in the present appeal, i.e., to "place appellant in a nonsupervisory position with the least reduction in grade and pay." Furthermore, although the order in the present appeal included additional language not present in *Hawkins*, we see no basis for finding that the additional language relieved the agency of its obligation to pay the appellant at the highest nonsupervisory grade below his former grade. That additional language indicated only that, if "no vacancy exist[ed] in such a position" -- i.e., at the level to which the appellant was to be demoted -- the agency was to "place the appellant in the highest available nonsupervisory position for which he [was] qualified until such time as a nonsupervisory position with the least reduction in grade bec[ame] available." This temporary- placement obligation is the same as the obligation the Board found to be present in *Hawkins*; and, as we have indicated above, the temporary placement of the employee in *Hawkins* in a lower-grade position did not relieve the agency of its obligation to pay the employee at the higher level.

In addition, we note that this case cannot be distinguished from *Hawkins* on the basis that *Hawkins* concerned a final Board order while this case concerns an order for interim relief. Although an interim relief order does not require the payment of back pay, see 5 U.S.C. § 7701(b)(2)(C), it does require the granting of "the relief provided in the decision," 5 U.S.C. § 7701(b)(2)(A), and, if the agency does not return the employee to work, it requires the agency to give the employee "pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review," 5 U.S.C. § 7701(b)(2)(B). In this appeal, the agency has not returned the appellant to work.³ See PFR File, Tab 1. During the pendency of this

³ In view of our disposition, we find it unnecessary to address the appellant's contention that the agency violated the interim relief order by placing him in a nonduty status. See PFR File, Tab 3 at 3-4. For the same reason, we do not reach his contention that, as shown by its April 24, 1994 memorandum to Utilities Services Section Employees concerning the appellant's recent

petition for review, however, the administrative judge's interim relief order required the agency to give the appellant the pay he would have received if the agency had returned him to work. See 5 U.S.C. § 7701(b)(2)(B).

For the reasons stated above, we find that the interim relief order required the agency to pay the appellant, while the agency's petition for review was pending before the Board, at the highest nonsupervisory grade below the supervisory grade at which he formerly was employed. We need not determine whether that grade is WG-13, as the appellant alleges, or whether the apparent absence of any WG-13 positions at the appellant's installation relieves the agency of any responsibility to pay him at that level. The record shows that there are WG-11 positions at the appellant's installation. See PFR File, Tab 8, Attachment 2 (position staffing plan). Because WG-11 is a higher grade than the grade at which the agency has been paying the appellant, we find that the agency has not paid the appellant at the highest nonsupervisory grade below his former grade. Accordingly, we conclude that the agency has not complied with the administrative judge's interim relief order, and that its petition for review must be dismissed.⁴ See *Ginocchi v. Department of the Treasury*, 53 M.S.P.R. 62, 68 & n.4 (1992).

The appellant's cross petition for review meets the Board's criteria for review; we do not sustain the falsification charge.

In his cross petition for review, the appellant contends that the administrative judge erred in finding that the warrantless search that led to the discovery of the gun he allegedly fired was proper and in sustaining the falsification charge. For the reasons stated in the initial decision, ID at 4-5, we agree with the administrative judge that the search was covered by the "plain view" exception, and we note that the administrative judge's analysis of the falsification charge was consistent with then-existing Board precedent. The Board, however, recently found that, consistent with the Court's holding in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988), it is improper for an agency to charge an employee with misconduct and also separately charge him with making false statements regarding the alleged misconduct. See *Walsh v. Department of Veterans Affairs*, MSPB Docket No. CH-0752-92- 0021-I-1, slip op. at 14, (May 31, 1994).

The falsification charge, therefore, is not sustained, and it is incumbent upon us to reexamine the appropriateness of the mitigated penalty in light of the two sustained offenses -- violating agency regulations concerning firearms and operating a government vehicle without a valid license. The administrative judge's analysis, at

designation as Acting Foreman of the Water and Wastewater Treatment Plants from April 19 - May 20, 1994, the agency's "undue disruption" determination was made in bad faith. PFR File, Tab 14.

⁴ We also need not address the appellant's allegation that he was entitled, under the interim relief order, to be paid at a rate higher than that of the first step of the appropriate grade. If a dispute arises concerning the pay the appellant is entitled to receive under the Board's final order, the appellant may file (as we have indicated below) a petition for enforcement concerning this matter with the Board's Washington Regional Office.

pages 9 - 15 of the initial decision, is thorough in regard to the two sustained charges, and we find no basis for further mitigation.⁵ The process of mitigation is not a mathematical one in which the previously-imposed penalty must be reduced by a percentage of sustained charges. See *Flanagan v. Department of the Army*, 44 M.S.P.R. 378, 382 (1990). Accordingly, we find that the administrative judge's modification of the removal penalty to impose a demotion is reasonable even though the falsification charge has not been sustained.

ORDER

We ORDER the agency to cancel the appellant's removal and to place the appellant in a nonsupervisory position with the least reduction in grade, retroactive to August 21, 1992. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes

⁵ In his latest submission, discussed at footnote 3 above in reference to the interim relief issue, the appellant also argues that the agency's "restoration, even on a temporary basis, of [the appellant] to the position of Foreman" shows that the agency did not lose trust or confidence in him, as it claimed. We note that, in finding that the maximum reasonable penalty was a demotion to a nonsupervisory position, the administrative judge considered the testimony of the appellant's second and third level supervisors that they could no longer trust him. See ID at 13. We have found, however, that a deciding official's statement that he has lost trust in an employee is not contradicted by the agency's allowing him to continue in his job pending trial. See *Stephens v. Department of the Air Force*, 58 M.S.P.R. 502, 507 (1993). We also have found that mitigation is not appropriate simply because an agency allows an employee to continue his regular duties after testing positive on urinalysis tests. See *Burrell v. Defense Logistics Agency*, 58 M.S.P.R. 372, 378 (1993). Similarly, we conclude that such evidence is insufficient to find that further mitigation is appropriate in these circumstances.

that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. This is the Board's final order in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.