

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

98 M.S.P.R. 98

WILLIE M. RAWLS, JR.,  
Appellant,

DOCKET NUMBER  
AT-0752-02-0707-B-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: December 1, 2004

Rebecca L. Fisher, Esquire, McGregor, Texas, for the appellant.

Jennifer C. Kellett, Esquire, Memphis, Tennessee, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 The agency petitions for review of a remand initial decision that reversed the appellant's indefinite suspension. For the reasons set forth below, we GRANT the agency's petition under 5 C.F.R. § 1201.115, REVERSE the remand initial decision, and SUSTAIN the indefinite suspension.

**BACKGROUND**

¶2 This appeal was previously before the Board. *Rawls v. U.S. Postal Service*, 94 M.S.P.R. 614 (2003). In summary, the appellant was arrested in July 1999 and charged with attempted first degree murder for allegedly shooting a nightclub bouncer several times with a 12-gauge pump shotgun. *Id.*, ¶ 2. The agency

indefinitely suspended him, effective August 19, 1999, based on reasonable cause to believe he committed a crime for which a sentence of imprisonment could be imposed. *Id.*, ¶ 3. He was tried on the charge of attempted first degree murder, convicted in March 2002 of the lesser offense of reckless endangerment, and sentenced to 11 months and 29 days' incarceration. *Id.*, ¶ 4. The agency removed him, effective June 21, 2002, based on his criminal conviction. *Id.*, ¶ 5.

¶3 The appellant appealed his suspension and removal, and the administrative judge (AJ) issued separate initial decisions reversing both actions for denial of minimum due process because the agency failed to issue notices proposing the actions before issuing notices of its decision to effect the actions. *Id.*, ¶ 6. On the agency's petitions for review of the initial decisions, the Board joined the petitions, reversed the initial decisions, and remanded the cases for readjudication, finding that the agency's failure to issue proposal notices did not constitute a denial of minimum due process under the particular circumstances presented. *Id.*, ¶¶ 1, 11-21. The Board instructed the AJ to determine instead whether such failure constituted harmful error warranting reversal of the actions, and, if she found no harmful error, to adjudicate the other issues pertaining to the merits of the actions. *Id.*, ¶¶ 24-25.

¶4 On remand, the AJ held a telephonic hearing and then issued a remand initial decision affirming the removal action. *Rawls v. U.S. Postal Service*, MSPB Docket No. AT-0752-02-0706-B-1 (Initial Decision, Jan. 27, 2004). Neither party has filed a petition for review of the remand initial decision affirming the removal action. The AJ also issued a separate remand initial decision reversing the indefinite suspension. Remand Initial Decision (RID), Remand Appeal File (RAF), Tab 14. She found that the appellant did not prove that the agency's action constituted harmful error, *id.* at 6-7, but that the indefinite suspension was nevertheless invalid because the agency's decision notice did not identify explicitly the condition subsequent for terminating the

suspension, *id.* at 3-6. The AJ further found that the appellant failed to establish his claim of race discrimination. *Id.* at 7-8.

¶5 The agency has filed a petition for review of the remand initial decision reversing the indefinite suspension, arguing that its failure to identify the condition subsequent explicitly in its decision notice does not warrant reversing the suspension. Remand Petition for Review (RPR), Remand Petition for Review File (RPRF), Tab 1. The appellant has filed a response opposing the agency's petition. RPRF, Tab 4.

### ANALYSIS

¶6 It is well-settled that an indefinite suspension, to be valid, must have an ascertainable end. *E.g.*, *Martin v. Department of the Treasury*, 12 M.S.P.R. 12, 17, 20 (1982), *aff'd in part, rev'd in part on other grounds sub nom. Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), *aff'd sub nom. Otherson v. Department of Justice*, 728 F.2d 1513 (D.C. Cir. 1984), *modified on other grounds by Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 663 n.5 (1994). This "ascertainable end" requirement derives from the statutory definition of a "suspension" -- "the placing of an employee, for disciplinary reasons, in a *temporary* status without duties and pay." 5 U.S.C. § 7501(2) (emphasis added); *see* 5 U.S.C. § 7511(a)(2); *Martin*, 12 M.S.P.R. at 17. Because a suspension must be *temporary*, the Board has stated that, "while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent ... which will terminate the suspension," and that an indefinite suspension imposed with no ascertainable end in sight is not sustainable. *Martin*, 12 M.S.P.R. at 17, 20.

¶7 In effecting the indefinite suspension here, the agency did not issue a proposal notice, *Rawls*, 94 M.S.P.R. 614, ¶ 13, and its decision notice did not explicitly identify a condition subsequent that would terminate the suspension. The decision notice simply informed the appellant that he was "indefinitely

suspended ... in accordance with Article 16.6 (Indefinite Suspension - Crime Situation) [of the applicable collective bargaining agreement (CBA)] because the agency found reasonable cause to believe that [he had] committed a crime for which a sentence of imprisonment c[ould] be imposed.” Initial Appeal File (IAF), Tab 5, Subtab 4J. Article 16.6 discusses the employee’s right to grieve the suspension and his right to back pay if the agency decides to return him to work, and states that the agency “may take action to discharge an employee during the period of an indefinite suspension whether or not the criminal charges have been resolved....” RAF, Tab 9, Attachment 1.

¶8 We agree with the AJ that the agency’s decision notice, even with reference to Article 16.6, did not explicitly identify the condition subsequent that would terminate the suspension. RID at 4-5. However, we also agree with the agency’s argument on review that the suspension clearly, albeit implicitly, *had* a condition subsequent since the suspension was based on a criminal charge which must be resolved, one way or another, through criminal proceedings. *Cf. Brown v. Department of Justice*, 715 F.2d 662, 668-69 (D.C. Cir. 1983) (“a suspension solely on the basis of indictment ... *must necessarily* be a conditional suspension, conditioned on the outcome of the employee’s involvement in the criminal justice system”). It is thus apparent under the circumstances that the appellant’s indefinite suspension had an ascertainable end, conditioned on the outcome of his involvement in the criminal justice system.

¶9 In reversing the indefinite suspension because the agency’s decision notice did not explicitly identify a condition subsequent, the AJ relied on a single Board precedent -- *Tigner-Keir v. Department of Energy*, 20 M.S.P.R. 552 (1984). RID at 6. In *Tigner-Keir*, 20 M.S.P.R. at 553, the indefinite suspension was “based on alleged threats made by appellant to her supervisors.” The Board, relying on *Martin*, reversed the suspension because “no specific event or requirement which would terminate the suspension was set forth” in the agency’s decision notice. *Id.* at 554. We find that *Tigner-Keir* is distinguishable, however, because the

suspension there was not based on a criminal charge, as here, but rather “appear[ed] to have been taken in an attempt to forego or delay removal of an employee with emotional problems.”<sup>1</sup> *Id.* Because the suspension in *Tigner-Keir* was not based on a criminal charge, it did not have an ascertainable end implicitly conditioned on the outcome of any criminal proceedings.

¶10 The AJ also relied on 5 C.F.R. § 752.402(e), which provides:

*Indefinite suspension* means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action which may include the completion of any subsequent administrative action.

5 C.F.R. § 752.402(e) (second emphasis added); RID at 4, 5. This regulatory definition, in the course of describing when the suspension should end, contemplates that the condition subsequent would be “set forth in the notice of action.” And Board cases involving indefinite suspensions often note that the condition subsequent was set forth in the agency’s decision notice. *E.g.*, *Jones v. Department of the Army*, 68 M.S.P.R. 398, 402 (1995) (the agency met the requirement for a condition subsequent where the agency’s decision notice provided that the suspension would continue “through such time as the criminal proceedings end[ed] and through any proposal period for any additional action”). However, the regulatory definition merely contemplates, and does not necessarily mandate, that agencies explicitly identify the conditions subsequent in their decision notices, and nothing in the regulation or its regulatory history states or

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<sup>1</sup> In *Giacobbi v. U.S. Postal Service*, 30 M.S.P.R. 39, 41-42 (1986), the Board reversed an indefinite suspension where the agency failed to identify any condition subsequent explicitly in its notice suspending the appellant. *Giacobbi* is also distinguishable, however, because the agency there had completed its investigation of the appellant’s alleged misconduct and there was no pending criminal charge at the time the agency imposed the indefinite suspension, so that a condition subsequent was not apparent from the circumstances at the time the suspension was imposed.

suggests that an agency's failure to identify a condition subsequent explicitly in its decision notice, without more, warrants reversal of the suspension. 53 Fed. Reg. 21,619 (1988).

¶11 Indeed, in finding that the indefinite suspensions were properly imposed in *Martin*, the Board did not mention whether the decision notices explicitly identified a condition subsequent. The Board noted, as to appellant Martin, that “the ongoing agency investigative process and the referral to the U.S. Attorney support the ‘temporary’ nature of the suspension,” and noted as to appellants Otherson, Brown, and Charest that, “since the appellants had been indicted and criminal proceedings were ongoing, the suspensions do contain clear conditions subsequent and so can be considered ‘temporary.’” *Martin*, 12 M.S.P.R. at 21. It thus appears in *Martin* that the conditions subsequent were not identified in the agency's decision notices but could be inferred from the circumstances surrounding the indefinite suspensions. We therefore find that, while the better practice is for agencies to identify the conditions subsequent explicitly in their decision notices imposing indefinite suspensions, the pertinent requirement for a valid indefinite suspension is that the suspension *have* a condition subsequent, rather than that the agency's decision notice *explicitly identify* the condition subsequent. We further find, for the reasons discussed above, that the appellant's indefinite suspension here did have a condition subsequent or ascertainable end.

¶12 Even assuming arguendo that the agency's failure to identify the condition subsequent explicitly in its decision notice constituted procedural error,<sup>2</sup> we find

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<sup>2</sup> The condition-subsequent requirement may be more properly viewed as a substantive, rather than a procedural, one because it derives from the substantive requirement that a suspension must be “temporary.” 5 U.S.C. § 7501(2); *see* 5 U.S.C. § 7511(a)(2); *Martin*, 12 M.S.P.R. at 17, 20 (because the “most essential criterion” of a suspension is that it must be “temporary,” an indefinite suspension must have a condition subsequent which will terminate it). In fact, where the agency failed to satisfy this (substantive) requirement, the Board has reversed the indefinite suspension without examining whether the failure constituted harmful (procedural) error. *See Giacobbi*, 30 M.S.P.R. at 41-42; *Tigner-Keir*, 20 M.S.P.R. at 554. We find it unnecessary to resolve

that it did not constitute harmful error warranting reversal of the indefinite suspension. In *Johnson v. U.S. Postal Service*, 37 M.S.P.R. 388, 393 (1988), the agency did not specifically identify the condition subsequent in its proposal or decision notices, but “the deciding official ... testified without contradiction that he placed the appellant on indefinite suspension pending the outcome of the criminal proceedings.” The Board found under those circumstances “that the agency’s delay in identifying the condition that will terminate the indefinite suspension does not constitute harmful error warranting reversal of the action.” *Id.*; see *Brode v. Department of the Army*, 35 M.S.P.R. 149, 152 (1987) (similar holding); *Clark v. U.S. Postal Service*, 30 M.S.P.R. 548, 551 (1986) (similar holding). Here, the appellant has not alleged or shown that he failed to understand that the condition subsequent was the resolution of his criminal proceedings. In fact, shortly after his misdemeanor conviction, he wrote to the agency to inquire about returning to work, as part of a Work Release Program during his incarceration. IAF, Tab 5, Subtab 4E. Nor has he alleged or shown how he was harmed by the agency’s failure to identify the condition subsequent explicitly in its decision notice. Under these circumstances, we find that any procedural error by the agency in this regard did not amount to harmful error warranting reversal of the indefinite suspension. See *Johnson*, 37 M.S.P.R. at 393; *Brode*, 35 M.S.P.R. at 152; *Clark*, 30 M.S.P.R. at 551; see also *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991) (harmful error cannot be presumed; an agency error is harmful only where the 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).

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definitively here whether the condition-subsequent requirement is a substantive or a procedural one because, in either case, it does not warrant reversal of the indefinite suspension for the reasons discussed above.

¶13 We further find, for the reasons discussed below, that the agency properly continued the indefinite suspension beyond the appellant's conviction in March 2002, until his removal in June 2002. In *Campbell v. Defense Logistics Agency*, 31 M.S.P.R. 691, 695 (1986), *aff'd*, 833 F.2d 1024 (Fed. Cir. 1987) (Table), the Board stated:

In order for an agency to effectuate an indefinite suspension [that continues after resolution of the criminal proceedings until the agency effects the employee's removal] ..., three criteria must be met. First, there must be a resolution of the charges. Second, the agency must have contemplated further action and advised the employee of the subsequent possibility of further adverse action when the initial indefinite suspension was proposed. Third, the agency must act within a reasonable period of time after resolution of the criminal charges to initiate the additional action. ...

(Footnote omitted.) *See also Engdahl v. Department of the Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990) (continuing the indefinite suspension beyond resolution of the criminal proceedings was appropriate where the employee was previously notified that the suspension "might continue past the resolution of the charges while the [agency] investigated further administrative action against him," and the agency "acted within reasonable time periods in considering, proposing, and finalizing his removal").

¶14 Here, the appellant's March 22, 2002 conviction resolved the criminal proceedings and confirmed the agency's original rationale for suspending him. In addition, as noted above, the agency informed the appellant, in its decision notice referencing Article 16.6 of the CBA, that he might be removed during the pendency of his indefinite suspension. Moreover, it is undisputed that the appellant did not inform the agency of his conviction until May 22, 2002, RAF, Tab 11, Agency's Post-Hearing Brief at 3; IAF, Tab 5, Subtab 4E, and the agency thereafter promptly initiated and effected his removal on June 21, 2002. Under these circumstances, the agency was not required to terminate the suspension and

reinstate the appellant in order to initiate and effect his removal. *See Engdahl*, 900 F.2d at 1578; *Campbell*, 31 M.S.P.R. at 695.

¶15 The parties do not dispute on review the AJ's findings that the agency established the other criteria for a valid indefinite suspension. RID at 2-3, 6 n.7. Nor do they dispute the AJ's findings that the appellant failed to prove his affirmative defenses of harmful error and race discrimination. *Id.* at 6-8. Accordingly, we SUSTAIN the indefinite suspension.

### ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

#### Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 19848  
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

### Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review the Board's regulations and other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

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Bentley M. Roberts, Jr.  
Clerk of the Board

Washington, D.C.