

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

89 M.S.P.R. 272

PATRICIA STUHLMACHER,
Appellant,

DOCKET NUMBER
CH-0752-00-0116-I-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 17, 2001

John P. Gamlin, Esquire, Fort Collins, Colorado, for the appellant.

Pamela S. Parrish, Indianapolis, Indiana, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that sustained her removal. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115, and AFFIRM the initial decision as MODIFIED, mitigating the appellant's removal to a demotion to the next lower-graded nonmanagerial position with the least reduction in grade and pay.

BACKGROUND

¶2 The appellant was the Postmaster in Shelburn, Indiana. On September 2, 1999, Post Office Operations Manager Dawna Fortner, the appellant's first-level

supervisor, proposed her removal based on a charge of “engaging in criminal misconduct – criminal conversion.” Initial Appeal File (IAF), Tab 5, subtab 4E. Under the charge, Fortner stated as follows:

¶3 On July 10, 1999, [while in an Elder-Beerman store in Terre Haute, Indiana], the appellant removed a \$30 price tag from a shirt, replaced it with a tag from cheaper merchandise, and purchased the shirt at the lower price. The appellant also put a \$10.50 tag on a \$109.99 dress and attempted to purchase the dress, but was “turned away because the price did not look right.” When the appellant left the store, she was arrested and charged with criminal conversion. On July 12, 1999, the appellant pled guilty to criminal conversion. She was fined \$35 and court costs of \$125; sentenced to one year in jail, which was suspended; sentenced to one-year probation and 32 hours of community service; and required to attend the Misdemeanor Program. *Id.*

¶4 On July 26, 1999, Fortner interviewed the appellant, who acknowledged that she had pled guilty to criminal conversion. The appellant also admitted that, in May 1999, she was caught taking a pair of shoes from a store but was not arrested. The appellant stated that she felt overwhelmed and had become depressed but could not explain how it led to her misconduct and stated that she had not sought counseling. She further stated that she did not believe that her employees knew about her arrest and the court said it would not be in the newspaper. Fortner stated, however, that the appellant’s arrest was reported by Oaktown, Indiana Postmaster Sheryl Ridge, who had been informed of it by Sullivan, Indiana Window Clerk Cheryl Morin. She further stated that a customer of the Sullivan Post Office had informed Morin and co-worker Bonita Wamsley of the arrest. *Id.*

¶5 On October 25, 1999, Manager Operations Programs Support Michael D. Armstrong issued a decision to remove the appellant, effective November 5, 1999, based on “the charge as stated in the notice [of proposed removal].” IAF, Tab 5, subtab 4C.

¶6 In the initial decision, the administrative judge stated that the agency specified as follows under the charge: “1) that in July 1999 the appellant was convicted on a charge of criminal conversion for switching price tags on a shirt and a dress and purchasing the shirt at a lower price, and 2) that in May 1999 the appellant took a pair of shoes from a shoe store without paying for them.” Initial Decision (I.D.) at 2. The administrative judge found that the appellant did not dispute the factual bases underlying the agency’s charge that she pled guilty to criminal conversion, was convicted, fined, and sentenced. He further found that she agreed that her conduct leading to her criminal conviction consisted of switching a price tag on a \$30 shirt and purchasing the shirt for a reduced amount. He also found that she admitted that she placed a \$10.50 price tag on a \$109.50 dress, attempted to purchase the item, and would have bought the dress for \$10.50 if the cashier had not questioned the price. I.D. at 2-3. The administrative judge further found that the appellant admitted that she took a pair of shoes from a Terre Haute, Indiana shoe store without paying for them “as specified in the agency’s charge.” I.D. at 3. The administrative judge found that, based on the undisputed documentary evidence and the appellant’s admission, the agency proved the charge and underlying specifications by preponderant evidence. I.D. at 3. The administrative judge also found a nexus between the appellant’s off-duty misconduct and the efficiency of the service. I.D. at 3-5. He further found that removal was a reasonable penalty. I.D. at 6-7.

¶7 On review, the appellant asserts that the administrative judge erred in his nexus and penalty determinations. Petition for Review (PFR) File, Tab 1. The agency has filed a timely response opposing the appellant’s petition for review. *Id.*, Tab 3.

ANALYSIS

Charge

¶8 We find that the administrative judge erred in interpreting the charge. *See, e.g., Dorsett v. U.S. Postal Service*, 75 M.S.P.R. 345, 348 (1997) (citing *Robinson v. Department of Veterans Affairs*, 72 M.S.P.R. 444, 449 n.3 (1996) (the Board, sua sponte, has refused to turn a blind eye to clear error affecting an appellant's rights, including an administrative judge's clear error of law)).

¶9 We first find confusion concerning whether the agency based the charge on the misconduct underlying the criminal conversion, the criminal conversion conviction, or both. The wording of the charge suggests that it was based on the underlying misconduct. IAF, Tab 5, subtab 4E. However, Fortner also indicated that the appellant pled guilty to criminal conversion. *Id.* Moreover, Fortner stated both that “[c]onviction of a violation of any criminal statute may be grounds for disciplinary action by [the agency]” as well as “[c]riminal conversion may be grounds for removal from [the agency].” *Id.*

¶10 In his prehearing memorandum, the administrative judge stated that the appellant did not dispute the factual basis of the agency's charge that she engaged in “criminal misconduct – criminal conversion.” He proceeded to describe the appellant's conduct leading to her criminal conversion conviction as consisting of “placing a \$10.50 price tag on a dress priced at \$109.50 and attempt[ing] to purchase it at \$10.50.” IAF, Tab 15. At the hearing's outset, the administrative judge corrected his memorandum to reflect that the appellant was also charged with purchasing a \$30 shirt for less than \$30 after she switched the price tag. Transcript (Tr.) at 5-7. Thus, the administrative judge's memorandum and prehearing correction indicated that the appellant was being charged with the underlying conduct. However, as previously noted, in the initial decision, the administrative judge described the specification as stating that the appellant was “convicted on a charge of criminal conversion.” I.D. at 2.

¶11 Because the appellant has not challenged the conviction, any error by the administrative judge in characterizing the charge, as it relates to the July 10, 1999 incident, was nonprejudicial. *Cf. Czubinski v. Department of the Treasury*, 76 M.S.P.R. 552, 556 (1997) (where a removal was based solely on the appellant's conviction and not on the underlying misconduct, and the conviction has been reversed, the removal must be reversed); *Payne v. U.S. Postal Service*, 69 M.S.P.R. 503, 508 (1996) (same). However, if the overlying charge required a conviction, and the May 1999 incident was considered a separate specification, that specification could not be sustained because the appellant was not arrested during that incident, much less convicted of any crime.

¶12 It is unnecessary to resolve that issue, however, because, contrary to the administrative judge's finding, the record does not show that the agency charged the appellant with the May 1999 incident of taking the shoes. In determining how charges are to be construed, the Board will examine the structure and language of the proposal notice. *Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 107 (citing *Schifano v. Department of Veterans Affairs*, 70 M.S.P.R. 275, 278 (1996)), *review dismissed*, 185 F.3d 879 (Fed. Cir. 1998) (Table). As indicated above, the notice of proposed removal did not charge the appellant with the May 1999 incident; rather, it simply mentioned the incident in describing what occurred during Fortner's July 26, 1999 interview with the appellant. IAF, Tab 5, subtab 4E.

¶13 Moreover, Armstrong's decision letter did not indicate that he considered the May 1999 incident as a specification under the charge. He stated that the appellant's "misconduct involved conversion; you attempted to deprive the store of monies for merchandise by changing price tags and then attempting to purchase the merchandise at a lower price," indicating that the misconduct with which she was charged was only the July 10, 1999 incident. IAF, Tab 5, subtab 4C. He simply referred to the May 1999 incident as an aggravating factor in considering the appropriate penalty. For example, he found that the appellant's

contention that she had engaged in criminal conversion only once was not “a mitigating factor” because she had acknowledged that she took the shoes in May 1999. He found that incident “an aggravating factor” and an indication that her “potential for rehabilitation [was] poor.” *Id.* He reiterated, in discussing the appellant’s rehabilitation potential, that it was not a one-time offense because she admitted to having stolen a pair of shoes from another store. *Id.* Furthermore, in his prehearing memorandum and correction to the memorandum at the hearing’s outset, the administrative judge did not mention the May 1999 incident as being part of the charge. IAF, Tab 15; Tr. at 5-7.

¶14 The Board will not sustain an agency action on the basis of a charge that could have been brought, but was not. *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981). Rather, it is required to adjudicate an appeal solely on the grounds invoked by the agency, and may not substitute what it considers to be a more appropriate charge. *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989). The Board adjudicates the charge as it is described in the agency’s proposal and decision notices. *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 276 (1998), *aff’d*, 194 F.3d 1336 (Fed. Cir. 1999) (Table). Accordingly, we find that the administrative judge erred in considering the May 1999 incident as a specification under the charge of “engaging in criminal misconduct – criminal conversion.” This error did not affect the correctness of his decision to sustain the charge, first because the specification was not part of the charge brought by the agency, and second, because, even if it was, one specification is sufficient to sustain a charge. *See, e.g., Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). However, we will consider the administrative judge’s error to the extent that it affected his analysis of the agency-imposed penalty.

Nexus

¶15 The appellant asserts that the administrative judge erred in finding a nexus between her off-duty misconduct and the efficiency of the service. PFR at 5-11. She suggests that the agency's standards of conduct cited by the administrative judge in finding nexus are not applied equally to all employees. PFR at 5-7. She further contends that both Fortner and Armstrong admitted that the appellant's misconduct had not hurt her ability to perform her fiduciary duties and responsibilities or her ability to supervise and to enforce standards of conduct for her subordinates. She asserts that Armstrong admitted that he did not know who the customer or employees were who reported the appellant's misconduct. PFR at 7-8. She also contends that the administrative judge erred in finding nexus because the agency failed to show that the appellant's misconduct rose to the level of egregiousness necessary to establish a rebuttable presumption, to produce evidence showing an adverse effect on any employee's performance or the agency's reputation, or to claim an adverse effect on its mission. PFR at 9. She contends that the administrative judge cited no evidence that the agency lost confidence in the appellant's job performance, as opposed to her moral character. PFR at 9-11.

¶16 The appellant has not supported her suggestion that the agency treated her disparately in applying its standards of conduct by specifically identifying any employees who were treated differently than she for such proven misconduct. Moreover, she has failed to show any prejudicial error in the administrative judge's nexus determination. The appellant held a high-level management position in which she had fiduciary responsibilities for up to \$25,000. Tr. at 15, 39; IAF, Tab 5, subtab 4C. Her off-duty misconduct of switching the price tags on merchandise and purchasing and attempting to purchase the merchandise at a reduced price establishes that she compromised the agency's trust in her ability to function in that supervisory position. *See, e.g., Fouquet v. Department of Agriculture*, 82 M.S.P.R. 548, ¶ 18 (1999) (finding a nexus between off-duty theft

and the appellant's position as a GM-14 Division Chief of Fiscal Operations). We therefore agree with the administrative judge that the agency proved a nexus between the sustained misconduct of "engaging in criminal misconduct – criminal conversion" and the appellant's position.

Penalty

¶17 The appellant asserts that removal exceeded the tolerable limits of reasonableness. PFR at 11-14. Citing *Toth v. U.S. Postal Service*, 76 M.S.P.R. 36, 39 (1997), she contends that the agency improperly did not consider any alternative sanctions, as evidenced by Armstrong's decision letter and testimony. She further contends that Armstrong erred in comparing her situation to that of a management employee who had been removed for manufacturing and trafficking in illegal drugs. She asserts that the administrative judge did not consider those issues in his initial decision. PFR at 12.

¶18 The appellant further disputes the administrative judge's finding that her actions in putting a \$10.50 price tag on a dress costing over \$100, and then purchasing a shirt by switching price tags after she had almost been caught, was cunning, surreptitious, and premeditated. Rather, she contends that her actions resulted from depression, that she testified that she had been diagnosed with depression and anxiety and had been prescribed medication, and that her actions showed extremely poor judgment exercised under a great deal of pressure and emotional problems. PFR at 13. The appellant asserts that her strong rehabilitation potential is evidenced by the genuine remorse she showed during the investigatory interview and in her response to the notice of proposed adverse action and in her breakdown during the hearing. She contends that the relatively isolated events will not have a lasting effect on her ability to supervise subordinate employees, and, even if so, simply show that she cannot be a manager or supervisor. Thus, she asserts that the penalty should be mitigated. PFR at 13-14.

¶19 The appellant also noted other factors she had identified as favoring mitigation, including the isolated nature of the incidents and the relatively de minimis value of the shirt, considering the difference between the price tag she placed on the shirt and its actual cost. PFR at 3. [The appellant testified without rebuttal that she paid around \$6 for the shirt, but that the shirt was actually less than \$30 because it was on sale. Tr. at 77]. She also pointed out that the incident occurred while she was off-duty and the items did not come into her possession as a result of her agency position. PFR at 3.

¶20 When the agency's charge is sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. In doing so, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. Thus, the Board will modify a penalty only when the Board finds that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty. The Board will correct the agency's penalty when all of the charges are sustained only to the extent necessary to bring it to the maximum penalty or the outermost boundary of the range of reasonable penalties. *See, e.g., Jacoby v. U.S. Postal Service*, 85 M.S.P.R. 554, ¶ 15 (2000); *see also LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). However, if the deciding official failed to appropriately consider the relevant factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), the Board need not defer to the agency's penalty determination. *See, e.g., Omites v. U.S. Postal Service*, MSPB Docket No. CH-0752-00-0241-I-1, slip op. ¶¶ 10-11 (Nov. 2, 2000); *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 39 (1999); *Toth*, 76 M.S.P.R. at 39-40.

¶21 In his decision letter, Armstrong acknowledged that the appellant raised several mitigating factors. However, the letter does not indicate that he considered any penalty less than removal, noting that he found her conduct so egregious that her years of service and satisfactory evaluations “do not mitigate the penalty,” and that removal was “consistent with the [a]gency’s penalties.” IAF, Tab 5, subtab 4C. In his testimony, Armstrong stated that he found that the agency had been consistent in imposing the removal penalty where the standards of conduct involving criminal misconduct had been violated, especially when the offenses “involved dishonesty”; he was aware that both craft employees and managers who had been convicted of criminal misconduct “where honesty was part of that,” had been removed from the Postal Service; and there was one case where the criminal conviction had been dismissed, but the employees were still removed because “they had demonstrated dishonest conduct.” Tr. at 42-43.

¶22 The appellant was convicted of criminal conversion under Indiana law. IAF, Tab 5, Subtab 4G. The statute provides that “[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor.” IND. CODE ANN. § 35-43-4-3 (West 2000). Under Indiana law, criminal conversion is a lesser included offense of theft and is properly considered a crime of dishonesty or false statement. *Winegar v. State*, 455 N.E.2d 398, 401 (Ind. App. 1983). We find no error in the deciding official’s characterization of the appellant’s criminal conduct as dishonest, or, the extent that it implied dishonesty, the AJ’s characterization of the conduct as cunning, surreptitious, and premeditated.

¶23 Nevertheless, Armstrong emphasized in both his decision letter and testimony that he believed that the appellant lacked rehabilitation potential because she had engaged in similar misconduct before by taking the shoes in May 1999. IAF, Tab 5, subtab 4C; Tr. at 38-41, 43. Admittedly, that misconduct was repeated can be an aggravating offense. *Cf. Omities*, slip op. ¶ 10 (noting that the appellant had not engaged in the charged misconduct or other misconduct in the past as

showing rehabilitation potential). However, the agency was aware of the appellant's taking of the shoes in May 1999 only because the appellant honestly admitted the incident in her interview with Fortner, thus weakening Armstrong's reliance on cases involving dishonesty as comparable to the appellant's.

¶24 Armstrong further found that the appellant's years of service and prior record were not sufficient to mitigate the penalty "[p]rimarily because of the seriousness of the offense." Tr. at 43. The seriousness of the offense, however, is not necessarily sufficient to outweigh the other *Douglas* factors. *Omites*, slip op. ¶ 10. Although Armstrong testified that removal was not the only penalty he considered imposing, he admitted that he did not identify in his decision letter any alternative penalties that he had considered. Tr. at 58. Moreover, Armstrong considered that the misconduct involving dishonesty, standing alone, represented a "strong character flaw which limits your potential for rehabilitation." IAF, Tab 5, Subtab 4C. That statement implies that the nature of the misconduct alone necessarily compels a conclusion that rehabilitative potential need not be seriously weighed. While that obviously may be true as to some particularly grave or heinous types of misconduct, we find that the fact that the appellant's misconduct was a criminal misdemeanor is but one factor to be considered in determining the maximum reasonable penalty. Thus, we find that Armstrong's treatment of the mitigating factors in his decision letter and testimony was not sufficiently substantive, and that it is appropriate not to defer to his penalty determination. *See, e.g., Blake*, 81 M.S.P.R. 394, ¶ 39.

¶25 As previously noted, we will consider the administrative judge's error in sustaining the May 1999 "specification" to the extent that it affected his analysis of the agency-imposed penalty. In evaluating the removal penalty, the administrative judge correctly acknowledged that the appellant's 26 years of federal service, all with the agency, with at least satisfactory performance and no prior disciplinary record, were mitigating factors. I.D. at 6-7; *see, e.g., Jacoby*, 85 M.S.P.R. 554, ¶ 17. He also correctly found that the appellant's offense was

very serious and that supervisors and employees with fiduciary duties are held to higher standards of conduct in considering the propriety of agency-imposed penalties. I.D. at 6; *see, e.g., Jacoby*, 85 M.S.P.R. 554, ¶ 17; *Hawkins v. U.S. Postal Service*, 35 M.S.P.R. 549, 552 (1987).

¶26 We find that the agency and the administrative judge failed to give sufficient weight to the appellant's evidence concerning her mental condition and erred in finding that she lacked rehabilitation potential. The administrative judge found that the appellant's failure to inform her doctor or seek mental health counseling concerning the incident raised questions about her willingness to obtain insight into her behavior. Thus, he found that she did not show good potential for rehabilitation. I.D. at 7. However, he acknowledged that she was being treated for depression, albeit by her "family physician." I.D. at 7. The appellant submitted evidence that she had been diagnosed with depression/anxiety and prescribed Paxil, an antidepressant, in early 1998, and that this diagnosis and prescribed medication had not changed in June 1999, shortly before the misconduct incident with which she was charged. IAF, Tab 1. Similarly, she testified that she went to see her doctor again in June 1999 about her conditions because she "felt the symptoms coming on again." Tr. at 81.

¶27 Moreover, although the appellant testified that she knew what she did was wrong and that the depression did not affect her ability to distinguish between right and wrong, Tr. at 88, 100, she also testified that she believed that her medical conditions affected her judgment, Tr. at 87. Similarly, Fortner testified concerning the July 1999 interview with the appellant that, although the appellant could not "give me a link" between her depression and misconduct, Tr. at 32-33, the appellant also stated that she did not know why she engaged in the misconduct "other than, you know, her depression and her anxiety," Tr. at 12. The appellant also testified that she is currently under a physician's care and taking medication. Tr. at 89. An appellant's action in seeking treatment for a medical condition that played a part in the charged misconduct indicates a

rehabilitation potential. *Hamilton v. U.S. Postal Service*, 84 M.S.P.R. 635, ¶ 19 (1999); *Bond v. Department of Energy*, 82 M.S.P.R. 534, ¶¶ 28-30 (1999).

¶28 Both the administrative judge and the agency stressed that the appellant had previously engaged in similar misconduct in May 1999 as showing that she lacked rehabilitation potential and as warranting an increased penalty. The administrative judge recognized, however, that the appellant honestly disclosed her May 1999 misconduct to the agency. I.D. at 7. Indeed, as previously noted, the agency would not have been aware of the May 1999 incident but for the appellant's disclosure. Contrary to the administrative judge's and the agency's conclusions, we find that the appellant's revelation of the prior incident shows that she possesses rehabilitation potential. Furthermore, the agency did not consider that the offense occurred off-duty and did not involve government property. The Board has found that both of these are mitigating factors. *See, e.g., Mallery*, 41 M.S.P.R. at 292-93; *Thurmond*, 41 M.S.P.R. at 231-32.

¶29 In that regard, we find the removal penalty inconsistent with Board precedent. In *Kelly v. Department of Health & Human Services*, 46 M.S.P.R. 358 (1990), the Board mitigated to a 90-day suspension the removal of a GS-10 Claims Representative based on illegal conduct, i.e., theft, on two occasions. The charge arose from the appellant's convictions for off-duty shoplifting on two dates. *Id.* at 359. The appellant had a past disciplinary record of a one-day suspension and reprimand, both for tardiness, *id.* at 359-60, and the Board found her misconduct serious, *id.* at 362. Nonetheless, the Board found that it did not outweigh the appellant's 23 years of federal service, satisfactory performance ratings, and rehabilitation potential. It further found that, although the appellant was in a position of trust involving management of government funds, her misconduct did not affect her performance of her functions; the items she took did not come into her possession as a result of her position; and no evidence linked her to any work-related thefts. It also found that her mental condition (depression) should be considered in determining the penalty. The Board concluded that the sustained

charge “does not demonstrate such pervasive conduct that a 90-day suspension would not deter future misconduct and be an effective sanction.” *Id.* at 362-63.

¶30 Similarly, in *Hawkins*, 35 M.S.P.R. at 550, the Board mitigated to a demotion to a nonsupervisory position the removal of a Postmaster, who had been charged with, and convicted of, shoplifting. The Board found that the appellant’s misconduct was serious and directly affected her reputation for honesty and integrity as a Postmaster. It also found that the appellant had more than 23 years of federal service, including 19 with the agency; no disciplinary record; and a long record of highly satisfactory performance. It further found that she was experiencing severe mental stress and depression that contributed to her misconduct and was a good candidate for rehabilitation. *Id.* at 552.

¶31 Likewise, in this case, the appellant had many years of service with the agency, a satisfactory performance record, and no disciplinary record. In addition, the evidence shows that the appellant was experiencing depression, for which she is being treated, that played a part in the charged misconduct. Moreover, we find that the appellant’s honesty in admitting her previous misconduct, which could have come to the agency’s attention only through her admission, *see, e.g.*, Tr. at 86, shows that she exhibits good rehabilitation potential. We thus find that the maximum reasonable penalty is a demotion to the next lower-graded nonmanagerial position with the least reduction in grade and pay. *See Stabile v. Department of Defense*, 85 M.S.P.R. 253, ¶¶ 6-7 (2000).

ORDER

¶32 We ORDER the agency to cancel the appellant's removal and to substitute a demotion to the next lower-graded nonmanagerial position with the least reduction in grade and pay effective November 5, 1999. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶33 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service regulations, as appropriate, 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 calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶34 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶35 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶36 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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of

the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Washington, D.C.

Robert E. Taylor
Clerk of the Board