

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

2007 MSPB 149

Docket No. CH-0752-06-0015-X-1

**Keith R. Welch,
Appellant,**

v.

**Department of Justice,
Agency.**

June 11, 2007

Keith R. Welch, Peoria, Illinois, pro se.

Betty J. Gannon, Phoenix, Arizona, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 This case is before the Board on a Recommendation of the administrative judge finding the agency in noncompliance with the final order in the underlying appeal which upheld the agency's indefinite suspension action pending the disposition of criminal charges. Specifically, the administrative judge found that the agency should have retroactively restored the appellant to his position of Cook Supervisor effective May 10, 2006, after the criminal charges against him were dismissed. For the reasons set forth below, we find the agency is now in compliance and dismiss the petition for enforcement as moot.

BACKGROUND

¶2 On September 2, 2005, the Department of Justice, Bureau of Prisons, indefinitely suspended the appellant from his position of Cook Supervisor because he had been indicted for criminal offenses that could result in a sentence of imprisonment. *See Welch v. Department of Justice*, MSPB Docket No. CH-0752-06-0015-I-1 (Feb. 15, 2006); Compliance File (“CF”), Tab 9, Sub-tab 4k. In the Board’s decision sustaining the indefinite suspension, the administrative judge found that the resolution of the criminal charges constituted the “determinable condition” that would end the indefinite suspension. *Id.*, at 2.

¶3 On May 10, 2006, all criminal charges were dismissed against the appellant. CF, Tab 18. On May 18, 2006, the appellant requested that the agency reinstate him. *Id.* Because the agency failed to reinstate him until August 10, 2006, and because the agency did not provide him with any back pay and benefits for the period between May 10, 2006, and August 10, 2006, the appellant filed a petition for enforcement. In his petition, the appellant requested that the Board order the agency to comply with the Board’s decision that he remain suspended only until the resolution of the criminal charges. CF, Tab 1.

¶4 On November 7, 2006, the administrative judge issued a Recommendation granting the appellant’s petition for enforcement. CF, Tab 18. The administrative judge observed that the sole reason for the indefinite suspension was the appellant’s criminal indictment, and that the agency had no plan to issue any other disciplinary action against him. Thus, the administrative judge concluded that the agency should have terminated the indefinite suspension on May 10, 2006, the day that all criminal charges were dismissed. The administrative judge, accordingly, recommended that the agency retroactively restore the appellant to the position of Cook Supervisor effective May 10, 2006. *Id.*

ANALYSIS

¶5 An indefinite suspension action based on criminal charges must have an ascertainable end which usually entails the resolution of the criminal charges. *See Dunnington v. Department of Justice*, 956 F.2d 1151, 1156 (Fed. Cir. 1992); *Campbell v. Defense Logistics Agency*, 31 M.S.P.R. 691, 694 (1986), *aff'd*, 833 F.2d 1024 (Fed. Cir. 1987) (Table). Here, the agency's decision letter notified the appellant that the indefinite suspension would continue "until the resolution of the criminal charges and or any administrative action for misconduct associated with these criminal charges." CF, Tab 9, Sub-tab 4n. The record shows that the criminal charges were dismissed against the appellant on May 10, 2006, and that the agency did not contemplate effecting any further disciplinary action relating to the criminal charges in the foreseeable future. *Id.*, Tab 9, Sub-tab 4j; Tab 15. Thus, as correctly found by the administrative judge, the appellant should have been restored to his position of Cook Supervisor on May 10, 2006. Moreover, because the appellant was not reinstated until August 10, 2006, the appellant was entitled to back pay and benefits for the period May 10, 2006, through August 9, 2006.

¶6 The agency has now submitted evidence showing that it retroactively effected the appellant's return to duty effective May 10, 2006, and rescinded the indefinite suspension on that date. The agency also has submitted evidence that it paid the appellant back pay for the period May 10, 2006 through August 9, 2006. CRF, Tab 4. The appellant has not responded to the agency's evidence of compliance.

¶7 In the Recommendation's "Notice to the Parties," the administrative judge advised the appellant in bold print that "[i]f the appellant does not respond to the agency's evidence of compliance within 20 days, the Board may assume that the appellant is satisfied and dismiss the petition for enforcement." We find that the agency's evidence of compliance appears to satisfy the concerns of the administrative judge and the appellant. In the absence of a response by the

appellant, the Board finds that the appellant is satisfied with the agency's actions. Therefore, based on the evidence submitted by the agency, we find the agency in compliance with the Board's final order of February 15, 2006, and we dismiss the petition for enforcement as moot.

ORDER

¶8 This is the final decision of the Merit Systems Protection Board in this enforcement proceeding. 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 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 the Board's regulations and other related material, at

our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.