

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

**Spencer E. Brackins, Jr., Appellant,**

**v.**

**Office of Personnel Management, Agency.**

Docket Number DA-0731-93-0327-I-1

Date: December 30, 1993

Edward Larvadain, Jr., Alexandria, LA, for appellant.

Joseph E. McCann, Washington, DC, for agency.

**BEFORE**

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

**OPINION AND ORDER**

The Office of Personnel Management (OPM) has petitioned for review of an initial decision, dated August 3, 1993, which did not sustain its decision to find the appellant unsuitable for Federal employment. For the reasons discussed below, we DISMISS the agency's petition as moot.

**BACKGROUND**

The appellant filed an appeal with the Board's regional office from a decision by OPM, dated March 10, 1993, which found that he was unsuitable for Federal employment; directed the Department of Veterans Affairs (employing agency) to remove him from his position as a nursing assistant; and barred him from competition for, or appointment to, any position in the Federal competitive service until November 12, 1995. Initial Appeal File (IAF), Tab 1. OPM based its decision upon the appellant's alleged falsification of his employment application documents. IAF, Tab 4, Subtabs 2a, 2b and 2e.

The administrative judge reversed OPM's decision, finding that OPM failed to support its negative suitability determination by a preponderance of the evidence.

IAF, Tab 11. The administrative judge found the appellant's testimony, that he had misread the directions and that the employing agency was fully aware of his past record both prior to and during the application process, credible and supported. *Id.* In addition, the administrative judge determined, based upon testimony, that the employing agency viewed the appellant's history of problems with alcohol and related criminal convictions as a positive factor in the decision to hire him. In fact, the appellant's problems with alcohol were the impetus for his participation in the work-release program at the employing agency, which in turn led to the decision to hire him. *Id.*

Consequently, the administrative judge did not sustain OPM's negative suitability determination; ordered OPM to cancel its decision letter dated March 10, 1993; and ordered OPM to inform the employing agency that the appellant should be placed back on its rolls. IAF, Tab 11 at 6. In the event that OPM petitioned for review of his decision, the administrative judge ordered it to provide interim relief in accordance with Section 6 of the Whistleblower Protection Act, 5 U.S.C. § 7701(b)(2)(A), effective upon the issuance of the initial decision. *Id.*

OPM has filed a petition for review of this decision and has submitted evidence purporting to comply with the administrative judge's order for interim relief. Petition for Review (PFR), PFR File, Tab 1. The appellant has responded in opposition. PFR File, Tabs 3 and 4.

## ANALYSIS

### Timeliness

OPM filed its petition for review on September 7, 1993. PFR File, Tab 1. The administrative judge had notified the parties that the initial decision would become final on September 6, 1993, unless a petition for review were filed by that date. IAF, Tab 11 at 7. The appellant moved for dismissal of the petition for review, alleging that it was untimely filed. PFR File, Tab 3. OPM responded, noting that September 6, 1993, was the Labor Day holiday and arguing, therefore, that the petition was timely filed on September 7, 1993. PFR File, Tab 5.

We find that OPM timely filed its petition for review and deny the appellant's motion to dismiss. The Board's regulations provide that, if the last day for filing falls on a Federal holiday, the filing period will include the first workday after that date. 5 C.F.R. § 1201.23. As September 6, 1993, was a Federal holiday, OPM timely filed its petition on September 7, 1993.

### Interim Relief

The Board's regulations require that a petition for review by an agency be accompanied by evidence showing that it has complied with the administrative judge's order for interim relief. 5 C.F.R. § 1201.115(b). Under the circumstances of this case, we find that OPM, at whose direction the employing agency removed the appellant, is subject to the Board's interim relief regulations. *Cf. Steele v. Office of Personnel Management*, 57 M.S.P.R. 458, 463 (1993) (the Board may award interim relief in appeals from OPM reconsideration decisions). OPM has not argued otherwise.

Upon review of OPM's evidentiary showing regarding interim relief, we find that the action that is the subject of this appeal has been removed from controversy. When an agency exceeds the administrative judge's order for interim relief and complies with the order for final relief by cancelling the action that is the subject of the appeal, then the matter is effectively removed from controversy, and the agency's petition for review is rendered moot. *Cooper v. Department of the Air Force*, 57 M.S.P.R. 120, 121 (1993); *Edney v. Department of the Treasury*, 56 M.S.P.R. 248, 250 (1993).

In this appeal, OPM has submitted evidence showing that it has "cancelled its March 10, 1993, determination, and instructed the employing agency to place [the appellant] back on the rolls." PFR File, Tab 1. OPM enclosed copies of letters sent by OPM to both the employing agency and the appellant, noting the cancellation of the negative suitability determination and the directive to restore the appellant to his former position. *Id.* Thus, OPM has cancelled the action at issue, exceeded the requirements for interim relief, and fully complied with the administrative judge's order for final relief.

Accordingly, we find that OPM's cancellation of its suitability determination, along with its instruction to the employing agency to return the appellant to its rolls, has effectively disposed of the cause of action, leaving no appealable matter for the Board to adjudicate. The matter has been removed from controversy, and we dismiss OPM's petition for review as moot.

### **ORDER**

We ORDER OPM to cancel its decision letter of March 10, 1993, and to direct the employing agency to restore the appellant effective March 10, 1993. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed.Cir.1984). OPM must accomplish these actions within 20 days of the date of this decision.

We also ORDER OPM to direct the employing agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under OPM'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

employing agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the employing 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 employing 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 OPM and the employing agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which OPM and the employing agency believe they have fully complied. If not notified, the appellant should ask either OPM or the employing agency, or both, about their efforts to comply.

Within 30 days of OPM's and the employing 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 that there is insufficient compliance, and should include the dates and results of any communications with OPM and the employing agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision remains the final decision of the Board with regard to the merits of the appeal. 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, N.W.  
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.