

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

2009 MSPB 166

Docket No. NY-0752-08-0344-I-1

**Cyril L. Edwards,
Appellant,**

v.

**United States Postal Service,
Agency.**

August 28, 2009

William E. Burkhart, Esquire, Rochester, New York, for the appellant.

Jennifer L. Pease, Esquire, Windsor, Connecticut, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision (ID) that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, REVERSE the appellant's suspension, and REMAND the appeal for further adjudication of the appellant's retaliation claim.

BACKGROUND

¶2 The appellant was employed by the agency as a Supervisor, Distribution Operations, EAS-17.¹ Initial Appeal File (IAF), Tab 25 at 30. On July 2, 2008, he received written notice of his emergency placement in a non-duty, non-pay status effective the same day. IAF, Tab 6 at 9. The notice did not indicate how long the appellant would remain in that status. The agency informed the appellant of his right to appeal the action internally, but it did not provide Board appeal rights. *Id.*

¶3 On August 21, 2008, the appellant filed a Board appeal challenging his July 2, 2008 placement in a non-duty status. IAF, Tab 1. He requested a hearing. *Id.* at 2. In its response to the appeal, the agency argued that the Board lacked jurisdiction over the appeal because the appellant was not in a non-duty, non-pay status for more than 14 days. IAF, Tab 6 at 5-6. Specifically, the agency argued that the appellant was placed on paid administrative leave beginning on the 15th day after his placement in a non-duty status. *Id.* at 6. The agency later specified that, at the time the appeal was filed, the appellant's time and attendance records showed that the appellant was on leave without pay (LWOP) from July 3 through July 11, 2008, and that he was credited with working the week of July 12 through 18, 2008 (which included his regularly scheduled days off). *See* IAF, Tab 22 at 4. The agency noted that it had made retroactive adjustments to the appellant's time and attendance records on September 11 and October 8, 2008, but that the net result of those adjustments was that the appellant was still not intentionally placed in a non-duty, non-pay status for more than 14 days. *Id.* at 5, 7-8.

¶4 The appellant argued that he was in a non-duty, non-pay status for a total of 16 days between June 27 and August 22, 2008. IAF, Tab 26 at 4-7. He

¹ The agency demoted the appellant after the present appeal was filed. The appellant filed a separate appeal, *Edwards v. U.S. Postal Service*, MSPB Docket No. NY-0752-09-0137-I-1, challenging his demotion. That appeal is currently pending in the New York Field Office.

submitted pay stubs to support his position. IAF, Tab 27. Those pay stubs show that the appellant was not charged with any LWOP through the first 13 pay periods of 2008, and that he was charged 16 hours of LWOP during pay period 14, 40 hours of LWOP during pay period 15, no LWOP during pay period 16, and 40 hours of LWOP during pay period 17.² *Id.*

¶5 After holding the appellant's requested hearing, the administrative judge (AJ) issued an ID dismissing the appeal for lack of jurisdiction. IAF, Tab 49. She found that the appellant had not been suspended for more than 14 days at the time he filed his appeal. *Id.* at 4-5.

ANALYSIS

The agency suspended the appellant for more than 14 days.

¶6 Generally, the Board's jurisdiction is determined by the nature of an agency's action against a particular appellant at the time an appeal is filed with the Board. *Himmel v. Department of Justice*, [6 M.S.P.R. 484](#), 486 (1981). The Board has jurisdiction over suspensions of more than 14 days. [5 U.S.C. §§ 7512\(2\)](#), 7513(d), 7701. A "suspension" is the temporary placement of an employee in a non-pay, non-duty status for disciplinary reasons. [5 U.S.C. § 7501\(2\)](#).

¶7 At the time the appellant filed his appeal, he had been in a non-pay, non-duty status from July 3 through July 10 (a period of 8 days), and from August 1 through August 7, 2008 (a period of 7 days),³ but he had been paid for the

² Pay period 14 of 2008 covered the period from June 21 through July 4, 2008. Pay period 15 covered the period from July 5 through July 18, 2008. Pay period 16 covered the period from July 19 through August 1, 2008. Pay period 17 covered the period from August 2 through August 15, 2008. IAF, Tab 32 at 10.

³ Both of these periods include the appellant's scheduled days off of Monday and Tuesday. *See* IAF, Tab 6 at 15 (indicating that the appellant's schedule was "SS—WTF.")

intervening period from July 11 through July 31, 2008.⁴ IAF, Tab 6 at 10, 13-20. There exists no precedent for combining nonconsecutive suspensions for purposes of finding Board jurisdiction. *Stanton v. Department of Transportation*, [109 M.S.P.R. 485](#), ¶ 9 (2008). Therefore, at the time the appellant filed his appeal, he had not been subjected to a suspension of 14 days or more.⁵

¶8 However, the Board has recognized that *consecutive* suspensions may be combined when they are based on the same reason, while leaving open the possibility that non-consecutive suspensions may be combined when (1) the suspensions are based on the same reason and (2) there is evidence that the agency attempted to circumvent Board jurisdiction by imposing multiple suspensions of 14 days or less. *Id.*, ¶ 10. Even though the appellant's separate periods of unpaid absences were apparently based on the same reason, the evidence does not establish that the agency separated the appellant's absences in order to circumvent Board jurisdiction. The agency claimed its intention was to place the appellant in a non-duty, non-pay status for no more than 14 days, and to grant him paid administrative leave thereafter. Hearing Tape (HT), Side 2A. It alleged the appellant's separate periods of unpaid absences were the result of errors in processing his time and attendance records. *Id.* The appellant has not

⁴ During the period at issue in this appeal, the appellant's scheduled tour of duty began at 10:00 in the evening and ended at 6:30 the following morning. *See, e.g.*, IAF, Tab 6 at 13. Any reference in this Opinion and Order to the appellant's duty and pay status on a particular date relates to the date on which the appellant's scheduled tour of duty began. Thus, when we indicate that the appellant was paid for July 11, 2008, we mean that he was paid for the tour of duty beginning at 10:00 p.m. on July 11, 2008, and continuing through 6:30 a.m. on July 12, 2008. *See id.* at 16.

⁵ In calculating the length of the appellant's suspension in this case, we have counted each tour of duty as a day. Applicable regulations define the word "day" for these purposes as a calendar day. [5 C.F.R. § 752.402\(a\)](#). It could be argued that an employee who is suspended for a tour of duty beginning on one day and ending on the following day has been suspended for 2 calendar days. We need not resolve that issue here because we find that the appellant was suspended for more than 14 days under either approach.

established that the agency was actively seeking to suspend him for more than 14 days while also depriving the Board of jurisdiction over the suspension. We therefore find insufficient evidence to combine the appellant's non-consecutive unpaid absences, as they stood at the time the appeal was filed, for jurisdictional purposes.

¶9 On September 11, 2008, several weeks after the appeal was filed, the agency retroactively amended the appellant's time and attendance records. As a result of those amendments, the appellant was placed on LWOP for the week of July 12 through July 18, 2008, and on administrative leave for the week of August 2 through August 8, 2008. IAF, Tab 6 at 11-12. Therefore, as of September 11, 2008, the appellant was in a non-duty, non-pay status for 16 days, from July 3 through July 18, 2008.

¶10 Although the Board generally looks only at the nature of an action at the time an appeal is filed to determine jurisdiction, *Himmel*, 6 M.S.P.R. at 486, the appellant could not have been expected to file a second appeal challenging his suspension while the first such appeal was still pending. We therefore find that the Board acquired jurisdiction over the appeal on September 11, 2008, based on the appellant's suspension of more than 14 days.

¶11 On October 8, 2008, the agency amended the appellant's time and attendance records for the week of July 12 through July 18, 2008 a second time. As a result of that amendment, the appellant was on LWOP for 24 hours and on administrative leave for 16 hours. IAF, Tab 28 at 10. Therefore, as of October 8, 2008, the appellant was in a non-duty, non-pay status for 13 days, from July 4 through July 16, 2008. However, an agency's unilateral modification of its adverse action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture, or unless the agency completely rescinds the action being appealed. *Himmel*, 6 M.S.P.R. at 486. The agency has not completely rescinded the appellant's suspension and the appellant has not agreed to divestiture. Therefore, the agency's October 8, 2008

amendments to the appellant's time and attendance records did not divest the Board of jurisdiction over the suspension.

The agency deprived the appellant of minimum due process.

¶12 The appellant argued in his initial appeal that the agency did not inform him of the basis for his suspension, IAF, Tab 1 at 5, and he argued in his post-hearing brief that he was denied minimum due process, IAF, Tab 45 at 4-5. The agency did not address the due process issue, arguing instead that the Board lacked jurisdiction over the appeal. *See, e.g.*, IAF, Tab 46 at 5-7. The administrative judge did not reach the due process issue in light of her jurisdictional determination. *See* IAF, Tab 49 at 4-5.

¶13 As a supervisory employee of the Postal Service, the appellant was subject to the provisions of subchapter II of chapter 75 of title 5 of the United States Code. [39 U.S.C. § 1005\(a\)\(4\)\(A\)\(ii\)\(I\)](#). Therefore, he had a constitutionally protected property interest in his employment. *See Clark v. U.S. Postal Service*, [85 M.S.P.R. 162](#), ¶ 1 (2000). He was thus entitled to minimum due process regarding his suspension, typically meaning notice of the charges, an explanation of the agency's evidence, and an opportunity to respond. *Id.* If the agency deprived the appellant of due process in suspending him, the suspension must be reversed due to the constitutional violation. *Id.*, ¶¶ 1, 6.

¶14 “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Gilbert v. Homar*, [520 U.S. 924](#), 930 (1997) (quoting *Morrissey v. Brewer*, [408 U.S. 471](#), 481 (1972)). In the present case, in its suspension notice, the agency cited Employee and Labor Relations Manual § 651.4, which allows it to place an employee on immediate suspension for various reasons, but it did not specify the reason for the appellant's suspension. IAF, Tab 6 at 9. Further, it gave the appellant written notice of his suspension and an opportunity to file an internal appeal only after he had been placed in a non-duty, non-pay status. *Id.* Although the absence of any pre-suspension process is not a per se constitutional violation, *see Homar*, 520 U.S. at 930 (citing

Parratt v. Taylor, [451 U.S. 527](#) (1981), *overruled in part on other grounds*, *Daniels v. Williams*, [474 U.S. 327](#) (1986)), the situations in which such a procedure is constitutionally permissible are rare. “An important government interest, accompanied by a substantial assurance that the deprivation [of property] is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.” *Homar*, 520 U.S. at 930-31 (quoting *Federal Deposit Insurance Corporation v. Mallen*, [486 U.S. 230](#), 240 (1988)). Thus, a public employee may be suspended with little or no pre-suspension process where the employee has been charged with a serious crime. *Homar*, 520 U.S. at 933-34; *Rawls v. U.S. Postal Service*, [94 M.S.P.R. 614](#), ¶¶ 15-17 (2003). In those cases, the imposition of formal criminal charges by an independent body provides assurance that the suspension is not “baseless or unwarranted.” *Homar*, 520 U.S. at 934 (citing *Mallen*, 486 U.S. at 240); *Rawls*, [94 M.S.P.R. 614](#), ¶ 16.

¶15 In the present case, the agency did not assert that the appellant had been charged with any crime. Nor did the agency identify any other fact that would provide comparable assurance that the appellant’s suspension was not baseless or unwarranted. Therefore, the agency was constitutionally required to provide the appellant with notice of the basis for the suspension and an opportunity to respond before the suspension took effect. The agency’s failure to do so deprived the appellant of minimum due process and accordingly we must REVERSE the suspension. *See Clark*, [85 M.S.P.R. 162](#), ¶¶ 1, 6.

The appeal must be remanded for further adjudication of the appellant’s retaliation claim.

¶16 The appellant claimed that the agency suspended him in retaliation for prior equal employment opportunity (EEO) activity. *See IAF*, Tab 8 at 4. He may be entitled to compensatory damages based on his outstanding retaliation claim. *See Simonton v. U.S. Postal Service*, [85 M.S.P.R. 189](#), ¶ 14 (2000). Although he has not yet sought compensatory damages, there is no indication that

he ever received the appropriate information with respect to any such damages claim. *See Harris v. Department of the Air Force*, [96 M.S.P.R. 193](#), ¶ 11 (2004). We therefore REMAND the appeal so that the administrative judge can inform the appellant of the requirements for requesting compensatory damages, *see* [5 C.F.R. § 1201.204\(b\)](#), and give him an opportunity to comply with those requirements. *Harris*, [96 M.S.P.R. 193](#), ¶ 12.

¶17 If the appellant properly requests compensatory damages, the administrative judge shall adjudicate his retaliation claim. We note that the administrative judge informed the parties of their respective burdens in connection with the retaliation claim. IAF, Tab 29 at 1-2. We also note that the hearing in this matter included some testimony concerning retaliation. However, it is unclear whether the record on the retaliation claim was fully developed. Therefore, if the appellant properly requests compensatory damages, the administrative judge should determine whether a supplemental hearing on the retaliation claim is appropriate.

ORDER

¶18 We remand the appellant's retaliation claim for further adjudication consistent with this Opinion and Order. *See Harris*, [96 M.S.P.R. 193](#), ¶ 12.

¶19 Pending the remand proceedings on the appellant's retaliation claim, we ORDER the agency to REVERSE the appellant's suspension and to restore the appellant effective July 3, 2008. *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. 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.

¶20 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 to describe 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\(b\)](#).

¶21 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 in 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\(a\)](#).

¶22 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶23 On remand, the administrative judge will provide notice regarding the appellant's right to request attorney fees and to request further review.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.