

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

2009 MSPB 176

Docket No. PH-0752-08-0442-I-1

**James M. Norton,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

August 31, 2009

Michael L. Speker, Esquire, Washington, D.C., for the appellant.

Kenyatta McLeod-Poole, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has filed a petition for review asking us to reconsider the administrative judge's initial decision. The appellant has filed a motion to dismiss the agency's petition on the ground that the agency has not complied with the initial decision's interim relief order. For the following reasons, we GRANT the appellant's motion and DISMISS the agency's petition.

BACKGROUND

¶2 The agency removed the appellant from his GS-14 Health Systems Specialist position, effective May 16, 2008. The removal, however, was not effected because the appellant retired on May 16, 2008. Initial Appeal File

(IAF), Tab 11, subtabs 4b, 4c. The Board retains jurisdiction over an appeal where an employee retires when faced with an agency's final decision to remove him. *Mays v. Department of Transportation*, [27 F.3d 1577](#), 1579-81 (Fed. Cir. 1994). Further, in such cases, the Board analyzes the appeal as a removal action. *Richards v. Department of Veterans Affairs*, [74 M.S.P.R. 17](#), 19 (1997).

¶3 The appellant filed an appeal of the agency's removal action. IAF, Tab 1. After conducting a hearing, the administrative judge reversed the action, finding that the agency had failed to prove by a preponderance of the evidence the charges against the appellant, and ordered the agency to provide the appellant with interim relief under [5 U.S.C. § 7701\(b\)\(2\)\(A\)](#), if a petition for review was filed. IAF, Tab 20. The agency filed a timely petition for review of the initial decision. Petition for Review File (PFRF), Tab 1. In his response in opposition to the agency's petition for review, the appellant, in part, moved to dismiss the petition on the basis that the agency has failed to comply with the interim relief order. *Id.*, Tab 5.

ANALYSIS

¶4 Under the Board's regulation, an agency's petition for review "must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. [§] 7701(b)(2)(A)(ii) and (B)." See [5 C.F.R. § 1201.115\(b\)\(1\)](#). The agency's failure to provide the required certification of compliance with an interim relief order "may result in the dismissal of the agency's petition or cross petition for review." [5 C.F.R. § 1201.115\(b\)\(4\)](#). The agency's certification must show, at a minimum, that it has appointed the appellant to a position carrying the proper title, grade, and rate of pay, and that the appointment was effective as of the date of the initial decision. See, e.g., *Moore v. U.S. Postal Service*, [78 M.S.P.R. 80](#), 83 (1998).

¶5 When the certification is missing in an agency's petition for review, the Clerk of the Board generally will issue an order directing the agency to file evidence and argument showing why the petition should not be dismissed for failure to comply with the interim relief order. [5 C.F.R. § 1201.115\(b\)\(2\)](#). However, the Board does not need to issue a show cause order in this case because the agency's petition clearly shows that it is on notice of the deficiency in the petition for review. *See Johnson v. Department of Justice*, [67 M.S.P.R. 494](#), 497 (1995), *modified on other grounds by Haebe v. Department of Justice*, [81 M.S.P.R. 167](#) (1999). Indeed, in lieu of the required certification, the agency argues that the administrative judge erred in ordering interim relief because the appellant is receiving a retirement annuity and, therefore, is not suffering any undue hardship by waiting for the final order of the Board. PFRF, Tab 1 at 3. Although the agency does not explicitly acknowledge that it has not restored the appellant to his former position, or provided other appropriate relief under [5 U.S.C. § 7701\(b\)\(2\)](#), the appellant's response confirms that the agency has not taken any action to comply with the administrative judge's interim relief order. PFRF, Tab 5.

¶6 The agency requests that the Board review the initial decision despite the violation of the interim relief order. PFRF, Tab 1 at 3-4; *see Guillebeau v. Department of the Navy*, [362 F.3d 1329](#), 1332-33 (Fed. Cir. 2004) (when an agency fails to comply with an interim relief order, dismissal of a petition for review by the Board is discretionary, not mandatory). In making this argument, the agency cites to four decisions in which the Board has found that the interim relief ordered was inappropriate. *See Sink v. Department of Energy*, [110 M.S.P.R. 153](#) (2008) (interim relief was inappropriate in an involuntary retirement appeal where the employee's position had been abolished in a valid agency reorganization and the employee declined a directed geographic reassignment to another position); *Armstrong v. Department of Justice*, [107 M.S.P.R. 375](#) (2007) (interim relief was inappropriate in a whistleblower

appeal of a denial of promotion where the appellant subsequently resigned from the agency and transferred to another agency); *Davis v. Department of Justice*, [61 M.S.P.R. 92](#) (Board found that interim relief is generally inappropriate in a restoration appeal where the appellant is receiving Office of Workers' Compensation Benefits because doing so could result in the agency's payment of monies in contravention of [5 U.S.C. § 8116\(a\)](#)), *aff'd*, 43 F.3d 1485 (Fed. Cir. 1994) (Table); *Siu v. Office of Personnel Management*, [59 M.S.P.R. 394](#) (1993) (Board found that ordering interim relief may be applicable to Office of Personnel Management (OPM) retirement appeals, but administrative judges should exercise caution in granting interim relief in such appeals because doing so may result in OPM's payment of monies in contravention of its statutory authority).

¶7 It is well established that the purpose of the statutory interim relief provision is not to make the appellant whole at the interim relief stage of the proceedings. *Ginocchi v. Department of the Treasury*, [53 M.S.P.R. 62](#), 71 n.6 (1992); *see, e.g.*, H.R. Rep. No. 100-274, at 28-29 (1987) (back pay not to be paid before Board's decision is final). Rather, the intent of interim relief is to protect the appellant from hardship during the pendency of his appeal if he prevails in the initial decision. *Herrin v. Department of the Air Force*, [95 M.S.P.R. 536](#), ¶ 15 (2004); *Smith v. Department of Veterans Affairs*, [59 M.S.P.R. 340](#), 350 (1993). More generally, interim relief is to benefit both the agency and the appellant by limiting the waste of human and financial resources during the petition for review process. *See* H.R. Rep. No. 100-274, at 29; *Herrin*, [95 M.S.P.R. 536](#), ¶ 15; *Ginocchi*, 53 M.S.P.R. at 69-70. When a removal action is reversed, it is a fundamental element of interim relief that the appellant be reinstated with pay effective as of the date of the initial decision. *Herrin*, [95 M.S.P.R. 536](#), ¶ 15; *Lambert v. Department of the Navy*, [85 M.S.P.R. 130](#), ¶ 7 (2000). Further, an administrative judge's exercise of her discretion to order interim relief is subject

to challenge on petition for review as an abuse of discretion. *Armstrong*, [107 M.S.P.R. 375](#), ¶ 11.

¶8 In this case, the agency has not shown that the administrative judge abused her discretion in ordering the appellant's reinstatement with pay in the interim relief order. In interpreting our statutory obligation to provide interim relief, the Board has found it inappropriate in two general circumstances. The first circumstance occurs where interim relief is clearly impractical or is outside the scope of the Board's authority to provide the relief ordered. For example, in an appeal of a suspension without pay, the Board has found that interim relief normally should not be provided if the suspension had concluded and the appellant had been returned to paid duty status at the time that the initial decision was issued. *Edwards v. Department of the Navy*, [62 M.S.P.R. 174](#), 177 (1994).

¶9 In *Sink*, which is the primary case relied upon by the agency, we found the interim relief order was erroneous under the particular circumstances of that appeal because the appellant's position had been abolished in a legitimate reorganization, the appellant had refused to accept a geographic reassignment to an appropriate position, and the appellant had retired based upon agency-provided misinformation while on administrative leave awaiting the agency's removal decision on his refusal to accept the reassignment. *Sink*, [110 M.S.P.R. 153](#), ¶ 17. In that case, we were concerned that the scope of interim relief should have taken into account the appellant's refusal to accept a directed reassignment, and that restoration to duty placed the appellant in a better position than a return to status quo ante. *Id.*, ¶¶ 18-22. Similarly, in *Armstrong*, as a practical matter, the agency could not comply with the interim relief order to promote the appellant because he was no longer an employee of the agency, having resigned after filing his appeal. *Armstrong*, [107 M.S.P.R. 375](#), ¶ 13. In the instant case, the agency has failed to show that there are any practical impediments that would prevent it from restoring the appellant to his former position or that his restoration to his

former position would have been beyond the scope of the Board's ability to provide relief.

¶10 In the second circumstance, the Board has advised administrative judges that they should exercise caution in ordering interim relief in cases where the appellants are receiving workers' compensation benefits or they are seeking an increase in the retirement benefits that they are receiving and the administrative costs required to prevent the appellants from receiving payment of monies in contravention of statutory authority would be unduly burdensome when weighed against the fact that the appellants are receiving some income. *See Davis*, 61 M.S.P.R. at 96; *Siu*, 59 M.S.P.R. at 396. In this appeal, the agency has failed to show that the administrative burden of insuring that the appellant does not improperly receive retirement benefits after being restored to paid status outweighs the hardship that the appellant has experienced by continuing to receive only retirement pay, which is approximately one half of his income while in paid status. IAF, Tab 11, subtab 4b at 34.

¶11 Accordingly, the appellant's motion to dismiss the agency's petition for review is granted.

ORDER

¶12 We ORDER the agency to cancel the removal and restore the appellant effective May 16, 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.

¶13 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.

¶14 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\(b\)](#).

¶15 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\(a\)](#).

¶16 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.

¶17 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 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 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 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, www.cafc.uscourts.gov. 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:

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