

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

2010 MSPB 212

Docket No. SF-752S-10-0589-I-1

**Marshall Lefavor,
Appellant,**

v.

**Department of the Navy,
Agency.**

October 29, 2010

Marshall Lefavor, Kailua, Hawaii, pro se.

Norman Grove, San Diego, California, for the agency.

Susan A. Miyamoto, Pearl Harbor, Hawaii, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his suspension appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the initial decision, and REMAND the appeal for adjudication on the merits.

BACKGROUND

¶2 The appellant is an Effects Assessment Planner, YA-301-2, in the agency's Standing Joint Force Headquarters. Initial Appeal File (IAF), Tab 3. On March

24, 2010, the agency proposed to suspend the appellant for 14 calendar days on a misconduct charge. IAF, Tab 10, Subtab 4d. The appellant did not respond to the proposal notice, and by letter dated April 9, 2010, the agency notified the appellant of its decision to suspend him “for fourteen days” effective April 12, 2010. *Id.*, Subtab 4c. However, the letter instructed the appellant to return to work “on your next regularly scheduled work day *after* April 26, 2010.” *Id.* (emphasis added). The letter did not provide notice of Board appeal rights.

¶3 On April 18, 2010, the appellant filed an appeal contesting the suspension. IAF, Tab 1. He did not request a hearing. *Id.* As instructed, the appellant returned to work on Tuesday, April 27, 2010, his first regularly scheduled work day after April 26, 2010. *Id.*, Subtabs 1, 4e, 4f. On May 17, 2010, the agency submitted a Standard Form (SF) 50, recording a suspension “NTE 25-APR-2010,” and another SF-50 marking the appellant’s return to duty effective April 26, 2010. IAF, Tab 3. Both SF-50s bear an approval date of May 6, 2010.¹ *Id.* The agency subsequently moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 10, Subtab 1. It contended that the statement in the decision letter directing the appellant to return to duty after April 26, 2010, was a typographical error, and that it had actually imposed only a 14-day suspension. *Id.* In support of its motion, the agency provided timecards, dated May 18, 2010, indicating that the appellant was on paid administrative leave on April 26, 2010. *Id.*, Subtabs 4a, 4e-4g. The administrative judge granted the agency’s motion, finding that the appellant had not submitted any evidence that his time in non-duty, non-pay status exceeded 14 days. IAF, Tab 11 (Initial Decision, June 22, 2010).

¶4 On petition for review, the appellant contends, *inter alia*, that the agency suspended him for 15 days and unilaterally placed him on administrative leave on April 26, 2010, in a deliberate attempt to avoid the Board appeal process.

¹ The table of contents in the agency file misleadingly suggests that the SF-50s are dated April 12 and April 26, 2010. IAF, Tab 10.

Petition for Review File (PFR File), Tab 1. The agency has responded.² PFR File, Tab 4.

ANALYSIS

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). Suspensions of more than 14 days are within the Board's jurisdiction under [5 U.S.C. §§ 7512\(2\) & 7513\(d\)](#). However, a suspension of 14 days or fewer is not an appealable action. *Stewart v. Department of Defense*, [82 M.S.P.R. 649](#), ¶ 15 (1999).

¶6 The case before us resembles *Clark v. Department of State*, [2 M.S.P.R. 575](#) (1980), and *Karpovich v. Department of the Navy*, [38 M.S.P.R. 330](#) (1988), in that the agency intended to impose a suspension of 14 days but erred in calculating the end date of the suspension. In both *Clark* and *Karpovich*, the Board found that the agency succeeded in timely amending its action to impose a non-appealable 14-day suspension. We find, however, that this case differs from *Clark* and *Karpovich* in crucial respects.

¶7 In *Clark*, the agency intended to impose a 14-day suspension beginning July 16, 1979, but the decision letter instructed the appellant to return to work on August 2, 1979, more than 14 days later. By letter dated July 24, 1979, the agency amended its action, instead suspending Mr. Clark from July 16, 1979, through July 29, 1979. The agency also telephoned Mr. Clark to inform him of the amendment. The Board found that, “[b]ecause the agency in writing amended the computation error in the letter of decision prior to the expiration of the 14

² The appellant has since filed additional submissions in reply to the agency's response. PFR File, Tabs 5, 6, 7. However, the Board's regulations do not provide for replies in support of a petition for review. See [5 C.F.R. § 1201.114\(d\)](#). We have therefore not considered the appellant's additional submissions in reaching our decision. See *Hunter v. Office of Personnel Management*, [109 M.S.P.R. 514](#), ¶ 8 n.2 (2008), *aff'd*, No. 2008-3554 (Fed. Cir. Jan. 27, 2009).

calendar-day period, and such action was communicated to petitioner during that time frame,” the suspension was not appealable. *Clark*, 2 M.S.P.R. at 575-76.

¶8 In *Karpovich*, the agency intended to impose a suspension of 14 calendar days, beginning November 23, 1987, but erroneously scheduled the suspension to last through December 7, 1987, which would have been 15 calendar days. However, on December 2, 1987, the agency issued an SF-50 correcting the return to duty date to December 7, 1987. Mr. Karpovich appealed the suspension on December 24, 1987, after the agency had corrected its error.³ *Karpovich*, 38 M.S.P.R. at 330-31. The Board dismissed the appeal, finding that Mr. Karpovich was subjected to a 14-day suspension. *Id.* at 331-32. In reaching that conclusion, the Board first noted that, as here, the agency did not intend to impose a 15-day suspension, and the appellant did not serve a suspension of that duration. *Id.* at 331. However, the Board also relied on the fact that “the agency effected no change in the suspension after the appeal was filed.” *Id.* The decision further noted that Mr. Karpovich had not shown or alleged that he was unaware of the agency’s action returning him to duty on December 7, 1987, and had not shown or alleged that he did not report for duty on that date. *Id.*

¶9 Here, by contrast, the agency did not issue SF-50s correcting the error in the decision letter until May 6, 2010, after the suspension was served and after the appellant filed his appeal. IAF, Tab 3. Furthermore, the record reflects that the agency did not inform the appellant that he was to return to work on April 26, 2010. Rather, as the agency relates in its narrative statement, the appellant returned to work on April 27, 2010, “[a]s instructed.” IAF, Tab 10, Subtab 1 at 2. The agency has since recorded the appellant’s absence on April 26, 2010, as paid

³ Subsequently, on December 30, 1987, the agency issued another SF-50 effecting the suspension from November 23 through December 6, 1987. *Karpovich*, 38 M.S.P.R. at 331. However, the agency had already corrected the return to duty date in the SF-50 issued on December 2, 1987, while the suspension was still in progress and before Mr. Karpovich filed his appeal.

administrative leave, which would not count toward the length of the suspension. *Id.*, Subtabs 4e-4f; *see* [5 U.S.C. § 7501\(2\)](#); *Alston v. Social Security Administration*, [95 M.S.P.R. 252](#), ¶ 7 (2003), *aff'd*, 134 F. App'x 440 (Fed. Cir. 2005). However, the appellant contends that he was not informed of his placement on administrative leave, and the timecard recording that action is dated May 18, 2010. IAF, Tab 10, Subtab 4f. In combination, these facts support a finding that the agency did not timely correct the error in the decision letter, but rather modified the action retroactively in response to the appellant's Board appeal.

¶10 The Board's jurisdiction is determined by the nature of an agency's action against an appellant at the time his appeal is filed. *Himmel v. Department of Justice*, [6 M.S.P.R. 484](#), 486 (1981). 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 the agency completely rescinds the action. *Id.* We find that as of April 18, 2010, when the appellant filed his appeal, the agency had, albeit inadvertently, imposed an appealable 15-day suspension. The agency has not completely rescinded the action, and the appellant has not consented to the agency's unilateral decision to reduce the suspension to 14 days. We therefore conclude that the Board has jurisdiction over this appeal.⁴

⁴ We do not decide whether Board jurisdiction would have attached if the agency had retroactively revised the action to a 14-day suspension before the appellant filed this appeal, as those facts are not present in this case.

ORDER

¶11 We remand the appeal to the Western Regional Office for adjudication on the merits.

FOR THE BOARD:

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