

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

2010 MSPB 241

Docket No. DC-0752-10-0064-I-1

**Sylvester E. Harding, III,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

December 9, 2010

Sylvester E. Harding, III, Fayetteville, North Carolina, pro se.

John C. Weaver, Esquire, Winston Salem, North Carolina, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has filed a petition for review of an initial decision that reversed the appellant's indefinite suspension. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and SUSTAIN the appellant's indefinite suspension.

BACKGROUND

¶2 The appellant is employed by the agency as a Housekeeping Aid. Initial Appeal File (IAF), Tab 1 at 3. On September 8, 2009, the agency proposed the appellant's indefinite suspension "pending investigation of probable criminal

conduct.” IAF, Tab 6, Subtab 4d at 1. Specifically, the agency indicated that, in December 2008, the appellant had been arrested and charged with two felony drug charges and two misdemeanors, and that the appellant was indicted on all four charges in June 2009. *Id.* The agency further indicated that the appellant was also charged under a Special Indictment as a Habitual Felon based on the alleged felonies underlying the December 2008 arrest and his prior criminal history. *Id.* Based on those indictments, the agency stated that there was reasonable cause to believe that the appellant might be guilty of a crime for which a sentence of imprisonment may be imposed. *Id.*

¶3 The agency gave the appellant until September 18, 2009, to respond to the notice of proposed suspension. *Id.* at 2. The appellant submitted a written response accompanied by a request for an extension of time to submit additional documentation. IAF, Tab 6, Subtab 4c at 1. The agency granted his request. *Id.*, Subtab 4a.

¶4 On September 25, 2009, the agency issued a letter of decision suspending the appellant indefinitely effective September 28, 2009. IAF, Tab 6, Subtab 4. The appellant filed a Board appeal challenging his indefinite suspension on October 13, 2009. IAF, Tab 1. He argued that his suspension was improper because he had not been convicted of any crime and that some of the charges against him had already been dismissed. *Id.* at 5. He requested a hearing. *Id.* at 4.

¶5 The administrative judge ordered the parties to file prehearing submissions by November 30, 2009. IAF, Tab 5 at 1. She also informed the parties of the prehearing conference scheduled for December 1, 2009. *Id.* at 2. In her summary of the prehearing conference, the administrative judge noted that the appellant had not filed any prehearing submissions and that neither the appellant, nor any representative of the appellant, participated in the prehearing conference. IAF, Tab 9 at 1. She therefore indicated that, unless the appellant filed his prehearing submissions and established good cause for the delay, he would not be permitted

to call any witnesses other than himself at the hearing. *Id.* The administrative judge also gave the appellant the option of withdrawing his hearing request and instead requesting a decision on the written record. *Id.* The appellant chose to withdraw his hearing request. IAF, Tab 10.

¶6 After both parties filed final written submissions, IAF, Tabs 11-12, the administrative judge issued a decision on the written record reversing the appellant's suspension, IAF, Tab 13. She found that the suspension lacked an "ascertainable end," and therefore could not be sustained. *Id.* at 2-4. The administrative judge also ordered interim relief in the event that either party filed a petition for review of the initial decision. *Id.* at 5.

¶7 The agency has filed a petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency argues that the ascertainable end of the appellant's indefinite suspension is the completion of criminal proceedings and that its failure to explicitly identify that condition subsequent in its notice to the appellant is not an error that requires reversal of the suspension. *Id.* at 7-13. The agency also submitted a Standard Form (SF) 50 reflecting the appellant's return to pay status effective December 16, 2009. *Id.* at 16. After the close of the record on review, *see* PFR File, Tab 2, the appellant filed a response to the agency's petition for review, PFR File, Tab 3. He argues that the agency failed to provide the interim relief ordered by the administrative judge. *Id.* at 1. The appellant filed additional pleadings more than 2 months after the close of the record on review.¹ PFR File, Tabs 5-11. He also submitted the transcript of a March 8, 2010 statement given by his supervisor in connection with an equal employment opportunity proceeding. *Id.*, Tab 5 at 3-17.

¹ In his submissions, the appellant alleges that the agency has proposed his removal. PFR File, Tabs 7-9, 11. If the agency removes the appellant, he may file a new appeal of that action.

ANALYSIS

The agency provided the required interim relief.

¶8 An employee who prevails in an initial Board decision generally “shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review.” [5 U.S.C. § 7701\(b\)\(2\)\(A\)](#). An agency’s petition for review of an initial decision that granted the appellant interim relief must be accompanied by a certification that the agency has complied with the interim relief order. [5 C.F.R. § 1201.115\(b\)\(1\)](#). To establish compliance with an interim relief order, all that an agency must accomplish by the petition for review filing deadline is to take appropriate administrative action, such as executing an SF-50 or SF-52, that will result in the issuance of a paycheck for the interim relief period. *Salazar v. Department of Transportation*, [60 M.S.P.R. 633](#), 639 (1994). Here, the agency submitted a certification and an SF-50 indicating that the appellant was returned to pay status effective December 16, 2009, the day the initial decision was issued. PFR File, Tab 1 at 16; IAF, Tab 13. If the agency submits evidence that, on its face, shows that it has met its interim relief obligations, the Board will look no further into the matter absent a timely challenge by the appellant to the sufficiency of the agency's interim relief measures. *May v. Department of Veterans Affairs*, [57 M.S.P.R. 422](#), 424 (1993); see [5 C.F.R. §§ 1201.115\(b\), .116\(a\)](#). An appellant's motion to dismiss a petition for review for noncompliance with an interim relief order must be filed before the record on review closes unless it is based on new and material evidence that was not readily available before the record closed. *Forma v. Department of Justice*, [57 M.S.P.R. 97](#), 102, *aff'd*, 11 F.3d 1071 (Fed. Cir. 1993) (Table); 5 C.F.R. § 1201.116(a).

¶9 The record on review closed on February 16, 2010. *See* PFR File, Tab 2.² The appellant’s pleading in which he argued that the agency failed to provide appropriate interim relief was filed 9 days later on February 25, 2010. PFR File, Tab 3. The appellant has not shown that his claim of noncompliance with the interim relief order is based on evidence that was not readily available before the record closed. The Board, therefore, will not consider the appellant’s untimely challenges to the agency’s interim relief actions. *See Alston v. Social Security Administration*, [95 M.S.P.R. 252](#), ¶ 6 (2003), *aff’d*, 134 F. App’x 440 (Fed. Cir. 2005); *Forma*, 57 M.S.P.R. at 102.

The appellant’s response to the petition for review and subsequent pleadings are untimely.

¶10 The agency filed its petition for review on January 20, 2010. PFR File, Tab 1. The appellant had until February 16, 2010, to file his response. *See supra* n.2; [5 C.F.R. §§ 1201.114](#)(d), (i), 1201.23. The appellant filed his response to the agency’s petition for review on February 25, 2010. PFR File, Tab 3 at 8. His response was therefore untimely by 9 days. The appellant filed his subsequent pleading on petition for review on May 5, 2010, July 27, 2010, July 30, 2010, August 5, 2010, August 12, 2010, September 17, 2010, and September 22, 2010. PFR File, Tab 5-11. The earliest of those pleadings was therefore untimely by more than 2 months.

¶11 “Any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion that shows good cause for the untimely filing” [5 C.F.R. § 1201.114](#)(f). The appellant has not filed such a motion

² The agency filed and served its petition for review on January 20, 2010. PFR File, Tab 1. Ordinarily, the appellant would have needed to file any response, cross petition, or motion to dismiss for failure to provide required interim relief within 25 days of that date, i.e., no later than February 14, 2010. *See* [5 C.F.R. §§ 1201.114](#)(d), (i), 1201.116(a). However, because February 14, 2010, was a Sunday and February 15, 2010, was a federal holiday, the record on review closed on the next workday. *See* 5 C.F.R. § 1201.23.

with respect to his untimely response to the agency's petition for review, and his response itself includes no explanation for the untimely filing, *see id.* ("In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing . . ."). We have therefore not considered the appellant's February 25, 2010 response in reaching our decision.

¶12 With respect to the untimely submission of his supervisor's statement, the appellant argues that the transcript had only recently been made available to him. PFR File, Tab 5 at 1. Under [5 C.F.R. § 1201.114\(i\)](#), the Board will not consider evidence submitted for the first time after the record on review closed absent a showing that it was not readily available before the record was closed. Although the transcript of the statement made by the appellant's supervisor on March 8, 2010, was unavailable at the time the record closed, the information contained in the document (i.e., the supervisor's recollection of events that took place in 2008 and 2009) was available before the close of the record. We therefore find that the transcript is not new evidence satisfying the standard set forth at [5 C.F.R. § 1201.114\(i\)](#), and we will not further consider the appellant's submission filed on May 5, 2010. *See Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989) (to constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed). We also decline to consider the appellant's other untimely submissions on petition for review.

The agency had reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment may be imposed.

¶13 An agency taking an indefinite suspension action lasting more than 14 days must comply with the procedural protections set forth at [5 U.S.C. § 7513\(b\)](#). Among those procedural protections is "at least 30 days' advance written notice, *unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed*, stating the specific

reasons for the proposed action.” [5 U.S.C. § 7513\(b\)\(1\)](#) (emphasis added). In the present case, the agency gave the appellant only 20 days’ advance notice of his indefinite suspension. IAF, Tab 6, Subtab 4 (imposing a suspension effective September 28, 2009); *id.*, Subtab 4f (acknowledging the appellant’s receipt of the proposed indefinite suspension on September 8, 2009). Because the agency took advantage of the shortened notice period, it must establish that it had reasonable cause to believe the appellant had committed a crime for which a sentence of imprisonment may be imposed. *See Perez v. Department of Justice*, [480 F.3d 1309](#), 1311-14 (holding that the “reasonable cause” requirement is not a substantive requirement applicable to cases in which an employee has received at least 30 days advance notice of the proposed action), *petition for reh’g and reh’g en banc denied*, [508 F.3d 1019](#) (Fed. Cir. 2007). In light of the appellant’s indictments by a grand jury on multiple felony charges, IAF, Tab 6, Subtabs 4j, 4k, we find that the agency has established that it had such reasonable cause, *see Dunnington v. Department of Justice*, [956 F.2d 1151](#), 1157 (Fed. Cir. 1992) (“[A]n indictment following an investigation and grand jury proceedings, would provide, absent special circumstances, more than enough evidence of possible misconduct to meet the threshold requirement of reasonable cause to suspend.”).

The appellant’s indefinite suspension has an ascertainable end.

¶14 The administrative judge found that the indefinite suspension lacked an ascertainable end because the agency indicated that the suspension would continue “pending investigation of probable criminal conduct,” and that the use of the word “pending” implied that the agency could simply continue the suspension as long as it wanted by claiming that its investigation into the matter remained open. IAF, Tab 13 at 3-4; *see* IAF, Tab 6, Subtab 4. The agency argues on petition for review that the ascertainable end of the indefinite suspension was the termination of criminal proceedings against the appellant. PFR File, Tab 1 at 7-13. For the reasons set forth below, we agree with the agency.

¶15 It is well-settled that an indefinite suspension, to be valid, must have an ascertainable end. *Rawls v. U.S. Postal Service*, [98 M.S.P.R. 98](#), ¶ 6 (2004). This “ascertainable end” requirement derives from the statutory definition of a “suspension” – “the placing of an employee, for disciplinary reasons, in a *temporary* status without duties and pay.” *Rawls*, [98 M.S.P.R. 98](#), ¶ 6 (quoting [5 U.S.C. § 7501\(2\)](#) (emphasis added), and citing § 7511(a)(2)). Because a suspension must be *temporary*, the Board has stated that, “while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent . . . which will terminate the suspension,” and that an indefinite suspension imposed with no ascertainable end in sight is not sustainable. *Rawls*, [98 M.S.P.R. 98](#), ¶ 6 (quoting *Martin v. Department of the Treasury*, [12 M.S.P.R. 12](#), 17, 20 (1982), *aff’d in part, rev’d in part on other grounds sub nom. Brown v. Department of Justice*, [715 F.2d 662](#) (D.C. Cir. 1983), *aff’d sub nom. Otherson v. Department of Justice*, [728 F.2d 1513](#) (D.C. Cir. 1984), *modified on other grounds by Barresi v. U.S. Postal Service*, [65 M.S.P.R. 656](#), 663 n.5 (1994)).

¶16 In *Rawls*, the agency did not specifically identify a condition subsequent that would terminate the suspension in its decision imposing the indefinite suspension. *Rawls*, [98 M.S.P.R. 98](#), ¶ 7. However, the appellant had been charged with attempted murder, *id.*, ¶ 2, and the agency indicated in its decision notice that it found reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment could be imposed, *id.*, ¶ 7. The Board found that it was apparent from the circumstances that the condition subsequent that would trigger the end of the indefinite suspension was the resolution of the criminal charges against the appellant through criminal proceedings. *Id.*, ¶ 8. The Board stated that “while the better practice is for agencies to identify the conditions subsequent explicitly in their decision notices imposing indefinite suspensions, the pertinent requirement for a valid indefinite suspension is that the suspension *have* a condition subsequent, rather than that the

agency's decision notice *explicitly identify* the condition subsequent.” *Id.*, ¶ 11 (emphasis in original).

¶17 In the present case, as in *Rawls*, the indefinite suspension was clearly based on the existence of pending criminal charges. IAF, Tab 6, Subtab 4d at 1. In both cases, the agency indicated that it had reasonable cause to believe that the appellant might be guilty of a crime for which a sentence of imprisonment may be imposed. *Id.*; see *Rawls*, [98 M.S.P.R. 98](#), ¶ 7; *Rawls v. U.S. Postal Service*, [94 M.S.P.R. 614](#), ¶ 3 (2003). Although the agency in the present case failed to explicitly state that the suspension would continue through the completion of criminal proceedings, we find, as the Board found in *Rawls*, that the indefinite suspension nevertheless has an ascertainable end, i.e., the resolution of the criminal proceedings that are the grounds for the suspension.

¶18 We note that the appellant appears to have understood that the length of his indefinite suspension was tied to the outcome of the criminal proceedings against him. In his final written submission to the administrative judge, he argued, “This action has no end date: That being that when I’m cleared of these charges it does not state that I would be returned to a paid status; rather it only states that ‘If they feel warranted they may propose my removal’” (sic). IAF, Tab 11 at 1. Therefore, it appears that the appellant understood that the resolution of criminal charges should trigger the end of the suspension. His argument is that the agency should be required to reinstate him immediately upon dismissal of those charges.³

³ We are unable to determine from the record before us whether the criminal charges against the appellant are still pending. If the agency were to continue the indefinite suspension after completion of the criminal proceedings, the appellant would have the right to challenge the continuation of the suspension in a separate Board appeal. See *Rhodes v. Merit Systems Protection Board*, [487 F.3d 1377](#), 1381 (Fed. Cir. 2007) (the imposition of an indefinite suspension and the failure to terminate that suspension after the condition subsequent has occurred are separately reviewable agency actions); *Arrieta v. Department of Homeland Security*, [108 M.S.P.R. 372](#), ¶ 9 (2008). The agency restored the appellant to pay status effective December 16, 2009, in order to comply with the interim relief ordered by the administrative judge. PFR File, Tab 1 at 16. The appellant, therefore, is not presently suspended. However, after issuance of

We also note that, in response to the proposed indefinite suspension, the appellant argued in part that “there is no basis for a conviction as a habitual felon,” and that there was insufficient evidence to convict him of the charges in the indictment, IAF, Tab 6, Subtab 4c at 1-2, further evidence that he understood that the suspension was tied to the outcome of criminal proceedings.

The agency established that the appellant’s indefinite suspension was taken for cause that promotes the efficiency of the service and that the penalty was reasonable.

¶19 In order to support an indefinite suspension, an agency must do more than show that the suspension has an ascertainable end. An indefinite suspension lasting more than 14 days is subject to the requirements of subchapter II of 5 U.S.C. chapter 75. *Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 12 (2010); *see McClure v. U.S. Postal Service*, [83 M.S.P.R. 605](#), ¶ 6 (1999); *see also* [5 C.F.R. § 752.401\(a\)\(2\)](#) (explicitly providing that regulations promulgated by the Office of Personnel Management implementing subchapter II of chapter 75 apply to indefinite suspensions). Therefore, such an indefinite suspension action may be taken “only for such cause as will promote the efficiency of the service.” [5 U.S.C. § 7513\(a\)](#); *see Pararas-Carayannis v. Department of Commerce*, [9 F.3d 955](#), 957 n.4 (Fed. Cir. 1993).

¶20 “Cause” under section 7513(a) generally connotes some specific act or omission on the part of the employee that warrants disciplinary action, and an agency charge that does not set forth actionable misconduct generally cannot be sustained. *Gonzalez*, [114 M.S.P.R. 318](#), ¶ 10. In this case, the agency is not suspending the appellant on the basis of his conduct per se, but rather on the basis of his indictment on felony and misdemeanor charges. IAF, Tab 6, Subtab 4d at

this Board decision, the agency is no longer required to provide interim relief. If the agency’s actions following issuance of this decision cause the appellant to believe that his indefinite suspension is being continued improperly, he should file a new Board appeal challenging that action.

1. The existence of pending felony charges has been found to constitute sufficient cause to warrant disciplinary action under chapter 75. *See, e.g., Dunnington*, 956 F.2d at 1156-57 (sustaining an indefinite suspension based on an arrest and criminal complaints). We therefore find that the appellant's felony indictments satisfy the cause requirement set forth in [5 U.S.C. § 7513\(a\)](#).

¶21 To show that an indefinite suspension promotes the efficiency of the service, the agency must establish a nexus between an employee's alleged misconduct and the efficiency of the service. *Dunnington*, 956 F.2d at 1155, 1158. In *Kruger v. Department of Justice*, [32 M.S.P.R. 71](#), 74 (1987), the Board held that an agency may show a nexus between off-duty misconduct and the efficiency of the service by three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that the misconduct adversely affects the appellant's or coworkers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *Id.*; *see Brown v. Department of the Navy*, [229 F.3d 1356](#), 1360-61 (Fed. Cir. 2000). In the present case, we find that the agency proved a nexus between the appellant's alleged misconduct and the efficiency of the service under the second category. Specifically, the deciding official indicated in his declaration that the misconduct with which the appellant was criminally charged had a negative impact on the efficiency of the operations at the appellant's workplace and "led to his supervisors losing confidence in [the appellant's] ability to carry out the performance of his duties." IAF, Tab 12 at 16. The deciding official also expressed his concern that the light duty position to which the appellant was assigned at the time of his suspension gave him access to veterans' personal information. *Id.* at 16-17. *See Dunnington*, 956 F.2d at 1158 (upholding the Board's finding of nexus where, given the nature of the pending criminal charges, the appellant had lost the confidence of his supervisors and could not be trusted as a law enforcement officer); *see also Adams v. Defense Logistics Agency*, [63](#)

[M.S.P.R. 551](#), 555-56 (1994) (the agency established a nexus between an employee's off-duty possession of marijuana and his removal for the efficiency of the service by the deciding official's unrebutted testimony that the agency had lost confidence in the appellant's job performance).⁴

¶22 In order to support an indefinite suspension (or any other adverse action under chapter 75), the agency must establish that the penalty is reasonable. *See Dunnington*, 956 F.2d at 1154; *Martin*, 12 M.S.P.R. at 19-20. The appellant has not raised any particular argument that his suspension was unreasonable under the circumstances, other than his general claim that he should be presumed innocent until convicted. IAF, Tab 11 at 1. The Board and its reviewing court have found that an agency may reasonably decide to suspend an employee based on pending criminal charges even though there has been no conviction. *E.g.*, *Dunnington*, 956 F.2d at 1156-58; *Martin*, 12 M.S.P.R. at 19-22. Considering the serious nature of the charges against the appellant, the agency's evidence that the appellant's supervisor lost confidence in his ability to carry out the performance of his duties, IAF, Tab 12 at 16-17, and the undisputed evidence suggesting that the agency could not finalize its investigation until the criminal proceedings concluded, *id.* at 16, we find that the agency reasonably decided to impose an indefinite suspension pending resolution of the criminal proceedings. *See*

⁴ The Board has at times stated the nexus requirement in this type of case somewhat differently, indicating that a nexus must exist between the criminal charge itself and the efficiency of the service, rather than between the appellant's alleged misconduct underlying the criminal charge and the efficiency of the service. *See, e.g.*, *Albo v. U.S. Postal Service*, [104 M.S.P.R. 166](#), ¶ 6 (2006). We need not resolve any disparity in the applicable standard in the present case, however, because we find that the agency established nexus under either characterization of the standard. Specifically, the deciding official indicated that he had lost confidence in the appellant's ability to perform his duties due to the misconduct with which the appellant was criminally charged and that the appellant's indictment under the habitual felon statute itself was an important factor in his decision. IAF, Tab 12 at 16-17. We find that such unrebutted testimony establishes a nexus between the existence of the criminal charges and the efficiency of the service under the circumstances of this case.

Pararas-Carayannis, 9 F.3d at 956, 958 (sustaining the employee’s indefinite suspension “pending the disposition of felony charges against him”).

¶23 Because we find that the agency satisfied the procedural and substantive protections set forth at [5 U.S.C. § 7513](#), we SUSTAIN the appellant’s indefinite suspension.

ORDER

¶24 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 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, 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.