UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 91

Docket Nos. DC-0752-11-0269-I-1
DC-0752-11-0270-I-1
DC-0752-11-0271-I-1

Walter J. Quinlan, et al.,

Appellants,

v.

Department of Homeland Security,

Agency.

July 26, 2012

Edward H. Passman, Esquire, and Amy L. Beckett, Esquire, Washington, D.C., for the appellants.

Kaitlyn Jorge, Michael W. Gaches, Esquire, and Steven E. Colon, Esquire, Arlington, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellants have petitioned for review of the initial decision that sustained the agency's decision to reduce their pay bands as a consequence of the downward classification of their positions and found that the appellants failed to meet their burden of proof on their affirmative defenses. For the following reasons, we DENY the petition for review and AFFIRM the initial decision, still SUSTAINING the agency's actions.

BACKGROUND

¶2 Appellants Sheila Vaughan, Richard Lazisky, and Walter Quinlan occupied SV-1801-L positions at the Transportation Security Administration (TSA) within the Emergency Preparedness Division. Initial Appeal File (IAF), Tab 11, Subtab 4D at 1.[1] The agency initiated a review of their position classifications and reduced them to SV-301-K positions due to a downward classification of their positions. *Id.* The agency granted them pay retention. *Id.* at 5 & n.1. They each filed an initial appeal of their reduction in grade, and they requested that their cases be consolidated. IAF, Tab 1 at 1. The appellants argued that the downgrade was an appealable adverse action because they did not receive grade retention benefits and because the agency's action was a reduction in force (RIF). IAF, Tab 6 at 10, 12. The appellants further argued that the agency's reclassification of the positions was not in accordance with law. *Id.* at 12. In their prehearing submissions, the appellants further challenged the classification decision and argued that the Board had jurisdiction to review the merits of the classification decision because the agency lacked a proper appeal process for reviewing the classification downgrade. IAF, Tab 20 at 4-7. Additionally, they argued that their due process rights were violated because the deciding official failed to consider the record. *Id.* at 9. Appellant Vaughan alleged that the agency's action was a result of age and sex discrimination and reprisal for prior equal employment opportunity (EEO) activity. *Id.* at 10, 13. Appellants Quinlan and Lazisky alleged that the agency's action was based on reprisal due to their support of Ms. Vaughan's prior EEO activity. *Id.*

¶3 In her prehearing summary, the administrative judge found that the appellants' challenge to the merits of the classification decision was not within the Board's jurisdiction. IAF, Tab 21 at 2. She also denied the appellants'

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[1] All of the citations to the record are to the file of Appellant Quinlan unless designated otherwise.

proposed witnesses. *Id.* at 5; IAF, Tab 20 at 19. The appellants submitted a lengthy exception to the administrative judge's prehearing conference summary, reiterating their argument that the Board has jurisdiction to hear the classification appeals, objecting to the administrative judge's denial of their request to certify her ruling regarding this issue in an interlocutory appeal, and taking exception to the exclusion of their witnesses. IAF, Tab 24 at 4-10. The appellants also withdrew their RIF appeal. *Id.* at 10. The agency submitted a substantive response. IAF, Tab 25.

¶4 The administrative judge consolidated the appeals during the hearing and issued an initial decision affirming the agency's actions. IAF, Tab 27, Initial Decision (ID) at 1-2. The administrative judge found that, although the Board generally lacks jurisdiction over appeals arising from position classification disputes, the appellants had a limited right to challenge their reduction in grade because they were not eligible for grade retention, citing to *Bobie v. Department of the Army*, 105 M.S.P.R. 592, ¶ 8 (2007). ID at 2. She found that, under *Bobie*, the Board's limited review was to determine whether the agency acted in accordance with law. *Id.* She further found that the appeals were governed by the provisions of the Aviation and Transportation Security Act (ATSA) because the appellants were TSA employees, and thus, the agency's internal procedures applied. ID at 3. She found that the agency appropriately followed the TSA Management Directive (MD) and accompanying Handbook in effecting the reduction in the appellants' pay band. ID at 4-5.

¶5 Regarding the appellants' due process argument, the administrative judge found that the agency appropriately afforded the appellants due process because the appellants had the opportunity to respond orally and in writing to the proposed actions and the deciding official considered the record before ultimately reducing their pay bands. ID at 5-6. The administrative judge also found that Appellant Vaughan failed to demonstrate that her reduction in pay band was due to age or sex discrimination or retaliation and that Appellants Quinlan and

Lazisky failed to demonstrate that their reduction in pay band was in retaliation for supporting Appellant Vaughan's EEO claim. ID at 6-9.

¶6 The appellants have filed a consolidated petition for review. Petition for Review (PFR) File, Tab 1. First, they argue that the administrative judge erred in applying the limited standard of review set forth in *Bobie* and *Gibson v. Department of the Navy*, 20 M.S.P.R. 274 (1984). *Id.* at 7-9. Next, they argue that, even assuming that the administrative judge properly applied *Bobie* and *Gibson* to their appeal, the administrative judge erred in finding that the agency's actions were according to law. *Id.* at 10-13. They further argue that the administrative judge erred in deciding the affirmative defenses of discrimination and reprisal without a full evidentiary hearing on the merits of the agency's classification decision. *Id.* at 13-14. They argue that the administrative judge failed to appropriately address the factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), to assess the credibility of the witnesses with respect to the due process arguments. *Id.* at 14-18. They also argue that the administrative judge erred in excluding the appellants' witnesses and erred both legally and factually in finding that the appellants' allegations of discrimination and retaliation were without merit. *Id.* at 18-26. The agency has filed a substantive opposition. PFR File, Tab 3.

ANALYSIS

The Board has jurisdiction over the appellants' reduction in grade appeals.

¶7 The administrative judge properly found jurisdiction over the appellants' reductions in grade. In *Atwell v. Department of the Army*, the Board held that employees who are assigned to positions that are reclassified downward and who receive the benefits of grade and pay retention under 5 U.S.C. §§ 5362, 5363 may not appeal to the Board. 2 M.S.P.R. 484, 490 (1980), *aff'd*, 670 F.2d 272 (D.C. Cir. 1981). Following this reasoning, in *Gibson*, the Board found jurisdiction over a reduction in grade appeal because the appellant was downgraded as a

result of a position classification and was not eligible for grade retention under chapter 53. 20 M.S.P.R. at 276; *see also Bobie*, 105 M.S.P.R. 592, ¶ 8 ("Because the appellant was not eligible for grade retention following his reduction in grade, he is not precluded from challenging that action before the Board.").

¶8 Under the ATSA, TSA employees are covered by the personnel management system that is applicable to employees of the Federal Aviation Administration under 49 U.S.C. § 40122, except to the extent the Administrator of TSA modifies that system as it applies to TSA employees. 49 U.S.C. § 114(n); *Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶ 5 (2009), *aff'd*, 370 F. App'x 119 (Fed. Cir. 2010). Under 49 U.S.C. § 40122(g)(2), with the exception of specifically enumerated sections, most of title 5 does not apply, including provisions of chapters 51 and 53 concerning the classification of positions and pay and grade retention. However, the Board has found jurisdiction over reductions in grade under the language of 49 U.S.C. § 40122(g)(3), which states that a TSA employee may submit an appeal to the Board from "any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996."[2] *See Miller v. Department of Homeland Security*, 111 M.S.P.R. 325, ¶ 17 (2009), *aff'd*, 361 F. App'x 134 (Fed. Cir. 2010); *Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 11 (2006).[3] Thus, the appellants have the right to appeal to the Board under 49 U.S.C. § 40122(g)(3) because they did not receive grade retention and such an action was appealable to the Board as of March 31, 1996. *See Bobie*, 105 M.S.P.R. 592, ¶ 8; *see also Miller*, 111 M.S.P.R. 325, ¶ 17.

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[2] "Appeals to merit systems protection board.— Under the new personnel management system . . . an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996." 49 U.S.C. § 40122(g)(3).

[3] The appellants meet the definition of "employee" under 5 U.S.C. chapter 75.

The administrative judge correctly determined that the agency's action was in accordance with law.

¶9 The crux of the appellants' arguments on review is that the Board has the jurisdiction to review the merits of the classification decision and that the administrative judge erred in only determining whether the agency's actions were in accordance with law. The appellants argue that, because they are not covered by title 5 and are precluded from appealing the classification decision to the Office of Personnel Management,[4] the Board must adjudicate the merits of the classification decision. PFR File, Tab 1 at 7-8. It is well established, however, that the Board does not have jurisdiction over the merits of a classification decision. *See Pierce v. Merit Systems Protection Board*, 242 F.3d 1373, 1375-76 (Fed. Cir. 2001); *Saunders v. Merit Systems Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985); *Gibson*, 20 M.S.P.R. at 277. That the appellants do not have a method for appealing the reclassification of their positions does not grant the Board jurisdiction over the merits of the classification decision.[5] *See, e.g.*, *Broderick v. Department of the Treasury*, 52 M.S.P.R. 254, 260-61 (1992) (rejecting the appellant's jurisdictional argument that she would have no recourse if she is denied review by the Board because the Board "may not assert jurisdiction that it does not have"); *Lomartere v. Department of Defense*, 4 M.S.P.R. 30, 32-33 (1980) (finding proper the presiding officials' limited review of whether the agency showed that its actions were in accordance with its statutory authority); *see also Wilson v. Merit Systems Protection Board*, 807 F.2d 1577, 1581-83 (Fed. Cir. 1986) (declining to apply the classification principles in chapter 51 to a Postal Service employee). The Board has held that, in cases in

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[4] *See* 5 C.F.R. §§ 511.603-511.614.

[5] Because the Board does not have jurisdiction over the merits of the classification decision, the administrative judge did not abuse her discretion in excluding witnesses who would have testified regarding this matter. PFR File, Tab 1 at 18.

which an employee suffered a reduction in grade due to a downward reclassification decision, the Board's review of the agency's action is limited to whether the agency's action in effecting the reduction in grade was in accordance with law. *See Bobie*, 105 M.S.P.R. 592, ¶¶ 8-10; *Gibson*, 20 M.S.P.R. at 277. Thus, we find that the administrative judge correctly examined the agency's adherence to its internal management directives to determine that the agency's actions were in accordance with law. ID at 3-5; *see* 49 U.S.C. § 114(n); *Winlock*, 110 M.S.P.R. 521, ¶¶ 5-6.

¶10 The administrative judge found that the agency complied with its internal policies regarding notice and an opportunity to respond pursuant to its MD 1100.75-3 Handbook. Under MD 1100.75-3, an agency conducting an adverse action is required to give the employee notice, an opportunity to respond orally and/or in writing, and a final decision. IAF, Tab 11, Subtab 4E at 1-2, 4, Subtab 4O at 6 (guidance regarding nondisciplinary action), 9 (guidance regarding disciplinary action). The appellants received a notice of proposed correction of position classification on June 30, 2010. IAF, Tab 11, Subtab 4K.[6] The notice to the appellants informed them that they had 7 days to respond or request more time to respond. *Id.* at 2. They received a 14-day extension to respond and submitted oral and written replies. IAF, Tab 11, Subtab 4D at 1; *see id.*, Subtab 4G. The deciding official, Roderick Allison, considered the appellants' oral and written replies prior to sustaining the proposal to reduce the appellants to the K band. IAF, Tab 11, Subtab 4D at 2; Hearing Transcript (HT) at 11-13. He responded to several of their contentions in the final decision letter and gave them notice of their right to appeal to the Board. IAF, Tab 11, Subtab 4D at 2-5. Furthermore, the agency informed the appellants of their right to receive pay

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[6] The correct citation for Appellant Vaughan is MSPB Docket No. DC-0752-11-0271-I-1, Initial Appeal File, Tab 10, Subtab 4J, and for Appellant Lazisky is MSPB Docket No. DC-0752-11-0270-I-1, Initial Appeal File, Tab 11, Subtab 4J.

retention in accordance with MD 1100.53-8. *Id.* at 5 & n.1; IAF, Tab 11, Subtab 4F; *see Gibson*, 20 M.S.P.R. at 277. Thus, we agree with the administrative judge's conclusion that the agency properly gave the appellants notice, an opportunity to respond, and a final decision in accordance with internal agency policies and due process. ID at 3-5; *see Rosenberg v. Department of Transportation*, 105 M.S.P.R. 130, ¶¶ 24-25 (2007) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985)).

¶11 The appellants rely on an e-mail from William Ferrara, the contractor retained to conduct the classification review, which he drafted prior to his interview with the appellants. The appellants allege that the e-mail demonstrates that he predetermined that their positions should be reclassified prior to interviewing them. PFR File, Tab 1 at 11. This e-mail, however, simply states that the positions encumbered by the appellants do not support the L band based on managerial criteria. IAF, Tab 20 at 29. It is clear that Mr. Ferrara was relying on preliminary information about the positions of Appellants Vaughan and Lazisky, and he had no position information for Appellant Quinlan. *Id.* The record reflects that he revised his evaluation after meeting with the appellants. *Id.* at 33. The appellants further stated that they were promised two interviews and did not receive their second interview and that the agency declined to consult with their first-line supervisor, John Moran. PFR File, Tab 1 at 11, 14 n.4. The appellants have not, however, argued how the agency's failure to give them two interviews or consult with their first-line supervisor violated any rules, policies, or procedures such that the Board could find the agency's actions not in accordance with law.

The appellants did not meet their burden of proof on their retaliation claims.

¶12 We agree with the administrative judge that the appellants have failed to meet their burden of proof on their retaliation claims.[7] Because the agency articulated a nondiscriminatory reason for the reduction in grade—the downward classification of the position as a result of the position classification review—the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellants have met their overall burden of proving illegal retaliation. *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). In order to meet their ultimate burden of proof on retaliation for EEO activity, the appellants must establish not only that they engaged in protected activity and that the accused official was aware of that activity, but also that there is a "genuine nexus" between the alleged retaliatory motive and the adverse action. *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 26 (2012).

¶13 First, we have considered the appellants' argument that the Board should have considered the merits of the classification decision to evaluate their retaliation claims. The appellants argue that the administrative judge improperly limited their ability to produce evidence on their retaliation claim by focusing on the reduction in grade without considering the merits of the reclassification. We find, however, that the administrative judge allowed testimony regarding the circumstances surrounding the classification decision insofar as it related to the retaliation claim and properly limited the record to exclude the merits of the classification decision itself. *See Davis v. Tennessee Valley Authority*, 10 M.S.P.R. 300, 302 (1982) (it was not error for the presiding official to limit evidence of racial discrimination to the appellant's RIF claim without considering evidence of discrimination in the classification of the appellant's position); *see also Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322-24 (1989) (the

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[7] Because Appellant Vaughan has not challenged the administrative judge's findings regarding her discrimination claims, we have not addressed these claims further.

Board found that because it lacked jurisdiction over the security clearance revocation underlying the removal action at issue, it could not consider allegations of discrimination and reprisal regarding the security clearance revocation). Additionally, the appellants have not shown that any relevant evidence, which could have affected the outcome, was disallowed. *See Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶ 12 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005).

¶14 The appellants elicited testimony from Mr. Allison, the associate director of their department, regarding his knowledge of the appellants' EEO activity. He testified that he became the assistant director of Flight Operations in September 2009. HT at 6-7. At the time, he reviewed the structure of the Emergency Preparedness Division and determined that it was "top-heavy." HT at 7. He contacted the Office of Human Capital (OHC) to discuss this issue in December 2009, and he was informed that there was an ongoing review of L band positions within TSA and that OHC would look into the L band positions in the Emergency Preparedness Division. HT at 8. He testified that he was not aware of the appellants' EEO activity at the time and that Appellant Vaughan informed him of it in or around January 2010, after he had initiated the classification review. HT at 8-9, 13. He also testified that he was otherwise not involved in the classification review and that he did not draft the notice or decision letters and relied upon OHC to evaluate the position classification. HT at 9, 14-15.

¶15 Additionally, the appellants had the opportunity to elicit testimony from Mr. Ferrara, the senior human resources consultant who conducted the classification review. He testified that he interviewed the appellants in April 2010 as a part of the classification review and that he learned of their EEO activity during the interviews. HT at 35-38. Lori Karin, the human resources supervisor who oversaw the classification review and drafted both the notice and final decision to downgrade the appellants, testified that she was unaware of the

appellants' EEO activity until they presented their oral replies to the notice of proposed downgrade. HT at 52-53.

¶16 This testimony is undisputed, and the appellants have failed to demonstrate that the deciding official or anyone involved in the classification process itself had actual or constructive knowledge of their EEO activity within a timeframe that gives rise to an inference of retaliation. In fact, the classification process was well underway by the time Mr. Allison, Mr. Ferrara, and Ms. Karin became aware of the appellants' EEO activity. Although the appellants demonstrated that Mr. Allison, Mr. Ferrara, and Ms. Karin became aware of their EEO activity at some point prior to the final decision to reduce them to K band positions and have argued that they engaged in protected opposition activity throughout the classification process, we find that this is insufficient to meet their burden of proof on retaliation, particularly because the classification process was well underway before the relevant actors became aware of their EEO activity. *See, e.g.*, *Clark County School District v. Breeden*, 532 U.S. 268, 272 (2001) (finding no evidence of causality when an employer proceeds with a previously contemplated action after discovering that the employee engaged in protected activity); *Riggiladez v. Harvey*, 510 F. Supp. 2d 106, 110 (D.D.C. 2007) ("[A]n adverse employment action following soon after the employee's engagement in the protected activity cannot establish causation if the employer contemplated the adverse action *before* the employee's protected activity."). The appellants have not shown that the agency's action was taken because of the protected activity. *Rhee*, 117 M.S.P.R. 640, ¶ 26.

¶17 The appellants further argue that there were other employees whose position classifications were reviewed and who did not suffer a reduction in grade. We agree with the administrative judge's finding that the appellants have not demonstrated how these other employees were similarly situated. *See, e.g.*, *Deas v. Department of Transportation*, 108 M.S.P.R. 637, ¶ 20 (2008). Indeed, the record simply reflects that these employees were K band employees who were

reclassified to J band positions and were allowed to stay in "incumbent" positions. There is no other information regarding how these employees might be similarly situated and, indeed, they appear to occupy different positions in different parts of the agency. With respect to the appellants' argument that another L band employee was not downgraded, they have also failed to demonstrate how this employee is similarly situated. The organizational chart submitted by the appellants does not reflect another L band employee within the Emergency Preparedness Division, and there is scant evidence concerning this L band employee. *See* IAF, Tab 10 at 33. Thus, we find that the appellants have not demonstrated a "convincing mosaic" of retaliation.[8] *See Agbaniyaka v. Department of the Treasury*, 115 M.S.P.R. 130, ¶ 16 (2010).

The appellants' challenges to the administrative judge's credibility determinations are without merit.

¶18 The appellants make several challenges to the administrative judge's credibility determinations. PFR File, Tab 1 at 14-18. They argue that the administrative judge failed to consider their testimony regarding Mr. Allison's behavior during their oral reply. Contrary to this assertion, however, the administrative judge did consider their evidence on this issue, found that Mr. Allison's "failure to [take notes, write memoranda or record their oral replies] is

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[8] We have considered the appellants' argument that they were unable to fully litigate their retaliation claim because the administrative judge improperly excluded the testimony of John Moran, their first-level supervisor. It is well established that administrative judges have broad discretion in ruling on discovery matters and, absent a showing of abuse of discretion, the Board will not find reversible error in such rulings. *See Schoenrogge v. Department of Justice*, 76 M.S.P.R. 216, 221 (1997). The appellants have not demonstrated how Mr. Moran's testimony would change the Board's analysis of the appellants' retaliation claims. *See Jezouit*, 97 M.S.P.R. 48, ¶ 12. It is not disputed that Mr. Allison did not consider the option of keeping the appellants in "incumbent" positions, and thus, Mr. Moran's testimony on this issue is not relevant. HT at 26-28 (testimony of Mr. Allison). The appellants' other general and unspecific arguments regarding Mr. Moran's testimony do not support a reopening of the record.

not evidence that the replies were not considered," and credited Mr. Allison's testimony that he reviewed the appellants' responses. ID at 5; *see Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). The appellants also argue that the administrative judge failed to consider the inconsistencies between the testimonies of Mr. Allison and Ms. Karin regarding who drafted the final decision. Mr. Allison testified that someone from Ms. Karin's office, possibly Linda Langley, drafted the decision letter. HT at 15. Ms. Karin testified that she drafted the decision letter. HT at 52. We find that this does not cast doubt on either witness's credibility. The appellants have not demonstrated that this issue is material to any aspect of this appeal and, indeed, the administrative judge did consider the testimony and found that it was Ms. Karin who undisputedly drafted the letter. ID at 5-6. Furthermore, the administrative judge specifically found that Mr. Allison did not consider the merits of the classification decision because his role was to determine the appropriate action in light of the position classification, *id.*, and the appellants' argument that she ignored evidence regarding Mr. Allison's limited review of the downgrade is unpersuasive, PFR File, Tab 1 at 16-17. Finally, we do not find persuasive the appellants' general argument that Mr. Allison had an "obvious bias" because he wanted to protect himself from legal scrutiny. *Id.* at 16; *see Bennett v. Department of the Air Force*, 84 M.S.P.R. 132, ¶ 10 (1999).

¶19 The appellants also challenge the administrative judge's credibility determinations for Mr. Ferrara and Ms. Karin. They assert that Mr. Ferrara had predetermined that the appellants' positions did not support the L band criteria prior to their interviews. The documents referenced by the appellants, however, reflect that Mr. Ferrara made a preliminary conclusion regarding two of the positions prior to interviewing the appellants and revised his finding after the interviews. IAF, Tab 20 at 29, 33. The appellants further assert that Ms. Karin's testimony is inconsistent with the testimony of Appellants Vaughan and Quinlan, who testified that Ms. Karin promised them two interviews during the

classification process. PFR File, Tab 1 at 18; HT at 72, 123. Ms. Karin, however, did not testify to this issue at all, and there is no conflicting testimony on the matter. HT at 48-59. The appellants do not make any additional arguments that sufficiently cast doubt on the witnesses' testimony. *See Haebe*, 288 F.3d at 1301.

ORDER

¶20 For the foregoing reasons, we AFFIRM the initial decision. 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 APPELLANTS 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 Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

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. § 2000e-5(f) and 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:

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