

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

RUSSELL HART, ET AL.,<sup>1</sup>  
Appellant,

DOCKET NUMBER  
AT-0752-07-0660-R-1

v.

DEPARTMENT OF  
TRANSPORTATION,  
Agency.

DATE: September 12, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>2</sup>**

Sean Lafferty, Esquire, Burlington, Massachusetts, for the appellants.

Parisa Naraghi-Arani, Esquire, Washington, D.C., for the agency.

**BEFORE**

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

**FINAL ORDER**

The appellants in this consolidated case have requested that the Board reopen and reconsider its final decision in their respective cases that ordered the

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<sup>1</sup> A list of the 26 other appellants and docket numbers that have been consolidated with this appeal is set forth in the attached Appendix.

<sup>2</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

agency to cancel their suspensions, to modify their personnel records to show that they were in a duty status during the period of the suspensions, but did not order the agency to provide back pay. For the reasons set forth below, we GRANT the appellants' requests under [5 U.S.C. § 7701](#)(e)(1)(B) and AFFIRM the final decisions as MODIFIED to order the agency to pay the appellants the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations.

The Board relied on then-current law that the Federal Aviation Administration (FAA) was not subject to the Back Pay Act in determining that the Board lacked jurisdiction to order the FAA to pay back pay to its employees. [49 U.S.C. § 40122](#)(g)(3); *Ivery v. Department of Transportation*, [102 M.S.P.R. 356](#), ¶¶ 12-14 (2006). The appellants' requests to reopen are based on a recently-passed amendment to that statute which provides that "[n]otwithstanding any other provision of law, retroactive to April 1, 1996, the Board shall have the same remedial authority over such employee appeals that it had as of March 31, 1996." FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 611, 126 Stat. 11 (2012). Request to Reopen File, Tabs 1, 10.

The agency agrees that the Board should exercise its authority to reopen these cases to consider the issue of the appropriate remedy for the appellants. The Board recently considered the effect of the FAA Modernization and Reform Act and found that it does retroactively restore the Board's authority to award back pay to FAA employees and that all forms of relief under the Back Pay Act are covered by the statutory amendment. *Hankins v. Department of Transportation*, [2012 MSPB 103](#), ¶¶ 10, 11.

The Board has the discretion to reopen and reconsider a case at any time. [5 U.S.C. § 7701](#)(e)(1)(B); [5 C.F.R. § 1201.118](#). The Board generally exercises its authority to reopen an appeal only within a short and reasonable time period, and this time period is usually measured in weeks rather than years. *See Tarrant v. Department of Transportation*, [87 M.S.P.R. 308](#), ¶ 4 (2000). Although in these

cases, some time has passed since the issuance of the Board's final decisions, we nevertheless find that reopening and reconsidering these cases is warranted under the particular circumstances presented here. *See Collins v. Department of Transportation*, [89 M.S.P.R. 582](#), ¶ 9 (2001) (reopening found warranted based on a retroactive change in the controlling law and the appellant's prompt and diligent actions in requesting the reopening of his previous appeal); *Tarrant*, [87 M.S.P.R. 308](#), ¶ 5 (same). Those circumstances include the fact that the appellants acted promptly in requesting reopening on March 16, 2012, only 1 month after the date of the statutory amendment, and the fact that the agency supports the appellants' requests.

#### **ORDER**

We ORDER the agency to pay the appellants the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellants 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 appellants the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to tell the appellants 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 appellants, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

No later than 30 days after the agency tells the appellants that it has fully carried out the Board's Order, the appellants may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellants believe that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellants believe 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\(a\)](#).

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.

**NOTICE TO THE APPELLANTS 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. §§ 1201.201](#), 1201.202, and 1201.203. 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 APPELLANTS REGARDING  
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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](http://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.

## APPENDIX

Appellant	Docket Number	Date of Final Decision Modified by this Order
Frederick Riley	AT-0752-07-0592-R-1	May 7, 2009
Kurt Ceniglio	AT-0752-07-0602-R-1	May 7, 2009
Bruce Beaulieu	AT-0752-07-0603-R-1	May 7, 2009
Kevin Kee	AT-0752-07-0604-R-1	May 7, 2009
Calvin Phillips	AT-0752-07-0605-R-1	May 7, 2009
Daniel Watts	AT-0752-07-0606-R-1	May 7, 2009
James Bridgeman	AT-0752-07-0608-R-1	May 7, 2009
Malcolm Kittrell	AT-0752-07-0659-R-1	May 7, 2009
John Giannetto	AT-0752-07-0661-R-1	May 7, 2009
Victor Wainwright	AT-0752-07-0662-R-1	May 7, 2009
William Pullich	AT-0752-07-0697-R-1	May 7, 2009
Ronald Stanton	DC-0752-07-0525-R-1	May 7, 2009
David Yarnell	DC-0752-07-0609-R-1	May 7, 2009
Michael Shanholtzer	DC-0752-07-0630-R-1	May 7, 2009
Randy Zak	DC-0752-07-0631-R-1	May 7, 2009
Michael Esau	NY-0752-07-0196-R-1	May 7, 2009
Ruben Foley	CH-0752-07-0414-R-1	April 21, 2009
Gary Leech	CH-0752-07-0415-R-1	April 21, 2009
John Schneider	CH-0752-07-0438-R-1	April 21, 2009
Scott Bronger	AT-0752-10-0127-R-1	August 31, 2010
Robert Kiser	AT-0752-10-0128-R-1	August 27, 2010
Harold Dunn	AT-0752-10-0134-R-1	September 1, 2010
Thomas Albright	AT-0752-10-0124-R-1	September 1, 2010
Scott Sinkhorn	CH-0752-07-0454-R-1	April 21, 2009
Troy Clogston	AT-0752-08-0006-R-1	October 5, 2009
Joseph Mackie	AT-0752-10-0123-R-1	September 1, 2010



## 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.