

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

JOSEPH W. MOORE,
Appellant,

DOCKET NUMBER
DA-0752-12-0098-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: September 25, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Howell D. Jones, IV, Esquire, Alexandria, Louisiana, for the appellant.

Bernadine Lenahan, Esquire, Fort Polk, Louisiana, for the agency.

BEFORE

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

FINAL ORDER

The agency has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

On review, the agency disagrees with the administrative judge's finding that the written statements of two agency contractors and the written statement attributed to a third contractor were insufficient to prove its charge, i.e., it had reasonable cause to believe that the appellant committed a crime for which a sentence of imprisonment could be imposed. *See* Petition for Review (PFR) File, Tab 1 at 8-9. Among other things, it alleges that the administrative judge erred in not considering the unsigned statement attributed to one of the contractors. *Id.* at 8; Initial Decision (ID) at 7. However, it appears from our review of the initial decision that the administrative judge considered the statement but afforded no weight to it. ID at 7. Even assuming that the administrative judge excluded that statement from her consideration, the alleged error does not change the outcome of this appeal because the three written statements, collectively, fall drastically short of the level of proof required to prove reasonable cause. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

It is undisputed that the agency indefinitely suspended the appellant for more than 14 days because, based on the three written statements, it believed that reasonable cause existed to believe that the appellant committed a crime for which a sentence of imprisonment could be imposed. *See* Initial Appeal File (IAF), Tab 12 at 5-6. "Reasonable cause" is virtually synonymous with "probable cause," which is necessary to support a grand jury indictment, i.e., probable cause to believe that a crime has been committed and that the accused probably committed it. *Barresi v. U.S. Postal Service*, [65 M.S.P.R. 656](#), 661 (1994). A formal judicial determination made following a preliminary hearing, an indictment following an investigation and grand jury proceedings, a criminal

information, and a probable cause determination by a magistrate issuing an arrest warrant are a few examples of evidence of reasonable cause. *See Dunnington v. Department of Justice*, [956 F.2d 1151](#), 1156-57 (Fed. Cir. 1992); *Martin v. Department of the Treasury*, [12 M.S.P.R. 12](#), 18 (1982), *aff'd sub nom. Otherson v. Department of Justice*, [728 F.2d 1513](#) (D.C. Cir. 1984).

Here, it is undisputed that the agency relied only on the written statements of the three contractors in deciding that it had reasonable cause to believe that the appellant committed a crime for which a sentence of imprisonment could be imposed. IAF, Tab 7 at 33-38. These statements, however, constitute nothing more than mere suspicion of misconduct. Even if the agency had concluded its investigation into the appellant's alleged misconduct prior to proposing the indefinite suspension action and referred the matter to local law enforcement, as the agency alleges on review, PFR File, Tab 1 at 8-13, the agency failed to submit evidence sufficient to support a grand jury indictment. *See Barresi*, 65 M.S.P.R. at 661. Consequently, the administrative judge properly concluded that the agency failed to prove its charge and, thus, the agency did not take the indefinite suspension action for "cause" as will promote the efficiency of the service, as required under [5 U.S.C. § 7513\(a\)](#).² ID at 6-8. Thus, we discern no reason to disturb the initial decision that does not sustain the charge and reverses the indefinite suspension action.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petition for review and AFFIRM the initial decision.

² "Cause" under [5 U.S.C. § 7513](#) 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 cannot be sustained. *Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 10 (2010). If an agency fails to allege or prove that there is "cause" for an action, the Board's inquiry stops here. *Id.*, ¶ 25.

ORDER

We ORDER the agency to cancel the suspension and retroactively restore appellant effective October 29, 2011.³ 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.

We also ORDER the agency to pay the appellant 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 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.

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).

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).

³ Although the initial decision ordered the agency to retroactively restore the appellant effective October 28, 2011, ID at 9, the appellant's SF-50 reflects that the indefinite suspension was effective October 29, 2011. IAF, Tab 7 at 19.

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 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. §§ 1201.201, 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 APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

The initial decision 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. 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.



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.