

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

WANDA M. MOSLEY,  
Appellant,

DOCKET NUMBER  
AT-0353-11-0927-I-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: November 26, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

David Champion, Memphis, Tennessee, for the appellant.

Sandra W. Bowens, Esquire, Memphis, Tennessee, 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 restoration appeal asking us to reconsider the initial decision issued by the administrative judge finding that the agency had arbitrarily and capriciously denied the appellant restoration and ordering the agency to retroactively restore the appellant. Generally, we

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).<sup>2</sup> For the reasons discussed below, we GRANT the agency's petition for review and AFFIRM the initial decision AS MODIFIED. Except as expressly modified by this Final Order, the initial decision of the administrative judge is the Board's final decision. Because we modify the relief awarded to the appellant in this appeal, we DENY the appellant's motions to dismiss the petition for review.

### **DISCUSSION OF ARGUMENTS ON REVIEW**

On review, the agency claims that the administrative judge erred in finding the appellant's Board appeal timely filed because she filed it approximately 1 year after the agency provided her with notice of her Board appeal rights. Petition for Review (PFR) File, Tab 1 at 9. The notification of rights referenced by the agency, however, informed the appellant of her right to file either a mixed case complaint with the agency or a mixed case appeal with the Board regarding her alleged denials of restoration. Initial Appeal File (IAF), Tab 22 at 226. Contrary to the agency's argument, notwithstanding the appellant's election to initially file a mixed case complaint with the agency, she retained her right to

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<sup>2</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

appeal the matter to the Board upon receipt of the final agency decision on the mixed case complaint or after 120 days had passed without issuance of a final agency decision or resolution of the matter. *Hay v. U.S. Postal Service*, [106 M.S.P.R. 151](#), ¶ 13 (2007); [5 C.F.R. § 1201.154\(b\)\(1\), \(2\)](#); see [29 C.F.R. § 1614.302\(d\)](#). Here, because 120 days had passed since the appellant filed her mixed case complaint without a decision by the agency, the administrative judge properly found that the appellant filed a timely Board appeal. IAF, Tab 7 at 1-2, Tab 18 at 1.

In order to establish jurisdiction over a restoration appeal as a partially recovered individual under [5 C.F.R. § 353.304\(c\)](#), an appellant must prove by preponderant evidence that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious because of the agency's failure to perform its obligations under [5 C.F.R. § 353.301\(d\)](#). See *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1104 (Fed. Cir. 2011); *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 10 (2012). If the appellant establishes jurisdiction over her restoration claim, she also prevails on the merits. *Latham*, [117 M.S.P.R. 400](#), ¶ 10 n.9.

The agency argues on review that the appellant is not entitled to relief because she was not absent from work due to a compensable injury at the time of the alleged denials of restoration because the Office of Workers' Compensation Programs denied her injury claims related to the June 2010 aggravation of her 1991 job-related injury. PFR File, Tab 1 at 10-11. The agency concedes, however, that on June 3, 2010, the date upon which the agency issued the first partial day letter reducing the appellant's workday from 8 hours to 6 hours per day, the appellant was working a limited duty assignment as a result of a compensable work-related injury dating from 1991. *Id.* at 10; IAF, Tab 26 at 1

(Stipulations 1 and 3). Accordingly, at the time of the initial reduction in hours, it is undisputed that the appellant satisfied the first jurisdictional element. Therefore, the administrative judge properly found that the agency denied the appellant restoration on June 3, 2010.<sup>3</sup> IAF, Tab 30, Initial Decision at 4.

The agency further argues on review that the relief awarded by the administrative judge exceeded the status quo ante. PFR File, Tab 1 at 11-12. We agree. The Board has held that it will not order the appellant restored to an assignment that was properly discontinued, nor will it order back pay on such an assignment because that would put the appellant in a better position than if the wrongful action had not occurred. *Tram v. U.S. Postal Service*, [118 M.S.P.R. 388](#), ¶ 10 (2012); see *Hagan v. Department of the Army*, [99 M.S.P.R. 313](#), ¶ 8 (2005) (“A status quo ante remedy does not require that the appellant be placed in a better position than he was in at the time of the agency’s action.”). Rather, in a case like this one, in which the denial of restoration was arbitrary and capricious for lack of a proper job search, the Board has found that “the appropriate remedy is for ‘the agency to conduct an appropriate search within the local commuting area retroactive to . . . the date of the appellant’s request for restoration, and to consider her for any suitable vacancies.’” *Tram*, [118 M.S.P.R. 388](#), ¶ 10 (quoting *Sapp v. U.S. Postal Service*, [82 M.S.P.R. 411](#), ¶ 21 (1999)). Accordingly, the appellant’s entitlement to back pay depends in part upon whether the agency’s

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<sup>3</sup> We note that the result would be the same even if we were to accept the agency’s argument that, because the appellant had not been absent from work due to a compensable injury on June 18 and July 2, 2010, it did not deny the appellant restoration when it issued the second and third partial day letters. The proper relief in this appeal, as discussed herein, is a job search retroactive to June 3, 2010, the date of the appellant’s initial request for restoration, irrespective of whether the agency additionally denied the appellant restoration on June 18 and July 2, 2010. See *Scott v. U.S. Postal Service*, [118 M.S.P.R. 375](#), ¶ 14 (2012) (ordering the agency to conduct a proper job search retroactive to the date of the appellant’s initial request for restoration following the agency’s reduction of the appellant’s work hours from 8 hours per day to 5 hours per day and then to 2 hours per day pursuant to the National Reassessment Process).

retroactive job search uncovers available work to which it could have restored her. *See id.* Therefore, we modify the relief awarded to the appellant as set forth below.

On review, the appellant seeks enforcement of the administrative judge's interim relief order because the agency did not assign her full-time limited duties that would allow her to sit while working and because it failed to pay her back pay. PFR File, Tab 3 at 1-2, Tab 4 at 1-2, Tab 5 at 1. The Board will not entertain a motion to enforce an interim relief order; it will treat such a motion as a motion to dismiss the petition for review. *Batten v. U.S. Postal Service*, [101 M.S.P.R. 222](#), ¶ 6, *aff'd*, 208 F. App'x 868 (Fed. Cir. 2006). Because we find that the appellant is not necessarily entitled to retroactive restoration and back pay as ordered by the administrative judge, the Board need not consider whether the agency complied with the interim relief order. *See Brownlow v. Department of the Treasury*, [85 M.S.P.R. 349](#), ¶¶ 5-6 (2000) (the Board need not consider whether an agency is in compliance with an interim relief order when the administrative judge erred in ordering interim relief). Therefore, we DENY the appellant's motions to dismiss the agency's petition for review.

### **ORDER**

We ORDER the agency to conduct a proper job search retroactive to June 3, 2010, and to consider the appellant for any suitable assignments available during that time period consistent with its restoration obligations under [5 C.F.R. § 353.301\(d\)](#). *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 30 days after the date of this decision.

In the event that the agency's retroactive job search uncovers available work to which it could have restored the appellant, we ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other

benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date on which it completes its job search. In such circumstances, 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 the agency's retroactive job search uncovers any suitable assignments and 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 on which it completes its job search.

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\(a\)](#).

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, as supplemented by this Final Order, constitutes the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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, D.C. 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, D.C. 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](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.



## 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.