UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RENE WHITTAKER, Appellant,	DOCKET NUMBER CH-0752-11-0693-I-1
v.	
DEPARTMENT OF THE TREASURY, Agency.	DATE: December 7, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Rene Whittaker, Belleville, Illinois, pro se.

Bridgette M. Gibson, Esquire, Dallas, Texas, for the agency.

BEFORE

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

FINAL ORDER

The appellant has filed a petition for review of the initial decision that canceled her indefinite suspension from April 3, 2010, through June 9, 2011, and replaced it with an indefinite suspension from April 3, 2010, through March 3, 2011, and affirmed the removal action. We previously severed the two appeals.

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Whittaker v. Department of the Treasury, MSPB Docket No. CH-0752-11-0692-I-1, Nonprecedential Order (Oct. 26, 2012). This decision addresses the indefinite suspension appeal only. Generally, we 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).[2] After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. We AFFIRM AS MODIFIED the administrative judge's decision to cancel the indefinite suspension from April 3, 2010, through June 9, 2011, and to replace it with an indefinite suspension from April 3, 2010, through March 3, 2011.

The Board has held that, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent that will terminate it. *Martin v. Department of the Treasury*, 12 M.S.P.R. 12, 17 (1982), *aff'd in part, rev'd in part sub nom. Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), *and aff'd sub nom. Otherson v. Department of Justice*, 728 F.2d 1513 (D.C. Cir. 1984). Depending on the outcome of the agency's investigation of an employee's suspected

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[2] 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.

misconduct, or the manner in which the criminal proceedings against her are resolved, the agency must either promptly return the employee to duty or proceed expeditiously to take further administrative action. *Campbell v. Defense Logistics Agency*, 31 M.S.P.R. 691, 694 (1986), *aff'd*, 833 F.2d 1024 (Fed. Cir. 1987) (Table).

On review, the appellant alleges that the agency failed to timely initiate the removal action and that the indefinite suspension action should have ended effective September 22, 2010, the date of her conviction. Petition for Review (PFR) File, Tab 1 at 4, 6. However, these bare assertions fail to establish any error in the administrative judge's finding that the agency properly continued the indefinite suspension action from April 3, 2010, through March 3, 2011.

To the extent that the Board has canceled an indefinite suspension as of the date that criminal charges were resolved based upon an agency's failure to act expeditiously to initiate an adverse action, the Board has only done so in cases where the indefinite suspension action continued for an unreasonable period of time after criminal charges were resolved in favor of the suspended employee. *See Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 107, 111-12 (1990) (canceling the indefinite suspension effective the date of the dismissal of the employee's indictment where the agency continued the suspension for 2½ months while it determined whether to initiate an adverse action); *Hernandez v. Department of Justice*, 35 M.S.P.R. 669, 671-73 (1987) (canceling the indefinite suspension as of the date that criminal charges were dismissed where the agency failed to provide any justification for waiting 2 months to initiate the removal action). The rationale for promptly returning a suspended employee to duty is the desire to protect employees subsequently not convicted of the charged criminal misconduct. *Campbell*, 31 M.S.P.R. at 694.

However, the Board has held that an agency may continue a suspension action if its original rationale for invoking the indefinite suspension action was confirmed by the employee's subsequent guilty plea or conviction. *See Engdahl*

v. Department of the Navy, 40 M.S.P.R. 660, 664 (1989), *aff'd*, 900 F.2d 1572 (Fed. Cir. 1990); *Campbell*, 31 M.S.P.R. at 695. In *Campbell*, the Board found that the agency's initial justification for invoking the indefinite suspension was enhanced by Campbell's subsequent conviction, and therefore the public interest and that of the agency were well served by the continuation of the suspension. *Campbell*, 31 M.S.P.R. at 695. We analogize the facts of this case to those in *Campbell*, as the agency's original rationale for invoking the indefinite suspension action not only remained, but was confirmed by the appellant's conviction. *See* Initial Appeal File (IAF), Tab 3, Subtabs 4c, 4i. Thus, we find that the public interest and the agency's interest were served by the continuation of the appellant's suspension.

An agency may properly continue a suspension action if it contemplates further administrative action and advises the employee of the possibility of a subsequent adverse action in the proposal notice of indefinite suspension, and the agency acts within a reasonable period of time after resolution of the criminal charges to initiate an adverse action. *Campbell*, 31 M.S.P.R. at 695. Here, it is undisputed that the proposal notice apprised the appellant that the agency may continue the indefinite suspension after criminal proceedings have concluded to impose an administrative action. IAF, Tab 3, Subtab 4i. The appellant has shown no error in the administrative judge's findings that, in light of the complexity of the matter and the time necessary to prepare the documentation to effect the adverse action, 2 months from the date that the agency first learned of the appellant's conviction[3] was a reasonable period of time to initiate the removal

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[3] The appellant appears to dispute the administrative judge's decision to credit the testimony of agency witnesses that the agency first learned of the appellant's conviction on January 3, 2011, over her testimony that she left a voicemail message for the territory collection manager regarding her conviction on September 22, 2010. PFR File, Tab 1 at 4; Initial Decision at 3-6. However, the Board will not overturn an administrative judge's findings of fact and credibility determinations absent persuasive evidence of error, which is not present here. *Heiter v. Office of Personnel Management*,

action and, thus, the agency properly suspended her from April 3, 2010, through March 3, 2011. Initial Decision at 7. We discern no reason to disturb these explained and reasoned findings. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106 (1997) (finding no reason to disturb the administrative judge's findings where the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same).

We therefore AFFIRM AS MODIFIED the initial decision that canceled the indefinite suspension from April 3, 2010, through June 9, 2011, and replaced the aforementioned suspension with an indefinite suspension from April 3, 2010, through March 3, 2011.

ORDER

We ORDER the agency to cancel the indefinite suspension action effective March 3, 2011, and to restore the appellant effective March 4, 2011. *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 Back Pay Act and/or Postal Service Regulations, as appropriate, 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.

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107 M.S.P.R. 514, ¶ 13 (2007); *Madison v. Defense Logistics Agency*, 48 M.S.P.R. 234, 238 (1991).

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 Clerk of the Board.

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 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:

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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.

UNITED STATES DEPARTMENT OF AGRICULTURE

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.