

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

JOHN G. BERRY,
Appellant,

DOCKET NUMBER
PH-0752-10-0519-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: January 3, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Jams B. Krasnoo, Esquire, Andover, Massachusetts, for the appellant.

Steven E. Colon, Esquire, Arlington, Virginia, for the agency.

BEFORE

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

Member Robbins issues a separate opinion concurring in part and dissenting in part.

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. Generally, we

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113](#)(b). We also DENY the appellant's motion to dismiss the agency's petition for failure to comply with the administrative judge's interim relief order.

The appellant in this case was suspended indefinitely after his top secret security clearance was suspended based on information that he was under investigation for criminal activity. In effecting the action, the agency stated that the suspension would remain in effect pending resolution of the suspension of the appellant's top secret clearance or the agency's investigation showed that there was sufficient evidence either to return him to duty or to support an administrative action against him. Initial Appeal File (IAF), Tab 5, Subtab 4A. One year later, after he had been acquitted of the criminal charges, the appellant

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.

filed an appeal arguing that the agency should have terminated his suspension. *Id.*, Tab 1. The agency admitted that it had completed its investigation into the appellant's possible misconduct, and both parties agreed that the appellant's security clearance suspension had not been resolved. *Id.*, Tab 25. The administrative judge determined that the case turned on a dispute over the interpretation of the condition subsequent, i.e., whether the second portion of the condition subsequent could be considered separately and, if so, whether it had occurred. *Id.*

In his June 2, 2011 initial decision, the administrative judge found that the two parts of the condition subsequent were separate; that the clauses were joined by "or," the plain meaning of which is disjunctive; and that, regardless of the status of the first condition, the agency was required to terminate the indefinite suspension if the second condition was met. *Id.*, Tab 34, Initial Decision (ID) at 5-10. The administrative judge further found that the individual who oversaw the office in charge of disciplining employees was in possession of the Office of Inspection's June 23, 2010 Report of Investigation regarding the appellant by July 10, 2010, at the latest, and that the report contained evidence sufficient for the agency to determine either to return the appellant to duty or to support an administrative action against him. *Id.* at 10-11. The administrative judge concluded that the second prong of the condition subsequent had therefore been satisfied and that the agency was required to act to terminate the indefinite suspension within a reasonable period of time after July 10, 2010, which he determined to be 3 months. *Id.* at 12. Accordingly, he ordered the agency to cancel the suspension and restore the appellant effective October 10, 2010, and to provide interim relief if either party filed a petition for review. *Id.* at 12-13.

The agency has petitioned for review and provided evidence that it returned the appellant to duty as of June 2, 2011, although in an administrative leave status due to his lack of a security clearance. Petition for Review (PFR) File, Tab 1 at 25-27. The appellant has filed a response and moved that the agency's

petition be dismissed on the basis that its actions following issuance of the administrative judge's initial decision violated the interim relief order.³ *Id.*, Tab 3 at 7-11.

ANALYSIS

The agency's action effecting a second indefinite suspension action against the appellant does not constitute a failure on its part to comply with the administrative judge's interim relief order.

An interim relief order cannot insulate an appellant from a subsequent adverse action so long as that action is not inconsistent with the initial decision. *Rothwell v. U.S. Postal Service*, [68 M.S.P.R. 466](#), 468 (1995); *Barcliff v. Department of the Navy*, [62 M.S.P.R. 428](#), 433 (1994); *Shumate v. Department of the Navy*, [62 M.S.P.R. 288](#), 290 (1994); see *Crespo v. U.S. Postal Service*, [53 M.S.P.R. 125](#), 129-30 (1992). The Court of Appeals for the Federal Circuit has approved the Board's holdings stating that an interim relief order only protects an employee from adverse actions based on the events underlying the action in which the interim relief order was granted, not events that are unrelated to the interim relief order. *Guillebeau v. Department of the Navy*, [362 F.3d 1329](#), 1333 (Fed. Cir. 2004). Here, while the appellant's underlying conduct caused the agency to undertake actions with regard to his security clearance, the original indefinite suspension action was based on the suspension of his security clearance, whereas the new indefinite suspension action is based on the revocation of his security clearance. IAF, Tab 5, Subtabs 4A, 4C, 4E; PFR File, Tab 3 at 15-17, 23-25. The agency's internal guidance specifically provides that an indefinite suspension is appropriate when an employee's security clearance has

³ The agency's actions include again proposing to indefinitely suspend the appellant based on its Notice of Determination to Revoke Access to Classified Information; its issuance of a final decision upholding the proposed revocation; and its issuance of a final decision upholding a new indefinite suspension. PFR File, Tab 3 at 15-17, 23-25; Tab 4 at 7-10.

been suspended, denied, or revoked, and a security clearance is a condition of employment or is otherwise required for the employee's position. IAF, Tab 5, Subtab 4I at 19 (TSA MD 1100.75-3, Handbook Addressing Unacceptable Performance and Conduct, section J(1)(d)). Under these circumstances, the agency's action in proposing and effecting the appellant's indefinite suspension based on the revocation of his security clearance does not violate the administrative judge's interim relief order in the instant case. The Board has indicated in similar cases that the appellant's claim that a second action was improper should be considered as a separate appeal of the second action. *See, e.g., Rothwell*, 68 M.S.P.R. at 468-69. Indeed, with the new evidence the appellant submitted regarding the agency action taken following the close of the record on review, he indicated that he intended to, and then "out of an abundance of caution" did, file an appeal of the new indefinite suspension that the Board docketed and assigned to the same administrative judge who handled the instant appeal. PFR File, Tab 4 at 5, Tab 5 at 4-5; *Berry v. Department of Homeland Security*, MSPB Docket No. PH-0752-11-0518-I-1.⁴

Based on the above, we find that the appellant's motion to dismiss the agency's petition for review for failure to comply with the administrative judge's interim relief order lacks merit, and we DENY it.

The administrative judge properly found that, because the agency's second condition subsequent for terminating the appellant's indefinite suspension had occurred, the agency was required to terminate it within a reasonable time.

In challenging the administrative judge's finding, the agency argues that he misinterpreted the Board's decision in *Drain v. Department of Justice*, [108 M.S.P.R. 562](#) (2008), PFR File, Tab 1 at 11-12, and the Federal Circuit's decision

⁴ The administrative judge subsequently dismissed that appeal without prejudice. *Berry v. Department of Homeland Security*, MSPB Docket No. PH-0752-11-0518-I-1, Initial Decision (Nov. 4, 2011).

in *Van Wersch v. Department of Health & Human Services*, [197 F.3d 1144](#) (Fed Cir 1999), *id.* at 12-13, erred in discounting certain evidence, *id.* at 14, and failed to consider that the second condition subsequent was wholly within the agency's control and that therefore the Board lacked authority to review it, *id.* at 14-16.

After careful consideration, the administrative judge distinguished *Drain* on the basis that, in that case, the second condition was directly dependent upon the resolution of the first condition, whereas in this case the second condition, completion of the agency's investigation, was not at all dependent upon the resolution of the security clearance suspension/revocation, and therefore the holding in *Drain* that continuation of the appellant's indefinite suspension was proper did not require a similar result here. ID at 6-9. The administrative judge relied upon the Federal Circuit's decision in *Van Wersch*, which cited to the dictionary definition of "or," and found that a statute in which two subsections were joined by that word must be read as providing two separate alternatives. *Id.* at 5-6. Acknowledging that the language in question in this case is not statutory, the administrative judge applied that accepted definition of "or," as well as the common sense understanding of the word, to find that the plain meaning of the condition subsequent is that the indefinite suspension is to terminate upon either resolution of the appellant's security clearance suspension or when the agency's investigation shows that there is sufficient evidence to return him to duty or to support an administrative action against him. *Id.*

The administrative judge considered the declaration of the individual who oversaw the office in charge of disciplining employees to the effect that the agency intended to keep the appellant on indefinite suspension pending the resolution of the security clearance issue because the clearance is a condition of his employment. IAF, Tab 32 at 8-9. The administrative judge found the argument unavailing, however, on the basis that the agency had cited no law, rule, or internal regulation that precluded it from either placing the appellant on administrative leave pending resolution of the security clearance issue or

returning him to duties that did not require a top secret clearance, to the extent he was qualified for any such position. ID at 9.

And, the administrative judge considered the agency's argument that the second condition subsequent was wholly within the agency's control and that therefore the Board lacked authority to review its decision as to that condition. Acknowledging that the argument would be correct if the agency had not completed its investigation and the appellant sought a ruling from the Board that the delay in completing the investigation was unreasonable, the administrative judge concluded that, in this case, the agency had completed its investigation and that the Board does have authority to determine whether an agency acted within a reasonable time after the investigation is concluded. ID at 10-11.

In sum, we have considered the agency's arguments on review, but discern no reason to reweigh the evidence or substitute our assessment of the record evidence for that of the administrative judge. *See Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 105-06 (1997) (finding no reason to disturb the administrative judge's findings where he considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions).

ORDER

We ORDER the agency to cancel the suspension and retroactively restore the appellant effective October 10, 2010. *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).

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**

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 the date of this order. 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 about the United States Court of Appeals for the Federal Circuit 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.

SEPARATE OPINION OF MEMBER MARK A. ROBBINS,
CONCURRING IN PART AND DISSENTING IN PART

in

John G. Berry v. Department of Homeland Security

MSPB Docket No. PH-0752-10-0519-I-1

¶1 I agree with the majority that the appellant's motion to dismiss the agency's petition for review should be denied. I do not agree that the agency's petition for review should be denied. I would grant the petition for review and reverse the initial decision.

¶2 It is undisputed that at all times relevant to this appeal, the appellant was an Air Marshal who was required to maintain a Top Secret security clearance as a condition of employment. It is also undisputed that, while in London, the appellant had an encounter with a woman that resulted in British authorities charging him with rape and assault. As a result, the agency suspended his security clearance, and then indefinitely suspended him from employment, effective July 6, 2009. The sole reason that the agency gave for the adverse action was "Suspension of Top Secret Security Clearance," supported by the following specification:

On or about March 26, 2009, the Personnel Security Division notified you in writing that your Top Security Clearance granted to you on August 14, 2003, was suspended effective immediately, pending an agency review because you failed to meet the Personnel Security Standards for Access to Classified Information. The Office of Security based the decision to suspend your security clearance due to an ongoing criminal investigation that raised concern regarding your ability to protect classified information.

Initial Appeal File (IAF), Tab 5, Subtab 4A at 1. The decision letter also stated:

This suspension will remain in effect pending resolution of the suspension of your Top Secret Clearance, or our investigation shows there is sufficient evidence either to return you to duty or to support an administrative action against you.

Id. at 3.

¶3 On November 20, 2009, a jury found the appellant not guilty on the rape charge and deadlocked on the assault charge. On March 16, 2010, upon retrial, a jury found the appellant not guilty on the assault charge. IAF, Tab 33A at 8. A few months later the appellant filed this appeal, claiming that the indefinite suspension should be terminated. *See Harding v. Department of Veterans Affairs*, [115 M.S.P.R. 284](#), ¶ 18 n.3 (2010) (an employee may file separate appeals challenging the imposition of an indefinite suspension and the continuation of the suspension), *aff'd*, 451 F. App'x 947 (Fed. Cir. 2011). On July 10, 2010, the agency completed its internal investigation. At that time the appellant was still without a security clearance.

¶4 The majority nevertheless concludes that the indefinite suspension should have ended on October 10, 2010 (a reasonable time after the agency completed its internal investigation). According to the majority, since the agency framed the condition subsequent in the disjunctive, it was required to end the suspension upon either situation described therein being met, i.e., resolution of the appellant's security clearance or completion of an internal investigation. The majority's conclusion is not supported by the language of the condition subsequent, which states that the indefinite suspension "*will remain in effect pending resolution of the suspension of your Top Secret Clearance, or our investigation shows there is sufficient evidence either to return you to duty or to support an administrative action against you*" (emphasis supplied). The suspension was clearly intended to continue as long as the security clearance was unresolved or the investigation remained open. The majority holds, in essence, that the agency was required to end the suspension when the security clearance issue was resolved or the investigation was completed, *whichever occurred first*, but the condition subsequent does not say when the suspension would "end"; instead it says how long the suspension would "remain in effect." I would

therefore interpret the condition subsequent to mean that the suspension would continue as long as either of the two situations described therein was present.

¶5 My interpretation of the condition subsequent is supported by reading the decision letter as a whole. The sole reason that the agency gave for indefinitely suspending the appellant was that he had lost his security clearance, so it is incongruous to find that the agency should have ended the suspension before the appellant's security clearance had been restored. In fact, the majority awards the appellant back pay for an eight-month period during which he lacked the security clearance that he was required to maintain as a condition of employment. Such a back pay award is unwarranted.

¶6 In light of the foregoing, I dissent from the majority's determination that the agency was required to end the appellant's indefinite suspension on October 10, 2010.

Mark A. Robbins
Member