

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

2013 MSPB 6

Docket No. PH-0752-10-0251-X-1

Jeffrey Paula,

Appellant,

v.

Social Security Administration,

Agency.

January 23, 2013

Peter H. Noone, Belmont, Massachusetts, for the appellant.

David Rodriguez, Baltimore, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The administrative judge issued a recommended decision that the Board find, under the Board's regulations in effect at that time, the agency in noncompliance with the Board's April 18, 2012 Final Order, and the matter was referred to the Board for consideration.¹ See [5 C.F.R. § 1201.183](#) (Jan. 1, 2012).

¹ 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 enforcement in this case was filed before that date. The revisions to [5 C.F.R. § 1201.183](#) do not affect our consideration of the merits of this compliance proceeding.

The April 18, 2012 Final Order required the agency to cancel the appellant's removal, restore him to the status quo ante, and pay him appropriate back pay and benefits. MSPB Docket No. PH-0752-10-0251-C-1, Compliance File (CF), Tab 8 at 6; MSPB Docket No. PH-0752-10-0251-I-1, Petition for Review (PFR) File, Tab 9 at 7-8. The administrative judge rejected the agency's contention that [5 U.S.C. § 7701\(j\)](#), governing appealability of removals from the service, does not require that an agency reinstate and pay back pay to an employee whose removal subsequently is reversed. *See* CF, Tab 6 at 5. The agency now renews its argument; the appellant opposes it.

¶2 For the reasons discussed below, we hold that [5 U.S.C. § 7701\(j\)](#) does not limit the relief that may be awarded to an appellant who retires based on an agency's final decision to remove him, but whose removal subsequently is reversed by the Board. We therefore find the agency in noncompliance with the Final Order, grant the petition for enforcement, and order appropriate relief.

BACKGROUND

¶3 On November 20, 2009, the agency proposed to remove the appellant based on a charge of conduct unbecoming a federal agent. MSPB Docket No. PH-0752-10-0251-I-1, Initial Appeal File (IAF), Tab 53 at 2. On February 2, 2010, following the appellant's oral and written responses, the agency issued a final decision sustaining the proposed removal, effective February 12, 2010. *Id.* at 1-2. On February 12, 2010 – the date his removal would have taken effect – the appellant retired pursuant to [5 U.S.C. § 8336\(c\)](#). CF, Tab 6 at 22.

¶4 The appellant timely appealed his removal to the Board. On April 21, 2011, the administrative judge issued an Initial Decision affirming the removal. IAF, Tab 53 at 21. On April 18, 2012, the Board issued a Final Order reversing the Initial Decision and ordering the agency to cancel the appellant's removal. Citing *Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#) (Fed. Cir. 1999), the

Board held that the agency violated the appellant's constitutional due process rights when it considered new and material information in assessing the penalty without providing him notice and an opportunity to respond. PFR File, Tab 9 at 3. The Board ordered the agency to cancel the removal action; restore the appellant effective February 12, 2010; and pay him the correct amount of back pay, interest on back pay, and other benefits pursuant to the Back Pay Act. *Id.* at 7.

¶5 In response to the Final Order, the agency canceled the appellant's removal but refused to restore him to duty or pay him back pay, interest, or benefits. *See* CF, Tab 6 at 20. The agency asserted that the appellant retired voluntarily on February 12, 2010, and that his retirement "completely and permanently separated him from the Agency, and cannot be revoked or withdrawn despite the" Board's Final Order. *Id.* The agency informed the appellant it would satisfy its compliance obligations by issuing a new SF-50 noting that the appellant retired voluntarily. *Id.*

¶6 The appellant timely filed a petition for enforcement. He asserted that his retirement was based solely on the agency's final decision to remove him and was not voluntary because the Board subsequently reversed the removal action. CF, Tab 1 at 17-18. He contended that in arguing otherwise, the agency relied on outdated case law, preceding the Civil Service Due Process Amendments of 1990. *Id.* at 9. Among other things, these reforms provided that the "appealability . . . of any case involving a removal from the service" should be decided without regard to "an individual's status under any retirement system established by or under any Federal statute nor any election made by such individual under any such system." 5 C.F.R. § 7701(j). The appellant contended that this provision entitled him to the same relief that would have been available had he not retired. *Id.* at 11-13.

¶7 The agency argued that § 7701(j) governed only the "appealability," in the jurisdictional sense, of cases involving both removal and retirement, and not the

relief to which prevailing appellants were entitled. CF, Tab 6 at 6 (“Appealability and reinstatement are two separate matters.”). The agency asserted that the provision’s legislative history indicates Congress intended a retired employee to contest his removal only to obtain a “clean record,” not to obtain full reinstatement and back pay. *Id.* at 13-14. The agency denied that its cases were outdated, or that § 7701(j) overruled them, and contended that, under its cases, the appellant retired voluntarily and thus was not entitled to restoration or back pay. *Id.*

¶8 On September 27, 2012, the administrative judge issued a Recommendation agreeing with the appellant’s position. He rejected the agency’s contention that § 7701(j) applied only to the jurisdictional analysis in a joint removal and retirement case. CF, Tab 8 at 5. He noted that several Board cases decided after the 1990 Civil Service Due Process Amendments awarded reinstatement and back pay to appellants who, like Mr. Paula, retired in the face of a final removal decision. *Id.* at 5-6. He also noted that [5 C.F.R. § 550.805](#)(e)(2), an Office of Personnel Management (OPM) regulation, “specifically contemplates an offset of retirement contributions paid to an employee based on a separation that is subsequently found erroneous and a gross back pay award and return to the retirement system.” *Id.* at 6. He therefore recommended that the agency be found noncompliant with the Final Order. *Id.*

¶9 The agency challenged the Recommendation, asserting the same legal arguments it made before the administrative judge. *See* MSPB Docket No. PH-0752-10-0251-X-1, Compliance Referral File (CRF), Tab 7. The appellant renewed his opposition to the agency’s arguments. CRF, Tab 9.

ANALYSIS

Section 7701(j)

¶10 The agency relies on the *Taylor* line of cases, beginning in 1979, in which the Board’s reviewing court held that when an appellant retired after receiving a

final decision of removal, he was not entitled to back pay or reinstatement if the removal action later was reversed. The Court of Claims held that “[t]he controlling issue is whether plaintiff’s retirement was voluntary. The clear import of the statutes, regulations, and decisional law is that a voluntary retirement, like a resignation, results in the employee’s complete separation from the Federal service – a separation which, after it becomes effective, may not thereafter be revoked or withdrawn at his option.” *Taylor v. United States*, [591 F.2d 688](#), 690 (Ct. Cl. 1979). *Accord Kestner v. Dep’t of the Interior*, 229 Ct. Cl. 772, 774-75 (Ct. Cl. 1982); *Ballentine v. Department of Justice*, [39 M.S.P.R. 543](#), 546 (1989) (“a voluntary retirement results in an employee’s complete separation from the service and . . . the employee is not entitled to rescind his voluntary retirement because he subsequently prevails in an appeal of an adverse action before the Board”); *Collier v. Office of Personnel Management*, [29 M.S.P.R. 38](#), 42 (1985) (“Appellant’s voluntary retirement was a discrete, intervening factor limiting appellant’s right to reinstatement”).² The agency contends that under these cases, the appellant voluntarily retired on February 12, 2010, and the Board’s subsequent reversal of his removal does not entitle him to withdraw his retirement, to be reinstated, or to receive back pay. CRF, Tab 7 at 5. The agency maintains that [5 U.S.C. § 7701\(j\)](#) (one of the 1990 Civil Service Due Process Amendments) and subsequent cases interpreting it did not supersede or overrule *Taylor*’s reasoning because § 7701(j) governs only whether the Board has jurisdiction over joint removal and retirement cases, and not the relief that may be awarded. *Id.*

¶11 We disagree. As explained below, our cases following the enactment of § 7701(j) consistently have recognized that an appellant who retires in the face of

² The agency also cites *Young v. Office of Personnel Management*, [99 M.S.P.R. 563](#) (2005), asserting that *Young* indicates the viability of the *Taylor* line of cases. *Young* is distinguishable, however, as it dealt with a disability retirement, not a retirement stemming from an adverse action.

a final removal decision, and whose removal is reversed, is entitled to all the relief he could have received if he had appealed the removal but had not retired.

¶12 [5 U.S.C. § 7701](#)(j) provides:

In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

The plain meaning of this provision is that the Board may not base its jurisdictional determination in a removal appeal on whether the appellant retired when faced with a final removal decision. Thus, as the Federal Circuit held in *Mays v. Department of Transportation*, this provision overruled *Taylor's* holding that a retirement stemming from a final decision of removal is voluntary and outside the Board's jurisdiction. [27 F.3d 1577](#), 1579-81 (Fed. Cir. 1994).

¶13 Following *Mays*, the Board analyzed joint removal and retirement claims as removal actions, without regard to the voluntariness of the retirement decision, and did not limit the relief available to prevailing appellants. Thus, in *Scalese v. Department of the Air Force*, the Board held:

Where . . . an employee decides to retire because his employing agency has issued a decision to remove him, and the employee retires on the date the removal was to become effective, the employee does not lose the right to file a Board appeal contesting the removal. . . . Whether the appellant's retirement was involuntary . . . need not be addressed. If the agency is unable to support its removal decision, then the appellant is entitled to all the relief he could receive if he could show that his retirement was coerced, and his involuntary retirement claim would thereby be mooted. Conversely, if the agency is able to show that it properly decided to remove the appellant . . . then he could not establish that his retirement was involuntary. Therefore, the appeal, which is properly before the Board as an appeal from an express decision of removal, can be adjudicated without regard to "constructive removal" (involuntary resignation or retirement) doctrine.

[68 M.S.P.R. 247](#), 248-49 (1995) (internal citations omitted). The Board's subsequent cases applied the same framework. See *Norton v. Department of Veterans Affairs*, [112 M.S.P.R. 248](#), ¶ 2 (2009); *Williams v. Department of Health and Human Services*, [112 M.S.P.R. 628](#), ¶¶ 7-8 (2009); *Cunningham v. Department of Veterans Affairs*, [86 M.S.P.R. 519](#), ¶¶ 5-9 (2000). Absent some intervening or superseding circumstance, the Board ordered restoration and back pay for appellants who prevailed on their removal claims. See *Norton*, [112 M.S.P.R. 248](#), ¶¶ 12-13 (ordering restoration and back pay for an appellant who retired but whose removal was reversed on substantive grounds)³; *Cunningham*, [86 M.S.P.R. 519](#), ¶¶ 9-10 (ordering restoration and back pay for an appellant who retired but whose removal was reversed on procedural due process grounds); cf. *Sink v. Department of Energy*, [110 M.S.P.R. 153](#), ¶¶ 21-22 (2008) (not awarding restoration or back pay where the appellant's involuntary retirement was based on misinformation about his retirement benefits, and not on the agency's removal decision, which was sustained).⁴

³ We disagree with the agency's attempt to distinguish *Norton*. The agency asserts that *Norton* "focuses on the appellant's right to 'interim relief' and does not address the issue presented in this case." CRF, Tab 7 at 10. However, like Mr. Paula, Mr. Norton both received a final decision of removal and retired. His entitlement to interim relief was based on the Board's reversal of the removal action. Under the agency's theory, Mr. Norton would not have been entitled to any relief – interim or final – because of his retirement. The Board, however, held that he was entitled to both. See [112 M.S.P.R. 248](#), ¶ 10.

⁴ We disagree with the agency's reading of *Sink* and *Williams*. Neither demonstrates, as the agency claims, that an appellant's remedy following retirement is to "pursue restoration of reputation and alleviation of the stigma associated with a removal action." CRF, Tab 7 at 14. In *Sink*, as explained above, the Board did not award reinstatement or back pay because the appellant's decision to retire was not based on a subsequently invalidated removal. [110 M.S.P.R. 153](#), ¶¶ 21-22. In *Williams*, the Board affirmed that the appellant's removal and involuntary retirement claims should be adjudicated as a single removal action, consistent with *Norton* and *Cunningham*. [112 M.S.P.R. 628](#), ¶¶ 7-8. The Board then dismissed the appeal for lack of jurisdiction because the appellant previously had entered into a settlement agreement waiving her right to appeal her removal. *Id.*, ¶¶ 10-11.

¶14 We see no error in these cases, and no sound policy or other reason to limit the relief awarded to an appellant who retires in the face of a final removal decision, but whose removal subsequently is reversed. As *Scalese* established, the Board has jurisdiction over and adjudicates such cases as it would a pure removal action; appellants therefore should receive the same relief. As we implicitly held in *Scalese* and subsequent cases, we now explicitly affirm: pursuant to [5 U.S.C. § 7701\(j\)](#), an appellant who retires in the face of a final removal decision, and whose removal subsequently is invalidated, is entitled to the same relief as if he did not retire. To the extent *Taylor* and its progeny may be read to hold otherwise, they are overruled.

¶15 We reject the agency's claim that Congress intended § 7701(j) to overturn only *Taylor's* holding regarding jurisdiction, leaving intact *Taylor's* reasoning regarding the limited relief awarded to employees who retire due to final removal decisions. The agency asserts that the legislative history of § 7701(j) evinces only an intent to permit employees to "pursue a 'clean record' through the appeal process," rather than to obtain full reinstatement and back pay. CRF, Tab 7 at 6. For this proposition, the agency relies on a single statement in *Mays*. *See id.* There, the Federal Circuit quoted the House Committee Report, which stated: "Simply put, the bill allows an employee who is eligible to retire but who the agency wants to fire to take his or her annuity and still challenge the adverse action before the Merit Systems Protection Board." *Mays*, 27 F.3d at 1580 (quoting 101 H. Rpt. 328, at 6 (1989)). The court then noted that this "rather broad language . . . certainly supports the proposition that pursuant to section 7701(j), an employee, stigmatized with an adverse final decision reflected in her government employment record, may challenge the final removal decision while also opting to retire." *Id.*

¶16 We do not read the court's statement as narrowly as the agency urges us to do. The court noted the breadth of the statutory language and neither stated nor implied that correcting the stigma of an adverse final decision was Congress's

sole consideration. Indeed, in the preceding sentences, the court recognized that Congress “intended to end the situation which forced federal employees to choose between appealing a removal action and accepting retirement benefits.” *Id.* This broader statement contains no qualifiers as to the scope of relief an employee might obtain on appeal. Nor do we see any such limitation in the legislative history quoted by the court or in any other portion of the legislative history related to this amendment. We therefore reject the agency’s claim that Congress intended § 7701(j) to limit the relief awarded to a retired employee who prevails on his removal claim.⁵

The Appellant’s Petition for Enforcement

¶17 In his petition for enforcement, the appellant asserted that he retired solely due to the agency’s final decision to remove him. CRF, Tab 1 at 17-18. We see nothing in the record to contradict this statement.⁶ The Board’s April 18, 2012 Final Order reversed the appellant’s removal on procedural grounds. He therefore falls squarely within the *Norton* line of cases, under which the Board awards to an appellant who both retired and was removed all the relief he could have obtained had he pursued his removal action without retiring.

⁵ We also reject the agency’s contention that [5 C.F.R. § 550.805\(e\)\(2\)](#) does not apply to employees who appeal under [5 U.S.C. § 7701\(j\)](#) and prevail on their removal claims. *See* CRF, Tab 7 at 15. The agency’s argument is founded on the voluntary/involuntary framework of adjudicating retirement appeals – which, as we have explained, does not apply to joint removal and retirement appeals over which the Board has jurisdiction pursuant to § 7701(j). In addition, the agency continues to claim that the appellant’s removal was “both warranted and justified,” CRF, Tab 7 at 15, in the face of the Board’s Final Order reversing it.

⁶ The agency insists that the appellant is not entitled to reinstatement because he retired “voluntarily.” *E.g.*, CRF, Tab 7 at 5. As we have explained, the Board no longer uses the voluntary/involuntary framework in adjudicating express removal and retirement appeals. *See Scalese*, 68 M.S.P.R. at 249. Rather, the Board adjudicates the removal action, whose outcome determines both the removal and the retirement claims. *Id.* Moreover, even if the Board did use such a framework, the appellant’s retirement would not be considered voluntary because it was based on a final removal decision that the Board reversed. *See id.*

¶18 When the Board reverses a personnel action, the agency must return the appellant as nearly as possible to the status quo ante. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). Thus, the Board properly ordered the agency to cancel the appellant's removal, reinstate him, and pay him appropriate back pay, with interest, and benefits. *See* PFR File, Tab 9 at 7.

¶19 The agency bears the burden to prove its compliance with the Board's order. The agency's assertions of compliance must include a clear explanation of its compliance actions supported by documentary evidence. *Vaughan v. Department of Agriculture*, [116 M.S.P.R. 319](#), ¶ 5 (2011). Here, the agency canceled the appellant's removal but neither reinstated him nor paid him back pay or benefits. CF, Tab 6 at 20. Accordingly, we find the agency noncompliant with the April 18, 2012 Final Order and order appropriate relief. This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(c)(1) ([5 C.F.R. § 1201.183\(c\)\(1\)](#)).

ORDER

¶20 We ORDER the agency to cancel the removal action and to restore the appellant effective February 12, 2010. *See Kerr*, [726 F.2d 730](#); PFR File, Tab 9 at 7. The agency must complete this action no later than **20 days** after the date of this decision.

¶21 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, no later than **20 days** after the date of this decision.

¶22 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 to describe the

actions it took to carry out the Board's Order.⁷ The appellant, if not notified, should ask the agency about its progress. [5 C.F.R. § 1201.181](#)(b).

¶23 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 Recommendation in this compliance action. 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).

**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:

⁷ The agency is reminded that if it fails to provide evidence of compliance, the Board may impose sanctions against the responsible agency official, including an order directing that said official not be paid during the period of noncompliance. See [5 U.S.C. § 1204](#)(e)(2)(a).

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. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.