



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: April 10, 2009

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## BOARD DECISIONS

- **Appellant: Darcy Johnson**  
**Agency: United States Postal Service**  
**Decision Number: [2009 MSPB 50](#)**  
Docket Number: CH-0752-08-0542-I-1  
Issuance Date: April 7, 2009  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

### **Jurisdiction - Suspensions**

Both parties petitioned for review of an initial decision that reversed one of the appellant's allegations of a constructive suspension and dismissed others for lack of jurisdiction. The appellant, who was suffering from injuries to his back and knee, requested and was granted light-duty work. His condition later worsened and he was unable to work in any capacity for a significant period of time, but later requested to return to light-duty work with restrictions different from those in his former light-duty position. Although several such requests were denied by the Senior Plant Manager, a subsequent request was approved by a Labor Relations Specialist for the period from May 27 to June 27, 2008. She testified that this action was taken on the mistaken belief that the appellant was entitled to work without regard to the agency's normal criteria for awarding light-duty assignments. When the Senior Plant Manager learned of the action, he determined that the assignment was not properly awarded, and ordered that it be terminated on the basis that there was a lack of productive work for the appellant. On the basis of this determination and order, an agency official prevented the appellant from reporting to duty in his temporary light-duty assignment. On appeal, the administrative judge (AJ) found that the appellant failed to establish jurisdiction as to several of his claims of a constructive suspension, but that the early termination of the May 27 to June 27 assignment constituted a constructive suspension that must be reversed because the appellant was not afforded notice or an opportunity to respond to the agency's action.

**Holdings:** The Board affirmed the initial decision in part and reversed it in part, dismissing the appeal for lack of jurisdiction:

1. When an employee requests work within his medical restrictions, and the agency is bound by policy, regulation, or contractual provision to offer available work to the employee, but fails to do so, his continued absence for over 14 days constitutes an appealable constructive suspension. Once an employee makes a nonfrivolous allegation that he was able to work within certain restrictions, that he communicated his willingness to work, and that the agency prevented him from returning to work, the burden of production shifts to the agency to show that there was no work available within the employee's restrictions, or that it offered such work to the employee and he declined it.

2. The termination of a light-duty assignment is not, per se, an adverse action appealable to the Board, and thus does not require notice and an opportunity to respond.

3. Although the agency terminated the appellant's light-duty assignment, it did not prevent him from returning to work in his regular duties, or from returning to work in his prior light-duty assignment. The appellant was faced with the unpleasant alternatives of returning to work with duties outside his medical restrictions, or requesting leave. His decision not to return to his regular duties or his previous light-duty work, however unpleasant, was voluntary. Accordingly, the appellant did not suffer an appealable constructive suspension when the agency terminated his temporary assignment due to the absence of productive work within his medical restrictions.

➤ **Appellant: Melissa A. Adde**

**Agency: Department of Health and Human Services**

**Decision Number: [2009 MSPB 51](#)**

Docket Number: DC-0752-08-0410-I-1

Issuance Date: April 7, 2009

Appeal Type: Adverse Action by Agency

Action Type: Reduction in Grade/Rank/Pay

**Jurisdiction – Reduction in Pay**

The appellant petitioned for review of an initial decision that dismissed her appeal of an alleged reduction in pay for lack of jurisdiction. Employed as a nurse, the appellant received a special salary under title 38 of the United States Code while serving at the National Institutes of Health in Bethesda, Maryland. In 2000, her duty station changed from Bethesda to Brussels, Belgium, but she continued to receive the special supplementary salary rate. The agency eventually determined that the appellant should not have received the special salary rate while working in Belgium, and reset her salary under the provisions of [5 C.F.R. § 530.323\(c\)](#). In dismissing the appeal for lack of jurisdiction, the AJ found, inter alia, that: (1) Although a reduction in an employee's basic rate of pay is generally appealable to the Board, a reduction in pay from a rate that is contrary to law or regulation is not appealable; (2) [5 C.F.R. § 530.309\(d\)](#) provides that the reduction or termination of an employee's special salary rate

supplement is not an adverse action; and (3) because the agency set the appellant's pay rate contrary to law at the time it reassigned her to Belgium, its termination of this erroneous special rate is not within the Board's jurisdiction.

**Holdings: The Board denied the appellant's petition for review (PFR), reopened the appeal on its own motion, vacated the initial decision, and remanded the appeal for further adjudication. It determined that a remand was necessary to resolve the conflict between the definitions of "basic rate of pay" under 5 U.S.C. chapters 75 and 53.**

- **Appellant: Moises U. Cabarloc**  
**Agency: Department of Veterans Affairs**  
**Decision Number: [2009 MSPB 52](#)**  
 Docket Number: SF-0752-08-0684-I-1  
 Issuance Date: April 7, 2009  
 Appeal Type: Adverse Action by Agency  
 Action Type: Removal

**Timeliness - PFA**

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed. The appellant, who was removed from his position as a Nursing Assistant effective May 23, 2008, based on the charge of unauthorized absence, filed his appeal on August 27, 2008. As was known to the agency, the appellant was incarcerated from February 15, 2008, until his release on July 31, 2008. On the appeal form, the appellant asserted that he did not receive the agency's final decision letter until August 25, 2008. The agency stated that the letter of removal was sent to the appellant's home address by certified mail on May 19, 2008, but was unable to locate the certified mail delivery verification card. In dismissing the appeal, the AJ found that the appellant failed to show "that he exercised due diligence in timely filing his appeal under the particular circumstances of this case."

**Holdings: The Board granted the appellant's PFR, vacated the initial decision, and remanded the case to the regional office for adjudication:**

1. Under [5 C.F.R. § 1201.22\(b\)](#), an appellant must file his appeal no later than 30 days after the effective date of the action being appealed, or 30 days after the date he receives the agency's decision whichever is later.
2. On his appeal form, the contents of which he certified were true, the appellant alleged that he did not receive the agency's final decision letter until August 25, 2008. The agency failed to rebut this allegation. Accordingly, the Board found that the appeal was timely filed.

- **Appellant: Frank Rosato**  
**Agency: Department of the Army**  
**Decision Number: [2009 MSPB 53](#)**  
Docket Number: SF-0752-08-0579-I-1  
Issuance Date: April 7, 2009  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

### **Mootness**

The appellant petitioned for review of an initial decision that dismissed his removal appeal as moot. While the appeal was pending, the agency indicated that it was rescinding the removal action and filed a motion to dismiss the appeal as moot, which the AJ granted.

**Holdings: The Board granted the appellant's PFR, vacated the initial decision, and remanded the appeal for further adjudication:**

- 1. The Board's jurisdiction is determined by the nature of an agency's action at the time an appeal is filed, and its unilateral action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents or unless the agency completely rescinds the action being appealed. For the appeal to be deemed moot, the employee must have received all of the relief he could have received if the matter had been adjudicated and he had prevailed.**
- 2. In his PFR, the appellant contends in a sworn statement that had not received any back pay or interest, and that the agency had not taken other actions to make him whole. The appellant's sworn statement constitutes a nonfrivolous allegation that he has not received all appropriate relief and that his appeal is not moot.**
- 3. While the agency has now submitted evidence that it has provided back pay and taken other remedial action, there remains a genuine factual dispute as to whether the appellant has received all of the relief he could have received if the matter had been adjudicated and he had prevailed. A remand is therefore necessary.**

- **Appellant: Gregg Giannantonio**  
**Agency: United States Postal Service**  
**Decision Number: [2009 MSPB 54](#)**  
Docket Number: DE-0752-08-0191-I-1  
Issuance Date: April 9, 2009  
Appeal Type: Adverse Action by Agency  
Action Type: Reduction in Grade/Pay

### **Constitutional Issues – Due Process**

Both parties petitioned for review of an initial decision that reversed the agency's demotion action. The AJ found that the action must be reversed under *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#) (Fed. Cir. 1999), on the basis that the agency had denied the appellant due process because the deciding official engaged in prohibited ex parte communications. Despite this determination, the AJ made an

“alternative finding” in which she determined that the agency proved its charge, but that the penalty must be mitigated to a letter of warning.

**Holding:** The Board denied both parties’ requests for review, but reopened the appeal on its own motion to vacate the AJ’s alternative finding. Under [Stone](#), when a procedural due process violation has occurred because of ex parte communications, “the merits of the adverse action are wholly disregarded.” The AJ should have reversed the agency’s action without making an “alternative” finding. Moreover, the AJ’s finding was not actually an alternative finding, which is a finding that would support the same outcome on a different basis.