

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

MALVIN W. HARMON,  
Appellant,

DOCKET NUMBER  
AT-0752-12-0094-I-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: February 19, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL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

Harvey G. Orr, Union City, Georgia, for the appellant.

Beverly R. Brooks, Charlotte, North Carolina, 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 dismissed his appeal for lack of jurisdiction. For the reasons explained below, 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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 the appellant's petition pursuant to [5 C.F.R. § 1201.115](#)<sup>2</sup> and REVERSE the initial decision. The agency's decision to suspend the appellant from March 26, 2011, until April 14, 2011, is NOT SUSTAINED.

### ANALYSIS

#### The administrative judge erred in dismissing the appeal for lack of jurisdiction.

A suspension of more than 14 consecutive days is an adverse action within the Board's jurisdiction. [5 U.S.C. §§ 7512](#)(2), 7513(d). It is undisputed that the agency's "emergency placement" action constitutes a suspension, i.e., the temporary placement of an employee, for disciplinary reasons, in non-duty, non-pay status. [5 U.S.C. § 7501](#)(2). Consequently, the jurisdictional issue before us is whether the appellant was suspended for more than 14 consecutive days.

Contrary to the initial decision, the Employee Everything Report (EER) and Postal Service (PS) Form 3972 establish that the appellant was suspended from March 26, 2011, until his restoration to pay status on April 14, 2011, a period of more than 14 consecutive days. Initial Appeal File (IAF), Tab 10, Exhibits (Exs.) 2, 4. The agency attempted to rebut that evidence with documentation purportedly showing that, prior to the filing of the appeal, the agency retroactively adjusted the appellant's pay to place him in paid administrative leave status during week 1 of Pay Period 9, beginning April 9, 2011. However, the PS Form 2240 clearly indicates that Postmaster Gantt requested a pay adjustment for *week 2* of the pay period, which began April 16, 2011. *Id.*, Ex. 6. The payroll journals and pay stubs submitted by the agency do not indicate for which specific days the appellant's pay was adjusted and are therefore consistent with a finding that a pay adjustment was made for week 2 of

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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.

Pay Period 9, not week 1. *Id.*, Exs. 7-9. Furthermore, the agency has not explained why the alleged adjustments to week 1 are not reflected on the EER, which was generated on November 16, 2011, several months after the adjustments to Pay Period 9 were authorized and effected. *See id.*, Ex. 4. Considering the record as a whole, we agree with the appellant that the administrative judge erred in dismissing the appeal for lack of jurisdiction.

We do, however, agree with the administrative judge that the appellant failed to show that he suffered an appealable suspension during the month of August 2011. The Board has suggested in dicta that nonconsecutive suspensions may be combined when the suspensions are based on the same reason and there is evidence that the agency attempted to circumvent jurisdiction by imposing multiple suspensions of 14 days or less. *Edwards v. U.S. Postal Service*, [112 M.S.P.R. 196](#), ¶ 8 (2009). However, it is unclear from the record why the appellant was in leave without pay status on the dates in question, and there is no evidence that the agency was seeking to avoid Board jurisdiction. Thus, the appellant has not shown that the Board has jurisdiction to review his placement in non-duty, non-pay status during August 2011.

The appellant has shown good cause for the untimely filing of his appeal.

With regard to the timeliness of the appeal, the appellant filed his appeal on November 7, 2011, approximately 7 months after the filing deadline. *See* [5 C.F.R. § 1201.22\(b\)](#). However, there is no indication that the agency ever notified the appellant of his right to appeal the suspension action, as required under [5 C.F.R. § 1201.21](#). When an agency is required to notify an individual of his Board appeal rights but fails to do so, the agency's failure may constitute good cause for the filing delay. *Powell v. Office of Personnel Management*, [114 M.S.P.R. 580](#), ¶ 11 (2010). In such cases, an appellant need only show that he acted diligently in pursuing his Board appeal rights once he discovered them. *Id.* The appellant has supplied a declaration, sworn under penalty of perjury,

indicating that he acted with due diligence in filing a Board appeal upon learning that he might have the right to appeal his suspension. IAF, Tab 11, Ex. H. We find that he has shown good cause for the untimely filing of his appeal.

The agency's decision to suspend the appellant from March 26, 2011, to April 14, 2011, is not sustained.

Under [5 U.S.C. § 7513](#)(b)(1), an agency is required to provide at least 30 days advance written notice before imposing an adverse action, unless it has reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Here, the agency did not provide the statutorily required 30 days notice, and it has not alleged that it had reasonable cause to believe the appellant had committed a crime of any degree of severity. Consequently, the agency's decision to summarily suspend the appellant must be reversed as not in accordance with law under [5 U.S.C. § 7701](#)(c)(2)(C). See *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 683 (1991); *Cuellar v. U.S. Postal Service*, [8 M.S.P.R. 624](#), 632 (1981).

### **ORDER**

We ORDER the agency to cancel the appellant's suspension for the period from March 26, 2011, until April 14, 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.

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. 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](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.