

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

NASIR UDDIN,
Appellant,

DOCKET NUMBER
SF-0752-10-0037-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: February 3, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL

Norman Jackman, Esquire, Cambridge, Massachusetts, for the appellant.

Michael L. Halperin, Esquire, Monterey, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

In his petition for review, the appellant asserts that the administrative judge erred in reinstating him only for the balance of his appointment, which was scheduled to end on February 10, 2010, when he reversed the agency's removal action. Petition for Review (PFR) File, Tab 1 at 1. The appellant asserts that the agency violated 5 C.F.R. § 316.401(c)(1) in extending his initial appointment, effective November 13, 2006, until January 11, 2009, because section 316.401(c)(1) "prohibits an agency from making a temporary appointment in excess of 24 months of total service." PFR File, Tab 1 at 2. He similarly asserts that the agency violated 5 C.F.R. § 316.401(c)(2) in extending his temporary appointment on December 18, 2008, until February 10, 2010, because section 316.401(c)(2) "prohibits an agency from filling a position by temporary appointment if that position has previously been filled by temporary appointment(s) for an aggregate of 2 years within the preceding 3 year period." PFR File, Tab 1 at 2. The appellant asserts that in violating 5 C.F.R. § 316.401 the agency converted him to a permanent employee, and therefore "his reinstatement should not have been limited by the date of February 10, 2010 or any other date." *Id.*

Each of the SF-50s submitted into the record by the agency shows that the appellant was appointed for periods exceeding one year. See Initial Appeal File (IAF), Tab 5, Subtab 4A at 5; *id.*, Tab 35, Subtabs 10-11. Accordingly, because the appellant's appointments were not limited to 1 year or less, they were not "temporary" appointments under 5 C.F.R. § 316.401. See *Murdock-Doughty v. Department of Air Force*, 74 M.S.P.R. 244, 251 (1997); 5 C.F.R. § 316.401(c) ("An agency may make a temporary appointment for a specified period not to exceed 1 year."). Moreover, even if the agency mistakenly sought to appoint the appellant under 5 C.F.R. § 316.401, the appellant has failed to point to any law, rule, or regulation that would convert him to a permanent employee under such circumstances.

Further, the evidence in the record indicates that the appellant's appointments were term appointments. *See* 5 C.F.R. § 316.301 ("An agency may make a term appointment for a period of more than 1 year but not more than 4 years to positions where the need for an employee's services is not permanent."). As noted above, each of the appellant's appointments was for a period of more than 1 year. *See* IAF, Tab 5, Subtab 4A at 5; *id.*, Tab 35, Subtabs 10-11. Further, as the agency points out in its response to the appellant's petition for review, the SF-50s show that the appellant was entitled to retirement benefits under the Federal Employees Retirement System (FERS) and FICA, benefits to which an employee serving under a temporary appointment would not be entitled. *See* 5 C.F.R. § 890.102(c)(1) (providing that an employee serving under an appointment lasting 1 year or less is not eligible for the Federal Employees Health Benefits Program); 5 C.F.R. § 842.105(a)(1) (providing that an employee serving under an appointment lasting 1 year or less is not eligible for FERS); <http://www.opm.gov/retire/pre/fercca/faq/Determine.htm> (noting that code K in box 30 of an SF-50 indicates FERS and FICA coverage); IAF, Tab 5, Subtab 4A at 5; *id.*, Tab 35, Subtabs 10-11; PFR File, Tab 3 at 1-2. Accordingly, as the appellant served under term rather than temporary appointments, we discern no error in the administrative judge's finding that the appellant is entitled only to retroactive reinstatement up to February 10, 2010, the date of the expiration of his term appointment. *See* Initial Decision at 39-40.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

We ORDER the agency to cancel the removal action and to restore the appellant for the balance of his term appointment effective September 4, 2009.

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. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

**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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. See Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 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 EEOC no

later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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:

William D. Spencer
Clerk of the Board

Washington, D.C.