

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

ERROL ADLER, et al. <sup>1/</sup> appellants,	DOCKET NUMBER NY075281F1346
v.	)
DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION.	)
	)
	)

OPINION AND ORDER

The appellants have petitioned for review of the initial decision dated November 26, 1982, sustaining their removals from the position of Air Traffic Control Specialist at the Westchester Airport Control Tower. The agency based the removal actions on charges of participating in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, and unauthorized absence.

Upon consideration of the appellants' petition, we find that the legal issues raised have been addressed and resolved by the Board,<sup>2/</sup> that the presiding official's findings as to those legal issues are essentially consistent with ours, and that any inconsistency in the presiding official's

<sup>1/</sup> This case was consolidated by the Regional Office and decided under the same name. Petitioners subject to this Opinion and Order are listed in Appendix A.

<sup>2/</sup> The legal issues in the appellant's petition for review and the briefs submitted in support thereof are identical to those addressed and resolved by the Board in Bangerter v. Department of Transportation, MSPB Docket No. S-075281F0279 (September 27, 1983).

determinations on those issues would not affect the outcome of these appeals.<sup>3/</sup> In addition, to the extent that the arguments made in the appellants' petition relate to the presiding official's factual determinations, we find that, with the exception of appellant Zimmerman, the appellants have not demonstrated any factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).

It is undisputed that appellant Zimmerman was on annual leave from August 3, until August 16. H.T. 27-28. Nonetheless, on August 5, the agency erroneously sent Mr. Zimmerman a notice of proposal to remove. Appellants' Exhibit B. At the hearing, the agency produced a letter dated August 10, Agency Exhibit 1, which purported to rescind the August 5 notice. However, the agency produced no proof that the August 10 letter was either mailed or that it was received by appellant. Indeed, the letter did not appear in either the adverse action file examined by appellant or the adverse action file submitted to the Board. See Zimmerman Skeleton File. On August 17, the agency issued a second notice of proposal to remove, upon which it depended to effect appellant's removal. Appellant received the second notice on August 20. <sup>4/</sup>

Because appellant did not testify at the hearing, the presiding official discredited the contention of appellant's

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<sup>3/</sup> The presiding official sustained the removals of all the appellants in this consolidation. He indicated in the initial decision that the agency's denial to appellants Palm and Wigsten of a full seven days to reply to the charges against them, although not harmful error, required that the agency amend its records to retroactively afford appellants the full seven day periods. Initial Decision at 4. The Board notes that since the employees lost no pay as a result of the agency error, there is no need for the agency to amend the records. See Johnson v. Department of the Treasury, MSPB Docket No. DC075209213 (August 27, 1982).

<sup>4/</sup> As we held in Bangerter, supra, at 39, "given the fact of the first erroneous notice, appellant justifiably believed that he could no longer report for duty."

counsel that the letter had not been received by the appellant, and thus found no harmful error in the issuance of the erroneous notice. Initial Decision at 4. We disagree.

On review of the record, the Board finds that appellant proved harmful error by showing that the erroneous notice directly misled him into believing that his deadline shift had passed while he was on approved annual leave, and effectively deprived him of the opportunity to report for his actual deadline shift. In the face of such a showing, supported by the agency's records, it was incumbent on the agency to prove that the rescission letter was received by the appellant. Further, the agency's failure to place the alleged rescission letter in the adverse action file constituted harmful error because the appellant was deprived of the right to respond to the agency's assertion of its existence. Thus, the agency's action cannot be sustained pursuant to 5 U.S.C. § 7701(c)(2)(A) and 5 C.F.R. § 1201.56(b)(1). Bangerter, supra, at 39.

Accordingly, the petition for review is GRANTED pursuant to 5 U.S.C. § 7701(e)(1). The initial decision is REVERSED with respect to appellant Zimmerman and AFFIRMED with respect to all other appellants listed in Appendix A. The agency is ORDERED to cancel appellant Zimmerman's removal.

This is the final order of the Merit Systems Protection Board in these appeals.

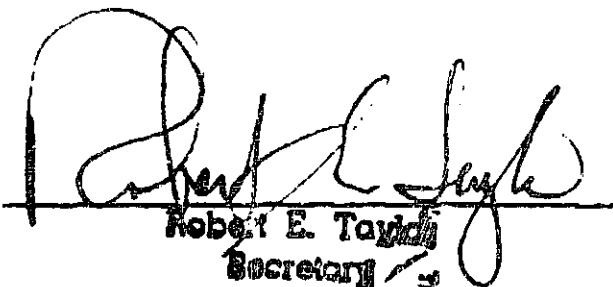
Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the New York Regional Office in accordance with 5 C.F.R. § 1201.181(a).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

NOV 10 1983  
(Date)

Washington, D.C.



Robert E. Taylor  
Secretary

Attachment: Statement of the Board's policy on service of its opinions and orders.

APPENDIX A

<u>APPELLANT</u>	<u>DOCKET NUMBER</u>
Errol Adler	NY075281F1346
Carl Aldrich	NY075281F1341
Laurence F. Brady	NY075281F1342
Sharon Brana	NY075281F1343
Timothy A. Carr	NY075281F1344
Vincent A. Geraci	NY075281F1352
Marvin L. Hill	NY075281F1354
William A. Kapp	NY075281F1356
Paul R. Lill, Jr.	NY075281F1358
Bruce Carlsen Linton	NY075281F1359
Robert L. Mims	NY075281F1363
Gary Allan Palm	NY075281F1364
Adam Richard Radzimirski	NY075281F1365
Elizabeth A. Rist	NY075281F1366
Charles W. Teichert	NY075281F1370
Carl Zimmerman	NY075281F1444

-- Attachment --

SERVICE OF BOARD OPINIONS

AND ORDERS

Under Federal regulations set forth at 5 C.F.R. § 1201.26(b)(1), the Board has discretionary authority to determine the persons to be listed in a certificate of service of a Board decision. The Board has determined to serve the decision in this case on both the appellant personally and the appellant's representative. An earlier notice which the parties may have received from the Secretary of the Board appears to suggest that the law requires service upon the appellant personally at his or her personal address. The Secretary's statement is incorrect and should be disregarded. To ensure a timely filing with the court, the 30-day time limit should be calculated from the date this decision is first received, whether by the appellant or the representative. The court has not yet decided whether service on the appellant or the representative controls the time for an appeal to the court.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing OPINION  
AND ORDER was sent by certified mail this date to:

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