UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

68 M.S.P.R.

Docket Numbers AT-0752-92-0878-X-1, AT-0752-94-0435-I-1, AT-0752-94-0663-I-1[1]

JEFFERY D. DALTON, Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date: February 8, 1995

Anthony L. Bajoczky, Esquire, Bajoczky & Fournier, Tallahassee, Florida, for the appellant.

Matthew Kline, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The agency has petitioned for review of the initial decision issued on August 24, 1994, that found it in noncompliance with a prior Board decision that reversed the appellant's removal and ordered that he be restored to the status quo ante, and that also reversed two indefinite suspension actions. For the reasons set forth below, we GRANT the agency's petition, REVERSE the initial decision and SUSTAIN the indefinite suspensions. *See* 5 C.F.R. § 1201.115. We do not adopt the administrative judge's recommendation of noncompliance with the removal decision, and we dismiss the appellant's petition for enforcement of such compliance.

BACKGROUND

The facts are not in dispute. The appellant was a Material Handler Foreman, WS-4, at the Federal Correctional Institution, Marianna, Florida. He was considered a Correctional Officer because he came into contact with inmates in the performance of his duties. The appellant was removed on July 27, 1992, based on charges of inappropriate relationships with female

inmates and introduction of contraband.[2] The appellant was alleged to have had sexual intercourse with a female inmate on several occasions from August 1988 through August 1990, and with another female inmate, at unspecified dates and times, in the prison laundry room and storage facilities. The introduction of contraband charge concerned giving an inmate a hair frosting kit on July 26, 1991, in violation of agency standards of conduct. *See* Appeal File (AF), Tab 8, Subtabs 4d-3, 4d-5.

In an initial decision issued on November 19, 1992, the agency's removal action was reversed. *See id*., Subtab 4d-6, Initial Decision No. AT-0752-92-0878-I-1. The full Board upheld this decision on March 15, 1993. *See id*., Subtab 4d-7. The appellant petitioned for enforcement of this decision on May 9, 1994, alleging, inter alia, that he was put on a home duty status as opposed to being returned to his job and that such status had deprived him of job promotion and additional benefits. *See* AF, Tab 18. During a telephone conference, held on July 14, 1994, the appellant clarified that his petition for enforcement only concerned the agency's decision not to return him to duty status following the April 4, 1994, dismissal of an indictment pending against him. *See* AF, Tab 26.

On February 9, 1994, the appellant had been indicted in the United States District Court for the Northern District of Florida on one count of knowingly engaging in a sexual act with a female inmate in the Marianna correctional facility on one occasion between on or about August 28, 1989 and December 29, 1989, in violation of 18 U.S.C. § 2243(b), and on another count of knowingly engaging in a sexual act with a female inmate in such facility between on or about March 1, 1991 to on or about September 1, 1991, also in violation of 18 U.S.C. § 2243(b). *See* Indictment, *id.,* Tab 8, Subtab 4h. By letter of February 16, 1994, the agency proposed to indefinitely suspend the appellant based upon the indictment and pursuant to its final decision of February 28, 1994, it effected the indefinite suspension on that date. *See id*., Subtabs 4b, 4e. The appellant timely appealed to the Atlanta Regional Office alleging that the indefinite suspension was improper because he was innocent of the criminal charges and because such suspension was based upon the same misconduct that formed the basis of the overturned removal action. *See* AF, Tab 1. As noted above, the indictment against the appellant was dismissed on April 4, 1994; the agency again returned the appellant to home duty status with full pay and benefits. In refusing to return the appellant to the workplace, the agency stated that the Office of the Inspector General was conducting an on-going investigation into the appellant's alleged sexual contacts with female inmates and that the appellant had again been indicted on charges of sexual contact with female inmates. Thus, in light of the pending investigation and the subsequent indictment, the appellant was not returned to work at the Marianna facility but was kept in a home duty status. *See* AF, Tab 31 and

Affidavit of G. E. Hurst, Warden, Federal Correctional Institution, Marianna, Florida, June 30, 1994.

On May 12, 1994, the appellant had again been indicted in the United States District Court for the Northern District of Florida on the same two counts as in the previous indictment, again in violation of 18 U.S.C. § 2243(b). *See* AF, Tab 32, Subtab 4g. On May 16, 1994, the agency proposed to indefinitely suspend the appellant based on the indictment and pursuant to a final decision issued on May 25, 1994, the appellant was indefinitely suspended on that date. *See id*., Subtabs 4a, 4b, and 4e. There is no evidence that this indictment has been dismissed. The appellant timely appealed the second indefinite suspension to the Atlanta Regional Office, again alleging that he was innocent of the criminal charges in the indictment, that such charges had not been proven and, further, that the misconduct charged in the indictment was that which formed the basis of the previously overturned removal. *See* AF, Tab 27.

In the initial decision, the administrative judge, relying on *Dunnington v. Department of Justice*, 956 F.2d 1151 (Fed. Cir. 1992), found that, in instituting the indefinite suspensions, the agency did not show by preponderant evidence that it had "reasonable cause" to believe that the appellant had committed a crime for which a sentence of imprisonment could be imposed because, notwithstanding the indictments, the Board had found, in the appellant's "fully-litigated appeal of his removal, that the charges were not proven by a preponderance of the evidence." *See* Initial Decision (I.D.) at 4, AF, Tab 34. The administrative judge noted that the court in *Dunnington* had held that an indictment was generally more than enough evidence to meet the "reasonable cause" requirement, "absent special circumstances," but reasoned that the instant case presented such special circumstances because the agency knew that it could not prevail on the criminal charges beyond a reasonable doubt when it had failed to prevail before the Board on the lesser standard of preponderant evidence. I.D. at 5. Accordingly, he declined to sustain either indefinite suspension action. In finding that the agency had failed to comply with the Board's final decision reversing the prior removal action, the administrative judge found that the appellant should have been returned to the status quo ante. He found "home duty" analogous to administrative leave and that to be returned to the status quo ante the appellant should have been returned to full duty status with the agency. He found that the agency had no compelling reason not to return the appellant to duty status because its fear that the appellant would again engage in misconduct with female inmates was mere disagreement with the Board's reversal of the original removal action. I.D. at 5-6.

Thus, the administrative judge recommended a finding of noncompliance with the prior removal decision and recommended that the agency return

the appellant to a duty status in a position of the same grade, pay, status, and tenure, as that which he previously held. He ordered the agency to cancel both suspension actions and to retroactively restore the appellant. Finally, he ordered the agency to provide interim relief to the appellant if it filed a petition for review.

The agency has responded to the administrative judge's recommendation of noncompliance with the prior removal decision, asserting that it has an overriding interest in not returning the appellant to the workplace. In its petition for review of the indefinite suspensions, it asserts that it had reasonable cause to suspend the appellant and that its suspension actions met all legal requirements.[3] The appellant has responded to the agency's petition for review.

ANALYSIS

The appellant's petition for enforcement of compliance with the Board's prior removal decision must be dismissed.

As noted above, it is undisputed that the appellant sought only to challenge the agency's noncompliance with the Board's final order of March 15, 1993, for the period commencing on April 4, 1994. *See* AF, Tab 26. Consequently, there is no live case or controversy remaining in connection with compliance in the removal action prior to April 4, 1994 and that matter is now moot. *See Occhipinti v. Department of Justice*, 61 M.S.P.R. 504, 507 (1994) (mootness occurs where issues are no longer "live"). The appellant, however, was not indefinitely suspended again until May 25, 1994; thus, the issue is whether the agency complied with the compliance order in the removal decision for the period from April 4, 1994 to May 26, 1994. We find that it has.

The Board has held that an agency may establish compelling reasons for not returning an employee to the status quo ante. *See Payne v. U.S. Postal Service*, 55 M.S.P.R. 317, 320-21 (1992). In our view, the agency's concern over the appellant's possible sexual contacts with inmates and its on-going investigation of the appellant clearly establishes such compelling reasons. *See* AF, Tab 31 and Affidavit of G. E. Hurst, Warden, Federal Correctional Institution, Marianna, Florida, June 30, 1994. We need not decide, therefore, whether the agency's placement of the appellant in a home duty status would constitute a return to the status quo ante in the context of this appeal. Even if we were to find, however, that the appellant's placement in such status was not a return to the status quo ante, *see, e.g., Rauccio v. U.S. Postal Service*, 44 M.S.P.R. 243, 245 (1990) (placement on administrative leave was not a return to the status quo ante), there is no remedy available to the appellant because his home duty status is no longer continuing. Since there is no showing of any loss of pay or benefits to the appellant, the matter of the agency's compliance with the administrative judge's order in the removal decision is moot because there is no remedy the Board can award the appellant. *See Occhipinti*, 61 M.S.P.R. at 507 (a matter is moot where the Board can grant no meaningful or significant relief and the appellant thus lacks a legally cognizable interest in the outcome of the case). Accordingly, we do not adopt the administrative judge's finding of noncompliance on the part of the agency, and we dismiss the appellant's petition for enforcement.

The administrative judge erroneously reversed the indefinite suspensions.

It is well-settled that an indefinite suspension is valid where: (1) There is reasonable cause to believe the employee committed a crime for which a term of imprisonment may be imposed; (2) the suspension has an

ascertainable end; (3) there is a nexus between the criminal charge and the efficiency of the service; and (4) the penalty is reasonable. *See Dunnington*, 956 F.2d 1155-56; *Smith v. Government Printing Office*, 60 M.S.P.R. 450, *review dismissed,* 36 F.3d 1114 (Fed. Cir. 1994) (Table); *Martin v. Department of the Treasury*, 12 M.S.P.R. 12, 17 (1982). Here, the administrative judge addressed only the aspect of reasonable cause and did not reach the other matters; because we find reasonable cause, we do so here.

The court stated in *Dunnington* that "a formal judicial determination made following a preliminary hearing, or an indictment following an investigation and grand jury proceedings, would provide, absent special circumstances, more than enough evidence of possible misconduct to meet the threshold requirement of reasonable cause to suspend." *Dunnington*, 956 F.2d at 1157. Here, there is no question that both indefinite suspensions were supported by indictments. The administrative judge, however, opined that special circumstances were present because the Board had reversed the agency's removal action based on essentially the same misconduct that supported the indictments,[4] and thus the agency could not have reasonably believed that it could prevail on a criminal charge resulting from the misconduct as such charge required a higher standard of proof (reasonable doubt) than did the removal action brought before the Board (preponderant evidence).

However, the standard for the imposition of an indefinite suspension is not whether the agency could prevail on the criminal charge but, rather, whether it had reasonable cause to believe that the appellant committed a crime punishable by a term of imprisonment at the time it imposed the suspension. *See* Martin, 12 M.S.P.R. at 17 (indefinite suspensions are temporary actions, based upon reasonable cause to believe that an employee is guilty of a crime for which a sentence of imprisonment can be imposed, and not upon proven misconduct). Thus, the eventual resolution of the criminal charges is irrelevant to whether the indefinite suspension was properly imposed. In this vein, the Board has recognized that a charge based on a criminal indictment differs from a charge based on the conduct underlying the indictment and has held that an agency properly complied with the administrative judge's interim relief order when it effected an indefinite suspension of the appellant in lieu of placing him into a duty status, based upon an indictment on essentially the same charges as those underlying the original reversed removal action. *See Crespo v. U.S. Postal Service*, 53 M.S.P.R. 125, 129 (1992).

In its ruling in *Crespo*, the Board implicitly recognized that criminal processes differ fundamentally from Board proceedings; namely, the Bureau of Prisons is not responsible for bringing criminal charges before the courts, rather, that is the province of the U.S. Attorney. The U.S. Attorney may

have access to evidence which, in turn, was presented to the grand jury, and which was not presented in the Board proceedings. Because of the secrecy of grand jury proceedings, *See* Fed. R. Crim. P. 6(e), the agency would have no basis for determining independently whether the U.S. Attorney had sufficient evidence to obtain a conviction.

Moreover, we have never held that an agency must independently evaluate the strength of the underlying evidence against the appellant in an indefinite suspension case based on a criminal indictment; instead, the agency may rely solely on a grand jury indictment to prove that there is reasonable cause to believe that the employee is guilty of a crime for which a sentence of imprisonment may be imposed. This is so because a grand jury indictment is a conclusive determination of the issue of probable cause. It has long been established that the courts have no authority to look into the judgment of the grand jury to determine whether or not its indictment was founded upon sufficient proof. *See United States v. Reed*, 27 Fed.Cas. pages 727, 738, No. 16,134 (1852), cited with approval in *Costello v. United States*, 350 U.S. 359, 362-63 (1956). *See also United States v. Calandra*, 414 U.S. 338, 344-45 (1974). We decline to assume that the Board has any greater authority than the courts might have to either look behind an indictment, or to require an agency to do so. Accordingly, in our view, the fact that the appellant prevailed before the Board is not a special circumstance vitiating the indictment supporting the indefinite suspension.[5] Further, the indefinite suspensions both had ascertainable ends. Each was to continue only until the resolution of the criminal charges and/or any administrative action against the appellant. *See* AF, Tab 8, Subtab 4b; Tab 32, Subtab 4b. In fact, the agency properly terminated the first indefinite suspension soon after the dismissal of the criminal charges. *See* AF, Tab 8, Subtab 4g; *Peyton v. Department of Justice*, 62 M.S.P.R. 113 (1994). As already noted, the second indictment has not yet been dismissed.

Moreover, there is no question that nexus is established since the alleged criminal misconduct was committed while on duty. Cf. *Johnson v. Department of Health and Human Services*, 22 M.S.P.R. 521 (1984) (an indefinite suspension was warranted for sexual misconduct of a criminal nature committed while off-duty). In addition, Warden Hurst considered numerous factors in determining to impose the indefinite suspensions. *See* AF, Tab 8, Subtab 4c; Tab 32, Subtab 4c. The record contains no basis upon which to dispute her consideration of the factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

Accordingly, we sustain the indefinite suspensions and, as detailed above, we do not accept the administrative judge's recommendation of noncompliance with the Board's order of March 15, 1993.

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

1 These appeals were joined by Order of the administrative judge. *See* Appeal File (AF), Tab 29. As it appears that joinder remains appropriate, the appeals will be joined for decision here. 5 C.F.R. § 1201.36(a)(2)

2 At the time of his removal, the appellant was a WS-3; he was promoted to the WS-4 level in October 1993, as a result of a change in classification standards for his position. *See* AF, Tab 25, Affidavit of Joanne Akin, Human Resources Manager, May 24, 1994.

3 In connection with interim relief, the agency avers that it has returned the appellant to a non-duty, pay status because it would be unduly disruptive to return him to duty at the Marianna Correctional Institution. The appellant raises no challenge to the agency's award of interim relief. Accordingly, we find that the agency has complied with the interim relief order.

4 We assume, for purposes of this decision, that the indictments were based on essentially the same misconduct as was the removal action. The record is unclear on this point; nonetheless, because of our disposition of this matter, there is no need to remand the appeal for resolution of whether indeed the misconduct underlying the indictments is the same as that underlying the removal.

5 We note also that the agency properly shortened the 30-day notice period under 5 U.S.C. § 7513(b)(1) because it had reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment may be imposed. Under 18 U.S.C. §

2243(b) knowingly engagingly in a sexual act with a person in official detention is punishable by a fine or imprisonment up to a year or both.