

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

2006 MSPB 361

Docket No. CH-0752-04-0546-M-1

**Gary Gose,
Appellant,**

v.

**United States Postal Service,
Agency.**

December 19, 2006

Michael A. McNew, Esquire, Dayton, Ohio, for the appellant.

Michael D. Jones, Esquire, Philadelphia, Pennsylvania, and David C. Belt, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

ORDER

¶1 This case is before the Board pursuant to a remand from the U.S. Court of Appeals for the Federal Circuit in *Gose v. U.S. Postal Service*, 451 F.3d 831 (2006), with respect to the Board's final decision in *Gose v. U.S. Postal Service*, MSPB Docket No. CH-0752-04-0546-I-1 (Initial Decision, Sept. 8, 2004), petition for review denied, 98 M.S.P.R. 638 (2005) (Table). For the reasons set forth below, we REVERSE the agency's removal action.

¶2 The Board affirmed the agency's removal of the appellant based on a charge of unacceptable conduct for consuming alcoholic beverages while wearing

his Postal Service uniform at the Veterans of Foreign Wars (VFW) Post 9927 in Kettering, Ohio, in violation of section 661.54 of the Employee and Labor Relations Manual (ELM), which provides, inter alia, that “[n]o employee will drink intoxicating beverages in a public place while in uniform.” On appeal, the court found that the agency interpreted its regulation to mean that a “public place” is every place where there is a Postal Service customer and, further, that it considered every citizen to be a Postal Service customer. *Gose*, 451 F.3d at 840. The court found that such an interpretation would classify as “public places” even employees’ homes when they were not home alone. *Id.* The court found that the agency’s interpretation of its regulation was not entitled to deference because it would eviscerate the regulation’s requirement that the conduct occur in a public place. *Id.* The court held that the VFW post was “not a public place by any reasonable construction of the [agency’s] regulation” and reversed the Board’s decision sustaining the appellant’s removal. *Id.* The court ordered, “Gose is to be immediately reinstated to his position, with back pay and credit, for all purposes, for the period of his improper removal from the Postal Service.” *Id.* The court also found that Gose had not breached the terms of a previously executed last-chance agreement (LCA), and that the agency is obligated to comply with its obligations under the LCA, including its obligation to remove all citable disciplinary actions in Gose’s record. *Id.* at 840-41. The court then remanded this case to the Board for further action consistent with its opinion. *Id.* at 841.

¶3 Accordingly, we ORDER the agency to cancel the appellant's removal and to reinstate him to his former City Carrier position as of the effective date of his removal. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency shall comply with its obligations under the LCA, including the removal of all citable disciplinary actions in Gose’s record. The agency must complete these actions no later than 20 days after the date of this Order.

¶4 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.

¶5 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 to describe 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).

¶6 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 in 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).

¶7 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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 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, <http://fedcir.gov/contents.html>. 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:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.