

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

68 M.S.P.R. 620

Docket Number AT-0752-95-0273-I-1

EDDIE SIMPKINS, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: October 30, 1995

Richard M. Maddow, Esquire, Atlanta, Georgia, for the appellant.

Eloise Lance, Atlanta, Georgia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The agency has petitioned for review of the May 30, 1995 initial decision which reversed its removal action. For the reasons set forth below, we DISMISS the petition for review because the agency has not fulfilled its statutory interim relief obligations.

BACKGROUND

The agency removed the appellant from his position of Custodian, PS-03, effective November 13, 1994, based on charges of being absent and unavailable for duty, failure to follow instructions, and absence without leave (AWOL). Initial Appeal File (IAF), Tab 7, Subtabs 4A, 4D. The administrative judge reversed the removal, finding that the agency did not prove its charges by preponderant evidence. IAF, Tab 21. The administrative judge further found that the appellant proved his claim of disability discrimination by preponderant evidence. *Id.* The administrative judge ordered the agency to provide interim relief to the appellant if it filed a petition for review. *Id.*

The agency filed a petition for review, arguing that the administrative judge erred in finding that the appellant established his claim of disability discrimination. Petition for Review File (PFRF), Tab 1. The agency further

argued that it was prejudiced in the preparation of its case by the appellant's refusal to comply with discovery requests. *Id.*

As evidence of its compliance with the order of interim relief, the agency attached a letter to the appellant from Roy D. Dowden, the agency's Labor Relations Specialist, advising him that "[e]ffective June 13, 1995, you have been placed in an administrative leave status with pay" *Id.* The letter further instructed the appellant to "furnish an updated medical report detailing your medical restrictions for purposes of determining appropriate work assignments in the future." *Id.* In a subsequent submission, the agency noted that it had erroneously "computed" the interim relief mandated by the administrative judge by setting its effective date as June 13, 1995, instead of May 30, 1995, the date of the initial decision. PFRF, Tab 4. The agency attached copies of a "PSDS Hours Adjustment Record," purportedly correcting this error. *Id.* In response to the Board's show-cause order regarding its compliance with interim relief, the agency further indicated that it had returned the appellant to work effective August 26, 1995, and that prior to this date he had been carried on paid administrative leave. PFRF, Tab 8.

ANALYSIS

When an agency files a petition for review of an initial decision that orders the provision of interim relief, it must present evidence, with its petition, that it has either: (1) Provided "complete interim relief," i.e., that it returned the appellant to his former position and duty station effective the date of the initial decision; or (2) determined that the appellant's return or presence in the workplace would be unduly disruptive. See *DeLaughter v. United States Postal Service*, 3 F.3d 1522, 1524 (Fed. Cir. 1993); *Heath v. Department of the Navy*, 60 M.S.P.R. 183, 185-86 (1993). An agency's failure to submit such evidence will result in the dismissal of the agency's petition. *Id.*

In *DeLaughter*, the U.S. Court of Appeals for the Federal Circuit held that, in placing the appellant on paid administrative leave without making an express undue disruption determination, the agency had failed to meet its interim relief obligations under 5 U.S.C. § 7701(b)(2)(A). In the present appeal, the evidence submitted by the agency with its petition for review similarly shows that it placed the appellant on paid administrative leave, without making a determination, express or otherwise, that returning him to his former duty station would be unduly disruptive. Although the agency states that the appellant was belatedly returned to duty on August 26, 1995, in its response to the Board's show-cause order, it has not shown that it made the requisite determination for the period that the appellant was

placed on administrative leave. Accordingly, the agency's petition for review must be dismissed.

ORDER

We ORDER the agency to cancel the appellant's removal and to restore the appellant effective November 13, 1994. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under Postal Service 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 compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision remains the final decision of the Board with regard to the merits of the appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.37(a). If you believe you meet these criteria, you must file a motion for attorney fees **WITHIN 35 CALENDAR DAYS OF THE DATE**

OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC 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. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, 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 should file your civil action with the district court 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)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping 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 choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(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.