

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

2008 MSPB 171

Docket No. DC-0752-07-0609-I-1

**David Yarnell,
Appellant,**

v.

**Department of Transportation,
Agency.**

July 31, 2008

Sean Lafferty, Esquire, Burlington, Massachusetts, for the appellant.

Randy E. Hyman, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that reversed an alleged constructive suspension action, but did not award back pay and benefits. The agency has filed a cross petition for review. For the reasons set forth below, we DENY the appellant's petition for review, GRANT the agency's cross petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant was employed as an Air Traffic Control Specialist (ATCS) with the Federal Aviation Administration's (FAA or agency) Charlotte Air Route

Traffic Control Tower in North Carolina. Initial Appeal File (IAF), Tab 1; Tab 11, Subtab 4d; Tab 18, Joint Stipulations, ¶ 1. It is undisputed that, as an ATCS, the appellant was required to maintain a medical certification in order to be qualified to perform the duties of his position. IAF, Tab 11, Subtabs 4f-4h.

¶3 The appellant became temporarily medically restricted from performing active air traffic control duties on November 30, 2006, and he remained in that status until January 26, 2007. IAF, Tab 1 at 2; Tab 18, Joint Stipulations, ¶¶ 2, 4. Article 45 of the collective bargaining agreement (CBA) between the agency and the appellant's union, the National Air Traffic Controllers Association, provides that an ATCS who is temporarily medically unqualified to perform active air traffic control duties must, at the employee's request, be assigned to other facility duties if such duties are available. IAF, Tab 11, Subtab 4e at 9; Tab 18, Joint Stipulations, ¶ 5. Article 45 further provides that, if no such work is available, the employee will be placed on sick leave or another type of leave at the employee's option. IAF, Tab 11, Subtab 4e at 9; Tab 18, Joint Stipulations, ¶ 6.

¶4 The appellant requested other administrative duties during the period of January 8 through 25, 2007, but the agency refused to provide such work. IAF, Tab 18, Joint Stipulations, ¶¶ 3-4, 7-10. Instead, the appellant was required to use sick leave or annual leave for the days he was supposed to work. IAF, Tab 11, Subtab 4b; Tab 18, Joint Stipulations, ¶ 11. The agency did not provide the appellant with any advance notice, opportunity to respond, or notice of his Board appeal rights prior to the appellant taking leave. IAF, Tab 18, Joint Stipulations, ¶¶ 12-15.

¶5 The appellant asserted in his Board appeal that he had been constructively suspended for the period the agency had medically disqualified him from his ATCS position and forced him to use leave, without providing him with due process or notice of his Board appeal rights. IAF, Tab 1. The appellant also asserted that the Board had the authority to award him back pay and restoration of leave as a result of the agency's asserted constructive suspension action. IAF,

Tab 17. The appellant withdrew his request for a hearing and the parties submitted a joint set of stipulated material facts. IAF, Tabs 18-19.

¶6 In the initial decision based on the parties stipulations of fact, the administrative judge (AJ) found that the agency had involuntarily placed the appellant on leave for the period of January 8 through 25, 2007. IAF, Tab 20, Initial Decision (ID) at 3. The AJ determined that, because the agency had admittedly failed to provide the appellant with the procedural protections of 5 U.S.C. § 7513(b) prior to placing him on enforced leave, the agency's action had violated the appellant's constitutional right to minimum due process and must therefore be reversed. *Id.* The AJ ordered the agency to cancel the appellant's constructive suspension and to retroactively restore him to duty effective January 8, 2007. ID at 4. Based on the Board's precedent in *Bennett v. Department of Transportation*, 105 M.S.P.R. 634, ¶¶ 9-20 (2007), the AJ found that the Board does not have the authority to award back pay or to order the agency to restore the appellant's used annual or sick leave. ID at 4.

¶7 The appellant filed a petition for review, and supplements thereto, challenging the initial decision's finding that the Board does not have the authority to order the FAA to award him back pay and to restore the sick and annual leave he was forced to use while medically disqualified from performing his ATCS duties. Petition For Review File (PFRF), Tabs 3-4, 6. The agency filed a cross petition for review challenging the initial decision's finding that the appellant had been constructively suspended. PFRF, Tab 5. The appellant opposes the agency's petition for review. PFRF, Tab 7.

ANALYSIS

¶8 Under the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century, Pub. L. No. 106-181, § 307(a), 114 Stat. 61, 124-25 (2000) (the Ford Act), an FAA employee may submit an appeal to the Board of any action that was appealable to the Board under any law, rule, or regulation as of

March 31, 1996. See 49 U.S.C. § 40122(g)(3); *Hart v. Department of Transportation*, 2008 MSPB 149, ¶ 7. Suspensions of more than 14 days were at that time and remain within the Board’s jurisdiction under 5 U.S.C. §§ 7512(2), 7513(d), and 7701. See *Hart*, 2008 MSPR 149, ¶¶ 6-7.

The appellant’s petition for review is denied.

¶9 In his petition for review, the appellant reiterates his argument below that the agency is authorized to award “back pay” against the FAA under the applicable CBA. PFRF, Tabs 3, 4, 6. We interpret the appellant’s argument to be that the Board has the authority to order the restoration of annual and sick leave that an employee is forced to take.* The appellant has not presented a persuasive reason for modifying prior Board precedent holding that the Back Pay Act, 5 U.S.C. § 5596, does not apply to the FAA. See *Bennett*, 105 M.S.P.R. 634, ¶¶ 10-20; *Ivery v. Department of Transportation*, 102 M.S.P.R. 356, ¶¶ 12-14 (2006), *dismissed*, 240 F. App’x 413 (Fed. Cir. 2007). He also has not presented a persuasive argument that the CBA or any other source provides authority for the Board to order restoration of leave in this case. Accordingly, the appellant’s petition for review is denied.

The agency’s cross petition for review is granted.

¶10 A “suspension” is the temporary placement of an employee in a non-pay, non-duty status. 5 U.S.C. § 7501(2). This definition covers not just unpaid absences, but also an agency’s placement of an employee on sick or annual leave against his will. *Pittman v. Merit Systems Protection Board*, 832 F.2d 598,

* The Back Pay Act, 5 U.S.C. § 5596, where it applies, provides for recovery of leave lost as a result of an unwarranted or unjustified personnel action. See, e.g., *Bullock v. Department of the Air Force*, 80 M.S.P.R. 361, ¶ 8 (1998).

599-600 (Fed. Cir. 1987); *Dixon v. U.S. Postal Service*, 69 M.S.P.R. 171, 175 (1995). For jurisdictional purposes, whether the employee was able to perform his regular duties is immaterial. Rather, the only question is whether the employee's placement in a leave status was voluntary or involuntary; only the latter is appealable. *Alston v. Social Security Administration*, 95 M.S.P.R. 252, ¶ 11 (2003), *aff'd*, 134 F. App'x 440 (Fed. Cir. 2005); *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 692 (1996); *Gallegos v. Department of the Air Force*, 70 M.S.P.R. 483, 485 (1996). We agree with the AJ's conclusion in this case that the appellant's placement on leave was involuntary. Further, the AJ correctly found that the appellant has the right to appeal to the Board his involuntary placement on leave because it exceeded 14 days. ID at 2-3; *see Bennett*, 105 M.S.P.R. 634, ¶¶ 6, 8.

¶11 However, consistent with our recent decision in *Hart*, 2008 MSPR 149, ¶¶ 8-10, we find that the AJ erred by finding that the agency was required to follow the statutory procedures set forth at 5 U.S.C. chapter 75, which include the right to 30 days' advance written notice and an opportunity to respond, *see* 5 U.S.C. §7513(b), before placing the appellant on leave. In *Hart*, we found that the FAA is not covered by chapter 75 of title 5, U.S.C. *Hart*, 2008 MSPR 149, ¶¶ 8-10. Therefore, the agency was not required to follow the procedures set forth at 5 U.S.C. § 7513(b) before placing the appellant on enforced leave. *Id.*

¶12 Nevertheless, under the FAA's Personnel Management System, Chapter III, "Performance Management" (November 2006), it appears that FAA employees are entitled to 15 days' advance notice and an opportunity to reply to a proposed suspension. IAF, Tab 11, Subtab 4c at 3. We thus remand this appeal to afford the appellant an opportunity to present argument and evidence as to whether the agency followed its internal procedures before suspending him. *See Hart*, 2008 MSPR 149, ¶ 11; *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

ORDER

¶13 The initial decision is vacated. The appeal is within the Board's jurisdiction under the Ford Act, 49 U.S.C. § 40122(g)(3). The appeal is remanded for consideration of whether the agency followed its internal procedures before it suspended the appellant and, if not, whether the agency committed harmful error under its own internal rules, and for adjudication of other issues not resolved by this decision, as appropriate.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.