

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

2014 MSPB 30

Docket No. CH-0752-13-1615-I-1

Randy McHenry,

Appellant,

v.

United States Postal Service,

Agency.

April 25, 2014

Christopher D. Vaughn, Esquire, Decatur, Georgia, for the appellant.

Brian J. Odom, Esquire, Denver, Colorado, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his suspension appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and DO NOT SUSTAIN the appellant's suspension from June 18, 2013, to August 20, 2013.

BACKGROUND

¶2 The appellant, an EAS-20 supervisor, filed an appeal of the agency's decision to convert his status from sick leave to leave without pay (LWOP). Initial Appeal File (IAF), Tab 1. The appellant initiated his absence on June 18,

2013, when he requested sick leave under the Family and Medical Leave Act of 1993 (FMLA). IAF, Tab 6 at 1. The Postmaster contacted the appellant on June 22, 2013, and informed him that if he intended to come to work on his next scheduled work day, June 24, he should not do so because he was being placed on emergency leave pending an ongoing investigation into alleged misconduct. IAF, Tab 10, Exhibit A at 3. The Postmaster also retroactively changed the appellant's sick leave to LWOP. *Id.* at 3-4. The appellant's physician cleared him to return to work on August 12, 2013. IAF, Tab 6, Exhibit 1. The agency then placed the appellant in an emergency LWOP status from August 12, 2013, until August 20, 2013, when it returned him to a paid status. IAF, Tab 8 at 26, 30 of 31.

¶3 On appeal, the appellant argued that, because he was in an approved sick leave status at the time that the agency placed him in an LWOP status, the agency's action constituted a constructive suspension. IAF, Tab 1. The agency argued in response that the Board lacks jurisdiction over the appeal because the appellant initiated his absence on June 18, 2013, due to a medical condition, and that because of his medical condition, he was not ready, willing, and able to work between June 18, 2013, and August 12, 2013. IAF, Tab 8. While acknowledging that the appellant was under investigation, the agency further asserted, without any supporting evidence, that the Postmaster properly placed the appellant in an LWOP status pending receipt of proper medical documentation. *Id.* at 7 of 31.

¶4 Without holding a hearing, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant initiated the absence and was not ready, willing, and able to return to work until August 12, 2013. IAF, Tab 11, Initial Decision (ID) at 3. She further found that the agency returned the appellant to a paid status on August 20, 2013, and that he therefore did not suffer an appealable suspension of more than 14 days. *Id.* Because the administrative judge dismissed the appeal for lack of jurisdiction, she did not address the timeliness of the appeal. *Id.*

ANALYSIS

¶5 A suspension is defined as “the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.” [5 U.S.C. §§ 7511](#)(a)(2), 7501(2). Here, the appellant argues on review that the agency suspended him when it retroactively changed his sick leave to LWOP. He also challenges the administrative judge’s finding that the agency placed him in a nonpay status because it was waiting for “proper documentation.” Petition for Review (PFR) File, Tab 1. The appellant argues that he sent medical documentation to the agency on June 18, 2013, which was signed for by an agency official. *Id.* at 4. The appellant asserts that he sent additional medical information to the agency on June 25, 2013, but the agency refused to accept delivery. *Id.* The appellant contends that he sent additional medical information to the agency on July 11, 2013, which was signed for by the Postmaster on July 12, 2013. *Id.* The appellant argues that, because his request for leave under the FMLA was retroactively approved based upon the information he originally submitted, the agency had no basis upon which to place him in an LWOP status for over 14 days pending proper documentation. *Id.*

¶6 The agency asserted below that the appellant’s leave was changed because he failed to provide adequate medical documentation. IAF, Tab 8 at 7 of 31; IAF, Tab 10, Exhibit A at 2. However, we have found no evidence in the record that the agency ever requested medical documentation from the appellant that he failed to provide. In addition, the agency’s answers to the appellant’s discovery requests indicate that the agency’s ongoing investigation into alleged misconduct was most likely the motivating factor behind the denial of the appellant’s sick leave and his retroactive placement on LWOP. IAF, Tab 10, Exhibit A at 3-4. In further support of that conclusion, we note that when the appellant was medically released to return to work, the agency immediately placed him in an emergency nonpay status due to the ongoing investigation. IAF, Tab 8 at 5, 7, 26, 30 of 31; Tab 10, Exhibit A at 3-4.

¶7 Regardless of the reason, it is undisputed that the Postmaster directed that the appellant's sick leave be retroactively changed to LWOP effective June 18, 2013. IAF, Tab 10, Exhibit A at 3-4. Because the agency completely and retroactively rescinded the appellant's sick leave and changed the nature of his leave status to LWOP before he filed this appeal, we find that he never received the sick leave he requested, and thus, he was never in a sick leave status for purposes of our jurisdictional analysis. *See Lefavor v. Department of the Navy*, [115 M.S.P.R. 120](#), ¶ 10 (2010) (the Board's jurisdiction is determined by the nature of an agency's action against an appellant at the time his appeal is filed). Accordingly, the suspension in this matter was not "constructive" and the case law concerning constructive suspensions is inapplicable here. *Cf. Alston v. Social Security Administration*, [95 M.S.P.R. 252](#), ¶ 11 (2003) (constructive suspension claims may arise when an agency places an employee on enforced leave pending an inquiry into her ability to perform her job, or when an employee absent from work for medical reasons requests to return to work with altered duties and the agency denies the request), *aff'd*, 134 F. App'x 440 (Fed. Cir. 2005).

¶8 Based on the appellant's arguments below and on review, we find that the Board has jurisdiction over this appeal because the appellant was suspended when the agency retroactively rescinded his sick leave, directed him not to return to work, and placed him in an LWOP status for more than 14 days.* The question of

* A Board appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. [5 C.F.R. § 1201.22](#)(b). However, an agency's failure to notify an employee of his Board appeal rights when such notification is required generally constitutes good cause for late filing. *Kirkland v. Department of Homeland Security*, [119 M.S.P.R. 74](#), ¶ 6 (2013). Thus, when an agency provides inadequate notice of Board appeal rights, the appellant is not required to show that he exercised due diligence in attempting to discover his appeal rights, but rather must show diligence in filing an appeal after learning that he could. *Id.* In this case, on June 22, 2013, the agency retroactively suspended the appellant effective June 18, 2013, without providing

whether the appellant was ready, willing, and able to return to work is irrelevant to the issue of whether the agency suspended him. Rather, it is relevant to the issue of back pay. *See Rutherford v. U.S. Postal Service*, [112 M.S.P.R. 570](#), ¶ 10 (2009). In addition, we find that the period of “emergency placement” in an LWOP status from August 12 to 20, 2013, was merely a continuation of the suspension, rather than a separate period of LWOP. Because the agency effected the suspension in this matter without affording the appellant minimum due process, we find that the suspension must be reversed. *Edwards v. U.S. Postal Service*, [112 M.S.P.R. 196](#), ¶ 13 (2009).

ORDER

¶9 We ORDER the agency to cancel the appellant's suspension effective June 18, 2013, to August 20, 2013. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶10 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.

him any notice of his appeal rights. Thus, the agency's action occurred on June 22, 2013, and the filing deadline for the appeal was July 22, 2013. However, because the agency failed to provide the appellant with any notice of appeal rights, we find good cause for a waiver of the 7-day filing delay.

- ¶11 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).
- ¶12 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).
- ¶13 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.
- ¶14 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. 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:

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



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.