UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

89 M.S.P.R. 655

DIANE H. BYERS,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
CH-0752-00-0125-I-1

DATE: September 10, 2001

Armand L. Andry, Esquire, Oak Park, Illinois, for the appellant.

Gregory A. Burke, Esquire, Hines, Illinois, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board on the agency's timely petition for review of the June 15, 2000 initial decision that mitigated to a written reprimand the appellant's removal based on charges of verbal patient abuse. For the reasons discussed below, we GRANT the petition under 5 C.F.R. § 1201.115 and AFFIRM the initial decision AS MODIFIED, MITIGATING the appellant's removal to a 120 calendar-day suspension.

BACKGROUND

¶2 Effective November 10, 1999, the agency removed the appellant from her GS-5 Licensed Practical Nurse (LPN) position in the Extended Residential Care Facility (ERCF) of the agency's hospital at Hines, Illinois for verbally abusing two patients. Initial Appeal File (IAF), Tab 4, Subtabs 4A, 4B, 4G. In the first charge, the agency claimed that the appellant, while on duty on March 23, 1999, made disparaging comments to Patient A, a quadriplegic, concerning his physical limitations and needs. *Id.*, Subtab 4G. In the second charge, the agency claimed that the appellant, while on duty on May 27, 1999, entered the room of Patient B, a paraplegic, when he was in bed, waved or shook papers in front of his face, and asked him, "Do you recognize this writing?" *Id.* These papers included Patient B's written statement that he prepared describing his observations of the appellant's argument with her supervisor on March 24, 1999. *Id.*; IAF, Tab 4, Subtab 4AA. The agency issued the appellant a written reprimand on May 18, 1999, for, inter alia, insubordination based on her argument with her supervisor on March 24, 1999. The appellant had received Patient B's written statement as part of the evidence file the agency gave the union concerning the reprimand. *Id.*; IAF, Tab 4, Subtab 4J. The appellant timely appealed the removal action, contesting the charges and the reasonableness of the penalty, and raising the affirmative defenses of harmful error and retaliation for equal employment opportunity (EEO) activity. IAF, Tabs 1, 14, 20.

¶3 After holding a hearing, the administrative judge (AJ) issued an initial decision, finding the second, but not the first, charge proven. Initial Decision (ID) at 4-16. She found that the appellant did not prove her affirmative defenses. ID at 16-19. She further found that the agency established a nexus between the sustained misconduct and the efficiency of the service. ID at 19. Finally, she mitigated the penalty from removal to a written reprimand because, inter alia, only one of the two charges had been sustained and the appellant's prior discipline, i.e., the May 18, 1999 reprimand, could not be considered under

Gregory v. U.S. Postal Service, 212 F.3d 1296 (Fed. Cir. 2000), *cert. granted*, 121 S. Ct. 1076 (2001). ID at 19-22. The AJ ordered the agency to provide interim relief. ID at 23.

¶4 The agency timely filed a petition for review, certifying that it had complied with the interim relief order. Petition for Review File (PFRF), Tab 3. The agency argued that the AJ erred in mitigating the penalty. *Id.* The appellant timely responded in opposition, and also asserted that the agency had not provided the required interim relief because, as of August 18, 2000, she had not received any back pay to the date of issuance of the June 15, 2000 initial decision, and the agency had transferred her to the Extended Care and Geriatric Nursing (ECGN) unit, instead of returning her to the ERCF.[1] PFRF, Tabs 4-5. The Clerk issued a show-cause order, ordering the parties to inform the Board of all proceedings challenging the merits of the May 18, 1999 reprimand, which were ongoing at the time the agency and the AJ made their penalty determinations in this case, and of the current status of any such proceedings. *Id.*, Tab 7. The Clerk also issued a show-cause order, ordering the agency to submit evidence and argument showing why its petition for review should not be dismissed for failure to comply with the interim relief order, that is, to submit evidence that it promptly paid the appellant appropriate pay from the date of the initial decision. *Id.*, Tab 10. The parties timely responded to those orders. *Id.*, Tabs 8, 9, 11, 12.

ANALYSIS

The agency has complied with the interim relief order.

¶5 The appellant asserts that the agency did not comply with the interim relief order because it assigned her to the ECGN unit, instead of returning her to the ERCF. PFRF, Tab 5. We disagree. When the relief granted in the initial

[1] The appellant does not dispute the AJ's findings concerning the merits of the charges, the nexus determination, or her affirmative defenses. PFRF, Tab 4. Accordingly, we have not considered those matters.

decision provides that the employee shall return to or be present at the workplace pending the outcome of any petition for review, the agency must either return her to the workplace or place her on administrative leave after determining that her presence in the workplace would be unduly disruptive. *DeLaughter v. U.S. Postal Service*, 3 F.3d 1522, 1524-25 (Fed. Cir. 1993). The Board has no authority to review whether an agency's decision to detail or reassign an appellant was made in good faith; the Board's authority is restricted to deciding whether an "undue disruption" determination was made when required, and whether the appellant is receiving appropriate pay and benefits. *King v. Jerome*, 42 F.3d 1371, 1374-75 (Fed. Cir. 1994). An agency's undue disruption determination need not take any particular form, but the agency must inform the appellant that her return to or presence in the workplace would cause excessive or unwarranted disorder or turmoil to the normal course of the agency's operation. *Manning v. Department of Defense*, 62 M.S.P.R. 456, 458-59 (1994).

¶6 Here, the agency submitted an affidavit from the proposing official, in which she asserts that she had determined that the appellant's return to the ERCF would harm patients and would jeopardize the relationship between the agency and the patients, who had expressed their fear of the appellant and the danger or harm that might come to them if they crossed her. PFRF, Tab 3, Ex. 3. The proposing official stated that she therefore informed the appellant that she would not be returned to work in the ERCF. *Id.* The agency also submitted a letter, dated July 14, 2000, notifying the appellant of her appointment, effective June 15, 2000, to an LPN position in the ECGN unit at the same grade and pay as her previous position in the ERCF unit based on the agency's determination that her presence or return to duty to the ERCF unit would be unduly disruptive to the work environment. PFRF, Tab 3, Ex. 1. In light of this evidence showing that the agency made an undue disruption determination, we will not review further the agency's decision to reassign the appellant to the ECGN unit during the interim relief period. *See King*, 42 F.3d at 1374-75.

¶7 The appellant also asserts that the agency failed to deposit into her account money owed for the period from June 15, 2000, through August 15, 2000, prior to filing its petition for review. PFRF, Tab 4. According to the appellant, that money should have been deposited no later than August 15, 2000. *Id.* Because the parties' subsequent submissions did not address the pay issue, PFRF, Tabs 5, 8, 9, the Clerk issued a show-cause order, ordering the agency to submit evidence and argument showing why its petition for review should not be dismissed for failure to comply with the interim relief order, that is, to submit evidence that it promptly paid the appellant appropriate pay from the date of the initial decision. *Id.*, Tab 10.

¶8 For the reasons discussed below, we find that the agency has submitted sufficient evidence showing that it has taken prompt and appropriate steps to issue a paycheck to the appellant for the interim relief period. An employee who obtains relief in an initial decision "shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review… ." 5 U.S.C.§ 7701(b)(2)(A). An agency must take appropriate administrative action by the deadline for filing the petition for review that will result in the issuance of a paycheck for the interim relief period. *Omites v. U.S. Postal Service*, 87 M.S.P.R. 223, ¶ 6 (2000). An agency, however, is not required to have actually paid the appellant by the deadline. *Id.* The failure of an agency to provide evidence of compliance with an interim relief order "may result in the dismissal of the agency's petition or cross petition for review." 5 C.F.R. § 1201.115(b)(4).

¶9 Here, the agency submitted sufficient evidence of its compliance with the interim relief order. With its petition for review, the agency submitted sufficient evidence showing that it promptly made an undue disruption determination and reassigned the appellant to the ECGN unit. PFRF, Tab 3, Exs. 1-3. In its July 14, 2000 letter, the agency instructed the appellant to report for duty to the ECGN unit on Monday, July 17, 2000. *Id.*, Ex. 1. The agency subsequently submitted

pay records and affidavits from Employee Relations Specialist James Lampada and Payroll Supervisor Shirley Howard that showed that: On or about July 14, 2000, the agency told the appellant that she was entitled to be paid from June 15, 2000, the date of the initial decision; on July 16, 2000, the appellant informed her supervisor, Dr. Lawson, that she would not return to work until August 7, 2000; Lawson, treating the appellant's plans as a request to be placed in a non-pay status from July 17 through August 6, 2000, granted the appellant leave without pay (LWOP) until her return on August 7, but erroneously concluded that the agency would not pay the appellant for the period of June 15, 2000, the date of the initial decision, through July 16, 2000, the date she informed Lawson of her plans; on August 6, 2000, when the appellant informed Lampada that she had not received any pay for the interim relief period, Lampada discussed the matter with Lawson and, upon discovering Lawson's error, advised her to authorize payment to the appellant for June 15 through July 16, 2000; Lawson did so; on August 9, 2000, Lampada informed the appellant that payment for the period of June 15 through July 16, 2000, was available from the Agent Cashier, but that the appellant would have to contact the Agent Cashier to arrange to receive such funds; when it was discovered that the appellant did not make such arrangements, the agency processed those funds as a pay adjustment, which was deposited to her bank on or about September 1, 2000. *Id.*, Tab 11, Exs. 1, 2.

¶10 In an unsworn statement, the appellant responded that the agency did not promptly pay her for the interim relief period. *Id.*, Tab 12. She asserts that: She never requested LWOP; instead, when Lawson gave her less than 2 days notice to report to her reassigned position on July 17, 2000, the appellant told her that she had plans, which could not be changed on such short notice, and that she would report instead on August 7, 2000; Lawson agreed to the August 7 return date; when the appellant was getting ready to return to work, Lampada called her and told her the agency had decided not to pay her because someone told him she had been working somewhere else; Lampada lied when he said the agency made

attempts to pay her; the Agent Cashier does not take care of employee pay checks; and the agency gave her only a portion of the money they owed her.[2] PFRF, Tab 12. The appellant has submitted in pertinent part a copy of a bank statement, indicating that the agency deposited money into her account on September 1, 2000. *Id.*

¶11 Although the appellant claims that she did not receive sufficient payment, her bank statement corroborates the agency's evidence showing that she received the required payment approximately one month after the agency filed its petition for review. The appellant's bare assertion concerning Lampada's alleged phone call and her unsupported accusation that he lied are outweighed by the agency's evidence showing that Lampada took prompt action to rectify inadvertent errors that delayed the required payment. The appellant's claim that she never requested LWOP during her conversation with her supervisor is consistent with the agency's own account of that conversation. In any event, when the appellant resigned from the agency on August 24, 2000, the agency informed her that it would provide her with a lump-sum payment for any unused annual leave. *Id.* (SF-50 Notification of Personnel Action). The appellant has not alleged that the agency failed to pay her for any unused annual leave.

¶12 Accordingly, based on our review of the parties' submissions and evidence, we find that the agency has shown that it took reasonable steps to insure that the appellant received the pay and benefits due her from the date of the initial decision and that it promptly corrected inadvertent errors as soon as it learned of them. *See Omites*, 87 M.S.P.R. 223, ¶ 7 (the Board declined to dismiss the

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[2] The appellant also alleges that she was harassed upon her return to the agency on August 7, 2000, and that she resigned from the agency on August 24, 2000, citing "the unrelenting adversarial demeanor at [the hospital]." PFRF, Tab 12. If the appellant is alleging that her resignation was involuntary, she may promptly file a constructive discharge appeal with the Board's Central Regional Office. She must demonstrate good cause for the delay in filing such an appeal. *See* 5 C.F.R. § 1201.22(c).

agency's petition for review where the agency had completed all the necessary paperwork for back pay to be issued within 3 months of the date the initial decision was issued); *Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, ¶¶ 5-8 (2000) (the agency showed that it took reasonable steps to insure that the appellant received the pay and benefits due him where it promptly corrected inadvertent errors upon learning that the appellant had not received his first interim relief payment), *aff'd sub nom. Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001); *cf. Bradstreet v. Department of the Navy*, 83 M.S.P.R. 288, ¶¶ 11-13 (1999) (the agency's failure to provide any payment as interim relief for 8 months following the issuance of the initial decision was neither excusable nor a minor mistake). We therefore do not dismiss the agency's petition for review.

¶13 Under these circumstances, even assuming that the agency's delay in paying the appellant for the interim relief period constitutes noncompliance with the interim relief order, we exercise our discretion and do not dismiss the agency's petition for review. *See Omites*, 87 M.S.P.R. 223, ¶ 8; *Yunus v. Department of Veterans Affairs*, 84 M.S.P.R. 78, ¶¶ 3-4 (1999), *aff'd*, 242 F.3d 1367 (Fed. Cir. 2001).

Mitigation of the penalty from removal to a 120 calendar-day suspension is warranted even considering the appellant's prior written reprimand.

¶14 In view of recent developments in case law regarding the consideration of some kinds of prior discipline in assessing the penalty, we first examine the prior discipline implicated in this appeal. The AJ noted that the proposing and deciding officials relied on the appellant's May 18, 1999 written reprimand for failure to respond to a patient's emergent medical care needs and for insubordination towards Lawson on March 24, 1999, in determining the penalty. ID at 21; IAF, Tab 4, Subtabs 4B, 4G. The AJ found, however, that this reprimand should not have been considered because *Gregory v. U.S. Postal*

Service, 212 F.3d 1296, 1300 (Fed. Cir. 2000), prohibits consideration of a prior disciplinary action where, as here, the prior disciplinary action was the subject of an ongoing proceeding. ID at 21. She therefore did not consider the reprimand in determining a penalty.

¶15 However, after the initial decision was issued in this case, the court clarified that the *Gregory* rule does not prohibit the Board from relying on prior disciplinary actions being challenged before the Equal Employment Opportunity Commission (EEOC) for complaints of discrimination. *Blank v. Department of the Army*, 247 F.3d 1225, 1230 (Fed. Cir. 2001). In *Powell v. Department of Defense*, MSPB Docket No. AT-0752-00-0746-I-1 (June 6, 2001), the Board found that where an EEO complaint was at an earlier stage in the EEO complaint process than the matter in *Blank* that had progressed to the EEOC, the reasoning in *Blank* still applies. *Powell*, slip op. ¶ 6.

¶16 Because the nature and current status of proceedings involving the reprimand were unclear, the Clerk issued a show-cause order, ordering the parties to inform the Board of all proceedings challenging the merits of the May 18, 1999 reprimand, which were ongoing when the agency and the AJ made their penalty determinations in this case, and of the current status of any such proceedings. PFRF, Tab 7. In response, the agency submitted unrebutted evidence showing that the appellant had filed a formal complaint of discrimination concerning the reprimand on May 24, 1999, the agency issued a final decision on November 14, 2000, which found that the appellant had not proven discrimination or retaliation, and the appellant had appealed that decision. *Id.*, Tab 9.

¶17 The agency has shown that the written reprimand at issue here, like the 10-day suspension in *Powell*, was being challenged at an early stage in the EEO discrimination complaint process when the agency and the AJ made their penalty determinations in this case. *Id.*; *Powell*, slip op. ¶ 6. Furthermore, like the 10-day suspension in *Powell*, the reprimand, here, was not appealable to the Board. We thus find, consistent with *Blank* and *Powell*, which the AJ did not

have the benefit of when she issued the initial decision, that the Board may rely on the written reprimand as past discipline in determining the penalty in this case.

¶18 Notwithstanding, the appellant argues that the reprimand cannot be considered in determining the penalty because the reprimand and the removal action were based on some of the same misconduct, i.e., the appellant's conduct towards Patient A. PFRF, Tab 8. Because the AJ found the first charge involving Patient A not sustained and found Patient A's testimony not credible, the appellant argues, the Board may not consider the reprimand, which also involved Patient A. *Id.*

¶19 We find, however, that the appellant has not established a basis for excluding the reprimand from consideration. An agency may not discipline an appellant more than once for the same misconduct. *Adamek v. U.S. Postal Service*, 13 M.S.P.R. 224, 226 (1982). Here, however, the reprimand and the removal action were based on separate alleged misconduct because the reprimand was based in part on the appellant's failure to suction Patient A on February 12, 1999, and the removal action was based in part on the appellant's alleged statements to Patient A on March 23, 1999. IAF, Tab 4, Subtabs 4G, 4AA. Furthermore, although the AJ found Patient A's testimony concerning the March 23, 1999 events less credible than the appellant's testimony, ID at 11-12, she did not find that Patient A's testimony was not credible concerning the events of February 12, 1999, i.e., concerning the merits of the reprimand, or otherwise find the reprimand clearly erroneous. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981) (the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline). Thus, the reprimand may be considered as prior discipline in determining the penalty.

¶20 Here, the AJ found only one of the verbal abuse charges sustained and the agency has never indicated that it would have imposed anything short of removal if fewer than the two charges were sustained; thus, we will consider all of the relevant factors, including the prior discipline, to determine whether removal is warranted for the sustained charge. *See LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999) (where the agency proves fewer than all of its charges, the Board may not independently determine a reasonable penalty; rather, unless the agency has indicated that it desires a lesser penalty to be imposed on fewer charges, the Board may mitigate to the maximum reasonable penalty if a careful balancing of the mitigating factors warrants, or the Board may impose the same penalty imposed by the agency based on a justification of that penalty as the maximum reasonable penalty after balancing those factors).

¶21 The deciding official's failure to weigh the relevant factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), provides an additional reason for not deferring to the agency's penalty determination. The deciding official testified that he believed in a "zero tolerance policy" towards patient abuse. Hearing Tape 2, Side A. He explained that he believed that removal was required for even the first offense of patient abuse regardless of mitigating factors. *Id.* There is no evidence or allegation that the appellant was aware of the deciding official's zero tolerance policy when she committed the sustained misconduct. The deciding official's position that removal is the proper penalty for any violation of his own zero tolerance policy, without real consideration of the relevant mitigating factors and the particular circumstances in this case, is contrary to *Douglas*. *See Omites*, 87 M.S.P.R. 223, ¶ 11. Thus, we will carefully balance the relevant factors and determine whether removal is appropriate for the sustained charge of verbally abusing Patient B (i.e., the charge that the appellant, while on duty on May 27, 1999, entered Patient B's room when he was in bed, waved or shook papers, including his written statement concerning his observations of the appellant's March 24, 1999 argument with Lawson, in his

face and asked him, "Do you recognize this writing?"). *Id.*; IAF, Tab 4, Subtab 4G.

¶22 The AJ found, and the parties do not dispute, that the most serious charge, i.e., the verbal abuse of Patient A, was not sustained. ID at 20. The agency argues, however, that the sustained charge was more serious than the AJ conveyed. The agency argues that it charged and proved that the appellant's actions towards Patient B were an "overt threat." PFRF, Tab 3 at 3-5. The agency, however, did not specifically charge the appellant with making an overt threat. IAF, Tab 4, Subtab 4G. Consequently, the AJ properly limited her analysis of the penalty to the charged verbal abuse of a patient. ID at 20-21. *See Gottlieb v. Veterans Administration,* 39 M.S.P.R. 606, 609 (1989) (the Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency; the Board may not substitute what it considers to be a more adequate or proper basis).

¶23 Nevertheless, verbal abuse of any patient is a serious offense. It is especially serious, here, where the appellant is a health care professional responsible for caring for vulnerable and dependent patients in the ERCF, like Patient B. PFRF, Tab 3 at 4-5; ID at 20-21. Patient abuse is clearly anathema to the agency's mission of providing quality health care. The appellant has not expressed remorse for this serious sustained misconduct. *E.g.*, IAF, Tab 4, Subtabs 4F, 4J. The appellant has worked for the agency only a relatively short period, i.e., approximately 6 years. IAF, Tab 1, Tab 4, Subtab 4J, and Tab 20 at 1.

¶24 In addition, the appellant had constructive knowledge that her actions towards Patient B on May 27, 1999, would constitute patient abuse. The AJ found that the agency had not established that its training and policy clearly defined "patient abuse" as encompassing the appellant's actions on May 27, 1999. ID at 21-22. She therefore found that the agency did not show that the appellant was on notice that her specific actions towards Patient B would constitute

prohibited patient abuse. *Id.* We disagree. The agency cannot define every possible example of patient abuse in its training manuals and seminars. As a health care provider, the appellant knew or should have known that she would commit patient abuse if she confronted a patient when he was in bed, waved or shook papers, including his written statement concerning his observations of previous misconduct by the appellant, in his face and asked him, "Do you recognize this writing?"

¶25 The agency's table of penalties provides the minimum penalty of a reprimand and the maximum penalty of removal for a first offense of patient abuse. IAF, Tab 10, Ex. 1. For a second offense of patient abuse, the table of penalties provides a penalty ranging from a 10-day suspension to removal. *Id.* Here, the appellant's verbal abuse of Patient B is her second such offense, given her earlier failure to suction Patient A, for which she received the May 18, 1999 written reprimand. Thus, the agency's table of penalties calls for a penalty ranging from a 10-day suspension to removal for the appellant's verbal abuse of Patient B.

¶26 Notwithstanding the seriousness of the misconduct, the appellant's lack of remorse, her constructive knowledge that her actions toward Patient B would constitute patient abuse, her prior discipline, and her relatively short period of service, we find that a 120 calendar-day suspension, not removal, is the maximum reasonable penalty for the sustained patient abuse charge. There is no evidence that the appellant intended to hurt or threaten Patient B. It is more likely that she acted out of frustration, having just learned that Patient B was bearing witness against her regarding the insubordination incident. Further, there is no evidence that Patient B suffered any lasting psychological damage from the appellant's actions. Under these circumstances, we find that a 120 calendar-day suspension, not removal, is the maximum reasonable penalty for the sustained charge. A lengthy suspension is particularly warranted, here, given the appellant's position as a health care provider. *Cf. Theisen v. Veterans Administration*, 31 M.S.P.R.

277, 281-82 (1986) (housekeeping aide's removal mitigated to a 30-day suspension for verbal patient abuse, consisting of making comments to a patient in the shower regarding the patient's anatomy, notwithstanding the appellant's prior 4-month suspension for sexual misconduct, where the comment was an insolated incident, the patient did not suffer lasting damage, the appellant did not intend to harm the patient, he had 9 years of satisfactory service with the agency, and there was no evidence that he was provided relevant training); *Small v. Veterans Administration*, 26 M.S.P.R. 488, 490 (1985) (30-day suspension sustained for cook's verbal patient abuse, consisting of telling a patient he was Idi Amin, in light of his 5 previous disciplinary actions and the fact that agency regulations clearly indicated that rudeness to patients would not be tolerated).

ORDER

¶27 We ORDER the agency to cancel the appellant's removal, effective November 12, 1999, to restore the appellant to her former position, and to substitute for the removal a 120 calendar-day suspension. *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.

¶28 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's 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 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.

¶29 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 of 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).

¶30 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 on 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).

¶31 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. § 1201.202. 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the

United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, 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 must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling 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 do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the

United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.