

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

2008 MSPB 180

Docket No. NY-0752-07-0195-I-1

**Kenneth Miller,
Appellant,**

v.

**Department of Transportation,
Agency.**

August 1, 2008

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

Zachary M. Berman, Esquire, Jamaica, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant and the agency have petitioned for review of the initial decision that reversed an alleged constructive suspension action but did not award back pay and benefits. For the reasons set forth below, we DENY both the appellant's and the agency's petitions, REOPEN this case on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.¹

¹ The Board received an untimely submission from the appellant dated July 25, 2008. The Board is not considering this submission as it is untimely and does not present any new, material evidence in this case.

BACKGROUND

¶2 The appellant is an AT-2152-LH Air Traffic Control Specialist (ATCS) with the Federal Aviation Administration's (FAA or agency) New York Traffic Control Center in Westbury, New York. Initial Appeal File (IAF), Tab 1; Tab 31, Subtab 4e. It is undisputed that, as an ATCS, the appellant is required to maintain a medical certification in order to be qualified to perform the duties of his position. IAF, Tab 31, Subtab 4g-4i.

¶3 Effective July 6, 2006, the FAA found the appellant to be temporarily incapacitated from his position as an ATCS on the ground that his medical condition required him to use a prohibited medication. IAF, Tab 31, Subtab 4a. The agency found the appellant medically qualified to resume his ATCS duties effective November 28, 2006. *Id.* Article 45 of the collective bargaining agreement (CBA) between the agency and the appellant's union, the National Air Traffic Controllers Association (NATCA), provides that an ATCS who is temporarily medically unqualified to perform active air traffic duties must, at the employee's request, be assigned to other facility duties if such duties are available. IAF, Tab 31, Subtab 4f. 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. *Id.* Although the appellant requested administrative duties during the period of his temporary incapacitation, the agency failed to provide him with work on various occasions, for a total of 19 days during the period the agency found him medically incapacitated. *Id.*, Subtab 4b. As a result, the appellant was placed on sick leave for 19 days and not permitted to work one holiday. *Id.*

¶4 The appellant filed an appeal in which he requested a hearing on his assertion that during the period of September 21 to November 25, 2006, the agency had "medically suspended" him from his ATCS position and required him to use sick leave for a total of 19 days during that time period. IAF, Tab 1. The appellant acknowledged that the agency had provided him with administrative duties for the rest of the time period that the agency had barred him from

performing his ATCS duties, but he asserted that he was physically fit to perform “administrative duties” for the entire period of time and that the agency did not provide him with any prior notice, opportunity to respond, or notice of his Board appeal right, before he was required to use sick leave for the 19 days the agency did not provide him with administrative work while he was medically suspended from his ATCS position. *Id.* The appellant subsequently asserted that the agency’s action constituted age, gender, and disability discrimination. IAF, Tab 30 at 5-6.

¶5 The parties thereafter agreed that the appeal could be decided without a hearing, using the legal analysis set forth in the Board’s decision in *Bennett v. Department of Transportation*, 105 M.S.P.R. 634 (2007), and that the appellant’s discrimination claims would be dismissed without prejudice. IAF, Tabs 40-43. The AJ agreed to the parties’ requested method of adjudication and to the dismissal of the appellant’s discrimination claims without prejudice. IAF, Tab 44. In the initial decision based on the record evidence, which included the parties’ factual stipulations, the AJ found that: The agency had medically disqualified the appellant from his ATCS position for the relevant period of September 21 through November 28, 2006; Article 45 of the CBA required the agency to provide the appellant with any available administrative work while he was so disqualified; the appellant had requested administrative work during the entire relevant period, which the agency provided intermittently; and the agency forced the appellant to use 19 days of sick leave and did not provide him with work on one holiday without providing him with prior notice of its intent to force him to use leave and without providing him with notice of his right to appeal his placement on enforced leave. IAF, Tab 47, Initial Decision (ID) at 2-4.

¶6 The AJ found that the agency initiated the appellant’s absence from work by forcing him to use sick leave on 19 days during the period it had declared him to be medically disqualified from his position and, further, that he was not provided with work on one holiday. ID at 4. Thus, the AJ found that the agency had constructively suspended the appellant for more than 14 days during the

period he was medically disqualified from his ATCS position. *Id.* Although the appellant was not suspended from his position for more than 14 consecutive days, the AJ found that the Board has jurisdiction over this appeal because he was suspended for more than 14 days over the course of the period the agency had declared him medically incapacitated from performing his ATCS duties. ID at 3.

¶7 The AJ found that, because the agency did not afford the appellant the procedural protections set forth under 5 U.S.C. § 7513(b) prior to suspending him, the agency violated the appellant's constitutional right to minimum due process of law and the suspension must be reversed. ID at 4. Accordingly, the AJ ordered the agency to retroactively restore the appellant effective September 21, 2006. *Id.* The AJ noted that the appellant had withdrawn his discrimination claims without prejudice. ID at 4 n.2. Consistent with the Board's analysis and decision in *Bennett*, the AJ found that she could not order the agency to provide the appellant with back pay or order the agency to restore the sick leave the appellant was forced to use for the 19 days he was not provided with administrative work during his constructive suspension from his ATCS position. ID at 4-5.

¶8 The appellant filed a petition for review 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 leave he was forced to use while medically disqualified from performing his ATCS duties. Petition For Review File (PFRF), Tabs 6, 9-10. The agency filed a petition for review challenging the initial decision's finding that the appellant had been constructively suspended, PFRF, Tabs 7, which the appellant opposes, PFRF, Tab 8.

ANALYSIS

¶9 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), 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 MSPB 149, ¶¶ 6-7.

¶10 Contrary to the initial decision, however, there exists no precedent, either before or after March 31, 1996, for combining non-consecutive suspensions of 14 days or less for purposes of finding Board jurisdiction. In *Kaminsky v. Department of Health & Human Services*, 13 M.S.P.R. 397, 399 (1982), the Board combined a 14-day suspension with a 10-day period of enforced leave that immediately preceded it, where the suspension and enforced leave were based on the same reason. *Cf. Jennings v. Merit Systems Protection Board*, 59 F.3d 159, 160-61 (Fed. Cir. 1995) (finding that two 14-day suspensions, served consecutively, would not be combined for purposes of determining jurisdiction, as the two suspensions arose out of separate events and circumstances). However, neither the Board nor its reviewing court has ever combined non-consecutive suspensions in order to reach the jurisdictional threshold. In *Price v. Veterans Administration*, 3 M.S.P.R. 91 (1980), the appellant argued that the 5-day suspension that was the basis for his appeal should be combined with a subsequent 10-day suspension on the grounds that the agency was attempting to circumvent the law by giving him short suspensions at different times. *Id.* at 92. The Board rejected the argument, finding that the two suspensions were based on wholly unrelated events and were different in time, and that there was no evidence that the agency had tried to circumvent regulations by imposing two suspensions of 14 days or less. *Id.* at 93; *see also Hightower v. Department of the Army*, 6 M.S.P.R. 170, 170 (1981) (declining to combine two suspensions of 5 and 14 days where suspensions were based on different offenses and were separated by a period of approximately 5 months).

¶11 These precedents establish, at most, that consecutive suspensions of 14 days or less may be combined when they are based on the same reason, while leaving open the possibility that non-consecutive suspensions of 14 days or less may be combined when (1) the suspensions are based on the same reason and (2)

there is evidence that the agency attempted to circumvent Board jurisdiction by imposing multiple suspensions of 14 days or less. *See Kaminsky*, 13 M.S.P.R. at 399; *Price*, 3 M.S.P.R. at 92-93. Here, the appellant was absent from duty on multiple occasions for the same reason, i.e., his temporary incapacitation, combined with a lack of available administrative work. There is no evidence, however, that the agency imposed multiple suspensions of 14 days or less in an attempt to prevent the appellant from exercising his appeal rights. Indeed, it does not appear that the agency regarded the appellant's absences as suspensions of any length. Consequently, we find that the appellant was not subjected to a suspension within the Board's jurisdiction, regardless of whether his absences from duty were voluntary or involuntary.²

¶12 We further find that the appellant was not subjected to a furlough within the Board's jurisdiction as of March 31, 1996. Then, as now, a furlough was defined by statute as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons." 5 U.S.C. § 7511(a)(5). Arguably, the appellant was placed in non-duty status for a nondisciplinary reason to the extent that his absences were due to the alleged unavailability of administrative work, as opposed to his temporary incapacitation, which constitutes a disciplinary reason in the broad sense of the term. *See Thomas v. General Services Administration*, 756 F.2d 86, 89 (Fed. Cir.), *cert. denied*, 474 U.S. 843 (1985). However, the appellant continued to receive pay while on sick leave, as well as on the holiday when he was not permitted to work. Hence, under the plain language of 5 U.S.C. § 7511(a)(5), the appellant was not furloughed on the dates in question. *See Carita v. U.S. Postal Service*, 67 M.S.P.R. 277, 279 (1995) (placement in non-pay status is an essential

² We further note that even if the appellant had been suspended for more than 14 consecutive days, the FAA is not subject to the procedural requirements of 5 U.S.C. § 7513(b). *See* 49 U.S.C. § 40122(g)(1), (2); *Hart*, 2008 MSPB 149, ¶¶ 8-10.

element of a furlough).³ Accordingly, we find that the Board lacks jurisdiction over this appeal. We therefore do not reach the appellant's objections to the remedy ordered in the initial decision, and the agency's arguments on petition for review are likewise moot.

ORDER

¶13 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 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).

³ The statutory definition of a suspension, read literally, also requires placement in non-pay status. *See* 5 U.S.C. § 7501(2). In *Pittman v. Merit Systems Protection Board*, 832 F.2d 598 (Fed. Cir. 1987), our reviewing court appears to have broadened that definition by holding that placement on enforced leave of any kind for medical reasons may constitute a suspension within the Board's jurisdiction. *See id.* at 599-600. At no point, however, has the statutory definition of a furlough been so expansively interpreted.

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, 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.