UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 146

Docket No. DC-0752-07-0821-B-1

Judy Lynne Aldridge,

Appellant,

v.

Department of Agriculture,

Agency.

July 28, 2009

John F. Karl, Jr., Esq., Washington, D.C., for the appellant.

Ron Garland, Saint Louis, Missouri, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review (PFR) of the remand initial decision (RID) that found that the appellant's retirement was voluntary and, therefore, not within the Board's jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the RID, and REMAND the appeal for consideration of the appellant's disability discrimination claim.

BACKGROUND

¶2 The appellant retired from a position as a GS-13 Management Analyst in the agency's Rural Development component, effective October 15, 2004, under a

voluntary early retirement program. MSPB Docket No. DC-0752-07-0821-I-1 (I-1) Appeal File, Tab 5, Subtab 4a. The appellant was 58 and had more than 28 years of federal service. *Id.* At the time of her retirement, there was a pending proposal to remove her for attendance and work deficiencies. *Id.*, Subtab 4d.[1] The appellant filed a formal equal employment opportunity (EEO) complaint alleging, inter alia, that her retirement was involuntary and that she had been discriminated against on the basis of a disability (cerebral aneurism). I-1 Appeal File, Tab 2. The agency issued a final agency decision (FAD) on June 15, 2007, finding no discrimination. *Id.* The appellant filed an involuntary retirement appeal with the Board and alleged failure to provide reasonable accommodation for her brain surgery and allergies. I-1 Appeal File, Tab 1. A Board administrative judge (AJ) found jurisdiction over the matter as a removal action and affirmed the removal. *Id.*, Appeal File, Tab 19. He also found that the appellant did not prove her affirmative defense of disability discrimination. *Id.*

¶3 On petition for review, the Board vacated the initial decision, finding that the agency had not issued a removal decision or effected the appellant's removal. *Aldridge v. Department of Agriculture*, 110 M.S.P.R. 21, ¶¶ 1, 7 (2008). The Board found that the appellant had made a nonfrivolous allegation that her retirement was involuntary, based on an unrebutted sworn statement she submitted on appeal that she was told she would lose her retirement benefits if she were removed. *Id.*, ¶ 12. The Board remanded the appeal for a hearing on whether the appellant's retirement was the result of agency misinformation and, therefore, an involuntary act within the Board's jurisdiction. *Id.*, ¶ 13.

¶4 On remand, the AJ assigned to the case held a hearing and found that the appellant did not show by preponderant evidence that her retirement was

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[1] Absent the voluntary early retirement program, the appellant was not eligible for regular retirement, which requires 30 years of service at age 55 or 20 years at age 60. *See* 5 U.S.C. §§ 8336(a)-(b).

involuntary. MSPB Docket No. DC-0752-07-0821-B-1 (B-1) Appeal File, Tab 17 (RID). He found the testimony of agency officials, rather than that of the appellant, credible with regard to the events leading to her retirement and so concluded that she did not retire because the agency provided her with misleading information. RID at 11, 13-14.

¶5 The appellant has filed a PFR. MSPB Docket No. DC-0752-07-0821-B-1 Petition for Review File (B-1 Review File), Tab 4. She asserts that the AJ erred in holding a hearing and permitting the agency to submit evidence to contradict her sworn statement below. *Id.* In addition, the appellant asserts, the AJ erred in his credibility determinations because the agency witnesses did not controvert her testimony regarding having received and acted on misleading information. *Id.* The agency has responded in opposition to the PFR. B-1 Review File, Tab 6.

ANALYSIS

¶6 The Board may grant a PFR when an AJ makes an adjudicatory error affecting the outcome or when there is new and material evidence not previously available. 5 C.F.R. § 1201.115(d). As a threshold matter, we find that the appellant's argument that the AJ erred in holding a hearing on remand is without merit. The Board previously found that the appellant made a nonfrivolous allegation of involuntary retirement and remanded the case for the hearing she had requested. *Aldridge*, 110 M.S.P.R. 21, ¶¶ 12, 13. Although the appellant asserted on remand that no hearing was necessary and moved for immediate reinstatement, she did not withdraw her hearing request. B-1 Appeal File, Tab 6; *see Campbell v. Department of Defense*, 102 M.S.P.R. 178, ¶ 5 (2006) (an appellant may only waive the right to a hearing by clear, unequivocal, or decisive action). Therefore, the AJ properly held a hearing. We grant the appellant's PFR, however, because we find that the AJ's credibility determinations are inconsistent with the evidence and that the appellant has proven that her retirement was involuntary.

¶7 It is well settled that retirements and resignations are presumed to be voluntary actions and thus outside the Board's appellate jurisdiction. A forced retirement or resignation, however, is tantamount to a removal and, as such, is appealable to the Board. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc); *Axsom v. Department of Veterans Affairs*, 110 M.S.P.R. 605, ¶ 9 (2009). An appellant must show by preponderant evidence that a retirement or resignation was involuntary and thus within the Board's jurisdiction. *Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1341 (Fed. Cir. 2001); *Garcia*, 437 F.3d at 1344. In such a case, the issue of the Board's jurisdiction and the merits of the action are inextricably intertwined. *Shoaf*, 260 F.3d at 1341 (citing *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987).) Thus, when the Board concludes that an appellant's action was involuntary, the Board not only has jurisdiction but the appellant also wins on the merits and is entitled to reinstatement. *Shoaf*, 260 F.3d at 1341; *Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶ 22 (2005); *Beverly v. U.S. Postal Service*, 88 M.S.P.R. 247, ¶ 12 (2001).

¶8 To overcome the presumption of voluntariness, an appellant must show that the retirement or resignation resulted from agency coercion, deception or misinformation. *Terban v. Department of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000); *Garcia*, 437 F.3d 1328-29. Where, as here, there is a claim that an involuntary action resulted from misinformation, an appellant must show: (1) that the agency made misleading statements; and (2) that the appellant reasonably relied on the misinformation to his detriment. *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983); *Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶ 26 (2008). The appellant need not show that the agency was intentionally misleading. *Covington v. Department of Health and Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984); *Baldwin*, 109 M.S.P.R. 392, ¶ 26. However, an agency is required to provide accurate information to permit an employee to make an informed, and thus voluntary, decision regarding

resignation or retirement. *Beverly*, 88 M.S.P.R. 247, ¶ 9; *Kolstad v. Department of Agriculture*, 30 M.S.P.R. 143, 145 (1986); *rev'd on other grounds*, 809 F.2d 790 (Fed. Cir. 1986). A decision based on misinformation is not binding as a matter of fundamental fairness and due process. *Covington*, 750 F.2d at 943.

The appellant has shown by preponderant evidence that her retirement was the result of agency misinformation.

¶9 This case centers on statements the appellant has asserted were made to her at a meeting on Thursday, October 14, 2004, by Sherrie Hinton Henry, then-Deputy Administrator of Rural Development for Operations and Management, and Robyne Jackson, a Human Resources Specialist. Henry was the deciding official on the appellant's proposed removal, and Jackson advised agency management on adverse actions. Hearing Tape (HT) (testimony of Henry and Jackson). The meeting was called to present the appellant with Henry's decision on the proposal to remove her. *Id.* The decision had been signed and dated. HT (testimony of Jackson). In her sworn statement on appeal, the appellant stated that Henry

> informed me that I was being terminated as of that day. I asked if that meant I would lose my retirement benefits. Both she and Ms. Jackson almost in unison, said, "That is exacting [sic] what it means." I then remarked to Ms. Hinton Henry that she had not offered early retirement in lieu of termination. She countered that I had every opportunity to retire before she made her final decision. (This implied that I knew what her final decision would be.) I replied that I had no intention of making a decision to retire. She then informed me that she would hold her decision in abeyance until Monday, October [18], 2004 for me to sign retirement papers. She threatened that if the retirement papers were not signed by this date, she would issue the termination decision. I asked for a copy of the termination decision and she said if I give you a copy, you will be terminated. . . . [I] signed the retirement papers in order to preserve retirement benefits I earned over approximately 28.5 years.

I-1 Appeal File, Tab 4. The appellant confirmed this account in her hearing testimony. HT. The day after the meeting with Jackson and Henry, she made an appointment with Diane Nero, a Human Resources Specialist handling retirement

matters, to meet on the following Monday, October 18. *Id.* The appellant signed and submitted her retirement application on that day. *Id.* As stated in the Board's prior decision, the appellant would have been eligible for a deferred annuity at age 62. *Aldridge*, 110 M.S.P.R. 21, ¶ 12. However, she "acted in the mistaken belief that her only options were to retire immediately or face the loss of all retirement benefits." *Id.* The appellant testified on remand that she could not afford to retire at that time, was not ready to retire, and would "absolutely not" have done so if she were not facing loss of her retirement benefits. HT.

¶10 Jackson testified that at the October 14, 2004, meeting, the appellant asked about her option to retire and that she (Jackson) said nothing in response. HT. She stated that after the appellant raised the issue of retirement, Henry stated she would give the appellant until Monday, October 18, to meet with the retirement officer. *Id.* Henry testified that when the appellant asked "what about her retirement," she told her she was willing to hold her decision in abeyance to allow her to retire. HT. She stated that the appellant did not ask any other questions about retirement benefits. *Id.* Neither Jackson nor Henry was asked whether they told the appellant that termination would result in loss of her retirement benefits, and neither specifically denied saying this. HT (testimony of Jackson and Henry).

¶11 The AJ found that the appellant's testimony was not credible for several reasons. The Board is not "free to overturn an administrative judge's demeanor based credibility findings merely because it disagrees with those findings." *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304 (Fed. Cir. 2008). Rather, when an AJ's finding "is explicitly or implicitly based on the demeanor of a witness" the Board may make determinations of fact different from those of the AJ only where it "articulate[s] sound reasons, based on the record, for its contrary evaluation of the testimonial evidence." *Haebe v. Department of Justice*, 288 F.3d 1288, 1300 (Fed. Cir. 2002). Because the AJ heard live testimony, his credibility determinations must be deemed to be at least implicitly

based upon the demeanor of the witnesses. *Haebe*, 288 F.3d at 1300 (deference is required "when an administrative judge [is] able to observe the demeanor of a testifying witness, and, as a result, the administrative judge's findings [are] explicitly or implicitly based on the demeanor of the witness"). An AJ's findings are due only as much weight as the evidence of record and the strength of the AJ's reasoning require. *Christopher v. Department of the Army*, 107 M.S.P.R. 580, ¶ 16, *aff'd*, 299 F. App'x. 964 (Fed. Cir. 2008). Moreover, where, as here, the record is sufficiently developed and we do not rely upon witness demeanor, it is not necessary to remand the case to the AJ, and we may adjudicate the case on the record. *Lizzio v. Department of the Army*, 110 M.S.P.R. 442, ¶ 9 (2009); *Dogar v. Department of Defense*, 95 M.S.P.R. 527, ¶ 4 (2004), *aff'd*, 128 F. App'x 156 (Fed. Cir. 2005). For the reasons explained below, we find sound reasons, based on the record, to disagree with the AJ's findings.

¶12 In finding that the appellant lacked credibility, the AJ stated that it was implausible that agency officials would tell the appellant she would lose her retirement benefits if terminated. RID at 11, 13. Inherent improbability, i.e., the likelihood of the event occurring in the manner described, is a factor to be considered in a credibility determination. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 461 (1987). The AJ, however, did not explain why it was improbable that Jackson and Henry would tell the appellant that she would lose retirement benefits if terminated. There is no evidence that either official had expertise in retirement matters, and misinformation may be provided even by those who have specialized knowledge. *See Covington*, 750 F.2d at 942 (reduction-in-force (RIF) notice was misleading and erroneous in material ways); *Scharf*, 710 F.2d at 1575 (retirement counselor misled appellant regarding the adverse consequences of taking optional retirement prior to disability retirement). We do not find it implausible that Jackson and Henry might provide inaccurate or misleading information regarding retirement benefits. *See Hendricks v. Office of Personnel Management*, 109 M.S.P.R. 179, ¶ 8 (2008) (finding it not inherently

unlikely that retirement counselor misinformed the appellant regarding the effect on his annuity of his failure to make a deposit for post-1956 military service).

¶13 The AJ also found the appellant's testimony incredible based on what he stated was the consistent testimony of Jackson and Henry contradicting the appellant's account of the October 14, 2004 meeting. Specifically, the AJ found that Jackson "testified neither she nor Ms. Hinton-Henry ever told the appellant that she would lose all of her retirement benefits in the event that the agency terminated her employment" and that Henry similarly testified that "she never told the appellant she would lose her retirement benefits if the agency were to remove her from employment." RID at 10. As stated above, however, a review of the hearing testimony of these two witnesses does not show that either denied making the statement attributed to them by the appellant. Henry's statement that the appellant asked "what about her retirement," but did not ask any other any questions, is ambiguous. It omits discussion of the appellant's statement that Jackson and Henry said she would lose her retirement benefits if she were terminated, but does not deny that statement. Testimony that is vague or guarded, such as this, is less credible than clear and specific contradictory testimony, such as the appellant's. *See Celaya v. Department of Homeland Security*, 100 M.S.P.R. 314 (2005) (separate opinion of Chairman Neil A.G. McPhie, ¶ 6) (the fact that testimony seemed guarded and coached weighed against its credibility under *Hillen*).

¶14 Further, the appellant's testimony as to what she was told by Jackson and Henry is corroborated by the testimony of a friend and former co-worker, Linda Solomon, whom she called after the October 14, 2004 meeting with Jackson and Henry. HT (testimony of the appellant and Solomon). Solomon testified that the appellant seemed panicked and almost hysterical when she called and that she said there was a document terminating her. *Id.* (Solomon). Solomon stated that she advised the appellant to call her attorney and told her, "You're going to lose all your benefits." *Id.* She stated that the appellant replied, "That's what they

said, I'm going to lose all my benefits, my pension . . ." *Id.* The AJ gave Solomon's testimony little weight, finding it "vague and not particularly specific." RID at 11. However, we find the testimony clear and specific and that it corroborates that the appellant was told at the October 14, 2004 meeting she would lose her retirement benefits if terminated. We find Solomon's testimony probative because it provides contemporaneous corroboration of what the appellant was told. *See Render v. Department of Veterans Affairs*, 90 M.S.P.R. 441, ¶ 6 (2001).

¶15 The AJ also found the appellant lacking in credibility as to whether the agency misled her because he found she made an incredible assertion that she never discussed retirement options with anyone until Jackson raised it in a meeting sometime in October 2004, prior to the meeting on the 14th regarding her termination. RID at 12-13. The AJ found this inconsistent with Jackson's testimony that the appellant asked about retirement options in an August 30, 2004 meeting, and with several documents: (1) an estimate of retirement benefits from Nero to the appellant dated September 2, 2004; (2) a September 3, 2004 letter to the appellant from her union representative, Don Maddrey, regarding the proposed removal encouraging her "to consider retirement so as not to jeopardize your retirement benefits . . ."; and (3) a September 3, 2004 handwritten request from the appellant for a 2-week extension of time to respond to the proposed removal, to obtain legal advice on whether or not to retire. ID at 9, 12, 13; *see* B-1 Appeal File, Tab 5, Exhs. 1-3.[2] However, the AJ's characterization of the appellant's testimony is incorrect. A review of the hearing tape shows that the appellant testified, as did Jackson, that retirement was discussed at the August 30,

[2] The AJ also referenced an August 30, 2004 memo from Maddrey to Jackson requesting an extension of time to meet with Nero. RID at 12. This appears to be a reference to the August 30, 2004 memo from Jackson to Maddrey granting a 7-day extension for this reason. B-1 Appeal File, Tab 5, Exh. 4. The appellant testified that she never saw this document. HT.

2004 meeting (although she asserts that it was Jackson who brought it up). HT. That is, the AJ misunderstood the appellant's testimony about when retirement was first raised and thought that it related to an October meeting, not to the August 30 meeting. Furthermore, although the appellant disputed, during the hearing, the degree to which she and the union representative discussed retirement and whether she was considering retirement when she made her September 3, 2004 extension request, she did not testify, as the AJ stated, ID at 9, that prior to a meeting with Jackson sometime in October 2004 "she had not considered retirement, and . . . that she did not consider retirement or discuss it at any time during September 2004." HT (testimony of appellant). Thus, the AJ's conclusion that the appellant incredibly denied any thoughts or discussion about retirement prior to October 2004, and that testimony on other matters is thus also incredible, is not supported by the evidence.

¶16 For the reasons discussed above, we find that the appellant has proven by preponderant evidence her assertion that Jackson and Henry represented to her in the October 14, 2004 meeting that she would lose her retirement benefits if she were terminated. In reaching this conclusion, we rely on the appellant's clear and specific account of what she was told, the lack of any contradiction by Jackson and only a vague and ambiguous response by Henry, and the testimony from Solomon corroborating the appellant's account, as well as the lack of the contradiction cited by the AJ to find the appellant not credible. *See Hillen*, 35 M.S.P.R. at 460 (contradiction by or consistency with other evidence as factors to be considered in determining credibility). The appellant has therefore shown that the agency made a misleading statement to her and has met the first prong of the evidentiary test to show that her retirement was involuntary. *See Scharf*, 710 F.2d at 1574-75; *Baldwin*, 109 M.S.P.R. 392, ¶ 20.

¶17 We also find that the appellant reasonably relied on this misinformation to her detriment and that she has thus met the second prong of her burden of proof. *Id.* A determination as to whether the appellant's resignation was voluntary must

be based on an objective evaluation of all the surrounding circumstances. *Scharf*, 710 F.2d at 1574; *Beverly*, 88 M.S.P.R. 247, ¶ 9. Thus, we have considered the fact that the appellant at least cursorily considered retirement in September 2004 and that she was told by Maddrey and Solomon, as well as by Jackson and Henry, that termination would result in the loss of these benefits. However, we are persuaded that the statement by Jackson and Henry in the October 14, 2004 meeting was what resulted in the appellant's decision to retire. While the appellant received the same information from Maddrey and Solomon, Jackson and Henry were more authoritative figures whose statements would carry more weight. As stated in the Board's previous decision, "it was reasonable for the appellant to rely on these sources," i.e., to believe that information Jackson and Henry provided was correct. *Aldridge*, 110 M.S.P.R. 21, ¶ 12. This was particularly true in the context of being told by Henry that she faced the option of retiring or being terminated. *See Covington*, 750 F.2d at 942 (employee receiving RIF notice reasonably relied on erroneous statement that he had no right of reassignment and could retire); *Scharf*, 710 F.2d at 1575 (employee who could not work due to health problems reasonably relied on misinformation from retirement counselor indicating that there would be no adverse consequences to taking optional retirement prior to disability retirement).

¶18 In addition, we are persuaded that the statement regarding loss of retirement benefits if she were terminated was the decisive factor in the appellant's decision to retire because she made an appointment the very next day to sign her retirement papers. HT (testimony of the appellant). Although she had previously been told by her union representative that the agency's pending removal action would put an end to her retirement benefits, the appellant did not retire until after she was told this by Jackson and Henry. As in cases where an individual alleges coercion, the showing of a short period of time between an employer's provision of misleading information and the employee's decision to

resign or retire is probative evidence that the employer's action was the triggering event. *Cf. Shoaf*, 260 F.3d at 1342; *Axsom*, 110 M.S.P.R. 605, ¶ 15.

¶19 Moreover, there is no evidence to show that the appellant knew at the time of her retirement that the information she received during the October 14, 2004 meeting was incorrect or that she was in fact eligible for a deferred annuity at age 62. The appellant testified, without rebuttal, that she did not know about the option of a deferred annuity until she read about it in the Board's prior decision. HT. She also stated that she did not ask Nero, when they met on October 18, 2004, to effect her retirement, whether what Jackson and Henry had told her was true. *Id.* Nero did not testify that she told the appellant about the deferred annuity option. HT (testimony of Nero). The AJ's statement that Nero testified that "she explained to the appellant she would always be eligible to receive a deferred annuity at age 62, even if the agency had removed her," RID at 11, is not supported by a review of the hearing tape. Finally, in finding that the appellant relied on the agency's misinformation to her detriment, we note the appellant's unrebutted testimony that she would not have retired but for the statement made in the October 14, 2004 meeting.

¶20 Because the appellant has shown that the agency made a misleading statement and that she reasonably relied on it in deciding to retire, she has proven that her retirement was involuntary. *See Scharf*, 710 F.2d at 1574-75; *Baldwin*, 109 M.S.P.R. 392, ¶ 20. As noted above, in an involuntary separation case, the issue of Board jurisdiction and the merits of the case are inextricably intertwined. Accordingly, because the appellant has proven that her retirement was involuntary and thus tantamount to a removal, there is Board jurisdiction and she prevails on the merits. *See Shoaf*, 260 F.3d at 1341; *Schultz*, 810 F.2d at 1136; *Porter*, 98 M.S.P.R. 461, ¶ 22. She is therefore entitled to reinstatement.

The appeal must be remanded for consideration of the appellant's disability discrimination claim.

¶21 Where an appellant raises allegations of discrimination in an appeal of an alleged involuntary retirement or resignation, the evidence on discrimination goes first to the question of whether the action was voluntary and thus whether there is Board jurisdiction. *Neice v. Department of Homeland Security*, 105 M.S.P.R. 211, ¶ 8 (2007); *Markon v. Department of State*, 71 M.S.P.R. 574, 578 (1996). Once it has been determined that the retirement or resignation was involuntary and the Board has jurisdiction in the appeal, the Board will adjudicate the discrimination on the merits under the substantive standards of antidiscrimination law. *See Garcia*, 437 F.3d at 1341; *Neice*, 105 M.S.P.R. 211, ¶ 8; *Markon*, 71 M.S.P.R. at 580.

¶22 In her initial appeal, the appellant alleged disability discrimination, i.e., failure of the agency to accommodate her brain surgery[3] and her allergies. I-1 Appeal File, Tab 1. In her prehearing submission on remand, the appellant also appeared to raise chronic depression and chronic fatigue as disabling conditions. B-1 Appeal File, Tab 8; *see Nugent v. U.S. Postal Service*, 59 M.S.P.R. 444, 447-48 (1993) (an appellant may raise a claim or defense that was not included in the appeal at any time before the end of the conference held to define the issues in the case), *review dismissed*, 36 F.3d 1107 (Fed. Cir. 1994) (Table); 5 C.F.R. § 1201.24(b). The appellant did not present any evidence at the hearing regarding disability discrimination, and the AJ did not address it in the RID.

¶23 Because the appellant has established that her retirement was involuntary, tantamount to a removal, and the Board thus has jurisdiction over her appeal, her disability discrimination claim must be addressed, even though she is entitled to reinstatement. *Schibik v. Department of Veterans Affairs*, 98 M.S.P.R. 591, ¶ 11

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[3] The parties stipulated prior to the first hearing in this case that the appellant underwent surgery to repair a cerebral aneurysm in February 2004 and was out of work for more than 6 weeks. I-1 Appeal File, Tab 17.

(2005); *Totten v. U.S. Postal Service*, 68 M.S.P.R. 255, 257 (1995); *Polite v. Department of the Navy*, 49 M.S.P.R. 653, 657 (1991). Thus, this case must be remanded for a hearing on, and adjudication of, the appellant's allegation of disability discrimination.[4]

ORDER

¶24 Accordingly, the initial decision is REVERSED, and the case is REMANDED to the Washington Regional Office for adjudication of the appellant's claim of disability discrimination.

¶25 Pending the remand proceedings on the appellant's discrimination claim, we ORDER the agency to cancel the appellant's retirement and restore her retroactive to October 15, 2004. *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.

¶26 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.

¶27 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

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[4] The Board's regulations provide that a request for attorney fees must be made within 60 days after issuance of a final decision. 5 C.F.R. § 1201.203(d). In this case, the time limit for filing such a request will not begin to run until the decision on remand is final. *See Totten*, 68 M.S.P.R. at 257 n.2.

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).

¶28 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).

¶29 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.

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

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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.