UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 55

Docket No. SF-0752-10-0001-I-1

Alan Zygas,

Appellant,

v.

United States Postal Service,

Agency.

May 24, 2011

Alan Zygas, Las Vegas, Nevada, pro se.

Michael D. Bassett, Esquire, Seattle, Washington, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that found that the appellant was constructively suspended and ordered cancellation of that action. The appellant has filed a motion to dismiss the agency's petition on the ground that the agency has not complied with the initial decision's interim relief order. For the reasons set forth below, we DENY the agency's petition for review, AFFIRM the initial decision's finding that the appellant was constructively suspended, VACATE the initial decision's interim relief order, and DENY the appellant's motion to dismiss the agency's petition for review. We

FORWARD the appellant's claim that the agency improperly reduced his work hours in May 2010 to the Western Regional Office for docketing and further adjudication as a new restoration appeal.

BACKGROUND

¶2 Due to a 2001 work-related injury, the appellant was employed in a limited duty capacity as a Mail Expeditor/Clerk at the agency's Las Vegas Processing and Distribution Center (P&DC). Initial Appeal File (IAF), Tab 10 at 75, 150, 188. On December 8, 2008, after a confrontation with his supervisor over a work matter, the appellant left work early and requested sick leave for the remainder of the day on the basis of "[s]tress hostile working conditions." *Id.* at 143-47. His supervisor denied the request "pending documentation." *Id.* at 145. The appellant acknowledged that he would need medical documentation before returning to work. *Id.* at 146.

¶3 By letter dated December 9, 2008, Beverly Jones, an Occupational Health Nurse Administrator (OHNA) with the agency, notified the appellant:

> In order [for you] to be cleared to return to work, the United States Postal Service requires that your doctor address and clarify the following questions:
>
> The nature of the problem?
> The extent of recovery?
> Dates of hospitalization or surgery?
> Diagnosis and prognosis of any medical/psychological condition that may prevent the employee from doing his job as clerk?
> What medications is the employee taking? Name of medication, dosage and frequency?
> If psychotropic medications are indicated, will they affect his ability to safely perform the essential functions of his job as clerk?
> Does employee pose a risk, or potential risk of threat to the safety of himself or others?
> Define any limitations . . . and the duration of those limitations?

IAF, Tab 10 at 142.

¶4 On December 23, 2008, Ms. Jones received a December 16, 2008 letter and a December 22, 2008 note written by Agapito Racoma, M.D., a staff psychiatrist at Harmony Healthcare. IAF, Tab 10 at 139, 141. In his December 16, 2008 letter, Dr. Racoma stated that he had interviewed the appellant on December 15, 2008, and that the appellant was suffering "significant anxiety and major depression" as a result of "serious job difficulties, reportedly with service managers and supervisors." *Id.* at 141. Dr. Racoma recommended that the appellant either take a medical leave of absence or transfer to another location within the agency. *Id.* In his December 22, 2008 note, Dr. Racoma stated that the appellant was under his care and treatment, was stable, and was not a danger to himself or others. *Id.* at 139.

¶5 By letter dated December 23, 2008, Ms. Jones informed the appellant that his medical documentation was incomplete and that he was not authorized to return to work until his doctor clarified all of the questions in her December 9, 2008 letter. IAF, Tab 10 at 135. She further informed the appellant, "Once the medical documentation is received and reviewed, a determination will be made about your readiness to return to work, and you will be notified." *Id.*

¶6 On December 24, 2008, the appellant reported for duty and began to work. IAF, Tab 62, Subtab 1. Shortly thereafter, Janice Cullen, Supervisor, Distribution Operations, told him that he was not cleared to return to work, that he would have to go home, and that management would contact him as soon as the OHNA cleared him to work. *Id.*, Subtab 5. Ms. Cullen then escorted the appellant to the door of the employee parking lot and he left the premises. *Id.*, Subtab 4.

¶7 Thereafter, in response to virtually every communication by the appellant's doctors and other health professionals that the appellant was stable, not a danger to himself or others, and could return to work, Ms. Jones deemed the documentation deficient. *See* IAF, Tab 10 at 55-56, 59, 68-69, 107, 117; Tab 46 at 7.

¶8 By letter dated August 31, 2009, Dr. Racoma stated that the appellant was never seen as a danger to himself or others nor had he displayed any indication of psychosis. IAF, Tab 10 at 26. He further stated that the appellant was on a medical leave of absence from December 8, 2008, through December 16, 2008, when he provided the appellant a letter indicating that he could return to work without restrictions as of December 16, 2008. *Id*.

¶9 After receiving Dr. Racoma's August 31, 2009 letter, the agency offered the appellant a limited duty assignment in the manual letter section of the Las Vegas P&DC on September 20, 2009. IAF, Tab 63, Transcript of Appellant's Deposition at 17:1-11; Tab 74 at 17-18. The appellant accepted the offer on September 23, 2009, and returned to work the following day. IAF, Tab 1 at 2, Tab 74 at 17.

¶10 On September 30, 2009, the appellant filed an appeal with the Board, alleging that the agency constructively suspended him from December 16, 2008, until September 24, 2009, by ordering him not to return to work until he provided "extensive medical information to the [a]gency well in excess of that legitimately needed by the [a]gency." IAF, Tab 1 at 2. He did not request a hearing or claim affirmative defenses.[1] *Id.*

¶11 Based on the parties' written submissions, the administrative judge issued an initial decision finding that the agency's refusal to allow the appellant to return to work on December 24, 2008, constituted a constructive suspension and that the appellant was not afforded notice or an opportunity to respond to the

[1] The record indicates that the appellant initially raised affirmative defenses of age discrimination and reprisal for Equal Employment Opportunity (EEO) activity, but withdrew those affirmative defenses in his response to the agency's discovery requests. IAF, Tab 51 at 36. In addition, he indicated during a February 23, 2010 telephonic status conference that he was claiming discrimination based on the agency regarding him as disabled. IAF, Tab 59. In a submission filed later that day, however, the appellant stated that he was withdrawing all of his affirmative defenses "as unnecessary." IAF, Tab 58.

agency's action.[2] IAF, Tab 81 (Initial Decision (ID)) at 20-21. He therefore reversed the appellant's constructive suspension and ordered the agency to retroactively restore the appellant effective December 24, 2008, and to award him back pay and benefits. *Id.* at 21-22. The administrative judge also ordered the agency to provide the appellant interim relief if either party filed a petition for review. *Id.* at 22-23.

¶12 The agency has filed a petition for review of the initial decision's finding that the agency placed the appellant on enforced leave by refusing to allow him to return to work pending an inquiry into his ability to perform his job and that the appellant's absence was therefore involuntary. Petition for Review File (PFR File), Tab 1 at 4. The appellant has filed a response in opposition to the agency's petition for review, requesting that the Board dismiss the agency's petition for failure to comply with the initial decision's interim relief order. PFR File, Tab 3 at 4-6. The agency has filed a reply to the appellant's motion to dismiss. PFR File, Tab 4. The appellant has filed a motion to strike the agency's response to his motion to dismiss, alleging that the agency's response improperly addressed the appellant's arguments on the merits of the agency's petition for review. PFR File, Tab 5.

ANALYSIS

The administrative judge erred in ordering interim relief under the circumstances of this case.

¶13 The purpose of the statutory interim relief provision is not to make the appellant whole at the interim relief stage of the proceedings. *See Armstrong v.*

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[2] In the initial decision, the administrative judge also addressed the timeliness of the appeal, correctly finding that the appellant properly filed his Board appeal in accordance with 5 C.F.R. § 1201.154(b)(2) because, when the appellant filed his appeal with the Board, the agency had not yet resolved the matter or issued a final decision on the appellant's formal EEO complaint and more than 120 days had elapsed since the appellant filed that complaint. ID at 15. The agency does not challenge this finding on review.

Department of Justice, 107 M.S.P.R. 375, ¶ 12 (2007). Rather, the intent of interim relief is to protect the appellant from hardship during the pendency of his appeal if he prevails in the initial decision. *Id.* It is a fundamental element of interim relief that the appellant be reinstated with pay effective as of the date of the initial decision. *Id.*, ¶ 13. However, the Board has found that there are circumstances in which it is inappropriate to order interim relief. In particular, the Board has found interim relief inappropriate where it is clearly impractical or is outside the scope of the Board's authority to provide the relief ordered. *Norton v. Department of Veterans Affairs*, 112 M.S.P.R. 248 (2009). For example, in an appeal of a suspension without pay, the Board has found that interim relief normally should not be provided if the suspension had concluded and the appellant had been returned to paid duty status at the time that the initial decision was issued. *Id.* (citing *Edwards v. Department of the Navy*, 62 M.S.P.R. 174, 177 (1994)).

¶14 At the time the initial decision was issued in this appeal, the agency had returned the appellant to paid duty status at the same grade and step he occupied prior to his absence beginning on December 8, 2008. IAF, Tab 74. Given these circumstances, we find that it was inappropriate to order the agency to provide interim relief. We therefore VACATE the interim relief order. Because interim relief should not have been ordered, we also DENY the appellant's motion to dismiss the agency's petition for review due to its alleged failure to comply with the interim relief order. *See Sink v. Department of Energy*, 110 M.S.P.R 153, ¶ 17 (2008).

¶15 In his response to the agency's petition for review, the appellant alleges that, shortly after the initial decision was issued, the agency improperly reduced his hours of work per day from eight hours to two and one-half hours. PFR File, Tab 3 at 5, Exhibit 1. In its reply, the agency asserts that the appellant was assigned a new limited duty position in May of 2010 as a result of the agency's National Reassessment Process, which is not part of this appeal. PFR File, Tab 4

at 6 n.4, 9. In his motion to strike the agency's response to his motion to dismiss the agency's petition for review, the appellant requests that his claim regarding the reduction in his work hours in May 2010 be assigned to an administrative judge for adjudication "[i]f, as the [a]gency argues, this constitutes a new claim that should be filed separately instead of being argued as a compliance issue within this case." PFR File, Tab 5 at 5 n.1. Accordingly, we FORWARD the appellant's claim that the agency improperly reduced his work hours in May 2010 to the Western Regional Office for docketing and further adjudication as a new restoration appeal.

The administrative judge correctly found that the agency constructively suspended the appellant by refusing to allow him to return to work on December 24, 2008.

¶16 An employee's absence for more than fourteen days that results in a loss of pay may be a constructive suspension appealable under 5 U.S.C. §§ 7512(2) and 7513(d). *Hamiel v. U.S. Postal Service*, 104 M.S.P.R. 497, ¶ 4 (2007). Constructive suspension claims generally arise in two situations: (1) when an agency places an employee on enforced leave pending an inquiry into his ability to perform; or (2) when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Sage v. Department of the Army*, 108 M.S.P.R. 398, ¶ 5 (2008). The key question for jurisdictional purposes is whether the employee or the agency initiated the absence; if the absence is involuntary, i.e., at the direction of the agency, then the employee has been constructively suspended, but a voluntary absence is not a constructive suspension. *Mills v. U.S. Postal Service*, 106 M.S.P.R. 441, ¶ 6 (2007). An initially voluntary absence can subsequently become involuntary, and vice versa. *Lewis v. U.S. Postal Service*, 82 M.S.P.R. 254, ¶ 8 (1999). An employee who alleges that he was constructively suspended must prove by preponderant evidence that his absence was involuntary. *Nolan v. U.S. Postal Service*, 80 M.S.P.R. 241, ¶ 5 (1998).

¶17 On petition for review, the agency argues that the administrative judge erred in finding that the agency placed the appellant on enforced leave by refusing to allow him to return to work on December 24, 2008, pending an inquiry into his ability to perform his job. PFR File, Tab 1 at 4, 16. The agency contends that, pursuant to Section 865 of the agency's Employee and Labor Manual (ELM), the appellant was required to provide medical documentation in support of his request to return to work. *Id.* at 5, 16, 18. The agency asserts that the appellant failed to provide the appropriate medical documentation and, therefore, the agency's refusal to allow him to return to work did not constitute a constructive suspension. *Id.* at 18.

¶18 Under Section 865.1 of the ELM, return-to-work clearance may be required for absences due to an illness when management reasonably believes that: (a) the employee may not be able to perform the essential functions of his position; or (b) the employee may pose a direct threat to the health or safety of himself or others due to his medical condition. By its own terms, this provision is triggered when the agency has "reliable and objective information" indicating that the appellant was unable to do his job or that he posed a threat to himself or others.

¶19 We find that the standard set forth in Section 865.1 of the ELM for requiring an employee to submit medical documentation to support his request to return to work was not met here. The appellant's request for sick leave due to stress allegedly caused by a hostile work environment is not by itself "reliable and objective information" indicating that the appellant was unable to do his job or that he posed a threat to himself or others. Looking at the record as a whole, we note that it contains a memorandum dated November 26, 2008, from the appellant's supervisor, wherein she asserted that the appellant "appears constantly paranoid; more so some days than others" and that she felt that there is "a potential or possibility of danger[.]" IAF, Tab 10, at 148-49. She then recounted several incidents and confrontations over an unspecified period of time involving the appellant. *Id.* While a couple of the incidents might indicate a

serious mental disorder, such as paranoia (e.g., the appellant becoming upset on a few occasions because he believed co-workers were talking about him or looking at him), most of the described incidents merely involve the appellant's accusation of harassment by his supervisor and other managers. *Id.* Thus, the record does not support a finding that the appellant's actions created a reasonable concern that he was a threat to his own safety or that of others when he requested sick leave on December 8, 2008. Therefore, we find that the ELM did not authorize the agency's demand for additional medical information as a condition for allowing the appellant to return to work.

¶20 The agency also challenges the administrative judge's finding that the appellant did not return to work seeking any job modification. PFR File, Tab 1 at 18. The agency asserts that this conclusion is "flatly contradicted" by the documentary evidence [3] because Dr. Racoma's December 16, 2008 letter recommended that the appellant either take a medical leave of absence or transfer to another facility. *Id.*; IAF, Tab 10 at 141. The agency asserts that these recommendations created medical restrictions that prevented him from returning to his previously assigned duties and that, because the appellant's request to return to those duties contradicted these restrictions, there can be no finding of constructive suspension. PFR File, Tab 1 at 12-15, 21.

¶21 We disagree. The record is clear that the appellant was not seeking any restrictions or accommodations as a condition for returning to work after sick leave on December 8, 2008. As the administrative judge properly found, because the appellant did not condition his request to return to work upon being granted a new light duty assignment, a reassignment to another position, or any modification in his duties, he was not obligated to submit medical documentation

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[3] Elsewhere in its petition for review, however, the agency acknowledges that it is undisputed that the appellant only sought to return to his position without restriction. *See* PFR File, Tab 1 at 10.

supporting a light duty request or reassignment. ID at 18-19 (citing *Barnes v. U.S. Postal Service*, 103 M.S.P.R. 103, ¶ 10 (2006) (the agency initiated the appellant's absence when it advised him he could not return to his prior position without medical documentation)).

¶22 The record reflects that, as of December 24, 2008, the agency had medical documentation indicating that, while suffering from anxiety and depression, the appellant was stable, could perform his job, and was not a threat to himself or others. *See* IAF, Tab 10 at 139. We find that this documentation was sufficient to support the appellant's request to return to work. Therefore, we believe that the agency improperly kept the appellant from work from December 24, 2008, to September 24, 2009. Accordingly, we affirm the initial decision's finding that the appellant's absence during that time period was involuntary and thus, a constructive suspension.

ORDER

¶23 We ORDER the agency to cancel the appellant's suspension from December 24, 2008, to September 24, 2009. *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.

¶24 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.

¶25 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).

¶26 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).

¶27 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.

¶28 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 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).

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.

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.