

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

2011 MSPB 79

Docket No. SF-0752-10-0274-I-1

**Michael L. Brunner,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

August 31, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Peter L. Petrich, Esquire, Tacoma, Washington, for the appellant.

Jaime L. Preciado, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mary M. Rose, Member

Member Rose issues a separate dissenting opinion.

ORDER

The agency has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes

¹ This Order may not be cited or referred to except by a party asserting collateral estoppel (issue preclusion), res judicata (claim preclusion), or law of the case.

this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The agency charged the appellant with misconduct of a sexual nature while he was alone with a female subordinate. Initial Appeal File (IAF), Tab 7, Subtabs 4A, 4B, 4D. The agency administered two polygraph examinations to the female subordinate and requested that the employee who administered the polygraph examinations, Mark Kreuziger, be a witness at the hearing. IAF, Tab 28. The administrative judge denied the agency's request, finding that the agency had failed to disclose Kreuziger in its response to the acknowledgment order. *Id.* Further, in the initial decision, the administrative judge gave little weight to the polygraph results. IAF, Tab 32 at 11. In its petition for review, the agency asserts that the administrative judge abused his discretion in denying its request for Mark Kreuziger as a witness at the hearing.

Administrative judges have broad discretion to control proceedings before them, including the discretion to exclude proffered witness testimony. *Butler v. Department of the Air Force*, [73 M.S.P.R. 313](#), 317 (1997). Our regulations provide that sanctions for violations of section 1201.73, including failure to comply with the initial disclosure requirement, may be used when necessary to serve the ends of justice. [5 C.F.R. § 1201.43](#).² In particular, sanctions may be imposed when a party has failed to exercise basic due diligence or when a party has exhibited negligence or bad faith. *See, e.g., Smith v. U.S. Postal Service*, [54](#)

² In addition, the Board may look to the Federal Rules of Civil Procedure for guidance on procedural matters. *Social Security Administration v. Long*, [113 M.S.P.R. 190](#), ¶ 10 (2010). Under the Federal rules, when a party violates the initial disclosure requirement in Rule 26, the sanction of exclusion of a witness is “automatic and mandatory unless the party to be sanctioned can show that its violation ... was either [substantially] justified or harmless.” *NutraSweet Co. v. X-L Engineering Co.*, [227 F.3d 776](#), 785-86 (7th Cir. 2000). The burden is on the party facing sanctions to prove that its violation was either substantially justified or harmless. *See Elion v. Jackson*, No. Civ.A. 05-0992, 2006 WL 2583694 at *1 (D.D.C. Sept. 8, 2006) (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106-07 (9th Cir. 2001)).

[M.S.P.R. 631](#), 635 (1992); *Peck v. Office of Personnel Management*, [35 M.S.P.R. 175](#), 178 (1987).

Here, the administrative judge denied the agency's request for Kreuziger's testimony because the agency did not identify Kreuziger in its initial disclosures. IAF, Tab 28. We find no abuse of discretion in the imposition of this sanction because the agency's omission of the polygraph examiner from its initial disclosure reflected, at best, a lack of due diligence. Specifically, given the agency's reliance on the polygraph to support its action against the appellant, its oversight in identifying the examiner in its initial disclosure could, and apparently did, mislead appellant's counsel into believing that the agency was not going to rely on him as a witness. We also reject the notion that the agency complied with its disclosure obligation because the examiner's name appeared in the report of investigation which it submitted to the appellant as part of the agency file.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

ORDER

We ORDER the agency to cancel the appellant's removal and to retroactively restore appellant effective December 10, 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.

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.

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\(b\)](#).

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\(a\)](#).

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.

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

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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

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

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

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

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

Attachments to AD-343

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

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

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

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

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

DISSENTING OPINION OF MARY M. ROSE

in

Michael L. Brunner v. Department of Homeland Security

MSPB Docket No. SF-0752-10-0274-I-1

¶1 The Board’s regulations provide for the imposition of sanctions “as necessary to serve the ends of justice.” [5 C.F.R. § 1201.43](#). The Board generally does not impose sanctions when there is a way to cure the violation or when there is no evidence of bad faith.* While I agree with the majority that the agency’s failure to disclose the witness in its initial submissions was negligent, and therefore, did not reflect due diligence, I see no evidence of bad faith and I believe that any prejudice to the appellant from the late notice could have been cured short of sanctions. I believe, therefore, that sanctions were not “necessary to serve the ends of justice” in this case, and I would remand this appeal to reopen the record and allow the witness’s testimony. For these reasons, I dissent.

Mary M. Rose
Member

* Cf. *Johnson v. Department of the Treasury*, [108 M.S.P.R. 592](#), ¶ 19 (2008) (sanctions were not warranted for the appellant’s untimely discovery responses where he eventually responded satisfactorily and complied fully with the administrative judge’s orders); *Hay v. U.S. Postal Service*, [106 M.S.P.R. 151](#), ¶ 10 (2007) (a party is not entitled to sanctions for the untimely filing of a submission absent a showing of prejudice); *Starks v. Department of the Army*, [94 M.S.P.R. 95](#), ¶¶ 7-8 (2003) (the appellant was not entitled to sanctions for the agency’s untimely provision of a document requested in discovery where the delay was inadvertent and the appellant was not prejudiced by the delay); *Ellshoff v. Department of the Interior*, [78 M.S.P.R. 615](#), ¶ 5 (1998) (the agency was not entitled to sanctions for the appellant’s untimely submission of her prehearing submission absent of showing of prejudice, given that the appellant’s filed her prehearing submission eleven days before the hearing).