

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

2011 MSPB 101

Docket No. DA-0752-11-0212-I-2

**Colbert Allen Rittgers,
Appellant,**

v.

**Department of the Army,
Agency.**

December 20, 2011

Charles C. Smith, Esquire, Corpus Christi, Texas, for the appellant.

Alex Lopez, Esquire, and Kenneth M. Muir, Esquire, Corpus Christi, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his appeal without prejudice to refiling. For the following reasons, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication of the merits of the case.

BACKGROUND

¶2 After issuing a November 19, 2010 proposal notice and affording the appellant an opportunity to reply, the agency indefinitely suspended the

appellant, effective December 15, 2010, from his WG-7 Aircraft Mechanical Parts Worker position because it had reason to believe that the appellant had committed a crime that could result in a sentence of imprisonment. Initial Appeal File (IAF), Tab 5 at 12, 14-16, 18-19. The agency asserted that the indefinite suspension would continue until the United States Army Criminal Investigation Command investigation, and the criminal charges the agency had reason to believe would follow, were resolved. *Id.* at 14. The agency also noted that the investigation had been referred to the Office of the United States Attorney for prosecutorial review. *Id.* at 18.

¶3 On appeal, the appellant asserted that the agency acted unreasonably in selecting the penalty and failed to consider relevant facts. IAF, Tab 1 at 9. After neither party responded to the administrative judge's order to show cause why the appeal should not be dismissed without prejudice, IAF, Tab 6, the administrative judge dismissed the appeal, finding that "[t]he agency's [indefinite suspension] action is based on the charge that the agency has reason to believe the appellant has committed a crime that could result in a sentence of imprisonment," the agency had an ongoing investigation into the appellant's conduct, and the matter had been referred to the United States Attorney for prosecutorial review, IAF, Tab 7 at 1-2. The administrative judge also found that the Board's policy is to stay its proceedings when criminal actions involving the same matter are pending, and she dismissed the appeal without prejudice to refiling no later than June 14, 2011, or within 30 days after the first to occur of the following events: (1) A conviction after trial or plea in connection with criminal proceedings based on the misconduct alleged in the appeal; (2) acquittal after trial in such criminal matter; (3) dismissal by the court of such criminal charges; or (4) declination of prosecution by the United States Attorney. *Id.* at 2-3.

¶4 After the appellant timely refiled his appeal, Refiled Appeal File (RAF), Tab 1 at 1, the administrative judge set a hearing date, the appellant filed a motion to compel discovery, the agency filed a witness list, the parties filed

prehearing submissions, and the administrative judge identified the issues in the case and ruled on witnesses and motions, RAF, Tabs 4, 6-10. The agency then filed a motion to stay the proceedings and dismiss the appeal without prejudice, arguing that the United States Attorney's Office had requested additional processing of the investigation that should conclude in 60 days, and that such a dismissal would protect the appellant from testifying at a hearing, preserve his due process rights, and further the interests of justice. RAF, Tab 11 at 4-5.

¶5 The administrative judge issued another show-cause order stating that, although the appellant indicated that he did not want a second dismissal of the appeal without prejudice, it appeared that such a dismissal was warranted to protect the appellant's due process rights and not interfere with the criminal investigation. RAF, Tab 12 at 1-2. In response, the appellant moved to dismiss the indefinite suspension action, asserting that the agency's proposal notice was insufficiently detailed to provide him a meaningful opportunity to respond. RAF, Tabs 14-15. Through his attorney representative, the appellant also filed an objection to the agency's motion to dismiss the appeal without prejudice, noting that no indictment or charges had been filed against him, there was no evidence that proceeding with the appeal would interfere with any criminal case, and his loss of pay due to the indefinite suspension and any further delay in processing his Board appeal were harmful to him. RAF, Tab 16 at 1-2.

¶6 The administrative judge denied the appellant's motion to dismiss the indefinite suspension action, RAF, Tab 19, and dismissed the appeal without prejudice a second time, finding that the action was based on a charge in which the agency had reason to believe the appellant had committed a crime that could result in a sentence of imprisonment, the agency had an ongoing investigation into the conduct, the matter had been referred to the United States Attorney for prosecutorial review, and the Board's policy under *Acree v. Department of the Treasury*, [74 M.S.P.R. 119](#), 122 (1997), was to stay proceedings where criminal actions involving the same matter are pending, RAF, Tab 20 at 1-2. The

administrative judge found that, notwithstanding the appellant's objection, a dismissal was warranted to protect the appellant's due process rights and not interfere with the criminal investigation. *Id.* at 2 (citing *Wallington v. Department of the Treasury*, [42 M.S.P.R. 462](#) (1989)). The administrative judge noted that, given the appellant's objection to the dismissal, she would redocket the appeal on October 4, 2011, rather than require the appellant to take action to refile the appeal. *Id.* at 2-3.*

ANALYSIS

¶7 The appellant asserts on review that the investigation has been ongoing since September 15, 2009, and that the delay in processing his appeal has become an economical and psychological burden on him and his family. Petition for Review (PFR) File, Tab 1 at 2. The appellant also contends that the administrative judge should have ruled on his motion for an interlocutory appeal, which he filed after the administrative judge issued the initial decision in this case. *Id.* at 3. The appellant further claims that the administrative judge incorrectly denied his motion to dismiss the indefinite suspension, pursuant to *Special Counsel v. Smith*, [116 M.S.P.R. 520](#) (2011), which affirmed the dismissal of a Hatch Act complaint that lacked the degree of particularity required by Board regulations and case law. Finally, the appellant contends that under *Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#) (2010), the agency lacked "just cause" to suspend him and the mere existence of an open agency investigation into the allegations was not grounds for disciplinary action. *Id.* at 4.

¶8 In *Wallington*, 42 M.S.P.R. at 463, the agency removed the appellant based on charges of unauthorized disclosure of sensitive information, making false

* The Board's records indicate that no appeal has been redocketed in this case, presumably because the appellant has filed a petition for review of the initial decision.

statements under oath in matters of official interest, and associating with persons connected with criminal activities. The appellant filed a Board appeal, informed the Board that he had been charged with two criminal misdemeanors, and moved that any further action in the appeal be stayed until the court disposed of the criminal charges. *Id.* The agency did not oppose the motion. *Id.* at 463-64. The administrative judge dismissed the appeal without prejudice, subject to refiling within 20 days after the criminal charges were dismissed or resolved, because the criminal charges arose from the same incident that formed the basis of the removal action. *Id.* at 464. On review, the appellant indicated that, although he was convicted of one of the criminal misdemeanor charges and found not guilty of the other, he had not yet been sentenced and he intended to file a motion for a new trial and, if necessary, an appeal of the conviction. *Id.* The appellant argued that his constitutional rights would be violated if he was required to proceed before the Board without having exhausted his remedies in the courts. *Id.* The agency did not object to an extension of the stay. *Id.*

¶9 The Board held that staying its appellate proceedings under such circumstances “recognizes that continuing the Board’s proceedings could constitute improper interference with the ongoing criminal case concerning the same conduct,” and that, although the U.S. Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings, the applicable standard in determining whether to stay a civil proceeding pending the outcome of criminal proceedings is whether the interests of justice seem to require such action. *Id.* at 464-65. In applying that standard, the Board balanced the appellant’s strong interest in postponement of the proceedings until the criminal charge was fully resolved against the possible prejudice to the agency in having to wait an indeterminate amount of time to bring the Board proceedings to a conclusion, and found that, in the absence of any objection by the agency to continuing the stay, the interests of justice “under the limited circumstances here presented” required that the stay be extended. *Id.* at 465-66.

¶10 In *Acree*, 74 M.S.P.R. at 121, the agency removed the appellant on the ground that he allegedly traded in national bank stock options based on non-public information that he obtained from his employment. On appeal, the administrative judge dismissed the appeal without prejudice to refiling because the Department of Justice was considering whether to bring a criminal action against the appellant for reasons the same as or similar to those that formed the basis for the removal action. *Id.* After the appellant timely refiled his appeal and the administrative judge again dismissed it without prejudice to refiling, the appellant again refiled his appeal, but the administrative judge this time dismissed it as untimely refiled. *Id.* at 121-22. In finding that the appellant timely refiled his appeal and vacating the initial decision, the Board noted generally that “[t]he Board’s policy is to stay its proceedings when criminal proceedings involving the same matter are pending.” *Id.* at 122-23.

¶11 By contrast, in *Moore v. Department of the Treasury*, [52 M.S.P.R. 362](#) (1992), the agency indefinitely suspended the appellant based upon his federal criminal indictment for unlawfully disclosing tax return information. The Board vacated the initial decision that had dismissed the appeal without prejudice, specifically finding the appellant had opposed dismissal of the appeal and distinguishing *Wallington* because it had involved the appeal from a removal action, not an indefinite suspension as in *Moore*. *Id.* at 363. Emphasizing the distinction between removal actions and indefinite suspensions when concurrent criminal proceedings exist, the Board found that the administrative judge erred in dismissing the appeal without prejudice to refiling pending resolution of the criminal proceedings. *Id.* The Board also found that a remand for a determination on the merits of the agency indefinite suspension action was required. *Id.*

¶12 We find that this appeal is more akin to *Moore* than to *Wallington* and *Acree*. An indefinite suspension based on the crime exception does not generally involve a determination on the merits of the alleged misconduct or any criminal

charge, but is valid when: (1) There is reasonable cause to believe the employee committed a crime for which a term of imprisonment may be imposed; (2) the suspension has an ascertainable end; (3) there is a nexus between the alleged misconduct and the efficiency of the service; and (4) the penalty is reasonable. *Dalton v. Department of Justice*, [66 M.S.P.R. 429](#), 435 (1995); *see Pararas-Carayannis v. Department of Commerce*, [9 F.3d 955](#), 957-58 (Fed. Cir. 1993); *Harding v. Department of Veterans Affairs*, [115 M.S.P.R. 284](#), ¶¶ 13-22 (2010). Therefore, a conflict with an appellant's due process rights is not necessarily created simply because criminal charges are pending and an appellant must defend against an indefinite suspension related to the alleged criminal misconduct. Moreover, in this case the administrative judge granted the *agency's* request for a second dismissal without prejudice over the appellant's express objection. Given the Congressional directive that the Board expeditiously process appeals because delays adversely affect employees who might be unemployed while their appeals are pending, as a matter of policy an agency's request for a dismissal without prejudice generally should not be granted over an appellant's objection. *See Thomas v. Department of Veterans Affairs*, [51 M.S.P.R. 218](#), 220-21 (1991). Accordingly, because the instant appeal involves an indefinite suspension and the appellant opposed the second dismissal without prejudice, the initial decision incorrectly granted the agency's requested dismissal. A remand for a determination on the merits of the agency's indefinite suspension action is required. *See Moore*, 52 M.S.P.R. at 363-64.

¶13 Although the appellant contends that the administrative judge should have ruled on his motion for certification of an interlocutory appeal, the administrative judge did not have the authority to rule on the motion after she issued the initial decision. *See 5 C.F.R. § 1201.112*(a). The appellant's allegations that the agency violated his due process rights because the proposal notice did not include sufficient particularity regarding the charge, and that the agency did not have

“just cause” to suspend him, may be raised on remand in connection with the merits of the indefinite suspension.

ORDER

¶14 Accordingly, we VACATE the initial decision and REMAND the appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.