

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

2012 MSPB 6

Docket No. DC-0752-10-0638-I-1

**Glenda B. Arrington,
Appellant,**

v.

**Department of the Navy,
Agency.**

January 24, 2012

Charles H. Allenberg, Esquire, Virginia Beach, Virginia, for the appellant.

Dorothy J. Whalen, Portsmouth, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed her appeal for lack of jurisdiction. For the following reasons, we GRANT the petition for review, REVERSE the initial decision, and REMAND the appeal for consideration of the appellant's discrimination claims.

BACKGROUND

¶2 The facts in this case are not in dispute. Prior to January 21, 2007, the appellant occupied a GS-0343-14 Supervisory Management Analyst position, basic pay \$81,752.00, adjusted basic pay and total salary \$92,085.00, in the

Executive Directorate, Inspector General & Management Controls, Assessment and Evaluation Branch, with the United States Fleet Forces Command. Initial Appeal File (IAF), Tab 4 at 9, 50. Effective January 21, 2007, the agency effected a general adjustment assigning the appellant from that position to the YC-0343-02 position of Supervisory Management Analyst, basic pay \$82,158.00, adjusted basic pay and total salary \$92,543.00, in the same organization but within the National Security Personnel System (NSPS). IAF, Tab 4 at 50. This action was authorized by the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1101, 117 Stat. 1392, 1621-22 (2003), which permitted the establishment of the NSPS. *Id.*

¶3 Effective April 27, 2008, the agency reassigned the appellant from the YC-0343-02 position of Supervisory Management Analyst, basic pay \$84,417.00, adjusted basic pay and total salary \$95,543.00, to the YA-0343-02 position of Management Analyst, basic pay \$84,417.00, adjusted basic pay and total salary \$95,543.00, in Personnel Development and Allocation, Strategic Plan & Fleet Personnel Transition Division, Special Projects Branch. IAF, Tab 4 at 48. Subsequently, on July 19, 2009, the agency reassigned the appellant from the YA-0343-02 position of Management Analyst, basic pay \$90,038.00, adjusted basic pay and total salary \$102,517.00, to the YC-0343-02 position of Supervisory Management Analyst, basic pay \$90,038.00, adjusted basic pay and total salary \$102,517.00, in Personnel Development and Allocation, Strategic Plan & Fleet Personnel Transition Division, “IA Health & Wellness” Branch. IAF, Tab 4 at 38.

¶4 On October 28, 2009, the President signed into law the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2498 (the Act), which repealed the NSPS and called for the conversion of all employees and positions back to the pay system and all other aspects of the personnel system that last applied before the NSPS applied, or that would have applied if the NSPS had never been established. *Id.*, § 1113(b)-(c). By notice

dated April 16, 2010, the appellant was informed that, based upon her current position title, pay schedule, occupational series, and pay band as a Supervisory Management Analyst, YC-0343-02, she would convert to a Supervisory Management Analyst, GS-0343-13, Step 10. IAF, Tab 4 at 23. The agency effected the conversion on April 25, 2010. *Id.* at 21. As a result of the conversion, the appellant's basic pay increased from \$92,068.00 to \$93,175.00, and her adjusted basic pay and total salary increased from \$105,105.00 to \$106,369.00. *Id.* The name and location of the position's organization did not change. *Id.*

¶5 On April 29, 2010, the appellant initiated equal employment opportunity (EEO) pre-complaint counseling, during which she raised a claim that the agency had demoted her from a GS-14 Supervisory Management Analyst position to a GS-13 Supervisory Management position as a result of discrimination based on sex, race, and age. *See* IAF, Tab 1, Ex. I. By memorandum dated June 9, 2010, the agency informed her that she had raised a mixed-case complaint which may be appealed to the Board. *Id.* The agency explained that she must make an election between filing a formal EEO complaint or filing a Board appeal, and that whichever she filed first would be considered a binding election to proceed in that forum. *Id.*

¶6 On June 19, 2010, the appellant filed an appeal with the Board alleging that the agency involuntarily demoted her from the position of GS-0343-14 Supervisory Management Analyst to the position of GS-0343-13 Supervisory Management Analyst.¹ IAF, Tab 1 at 2. She again raised claims of race, sex, and age discrimination. *Id.* at 3. The administrative judge informed the appellant that the Board may lack jurisdiction over her appeal and ordered her to submit evidence and argument showing that the agency reduced her in pay or grade or

¹ The appellant subsequently filed a formal EEO complaint on June 22, 2010. *See* IAF, Tab 4 at 19.

that she suffered a constructive reduction in grade because she was reassigned from a position which, due to issuance of a new classification standard or correction of a classification error, was worth a higher grade, she met the requirements for promotion to the higher grade, and she was permanently reassigned to a position classified at a grade level lower than the grade level to which she otherwise would have been promoted. IAF, Tab 8 at 1-3.

¶7 Based on the written record, and after receiving responses from the parties, IAF, Tabs 11-12, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 13 at 1. The administrative judge found it undisputed that the appellant's basic pay and adjusted basic pay never decreased, and thus the appellant did not nonfrivolously allege a reduction in pay. *Id.* at 3. The administrative judge further found that the agency made a classification determination, pursuant to [5 C.F.R. § 9901.372\(b\)](#), that the position the appellant held at the time of conversion was a GS-13; that the Office of Personnel Management (OPM), not the Board, determines whether a position is properly classified; and that the appellant did not nonfrivolously allege that she was reduced in grade because a GS-13 is within the YC-2 NSPS pay band of classification. *Id.* at 3-4. The administrative judge also rejected the appellant's contention that she was demoted at some point while serving in NSPS, finding that the appellant should not have expected to return to a GS-14 position upon conversion because the position description of her initial GS-14 position was not the same as the position description assigned to the YC-0343-02 position she held when she was converted back to the General Schedule. *Id.* at 4. Finally, the administrative judge held that, given her dismissal of the case for lack of jurisdiction, she did not need to address the timeliness of the appeal, and that the Board lacked jurisdiction over the appellant's claims of discrimination. *Id.* at 1, 5.

ANALYSIS

The appellant did not suffer an appealable reduction in pay.

¶8 We first consider the appellant's claim that she suffered a reduction in pay, which is an appealable action under [5 U.S.C. §§ 7512\(4\)](#) and 7513(d). For adverse action purposes, pay means "the rate of basic pay fixed by law or administrative action for the position held by an employee." [5 U.S.C. § 7511\(a\)\(4\)](#). We agree with the administrative judge that the appellant failed to nonfrivolously allege that she was reduced in pay because, as set forth above, the agency did not at any point reduce the rate of basic pay fixed by law or administrative action for the position held by the appellant.

¶9 On review, the appellant cites *Malan v. Department of the Air Force*, [55 M.S.P.R. 283](#), 290-91 (1992), for the proposition that an appellant who is transferred from a position under one pay system to a position with a lower rate of basic pay under a different pay system, and given retained pay without retained grade, has suffered a reduction in pay. *Id.* at 5. In *Malan*, the appellant was reassigned from a WG-09 Aircraft Engine Repairer position paying \$13.31 per hour, equivalent to an annual salary of \$27,778.00, to a GS-05 Supply Clerk position, which had a basic pay range of \$16,305.00 to \$21,101.00, and received retained pay of \$27,778.00. The Board held that the agency action entailed a reduction in pay because placing a Wage Grade employee into a General Schedule position having a lower rate of pay is a reduction in pay, because "although an employee may initially preserve the same pay level under pay retention, that pay level would subsequently be reduced pursuant to [5 U.S.C. § 5363](#)." *Id.* at 290-91. Here, by contrast, the appellant did not receive retained pay, and there is no indication that her pay level will be reduced in the future

pursuant to [5 U.S.C. § 5363](#) or any other statute or regulation.² In addition, there is no indication that the agency reassigned the appellant to a different position when it converted her from the NSPS back to the General Schedule, as occurred in *Malan* and similar cases. See *McAlexander v. Department of Defense*, [105 M.S.P.R. 384](#), ¶¶ 2, 7 (2007) (the appellant was “reassigned” from an AD-07 Police Officer to a GS-07 Office Support Assistant); *Goldberg v. Department of Transportation*, [97 M.S.P.R. 441](#), ¶¶ 2-3, 7-8 (2004) (the appellant was “reassigned” from an AT-2152-KH Air Traffic Control Specialist to an FV-2152-H Support Specialist); [5 C.F.R. § 210.102\(b\)\(12\)](#) (defining “reassignment” as a change of an employee, while serving within the same agency, from one position to another without promotion or demotion). Rather, the appellant had her position converted from one pay system to another pursuant to a statutory requirement. Thus, the appellant’s reliance on *Malan* is misplaced.

The appellant suffered an appealable reduction in grade from GS-14 to GS-13.

¶10 The Board also has jurisdiction over an employee’s reduction in grade. See [5 U.S.C. §§ 7512\(3\), 7513\(d\)](#). Grade means “a level of classification under a position classification system.” [5 U.S.C. § 7511\(a\)\(3\)](#). OPM’s regulations similarly define “grade” as “a level of classification under a position classification system.” [5 C.F.R. § 752.402](#).

¶11 We agree with the administrative judge that the appellant was not reduced in grade from GS-14 to GS-13 while she was within the NSPS pay system. At no point while she was subject to NSPS did the appellant occupy a position at any level of classification within the General Schedule. Moreover, the appellant’s movement within the NSPS apparently was consistent with the principles behind

² We further note that, contrary to the majority opinion in *Malan*, it is not the case that an employee receiving retained pay but not retained grade will inevitably be reduced in pay pursuant to [5 U.S.C. § 5363](#). See *Malan*, 55 M.S.P.R. at 301-02 (Chairman Levinson, dissenting).

the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1621 (2003), which authorized the creation of the NSPS to replace the perceived limitations of the traditional federal pay and classification system with a broader pay-banding structure, thus allowing agencies to move employees more freely between positions without being bound by narrowly described work definitions.

¶12 We also agree that the appellant’s conversion from a YC-02 position within NSPS to a GS-13 position within the General Schedule did not, standing alone, result in an appealable reduction in grade. Neither 5 U.S.C. chapter 75 nor 5 C.F.R. part 752 indicates how a reduction in grade, i.e., a level of classification “under a classification system,” is to be determined where, as here, there is movement with no reduction in pay across or between position classification systems.³ Cf. *Peele v. Department of Health & Human Services*, [6 M.S.P.R. 296](#), 299 (1981) (finding no reduction in grade when a position was moved from the General Schedule to a position not under a position classification system). Nor is there any language in the 2009 Act or elsewhere in the NSPS statutes or regulations to indicate that the appellant’s conversion, standing alone, would constitute an appealable reduction in grade under [5 U.S.C. § 7512](#).⁴

³ The legislative history of the Civil Service Reform Act of 1978, explaining the purposes of the “reduction in grade” language included in chapter 75, does not answer this question either. See *Russell v. Department of the Navy*, [6 M.S.P.R. 698](#), 706-07 (1981). The legislative history does reflect, however, Congress’s belief that determinations of whether an appealable “reduction in grade” has occurred would be based on objective criteria that would be relatively easy to apply, e.g., an employee’s grade is reduced from GS-14 to GS-13. See *id.*

⁴ Nor do we find any language in the 2009 Act or elsewhere in the NSPS statutes and regulations that would provide an independent basis for Board review of the appellant’s conversion from NSPS to the General Schedule. The NSPS regulations provide that movement from a non-NSPS personnel system to an NSPS position determined to be at a lower level of work may constitute a reduction in band, see [5 C.F.R. § 9901.103](#), but there is no comparable provision defining reduction in band for purposes of conversion from NSPS to a non-NSPS position. The appellant has not alleged that she was reduced

¶13 The crucial fact in this case, however, is that the appellant initially occupied a position at one level of classification within the General Schedule, GS-14, and was later placed involuntarily at a lower level, GS-13, under that same classification system.⁵ This sequence of events constitutes an appealable “reduction in grade” as the term is defined under chapter 75 and its implementing regulations.⁶ While it is true that this reduction in grade was not recorded on any one Standard Form 50, the cumulative effect of the personnel actions effected in this case was the appellant’s reduction in grade from a GS-14 position to a GS-13 position. Under the unique circumstances surrounding the institution of NSPS and its subsequent repeal, we conclude that the appellant suffered an appealable reduction in grade from GS-14 to GS-13, effective April 25, 2010.⁷

in band as a result of her conversion to NSPS or her reassignments between pay-banded positions within NSPS.

⁵ The agency argues that the appellant voluntarily accepted one or more reassignments while in the NSPS that significantly changed her duties and position description. These reassignments took place prior to the repeal of NSPS, however, and there is no indication that the appellant voluntarily accepted a reduction in grade from a GS-14 position to a GS-13 position.

⁶ We note that the downgrading of an employee pursuant to a position reclassification is not appealable to the Board where the employee is eligible for and receives retained grade and pay pursuant to 5 U.S.C. chapter 53. *Atwell v. Department of the Army*, [2 M.S.P.R. 484](#) (1980), *aff’d*, [670 F.2d 272](#), 282-86 (D.C. Cir. 1981). However, the appellant in this case did not receive, nor was she eligible for, either retained grade or retained pay under chapter 53. Moreover, her downgrading to a GS-0343-13 Supervisory Management Analyst position resulted from reclassification of the YC-0343-02 position she held immediately prior to her conversion to the General Schedule, and not from reclassification of the GS-0343-14 Supervisory Management Analyst position she held prior to her conversion to NSPS.

⁷ We noted in paragraph 12 and footnote 4, *infra*, that nothing in the language of 5 U.S.C. chapter 75, the 2009 Act, or other NSPS statutes or regulations expressly provides for Board review of an appellant’s conversion from the NSPS to the General Schedule. However, our conclusion that an appealable reduction in grade has been effected here, in the unique circumstances involving the NSPS, is consistent with § 1113(c)(1)(A) of the Act. With exceptions not applicable here, the 2009 Act provides for the conversion of all NSPS employees and positions to the “statutory pay system and all other aspects of the personnel system that last applied to such employee or

The appellant has shown good cause for the delay in filing.

¶14 The Board's regulations require that an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after date of receipt of the agency's decision, whichever is later. [5 C.F.R. § 1201.22\(b\)](#). The regulations further provide that, if a party does not submit an appeal within the applicable time limit, it will be dismissed as untimely filed unless a good reason for the delay is shown. 5 C.F.R. § 1201.22(c).

¶15 Here, the appellant filed her appeal on June 19, 2010, more than 50 days after the effective date of her reduction in grade. However, the agency did not notify the appellant of her Board appeal rights at the time of the action, as required under [5 C.F.R. § 1201.21](#). When an agency is required to notify an individual of her Board appeal rights, but fails to do so, the agency's failure may constitute good cause for a filing delay. *See Shiflett v. U.S. Postal Service*, [839 F.2d 669](#), 674 (Fed. Cir. 1988); *Powell v. Office of Personnel Management*, [114 M.S.P.R. 580](#), ¶ 11 (2010). In such cases, an appellant need not show that she acted diligently in discovering her Board appeal rights; she need only show that she acted diligently in pursuing her Board appeal rights once she discovered them. *Powell*, [114 M.S.P.R. 580](#), ¶ 11. Here, the agency first advised the appellant of her Board appeal rights in a memorandum dated June 9, 2011, just 10 days before she filed her initial appeal. IAF, Tab 1, Exhibit I. We find that the appellant acted diligently thereafter in pursuing her Board appeal rights, and that good cause exists for the filing delay. *See Cranston v. U.S. Postal Service*, [106 M.S.P.R. 290](#), ¶ 14 (2007) (the appellant established good cause for the

position (as the case may be) before the [NSPS] applied.” One aspect of the General Schedule personnel system that “last applied” to the appellant before she was converted to the NSPS was her GS-14 grade level. Although the language of Act is not dispositive of the meaning of a “reduction in grade” appealable to the Board pursuant to the unchanged [5 U.S.C. §§ 7512\(3\)](#) and 7513(d), it does suggest a broad Congressional intent that employees not be harmed when their positions are converted from the NSPS to the General Schedule.

untimely filing of his appeal where the agency failed to provide notice of his appeal rights and the appellant was diligent in filing his appeal two weeks after he learned that he could do so).

The reduction in grade is not sustained.

¶16 An agency's failure to provide a tenured public employee with an opportunity to present a response, either in person or in writing, to an appealable agency action that deprives her of her property right in her employment constitutes an abridgement of her constitutional right to minimum due process of law, i.e., prior notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 546 (1985); *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 680-81 (1991). Here, the agency did not provide the appellant an opportunity to make a response in connection with the reduction in grade action. Because the agency did not provide the appellant with minimum due process in reducing her in grade from GS-14 to GS-13, we find that the reduction in grade must be reversed.

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

¶17 Because the Board has jurisdiction over this appeal, the appellant must be afforded an opportunity on remand to develop and prove her allegations of race, sex, and age discrimination. See [5 U.S.C. § 7702](#)(a)(1); *Aldridge v. Department of Agriculture*, [111 M.S.P.R. 670](#), ¶ 23 (2009); *Polite v. Department of the Navy*, [49 M.S.P.R. 653](#), 657 (1991). However, the reduction in grade must be reversed regardless of the outcome of the proceedings on remand. Accordingly, despite the absence of a final decision on the appellant's discrimination claims, we find it appropriate that the agency now restore the appellant to the GS-14 grade. See *Aldridge*, [111 M.S.P.R. 670](#), ¶ 25; *Polite*, 49 M.S.P.R. at 657-58.

ORDER

¶18 We REVERSE the initial decision and REMAND the appeal to the Washington Regional Office for adjudication of the appellant's claims of race, sex, and age discrimination.⁸

¶19 We ORDER the agency to restore the appellant to the grade of GS-14, with no reduction in pay, effective April 25, 2010. *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.

¶20 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.

¶21 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\(b\)](#).

¶22 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

⁸ 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 Aldridge*, [111 M.S.P.R. 670](#), ¶ 23 n.4.

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\(a\)](#).

¶23 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

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.