

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

**2012 MSPB 116**

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Docket No. SF-0752-11-0270-I-1

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**Noel D. Hodges,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

October 11, 2012

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Michael Stichler, Santa Barbara, California, for the appellant.

Kris Ashman, Esquire, Long Beach, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of an initial decision that sustained a single charge of failure to follow instructions, found that the appellant did not prove his affirmative defenses of harmful error or violation of his due process rights, and affirmed a reduction in grade from the position of Manager of Customer Services, EAS-22, to Manager of Customer Services, EAS-21. For the reasons set forth below, we GRANT the petition for review and REVERSE the reduction in grade.

## BACKGROUND

¶2 The appellant was employed by the U.S. Postal Service as a Manager of Customer Services. Initial Appeal File (IAF), Tab 6, Subtab 4A. On August 25, 2010, the agency audited his station and found numerous deficiencies relating to the processing and reporting of delayed mail. IAF, Tab 6, Subtab 4L. The agency conducted an investigative interview on August 31, 2010, at which the appellant was provided the opportunity to explain the findings of the audit. IAF, Tab 6, Subtab 4J. On September 24, 2010, the agency issued a notice proposing the appellant's reduction in grade on a charge of failure to follow instructions. IAF, Tab 6, Subtab 4F. The proposal notice described the appellant's responses during the August 31, 2010 interview. *Id.* The appellant submitted a written response to the proposal notice on November 25, 2010. IAF, Tab 7 at 7-10. In his response, the appellant also requested an opportunity to meet with the deciding official, Postmaster Mark Anderson, to orally reply to the proposed downgrade action. *Id.* at 7, 10. Apparently, no such meeting occurred. On December 14, 2010, Mr. Anderson issued a decision letter that sustained the charge and reduced the appellant in grade effective January 1, 2011. *Id.*, Tab 6, Subtab 4B. This appeal followed.

¶3 At the hearing, Mr. Anderson testified that he did not recall receiving the appellant's November 25, 2010 response to the proposal notice, and that he did not consider it in making his final decision. Hearing Transcript (HT) at 144-45. In light of that testimony, the administrative judge permitted the appellant to raise a claim that Mr. Anderson's failure to consider his written response amounted to a lack of due process and/or harmful error. HT at 194-95. In the initial decision sustaining the action, the administrative judge found that the agency had committed procedural error by failing to consider the appellant's written response or to allow for the requested oral reply, but that the appellant had failed to show that Mr. Anderson's decision would have been different had he reviewed the letter. Initial Decision (ID) at 9-10. The administrative judge also found that the

appellant had been provided minimum due process of law because Mr. Anderson had considered the explanations the appellant provided in the August 31, 2010 interview. *Id.* Moreover, the administrative judge found that the agency established nexus and that the penalty of reduction in grade is reasonable. ID at 10-15.

### ANALYSIS

¶4 On review, the appellant reiterates his argument that the agency deprived him of minimum due process when Mr. Anderson admittedly failed to consider the appellant's response to the notice of proposed action prior to making the final decision to reduce his grade. Petition for Review (PFR) File, Tab 1 at 4, 8; HT at 194; IAF, Tab 11. We agree.

¶5 The agency's proposal notice gave the appellant two options with respect to the proposed disciplinary action: (1) He could request mediation with the Federal Mediation and Conciliation Service; or (2) he could respond to the proposed notice in writing or in person. Either action had to be taken within 10 calendar days of receiving the proposal notice. If the appellant initially chose mediation, but the parties did not resolve the matter, he then had an additional 10 calendar days to submit a written response to the proposal notice. IAF, Tab 6, Subtab 4F. The appellant timely requested mediation on September 29, 2010, and the mediation occurred on November 16, 2010. PFR File, Tab 1 at 16, 18-19. Specifically, the appellant submitted a receipt for priority mail dated November 26, 2010, in addition to a page signed by an agency official on the same date entitled "Official Appeal of 650 Mediation of Noel Hodges," with the notation that it was hand-delivered that date. IAF, Tab 7 at 7-10; Tab 10. Accordingly, we find that the appellant's written response to the proposal notice dated November 25, 2010, both mailed and hand-delivered on November 26, 2010, was timely filed with the agency.

¶6 We find the deciding official’s complete failure to consider the appellant’s written response to the proposal notice before issuing a decision constitutes – in and of itself – a violation of minimum due process of law. *See* HT at 145. The Supreme Court has described “the root requirement” of the Due Process Clause as being “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.” *Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 542 (1985) (emphasis in original). This requires a “meaningful opportunity to invoke the discretion of the decisionmaker” before the personnel action is effected. *Id.* at 543. “The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Id.* at 546. An employee cannot be said to have had a meaningful opportunity to present his side of the story and to invoke the discretion of the deciding official if the deciding official did not provide for an oral response to the proposal notice and did not read the employee’s written response to the proposal notice before issuing his decision. Although the deciding official considered the appellant’s input *prior* to the issuance of the proposal notice, this does not satisfy the due process requirements of *Loudermill*, which requires that the employee have the “opportunity to present reasons, either in person or in writing, why *proposed action* should not be taken.” *Id.* (emphasis added). In an adverse action, there is no “proposed action” for due process purposes before an agency issues its proposal notice. Accordingly, we reverse the agency’s action reducing the appellant in grade.

### ORDER

¶7 We ORDER the agency to cancel the reduction in grade from the position of Manager of Customer Service, EAS-22, to Manager of Customer Service, EAS-21 and to restore the appellant effective January 1, 2011. *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.

¶8 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.

¶9 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\(b\)](#).

¶10 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\(a\)](#).

¶11 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.

¶12 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](http://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:

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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.