

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

2012 MSPB 133

Docket No. NY-0752-10-0130-I-2

**George Camaj,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

December 21, 2012

Thomas G. Roth, Esquire, West Orange, New Jersey, for the appellant.

Jeffrey M. Feinblatt, Esquire, Newark, New Jersey, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has petitioned for review of the May 6, 2011 initial decision that reversed the agency's decision to continue the appellant's indefinite suspension beyond October 8, 2009. For the reasons set forth below, we GRANT the agency's petition for review and VACATE the initial decision. The agency is

ORDERED to terminate the appellant's indefinite suspension effective February 22, 2010.¹

BACKGROUND

¶2 At all times relevant to this appeal, the appellant was a Deportation Officer with U.S. Immigration and Customs Enforcement (ICE) at its Field Office in New York. Initial Appeal File, MSPB Docket No. NY-0752-10-0130-I-1 (IAF-1), Tab 4, Subtab 4, Exhibit A. On February 4, 2009, Special Agent Michael Fischgrund filed a criminal complaint with the U.S. District Court for the District of New Jersey, charging the appellant with three counts of willfully and without authorization accessing and obtaining information from the Treasury Enforcement Communications System (TECS), in violation of [18 U.S.C. § 1030](#)(a)(2), on three separate dates: May 19, 2004, June 18, 2004, and December 20, 2006. *Id.*, Exhibit F at 1-2. The complaint was based on an agency investigation, which found that the appellant had committed the alleged misconduct. *Id.* at 3-6.

¶3 By notice dated February 13, 2009, John Tsoukaris, Deputy Field Office Director, proposed to suspend the appellant indefinitely on the ground that there was reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment might be imposed. *Id.*, Exhibit E. On June 2, 2009, Christopher Shanahan, Field Office Director, issued a decision to indefinitely suspend the appellant for the reasons set forth in the proposal notice, effective June 5, 2009. *Id.*, Exhibit D. The decision letter described the following conditions subsequent for termination of the suspension:

The suspension will remain in effect until the later of:

1. The resolution of the criminal charges pending against you;

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition for review under the previous version of the Board's regulations, the outcome would be the same.

2. The completion of any Agency investigation concerning the factual situation which forms the basis of the criminal charges; or
3. The notice period of any adverse action proposed on the factual situation which forms the basis of the criminal charges.

Id.

¶4 On August 13, 2009, the appellant entered into an Agreement for Pretrial Diversion (PTD) with the U.S. Attorney's Office. *Id.*, Exhibit C. As part of the PTD agreement, the appellant agreed that the prosecution of his criminal offenses would be deferred for 6 months in exchange for his acceptance of responsibility for his conduct and agreement to complete the PTD program. *Id.* In the agreement, the appellant admitted that he knowingly conducted approximately 300 queries in TECS, in excess of his authorized access to TECS, that he had thereby obtained information from the agency, and that he had received training and was aware that the queries were in excess of his authorized access to agency computers. *Id.* at 4-13. The agreement provided that the appellant's admissions, particularly with respect to his unauthorized access of TECS, "shall be admissible in any administrative proceeding[.]" *Id.* at 2.

¶5 On September 8, 2009, the criminal complaint against the appellant was dismissed without prejudice on the basis that the prosecution was being "deferred" under the terms of the PTD agreement. Initial Appeal File, MSPB Docket No. NY-0752-10-0130-I-2 (IAF-2), Tab 23, Subtab 1. By letter dated February 22, 2010, the U.S. District Court Pretrial Services Agency notified Andrew Kogan, Assistant U.S. Attorney, that the appellant had complied with the terms of the PTD agreement, and that it was therefore recommended that the pending charges be dismissed. IAF-1, Tab 4, Exhibit B.

¶6 After the criminal charges against the appellant were dismissed, the agency proceeded to investigate the appellant regarding alleged misconduct apart from the incidents referred to in the criminal complaint and the PTD agreement. IAF-2, Tab 23 at 4; *see also id.*, Exhibit 2. On March 10, 2010, the appellant

filed the instant appeal, alleging that the agency had continued his indefinite suspension for an unreasonable period of time after the criminal case was dismissed. IAF-1, Tab 1. By notice dated May 19, 2010, the agency proposed to remove the appellant, based in part on alleged misconduct with which he was not charged in the criminal complaint. Initial Appeal File, MSPB Docket No. NY-0752-11-0048-I-1 (Removal Appeal File), Tab 5, Subtab 4F. The following day, the parties jointly requested that the appeal be dismissed without prejudice, pending a decision on the proposed removal. IAF-1, Tab 17. Accordingly, on May 28, 2010, the administrative judge dismissed the appeal without prejudice. IAF-1, Tab 19, Initial Decision.

¶7 The agency removed the appellant, effective November 16, 2010, on charges of conduct unbecoming a law enforcement officer and misuse of an official government database.² Removal Appeal File, Tab 5, Subtab 4B. The latter charge included 133 specifications of unauthorized TECS access, including incidents not referred to in the criminal complaint. *Id.* On November 29, 2010, the appellant refiled his appeal of the continuation of the indefinite suspension.³ IAF-2, Tab 1.

¶8 In an initial decision dated May 6, 2011, the administrative judge reversed the agency's decision to continue the indefinite suspension beyond October 8, 2009. IAF-2, Tab 25, Initial Decision (ID-2). In reaching that decision, the administrative judge found that the criminal charges had been resolved on September 8, 2009, and that 30 days was a "reasonable amount of time for the agency to investigate and effect the disciplinary action against the appellant." *Id.*

² Because the appellant was removed effective November 16, 2010, the indefinite suspension was terminated effective that day. See *Wiemers v. Merit Systems Protection Board*, [792 F.2d 1113](#), 1115 (Fed. Cir. 1986).

³ The appellant filed an appeal of his removal on November 29, 2009. Removal Appeal File, Tab 1. By order dated December 3, 2010, the administrative judge joined the two appeals; however, the appeals were subsequently severed by order dated March 22, 2011. *Id.*, Tabs 3, 17.

at 17, 20. The agency filed a petition for review in which it asserts that its delay in terminating the appellant's indefinite suspension was reasonable. Petition for Review (PFR) File, Tab 1. The appellant has responded in opposition. PFR File, Tab 3.

ANALYSIS

¶9 As an initial matter, we find that the administrative judge erred in finding that the charges were resolved on September 8, 2009, when the charges were dismissed without prejudice pending the appellant's successful completion of the PTD program. In *Cooper v. Department of Health & Human Services*, [80 M.S.P.R. 612](#), ¶ 7 (1999), the Board reversed an administrative judge's finding that criminal charges against the appellant were disposed of when the appellant was placed on pretrial probation. In doing so, the Board noted that the charge could still have been brought forward if the appellant did not meet the terms of the pretrial probation program. *Id.*, ¶¶ 7-8. The Board concluded that when a case may still be brought forward for prosecution, the agency will still have reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment could be imposed, and may therefore continue the indefinite suspension. *Id.*, ¶¶ 7-9. Similarly, in *Taylor v. Department of the Air Force*, [89 M.S.P.R. 402](#), ¶ 3 (2001), charges against the appellant were deferred during a period of pretrial probation. Citing *Cooper*, the Board again found that entry into a pretrial probationary program was not a disposition of criminal charges. *Id.*, ¶¶ 7-8.

¶10 In the instant case, the PTD agreement provided that “[t]he United States Attorney may at any time within the period of the [appellant's] supervision initiate prosecution for these offenses should [the appellant] violate the conditions” of the PTD program. IAF-1, Tab 4, Subtab 4, Exhibit C at 1. Moreover, the order filed by the U.S. Attorney's office on September 8, 2009, noted that the appellant's prosecution had been “deferred,” and that the dismissal

was “without prejudice.” IAF-2, Tab 23, Subtab 1. We therefore find that the charges were not resolved until February 22, 2010, when the Pretrial Services Agency certified the appellant’s completion of the PTD and recommended that the pending charges be dismissed. IAF-1, Tab 4, Exhibit B. Until that date, the agency had reasonable cause to believe a sentence of imprisonment could be imposed and was permitted to keep the appellant on indefinite suspension. *See Cooper*, [80 M.S.P.R. 612](#), ¶¶ 7-9; *see also Taylor*, [89 M.S.P.R. 402](#), ¶ 7.

¶11 The remaining question is whether the agency was permitted to continue the indefinite suspension beyond February 22, 2010. An indefinite suspension may be continued after resolution of criminal charges where the agency provides advance notice of possible administrative action in the suspension proposal or decision notice and takes action within a reasonable time of the conclusion of the criminal proceedings. *Engdahl v. Department of the Navy*, [900 F.2d 1572](#), 1578 (Fed. Cir. 1990); *Albo v. U.S. Postal Service*, [104 M.S.P.R. 166](#), ¶ 8 (2006); *Rawls v. U.S. Postal Service*, [98 M.S.P.R. 98](#), ¶ 13 (2004). However, an agency must provide reinstatement to the date of the resolution of criminal charges if it fails to implement an adverse action within a reasonable time. *See, e.g., Jarvis v. Department of Justice*, [45 M.S.P.R. 104](#), 111-12 (1990); *Hernandez v. Department of Justice*, [35 M.S.P.R. 669](#), 672-73 (1987).

¶12 Here, the agency did not issue a notice of proposed removal until May 19, 2010, nearly 3 months after resolution of the criminal charges. We note that the delay was at least in part the result of the agency’s decision to investigate additional alleged misconduct before initiating adverse action proceedings against the appellant. However, the time required for that further investigation did not itself warrant continuation of the indefinite suspension, because the mere existence of an open agency investigation into alleged misconduct does not serve as cause for taking—or, as in this case, continuing—an adverse action under subchapter II of chapter 75. *See Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 28 (2010). Hence, in order to determine whether the agency

was permitted to continue the indefinite suspension beyond February 22, 2010, we must determine whether the delay would have been reasonable had the agency instead elected to pursue an adverse action based solely on the conduct that formed the basis of the criminal charges.

¶13 We find that the delay would not have been reasonable under those circumstances. First, the agency investigation into the conduct that formed the basis of the criminal charges preceded the filing of the February 4, 2009 criminal complaint, which was based on the results of that same investigation. IAF-1, Tab 4, Subtab 4, Exhibit F at 1-2. Moreover, the appellant admitted to that same conduct when he entered into the PTD agreement on September 8, 2009, and further agreed that his admissions could be used in any administrative proceeding. *Id.*, Exhibit C at 2, 4-13. Thus, when the criminal charges against the appellant were resolved on February 22, 2010, the agency already had all the information it needed to commence adverse action proceedings based on the conduct underlying those charges. Accordingly, we find that it would not have been reasonable for the agency to wait until May 19, 2010, before proposing an adverse action based solely on that same conduct. *See Jarvis*, 45 M.S.P.R. at 111-12 (an agency delay of 2½ months to review files was not reasonable); *Hernandez*, 35 M.S.P.R. at 672-73 (same result in regard to a delay of 60 days to issue a notice of proposed removal where the agency failed to provide justification for the delay). The agency must therefore reinstate the appellant effective February 22, 2010.

ORDER

¶14 We ORDER the agency to terminate the indefinite suspension and to reinstate the appellant effective February 22, 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.

¶15 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.

¶16 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).

¶17 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).

¶18 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.

¶19 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

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.