

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

2014 MSPB 1

Docket No. DC-0752-12-0784-I-1

**Wandra Simmons,
Appellant,**

v.

**Department of Housing and Urban Development,
Agency.**

January 6, 2014

Jessica L. Parks, Esquire, and Kerrie D. Riggs, Esquire, Washington, D.C.,
for the appellant.

Javes Myung and Tiffanie Smith Johnson, Washington, D.C., 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 initial decision that reversed the appellant's reduction in grade and pay on due process grounds. For the reasons set forth below, we DENY the petition for review.

BACKGROUND

¶2 The agency appointed the appellant, a GS-14-05 Supervisory Program Specialist with the United States Department of Justice, to a GS-15-02 Resources and Services Manager position, effective July 18, 2010. Initial Appeal File

(IAF), Tab 6 at 36, 38-39. In June 2011, the agency determined that her noncompetitive appointment to the GS-15 position was improper, and it transferred her to a GS-14-05 Budget Officer position, retroactive to the initial date of her appointment and issued her a notice of salary offset regarding the difference in salary. IAF, Tab 6 at 21, 35.

¶3 The appellant filed a Board appeal. IAF, Tab 1. In addition to arguing that such a demotion was improper, she also argued that the agency denied her due process by failing to give her notice and the opportunity to respond. *Id.* The agency argued that the Board lacked jurisdiction over the appeal because it was correcting a pay classification error. IAF, Tabs 6, 7. After a hearing, the administrative judge found jurisdiction over the appeal as a reduction in pay and reversed the agency's action on due process grounds. Initial Decision (ID) at 6-7. The agency has filed a petition for review, arguing that the administrative judge failed to apply the relevant case law and erroneously found jurisdiction. Petition for Review (PFR) File, Tab 1. The appellant has filed a response in opposition. PFR File, Tab 3.

ANALYSIS

¶4 To establish Board jurisdiction over the cancellation of a promotion or appointment, the appellant must show that: (1) the promotion was approved by an authorized official aware that he or she was making the promotion or appointment; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant performed in the position. *Marrero v. Department of Veterans Affairs*, [100 M.S.P.R. 424](#), ¶ 7 (2005), *overruled on other grounds by Deida v. Department of the Navy*, [110 M.S.P.R. 408](#), ¶ 16 (2009).¹ It is

¹ *Deida* concerned the burden of production in an appeal involving a pay-setting error and clarified that once an appellant made a prima facie case of jurisdiction the burden

undisputed that the appellant demonstrated that the promotion actually occurred and that she performed in it for almost a year prior to the agency's action. Further, it is undisputed that, by cancelling the promotion, the appellant suffered a reduction in grade and pay.

¶5 The Board generally has jurisdiction to review an appeal of a reduction of grade or pay. [5 U.S.C. § 7512](#); see *Kim v. Department of the Army*, [119 M.S.P.R. 429](#), ¶ 7 (2013) (a cancellation of an effected promotion constitutes an appealable reduction in grade). A reduction in grade or pay that is to correct a classification error or pay-setting error that is contrary to law or regulation, however, is not appealable to the Board. See *Trotter v. U.S. Postal Service*, [91 M.S.P.R. 282](#), ¶ 8 (2002), *overruled on other grounds by Deida*, [110 M.S.P.R. 408](#), ¶ 16; [5 C.F.R. § 752.401](#)(b)(15) (excluding from its coverage “[r]eduction of an employee’s rate of basic pay from a rate that is contrary to law or regulation”). The agency takes the position that the appeal is not within the Board’s jurisdiction because its action of setting the appellant’s grade at the GS-15 level was contrary to law or regulation. PFR File, Tab 1 at 10; see [5 C.F.R. § 752.401](#)(b)(15). We disagree; the agency’s error in this circumstance does not divest the Board of jurisdiction over this appeal. The agency selected the appellant for a position that was properly graded as a GS-15 position, and the appellant performed GS-15 level work. Any error in noncompetitively promoting the appellant was in the hiring process, and the agency’s action to correct such error by retroactively cancelling the appellant’s promotion and placing her in a different GS-14 position is an appealable reduction in grade and pay. See *Marrero*, [100 M.S.P.R. 424](#), ¶ 9. We find that the agency’s action was not simply a correction of the employee’s rate of basic pay within the meaning of [5 C.F.R. § 752.401](#)(b)(15).

of production shifted to the agency to show an error contrary to law or regulation. [110 M.S.P.R. 408](#), ¶¶ 4, 9, 15-17.

¶6 The agency relies upon *Gessert v. Department of the Treasury* to argue that the Board does not have jurisdiction over an appeal concerning an improper promotion. [113 M.S.P.R. 329](#) (2010), *aff'd*, No. 2010-3115, 2011 WL 463094 (Fed. Cir. Feb. 10, 2011) (nonprecedential). *Gessert*, however, is distinguishable, and we decline to follow it in this circumstance. In *Gessert*, the agency was required to follow certain regulations to noncompetitively convert Mr. Gessert, a GS-13 Budget Analyst, from the Presidential Management Fellowship program to a career or career-conditional appointment. The agency converted him to a career appointment in the same position and simultaneously promoted him to a GS-14 level in the same position. Upon discovering that it lacked the legal authority to noncompetitively promote the appellant to the GS-14 level, it returned him to the GS-13 level in the same position. The Board in *Gessert*, without much discussion of jurisdiction, applied the same jurisdictional framework that it applies to an improperly granted within grade increase to find that it lacked jurisdiction because the agency was correcting an error in setting the appellant's pay.² [113 M.S.P.R. 329](#), ¶¶ 8-9, 13 (citing *Hall v. Department of the Navy*, [73 M.S.P.R. 251](#), 254 (1997); [5 C.F.R. § 752.401](#)(b)(15)). Here, however, the agency retroactively canceled the appellant's original appointment, reduced her grade and pay, and transferred her to a different position in a different series.³ IAF,

² The definition of "pay" is "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); [5 C.F.R. § 752.402](#). In *Gessert*, the appellant was improperly paid at a higher rate due to a promotion within the same position; to remedy this error, the agency corrected his grade and pay. The appellant otherwise remained in the same Budget Analyst position.

³ It is worth emphasizing that the agency took these actions retroactively, effective the date of the appellant's appointment. The agency also sought the difference in pay during the time that the appellant was in the GS-15 position even though she performed the duties of her GS-15 position. Further, the appellant asserts that she lost service credit at the GS-15 level for the time that she performed in the position. These consequences far exceed a correction of a pay-setting error.

Tab 6 at 35. Further, unlike in *Gessert*, the agency did not afford the appellant notice and an opportunity to respond.

¶7 In addition to the factual differences, we also decline to follow *Gessert* because the central dispute in *Gessert* was whether the promotion itself was improper. There was little discussion concerning the jurisdictional aspect of the appeal,⁴ and the Board did not consider *Marrero* and other case law that directly applies to the jurisdictional question here. Further, the appellant in *Gessert* received notice and an opportunity to respond to the agency's action; thus, it was not critical to distinguish the jurisdictional question—to the extent there was one—from a determination on the merits concerning the agency's action. In contrast, due to the undisputed lack of due process afforded to the appellant, the jurisdictional question is the central question in this appeal, irrespective of whether the agency properly canceled the appellant's promotion to correct a hiring error. *Gessert* is simply not instructive on this issue.

¶8 For the foregoing reasons, we find that the Board has jurisdiction over the appeal. See *Marrero*, [100 M.S.P.R. 424](#), ¶ 9; *Kimzey v. U.S. Postal Service*, [94 M.S.P.R. 457](#), ¶ 14 (2003), *overruled on other grounds by Deida*, [110 M.S.P.R. 408](#), ¶ 16. It is undisputed that the agency did not give the appellant notice of the proposed action or an opportunity to respond. Therefore, we REVERSE the agency's action for the reasons set forth in the initial decision.

ORDER

¶9 We ORDER the agency to restore the appellant to the Resource and Services Manager position, GS-0301-15-02, effective July 18, 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.

⁴ Indeed, it does not appear that there was a dispute over jurisdiction itself; rather, the arguments concerned whether the agency's action in setting the appellant's pay was contrary to law or regulation.

¶10 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.

¶11 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\(b\)](#).

¶12 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\(a\)](#).

¶13 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.

¶14 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.