

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

MARK GRIFFIN,
Appellant,

DOCKET NUMBER
SF-0752-04-0690-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: November 26, 2004

Steven E. Brown, Esquire, Westlake Village, California, for the appellant.

Clement J. Priebe, Point Mugu, California, for the agency.

BEFORE

Craig A. Berg
Administrative Judge

INITIAL DECISION

INTRODUCTION

On July 30, 2004, the appellant filed a petition with the Board's Western Regional Office appealing the agency's decision removing him from the position of Firefighter, GS-6, effective July 1, 2004. Initial Appeal File (IAF), Tab 1. The appellant initially requested a hearing, but subsequently withdrew his hearing request. *Id.*, Tab 13. For the reasons discussed below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

Factual Background

On September 4, 2003, the appellant was summoned to provide a urine specimen pursuant to a random drug test of employees at Naval Base Ventura County. On September 25, 2003, the agency's Medical Review Officer notified the appellant that his drug test result was reported as being "substituted-refusal to test." IAF, Tab 3, Subtab 4k. On November 19, 2003, the agency proposed the appellant's removal for "substituting, adulterating, or otherwise tampering with a urine sample." *Id.*, Subtab 4j. The appellant replied both orally and in writing, denying adulterating the sample, and he raised numerous problems with the testing procedures and the chain-of-custody of the urine specimen. *Id.*, Subtab 4g. On May 19, 2004, the agency issued a decision sustaining the charge and finding the penalty reasonable, and stating that the appellant's removal would be effected on May 22, 2004. *Id.*, Subtab 4f. On May 27, 2004, the deciding official issued a letter to the appellant stating that, in light of the appellant's voluntary request to take a polygraph, his removal would be held in abeyance pending the results of the test.¹ *Id.*, Subtab 4d. On June 8, 2004, the appellant took the polygraph examination. *Id.*, Subtab 4c. On June 30, 2004, the deciding official issued a letter notifying the appellant that the polygraph examination indicated deception, and effecting the removal, effective on July 1, 2004. *Id.*, Subtab 4b.

Procedural Background

In his petition for appeal, in addition to other arguments pertaining to the results of the drug test, the appellant averred that the agency had violated his right to due process when it proposed his removal for one reason (substituting,

¹ The parties dispute whether the appellant's May 21, 2004 letter requesting a polygraph was voluntary. IAF, Tab 3, Subtab 4e.

adulterating, or otherwise tampering with his urine sample) and ultimately effected his removal for another reason (failing the polygraph examination). IAF, Tab 1. During a preliminary status conference, on September 13, 2004, the appellant's counsel reasserted that the agency had violated the appellant's right to due process, and the agency representative disagreed with that argument. Accordingly, I requested that the parties brief the due process issue and, in a submission dated September 21, 2004, the appellant complied. *Id.*, Tab 6. The agency did not initially respond in writing to the appellant's argument or my request for briefing of the issue, but, during an October 12, 2004 conference call, the agency agreed to provide a response on the due process issue. *Id.*, Tab 11. On October 14, 2004, the agency responded, arguing that its action comported with the requirements of due process. *Id.*, Tab 12.

During the October 21, 2004 telephonic prehearing conference, I informed the parties that I agreed with the appellant's argument that the agency had violated his due process rights, and as a result, the appellant withdrew his hearing request. IAF, Tab 13. Subsequently, the agency notified the Board that it was canceling the removal action, and requested that the appellant's appeal be dismissed as moot. *Id.*, Tab 14. On October 27, 2004, I held two telephonic conferences with the parties, and I explained to the agency that, at that point, its actions did not show that the appellant had been restored to the *status quo ante*, and therefore the appeal was not moot. *Id.*, Tab 15. I provided the parties with additional information addressing the requirements for restoring an employee to the *status quo ante*, and afforded the agency an opportunity to completely rescind the action, and the appellant with an opportunity to respond to any evidence and/or argument that the appeal was moot. *Id.* The agency responded with additional evidence and argument, and again moved for dismissal of the appeal, and the appellant responded in opposition to the agency's motion. *Id.*, Tabs 16 & 17.

Motion to Dismiss as Moot

An agency's unilateral modification of its adverse action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture or unless the agency completely rescinds the action being appealed. *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981). Thus, the Board may dismiss an appeal as moot if the appealable action is canceled or rescinded by the agency. *Gillespie v. Department of Defense*, 90 M.S.P.R. 327, ¶ 7 (2001). For the appeal to be deemed moot, however, the agency's rescission of the appealed action must be complete. *Id.* That is, the employee must be returned to the *status quo ante* and not left in a worse position because of the cancellation than he would have been in if the matter had been adjudicated. *Id.*

Restoration to the status quo ante generally requires that the employee be placed back in his former position or in a position substantially equivalent in scope and status to his former position. *Taylor v. Department of the Treasury*, 43 M.S.P.R. 221, 224 (1990). Specifically, return to the status quo ante requires return, with back pay, to a position of the same grade, pay, status, and tenure as the one occupied before the agency's action. *See Payne v. U.S. Postal Service*, 77 M.S.P.R. 97, 101 (1997); *Rojas v. U.S. Postal Service*, 70 M.S.P.R. 400, 405-06 (1996); *Davis v. Department of the Army*, 41 M.S.P.R. 67, 69 (1989). Additionally, restoration to the status quo ante requires that the agency remove all references to the adverse action from the appellant's personnel file. *Tyrrell v. Department of Veterans Affairs*, 60 M.S.P.R. 276, 278 (1994). Finally, an appellant is not restored to the status quo ante where he does not receive all of the back pay to which he is entitled. *Gillespie*, 90 M.S.P.R. 327, ¶ 10; *Tyrrell*, 60 M.S.P.R. at 278.

In its October 28, 2004 motion to dismiss, the agency argued that the appeal was moot and attached a copy of standard form (SF) 50's showing that the appellant's removal had been cancelled effective July 1, 2004. IAF, Tab 14. In

its November 5, 2004 filing, the agency stated that it had completed its calculations of the appellant's back pay and benefits and had funded the amount to the appellant's account by direct deposit. *Id.*, Tab 16. The agency attached a declaration from Cindy Bradford, Personnel Management Specialist, in which Ms. Bradford stated that she had been tasked with fully restoring the appellant to his Firefighter position, that she contacted the payroll office and requested that the appellant's back pay and benefits for June 27, 2004 to October 30, 2004 be calculated, and that she was informed that the appellant would be fully restored by November 5, 2004. She attached to the declaration pay calculations and the applicable payroll codes. *Id.*

The appellant argues that the agency has failed in a number of ways to return him to the *status quo ante*, and that as a result, this appeal cannot be dismissed as moot. IAF, Tab 17. Specifically, he asserts that he has not been returned to duty, but rather has been placed on administrative leave, the agency has not shown that his Official Personnel Folder (OPF) has been purged of reference to the removal action, it has not paid interest on his back pay, as required by law, and it has not restored other benefits, such as retirement, a Thrift Savings Plan loan, and his health insurance. *Id.*

As the appellant argues, when an agency elects to cancel an adverse action, in order to render a Board appeal of that action moot, it must remove all references to the canceled action from the appellant's personnel record. *See Gonzales v. U.S. Postal Service*, 44 M.S.P.R. 517, 519-20 (1990). Here, the SF-50 documenting the agency's cancellation of the action clearly states that the action canceled was a removal, which supports a finding that the appellant's OPF still contains at least one reference to the agency's action. IAF, Tab 14. The agency has submitted no other evidence showing that this SF-50 and any other documents in the OPF that refer to the action have been purged. Accordingly, I

find that the agency has failed to restore the appellant to the *status quo ante*, and I DENY the agency's motion to dismiss this appeal as moot.²

Due Process Violations

The appellant argues that the agency committed a due process violation in one of two ways: First, he asserts that the agency removed him for one reason, then held that action in abeyance for a period, and then issued a final, effective removal decision on a different ground than that proposed without affording him the opportunity to respond to the latter basis. IAF, Tab 6. In the alternative, the appellant argues that if it is determined that he was removed for the reason stated in the first decision letter, then the receipt of an *ex parte* communication by the deciding official in the form of the results of the polygraph examination, without providing those results to the appellant or affording him an opportunity to respond to that evidence, violated his right to due process. *Id.*

The agency argues that it only issued one final removal decision, the first decision issued, and that only the effective date of the decision was held in abeyance by the latter, June 30, 2004 letter. IAF, Tab 12. The agency also avers that it did not remove the appellant for failing the polygraph, but rather refers to the examination as an opportunity for the appellant to get his job back in the event he passed the test. IAF, Tab 12.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 546 (1985), which involved the termination of a tenured government employee, the U.S. Supreme Court stated:

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." ... This principle

² Because I have found the agency has failed to restore the appellant to the *status quo ante*, since it has not purged his OPF of all references to the removal, I need not determine whether there are other deficiencies in the agency's attempt to cancel the removal.

requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment....

* * *

The essential requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. ... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. ...

Citing *Loudermill*, the Board has stated that an agency's failure to provide a nonprobationary federal employee with an opportunity to present a response, either in person or in writing, to an appealable agency action that deprives him of his property right in his employment constitutes an abridgement of his constitutional right to minimum due process of law, *i.e.*, prior notice and an opportunity to respond. See *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991). Thus, if, as the appellant has claimed, the agency removed him because the results of his polygraph examination indicated deception, as stated in the agency's June 30, 2003 letter, since it is undisputed that the appellant was given neither prior notice of the results of the examination nor a chance to respond to the charge, the agency's action deprived him of his right to due process.

In support of his arguments, the appellant cites *Hanley v. Department of Transportation*, 90 M.S.P.R. 43 (2001), but attempts to distinguish that case in several respects. Initially, however, as stated in *Hanley*, in order to determine if the appellant received the minimum due process required by the Constitution, I must determine whether the agency removed the appellant for substituting, adulterating, or otherwise tampering with a urine sample, as charged in the November 19, 2003 proposal letter, or whether the removal was a new action, taken because the agency received notice that the appellant had failed the

polygraph examination, and set out in the June 30, 2004 letter. *Hanley*, 90 M.S.P.R. 43, ¶ 9.

In *Hanley*, the agency proposed the appellant's removal on a charge of Misuse of Alcohol. 90 M.S.P.R. 43, ¶2. After receiving the proposal letter, the appellant executed a Rehabilitation Agreement under which he agreed to abstain from alcohol use at all times. The agency then issued a letter finding that the evidence supported the charge in the proposal letter, that a decision would be held in abeyance because the appellant had executed the Rehabilitation Agreement, and that any further use of alcohol by the appellant or failure to adhere to the terms of the Rehabilitation Agreement would result in the appellant's separation. *Id.* Subsequently, the agency suspected that the appellant was under the influence of alcohol while on duty one day and gave him a breath alcohol test, the results of which were positive. *Id.*, ¶3. The agency issued a letter notifying the appellant that he had failed the test and had therefore violated the Rehabilitation Agreement, and that his removal that had been held in abeyance was being implemented, effective immediately. *Id.* Following Mr. Hanley's appeal to the Board, an administrative judge reversed the agency's action, finding that the agency had violated the appellant's due process rights. *Id.*, ¶4.

The agency filed a petition for review of the administrative judge's decision, arguing that it had complied with the minimum requirements of due process. *Hanley*, 90 M.S.P.R. 43, ¶5. The Board agreed with the agency, citing a similar case decided by the Federal Circuit, *Girani v. Federal Aviation Administration*, 924 F.2d 237 (Fed. Cir. 1991). The Board found that the agency had made it clear to the appellant that the agency's decision on the originally proposed action was contingent on his adherence to the Rehabilitation Agreement, that he had failed to do so, and that he was therefore being removed. *Id.*, ¶12. The Board stated, "[o]nce the agency believed that the appellant had violated the agreement, it was free to issue a decision on the earlier proposed

removal, which was still pending.” *Id.* Thus, the Board interpreted the letter effecting the appellant’s removal following his failure to adhere to the terms of the Rehabilitation Agreement as a decision removing him for the original Misuse of Alcohol charge. *Id.*

After careful review, I find the appellant’s attempts to distinguish *Hanley* from the instant case unavailing, and I find that *Hanley* controls here. The appellant argues that here, unlike in *Hanley*, the charges in the two decision letters are entirely different, that there was an unconditional removal letter here, while in *Hanley* the first letter upholding the charges also held a final decision in abeyance, and finally, here, unlike in *Hanley*, the parties did not come to any “agreement” to hold a decision on the proposed removal in abeyance, since he was pressured into taking the polygraph examination. IAF, Tab 6. First, the appellant is correct that both “charges” in *Hanley* involved the misuse of alcohol, and the first decision letter here charged the appellant with substituting, adulterating, or otherwise tampering with a urine sample while the June 30, 2004 letter effecting his removal stated that the removal was being effected because the polygraph results showed deception. There is no doubt, however, that the polygraph examination given to the appellant was directly linked to the charge in the proposal letter, and not wholly distinct as the appellant claims, since the undisputed purpose of the examination was to determine whether the appellant was “innocent” of the earlier charge. Moreover, as explained in more detail below, after reviewing the documents the agency issued and other related evidence, I find that the reference to the results of the polygraph does not render it a distinct, and new, charge.

With regard to the appellant’s second argument, I also agree with the appellant that here, the agency issued a decision on the proposed removal on the original charge and only later held that decision in abeyance, while in *Hanley*, the employing agency stated that it was sustaining the charge and holding the action in abeyance in the same letter. Nonetheless, I find this distinction to be

insignificant because here, there is no evidence that the agency ever effected the removal referenced in the May 19, 2004 letter prior to issuing the May 27, 2004 letter holding the removal in abeyance and agreeing to allow the appellant to take a polygraph examination. That is, neither party argues that the appellant was actually removed on May 22, 2004 as the May 19 letter stated he would be, and there is no evidence, such as any SF 50's or other documents, that the agency implemented the action. In fact, had the agency already processed the removal, it is arguable that the appellant would have been applying for reinstatement by taking the polygraph. Accordingly, the fact that the agency in this case accomplished the same objective as the agency in *Hanley* in two separate letters, rather than one, does not substantially distinguish the factual scenario between the two cases.

Finally, I find no evidence in this record from which to conclude that the appellant did not agree to take a polygraph examination in order to retain his job, as the appellant in *Hanley* agreed to adhere to the terms of the Rehabilitation Agreement to maintain his employment. Even assuming it is true that the agency initiated the idea of the polygraph examination after the decision letter had been issued and the appellant felt that he was "coerced" into taking the examination because it was the only way to get his job back, IAF, Tabs 1 & 6, the appellant could have decided not to take the examination and simply appealed the agency's removal action, rather than having his then-attorney write a letter agreeing to undergo the polygraph. IAF, Tab 3, Subtab 4e. It is well-settled that a choice between two unpleasant alternatives does not render the ultimate decision involuntary. *See, e.g., Pawlowski v. Department of Veterans Affairs*, 96 M.S.P.R. 353, ¶9 (2004). Although the appellant did not sign a formalized agreement that set particular conditions, as the appellant in *Hanley* did, the evidence supports a finding that he did agree to take the polygraph in an attempt to defend himself against the initial charge.

Despite differences between the facts in this appeal and the facts in *Hanley* (and *Girani*), I find the differences to be minor, and it is clear that here, as in the aforementioned cases, the agency's decision on the earlier proposed removal was "contingent" on a particular factor – in this case, passing the polygraph examination. IAF, Tab 3, Subtab 4d (agency's May 27, 2004 letter stating that appellant's removal would be held in abeyance "pending the results" of the polygraph examination, and that should appellant not take the test or fail it, the removal "will become effective immediately.") In addition, the agency's June 30, 2004 letter referred specifically to the May 19, 2004 removal letter that had been held in abeyance, as well as the May 27, 2004 letter stating that the action specified in the May 19, 2004 letter would be effective immediately in the event the appellant failed the polygraph, and the June 30, 2004 letter concluded that, since the polygraph indicated deception, the removal was effective immediately. Accordingly, as in *Hanley*, I interpret the June 30, 2004 letter as a final decision removing the appellant from his position based on the charge in the proposal letter-substituting, adulterating, or otherwise tampering with a urine sample, rather than a summary removal, without due process, on a new charge, as the appellant claims.

I find merit to the appellant's alternative argument, however, that the communication of the results of the polygraph examination to the deciding official prior to issuance of the final decision, and without providing the results to the appellant or affording him the opportunity to respond to the results, was an *ex parte* communication of new and material evidence that violated his due process rights under *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). IAF, Tab 6. In *Stone*, the Federal Circuit recognized that, under *Loudermill*, as stated above, federal employees with a property interest in their job, like the appellant, cannot properly be deprived of that interest without due process of law, i.e., without notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond. *Id.* at 1375-76. The

court further held that the employee's due process rights could be violated by the deciding official's receipt, on an *ex parte* basis, of "additional material information that [might] undermine the objectivity required to protect the fairness of the process." *Id.* at 1376.

The court noted, however, that "not every *ex parte* communication [was] a procedural defect so substantial and so likely to cause prejudice" that it was fatal to the action at issue, and that only those that "introduce[d] new and material information to the decision official [would] violate the due process guarantee of notice." *Id.* at 1376-77. Factors relevant in determining whether there was such a violation include whether the communication introduced new information or information that was merely cumulative, whether the employee knew of the communication and had an opportunity to respond to it, and "whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner." *Id.* at 1377. The "[u]ltimate[] ... inquiry" with respect to this issue "is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Id.* If this last question is answered in the affirmative, "the employee is entitled to a new constitutionally correct removal procedure." *Id.*

Considering the first of the factors set out by the court, the agency does not dispute that the results of the polygraph examination were "new," and not cumulative, since there is no other evidence in the record, nor could there reasonably have been other similar evidence prior to the polygraph examination, bearing directly on the veracity of the appellant's claim that he had not substituted, adulterated, or tampered with the urine sample. *Cf. Freeman v. Department of the Navy*, 88 M.S.P.R. 659, ¶ 13 (2001) (provision by proposing official to deciding official of *Douglas* factors worksheet after appellant replied to proposed removal was cumulative information because it was either already

incorporated into proposal letter or had already been considered by deciding official), *aff'd*, 28 Fed. Appx. 956 (Fed. Cir. 2002).

With regard to the second *Stone* factor, i.e., whether the employee knew of the error and had a chance to respond to it, the record reflects that, even at the time it filed its prehearing submissions in this appeal, the agency had not yet provided the appellant with the detailed polygraph results. IAF, Tab 8 at 7(Agency Proposed Exhibit List Index noting records of Polygraph test “will be provided upon receipt from NCIS.”) In fact, not only is there no record that the agency ever provided the appellant with the records that would normally accompany the results, but there is also no indication in this record, and the agency does not even argue, that the appellant was informed that he had failed the examination prior to the implementation of the final decision in the June 30, 2004 decision. IAF, Tab 3, Subtabs 4b, 4c (polygraph results provided to appellant with June 30, 2004 decision letter). *See Stone*, 179 F.3d at 1376 (procedural due process guarantees not met when employee has notice of only certain portions of the evidence). Thus, I find that the appellant was not aware of the polygraph results, nor was he afforded an opportunity to respond to that evidence.

As to the third of the factors that the *Stone* court suggested the Board consider in determining whether the appellant's due process rights were violated – “whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner” – here, the polygraph results were from an ostensibly objective source, and the record evidence indicates that the agency viewed them as dispositive. IAF, Tab 3, Subtab 4d (May 27, 2004 letter informing the appellant that, “[s]hould you change your mind and decline the polygraph test, or should you not pass the polygraph, your removal will become effective immediately.”); *Id.*, Subtab 4b (June 30, 2004 letter, stating that the results of the polygraph indicated deception, therefore the removal will be effective immediately); *Id.*, Tab 12 (agency assertion that “the Appellant had an opportunity to get his job back in the event

he passed his polygraph test”). In contrast to other cases in which the *ex parte* communications consisted of relatively benign contacts between the deciding official and others involved in the particular case or of information such as documents showing the opinion of another agency official, which have been judged not to be the type of *ex parte* contacts or information that would put undue pressure on the deciding official to rule in a particular manner, *see Blank v. Department of the Army*, 247 F.3d. 1225, 1229 (Fed. Cir. 2001); *Freeman*, 88 M.S.P.R. 659, ¶ 13, in the instant appeal, I find the evidence at issue was highly likely to put strong pressure on the deciding official to implement the decision to remove the appellant.

To the extent the agency is arguing that the deciding official had already made the decision to remove the appellant prior to having received the polygraph results, and that it was only the effective date of the removal that was held in abeyance, rather than the decision itself, equivalent to a claim that the polygraph results were not material to its decision, both the record and common sense belie this contention.³ While it is true that the deciding official had determined and expressed in the May 19, 2004 letter that the charge was sustained, the penalty of removal was appropriate, and the action would be effected on a specific date, the May 27, 2004 letter made it clear his decision would not be implemented until he received specified additional evidence – the polygraph results. The agency cannot claim that it would have considered that evidence only if the appellant had passed the examination, in which case he would have gotten his job back, but that

³ In *Hanley*, the Board determined that there had not been a due process violation under *Stone* because the appellant’s removal was for the original charge of misuse of alcohol, which had already been sustained, and his breach of the Rehabilitation Agreement was not material to that charge. 90 M.S.P.R. 43, ¶13. Here, in contrast, while the agency had also already sustained the original charge of substituting, adulterating, or otherwise tampering with his urine sample, when it held that decision in abeyance it was to gather evidence – the results of the polygraph – that was directly related to the original charge. Thus, the Board’s decision in *Hanley* on the question of whether the agency met the minimum due process requirements under *Stone* does not compel the same finding here.

his failure of the test did not factor into its decision to implement the final decision. In fact, any argument by the agency that the results of the polygraph were not material to its decision is significantly undercut by its proposed submission of the polygraph results as evidence in this appeal. IAF, Tab 8 at 7 (proposed Exhibit 3).

Since it is apparent that the polygraph test results were considered prior to the agency decision that is the subject of this appeal, the agency had an obligation to provide those results to the appellant and afford him an opportunity to respond to them before effecting his removal. Based on this record, I do not attribute the agency's failure to do so to any ill motive. Nevertheless, the agency's motive is not at issue here and, after considering the relevant factors set out in *Stone*, I find the *ex parte* communication at issue here was so substantial and so likely to cause prejudice that the appellant cannot fairly be required to be subjected to a deprivation of his job under such circumstances. Accordingly, I must reverse the agency's action.

DECISION

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **July 1, 2004**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits

due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

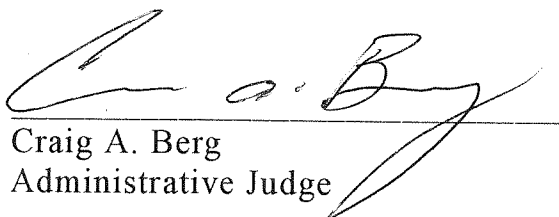
I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:


Craig A. Berg
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **December 31, 2004**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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, <http://fedcir.gov/contents.html>. 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.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.