

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HERFNER J. CUTLIFF,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
DA04329010090

DATE: FEB 11 1992

Connie L. Birth, American Federation of Government
Employees, Local 2562, Oklahoma City, Oklahoma, for the
appellant.

Janet E. Stewart Harford, Oklahoma City, Oklahoma, for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency has petitioned for review of an initial decision issued on March 22, 1990, reversing the appellant's demotion. For the reasons set forth below, we DISMISS the petition for failure to comply with the Board's interim relief regulations.

BACKGROUND

The administrative judge ordered the agency to restore the appellant to his WS-2 Food Service Worker Foreman position, retroactive to November 5, 1989, the date of his demotion. Initial Decision at 17. The administrative judge also directed the agency to provide interim relief to the appellant if the agency filed a petition for review in accordance with Section 6 of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, codified at 5 U.S.C. § 7701(b)(2)(A). *Id.* at 17-18.

On April 25, 1990, the agency filed a petition for review in which it submitted neither evidence of its compliance with the administrative judge's order for interim relief, nor a statement that it had determined that the appellant's return to the workplace would be unduly disruptive. Petition for Review File, Tab 1.

In response to a Board order returning the petition because of this omission, the agency asserted that the appellant would be reinstated to his position effective August 26, 1990. Petition for Review File, Tabs 7-8. Thereafter, the appellant moved to dismiss the agency's amended petition, alleging that the interim relief was insufficient and untimely. Petition for Review File, Tabs 10-11. The agency has responded in opposition to the appellant's motion to dismiss. Petition for Review File, Tabs 12-14.

ANALYSIS

On this record, we need not decide whether the agency's belated showing complies with the particulars of the administrative judge's order. We have recently held that our interim relief regulations, 5 C.F.R. § 1201.115(b)(1), (b)(2), and (b)(4), require the petitioning agency to submit evidence that it has complied with the interim relief order or, having determined that the prevailing appellant's presence in the workplace would be unduly disruptive, that it is providing the appellant with pay, compensation, and other benefits, within the time period for filing a timely petition for review. *Brown v. United States Postal Service*, MSPB Docket No. AT07529010741 (Jan. 23, 1992); *Baughman v. Department of the Army*, 49 M.S.P.R. 415, 417-18 (1991). Here, the agency's petition for review failed to comply with either regulatory requirement. The agency's subsequent submissions were filed well after the last day for filing a timely petition for review. Thus, we conclude that the agency failed to comply with the interim relief order.

ORDER

Accordingly, we DISMISS the petition for review. 5 C.F.R. § 1201.115(b)(4). We ORDER the agency to cancel the appellant's demotion and to restore the appellant effective November 5, 1989. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must

accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, 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 compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

The initial decision is now final.
5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of

discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.