UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEONARD GINOCCHI, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER DC315I8910527 DATE: FEB 19 1992

Michael J. Riselli, Esquire, Riselli & Pressler, P.C., Washington, D.C., for the appellant.

Nancy L. Elam, Esquire, Washington, D.C., for the agency.

BEFORE

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

Chairman Levinson issues a dissenting opinion.

OPINION AND ORDER

The agency petitions for review and the appellant cross petitions for review of the initial decision, issued December 20, 1989, that reversed the appellant's demotion from the position of Supervisory Auditor, GM-14, to the position of Auditor, GS-13. For the reasons below, the Board DISMISSES the appellant's motion for compliance, DENIES the appellant's motion to dismiss the agency's petition for review, DENIES the agency's petition for review, GRANTS the appellant's cross petition for review, AFFIRMS the initial decision AS MODIFIED,

and REMANDS the case to the regional office for adjudication of the appellant's allegation that the agency committed a prohibited personnel practice.

BACKGROUND

By letter dated August 1, 1989, the agency notified the appellant that, effective August 13, 1989, he would be returned to the position of Auditor, GS-13, for failure to perform effectively in the position of Supervisory Auditor, GM-14. The letter noted that the appellant's appointment to the supervisory position, effective September 11, 1988, had been subject to a 1 year probationary period, and accorded the appellant only the limited appeal rights available to probationary employees. The appellant filed a petition for appeal with the Board more than 20 days after the effective date of the demotion.

The administrative judge found that, contrary to the agency's assertion, the appellant's appointment to the GM-14 supervisory position was not subject to a 1 year probationary period. She found that the totality of the circumstances showed that, prior to being selected for the GM-14 position, the appellant had served in an overseas supervisory FC-11 position that was the equivalent of the GM-14 for more than a year. Accordingly, she found that the appellant was not a probationer, that the Board has jurisdiction over his appeal, and that the agency action must be reversed because the agency

improperly failed to accord the appellant the procedures of 5 U.S.C. §§ 4303 or 7513.

The administrative judge also found good cause to waive the appellant's untimely filing of his petition for appeal. She found that the appellant was not notified of his appeal right to the Board and that he filed his appeal diligently after he was advised that he might have such a right.

Finally, in addition to ordering the agency to cancel the appellant's demotion, the administrative judge ordered the agency to provide the appellant with interim relief in accordance with Section 6 of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. § 7701(b)(2)(A).

The agency filed a petition for review, received by the Board on January 30, 1990, asserting that the administrative judge erred in finding that the agency created, or allowed to continue from 1987 on, circumstances which could lead the appellant to believe that he was acting as a supervisor and in finding that the agency did not notify the appellant that he was serving a probationary period. With its petition for review, the agency provided affidavits stating, with regard to the order for interim relief, that, although the appellant was being paid at the GM-14 rate, he was not being returned to the GM-14 duties because the agency had determined that to do so would be unduly disruptive.

Subsequently, the appellant filed a "Motion for Issuance of Order to Show Cause to Agency for Noncompliance with Order of the Board." In his Motion, the appellant contends that the agency is not in compliance with the administrative judge's order of interim relief because its failure to restore the appellant to the GM-14 duties further damages his career status by continuing to reflect in official personnel records that he is a GS-13 instead of a GM-14. Also, the appellant moved that the Board dismiss the agency's petition for review as untimely filed and filed a cross petition for review contending that the administrative judge erred in failing to adjudicate the appellant's allegation of prohibited personnel practices.[1]

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[1]After the agency's petition for review was received by the Board, some confusion developed over whether the petition was or was not postmarked. Apparently, agency counsel believed, after a conversation with the Office of the Clerk of the Board, that the petition had been postmarked January 25, which would have made the petition untimely by one day, and she stated in her "Motion for Waiver of Time Limit" that the petition had been postmarked January 25. The appellant urges the Board to construe this statement as an admission that the petition was untimely filed.

The agency has continually maintained that the petition was timely filed by mail. The Certificate of Service accompanying the petition is dated January 24, 1991, the last day for timely filing. Therefore, the Board construes the agency's statement that the petition was postmarked January 25 as a misstatement growing out of the confusion in communications between the agency and the Office of the Clerk. The Board finds therefore that the statement was not an admission of untimely filing.

ANALYSIS

The agency's petition for review is timely filed.

The initial decision in this case was to become final on January 24, 1990, unless a petition for review was filed. The agency's petition for review was filed by mail in a franked, unpostmarked envelope received by the Board on January 30, 1990.

The Board's regulations provide: "The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is closed for business) before its receipt." 5 C.F.R. § 1201.4(l). The agency's petition reached the Board on Wednesday, January 30. Counting back five days, excluding the Saturday and Sunday on which the Board was closed for business, the petition is presumed to have been filed by mail as early as the preceding Tuesday, January 23, one day before the final date for filing a timely petition for review. Thus, the Board finds that the petition is timely filed.[2]

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[2]The Clerk of the Board granted the appellant's request for an extension of time to file his cross petition for review until March 6, 1990, Petition for Review File, Tab 11, and the cross petition was timely filed.

The agency is properly effecting the administrative judge's order of interim relief.

Section 6 of the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 7701(b)(2)(A), amended the Civil Service Reform Act and authorized the Board to order interim relief to appellants who prevail at the regional office level between the date of the initial decision and the date that the Board issues a final decision on a petition for review that may be filed in the case. Specifically, Section 6 provides:

> (2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review ... unless --
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> (i) the deciding official determines that the granting of such relief is not appropriate; or
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> (ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review ...; and
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> (II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.
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> (B) If an agency makes a determination under paragraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review ....

Pursuant to this statutory provision, the Board has implemented regulations, 5 C.F.R. § 1201.115(b)(1), (b)(2), and (b)(4), providing:

> (b)(1) If the appellant was the prevailing party in the initial decision and that decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by evidence that the agency has provided the interim relief required, except when the agency has made a determination as described in paragraph (b)(2) of this section.
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> (2) Under 5 U.S.C. 7701(b)(2), if the initial decision provides interim relief which requires that the appellant be returned to his or her place of employment pending the outcome of any petition for review and the agency determines that the return or presence of the appellant will be unduly disruptive to the work environment, the agency must notify both the appellant and the judge in writing. The agency must also provide evidence of such notification to the Board at the time of filing a petition or cross petition for review. The evidence must show that the agency has provided that the appellant will receive pay, compensation, and all other benefits as terms and conditions of employment during the period a petition for review is pending ....
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> (4) Failure of the agency to submit evidence that it has complied with the granting of interim relief in accordance with paragraph (b)(1) of this section, or that it has provided notification that interim relief will not be granted fully in accordance with paragraph (b)(2) of this section, will result in the dismissal of the agency's petition or cross petition for review.

In the case at hand, the administrative judge properly ordered interim relief.[3] The agency has, however, made a

[3]Interim relief may not be appropriate in all Board cases in which the appellant prevails. The administrative judge must make the determination whether such relief is inappropriate in an individual case, balancing the benefits and burdens to the parties anticipated by the process of effecting the interim relief order. The statute, however, contemplates that interim

determination that return of the appellant to his former work environment would be unduly disruptive and effected the alternative of affording the appellant the pay, compensation, and benefits of the GM-14 position without his performing the duties of that position. The agency has provided the appellant, the administrative judge, and the Board with evidence, in the form of affidavits of agency officials and letters to the administrative judge and the appellant, showing that the appellant will continue to serve in the GS-13 position while the petition for review is pending, but will receive pay, compensation, and all other benefits as terms and conditions of employment for the GM-14 position during that period.

In the context of interim relief, the Board will not look behind an agency determination that returning an employee to the position he encumbered will be unduly disruptive to the work environment. The statute and the regulation providing for interim relief commit this determination to the agency and provide only that the appellant may seek the remedy of dismissal of the agency petition for review if the agency does not show that the appellant, either present or absent from the position in issue, is receiving the benefits to which he is entitled.[4]

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relief would be appropriate in most adverse action cases where the appellant has prevailed.

[4]The Board's regulations do not provide for a motion for compliance with an order of interim relief, and the Board will

As noted above, the WPA provides that the employee who prevails below shall be granted the relief provided in the initial decision unless:

> (ii) (I) the relief...provides that such employee shall return or be present at the place of employment...: and
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> (II) the...agency...determines that the return or presence of such employee...is unduly disruptive to the work environment.

5 U.S.C. § 7701(b)(2)(A) (emphasis added). It is an elementary rule of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute so that no provision will be superfluous, inoperative, or insignificant. *See American Radio Relay League v. Federal Communications Commission*, 617 F.2d 875, 879 (D.C. Cir. 1980). The provisions of the WPA afford agencies the authority to determine whether the "return or presence" of the employee is unduly disruptive. Interpreting this phrase so as to give meaning to each word, the Board first concludes that the phrase means something different than either the term "return" or the term "present/presence" used alone. The Board concludes that the word "return" means a return to the former position and duties, while "presence" means something broader, a return to the former position with altered or restricted duties, or an assignment to a different position.

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not entertain such a motion. Rather, an appellant's remedy, if he believes that the agency has not afforded him the interim relief ordered, is to move that the Board dismiss the petition for review.

Under this interpretation of the phrase "return or presence," an agency may determine that an employee's "return" would be unduly disruptive, but that his "presence" would not be. This interpretation permits the agency to detail or assign the employee to a position other than the former position, or to return the employee to the former position but with restricted duties, with the same pay and benefits as he would have received in the former position.

The intent of the statutory interim relief provision is to benefit both the agency and the appellant by limiting the waste of human and financial resources. *See* H.R. Rep. No. 274, 100th Cong., 1st Sess. 29 (1987). Congress did not, however, intend that the benefit to the appellant would be as complete as that which he would receive upon prevailing in a final Board decision. Both the House and Senate Reports state, for example, that neither back pay nor attorneys' fees shall be paid before the Board's decision becomes final. *See id.*; S. Rep. No. 413, 100th Cong., 1st Sess. 35 (1987). The House Report refers to the appellant who has prevailed in the initial decision as the "employee who will ultimately be reinstated with back pay," *see* H.R. Rep. 274 at 29, allowing the inference that interim relief is not full relief with regard to the employee's return or presence at the workplace.

Both the House and Senate Reports recognize therefore that the grant of interim relief includes only some aspects of the full measure of relief. The Board's interpretation of the interim relief provision does not interfere with the stated Congressional intent that appellants who prevail in the initial decision receive the pay and benefits that they would receive if they were "working."[5] *See* S. 413 at 35. It does, however, assure that the interim relief provision provides a benefit to both the agency, which, even if it makes the undue disruption determination, may receive useful service from the employee during the interim relief interval, and to the employee, who, regardless of the agency's decision about his

[5]Prior to the enactment of the Civil Service Reform Act of 1978, the regulations of the Civil Service Commission provided as follows:

> The immediate action in ... cases [where an agency requests reopening of the decision of an appeals officer] shall be a temporary appointment, a temporary restoration to duty status to a position of like grade or pay, or a similar conditional action pending decision of the Board on the case.

5 C.F.R. § 772.310(e)(2) (1978).

The interim relief provision of the WPA does not replicate this regulatory practice. Rather the WPA's provision grants the prevailing appellant restoration to the pay, compensation, and benefits of the position awarded in the initial decision during the pendency of the agency's petition for review. The Board's interpretation of the agency's discretion to make the undue disruption determination and the consequences of that determination on the relief to the employee while the agency's petition is pending with the Board does not mirror the CSC's practice regarding relief pending a final decision. Put simply, the agency's undue disruption determination may not interfere with the interim relief provision that the employee receive, during the pendency of the agency's petition for review, the pay, compensation, and benefits of the permanent position awarded him in the initial decision.

return or presence at the workplace, must receive pay, compensation, and benefits as if he were working in the position which he was awarded in the initial decision.

To read the interim relief provision restrictively, i.e., that the agency's only alternative, once it determines that the appellant's return to the duties ordered in the initial decision, would be unduly disruptive is to put the appellant in a non-work status with the appropriate pay and benefits while the agency's petition for review is pending, severely restricts the benefit to the government from the interim relief provision. Under that interpretation of the statute, an agency could exercise its discretion to make an undue disruption determination only by giving up any benefit from the employee's performance of useful service. The legislative history of the interim relief provision does not suggest Congressional intent to so circumscribe an agency's exercise of its discretion.

The Senate Report notes that a few weeks or months between a regional office decision and a full Board decision may be too long for an employee denied his or her job or performing unwanted duties. See S. Rep. 413 at 22. To guard against the possibility of an employee's having to suffer the assignment of inappropriate duties as the result of an agency's abuse of the authority to determine that the

employee's "return" would be unduly disruptive, but his "presence" would not be, the Board will hold the agency's decision to detail, assign, or restrict the duties of an employee for whom interim relief has been ordered subject to a "bad faith" standard of review. Thus, for example, if the agency's decision is discriminatory, demeaning, or inherently unsafe, such action will be held to be in bad faith, and its petition for review will be dismissed. The appellant has the ultimate burden of persuasion on the bad faith issue. The burden of production, however, shifts. If the appellant makes a prima facie showing of bad faith by presenting evidence and argument which, if true, shows bad faith on the part of the agency, then the burden of going forward shifts to the agency to rebut the showing under all the circumstances of the case.[6]

Using the forgoing analysis, the Board finds here that the agency's decision to place the appellant in the GS-13 position, during the interim relief period, with the pay and benefits of his GM-14 position, is permissible under the

[6]The legislative history does not suggest that the interim relief provision should result in interim compliance proceedings which would further impinge upon Board and agency resources. Indeed, such a result would be contrary to the intent of providing a benefit to the government. The purpose of the interim relief provision is not to make the appellant whole at the interim relief stage of the proceedings. Rather it is to provide the limited relief specified in the statute until a final decision is issued. If the appellant prevails in the final decision, then he will be made whole. We find that the most efficient and appropriate time for resolution of disputes over whether an appellant has been made whole is after a decision has been issued which entitles the appellant to return to the status quo ante.

statute. There is no showing that such decision was made in bad faith.[7]

The agency's demotion action was not effected in accordance with minimum due process requirements.

Contrary to the agency's argument in its petition for review, the administrative judge did not err in finding that the agency created, or allowed to continue from 1987 on, circumstances which show that the appellant was acting as a supervisor in the FC-11 position and in finding that the agency did not notify the appellant that he was serving a probationary period. As found by the administrative judge, because of the conflicting evidence on whether the appellant was in a supervisory position before he was chosen for the GM-14 position, it is necessary to examine the totality of the circumstances in order to determine the nature of the

[7]The Board recognizes that the Office of Personnel Management (OPM) has recently issued regulations interpreting the undue disruption clause contained in the interim relief provision of the WPA. 57 Fed. Reg. 3713 (1992) (to be codified at 5 C.F.R. § 772.102(d)). It appears that OPM's interpretation may differ from that set forth in this opinion. *Id.* The Board, however, is not required to defer to OPM's interpretation. In enacting the interim relief provision, Congress chose to codify it in 5 U.S.C. § 7701, a section which authorizes only the Board to issue implementing regulations. 5 U.S.C.A. § 7701(k) (West Supp. 1991). As a result, it is the Board, not OPM, that is the principal administrative agency charged with administering and interpreting the interim relief provision. Accordingly, OPM's interpretation of the interim relief provision is not entitled to deference where it conflicts with the Board's interpretation. *See Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1964) (agency's interpretation of statute it is charged with administering is entitled to deference); *Davis v. Office of Personnel Management*, 918 F.2d 944 (Fed. Cir. 1990).

appellant's former position. *See Bilodeau v. American Battle Monuments Commission*, 39 M.S.P.R. 243, 247 (1988), *aff'd*, 895 F.2d 1420 (Fed. Cir. 1990) (Table). Further, we agree with the administrative judge that the totality of the circumstances shows that the appellant was in a supervisory position from 1987.

The FC-11 position is identified as "Equivalent to the GS/GM-14" for pay purposes. The position description for the FC-11 position, assumed by the appellant in 1987, states that the incumbent "acts as supervisor for any short term TDY employees from U.S. Customs that are assigned to the project."[8] Also, the appellant's performance plan for the FC-11 position identified him as a Supervisory Auditor, and he was rated as presumed fully successful on the element "supervision of subordinates." Although the appellant drafted the performance plan, nonetheless the agency did not correct the title of the position or the performance elements, and awarde the appellant a merit pay increase for his performance. Additionally, in reliance on the record of the appellant's service in the FC-11 position, the SF-50 appointing the appellant to the position of Supervisory

[8]The appellant supervised only one short term TDY employee while he served in the FC-11 position. The fact that the appellant performed the supervisory duty so minimally is immaterial, however. The important points are that the duty was officially assigned and that the assignment was proper. Thus, the potential existed for the appellant to supervise a number of employees at the same time. *See Moraglia v. Environmental Protection Agency*, 20 M.S.P.R. 256, 258 (1984).

Auditor, GM-14, stated that the appellant was not required to complete a supervisory probationary period in the position.

The agency first stated that the appellant was serving a probationary period in the GM-14 position several months after the appellant had been selected. No documentation of this statement appeared however until after the appellant was notified that he was being demoted. The agency's statement that the appellant was serving a probationary period does not outweigh the earlier evidence showing that the appellant had completed a supervisory probationary period. Further, the weight of this evidence is diminished by its occurrence after the appellant's supervisors expressed some dissatisfaction with his performance. Additionally, the record contains no evidence that the GM-14 position required per se that the incumbent, regardless of prior supervisory experience, serve a probationary period.

Thus, the Board finds that the appellant was not a probationary employee at the time of his demotion and was entitled to the procedural protections of 5 U.S.C. §§ 4303 or 7513(b). He did not receive them.

In *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672 (1991), the Board modified its prior decisions reversing agency actions for "harmful error" based solely on an agency's failure to afford employees their statutory or regulatory

procedural rights. The Board held that, when an appealable action against a nonprobationary Federal employee has not been effected in accordance with the minimum procedures that satisfy the constitutional requirements of due process of law under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), the action will be reversed because it cannot withstand constitutional scrutiny, rather than because the action constitutes harmful error. In this case, the agency did not provide any of the procedural protections of 5 U.S.C. § 7513(b). Nor did it provide the appellant with any other notice or opportunity to be heard. Thus, the Board finds that the agency action must be set aside.

The administrative judge erred in failing to decide the appellant's allegation that the agency committed a prohibited personnel practice.

Having found that the appellant established the existence of an appealable demotion, the administrative judge was required to consider his allegations of prohibited personnel practices, even though the agency action could not be sustained. *See Morey v. Department of the Navy*, 34 M.S.P.R. 97, 100 (1987). *See also Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987). Thus, the Board remands this case for adjudication of the appellant's allegation that in

effecting his demotion the agency violated 5 U.S.C. § 2302(b)(11).[9]

The Board finds, however, that in the circumstances of this case, despite the absence of a final decision on the appellant's prohibited personnel practice allegation, the agency should cancel its demotion action and restore the appellant to his GM-14 position. The continued processing of, and ultimate decision on, the prohibited personnel practice issue can have no affect on the appellant's entitlement to return to duty under our holding in this Opinion and Order. *See Polite v. Department of the Navy*, MSPB Docket No. AT315H8710151 (Aug. 2, 1991).

The relief that the Board grants during remand is distinguishable from the interim relief that has been provided to the appellant under Section 6 of the Whistleblower Protection Act, since the relief of Section 6 is prospective only. Further, the final relief granted during remand is derived from the Board's general authority under 5 U.S.C. § 1205, "Powers and functions of the Merit Systems Protection Board."

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[9]Board regulations provide that any request for attorney fees must be made within 20 days of the date on which an initial decision becomes final under 5 C.F.R. § 1201.113 or within 25 days of the date of issuance of a final decision under 5 C.F.R. § 1201.116. In this case, the time limit for filing a petition for fees will not start running until the decision on remand is final under §§ 1201.113 or 1201.116.

ORDER

We ORDER the agency to cancel the appellant's demotion and to restore the appellant to the GM-14 Supervisory Auditor position effective August 13, 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.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF
CHAIRMAN DANIEL R. LEVINSON

In
Ginnochi
v.
Department of the Treasury
(DC315I8910527)

I respectfully dissent. The majority offers a strong rationale for preferring an interim relief scheme under which agency management may unilaterally modify the relief ordered in the initial decision. We should not, however, attempt to legislate our own policy prescriptions where the relevant statute furnishes unambiguous guidance. Because I believe the statute only permits agencies to effect the relief ordered by the administrative judge or place the appellant on a paid, non-duty status and that the agency did not comply with this statutory obligation, I would dismiss the agency's petition for review.

After the agency demoted the appellant from the position of Supervisory Auditor, GM-14, to the GS-13 position of Auditor for failing to perform satisfactorily during his probationary period, the appellant appealed to the Board. The administrative judge reversed the agency's action, finding the appellant was not a probationer and that the demotion was not effected in accordance with the procedures of 5 U.S.C. §§ 4303 or 7513. She ordered the agency "to retroactively restore" the appellant, Initial Decision at 8, and to provide interim relief under Section 6 of the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701(b)(2), if it filed a petition for review. The

agency then filed this petition for review and indicated it was complying with the interim relief order by providing the appellant with the pay and benefits of the supervisory position, but, deeming his return to that position unduly disruptive, keeping him in his GS-13 position.

The appellant complains that the agency has not complied with the administrative judge's order. Based upon its reading of the statute, the majority concludes that the agency has satisfied its interim relief obligations. In the majority's view, the agency may, subject to a "bad faith" exception, create a remedy of its own choosing rather than provide the relief specified in the initial decision or place the appellant in a non-duty status with pay.

The words of the statute are our primary guide to the extent of the agency's obligations and options in effecting interim relief. *Benedetto v. OPM*, 32 M.S.P.R. 530, 534 (1987), *aff'd*, 847 F.2d 814 (1988). Section 7701(b)(2) reads, in pertinent part, as follows:

> (A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review ... unless-
>
> (i) the deciding official determines that the granting of such relief is not appropriate; or
>
> (ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review ...; and

> (II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.
>
> (B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment ... pending the outcome of any petition for review ... .

The phrase "return or be present at the place of employment" or its direct counterparts appear in the two subparagraphs of section 7701(b)(2)(A)(ii) and in subsection (B). When read together, these subparagraphs provide that if the initial decision requires either the return or presence of the appellant, the agency may determine that his return or presence would be unduly disruptive. Subsection (B) says the agency must put the appellant on a paid, non-duty status if it prevents either his return or presence. Thus, both the words and structure of this statute convince me Congress intended to give agencies only one option if the relief ordered by the administrative judge would be unduly disruptive: put the employee on non-work status with the appropriate pay and benefits.

The majority correctly equates the word "return" in the statute with reinstatement in the position from which the appellant was removed, and I also agree that "presence ... at the place of employment" is a broader concept. I differ, however, with the majority's interpretation of the latter.

We presume that Congress was aware of existing Board law when it passed the Whistleblower Protection Act. *See Miles v.*

Apex Marine Corp., 111 S.Ct. 317, 325 (1990); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1581 (Fed. Cir. 1990), *cert. denied*, 111 S.Ct.. 1315 (1991). *See generally*, 2A N. Singer, *Statutes and Statutory Construction*, § 45.12 at 55 (Sands 4th Ed. 1984). It presumably knew Board orders have occasionally directed the agency not to return the prevailing appellant to his old job, but to place him in a lower-level position, e.g., by mitigating the penalty of removal to a demotion. The parallel wording of the two subparagraphs of subsection (A) and subsection (B) indicates that, being aware of this practice, Congress wanted to give agencies faced with such orders the option of placing the appellant on non-duty status with pay. It did so by using "presence ... at the place of employment" and like phrases to cover those situations in which the initial decision orders relief that is something less than full reinstatement to the appellant's original position. In addition, Congress may also have used the words "present" and "presence" because applicants for employment, unlike employees, could not be "returned" to the work place.

In short, the words and structure of the statute demonstrate that Congress intended only to permit an agency faced with an initial decision requiring it to place the appellant in his old job or another one to opt to place him on paid, non-duty status if it determined that affording the relief directed by the administrative judge would be unduly disruptive. They do not suggest, though, that Congress

empowered agencies to improvise rather than adhere to the initial decision.

The legislative history of the Whistleblower Protection Act supports this narrower construction. The Senate report noted there would be two "exceptions" to the principle that appellants be given "the relief ordered by the deciding official." S. Rep. 413 at 35. The first, of course, is when the administrative judge decides not to order interim relief. The report described the second as being when "the employing agency determines that an employee should not be returned to the work place." *Id.* At another point, the Senate report explained that the period between the initial decision and the full Board's ruling on the petition for review may be too long "for an employee denied his job *or performing unwanted duties.*" *Id.* at 22 (emphasis supplied.) The italicized portion is contrary to the notion that agencies may comply with an interim relief order by restructuring jobs or reassigning employees.

The linchpin of the majority's contrary conclusion is its belief that "present" and "presence" can be construed to mean "a return to the former position with altered or restricted duties, or an assignment to a different position." From this, the majority reasons that an agency may decide that reinstating the appellant would be unduly disruptive, but placing him in another job - or even in the same job with different duties - would not. The agency would then be free to ignore both the relief specified in the initial decision and the statutory prescription of paid, non-duty status. Under this reading,

agencies would be vested with about the same discretion in job assignment as they enjoyed under the Civil Service Commission's interim relief regulations. 5 C.F.R. § 772.310(e)(2) (1978). Temporary restoration to a position of "like grade or pay, or a similar conditional action" was all that agencies were required to provide under that regime.

However, nothing in the language of the present statute or its legislative history suggests that Congress intended to vest agency management with this range of discretion. Although "presence" is a broader concept than "return," it cannot reasonably be construed to mean placement in a former position with altered duties or even reassignment. That simply erases the phrase "at the place of employment" from the statute. Yet, as the majority itself notes, majority op. at 9, we must give effect to all of the statute's words.

A more fundamental problem with the majority's interpretation is that the words "present" or "presence" are simply not used in the statute to describe an option available to the agency after making an undue disruption determination. Rather, they appear only in sections of the statute describing the nature of the relief ordered by the initial decision or the effect of that relief on the agency. Thus, no matter how broadly "presence" may be defined, there is no statutory basis whatsoever for concluding that its use confers upon agencies authority to modify the relief specified in the initial decision.

It is clear from the agency's submission that it neither put the appellant on paid, non-duty status nor provided the relief specified in the initial decision. Thus, I would find that the agency has not complied with its statutory obligation to provide interim relief. Accordingly, I would dismiss the agency's petition for review in accordance with 5 C.F.R. § 1201.115(b)(4). *Schulte v. Department of the Air Force*, 50 M.S.P.R. 126 (1991).

Daniel R. Levinson
Chairman

FEB 19 1992
Date