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

**2010 MSPB 132**

Docket No. NY-0752-09-0052-I-1

**Manuel J. Gonzalez,**

**Appellant,**

**v.**

**Department of Homeland Security,**

**Agency.**

July 12, 2010

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Kenneth William, Esquire, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

## OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed his indefinite suspension. For the reasons set forth below, we GRANT the petition for review and REVERSE the initial decision. The indefinite suspension is NOT SUSTAINED.

## BACKGROUND

¶2 The appellant is a GS-1811-13 Criminal Investigator with the agency's U.S. Immigration and Customs Enforcement office in San Juan, Puerto Rico. Initial Appeal File (IAF), Tab 1 at 4, Tab 5, Subtab 4A. On September 30, 2008,

the agency issued the appellant written notice of its proposal to suspend him without pay indefinitely, pending an agency investigation into allegations that he had committed acts of domestic violence on September 7, 2008. IAF, Tab 5, Subtab 4D. The notice specifically stated that, "while these issues raise the possibility of criminal prosecution by the Commonwealth of Puerto Rico, this action is *not* being proposed based upon a reasonable cause to believe that you have committed a crime for which a sentence of imprisonment may be imposed." *Id*. at 2 (emphasis added). The agency indicated that it was relying on a Report of Investigation prepared by the agency's Office of Professional Responsibility and a criminal complaint executed by a police officer regarding the alleged incident on September 7, 2008. IAF, Tab 5, Subtab 4D at 3, Subtabs 4E-4F. The appellant made an oral reply to the indefinite suspension proposal notice. *Id.*, Subtab 4C.

¶3 On November 7, 2008, the agency provided the appellant with written notice of its decision to indefinitely suspend him without pay beginning November 9, 2008. *Id.*, Subtab 4B at 3, 5. The agency's deciding official found that the allegations against the appellant were "sufficiently credible" and, because the agency had provided the appellant with at least 30 days' notice of its proposed action, "the only applicable standard is whether an indefinite suspension in this case promotes the efficiency of the service." *Id.* at 2. The deciding official found that the indefinite suspension satisfied that general standard under the circumstances. *Id.* at 2-3. The decision letter indicated that the suspension would remain in effect until the later of the resolution of the allegations pending against the appellant, the completion of any agency investigation concerning the factual situation that formed the basis of the allegations, or the notice period of any adverse action proposed based on the factual situation that formed the basis of the criminal charges. *Id*. at 3.

¶4 The appellant filed this appeal asserting, among other things, that the agency lacked "just cause" to suspend him. IAF, Tab 1 at 6. Specifically, he

argued that the mere existence of an open agency investigation into the allegations against him was not grounds for disciplinary action. IAF, Tabs 11, 36. He further disputed the deciding official's claim that the allegations against him were credible, and he introduced evidence suggesting that a court had determined that there was no probable cause related to the criminal complaint against him, based in part, on a statement from the alleged adult victim of the alleged abuse. IAF, Tab 36, Appellant's Closing Memorandum at 1-2, 6-9 & attachments. The agency responded that the indefinite suspension was based solely on its investigation into the allegations against the appellant—not on any criminal proceedings related to those allegations—and therefore, it did not need to establish a reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment could be imposed. IAF, Tab 35 at 8. The agency maintained that it could indefinitely suspend the appellant without pay for the purpose of conducting its own investigation into the allegations. *Id.* at 1-19. The agency also argued that it did not need to prove that the appellant actually committed the alleged acts of domestic violence, but only that there were allegations that the agency was investigating and that it promoted the efficiency of the service to suspend the appellant without pay while it completed its investigation. *Id.* at 7, 12-19.

¶5 The administrative judge issued an initial decision affirming the suspension, finding that the agency was investigating allegations that the appellant committed acts of domestic violence, that a nexus existed between the agency's investigation and the efficiency of the service, that the suspension had an ascertainable end, and that an indefinite suspension was a reasonable "penalty" under the circumstances. IAF, Tab 38 at 1-20. She also concluded that the agency lawfully continued the appellant's suspension after the dismissal of the criminal charges against him. *Id.* at 21-23. The appellant has filed a petition for review, and the agency has filed a response in opposition. Petition for Review File (PFR File), Tabs 1, 3.

## ANALYSIS

The nature of the agency's charge.

¶6 The agency's proposal notice labeled the "reason" for its action as "Indefinite Suspension Pending Agency Investigation," and the agency supported its "reason" with the following "specification":

> On September 8, 2008, the Office of Professional Responsibility (OPR) was notified of allegations of misconduct committed by you. Specifically, OPR has an open administrative investigation into whether you committed acts of domestic violence (physical assault and verbal threats) against [Ms. X[1]], on September 7, 2008, in the jurisdiction of the Superior Court of Aguadilla, in Moca, Puerto Rico. A preliminary investigation by the Puerto Rico Police Department indicates you employed physical violence against [Ms. X] when you pushed her, choked her neck and pulled her hair. The investigation also indicates that you made threatening statements when you stated "If you take the girl, I will kill you and your parents." Moreover, Judge Jose Morales, Department of Justice, Commonwealth of Puerto Rico found probable cause for your arrest and you were charged in violation of Puerto Rico's domestic violence law 54, Articles 3.1 and 3.3.

IAF, Tab 5, Subtab 4D at 1. The proposal notice further explained that the suspension would "remain in effect until such time as the agency has concluded its investigation into this matter, or there is sufficient evidence to return [you] to duty or to support an administrative action against you." *Id.*

¶7 The Board must review the agency's decision solely on the grounds invoked by the agency; the Board may not substitute what it considers to be a more appropriate basis for the agency's action. *E.g.*, *O'Keefe v. U.S. Postal Service*, 318 F.3d 1310, 1315 (Fed. Cir. 2002); *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989). Despite the deciding official's statement that he found the allegations against the appellant to be "sufficiently credible," IAF, Tab 5, Subtab 4B at 2, the proposal notice makes clear that the

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[1] The proposal notice specifically identified the alleged victim by name.

agency was not charging the appellant with the underlying misconduct itself, *id.*, Subtab 4D. The agency did not charge the appellant with, for instance, committing acts of domestic violence by employing physical violence against Ms. X, or by making threatening statements to Ms. X. *Id.* Indeed, one of the stated purposes of the agency's continuing investigation is to determine whether grounds exist for taking "an administrative action" against the appellant based on his alleged conduct on September 7, 2008. IAF, Tab 5, Subtab 4D at 1, Subtab 4B at 3. In addition, the proposal notice specifically stated that "the action is *not* being proposed based upon a reasonable cause to believe that you have committed a crime for which a sentence of imprisonment may be imposed."[2] *Id.*, Subtab 4D at 2 (emphasis added). Instead, the express basis for the agency's action is that it has an open investigation into allegations regarding the appellant's off-duty conduct.[3] *Id.* at 1.

¶8 The appellant argues, among other things, that the agency may not lawfully suspend him without pay based "merely on the fact that it wishes to investigate allegations of off-duty misconduct." PFR File, Tab 1 at 10. The agency maintains that, because it gave the appellant at least 30-days advance notice, it may suspend him without pay indefinitely while it investigates whether he actually engaged in misconduct that would justify disciplinary action because the suspension serves the purpose of protecting agency personnel, the public, or

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[2] The agency has been adamant throughout these proceedings that it did not invoke the "crime provision" under 5 U.S.C. § 7513(b)(1), and there is no dispute that the agency provided the appellant with at least 30-days notice before effecting his suspension.

[3] In explaining why an indefinite suspension was a reasonable penalty, the proposing official mentioned that the agency had taken away the appellant's weapon, credentials, badge, and government owned vehicle. IAF, Tab 5, Subtab 4D at 2. These facts are not mentioned in the decision letter, however, *id.*, Subtab 4B, and it is clear that the agency's charge is based on the existence of its own open investigation into allegations against the appellant rather than the fact that the agency had taken away the appellant's access to these items, *id.*, Subtab 4D at 1-2.

government property, and maintains the orderly operation of the government. PFR File, Tab 3 at 4-18. The practical effect of such a procedure is that the agency has subjected the appellant to a severe adverse action—a lengthy suspension without pay—while the agency conducts its investigation into whether any grounds exist for taking an adverse action against the appellant for misconduct. In addition, the agency has, in effect, unilaterally and indefinitely delayed the point at which it could be required to meet its statutory obligation to prove by preponderant evidence that the appellant actually engaged in conduct warranting an adverse action. *See* 5 U.S.C. § 7701(c)(1)(B). For the following reasons, we find that the appellant's suspension is unlawful and must be reversed.

The agency may not indefinitely suspend the appellant merely because it has a pending investigation into allegations regarding the appellant's conduct.

¶9 The Civil Service Reform Act of 1978 (Reform Act)[4] "created a comprehensive system of procedural protections for civil service employees faced with adverse personnel actions." *LeBlanc v. United States*, 50 F.3d 1025, 1029 (Fed. Cir. 1995); *see also United States v. Fausto*, 484 U.S. 439, 443-45 (1988), *superseded by statute on other grounds*, Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461, *as recognized in Bosco v. United States*, 931 F.2d 879, 883 n.3 (Fed. Cir. 1991). As described by the Supreme Court, the resulting system is "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445; *see also Hamlet v. United States*, 63 F.3d 1097, 1106 (Fed. Cir. 1995) (noting "Title 5's 'elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations"') (quoting *Bush v. Lucas*, 462 U.S. 367, 388 (1983)). The

[4] Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of title 5 of the United States Code).

Reform Act grants an employing agency specific authority "to take actions necessary to ensure adequate employee performance and conduct" under chapters 43 and 75 of title 5 of the United States Code. *Harrison v. Bowen*, 815 F.2d 1505, 1509 (D.C. Cir. 1987). The Reform Act also provides federal employees with specific substantive rights regarding such actions, including protection against various types of unfair treatment, and establishes the procedural framework through which employees may vindicate these rights. *Id.*; *see Bush*, 462 U.S. at 385 ("Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed.").

¶10 Subchapter II of chapter 75 (5 U.S.C. §§ 7511-14) governs major adverse actions against federal employees, such as a removal, a reduction in grade or pay, or a suspension lasting for more than 14 days. *See* 5 U.S.C. § 7512. The Reform Act provides that an agency may take such an action against an employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). "Cause" under section 7513(a) generally connotes some specific act or omission on the part of the employee that warrants disciplinary action, and an agency charge that does not set forth actionable misconduct cannot be sustained. *See Wilson v. Department of Justice*, 66 M.S.P.R. 287, 297 (1995) ("Regardless of whether the charged misconduct actually occurred, we agree with the administrative judge's finding that the charged misconduct is not actionable."); *Capozzella v. Federal Bureau of Investigation*, 11 M.S.P.R. 552, 556-57 (1982) (the agency's charge, "relating to appellant's revenge motivated plan to attack his neighbor," could not "be considered misconduct" because the agency did not charge the appellant with any action); *see also O'Keefe*, 318 F.3d at 1314 (facts set forth in proposal notice, "even if true," did not constitute "wrongdoing" and were insufficient to support a conclusion that the appellant engaged in egregious misconduct); *Holland v. Department of the Air Force*, 31 F.3d 1118, 1121-22

(Fed. Cir. 1994) (employee's statements regarding hiring women were not actionable, and the agency's charge was "insufficient as a matter of law," absent some showing that he had taken action consistent with the statements or committed some discriminatory act); *Ray v. Department of the Army*, 97 M.S.P.R. 101, ¶ 54 (2004) (finding no basis to disturb the administrative judge's conclusion that the charged conduct did not constitute actionable misconduct), *aff'd*, 176 F. App'x 110 (Fed. Cir. 2006).

¶11 An employee subjected to an action identified in 5 U.S.C. § 7512 is entitled to procedures prescribed in the Reform Act, including an advance notice period (generally 30 days) and the right to file an appeal with the Board. 5 U.S.C. § 7513(b), (d). As our reviewing court has recognized, "[t]he cornerstone of the [Reform Act]'s protections is the aggrieved employee's right to seek review of adverse agency action in the Merit Systems Protection Board." *LeBlanc*, 50 F.3d at 1029 (citing 5 U.S.C. § 7701). By law, the Board shall sustain such an agency action "only if" it "is supported by a preponderance of the evidence." 5 U.S.C. § 7701(c)(1)(B). This means that:

> [A]n agency must establish three things to withstand challenge to an adverse action against an employee. First, it must prove, by a preponderance of the evidence, that the charged conduct occurred. 5 U.S.C. § 7701(c)(1)(B) (1994). Second, the agency must establish a nexus between that conduct and the efficiency of the service. 5 U.S.C. § 7513(a) (1994); *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984). Third, it must demonstrate that the penalty imposed is reasonable. *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 306-07 (1981).

*Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997).

¶12 Although chapter 75 contains no specific reference to "indefinite" suspensions, the requirements of subchapter II of chapter 75 apply to "a suspension for more than 14 days." 5 U.S.C. § 7512(2).[5] An "indefinite"

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[5] For purposes of subchapter II of chapter 75, a suspension "means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."

suspension is a "suspension" for purposes of chapter 75, even though it is imposed without a definitive end date. *McClure v. U.S. Postal Service*, 83 M.S.P.R. 605, ¶ 6 (1999); *see Pararas-Carayannis v. Department of Commerce*, 9 F.3d 955, 957 n.4 (Fed. Cir. 1993); *Dunnington v. Department of Justice*, 956 F.2d 1151, 1153 (Fed. Cir. 1992). Where, as here, an indefinite suspension lasts for more than 14 days, it becomes an action subject to the requirements of subchapter II of chapter 75. *See McClure*, 83 M.S.P.R. 605, ¶ 6; *see also* 5 C.F.R. § 752.401(a)(2) (2009) (explicitly providing that regulations promulgated by the Office of Personnel Management (OPM) implementing subchapter II of chapter 75 apply to indefinite suspensions).[6]

¶13 As our reviewing court has recognized, the Reform Act "does not articulate the standard applicable to the decision to suspend, beyond requiring that it may be taken 'only for such cause as will promote the efficiency of the service,'" if it lasts for more than 14 days. *Pararas-Carayannis*, 9 F.3d at 957 n.4 (quoting 5 U.S.C. § 7513(a)). Although we are aware of no statute, regulation, or binding

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5 U.S.C. §§ 7501(2), 7511(a)(2). Neither party has argued that the appellant was not suspended "for disciplinary reasons"; and there is no dispute that the appellant has been subjected to a suspension that is appealable to the Board. *See generally Thomas v. General Services Administration*, 756 F.2d 86, 88-90 (Fed. Cir. 1985) (regarding the right to appeal certain types of involuntary suspensions).

[6] OPM made various changes to 5 C.F.R. part 752 that took effect on February 2, 2010. 74 Fed. Reg. 63531 (Dec. 4, 2009); 5 C.F.R. part 752, note (2010). The Board generally applies regulations in effect when the agency initiated the action being appealed. *See Burge v. Department of the Air Force*, 82 M.S.P.R. 75, ¶ 12 n.3 (1999); *Kent v. Department of the Army*, 44 M.S.P.R. 676, 679 (1990). Neither party has argued that the new regulations should apply to this action, which was originally proposed and effected in 2008. Further, the new regulations do not make any changes that are material to our analysis of this appeal. *See* OPM's Comments Regarding Final Regulations, 74 Fed. Reg. at 63531 (noting that OPM decided not to make any changes in the regulations related to indefinite suspensions). Thus, we do not need to reach any question regarding the applicability or potential retroactivity of the new regulations, and we generally cite to the 2009 Code of Federal Regulations, which contains the version of part 752 that was in effect at the time the agency proposed and effected the appellant's suspension.

precedent establishing a finite list of acceptable bases for an indefinite suspension, it appears that the Board and its reviewing court have only approved of the use of indefinite suspensions in three limited circumstances:

> 1. When the agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed—pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process.[7]
>
> 2. When the agency has legitimate concerns that an employee's medical condition makes his continued presence in the workplace dangerous or inappropriate—pending a determination that the employee is fit for duty.[8]
>
> 3. When an employee's access to classified information has been suspended and the employee must have such access to perform his job—pending a final determination on the employee's access to classified information.[9]

The indefinite suspension in this case is not based on any of these recognized bases. Instead, the agency has suspended the appellant while it investigates allegations regarding the appellant's off-duty conduct to determine whether grounds exist to take "an administrative action." IAF, Tab 5, Subtabs 4B, 4D.

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[7] *E.g.*, *Martin v. Department of the Treasury*, 12 M.S.P.R. 12, 17-20 (1982), *aff'd in part, rev'd in part on other grounds sub nom. Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), *and aff'd sub nom. Otherson v. Department of Justice*, 728 F.2d 1513 (D.C. Cir. 1984), *modified on other grounds by Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656, 663 n.5 (1994); *see also Pararas-Carayannis*, 9 F.3d at 957; *Dunnington*, 956 F.2d at 1155. *But cf. Perez v. Department of Justice*, 480 F.3d 1309, 1313-14 (finding that the "reasonable cause to believe" clause in 5 U.S.C. § 7513(b)(1) is not a substantive requirement for imposing an indefinite suspension after at least 30 days' notice), *petition for reh'g and reh'g en banc denied*, 508 F.3d 1019 (Fed. Cir. 2007).

[8] *E.g.*, *Pittman v. Merit Systems Protection Board*, 832 F.2d 598, 599-600 (Fed. Cir. 1987); *Mercer v. Department of Health & Human Services*, 772 F.2d. 856, 858 (Fed. Cir. 1985); *Thomas v. General Services Administration*, 756 F.2d 86, 90 (Fed. Cir. 1985); *Norrington v. Department of the Air Force*, 83 M.S.P.R. 23, ¶¶ 8-9 (1999).

[9] *E.g.*, *Jones v. Department of the Navy*, 48 M.S.P.R. 680, 687-91, *aff'd as modified on recons.*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992).

¶14 The notice of proposed indefinite suspension issued to the appellant states the agency's belief that OPM's regulations set forth a standard applicable to indefinite suspensions, and that the standard is satisfied under the circumstances of this case. IAF, Tab 5, Subtab 4D at 2; PFR File, Tab 3 at 4. Specifically, the notice states that "[u]nder [OPM's] regulations, indefinite suspensions can be effected pending criminal proceedings or administrative inquiry, under certain other circumstances in which an agency believes that the employee's retention on active duty could result in damage to federal property, be detrimental to government interests, or be injurious to the employee, his fellow workers, or the public." IAF, Tab 5, Subtab 4D at 2. For the following reasons, we find that OPM's regulations do not set forth this standard for imposing an indefinite suspension or authorize an indefinite suspension on the grounds asserted by the agency in this case.

¶15 OPM has specific authority to promulgate regulations to carry out the purpose of chapter 75, subchapter II. 5 U.S.C. §§ 7513(a), 7514. OPM has done so, and its regulations are codified in 5 C.F.R. part 752, subpart D. Notably, those regulations contain OPM's definition of an "indefinite suspension." 5 C.F.R. § 752.402(e) (2009).[10] Under the regulations in effect at the time the agency proposed and effected the appellant's suspension, *see supra* n.6, OPM used the term "indefinite suspension" in three specific places in part 752, but not

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[10] OPM defines the term as follows:

> *Indefinite suspension* means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action which may include the completion of any subsequent administrative action.

5 C.F.R. § 752.402(e) (2009); *accord* revised version of 5 C.F.R. § 752.402 *codified at* 5 C.F.R. part 752, note (2010).

to set forth a special standard applicable to such an action.[11] The first usage merely provides that 5 C.F.R. part 752, subpart D, applies to indefinite suspensions. 5 C.F.R. § 752.401(a)(2) (2009); *accord* revised version *codified at* 5 C.F.R. part 752, note (2010). The other two prescribe procedures an agency must follow during the "advance notice period" before imposing an action, including an indefinite suspension, covered by chapter 75, subchapter II. 5 C.F.R. § 752.404(b)(3), (d) (2009); *accord* revised version *codified at* 5 C.F.R. part 752, note (2010).

¶16 However, OPM's regulations do not purport to authorize indefinite suspensions "pending criminal proceedings or administrative inquiry, under certain other circumstances in which an agency *believes that the employee's retention on active duty could result in damage to federal property, be detrimental to government interests, or be injurious to the employee, his fellow workers, or the public*," as the agency claims here. IAF, Tab 5, Subtab 4D at 2 (emphasis added); PFR File, Tab 3 at 4. The only regulation in part 752 containing language even remotely similar to this italicized language is contained in 5 C.F.R. § 752.404(b)(3), which generally mandates that an agency retain an employee in a paid duty status during the advance notice period prior to taking an adverse action. That regulation sets forth alternatives an agency may employ "[i]n those rare circumstances where the agency determines that the employee's

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[11] The definition at 5 C.F.R. § 752.402(e) (2009) made no attempt to establish a standard for when a "pending investigation, inquiry, or further agency action" could constitute "cause as will promote the efficiency of the service" under 5 U.S.C. § 7513(a). *Accord* revised versions of 5 C.F.R. §§ 752.402, .403 *codified at* 5 C.F.R. part 752, note (2010); *see* OPM's Comments Regarding Final Regulations, 74 Fed. Reg. 63531, 63531-32 (Dec. 4, 2009) (stating that OPM had decided not to promulgate substantive regulations specific to indefinite suspensions). In its revised regulations, OPM has added a fourth usage of the term "indefinite suspension" in 5 C.F.R. § 752.403(a), which provides, "An agency may take an adverse action, including . . . an indefinite suspension, under this subpart only for such cause as will promote the efficiency of the service." 5 C.F.R. part 752, note (2010).

continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests." 5 C.F.R. § 752.404(b)(3) (2009); *accord* revised version *codified at* 5 C.F.R. part 752, note (2010). Suspending an employee, definitely or indefinitely, is not one of the stated alternatives, and, except in one special circumstance not applicable here, the agency must retain the employee in a paid status during the "advance notice period" even in these "rare circumstances."[12] *See* 5 C.F.R. § 752.404(b)(3)(i)-(iv) (2009); *accord* revised version *codified at* 5 C.F.R. part 752, note (2010). Thus, this regulation provides no support for the agency's position.

¶17 Although the above-quoted language in the agency's proposal notice does not appear in 5 C.F.R. part 752, similar language did at one time appear in OPM's regulations related to an agency's obligation to file for disability retirement on behalf of an employee, i.e. former 5 C.F.R. § 831.1206 (1984). That regulation provided that, as a general rule, when an agency filed an application for disability retirement on behalf of an employee, the agency was required to retain the employee in an active duty status, except that the agency could, based on medical evidence, place the employee on leave with the employee's consent, or without the employee's consent "when the circumstances are such that his/her retention in an active duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his/her fellow workers, or the general public." 5 C.F.R. § 831.1206 (1984).[13]

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[12] The limited exception is when an employee has absented himself from the worksite without requesting leave and the agency carries the employee in a leave without pay status. 5 C.F.R. § 752.404(b)(3)(ii) (2009). As a general rule, an employee who voluntarily absents himself from the workplace is deemed not to have been subjected to a suspension appealable to the Board under 5 U.S.C. chapter 75. *E.g.*, *Perez v. Merit Systems Protection Board*, 931 F.2d 853, 855 (Fed. Cir. 1991).

[13] OPM amended this regulation in early 1984. 49 Fed. Reg. 1321, 1331-32 (Jan. 11, 1984). Under current disability retirement regulations, the agency must actually

¶18 In *Thomas v. General Services Administration*, 756 F.2d 86, 89 (Fed. Cir. 1985), the Federal Circuit discussed this former regulation, which was then in effect, in deciding that federal employees had the right to file an appeal with the Board regarding an "enforced leave" suspension of that type. However, we decline to consider this discussion in *Thomas* as implicitly authorizing a suspension on the basis charged by the agency here, given that it concerns a regulation that no longer exists, and was based on a claim that the employee was medically unfit for duty—a claim which is not at issue here.[14] In addition, we note that the court's decision upholding the suspension in *Thomas* was based on more than the mere existence of an inquiry into allegations of medical unfitness, and instead including a finding that the agency met its burden with medical evidence establishing the existence of a medical disorder and evidence that the disorder had actually manifested itself in several instances of inappropriate, disruptive, or threatening behavior in the workplace. 756 F.2d at 90. In contrast, the agency has charged the appellant in this matter only with being the subject of allegations that are under investigation.

¶19 We acknowledge that the Board has previously relied on the court's discussion of the former disability retirement regulations in *Thomas* for the proposition that "indefinite suspensions can be effected, pending criminal proceedings or agency inquiry, *under certain other circumstances* in which an

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separate an employee before OPM will consider an agency's application for an employee's disability retirement. 5 C.F.R. § 831.1205(a)(1), (c)(1) (2010). Thus, OPM's disability retirement regulations no longer prescribe situations in which the agency may be excused from the general rule that an employee be kept on active duty while an agency-filed application for disability retirement is pending, which was the issue addressed in the prior regulation at 5 C.F.R. § 831.1206 (1984).

[14] *But cf. Engdahl v. Department of the Navy*, 900 F.2d 1572, 1574 (Fed. Cir. 1990) (broadly stating that *Thomas*, 756 F.2d at 89, "held" that suspensions were "authorized and reviewable" in certain circumstances, without mentioning the particular medical circumstances at issue in *Thomas*).

agency believes that the employee's retention on active duty could result in damage to Federal property, be detrimental to government interests, or be injurious to the employee, his fellow workers, or the public." *Jones v. Department of the Navy*, 48 M.S.P.R. 680, 689 (emphasis added), *aff'd as modified on recons.*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992). As explained above, the "certain . . . circumstances" surrounding the pending inquiry in *Thomas*, however, are not present here. Moreover, the particular "circumstance" the Board was addressing in *Jones* was an indefinite suspension taken after the agency suspended an employee's required access to classified information, which is also not an issue here. 48 M.S.P.R. at 682-84, 687-91. The agency has not identified, and we are unaware of, any legal authority establishing that the mere existence of an agency investigation or inquiry into allegations of misconduct constitutes a circumstance justifying, or cause for imposing, a suspension under 5 U.S.C. § 7513. *Cf. Martin v. Department of the Treasury*, 12 M.S.P.R. 12, 21 (1982) ("[A]n investigation should not *per se* form the basis for an indefinite suspension . . . .") (see *supra* n.7 for subsequent case history). Further, the type of investigation allegedly being conducted by the agency in the instant matter is substantially different from the types of investigations or inquiries that the Board and its reviewing court have previously recognized could constitute "cause" for indefinite suspensions under 5 U.S.C. § 7513(a). *See supra*, ¶ 13.

¶20 For instance, the Board has previously recognized that special concerns arise when there is reasonable cause to believe that a crime has been committed. *See Martin*, 12 M.S.P.R. at 18 (noting that subjecting an employee to an administrative hearing while a criminal action is pending raises due process concerns and could prejudice the employee's defense in that trial).[15] In such

[15] The peculiar nature of such circumstances is recognized in the Reform Act itself, which contains a special procedural rule that applies only to circumstances in which

circumstances, the employing agency lacks control over the resolution of the criminal matter, and its ability to conduct its own investigation may be substantially impaired while criminal charges are pending. *See Engdahl v. Department of the Navy*, 40 M.S.P.R. 660, 664-65 (1989), *aff'd*, 900 F.2d 1572 (Fed. Cir. 1990). In part because of the potential impairment of an agency's ability to conduct a thorough investigation in such circumstances, the Board has approved indefinite suspensions when the agency has reasonable cause to believe the appellant may have committed a crime for which he may be imprisoned, which may continue for a reasonable period of time after the criminal charges have been resolved to allow for a reasonable agency investigation. *See id.*; *Drain v. Department of Justice*, 108 M.S.P.R. 562, ¶ 8 (2008); *see also Pararas-Carayannis*, 9 F.3d at 957; *Dunnington*, 956 F.2d at 1155; *Engdahl v. Department of the Navy*, 900 F.2d 1572, 1577 (Fed. Cir. 1990). *But cf. Perez v. Department of Justice*, 480 F.3d 1309, 1313-14 (finding that the "reasonable cause to believe" clause in 5 U.S.C. § 7513(b)(1) is not a substantive requirement for imposing an indefinite suspension after at least 30-days notice), *petition for reh'g and reh'g en banc denied*, 508 F.3d 1019 (Fed. Cir. 2007).[16]

¶21 Similarly, when an employee is medically unfit for duty, the length of the suspension is dependent, to a large extent, on the employee's diligence in pursuing effective medical treatment and/or obtaining a firm determination that

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there is reasonable cause to believe that a crime has been committed for which a sentence of imprisonment may be imposed. *See* 5 U.S.C. § 7513(b).

[16] Although there appears to have been, at least initially, some potential for criminal prosecution in this case, the agency explicitly decided not to charge the appellant on the grounds that there was reasonable cause to believe that a crime had been committed. IAF, Tab 5, Subtab 4D at 2. Further, the agency's litigation position is that pending criminal proceedings were not the reason for its suspension, IAF, Tab 8 at 3, Tab 35 at 8, and neither the proposal notice nor the decision notice mentioned any obstacles to the agency's ability to timely complete its investigation, IAF, Tab 5, Subtabs 4B, 4D. Thus, we make no finding regarding whether such a charge might have been appropriate here. *See O'Keefe*, 318 F.3d at 1315; *Gottlieb*, 39 M.S.P.R. at 609.

he is fit for duty. The employee largely controls the pace at which he produces medical evidence establishing fitness for duty, and thus the length of the suspension. *Compare Sarratt v. U.S. Postal Service*, 90 M.S.P.R. 405, ¶¶ 6-10 (2001) (because the appellant initially failed to submit medical evidence that he could perform the duties of his position, the agency properly placed him on enforced leave based on physical inability to perform; however, the agency should have returned the appellant to work upon receipt of adequate medical documentation), *with Norrington v. Department of the Air Force*, 83 M.S.P.R. 23, ¶¶ 8-13 (1999) (the agency properly continued the appellant's enforced leave based on physical disability because the appellant failed to submit medical evidence demonstrating his physical capacity to perform without endangering his health).[17]

¶22 In the case of indefinite suspensions based on the suspension of required access to classified information, it is true that the Board cannot review the underlying merits of an agency's decision to suspend or revoke access to such information. *See Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988); *Cheney v. Department of Justice*, 479 F.3d 1343, 1351-52 (Fed. Cir. 2007); *Jones*, 48 M.S.P.R. at 689-91. However, that does not mean that such indefinite suspensions are based on the mere existence of an inquiry into allegations of misconduct, as the agency has charged here. Rather, they are based on the fact that required access to classified information has been suspended. The limited scope of Board review of the agency's "sensitive and inherently discretionary" determinations does not alter the nature of the underlying cause for the indefinite suspension.

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[17] Further, as discussed above, OPM's regulations explicitly authorized such a suspension, at least at one time. *See supra* ¶¶ 17-18; *Thomas*, 756 F.2d at 89-90; 5 C.F.R. § 831.1206 (1984).

¶23 In the instant appeal, however, none of the foregoing special considerations are present. Instead, the agency has indefinitely suspended the appellant while it investigates whether it has strong enough grounds to take an adverse action against him for off-duty conduct. The underlying issues are within the Board's typical review authority, and the timely completion of the investigation appears to be largely within the agency's control.

¶24 We note that the agency deciding official mentioned in his decision letter that he believed that the allegations against the appellant were "sufficiently credible." IAF, Tab 5, Subtab 4B at 2. The agency's belief regarding the credibility of the allegations against the appellant is immaterial to our analysis, given the agency's charge. Notwithstanding the deciding official's remark, the agency plainly did not charge the appellant with committing actionable misconduct during the alleged incident on September 7, 2008. *Id.*, Subtab 4D. Further, the Reform Act generally protects federal employees from adverse actions based on mere suspicion or mere allegations of misconduct by mandating that adverse actions may only be taken for "cause," and by requiring an agency to prove the specific alleged "cause" by a preponderance of the evidence when an employee seeks review of the action by the Board. *See* 5 U.S.C. §§ 7513(a), 7701(c)(1)(B); *Remy v. Veterans Administration*, 8 M.S.P.R. 141, 145 & n.2 (1981) (on appeal to the Board, the relevant standard is whether the agency proved by preponderant evidence that the charged misconduct occurred, not whether the agency reasonably concluded that misconduct occurred); *see also Martin*, 12 M.S.P.R. at 21 ("[A]n investigation should not *per se* form the basis for an indefinite suspension . . . ."). The agency has failed to identify any valid statutory or regulatory basis for the proposition that it can preliminarily suspend the appellant based on some lesser standard of proof while it gathers additional evidence to support an action based on the underlying alleged misconduct. *Cf. Cox-Vaughn v. U.S. Postal Service*, 100 M.S.P.R. 246, ¶ 18 (2005) ("[T]he law does not permit an agency to place an employee on emergency suspension during

the notice period of a removal and then effect a removal for the same act of misconduct."); *Littlejohn v. U.S. Postal Service*, 25 M.S.P.R. 478, 481 (1984) (the agency could not effect both a suspension and removal action against the appellant for the same act of misconduct); *Cuellar v. U.S. Postal Service*, 8 M.S.P.R. 624, 627-32 (1981) (finding that, after the enactment of the Reform Act, "emergency suspensions" based on standards inconsistent with 5 U.S.C. § 7513 were no longer authorized by law).

¶25 The agency has argued that the suspension here "promotes the efficiency of the service," citing alleged governmental interests in effecting the suspension. *E.g.*, IAF, Tab 35 at 12-19; PFR File, Tab 3 at 11-18. Before the Board would reach such issues, however, the agency would first need to establish that there is "cause" under 5 U.S.C. § 7513(a). If the agency fails to allege or prove that there is "cause" for action, the Board's inquiry stops there. *See Holland*, 31 F.3d at 1121-22; *Ray*, 97 M.S.P.R. 101, ¶ 54; *Wilson*, 66 M.S.P.R. at 297; *Capozzella*, 11 M.S.P.R. at 556-57; *see also Pope*, 114 F.3d at 1147 & n.2 (in an adverse action appeal, an agency must prove first that the charged conduct occurred and second that there is a nexus between that conduct and the efficiency of the service; only after an agency has proven that charged actionable misconduct occurred "may an agency rely on the presumption of harm to the efficiency of the service" applicable in certain situations). Because we find that the agency's pending inquiry into allegations against the appellant is not actionable "cause" as required under 5 U.S.C. § 7513(a), the agency's arguments regarding the efficiency of the service are immaterial.

¶26 We reject the agency's assertion that this suspension is authorized by *Perez*, 480 F.3d 1309, and *Lamour v. Department of Justice*, 106 M.S.P.R. 366 (2007). PFR File, Tab 3 at 5, 7-11. The narrow legal issue raised by the appellant in *Perez* was whether the agency was required by 5 U.S.C. § 7513(b) to prove before the Board that it had reasonable cause to believe that the appellant had committed a crime for which a sentence of imprisonment may be imposed in

order to have its indefinite suspension action sustained on review. *Perez*, 480 F.3d at 1311-12. The court found that, although an agency must have reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed to take an action on a shortened notice period under section 7513(b)(1), the agency was not required to establish such "reasonable cause" to effect the appellant's suspension, which was taken on 31 days' notice. *Id.* at 1313-14. There is nothing in *Perez* that excuses an agency from the requirements of 5 U.S.C. § 7513(a) when imposing an indefinite suspension lasting more than 14 days. *Id.*; *see also supra* ¶ 12 (an indefinite suspension lasting more than 14 days is subject to the requirements of chapter 75, subchapter II). Because the panel majority deemed the appellant not to be raising any challenge that his suspension failed to satisfy the substantive criteria of 5 U.S.C. § 7513(a), the court did not have occasion to decide whether the mere existence of an open agency investigation of the sort at issue here satisfies those criteria. *See Perez*, 480 F.3d at 1313-14; *see also Perez*, 508 F.3d at 1022-23 (concurring and dissenting opinions regarding the denial of the petition for rehearing en banc) (both noting the narrow scope of the legal issue decided by the panel decision in *Perez*, 480 F.3d 1309).

¶27 In *Lamour*, the Board specifically noted the requirement of 5 U.S.C. § 7513(a) that an agency may only take an adverse action for such cause as will promote the efficiency of the service. 106 M.S.P.R. 366, ¶¶ 7, 9. The Board reversed the appellants' indefinite suspensions because the agency's "insufficiently detailed" proposal letters violated the appellants' rights to due process, *id.*, ¶ 10, and the agency failed to prove that it had any basis to believe that the employees had engaged in any improper behavior, *id.*, ¶¶ 11-15. In reversing the indefinite suspension, the Board noted that it did not intend to "imply" that credible allegations of serious misconduct could never satisfy the "efficiency of the service" requirement of 5 U.S.C. § 7513(a) in taking an indefinite suspension when there is no related criminal proceeding. *Id.*, ¶ 15 n.5.

However, the Board did not explain the circumstances in which such a suspension might be appropriate, and this statement was unnecessary to the decision in *Lamour*. Thus, to the extent that the Board implied that a suspension such as the one here might be consistent with law, the Board's statement was dictum that we decline to follow in this case. *See Cruz-Packer v. Department of Homeland Security*, 102 M.S.P.R. 64, ¶ 11 (2006).

¶28 In resolving this appeal, we hold only that the mere existence of the agency's open investigation into allegations regarding the appellant's conduct is not "cause" for taking an action under subchapter II of chapter 75. *See* 5 U.S.C. § 7513(a). We give no opinion on whether the agency could impose an indefinite suspension or other adverse action on some other grounds based on the facts of this case, constrained, as we are, to review this action solely on the basis charged by the agency. *See, e.g.*, *O'Keefe*, 318 F.3d at 1315; *Gottlieb*, 39 M.S.P.R. at 609.[18]

## ORDER

¶29 We ORDER the agency to CANCEL the appellant's indefinite suspension effective November 9, 2008. *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.

¶30 We also ORDER the agency to pay the appellant the correct 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 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

[18] Because we have reversed the suspension for the reasons stated above, we do not reach the other issues raised in the appellant's petition for review.

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.

¶31 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶32 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶33 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.

¶34 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

## NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

## NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

# DFAS CHECKLIST

## INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD



## 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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

# 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.