

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

2009 MSPB 63

Docket No. CB-1216-06-0006-B-1

**Special Counsel,
Petitioner,**

v.

**Robert Wilkinson,
Respondent.**

April 23, 2009

Erica S. Hamrick, Esquire, Washington, D.C., for the petitioner.

J. Ward Morrow, Esquire, Washington, D.C., for the respondent.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The parties filed a Joint Settlement Agreement with the administrative law judge that was signed by the petitioner on July 30, 2007, and by the respondent on July 31, 2007. The administrative law judge (ALJ) recommended that the Board approve the parties' Joint Settlement Agreement and impose a suspension without pay upon the respondent for a period of thirty days. For the reasons stated below, we ADOPT the administrative law judge's recommendation as MODIFIED by this Opinion and Order, and APPROVE the Joint Settlement Agreement. The respondent's employing agency is ORDERED to SUSPEND the respondent without pay for a period of thirty days.

BACKGROUND

¶2 The Office of Special Counsel filed a complaint for disciplinary action charging that the respondent, an employee of the Environmental Protection Agency, violated [5 U.S.C. § 7324\(a\)\(1\) and \(2\)](#) and [5 C.F.R. § 734.306\(a\)\(1\) and \(3\)](#), by engaging in political activity while on duty in a government building and occupied in the discharge of his official duties. Initial Complaint for Disciplinary Action File (ICF), Tab 1. The petitioner specified that the respondent sent an electronic mail message that contained a letter endorsing a Presidential candidate to approximately thirty Environmental Protection Agency employees while he was on duty. *Id.* In a March 3, 2006 decision, the administrative law judge granted the respondent's Motion for Summary Judgment and denied the petitioner's request for disciplinary action. ICF, Tab 14. The Office of Special Counsel then filed a petition for review of that decision asserting error in the administrative law judge's findings, including his ultimate recommendation to deny OSC's request for disciplinary action. Petition for Review Complaint File (PCF), Tab 1. In an Opinion and Order, the Board granted the petition for review, reversed the administrative law judge's recommended decision, found that the respondent violated the Hatch Act as charged, and remanded the action to the administrative law judge to allow the parties to present evidence and argument on the issue of the appropriate penalty in this case. *Special Counsel v. Wilkinson*, [104 M.S.P.R. 253](#) (2006); PCF, Tab 8.

¶3 Following the Board's Opinion and Order, the parties reached a settlement of the referenced matter and requested that the Board approve a Joint Settlement Agreement. The parties stipulated, and requested that the Board find, that the respondent's violation of the Hatch Act warranted a 30-day suspension. Remand Complaint File (RCF), Tabs 5-6.

¶4 In an August 8, 2007 Recommended Decision Following Remand, the administrative law judge recommended that the Board grant the parties' Joint Settlement Agreement and impose a 30-day suspension on the respondent.

Respondent Appeal File (RCF), Tab 7. The ALJ noted with regard to his penalty recommendation that the respondent addressed the six factors that the Board has found relevant in determining the penalty in Hatch Act cases, and the administrative law judge concluded that these factors justified mitigation of the presumptive penalty of removal to the minimal statutory penalty of a 30-day suspension. *Id.* at 7-8.

ANALYSIS

¶5 The Board has jurisdiction over this case under [5 U.S.C. §§ 1215\(a\)](#) and [1216\(a\)\(1\)](#). Under [5 U.S.C. § 7324](#) (a)(1) and (2) and [5 C.F.R. § 734.306\(a\)](#), a federal employee may not engage in political activity while on duty and on agency premises. The Board must order the removal of an employee found to have violated section 7324, unless it finds by unanimous vote that the violation does not warrant removal. [5 U.S.C. § 7326](#). In that case, the Board must order a “suspension without pay” for “not less than 30 days.” *Id.* A respondent who has been found to have violated the Hatch Act has the burden of presenting evidence showing that the presumptive penalty of removal should not be imposed. *Special Counsel v. Briggs*, [110 M.S.P.R. 1](#), ¶ 12 (2008).

¶6 For the reasons set forth below, we adopt the ALJ’s recommendation as modified by this Opinion and Order, and approve the Joint Settlement Agreement, which requires the Environmental Protection Agency to suspend the respondent without pay for thirty days.

¶7 Before dismissing a matter as settled, the Board must decide whether the parties have freely entered into a settlement agreement, understand its terms, and intend to have the agreement entered into the record for purposes of enforcement by the Board. *Bruce v. Social Security Administration*, [108 M.S.P.R. 339](#), 340 (2008). We find here that the parties have, in fact, freely entered into a settlement agreement, that they understand its terms, and that they want the Board to enforce those terms. *See* RCF, Tab 6.

¶8 In addition, before accepting a settlement agreement into the record for enforcement purposes, the Board must determine whether the agreement is lawful on its face, whether the parties freely entered into it, and whether the subject matter of the appeal is within the Board's jurisdiction; that is, the Board must determine whether a law, rule or regulation grants the Board the authority to decide such a matter. *See Stewart v. U.S. Postal Service*, [73 M.S.P.R. 104](#), 107 (1997). We find here that the agreement is lawful on its face, that the parties freely entered into it, and that the subject matter of the case – a complaint for disciplinary action brought against a federal employee for violations of the Hatch Act – is within the Board's jurisdiction under [5 U.S.C. §§ 1215\(a\) and 1216\(a\)\(1\)](#). *See* ICF, Tab 1, OSC Complaint for Disciplinary Action at 1. Accordingly, we find that dismissal of the petitioner's complaint for disciplinary action with prejudice to refiling is appropriate under these circumstances, and we accept the settlement agreement into the record for enforcement purposes.

¶9 Finally, we find that, to the extent that the administrative law judge's Recommended Decision Following Remand is contrary to the Board's Remand Order, or otherwise contrary to the ultimate conclusions in this Opinion and Order, we hereby VACATE that portion of the recommended decision.

ORDER

¶10 Accordingly, we ORDER the Environmental Protection Agency to suspend the respondent without pay for 30 days. We ORDER the Office of Special Counsel to notify the Board within 30 days of this Opinion and Order whether the respondent has been suspended as ordered. This is the final decision of the Merit Systems Protection Board in this matter. Title 5 of the Code of Federal Regulations, sections 1201.125(c) (5) and 1201.126(c).

NOTICE TO THE PARTIES OF THEIR ENFORCEMENT RIGHTS

If the petitioner or the respondent has not fully carried out the terms of the agreement, either party may ask the Board to enforce the settlement agreement by

promptly filing a petition for enforcement with the Office of the Clerk of the Board. The petition should contain specific reasons why the petitioning party believes that the terms of the settlement agreement have not been fully carried out, and should include the dates and results of any communications between the parties. [5 C.F.R. § 1201.182\(a\)](#).

**NOTICE TO THE RESPONDENT 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.