

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
2008 MSPB 88**

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Docket No. DC-0752-07-0231-I-1

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**Terese A. Durden,  
Appellant,**

v.

**Department of Homeland Security,  
Agency.**

April 10, 2008

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Kimberly E. Jones, Esquire, Norfolk, Virginia, for the appellant.

Wayne P. Marta, Esquire, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant petitions for review of the August 9, 2007 initial decision which sustained her removal for physical inability to perform the duties of her position. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the initial decision, and DO NOT SUSTAIN the agency's removal action.

**BACKGROUND**

¶2 The appellant was an Aircraft Mechanic, WG-10, at the United States Coast Guard's (CG) Aircraft Repair and Supply Center (ARSC), in Elizabeth City, North Carolina. Initial Appeal File (IAF), Tab 1. The appellant suffered from a

medical condition that required her physician, Dr. Sonnino, to recommend in a January 5, 2005 letter that the appellant “avoid any cramped, awkward, strained positions” and that she “limit her carrying to approximately 25 lbs for the next month at least.” IAF, Tab 5, Subtab 4H at 2. She underwent significant neck surgery on November 8, 2005. IAF, Tab 22 at 1-2, Appellant’s Exhibits 5-6. The appellant alleged that, in January 2006, she requested accommodation of her medical condition and that the agency requested that she obtain documentation of her medical condition from her physician. IAF, Tab 22 at 2. Dr. Sonnino provided a letter dated April 18, 2006, which, similar to the medical restrictions that the appellant worked under before her surgery, stated that the appellant, among other things, should not engage in heavy lifting or any other activity that would put a strain on her neck, shoulders, or lower back. IAF, Tab 5, Subtab 4H at 1. Dr. Sonnino also noted that the appellant would not “be able to work in tight spaces such as could be required in different types of aircraft maintenance or in general cramped, tight or awkward spaces.” *Id.* Dr. Sonnino’s April 18, 2006 letter further stated that he would see the appellant in his office again on May 4, 2006 in order to “decide if a further evaluation is necessary or whether a referral to [a] rehabilitation specialist would be warranted[,]” *id.*, but the agency stated that it never received “any more documentation concerning [the appellant’s] physical condition in general or her work restrictions in particular[,]” *id.*, Subtab 1 at 2. However, following her May 4, 2006 appointment, the appellant told the agency that Dr. Sonnino had not changed her work restrictions. *Id.*, Subtab 4C; IAF, Tab 22 at 3. In a May 15, 2006 e-mail message to her third line supervisor, deciding official Danny Hale, the appellant acknowledged that her neck surgery and degenerative disc disease made remaining in her position “extremely difficult, at best[,]” but she asserted that she was “in no way ready to ‘be put out to pasture,’” and reiterated her request that the agency accommodate her condition. IAF, Tab 22, Appellant’s Exhibit 10. The appellant also noted that the supervisor in the ARSC upholstery shop, Jack Estes, told her that he had

a heavy workload and that the upholstery work would not exceed her lifting restrictions, and the appellant further claimed that she had other offers of accommodation involving minimal lifting as well. *Id.* However, the appellant did not specifically identify any such vacant positions. *Id.* In response to the appellant's May 15, 2006 e-mail message to Hale, Donna Caras, a command staff advisor at ARSC, replied that as soon as the appellant told Hale that she could "no longer physically perform the work of a line mechanic due to [her] physical conditions/restrictions[.]" the agency "proceeded with the evaluative process regarding any accommodation." *Id.*, Appellant's Exhibit 11 at 1. Caras also encouraged the appellant to "specify ANY specific accommodation [she was] requesting so that it can be properly evaluated." *Id.* It is unclear whether the appellant responded to Caras, but before the Board, the appellant argued that the agency could have accommodated her in her aircraft mechanic position. IAF, Tab 22 at 1.

¶3 On July 24, 2006, the agency proposed the appellant's removal for her physical inability to perform the duties of her position. IAF, Tab 5, Subtab 4D. The agency asserted that the aircraft mechanic position required the appellant, among other things, "to bend, stoop, and work in tiring and sometimes uncomfortable positions," that she "must be able to climb up and down ladders," and that the appellant's "current medical condition [was] not compatible with [her] position's requirements." *Id.* at 1. After holding his decision in abeyance pending a decision on the appellant's disability retirement application, Hale decided to remove the appellant, effective November 30, 2006, for her physical inability to perform the duties of her position. *Id.*, Subtab 4B. The decision stated that the appellant's "physical inability to perform [her] duties place[d] an administrative burden on the agency," because she held "a full time position and the [agency's] need is to have a person performing the full duties [of the aircraft mechanic position] in a full time capacity." *Id.* at 1-2. The appellant filed a timely appeal with the Board's Washington Regional Office which claimed that

the agency committed harmful error, that her removal was not supported by a preponderance of the evidence, that the penalty was harsh, unreasonable and disparately applied, that her removal did not promote the efficiency of the service, and that she was the victim of discrimination on the bases of sex and disability and also subjected to reprisal for prior equal employment opportunity (EEO) activity. IAF, Tab 1. The agency responded that the appellant failed to honor its repeated requests for medical documentation following Dr. Sonnino's April 18, 2006 letter and that, after it proposed her removal, the appellant "expressed [her] desire (on more than one occasion) that she be removed as quickly as possible." IAF, Tab 5, Subtab 1 at 2. The agency further contended that it waited to decide to remove the appellant until after it had informed the appellant of "many vacant positions within the [Coast Guard]" for which she was qualified and that did not exceed her medical restrictions, and that the appellant had declined to pursue any of those opportunities. *Id.*

¶4 On the question of sex discrimination, the appellant alleged that she received worse treatment than a similarly situated male aircraft mechanic, Tom Doshen, who, like the appellant, was unable to perform some of the essential functions of the AM position, but whom, unlike the appellant, the agency accommodated in his AM position by giving him unofficial light duty assignments within his perceived medical restrictions. IAF, Tab 20 at 9. Regarding his medical condition, Doshen testified that, due to chronic problems with his left knee that began to bother him in 1991, he had knee replacement surgery in early 2005. Hearing Tapes, September 26, 2007, Tape 5, Side A (HT 9/26 5A). Doshen also testified to having hereditary balance problems, unrelated to his knee condition, such that he could not go up on ladders or on scaffolding without a supporting rail to steady himself and that, as a consequence, he had not worked on top of an airplane since 2002. *Id.* Regarding his physical limitations, Doshen testified that he had never turned down an assignment in his aircraft mechanic position, that he did everything that he was asked to do, and claimed

that he did “the best that [he] could with what [he] had.” *Id.* Regarding the documentation of his medical condition, Doshen testified that after he returned from knee replacement surgery in May 2005, he told his crew leader that he would need to attend physical therapy and ultimately reported to the agency that he had obtained a full release from his doctor, but that he presented no doctors’ notes to the agency regarding his knee replacement. *Id.* Doshen also acknowledged in his testimony that he currently qualified for a handicapped license plate on his car and that he used a cane to enable him to walk from his car to his workplace, hanging his cane on his toolbox and rarely using it during the work day, if at all. *Id.* After the agency removed the appellant in November, 2006, IAF, Tab 5, Subtab 4B, Doshen submitted an application and was hired for an Aircraft Mechanic Parts and Repair (AMPR) position at ARSC, HT 6/26 5A. Jack Estes, the foreman in the ARSC upholstery shop and the supervisor for the AMPR position, testified that the AMPR position did not require climbing on top of the airplane or working in tight, cramped spaces. HT 6/26 5A. Doshen testified that he began the new position on March 6, 2007 and claimed that he took the new job because he “felt like it would be better to do that type of thing” because it would be a “better work environment” for him. HT 6/26 5A.

¶5 Robert Cook, who originally hired Doshen into the aircraft mechanic position and was his supervisor at the ARSC in 2000 at a time when Doshen’s knee was causing him problems, testified that Doshen had taken leave around that time on account of his knee and, upon his return, had presented a doctor’s note which cleared him to perform his duties. HT 6/20 4A. Nevertheless, Cook testified that there were times when he observed that Doshen could barely walk and that Doshen sometimes fell down on the job. *Id.* Cook also testified that even though an aircraft mechanic is required to be able to work on the entire aircraft, not just on particular pieces or parts of the aircraft, neither he nor the crew leaders tasked Doshen with climbing on top of the plane, which is an essential function of the position, due to his physical condition. *Id.* Likewise,

Cook testified that he and the crew leaders would never require Doshen to perform another essential function of the aircraft mechanic position, working in the “hellhole,” a tight compartment in the tail section of the airplane (also known as the F compartment), again due to his medical condition. *Id.* Cook testified that it was common knowledge among the crew leaders that Doshen could not perform the full functions of an aircraft mechanic and that, accordingly, no one tasked Doshen with getting on top of the plane where he could get hurt or with working in a small space that could cause him pain. *Id.*

¶6 Robert Dorsey, who was the proposing official on the appellant’s removal, IAF, Tab 5, Subtab 4D, and who supervised both Doshen and the appellant from September 2005 until the appellant’s removal at the end of November 2006, acknowledged in his testimony that, at the time he became Doshen’s supervisor, he was aware that Doshen was physically unable to work on top of the plane or in the F compartment, tasks that were essential functions of the aircraft mechanic position, but that he nevertheless continued Doshen’s informal light-duty arrangement and did not propose Doshen’s removal for inability to perform the essential functions of the aircraft mechanic position, HT 6/21 2B. In contrast, Dorsey testified that upon the appellant’s return to work in April 2006 following neck surgery, when the appellant presented Dr. Sonnino’s April 18, 2006 letter setting forth general physical restrictions for her,<sup>1</sup> Dorsey requested that the appellant get more specific medical information and he was instructed not to allow the appellant on the hangar floor until it was established exactly what the appellant could do, due to the CG’s liability for the appellant’s safety. HT 6/21 1B. Dorsey further testified that Hale put the appellant on administrative leave

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<sup>1</sup> Although he was the appellant’s immediate supervisor, Dorsey testified that he never actually saw Dr. Sonnino’s April 18, 2006 letter setting forth the appellant’s physical restrictions. HT 6/21 2A. Instead, Dorsey testified that he had heard about Dr. Sonnino’s letter from his supervisor John Pickett and from his second-line supervisor at the time, Danny Hale. *Id.*

and that he required the appellant to call in every day and told her that she could not come back to work until she provided more specific medical information. HT 6/21 2B. Hale testified that he insisted on more medical documentation because the nature of the appellant's injuries to her neck and back made him, as a layperson, "scared from a government liability point of view" to just tell the appellant to go back to work or to be safe about it, because after "one twist, one whatever, [the appellant] could end up in permanent paralysis." HT 6/20 1A. Dorsey, echoing Hale's testimony, asserted that the appellant, in contrast to Doshen, had gone to Hale to tell him she could not do the job anymore "and that ties our hands." HT 6/21 2B, 3A. After the appellant provided no further medical information, the agency proposed her removal for her physical inability to perform the duties of her position. IAF, Tab 5, Subtab 4D.

¶7 When Dorsey was asked why he allowed Doshen to continue in his aircraft mechanic position on light-duty but initiated a removal against the appellant for her physical inability to perform the duties of the same position, Dorsey testified that Doshen had developed a "niche" in his position, performing the tasks he was physically able to do, and that, unlike the appellant, Doshen never came forward to say that he couldn't do the job. HT 6/21 2B. Cook, by contrast, testified that he gave Doshen light-duty work because Doshen was a good employee and that he didn't want to put Doshen in a position in which he could hurt himself or that would cause him pain, like climbing on top of the airplane or working in a tight, cramped space. HT 6/20 4A. Further, Cook testified that he probably would have offered light-duty work to Doshen even if, like the appellant, Doshen had said he couldn't perform the duties of his position. *Id.* However, Cook insisted, contrary to Dorsey, that aircraft mechanics are supposed to work on the whole airplane, without specializing on any one part. *Id.* Cook was not the only witness to contradict Dorsey's stated reason for Doshen's unofficial light-duty assignment, i.e., Doshen's "niche" performing only the functions of the aircraft mechanic position which were within his obvious physical restrictions. Hale also

contradicted Dorsey, testifying that aircraft mechanics do not have specialties, but rather that a single crew of aircraft mechanics will, over a nine-month period, completely strip and rebuild an aircraft as a team, moving through all the tasks in order and seeing the job the whole way through before moving on to the next aircraft. HT 6/20 1B. Hale also testified regarding the rationale stated in his decision on the appellant's removal, i.e., the agency's need "to have a person performing the full duties [of the aircraft mechanic position] in a full time capacity." *Id.*; IAF, Tab 5, Subtab 4B at 1-2. Hale testified that he had a fixed number of aircraft mechanic positions, called "billets," and that, because he had detailed the appellant in April 2005 to work in the tool room for another product line at the ARSC, the five person crew on which the appellant had previously worked was down by one member and therefore only operating at 80% of its capacity, severely impacting the crew's ability to finish overhauling their assigned aircraft on time. HT 6/20 1B. Hale went on to explain that, regardless of the appellant's detail to another product line, her aircraft mechanic "billet" remained encumbered and the only way that he could get the appellant's former crew up to full strength was to remove the appellant in order to open up her billet. *Id.*

¶8 After holding a hearing, the AJ affirmed the appellant's removal, finding that the agency proved its charge, that the appellant failed to establish her affirmative defenses of harmful error, discrimination, and reprisal by preponderant evidence, and that the penalty did not exceed the bounds of reasonableness. IAF, Tab 41, Initial Decision (ID). After the Clerk of the Board granted her an extension, the appellant filed a timely PFR, arguing: That the AJ erred in finding that she failed to show harmful error; that the agency committed disability discrimination by failing to engage in the interactive process to find her a reasonable accommodation; that she established she was a victim of sex discrimination because she was disparately treated concerning her request for light-duty; that key witnesses were improperly excluded; and, that the AJ erred in

finding Hale credible. Petition for Review File (PFRF), Tab 3. The agency failed to respond.

### ANALYSIS

¶9 The appellant's PFR fails to establish her contentions regarding harmful procedural error, disability discrimination, and the conduct of her hearing below. Thus, the appellant fails to establish any reason to overturn the Initial Decision on those issues.

¶10 However, the record does establish by preponderant evidence that the agency treated the appellant disparately from Doshen, a similarly situated employee outside the appellant's protected group. To establish a claim of prohibited employment discrimination, an employee first must establish a prima facie case; the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Regarding disparate treatment, an employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that she is a member of a protected group, she was similarly situated to an individual who was not a member of the protected group, and she was treated more harshly or disparately than the individual who was not a member of her protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). However, in a case like this, where the record is complete and a hearing has been held, it is unnecessary to follow the traditional burden-shifting order of analysis; rather, the inquiry shifts from whether the appellant has established a prima facie case to whether she has demonstrated by a preponderance of the evidence that the agency's reason for its actions was a pretext for discrimination. *Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 52 (1998). The agency, under the circumstances presented, may have properly removed the appellant for her physical inability to perform the duties of her AM

position, “but only if the same criteria is applied alike” to men and women. *See McDonnell Douglas*, 411 U.S. at 804 (noting that the introduction of evidence which indicated that the employer did not apply the stated criteria for such an adverse action equally would be especially relevant to a showing that the employer’s stated reason for the adverse action was pretext for illegal discrimination). For the reasons set forth below, we find that the appellant established by a preponderance of the evidence that she was disparately treated with respect to her request for light-duty and that the agency’s reasons for removing her were pretext for discrimination on the basis of sex.

¶11 On the question of sex discrimination, the appellant contends that the AJ erred in determining that Tom Doshen, another aircraft mechanic at the ARSC whose physical condition, like the appellant’s, also precluded the performance of some of the essential functions of his position, was not similarly situated to the appellant. PFRF, Tab 3 at 11. The AJ found that the appellant and Doshen were not proper comparators because their respective situations were not “nearly identical.” ID at 15 (citing *Pleasant v. Department of Housing & Urban Development*, 98 M.S.P.R. 602, ¶ 15 (2005) (all relevant aspects of the appellant’s and the comparison employee’s employment situation must be nearly identical; they must have engaged in similar conduct without differentiating or mitigating circumstances that would distinguish either their misconduct or the appropriate discipline for it). The AJ determined that Doshen and the appellant were not similarly situated in part because of differences in their respective physical conditions, noting that Doshen only had knee surgery while the appellant had both neck and knee surgery. ID at 15. In further support of his determination that the appellant and Doshen were not similarly situated, the AJ noted that Doshen had not informed the CG that he could no longer work as an aircraft mechanic while the appellant had done so, and that Doshen had not provided the CG with restrictions from his physicians preventing him from performing the essential duties of an airline mechanic, while the appellant had

provided Dr. Sonnino's restrictions on lifting and working in tight spaces. *Id.* However, there are significant similarities between Doshen and the appellant, and the Board has held that potential comparators' respective situations do not have to be perfectly identical to be considered similar and comparable without differentiating or mitigating circumstances. *See Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶¶ 30-32 (2003). Thus, although the issue presented is whether the agency discriminated against the appellant on the basis of sex rather than on the basis of disability, we must explore the parties' respective physical conditions to determine if they are proper comparators.

¶12 While the AJ correctly noted several differences between the appellant and Doshen, ID at 15-16, those differences obscure the basic facts set forth above, which establish that, although Doshen and the appellant were both physically incapable of performing some of the essential functions of the aircraft mechanic position, the agency allowed Doshen to work light-duty for an indefinite period of time, until he eventually found a position with less demanding physical requirements, and the appellant was removed for her physical inability to perform the essential functions of her position. Although the AJ also correctly noted that only the appellant, not Doshen, presented medical documentation which prevented her from performing some of the essential functions of her aircraft mechanic position, ID at 15, Cook's and Dorsey's testimony make it clear that Doshen, without having to ask, received the same consideration that the appellant requested but that the agency denied to her, i.e., relief from the performance of the essential functions of the aircraft mechanic position that Doshen was unable to perform on account of his medical condition, HT 6/20 4A, 6/21 2B. Despite the fact that Doshen never presented medical evidence to the agency which documented his limitations, the record establishes that the agency perceived that both Doshen and the appellant were unable to perform essential functions of their aircraft mechanic position, but that each employee suffered disparate fates; Doshen received open-ended informal light-duty and the appellant was removed

for her physical inability to perform the essential functions of her position. Further, the agency apparently allowed Doshen to return to work after his knee surgery solely on the strength of his word that his physician gave him a full release and despite the fact the agency witnesses testified that they observed occasions when Doshen was barely able to walk or fell at work, but the agency required the appellant to provide further details following Dr. Sonnino's April 18, 2006 letter before it would let her work. The agency's insistence on further medical documentation from the appellant, while demanding none from Doshen, in spite of his patent physical deficits and the agency's knowledge of his condition, also establishes that the agency treated the appellant and Doshen disparately.

¶13 The appellant alleges that, had the agency offered the same consideration in work assignments to her that it gave to Doshen, "there would have been no need for a letter from her doctor" as well. PFRF, Tab 3 at 12. As the appellant aptly notes in her PFR, "the evidence supports the existence of a gentlemen's implied agreement or practice of only assigning Mr. Doshen work that he was physically able to perform." *Id.* at 11. Based on the testimony of these two employees' supervisors recounted above, we agree. Although the agency established legitimate reasons to remove the appellant for her physical inability to perform essential functions of the aircraft mechanic position, the agency's reasons are pretext because the same reasons applied equally to Doshen, but the agency afforded him open-ended light duty instead of removing him for his physical inability to perform the essential function of the position. Hale's testimony that the appellant's medical condition made him "scared from a government liability point of view" to allow the appellant to continue working, HT 6/20 1A, and Dorsey's similar testimony that the appellant's assertion that she could not perform some of the essential functions of the position "tie[d] our hands," HT 6/21 3A, could apply equally to Doshen. Hale and Dorsey's testimony that they were aware of Doshen's serious physical shortcomings, HT

6/20 1A, 6/21 3B, as well as Cook's testimony that he had observed that Doshen could barely walk and that he saw him fall down on the job, HT 6/20 4A, in light of the agency's decision to allow him to remain in his position anyway, support the existence of a tacit agreement to allow Doshen to work light-duty without proper documentation despite his known inability to perform essential functions of the AM position. The agency fails to explain why Dr. Sonnino's letter regarding the appellant's condition tied the agency's hands or made the government liable for the appellant's physical safety but the agency's obvious knowledge of Doshen's physical condition did not. The record reflects that the agency's stated rationale for removing the appellant, i.e., her physical inability to perform essential functions of the aircraft mechanic position, IAF, Tab 5, Subtab 4D, applied with equal force to Doshen, but the agency did not remove him. Hale's other stated rationale for removing the appellant, that the agency needed to have someone performing the full duties of the AM position in a full time capacity, also applied with equal force to Doshen, yet the agency did not remove him. Thus, the reasons which the agency set forth to justify the appellant's removal for her inability to perform the duties of the AM position, concern for her physical safety and the need to unencumber an aircraft mechanic billet to an employee that could do the full range of aircraft mechanic duties on a full time basis, applied equally to Doshen as well as to the appellant, but the agency failed to remove Doshen for his physical inability to perform the duties of his position.

¶14 Accordingly, the appellant has established by preponderant evidence that she was similarly situated to Doshen, an individual who was not a member of her protected group, in that both the appellant and Doshen could not perform some of the essential functions of the aircraft mechanic position, and that the agency treated them disparately; the agency allowed Doshen to work light-duty without requiring medical documentation of his obvious physical deficits until he found a position within his physical requirements while the appellant was forced to document her physical condition and was then removed for her physical inability

to perform the essential functions of her position based on that medical evidence. Because the agency removed the appellant, but failed to remove Doshen, even though the agency's stated reason for the appellant's removal applied equally to Doshen, the appellant has established that the agency's stated reason for her removal, i.e. her physical inability to perform the duties of the AM position, was pretext. Thus, we find that the appellant has established her affirmative defense of sex discrimination by a preponderance of the evidence. A removal motivated by discrimination against an employee on the basis of her sex is a personnel practice prohibited by 5 U.S.C. § 2320(b)(1)(A), and, in light of our finding that the appellant has established that the decision to remove her was based on this prohibited personnel practice, we DO NOT SUSTAIN the appellant's removal. *See* 5 U.S.C. § 7701(c)(2)(B).

#### ORDER

¶15 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective November 30, 2006.<sup>2</sup> *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.

¶16 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 Board's Order. If there is a dispute about the amount of back pay, interest due,

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<sup>2</sup> We acknowledge the inherent difficulty caused by our ordering the agency to restore the appellant to a position, the duties of which we have found she is unable to perform. We therefore encourage the parties to cooperate in locating a position that she can perform which is at the same grade level and pay as the position she formerly encumbered.

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.

¶17 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).

¶18 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).

¶19 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.

¶20 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 RIGHT TO REQUEST  
COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your compensatory damages, including pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. To be paid, you must meet the requirements set out at 42 U.S.C. § 1981a. The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202, and 1201.204. If you believe you meet these requirements, you must file a motion for compensatory damages **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

#### Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

#### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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](http://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:

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