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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN H. KERR

v.

NATIONAL ENDOWMENT FOR THE ARTS



OPINION AND ORDER

Appellant, a preference eligible occupying a Schedule A position in the excepted service, was separated from his position effective August 31, 1979. He thereafter appealed the action to the Board's Boston Field Office, which, after two unsuccessful attempts at obtaining a response by the agency, adjudicated the appeal based on appellant's representations and submissions. The initial decision found that appellant was entitled to appeal the action under 5 U.S.C. 7511(a), and that the agency's failure to process the action in accordance with the provisions of 5 U.S.C. 7513 constituted harmful error under 5 U.S.C. 7701(c) (2) (A). Accordingly, the agency was ordered to cancel the action.

In its petition for review, the agency asserts that appellant's separation was "carried out in a manner fully sensitive to (his) fundamental rights, and involved an unprecedented degree of patience, consideration, and leniency on the part of the (agency)" Submitted as evidence which was purportedly "unavailable at the time the record regarding Mr. Kerr's appeal was closed" are copies of two memoranda and two letters which it is claimed illustrate the agency's efforts to ensure that appellant's rights were given full recognition. Both the appellant and his attorney have responded to the petition. The attorney's response simply requests that the agency petition be denied as it fails to meet the criteria for review set forth at 5 C.F.R. 1201.115. Appellant's response consists of some 15 pages of arguments, as well as 16 submissions, most of which represent primarily an attempt to dispute the merits of the agency action.

Upon review of the agency petition and submissions, it is readily apparent that the agency has made no real attempt to satisfy the Board's criteria for review. All four agency submissions bear cover dates which precede the closing of the record by at least six months. Moreover, even if the Board were to accept what is little more than a belated agency attempt to argue the merits of the action, there is nothing presented that shows error in the initial decision. In fact, the agency petition and submissions clearly establish that it did not comply with any of the procedural requirements of 5 U.S.C. 7513. These procedures not having been afforded appellant, there is no difficulty in finding this omission a harmful error. White v. Department of the Treasury, MSPB Docket No. SF075299026, at 5 (October 15, 1980).

The Board, having fully considered the agency's petition for review of the initial decision issued on September 2, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

April 9, 1981

Date

Ronald P. Wertheim

Washington, D.C.