

CONTACT PERSON FOR MORE INFORMATION:
Larry Solomon, Deputy Director, 202–307–3106, ext. 44254.

Morris L. Thigpen,
Director.

[FR Doc. 02–5015 Filed 3–1–02; 8:45 am]

BILLING CODE 4410–36–M

MERIT SYSTEMS PROTECTION BOARD

Opportunity to File Amicus Briefs in *Charles F. Thomson v. Department of Transportation*, MSPB Docket No. AT–0752–01–0566–I–1

AGENCY: Merit Systems Protection Board.

ACTION: The Merit Systems Protection Board is providing interested parties with an opportunity to submit amicus briefs on whether the Board has appellate jurisdiction to review a final agency decision on an adverse action where the actual effective date of the action (here, the date when the employee would no longer be employed by the agency) has been stayed to allow exhaustion of administrative appeals (such as an appeal to the Board) pursuant to a collective bargaining agreement.

SUMMARY:

Background

The appellant in *Thomson v. Department of Transportation*, MSPB Docket No. AT–0752–01–0566–I–1, received a letter on April 18, 2001, from the manager of the facility where he was employed removing him from his Air Traffic Control Specialist position for misconduct effective April 27, 2001. In the notice of removal, the agency informed the appellant that he could grieve the removal through the negotiated grievance procedure or appeal the matter to the Board. Citing the collective bargaining agreement between the agency and the National Air Traffic Controllers Association, an Association representative requested that the appellant be allowed to exhaust his appeal rights before the removal became effective. The relevant collective bargaining agreement provision states that the agency may allow an employee “subject to removal or a suspension of more than fourteen (14) days the opportunity to exhaust all appeal rights available under this Agreement before the suspension or removal becomes effective.” Statutory appeal rights to the Board are available under the agreement. In a May 7, 2001 letter, the deciding official in the appellant’s

removal approved the Association’s request and stayed the appellant’s removal. It is undisputed that the appellant remains in a pay and duty status.

Through his representative, the appellant filed an appeal of his removal. After allowing for argument from the parties, the administrative judge dismissed the appeal for lack of jurisdiction, reasoning that the appellant’s removal had not been effected. The appellant has filed a petition for review arguing that the Board has jurisdiction over his appeal. The agency has responded in opposition to the petition.

Question To Be Resolved

This appeal raises the question of whether the Board has appellate jurisdiction to review an otherwise appealable action which has been subject to a final agency decision which, however, has been stayed pursuant to the terms of a collective bargaining agreement that allows the employee to exhaust administrative appeals, such as an appeal to the Board, before the adverse action becomes effective.

Issues To Be Considered In Resolving The Question Posed

Title 5 of the United States Code, section 1204(h), states that “[t]he Board shall not issue advisory opinions,” and title 5 of the United States Code, section 7513(d) provides that “an employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.” (Emphasis supplied.) These statutes raise the question of whether an adverse action “is taken” when a final decision is made or when the action actually is effectuated (for example, the date when the employee no longer is employed by the agency), and whether a Board decision on a final, but not yet effectuated, adverse action constitutes a prohibited advisory opinion.

Also relevant to the question raised in this appeal is the decision of the United States Court of Appeals for the District of Columbia Circuit in *National Treasury Employees Union v. Federal Labor Relations Authority*, 712 F.2d 669 (D.C. Cir. 1983). While the Board is not bound by decisions of the District of Columbia Circuit Court, the Board can look to such decisions for guidance. In *National Treasury Employees Union*, the court found that the Federal Labor Relations Authority erroneously reasoned in a negotiability decision that the Board lacked jurisdiction over an adverse action where the execution of the adverse action had been delayed

under the terms of a collective bargaining agreement. The court concluded that the Customs Bureau was required to negotiate over a collective bargaining agreement provision similar to the one at issue here because the Board had jurisdiction over final, but not yet effected, actions.

Finally, the Board advises interested parties about the practice of the U.S. Postal Service where, pursuant to a collective bargaining agreement, the agency places employees in a non-pay, non-duty status after a removal action, even though the individual remains on the agency’s rolls. The Board has considered this practice of placing employees in a non-pay, non-duty status, while still on the agency’s rolls, and has held that it may exercise jurisdiction over such adverse actions by the Postal Service. *See Benjamin v. U.S. Postal Service*, 29 M.S.P.R. 555, 556–57 (1986); *see also Anderson v. U.S. Postal Service*, 67 M.S.P.R. 455, 457 (1995). Whether there is a distinction between allowing an employee to exhaust administrative appeals before the adverse action actually is effectuated and the practice of the U.S. Postal Service is one of the issues the Board will consider in addressing the question posed above.

DATE: All briefs in response to this notice shall be filed with the Clerk of the Board on or before March 22, 2002.

ADDRESSES: All briefs shall include the case name and docket number noted above (*Thomson v. Department of Transportation*, MSPB Docket No. AT–0752–01–0566–I–1) and be entitled “Amicus Brief.” Briefs should be filed with the Office of the Clerk, Merit Systems Protection Board, 1615 M St., NW., Washington, DC 20419. Because of possible mail delays caused by the closure of the Brentwood Mail facility, respondents are encouraged to file by facsimile transmittal at (202) 653–7130.

FOR FURTHER INFORMATION CONTACT: Shannon McCarthy, Deputy Clerk of the Board, or Matthew Shannon, Counsel to the Clerk, at (202) 653–7200.

Dated: February 26, 2002.

Robert E. Taylor,
Clerk of the Board.

[FR Doc. 02–4974 Filed 3–1–02; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL INSTITUTE FOR LITERACY

Notice of Meeting

AGENCY: National Institute for Literacy (NIFL).

SUMMARY: This notice sets forth the schedule and proposed agenda of a