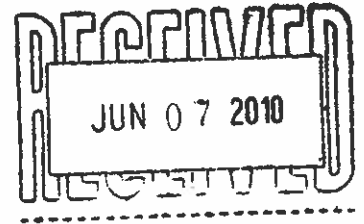


UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
ATLANTA REGIONAL OFFICE



KELLY J. SMITH,  
Appellant,

DOCKET NUMBER  
AT-3443-10-0393-I-1

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: June 4, 2010

Vicki L. Fuller, Huntsville, Alabama, for the appellant.

Walter A. Baker, Esquire, Redstone Arsenal, Alabama, for the agency.

**BEFORE**  
Stuart A. Miller  
Administrative Judge

**INITIAL DECISION**

**INTRODUCTION**

On February 2, 2010, the appellant filed an appeal from the agency's action terminating his law enforcement availability pay (LEAP) effective December 10, 2009.<sup>1</sup> The appellant is employed by the agency as a Game Warden, GL-1812-09, Redstone Arsenal, Alabama. For the reasons below, the agency's action is REVERSED.

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<sup>1</sup> The record reflects that the agency did not provide the appellant with appeal rights regarding this action. Thus, the time limit for filing the appeal is waived.

## ANALYSIS AND FINDINGS

The appellant is a Game Warden, GL-1812 series. He receives availability pay under the Law Enforcement Availability Pay Act of 1994 (LEAPA), 5 U.S.C. § 5545a, in the same manner and under the same statutory and regulatory bases as Criminal Investigators. On September 30, 2009, the appellant signed his request for certification and his supervisor endorsed that certification by initialing the annual certification for availability pay, rendering the certification valid until October 1, 2010, at which time it would have to be recertified. Agency Response, Tab 4f, p.2. However, effective December 10, 2009, the appellant's LEAP was cancelled upon direction of Maurice Buchanan at higher command. Agency Response, Tabs 4a and 4c. This appeal followed.

The agency moved to dismiss the appeal for lack of jurisdiction arguing that the appeal concerned a premium pay matter, not a reduction in pay. Appeal File, Tab 4. The appellant responded to the agency's motion and, after considering the submissions of the party, a telephonic status conference was conducted with the parties on May 24, 2010 and an Order To Show Cause why the agency action should not be reversed as a matter of law was issued May 25, 2010. Neither party responded to the Order To Show Cause.<sup>2</sup>

The Board has jurisdiction over reductions in pay. *See* 5 U.S.C. § 7512(4). "Pay" is defined as "the rate of basic pay fixed by law or administrative action for the position held by an employee." 5 U.S.C. § 7511(a)(4). "Premium pay" is typically not part of the basic rate of pay and a denial of premium pay is not appealable as a reduction in pay. For Game Wardens and Criminal Investigators, however, an "involuntary suspension of availability pay resulting from a denial or cancellation of certification under paragraph (d) of this section is a reduction in

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<sup>2</sup> The appellant did, however, file a submission withdrawing his allegation of discrimination based on age. Appeal File, Tab 10.

pay for the purposes of applying the adverse action procedures of 5 U.S.C. § 7512....” 5 C.F.R. § 550.184(e).

To be entitled to availability pay under LEAPA, the criminal investigator/game warden and appropriate supervisory officer “shall make an annual certification to the head of the agency attesting that the investigator currently meets, and is expected to meet, during the upcoming one-year period, the substantial hours requirement in section 550.183.” 5 C.F.R. § 550.184(b). Other than leaving federal service, leaving the agency, being reassigned out of the criminal investigator series, or voluntarily opting out of the program—situations where certifications no longer apply—there are only two other bases for denying or canceling a certification. 5 C.F.R. § 550.184(c) and (d). Under subsection (d), the agency may deny or cancel a certification based only on a finding that an investigator has failed to perform unscheduled duty as assigned or reported, or is unable to perform unscheduled duty for an extended period due to physical or health reasons.”

The agency’s motion to dismiss was based on the agency’s belief that the Board’s holdings in *Gaffney v. Department of the Army*, 81 M.S.P.R. 241 (1999), and *Martinez v. Department of the Treasury*, 71 M.S.P.R. 262, 264 (1996), *aff’d*, 126 F.3d 1480 (Fed. Cir. 1997), support its position that the agency can terminate the appellant’s LEAPA because it did not issue a specific denial of certification. Instead, the agency simply terminated his entitlement to the pay.

*Martinez* involved a case where the appellant was reassigned out of the Criminal Investigator position; section 550.184(c) specifically provides that a certification of availability pay under LEAPA no longer applies. *Gaffney* involved a case where the agency had never issued a certification in the first place. Thus, there was no specific denial or cancellation of certification that would provide the Board with jurisdiction.

In terminating the appellant’s LEAP herein, however, the agency’s action did not cite any of the regulatory bases for canceling that eligibility. That the

agency argues that it simply terminated the appellant's LEAP pay and did not cancel any certification elevates form over substance. A certification was issued, it was acted upon, and the appellant, who remains in a Game Warden position and is ready and willing to serve, is being denied the entitlement that that certification provides.

Thus, the agency's action must be reversed as a matter of law.<sup>3</sup>

### DECISION

The agency's action is REVERSED.

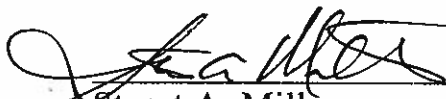
### ORDER

The agency is ORDERED to restore the appellant's law enforcement availability pay effective December 10, 2009.

### INTERIM RELIEF

Although appellant is the prevailing party, I have determined not to order interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A) because the decision requires the payment of funds from the treasury and those payments may, on appeal, be determined not to be authorized.

FOR THE BOARD:

  
Stuart A. Miller  
Administrative Judge

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<sup>3</sup> The agency action also fails as a denial of due process inasmuch as the agency did not provide the appellant with notice of its intent to cancel the LEAP and an opportunity to respond.

## NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

## NOTICE TO APPELLANT

This initial decision will become final on **July 9, 2010**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

## BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.,  
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and

may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

### **JUDICIAL REVIEW**

If you are dissatisfied with the Board's final decision, you may file a petition with:

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

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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.

### **ENFORCEMENT**

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

### **NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail                    Kelly J. Smith  
                                    4280 County Road 1212  
                                    Vinemont, AL 35179

Appellant Representative


U.S. Mail                    Vicki L. Fuller  
                                    3202 Mauler Road  
                                    Huntsville, AL 35898

Agency Representative

U.S. Mail                    Walter A. Baker  
                                    Department of the Army  
                                    U. S. Army Aviation & Missile Command  
                                    AMSAM-L-G/W.A.Baker  
                                    5300 Martin Road  
                                    Redstone Arsenal, AL 35898

June 4, 2010

(Date)

  
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Jeanne Robinson  
Paralegal Specialist