

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

JAMES R. STEWART,
Appellant,

DOCKET NUMBER
DC-0752-00-0696-M-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: December 29, 2004

Robert J. Fiore, Esquire and Peter B. Broida, Esquire, Arlington, Virginia,
for the appellant.

Maxwell G. Selz, Wiesbaden, Germany, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 As explained below, pursuant to an unpublished decision of the U.S. Court of Appeals for the Federal Circuit remanding this case to the Board, *Stewart v. Department of the Army*, 104 Fed. Appx. 718 (Fed. Cir. 2004), we find that the agency is in noncompliance with the settlement agreement entered into by the parties.

¶2 In 1997, the appellant, then a professor at the Army Management Staff College at Fort Belvoir, Virginia, accepted an overseas assignment to the GS-15 position of Base Operations Manager with the 104th Area Support Group, Hanau, Germany. Initial Appeal File (IAF), Tab 21, Exhibit 10. Effective July 2, 2000,

the agency demoted the appellant from the GS-15 position to the GS-11 position of Budget Analyst based on charges of abuse of supervisory authority, conduct unbecoming a Federal supervisor, insubordination, and making false statements. IAF, Tab 4, Subtabs 4b, 4c, 4d, 4e. The appellant petitioned for appeal. IAF, Tab 1.

¶3 During proceedings before the administrative judge, the parties entered into a settlement agreement providing that the agency would change the penalty for the charged misconduct to a 90-day suspension, effective beginning July 2, 2000, and release the appellant from his overseas tour obligation in return for the appellant's exercising his right to return to his former position, withdrawing all pending appeals, and waiving any claim for personnel records adjustment. IAF, Tab 32. The administrative judge issued an initial decision that entered the agreement into the record as enforceable by the Board and dismissed the appeal. IAF, Tab 34. The initial decision became the final decision of the Board when neither party petitioned for review.

¶4 Subsequently, the appellant filed a petition for enforcement. Compliance Initial Appeal File (CIAF), Tab 1. He alleged that the agency breached the agreement by allowing a collection action "as the result of a late processing of suspension effective July 2nd, 2000, NTE September 29, 2000." *Id.*, Exhibit A. He alleged that the collection action violated 31 U.S.C. § 1342, which provides that a federal employee may not waive compensation for time worked, because he worked in the demotion position during the period reflected on the suspension SF 50 and for which the Defense Finance and Accounting Service (DFAS) seeks repayment. CIAF, Tab 4.

¶5 The administrative judge found that the agency was in compliance with the agreement. CIAF, Tab 7. She found that the agreement failed to provide that the suspension would be a "paper suspension," i.e., a suspension without loss of pay, and that the agreement thus did not obligate the agency to assure that the appellant would not be subject to a collection action. *Id.* She found that the

appellant must raise his claim that collection of the money he was paid from July 2 through September 29, 2000, would violate 31 U.S.C. § 1342 with DFAS or with his employing agency. *Id.*

¶6 The compliance initial decision became the final decision when the Board denied the appellant's petition for review, *Stewart v. Department of the Army*, 95 M.S.P.R. 297 (2003) (Table), and the appellant filed a petition for review with the Federal Circuit. The court vacated the Board's final decision and remanded the case to the Board to reconsider the petition for enforcement and to issue a decision correctly interpreting the settlement agreement in keeping with the court's opinion.

¶7 As the court noted, the issue in this case is what is meant by the contract terms "change the penalty . . . from a demotion to a 90 day suspension, effective 2 July 2000." IAF, Tab 32. The agency originally proposed and enforced the appellant's permanent demotion from GS-15 to GS-11, contemplating that he would continue without a break in government service, just at the reduced GS level. In the court's view, the settlement agreement, arrived at more than 90 days after the appellant had been demoted, but expressly dating his 90-day suspension to run from July 2, 2000, can only be interpreted to mean that the appellant was to continue to work, but in suspension from his GS-15 status for 90 days. Accordingly, the court reasoned, the correct interpretation of the agreement is that the appellant was to serve a 90-day suspension from the GS-15 position. The appellant in fact served that suspension, since for the 90 days in question he served as and was paid for the GS-11 status. He was denied the difference in pay between a GS-11 position and a GS-15 position for the specified 90 days. Under the court's interpretation of the settlement agreement, there are no monies owed by the appellant to the government.

¶8 Further, under the court's interpretation of the settlement agreement, the parties have fulfilled their agreement and the agency erred in seeking recoupment of pay from the appellant. Since the appellant served his 90-day suspension from

the GS-15 rank and pay, and since that was the bargain to which he agreed, there is no basis to assert that there is money due from him to the agency on account of the demotion/suspension action taken by the agency. As the agency conceded, the law prevents the agency from accepting voluntary services. The notion that the appellant tendered his GS-11 pay as consideration for the agency's agreement is incorrect in the court's view. The settlement agreement has a separate section addressing the consideration given by the appellant and that section does not refer to money he would owe the agency. In sum, under the court's reading of the settlement agreement, there are no monies due from the appellant to the agency.

ORDER

¶9 Accordingly, we ORDER the agency to submit to the Clerk of the Board within 20 days of the date of this Order satisfactory evidence of compliance with this decision. The agency's submission must include proof that it paid the appellant at the GS-11 salary level during the period of his 90-day suspension that began on July 2, 2000, and that it has resolved the collection action in a manner such that the appellant has received full payment at the GS-11 level for the full period of that suspension. The agency must serve all parties with copies of its submission.

¶10 We also ORDER the agency to identify the individual who is responsible for ensuring compliance and file the individual's name, title and mailing address with the Clerk of the Board within five days of the date of service of this Order. This information must be submitted even if the agency believes that it has fully complied with the Board's Order. If the agency has not fully complied, it must show cause why sanction, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) and 5 C.F.R. § 1201.183, should not be imposed against the individual responsible for the agency's continued noncompliance.

NOTICE TO APPELLANT

¶11 You may respond to the agency's evidence of compliance within 15 days of the date of service of that evidence. If you do not respond, the Board will assume you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.