

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

2009 MSPB 6

Docket No. PH-0752-07-0298-X-1

**James Galatis,
Appellant,**

v.

**United States Postal Service,
Agency.**

January 27, 2009

Richard Heavey, Esquire, Brookline, Massachusetts, for the appellant.

Michael Salvon, Esquire, Windsor, Connecticut, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This decision addresses the appellant's petition for enforcement of the settlement agreement with the agency that resolved his appeal of a demotion. *Galatis v. U.S. Postal Service*, MSPB Docket No. PH-0752-07-0298-I-1 (August 29, 2007). In a previous decision in this compliance proceeding, the Board resolved an issue about the computation of the appellant's back pay and ordered the agency to provide evidence of its payment with documentation showing the calculations on which it was based. *Galatis v. U.S. Postal Service*, MSPB Docket No. PH-0752-07-0298-X-1 (August 21, 2008). In response to the evidence then submitted by the agency, the appellant has raised various objections, to which the

agency has replied. For the reasons set forth below, the Board finds that the agency is for the most part in compliance with the agreement, but in one respect must take additional action to be in full compliance.

BACKGROUND

¶2 In his response to the agency's evidence of compliance, the appellant challenges the adequacy of the agency's compliance with the term of the settlement agreement providing "that the Appellant will be afforded back pay from the effective date of the agency action, which was March 17, 2007." The agency paid the appellant the difference between the basic pay that he would have earned during the back pay period as an EAS-17 supervisor at the top step and the basic pay that he actually earned in the PS-05 position to which he was demoted.¹ The appellant now contends that under this provision he is also entitled to additional night differential pay for work actually performed during this period and to additional "pay for performance" that he would have earned as a supervisor during this time had he not been demoted, as well as to such pay for his performance in the year preceding his demotion. He also argues that the agreement's back pay provision entitles him to an adjustment of his annual leave balance. Finally, the appellant objects to the agency's issuance of corrected income tax reporting forms retroactively increasing his income. He argues that they are not consistent with the agency's agreement in the settlement to waive collection of allegedly erroneous Sunday premium pay that he received. Compliance Referral File (CRF), Tab 17. The agency responds that calculating the appellant's night differential and other premium pay as he suggests would entitle him to less pay than he received, that he is not entitled to pay for

¹ In its previous decision, the Board rejected the appellant's contention that he was entitled to the difference between what he earned during the back pay period and the pay of his former EAS 19 position. *Galatis v. U.S. Postal Service*, PH-0752-0298-X-1 (August 21, 2008). This claim, which the appellant reiterates here, will not be further addressed by the Board.

performance since he did not work as a supervisor during the back pay period, and that the corrected tax forms merely returned him to the tax status he had before his Sunday premium pay was challenged. The agency did not address the appellant's leave adjustment claim. CRF, Tab 20.

ANALYSIS

¶3 When a settlement agreement provides for “back pay” without further defining this term of art, the Board will apply the regulatory or statutory definition of the term, unless the agreement reveals a contrary intent. *Bergquist v. Department of the Interior*, [99 M.S.P.R. 516](#), ¶ 8 (2005). The appellant is not a preference eligible employee covered by the Back Pay Act, and therefore the Board will construe the term consistent with the agency's Employee and Labor Relations Manual (ELM) since no contrary intent is evident. The parties do not dispute that under the ELM back pay includes night differential pay. *See Toth v. U.S. Postal Service*, [85 M.S.P.R. 404](#), ¶ 9 (2000). What the appellant seeks is the difference between the night differential pay that he would have received in his supervisory position and what he received for night work in his PS-05 craft position because the former's differential is calculated at a higher rate. The agency concedes that using the higher supervisory rate (a percentage of gross hourly pay) instead of the flat rate applicable to craft employees would have increased the appellant's night differential pay by a small amount. However, the agency submitted evidence showing that the overtime pay that appellant received as a craft employee was much larger than what he would have been entitled to as a supervisor and that this advantage to him more than cancels out the advantage in night differential pay on which he relies. *See* CRF, Tab 20, Exhibits 1-3. The agency notes that, if it were to recalculate all of the appellant's premium pay received during the back pay period at the supervisory rate, the appellant would owe the agency money. Under these circumstances, we find that the agency's

decision not to recalculate the appellant's premium pay was appropriate and that he is not entitled to additional night differential pay as part of his back pay.

¶4 The appellant also contends that the settlement agreement's provision granting him back pay as an EAS-17 supervisor to March 17, 2007, makes him retroactively entitled to a pay for performance award as a supervisor, and he states that the payment of this additional pay for fiscal year 2007 ranged from 5% to 12% of base annual salary. The agency responds that the appellant was not entitled to such pay in the form of a bonus or a raise because during the back pay period he never worked as a supervisor and so did not have supervisory goals in terms of which his performance could have been rated. However, the appellant's absence from the kind of position to which he has now been restored is not necessarily dispositive.

¶5 Under certain circumstances, the Board has found that employees may be entitled to back bonuses under the terms of a settlement agreement. Thus in *Basbas v. U.S. Postal Service*, [74 M.S.P.R. 516](#), 520-21 (1997), a settlement agreement in a demotion appeal provided that the appellant would receive saved grade, pay and benefits in a reassignment that would be substituted for the demotion. Despite the appellant's absence from a managerial position during the entire period, the Board held that the appellant was entitled to a merit increase benefit that was awarded to all managers in the district. Similarly, in *Vaughan v. U.S. Postal Service*, [77 M.S.P.R. 541](#), 547-48 (1998), where the appellant also settled his appeal of a demotion, he contended that a bonus was a benefit due him under the agreement because it provided that he would receive a retroactive rating of "satisfactory" and all managers in his district who received this rating or better received the bonus. The Board held that the appellant could be entitled to the bonus if his allegations were true and no other circumstance disqualified him and remanded the case for consideration of additional evidence bearing on the issue.

¶6 These cases are consistent with the general rule in cases where the Board has ordered back pay in a decision. The Board has held that an agency may be

required to include pay for performance as part of an appellant's back pay, but only if some provision of law mandates the payment or the appellant clearly establishes that he would in fact have received such an award. *Blackmer v. Department of the Navy*, [47 M.S.P.R. 624](#), 631-32 (1991). In *Blackmer*, the Board found that the performance award at issue was discretionary, not mandatory, and that the appellant failed to show he would have received such an award. The Board indicated that he could have shown such entitlement by evidence that his performance before or during his reassignment to another foreman position warranted one. *Id.* at 632. Here, the appellant merely asserts that, since the agreement retroactively placed him in an EAS-17 position, he is entitled to an award of pay for performance as part of his back pay. While he states that the EAS performance awards made for 2007 ranged from 5% to 12% of base annual salary, he has not asserted or provided any evidence that the awards were mandatory or that all EAS supervisors received them. We find that he has not clearly established that he would have received such an award and that therefore the agreement does not entitle him to pay for performance as a part of his back pay.²

¶7 The appellant also claims that he is entitled to restoration of certain leave that he took during the back pay period. He states that as a craft employee he took partial leave (less than half a day) totaling 66.45 hours (63.45 hours of annual leave and 3 hours of sick leave) and that, under ELM § 519.72, supervisors are not required to take leave for absences of less than half a day.³

² The appellant also seeks pay for performance for fiscal year 2006 on the ground that he was unfairly excluded from eligibility when the agency issued the proposal to remove him that led to his demotion. This claim is outside the back pay period covered by the settlement agreement and therefore outside the scope of this proceeding.

³ This provision states that “partial day absences are paid the same as work time. . . . If approved, the time off is “personal absence time” and is not charged to annual leave, sick leave or LWOP.” CRF, Tab 17, Exhibit E.

The agency has not disputed the appellant's allegations or responded at all to the appellant's contention that this leave should be restored. The Board has held that an award of back pay includes the restoration of leave. *See Toth v. U.S. Postal Service*, 85 M.S.P.R. at 407, ¶ 9; *Rivera v. U.S. Postal Service*, [107 M.S.P.R. 542](#), ¶ 9 n.5 (2007). Accordingly, we find that the appellant is entitled to restoration of this leave.

¶8 The appellant also objects to the agency's issuance of new W-2c forms for tax years 2005 and 2006 that increase his income by the amount of Sunday premium pay, formerly disputed by the agency, which in the settlement it agreed not to collect. He contends that this action mistakenly provides for taxing a second time, as a forgiven debt, income on which he has already paid taxes and that it would require him to file an amended income tax return. The agency responds that the mistaken Sunday premium pay was reported as part of the appellant's income in 2005 and 2006, but the agency subsequently sought to recoup it and at that time issued new W-2c forms decreasing his income for those years. The agency notes that the W-2c forms to which the appellant now objects were issued after the agency's agreement to waive collection of the mistaken pay and that they merely restore the appellant's reported income to the level originally reported on which the appellant's income taxes for the years in question were based. Thus no amended returns or double taxation is threatened. The evidence submitted by the agency supports this contention. *See* CRF, Tab 20, McGinty Declaration. Accordingly, we find that the agency is in compliance with the provision of the agreement waiving collection of Sunday premium pay.

ORDER

¶9 We ORDER the agency to adjust the appellant's leave balance to restore the annual and sick leave that he took for absences of less than half a day that would not have been charged to leave if taken by an EAS employee. The agency must submit this evidence to the Clerk of the Board within 10 calendar days of

the date of this Order. The appellant may respond to the agency's evidence of compliance within 10 calendar days of the date on the agency's certificate of service. The lack of a response will be considered acceptance of the agency's actions as compliance with the Board's Order.

FOR THE BOARD:

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