UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 98

Docket No. SF-0752-06-0817-X-1

Andrew Clark,
Appellant,
v.
Department of the Air Force,
Agency.

June 5, 2009

Ronald P. Ackerman, Esquire, Culver City, California, for the appellant.

Patricia M. Mayberry, Esquire, El Segundo, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board based on a recommendation of the administrative judge which found the agency in noncompliance with a final Board order. For the reasons set forth below, we agree with the administrative judge's recommendation and find that the agency is NOT IN COMPLIANCE with the Board's final order.

BACKGROUND

¶2 Effective August 1, 2006, the agency suspended the appellant for 60 days and demoted him from his GS-13 supervisory administrative officer position to a GS-12 nonsupervisory position in another office at the same agency facility.

MSPB Docket No. SF-0752-06-0817-I-1, Initial Appeal File (IAF), Tab 8, Subtabs 4a and 4b. The appellant filed an appeal with the Board's Western Regional Office, and in an October 10, 2007 initial decision, the administrative judge sustained the allegations that the appellant had negligently performed his supervisory duties regarding time and attendance reports on various occasions between October 1, 2003, and September 30, 2004, and that he had made false official statements on November 17 and 18, 2004. IAF, Tab 26 at 23-30. The administrative judge mitigated the penalty to a 30-day suspension. *Id*. at 33-34.

¶3 The initial decision became the final decision of the Board when, in a May 7, 2008 decision, the Board denied the agency's petition for review. MSPB Docket No. SF-0752-06-0817-I-1, Petition for Review File, Tab 5. The Board ordered "the agency to cancel the demotion and 60-day suspension and to substitute in their place a 30-day suspension without pay and to restore the appellant effective August 1, 2006." *Id*. at 2. The Board also ordered "the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of [the] decision." *Id*.

¶4 In a petition for enforcement received by the regional office on September 5, 2008, the appellant complained that the agency had not complied with various aspects of the Board's final order. Docket No. SF-0752-06-0817-C-1, Compliance File, Tab 1. After affording the parties the opportunity to submit evidence and argument, the administrative judge agreed with the appellant that the agency had not restored him to the proper position and had not demonstrated that it had provided the appellant back pay, interest on back pay, and associated benefits of federal employment. *Id*., Tab 6 at 3-5. Regarding the position to which the appellant should be restored, the administrative judge stated that, because of a reclassification, a GS-14 Management Analysis Officer position was the "clear successor" to the job from which the appellant was demoted, and that the appellant "would have remained in the position at the higher grade level if the

unwarranted personnel action had not occurred." *Id*. at 4. Accordingly, the administrative judge found that the GS-14 position was the position "to which the appellant should have been returned following the Board's final order." *Id*. The administrative judge recommended that the Board find the agency in noncompliance and, accordingly, the matter was referred to the Board. *Id*. at 6.

ANALYSIS

¶5 An agency bears the burden of proving its compliance with a final Board order, and compliance must be supported by relevant, material, and credible evidence in the form of documentation or affidavits. *See New v. Department of Veterans Affairs*, 106 M.S.P.R. 217, ¶ 6 (2007); *Donovan v. U.S. Postal Service*, 101 M.S.P.R. 628, ¶¶ 6-7 (2006), review dismissed, 213 F. App'x 978 (Fed. Cir. 2006); *Brownlow v. Department of the Treasury*, 89 M.S.P.R. 223, ¶ 7 (2001). The appellant may rebut that evidence by making specific, nonconclusory, and supported allegations to the contrary. *See New*, 106 M.S.P.R. 217, ¶ 6; *Donovan*, 101 M.S.P.R. 628, ¶ 7.

¶6 The parties have made additional submissions regarding the agency's efforts at compliance and those pleadings have been considered. Several issues remain unresolved and accordingly, we will address those matters.

The appellant's entitlement to an exemplary performance award and a quality step increase

¶7 The agency explains that, consistent with the administrative judge's recommendation regarding the successor position to the position held by the appellant at the time of the adverse action, on March 3, 2009, it placed the appellant in a GS-14, step 2 position retroactive to April 16, 2006. Compliance Referral File (CRF), Tab 3 at 3. The agency provided an SF-50 documenting the appointment. CRF, Tab 5, Exhibit 9. According to the agency, based on the agreement of the appellant's attorney, the position the appellant was assigned to is in the Financial Management Office. CRF, Tab 3 at 3.

¶8 The appellant contends that he should have been placed at the GS-14, step 4 level instead of at the GS-14, step 2 level retroactive to April 16, 2006. CRF, Tab 4 at 5. The appellant reasons that he should have received an Exemplary Performance Award (EPA) "2 step pay increase in June 2005, which would have made [him] a GS-13, step 6" and a Quality Step Increase (QSI) on May 14, 2006, but that both actions were held in abeyance pending the outcome of the Merit Systems Protection Board appeal. *Id*. According to the appellant, these step increases should have been granted to him when the "adverse action was reversed." *Id*. He concludes that, if the agency had properly promoted him to the GS-13, step 6 level and then subsequently to the GS-13, step 7 level, he would have been placed at the GS-14, step 4 level in April 2006. *Id*.

¶9 Regarding the EPA 2 step increase, the agency disagrees with the appellant's contention and argues that the Board lacks jurisdiction over the claim because the appellant filed a formal equal employment opportunity (EEO) complaint alleging discrimination based on his failure to receive the EPA. CRF, Tab 5 at 4-5. According to the agency, in response to a show cause order issued by the United States District Court in the appellant's EEO litigation, the parties agreed that the Merit Systems Protection Board lacked jurisdiction over the denial of the EPA. *Id*. While the Board generally lacks jurisdiction over an appeal of a denial of a performance related award, such as an EPA or QSI, the Board's authority to restore an individual to the status quo ante following the reversal of an unwarranted personnel action is broad. *James v. U.S. Postal Service*, 60 M.S.P.R. 504, 509 (1994) (stating that "[t]he Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order, and broad authority to enforce compliance with that order."); *see Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984) (the Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order). Accordingly, the Board has the authority to determine the appellant's entitlement to an EPA as part of the remedy in this case.

¶10 The agency also argues that, even if the Board has jurisdiction over the appellant's claim of entitlement to an EPA, the Board should not order the agency to award the appellant such a benefit because the appellant engaged in misconduct, which was sustained by the administrative judge. CRF, Tab 5 at 5. Specifically, the agency argues that, because of the appellant's misconduct in 2004, which was sustained by the administrative judge, there was no basis to award the appellant an EPA in June 2005. *Id.*

¶11 The Board has held in the context of performance bonuses, which are similar to the performance-based step increases at issue here, that if an employee would have, in fact, received a performance award he is entitled to one as part of Board-ordered status quo ante relief. *Bullock v. Department of the Air Force*, 93 M.S.P.R. 217, ¶ 10 (2003); *Payne v. U.S. Postal Service,* 77 M.S.P.R. 97, 100-01 (1997). Here, the agency asserts that the appellant would not have received an EPA in June 2005 because of his misconduct in the previous year, but the agency has provided nothing to support this assertion. Nor has the appellant provided anything showing that he would have received the EPA despite the misconduct sustained by the administrative judge.

¶12 To be in compliance regarding this issue, the agency must submit evidence regarding the appellant's entitlement or lack of entitlement to an EPA. Such evidence would include any agency policies regarding the awarding of EPAs, how the agency treats EPAs with regard to employees similarly situated to the appellant, and any evidence addressing the appellant's circumstances and his entitlement or lack of entitlement to an EPA. *See Bulluck*, 93 M.S.P.R. 217, ¶ 9.

¶13 Regarding the appellant's entitlement to a QSI on May 14, 2006, the agency asserts that, pursuant to its policies, only employees at or above the step 4 level qualify for a QSI. CRF, Tab 5 at 4; Exhibit 11 at 3. The agency states that, because the appellant was retroactively placed in a GS-14, step 2 position effective April 16, 2006, he would not have been entitled to a QSI the following month. CRF, Tab 5 at 4. The appellant provides nothing showing that the policy identified by the agency is inapplicable to his

situation. Accordingly, we find the agency in compliance with regard to the appellant's entitlement to a QSI on May 14, 2006.

Other compliance issues

¶14 As mentioned above, the agency has placed the appellant in a GS-14 position consistent with the administrative judge's instructions. The record shows, however, that the position is described by the agency as "Unobligated" and the appellant is considered an "overhire." CRF, Tab 7 at 11 and 12. According to the appellant, the agency has not properly restored him because he "is now in a position for which the Agency has no funding and which is subject to be eliminated at anytime." *Id*. at 6-7. The agency has not explained the nature of the appellant's appointment and how that appointment constitutes status quo ante relief. Accordingly, the agency is in noncompliance in this regard.

¶15 In a March 31, 2009 submission, the agency admitted that it still needed to update the appellant's "Civilian Employee Career Brief" to delete references to the position held by the appellant while he was wrongly demoted. CRF, Tab 5 at 3. The agency also acknowledged that it still needed to correct the appellant's rating of record for the period from April 1, 2006, to March 1, 2007, to reflect the correct grade level. *Id.* The appellant agreed that these matters were still unresolved. CRF, Tab 7 at 5. Accordingly, the agency is still in noncompliance with the Board's final order regarding these matters.

¶16 In his compliance recommendation, the administrative judge noted that the agency had not provided a detailed explanation regarding its calculations of back pay, interest on back pay, payments to the appellant's retirement account, the crediting of leave, and the provision of other benefits which are an integral parts of an agency's obligation to comply with an order awarding back pay. CF, Tab 6 at 5. The agency has still failed to provide a detailed and understandable explanation of its calculations regarding the payments and benefits due to the appellant. Accordingly, the agency is in noncompliance in this regard. *See Dougherty v. Department of Agriculture*, 99 M.S.P.R. 161, ¶ 17 (2005) (finding an

agency in noncompliance where it had not "explained or established how it calculated the amount of the appellant's back pay award or interest.")

ORDER

¶17 Accordingly, we ORDER the agency to submit to the Clerk of the Board within 30 days of the date of this order satisfactory evidence of compliance with this decision. The agency's submission must include evidence and argument regarding: 1) the appellant's entitlement or lack of entitlement to an EPA; 2) the nature of the appellant's appointment and how that appointment constitutes status quo ante relief; 3) corrections to the appellant's Civilian Employee Career Brief and rating of record; and 4) a detailed and understandable explanation of the agency's calculations and payments regarding back pay, interest on back pay, contributions to the appellant's retirement account, the crediting of leave, and the provision of other benefits which are integral parts of an agency's obligation to comply with an order awarding back pay. The appellant may respond to the agency's evidence of compliance within 15 days of the date of service of the agency's submission. If the appellant fails to respond to the agency's evidence of compliance, the Board may find that he agrees that the agency is in compliance and dismiss the petition for enforcement.

¶18 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 sanctions, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) and

¶19 5 C.F.R. § 1201.183, should not be imposed against the individual responsible for the agency's continued noncompliance.

FOR THE BOARD:

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