

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

2009 MSPB 104

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

**James Galatis,
Appellant,**

v.

**United States Postal Service,
Agency.**

June 9, 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 In the Board's previous decision in this compliance proceeding, the Board ordered the agency to make an adjustment in the appellant's leave balance. The appellant agrees that the agency has made the ordered adjustment, and we find that the agency is in compliance with respect to this matter. However, the appellant has requested the Board to reconsider its determination in its previous decision that he is not entitled to pay for performance as part of the back pay to which the agency agreed. For the reasons stated below, the Board on reconsideration has determined that the appellant is entitled to pay for

performance during the back pay period and finds that its payment is required for the agency to be in full compliance.

BACKGROUND

¶2 This case involves the enforcement of a settlement agreement’s provision awarding back pay from the date of the appellant’s demotion to a PS-05 mail processing clerk position to the date he was placed in the top step of an EAS 17 supervisor position. In its previous decision, *Galatis v. U.S. Postal Service*, [110 M.S.P.R. 399](#), ¶ 3 (2009), the Board noted that the term “back pay” in a settlement agreement is given its regulatory or statutory meaning where, as in this case, the agreement does not show a contrary intent. The appellant contended that the back pay provision entitled him to pay for performance for fiscal years 2006 and 2007. The agency in response took the position that the appellant was not entitled to a pay for performance bonus or raise because he never worked as a supervisor during the back pay period.

¶3 The Board held that the appellant’s absence from his former position was not dispositive of his claim and cited demotion appeals in which the Board found that a bonus or merit increase was or could be required under a settlement agreement’s back pay provision. *Id.* at ¶ 5. The Board stated that an agency may be required to include pay for performance as part of back pay if a provision of law mandates the payment or if the appellant clearly establishes that he would in fact have received such an award. *Id.* at ¶ 6. The Board found that the appellant was not entitled to pay for performance during the back pay period because he merely asserted that he would have received it and failed to provide evidence that such bonuses were mandatory or that all EAS supervisors received them.¹ *Id.*

¹ The Board also rejected his claimed right to pay for performance for fiscal year 2006, noting that this year was outside the back pay period and not addressed by the settlement agreement. *Id.* at ¶ 6 n.2.

¶4 In seeking reconsideration, the appellant stated that all EAS employees in his unit received a pay for performance award for fiscal year 2007, and he submitted agency documents indicating that such awards were based 90% on the unit's corporate rating score and only 10% on the individual's rating. These submissions show, and the agency does not dispute, that pay for performance includes a merit increase in salary up to a pay ceiling and a lump sum payment of the amount exceeding the ceiling.² Compliance Referral File (CRF), Tab 23, Exhibit 2 at 1. The appellant also asserted that all EAS employees in his unit received at least a 5.75% of salary award for 2007. The appellant argued that in these circumstances pay for performance was not a discretionary bonus, but a mandatory benefit for all EAS employees in his unit to which he is entitled.³ CRF, Tab 23 at 2, 6.

¶5 The agency responded that the appellant's claim to pay for performance was not persuasive since he was not vindicated by a Board decision or a unilateral action by the agency, but instead was placed pursuant to a settlement agreement in a lower level supervisory position than the one from which he was demoted. The agency also objected to payment of a bonus which was not negotiated as a part of the settlement. Finally, the agency argued that, if an entitlement to pay for performance should be found, a lesser amount than the 5.75 % sought by the appellant should be awarded. The agency contended that the appellant's individual rating should be 0, in view of his absence, and that, using this factor, his overall rating would be 4, which under its rules would entitle him to a bonus of 2.5%. CRF, Tab 26.

² The parties agree that the ceiling for 2007 pay for performance was 2%.

³ The appellant also continues to present arguments concerning pay for performance during fiscal year 2006. However, he has shown no error in the Board's previous finding that the settlement agreement at issue here applies only to back pay in fiscal year 2007. *See* note 1, *supra*. Accordingly, these arguments will not be addressed.

¶6 The appellant in reply noted that the agency did not deny that all eligible EAS in his unit received pay for performance and that, because of weighted rating, the awards were primarily due to the performance of the cluster as a team. He disputed as contrary to the case law the agency's argument that a bonus could not be awarded in a settled case unless expressly provided for. Finally he noted the agency cited no precedent or authority in its pay for performance rules for an individual rating of 0. CRF, Tab 27.

ANALYSIS

¶7 The Board's previous decision found that the appellant failed to establish entitlement to pay for performance by merely asserting that eligible EAS employees in his unit received pay for performance awards for 2007 within a specified range. In his reconsideration request, the appellant has clarified his claim to state explicitly that all EAS employees in his unit received such bonuses, and he has submitted the agency's pay for performance rules and guidance to evidence how such awards are made. While there is no showing that this evidence was not available before, the Board has also considered the agency's initial response to the appellant's claim in determining whether to reconsider its previous ruling. The agency submitted no evidence concerning the basis on which it awards pay for performance or the extent of such awards in the appellant's unit for performance during 2007. Instead, it opposed the appellant's entitlement to pay for performance on the basis of his absence from a supervisory position during the back pay period, an argument previously rejected by the Board in other cases.

¶8 Although the appellant has the ultimate burden of proving his claim that the agency has not complied with the settlement agreement, the agency is required to produce evidence within its possession that is material to the appellant's claim. *See Vaughan v. U.S. Postal Service*, [77 M.S.P.R. 541](#), 546 (1998) (the appellant, as the party seeking enforcement of a settlement

agreement, has the ultimate burden of proving the agency's failure to comply, but the agency must produce relevant, material, and credible evidence of its compliance upon the filing of a petition for enforcement). For this reason, the Board ordered the agency to address the appellant's evidence in support of his request for reconsideration in the light of the Board's case law concerning bonuses as a part of back pay.

¶9 In its response the agency did not dispute the appellant's assertions that all EAS employees in his unit received pay for performance for 2007 or that unit performance is given 90% weight in the employee's overall rating. The latter assertion is clearly supported by the agency's pay for performance rules that the appellant submitted. The agency argued instead that the appellant should be denied a bonus because he did not obtain an express provision for it in the settlement and because he was not fully vindicated in that under the agreement he obtained only part of the relief he sought. CRF, Tab 26 at 4-5. However, the other terms of the settlement do not affect the meaning of "back pay," which, as noted above, is read in accordance with the applicable statute or regulation unless it is explicitly given a different meaning. Where this term is interpreted by reference to the Back Pay Act, an appellant is entitled to a bonus if all comparably situated employees received them unless some other circumstance disqualifies him. *See Amos v. U.S. Postal Service*, [84 M.S.P.R. 186](#) (1999). The agency cites no authority for disqualification based on the extent of the relief the appellant obtained.

¶10 In the alternative, the agency argued that, even if it should be found that the appellant is entitled to a pay for performance award, it should be awarded at a rate below the lowest salary percentage received by the other EAS employees in his unit. The agency reasoned that the individual rating that is part of the agency's pay for performance formula should be 0 in the appellant's case because he did not provide any performance during the back pay period. CRF, Tab 26 at 6-7. The agency states that using this rating for the appellant would result in a

bonus of 2.5% of salary.⁴ This argument is essentially another version of the previously rejected argument that the appellant's absence from his position precludes an award. There is no basis for assuming that the appellant would have received a 0 rating if he had remained in an EAS position during the back pay period.

¶11 The appellant's individual rating used in calculating his overall rating could reasonably be based on his performance in previous years, *see Blackmer v. Department of the Navy*, [47 M.S.P.R. 624](#), 632 (1991), but the parties have submitted no evidence concerning his prior ratings. Since the appellant seeks only the lowest amount (5.75%) in the range of awards that were received by employees in his unit, we do not think a remand for a more precise determination is necessary. We find that the appellant would have received pay for performance at least at the 5.75% rate. Since the parties do not dispute that the appellant's back pay includes the maximum 2% salary increase that was awarded as pay for performance in 2007, we find that this amount should be offset to determine the amount of pay for performance that year now due the appellant. Accordingly, we find that, in order for the agency to be in compliance with the settlement agreement's back pay provision, the agency must pay the appellant a lump sum payment of 3.75% of his 2007 EAS 17 salary.

ORDER

¶12 We ORDER the agency to award the appellant, as the balance of the pay for performance due under the parties' settlement agreement, a lump sum payment of 3.75% of the relevant salary. The agency must submit this evidence to the Clerk of the Board within 21 calendar days the date of this Order. The

⁴ In reaching this result, the agency gives the individual rating factor a weight of 30% and the composite or group rating score 70%, CRF, Tab 26, Attachment 2, without explaining its departure from the 10%/90% weighting set forth in the agency pay for performance rules in the record, CRF, Tab 23, Exhibit 2 at 1.

appellant may respond to the agency's evidence of compliance within 14 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.