UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 107

Docket No. CH-0752-07-0675-X-1

Lori E. Heath,

Appellant,

v.

Department of Agriculture,

Agency.

June 9, 2009

John Fabian, Esquire, Minneapolis, Minnesota, for the appellant.

Sandra J. Fortson, Esquire, Beltsville, Maryland, 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 an administrative judge which found the agency in noncompliance with a final Board order. For the reasons set forth below, we find the agency in compliance with the final Board order in this matter and DISMISS the petition for enforcement as MOOT.

BACKGROUND

¶2 The agency removed the appellant from her civilian pay technician position effective February 1, 2007, based on the appellant's absence without leave (AWOL) from September 1, 2006, to November 15, 2006. MSPB Docket No.

CH-0752-07-0675-I-1, Initial Appeal File (IAF), Tab 8, Subtabs 4a, 4c, 4h. The appellant appealed to the Merit Systems Protection Board, and in a February 7, 2008 initial decision, an administrative judge of the Central Regional Office reversed the removal action. IAF, Tab 51. In his initial decision, the administrative judge found that the appellant was incapacitated during the entire period that she was charged AWOL and that, because she had "sufficient leave to cover the entire period of her absence," the agency had "not fulfilled its burden to prove she was properly recorded in an AWOL status." *Id*. at 5. The administrative judge also found that the appellant established her affirmative defense of disability discrimination because she proved that she was a disabled person, she could perform the essential functions of her position with a reasonable accommodation, and the agency failed to provide the reasonable accommodation. *Id*. at 6-8. Finally, the administrative judge ordered "the agency to cancel the removal and to retroactively restore appellant effective **February 1, 2007**." *Id*. at 8 (emphasis in original).

¶3 The agency filed a petition for review of the administrative judge's decision, but the appellant did not file a cross-petition for review. *See* Petition for Review File. In an August 21, 2008 opinion and order, the Board dismissed the petition for review as untimely filed without good cause shown. *Heath v. Department of Agriculture*, 109 M.S.P.R. 684, ¶ 6 (2008). In that decision, the Board ordered the agency, within 20 days, "to cancel the appellant's removal and to restore the appellant effective February 1, 2007." *Id*., ¶ 7.

¶4 In a petition for enforcement received by the Central Regional Office on November 26, 2008, the appellant complained that the agency had not complied with the Board's final order. MSPB Docket No. CH-0752-07-0675-C-1, Compliance File, Tab 1. The agency did not respond to the petition for enforcement, and on January 16, 2009, the administrative judge recommended that "the Board order the agency to retroactively restore the appellant to her position with full back pay and benefits." *Id*., Tab 4 at 2. Because the

administrative judge recommended that the Board find noncompliance, the matter was referred to the Board's Office of General Counsel.

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) (Table); *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 In a February 24, 2009 filing, the agency asserted that it was in full compliance with the final Board order in this matter. MSPB Docket No. CH-0752-07-0675-X-1, Compliance Referral File (CRF), Tab 3. The appellant, however, disagreed with the agency's assertion in a March 11, 2009 submission. *Id*. Tab 4. The parties thereafter narrowed their areas of disagreement and made additional submissions regarding their respective positions on April 3 and 4, 2009, and those submissions have been considered. *Id*., Tabs 5 and 7. The sole issue before the Board at this point is the appellant's claim that she is entitled to back pay for the period from September 1, 2006, to February 1, 2007, during which she was carried in an AWOL status prior to her removal.[1] *See* CRF, Tab 5

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[1] In her April 3, 2009 submission, the appellant also complained that the agency had failed to pay her compensatory damages and attorney fees by March 20, 2009, as ordered by the administrative judge in two January 16, 2009 decisions in related matters. CRF, Tab 5 at 11. In a subsequent submission, the appellant acknowledged that the compensatory damages issue had been resolved. CRF, Tab 12. In a second submission, the agency filed a copy of a settlement agreement signed by the appellant, the appellant's representative, and the agency's representative resolving the attorney fees and costs issue. *Id*., Tab 13. Under its terms, the agreement is to be entered into

at 7-8, Tab 7 at 11. The essence of the appellant's argument is that, because the administrative judge found in his initial decision on the merits of the appeal that the agency was unjustified in placing her in an AWOL status, she is entitled to be made whole by being awarded back pay for the AWOL period. CRF, Tab 5 at 8-11. The agency counters by arguing, among other things, that the Board's order did not direct the agency to pay the appellant back pay for the period she was carried in an AWOL status. CRF, Tab 7 at 14. The agency states that, "[h]ad the Board intended for the Agency to provide payment and benefits to Appellant for the AWOL period, it would have specifically stated so in its Order." *Id*.

¶7 As set forth above, in the initial decision the administrative judge did not direct the agency to cancel the appellant's placement in an AWOL status or to pay her for that period of time, but rather directed the agency to "restore the appellant effective **February 1, 2007**." *See* IAF, Tab 51 at 8 (emphasis in original). The Board's order denying the agency's petition for review also did not address the AWOL period and ordered the agency "to cancel the appellant's removal and to restore the appellant effective February 1, 2007." *Heath*, 109 M.S.P.R. 684, ¶ 7.

¶8 There is no dispute that the agency has restored the appellant effective February 1, 2007. As stated above, the sole issue before us is the appellant's claim of entitlement to back pay for the period from September 1, 2006, to February 1, 2007. Such relief would exceed the scope of the remedy provided for by the plain language of both the February 7, 2008 initial decision and the August 21, 2008 opinion and order. *See* IAF, Tab 51; *Heath*, 109 M.S.P.R. 684,

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the record for purposes of enforcement. *Id*. Because the parties have freely and knowingly entered into a settlement agreement, which is lawful on its face, to resolve the question of attorney fees relating to this case, and because they want the Board to enforce those terms, we accept the settlement agreement into the record for purposes of enforcement. *See Stewart v. U.S. Postal Service*, 73 M.S.P.R. 104, 107 (1997); *Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 149 (1988).

¶ 7.[2] Both documents limited the appellant's relief to the period after February 1, 2007. Thus, there is no basis to require that the agency provide the relief now sought by the appellant to comply with the Board's final order.

ORDER

¶9 Because the agency has complied with the Board's final order in this matter and restored the appellant effective February 1, 2007, the petition for enforcement is dismissed as moot. This is the final decision of the Merit Systems Protection Board in this compliance matter. Title 5 of the Code of Federal Regulations, section 1201.183(b).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

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[2] In this regard, we note that the appellant could have filed a cross-petition for review of the administrative judge's initial decision seeking to extend the remedy ordered by the judge. Similarly, she could have sought judicial review before the Court of Appeals for the Federal Circuit of the Board's opinion and order.

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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. 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.

FOR THE BOARD:

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