UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 139

Docket No. CH-0752-08-0498-X-1

Dennis K. Harlan,

Appellant,

v.

United States Postal Service,

Agency.

July 21, 2009

W. Philip Jones, Esquire, Avon, Connecticut, for the appellant.

Judith L. Sandoval, Denver, Colorado, 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 settlement agreement between the parties that was entered into the record for purposes of enforcement. For the reasons set forth below, we find that the agency is now in compliance with the settlement agreement and DISMISS the petition for enforcement as MOOT.

BACKGROUND

¶2 The agency removed the appellant from his position as Postmaster in Sherrard, Illinois effective April 7, 2008, based on his alleged misconduct and he

filed an appeal with the Central Regional Office. MSPB Docket No. CH-0752-08-0498-I-1, Initial Appeal File (IAF), Tab 1, Tab 4, Subtabs 4b, 4f. While the case was pending before the administrative judge, the parties reached a May 29, 2008 settlement agreement. IAF, Tab 9. Under the terms of the agreement, among other things: 1) the appellant was to be reassigned to a part-time flexible clerk position in Bettendorf, Iowa, after he passed a physical examination; 2) if the appellant failed the physical exam, the agency would remove him based on his physical inability to perform his job; 3) the agency would rescind the removal decision letter "subject to the execution of the terms and conditions" of the settlement agreement; and 4) the agreement was to be entered into the record for purposes of enforcement. *Id.* Based on the settlement agreement, the administrative judge issued a June 4, 2008 initial decision dismissing the appeal as settled and entering it into the record for purposes of enforcement. IAF, Tab 10.

¶3 On February 26, 2009, the appellant filed a petition for enforcement complaining that the Postal Service had breached the terms of the parties' agreement. MSPB Docket No. CH-0752-08-0498-C-1, Compliance File (CF), Tab 1. The appellant explained that: 1) he failed the physical examination called for by the settlement agreement; 2) he applied for disability retirement with the Office of Personnel Management (OPM); and 3) in a January 26, 2009 decision, OPM denied his retirement application stating that the appellant's supervisor reported that the appellant had engaged in a "service deficiency in conduct." *Id.*; *see id.*, Exhibit C. The appellant argued that the agency's action in reporting his alleged misconduct to OPM was "exactly what the agreed to settlement was intended to prevent" and that the agency thus breached the agreement. CF, Tab 1 at 3. The appellant asserted that, because the agency's actions prevented him from obtaining a disability retirement, he should be restored to the position of Postmaster, subject to a physical examination. CF, Tab 6 at 2. The agency

maintained that the petition for enforcement should be denied because it submitted a corrected supervisory statement to OPM. *Id*., Tab 4 at 1-2.

¶4 In his April 17, 2009 recommendation, the administrative judge found that the agency had breached the terms of the settlement agreement and that the breach was material. CF, Tab 7 at 3. He stated that, while typically the non-breaching party may elect either to enforce the terms of the agreement or rescind the agreement and reinstate the appeal, because the agency's actions prevented the appellant from obtaining a disability retirement, the Board should direct the agency to cancel the removal action and restore the appellant to the postmaster position. *Id*. at 3. Upon the restoration, the appellant could be reassigned to the clerk position in Bettendorf subject to passing a physical examination. *Id*. at 4. Because the administrative judge recommended finding the agency in noncompliance, the matter was referred to the Board. *Id*.

ANALYSIS

¶5 The Board has the authority to enforce a settlement agreement which, like the agreement in this case, has been entered into the record. *Perkins v. Department of Veterans Affairs*, 106 M.S.P.R. 425, ¶ 4 (2007), *aff'd*, 273 F. App'x 957 (Fed. Cir. 2008); *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981). As the party asserting noncompliance, the appellant bears the burden of proving by preponderant evidence that the agency breached the settlement agreement. *Perkins*, 106 M.S.P.R. 425, ¶ 4; *Vaughan v. U.S. Postal Service*, 77 M.S.P.R. 541, 546 (1998). Following the appellant's filing of a petition for enforcement, the agency must produce relevant, material evidence of its compliance with the agreement. *Rivera v. U.S. Postal Service*, 107 M.S.P.R. 542, ¶ 4 (2007); *Vaughan*, 77 M.S.P.R. at 546.

¶6 After the administrative judge's recommendation and the referral of this matter to the Board, the parties made additional submissions in which they argued

about the agency's compliance.* CRF, Tabs 4-7. Subsequent to those submissions, the appellant made a June 25, 2009 filing in which he indicated that OPM had granted him disability retirement. *Id*., Tab 8 at 2. The appellant states that "OPM's decision is *de facto* confirmation that the [agency] has corrected the errors resulting in the Administrative Judge's Recommendation." *Id*. The appellant provides a copy of OPM's letter approving the disability retirement application. CRF, Tab 8, Exhibit A. The appellant states that, because the agency had complied, "this matter is moot." *Id*., Tab 8 at 2.

¶7 Based on the evidence of record, the appellant's assertion that the agency corrected the actions that led to the administrative judge's recommendation, and the statement that "this matter is moot," we find the agency in compliance with the parties' settlement agreement. Accordingly, the petition for enforcement is dismissed as moot.

ORDER

¶8 Because the agency has complied with the settlement agreement in this matter, 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:

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* The agency submitted various documents to support its assertions of compliance including several PS-50s notification of personnel action and a July 7, 2008 notice indicating the appellant's removal for physical inability to perform the duties of his position. MSPB Docket No. CH-0752-08-0498-X-1, Compliance Referral File (CRF), Tab 5, Exhibits 2, 3, 4.

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 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.