UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 167

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

Andrew Clark,

Appellant,

v.

Department of the Air Force,

Agency.

August 28, 2009

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

Patricia M. Mayberry, Esquire, and Capt. Sharoiha P.K. Jameson, 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 an administrative judge which found the agency in noncompliance with a final decision of the Merit Systems Protection Board (MSPB). In a June 5, 2009 opinion and order, the Board found that the agency remained in noncompliance and ordered the agency to provide specific evidence to demonstrate compliance. Thereafter, the agency submitted evidence showing that it is now in compliance with the final decision. Accordingly, we DISMISS the petition for enforcement as MOOT.

BACKGROUND

¶2 Effective August 1, 2006, the agency suspended the appellant for 60 days and demoted him from his supervisory administrative officer position to a 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 the correct back pay, interest on back pay, and associated benefits of federal employment. *Id*., Tab 6 at 3-5.

¶5 Because the administrative judge found the agency in noncompliance, the matter was referred to the Board. After the parties made additional submissions, the Board issued a June 5, 2009 opinion and order finding that the agency remained in noncompliance. *Clark v. Department of the Air Force*, 111 M.S.P.R. 477 (2009). The Board ordered the agency to submit evidence and argument demonstrating compliance regarding four specific matters and informed the appellant that he could respond to the agency's submission. *Id.*, ¶ 17. The Board also informed the appellant that if he failed 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." *Id.*

ANALYSIS

¶6 An agency bears the burden of proving its compliance with a Board order, and assertions of 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), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); *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). The appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions of continued noncompliance. *See New*, 106 M.S.P.R. 217, ¶ 6; *Donovan*, 101 M.S.P.R. 628, ¶ 7.

¶7 In response to the Board's June 5, 2009 decision, the agency made a July 13, 2009 submission, which it maintains demonstrates compliance. MSPB Docket No. SF-0752-06-0817-X-1, Compliance Referral File (CRF), Tab 14. The appellant has made a submission asserting ongoing noncompliance. *Id.*, Tab 15. For the reasons discussed below, we find that the agency is in compliance.

The agency is in compliance regarding the appellant's entitlement to an Exemplary Performance Award.

¶8 When the Board finds a personnel action unwarranted, the aim is to place the appellant, as nearly as possible, in the situation he would have been in had the wrongful personnel action not occurred. *See House v. Department of the Army*, 98 M.S.P.R. 530, ¶ 9 (2005); *Mascarenas v. Department of Defense*, 57 M.S.P.R. 425, 430 (1993); *see also Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). As set forth in the June 5, 2009 opinion and order, a major point of contention between the parties is whether the appellant is entitled to an Exemplary Performance Award (EPA)[1] as part of the make whole relief in this case. *Clark*, 111 M.S.P.R. 477, ¶¶ 7-13.

¶9 The agency argued that the Board lacked jurisdiction over the appellant's entitlement to an EPA, but in the June 5, 2009 opinion and order, the Board found that, while it generally lacks jurisdiction over an appeal of a denial of a performance-related award, such as an EPA or quality step increase, the authority to determine the appellant's entitlement to an EPA is part of the broad authority to restore an individual to the status quo ante following the reversal of an unwarranted personnel action. *Id.*, ¶ 11.[2] In the June 5, 2009 decision, the Board directed the agency to submit evidence "regarding the appellant's entitlement or lack of entitlement to an EPA." *Id.*, ¶ 12.

¶10 The appellant's argument is that he should have received an EPA in June 2005, but the award was held in abeyance pending the outcome of his MSPB appeal. CRF, Tab 12 at 6. He asserts that he is entitled to an EPA as part of

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[1] An EPA apparently affords an employee a two step pay increase similar to what a quality step increase does. CRF, Tab 14, Exhibit 1.

[2] *See also 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*, 726 F.2d at 733 (the Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order).

make whole relief because he would have received an EPA "if not for the [a]gency's action which was reversed." *Id*., Tab 15 at 5. The agency counters that the appellant is not entitled to an EPA for his performance between April 1, 2004, and March 31, 2005, because he engaged in misconduct during that period. *Id*., Tab 14 at 9-12. The appellant replies that the material distributed to agency employees describing the eligibility criteria for an EPA did not require that a recipient be "discipline-free." *Id*., Tab 15 at 5; *see id*., Tab 12, Exhibit 1

¶11 Contrary to the appellant's characterization, the agency's adverse action against him was not reversed. The administrative judge sustained the allegations that the appellant negligently performed his supervisory duties regarding time and attendance reports between October 1, 2003, and September 30, 2004, and made false official statements on November 17 and 18, 2004. MSPB Docket No. SF-0752-06-0817-I-1, IAF, Tab 26 at 23-30. While finding that the appellant engaged in misconduct, the administrative judge mitigated the demotion and 60-day suspension to a 30-day suspension. *Id*. at 33-34. Thus, the record shows that the appellant engaged in serious misconduct that went to the very core of his supervisory responsibilities and received a significant penalty as a result of his misconduct.

¶12 The agency provides an uncontradicted declaration made under penalty of perjury from Robert Rottweiler, the Human Resources Technical Director at the agency facility, explaining that EPAs were first awarded at the agency facility in May 2005, and that of the 90 employees who received such awards between 2005 and 2008, not one was the subject of a disciplinary action during the period for which he or she received the award. CRF, Tab 14, Exhibit 11. Rottweiler also stated that EPAs recognize the "highest performers during a specified appraisal cycle," and that, because the appellant engaged in misconduct during the 2004-

2005 appraisal cycle, the agency would never have allowed him "to receive the highest performance award reserved for its truly outstanding performers."[3] *Id*.

¶13 The agency also provides an uncontradicted declaration made under penalty of perjury from Marilyn Seneviratne, a supervisory human resources specialist for the agency, explaining the process for granting an employee an EPA. *Id*., Exhibit 14. According to Seneviratne, the Executive Director of the Space and Missile Systems Center must approve all EPAs, and she would "flag" and discuss with the Executive Director any EPA proposed for an employee subject to an adverse action. *Id*. Seneviratne also stated that "[a]warding an [EPA] to an employee engaging in misconduct during the appraisal cycle is contrary to our policy. This would be especially true where the conduct is directly related to the employee's performance standards." *Id*.

¶14 It is clear that EPAs are reserved for the agency's top employees demonstrating exceptional performance. The very title of the award, the small number of such awards given, the level at which the authority to approve such awards resides, and the declarations discussed above support this conclusion. There is, however, nothing exemplary about the performance of a supervisor, such as the appellant, who is suspended for 30 days based on his proven negligent performance of his supervisory responsibilities and making false statements. Thus, we agree with the agency that the appellant is not entitled to an EPA. Accordingly, the agency is in compliance with regard to this issue.

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[3] The appellant asserts that his supervisor stated that the appellant should have been given an EPA because he earned and deserved it and he was innocent until proven guilty. CRF, Tab 15 at 5; *id*., Tab 14, Exhibit 10. The supervisor also stated that he was instructed by his superior and the agency legal department not to take any actions regarding the appellant pending the outcome of an investigation. CRF, Tab 14, Exhibit 10. Regardless of what the appellant's supervisor believed should have been done, there is no indication that he had the authority to grant an EPA. *See id*. Exhibit 14.

The agency is in compliance regarding back pay, interest on back pay, retirement contributions, and the crediting of annual and sick leave.

¶15 In the June 5, 2009 opinion and order, the Board ordered the agency to provide 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." *Clark*, 111 M.S.P.R. 477, ¶ 17. The agency has now made a detailed filing containing spreadsheets and a narrative explanation addressing these matters. CRF, Tab 14.

¶16 As noted above, the appellant was informed that he could reply to the agency's evidence of compliance and that if he failed to respond "the Board may find that he agrees that the agency is in compliance." *Id*. Based on the agency's evidence of compliance and the appellant's failure to object to those assertions, we find that the agency is in compliance regarding the agency's back pay and related obligations.[4]

The agency is in compliance regarding the nature of the appellant's position, the correction of his "Civilian Employee Career Brief," and the correction of his performance rating.

¶17 In the June 5, 2009 opinion and order, the Board observed that the record shows that the position that the agency placed the appellant in is described as "unobligated" and the appellant is considered an "overhire." *Id*., ¶ 14; CRF, Tab 7 at 11 and 12. The Board noted that the agency had not explained the nature of the appellant's appointment and how that appointment constituted status quo ante relief. *Clark*, 111 M.S.P.R. 477, ¶ 14. Accordingly, the Board found that the agency was in noncompliance. *Id*.

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[4] To the extent that the appellant's purported entitlement to an EPA impacts his back pay and related benefits, as discussed above, the agency properly did not award the appellant an EPA.

¶18 In it response to the June 5, 2009 opinion and order, the agency explained that it permanently placed the appellant in a management analysis officer position and removed him from his overhire position. CRF, Tab 14 at 15. In support of that assertion, the agency provides an SF-50 documenting the appointment and a declaration made under penalty of perjury explaining the cancellation of certain personnel actions. *Id.*, Exhibit 7.

¶19 Finally, in its June 5, 2009 opinion and order, the Board noted that the agency acknowledged that it still needed to update the appellant's "Civilian Employee Career Brief," and make certain corrections to the appellant's performance rating for the period from April 1, 2006, to March 1, 2007. *Clark*, 111 M.S.P.R. 477, ¶ 15. In its latest submission to the Board, the agency asserts that it had completed both items. CRF, Tab 14 at 15-16. The agency provides documentary evidence in support of its assertions. *Id.*, Exhibits 15 and 23.

¶20 As noted above, the appellant was informed that he could reply to the agency's evidence of compliance and that if he failed to respond "the Board may find that he agrees that the agency is in compliance." *Clark*, 111 M.S.P.R. 477, ¶ 17. Based on the agency's assertions and evidence of compliance and the appellant's failure to object, we find that the agency is in compliance regarding the nature of the appellant's current appointment, the correction of his "Civilian Employee Career Brief," and the corrections to the appellant's performance rating for the period from April 1, 2006, to March 1, 2007.

ORDER

¶21 Because the agency has complied with the Board's final order 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:

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.