UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 63

Docket No. AT-0752-09-0163-X-1

Reginald B. Day,
Appellant,
v.
United States Postal Service,
Agency.

April 13, 2010

C. B. Weiser, Esquire, Marshall, Texas, for the appellant.

Richard S. Kessler, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board pursuant to a recommendation of the administrative judge that the Board grant the appellant's petition for enforcement and enforce the terms of a final Board order. For the reasons set forth below, we find the agency in noncompliance and order it to submit evidence and argument demonstrating compliance.

BACKGROUND

¶2 In a March 12, 2009 initial decision, the administrative judge found that the agency's placement of the appellant on enforced leave for more than 14 days

constituted a constructive suspension. MSPB Docket No. AT-0752-09-0163-I-1, Initial Appeal File, Tab 13. The administrative judge reversed the agency action and, among other things, ordered the agency to provide the appellant back pay and benefits and interest on back pay. *Id*. at 4. The initial decision became the final decision of the Board on April 16, 2009, when neither party filed a petition for review.

¶3 On July 7, 2009, the appellant filed a petition for enforcement of the March 12, 2009 initial decision, stating that the agency had failed to pay the appellant back pay for the constructive suspension period. MSPB Docket No. AT-0752-09-0163-C-1, Compliance File (CF), Tab 1. In response to the petition for enforcement, the agency argued that the appellant was not ready, willing, and able to work during the constructive suspension period, and, therefore, he was not entitled to back pay for that period. *Id.*, Tab 4. After considering the appellant's response to the agency's argument, the administrative judge found the agency's argument without merit and found that the appellant was entitled to back pay. *Id*., Tab 6 at 5. On November 3, 2009, the administrative judge recommended that the appellant's petition for enforcement be granted.

¶4 In his compliance recommendation, the administrative judge informed the agency that, if it agreed with the compliance recommendation, it had 15 days to submit to the Clerk of the Board evidence that it had taken the actions required by the recommendation. *Id*. at 6. The administrative judge also informed the agency that, if it decided not to take any of the actions required by the compliance recommendation, it had 30 days to file written arguments supporting its disagreement with the recommendation with the Clerk of the Board. *Id*.

¶5 Because the administrative judge found the agency in noncompliance, this matter was referred to the Board. In a November 9, 2009 acknowledgment order, the Clerk of the Board reiterated that, "[i]f the agency chooses to take all actions identified in the administrative judge's recommendation, the agency must submit evidence of compliance within 15 calendar days after the issuance of the

recommendation." MSPB Docket No. AT-0752-09-0163-C-1, Compliance Referral File (CRF), Tab 2 at 2. The Clerk of the Board also reiterated that, "[i]f the agency disagrees with all or part of the administrative judge's recommendation, the agency must submit evidence of partial compliance and written arguments supporting its disagreement with the recommendation within 30 calendar days after the issuance of the recommendation. 5 C.F.R. § 1201.183(a)(iii)." *Id*. Finally, the Clerk of the Board noted "a failure to comply with the final Board order in this case may result in the imposition of sanctions against the responsible agency official pursuant to 5 U.S.C. § 1204(e)(2)(A)." In a December, 9, 2009 letter to the Clerk of the Board, which was served on the agency representative, the appellant restated the requirements set forth above and inquired whether the agency had made a filing with the Clerk of the Board. CRF, Tab 3. As of the date of this decision, more than 160 days have passed since the issuance of the administrative judge's November 3, 2009 compliance recommendation, and the agency has failed to inform the Clerk of the Board whether it agrees or disagrees with the compliance recommendation.

ANALYSIS

The agency is in noncompliance with the final Board order.

¶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, *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006). In the instant case, the March 12, 2009 final Board decision ordered the agency to, inter alia, provide the appellant back pay and benefits and interest on back pay for the constructive suspension period. The agency's assertion that the appellant was not entitled to these items was found without merit in the compliance recommendation.

¶7 Despite the clear language of the compliance recommendation, the acknowledgment order, and the appellant's December 9, 2009 letter, the agency has failed to make a submission to the Board in response to the compliance recommendation. Because of the agency's failure to make a submission, nothing in the record shows that the agency has provided the appellant with back pay and benefits and interest on back pay as required by the final Board order. Accordingly, the agency is in noncompliance with the final order.

Acting Postal Service Vice President Linda J. Welch is the agency official responsible for compliance in this case.

¶8 As set forth above, the agency has failed to demonstrate compliance with the Board's final order in this matter. In the July 15, 2009 order acknowledging receipt of the appellant's petition for enforcement, the administrative judge ordered the agency to submit the name of the official responsible for compliance with the March 12, 2009 order. CF, Tab 2 at 2. The administrative judge repeated that instruction in the November 3, 2009 compliance recommendation. CF, Tab 6 at 6. The agency has failed to identify the official responsible for compliance. Accordingly, we have determined that Linda J Welch, Acting Vice President, Southeast Area Operations, is the agency official responsible for compliance. 5 C.F.R. § 1201.183(a)(2). If the agency fails to demonstrate compliance, the Board may seek the withholding of the responsible agency official's pay until the agency demonstrates compliance. 5 U.S.C. § 1204(e)(2)(A).

ORDER

¶9 The agency is ordered to file evidence and argument demonstrating compliance with the Board's final order in this case and shall support its assertions of compliance with clear and understandable documentary evidence.*

---

* Both parties are directed to explain all abbreviations, acronyms, and codes used in all submissions to the Board.

The agency shall file its submission in such a way so that it is received by the Clerk of the Merit Systems Protection Board within 25 calendar days of the date of this decision. The agency shall serve its submission on the appellant in such a way as to ensure its prompt receipt. If the agency fails to demonstrate compliance, the responsible agency official may be ordered to appear before the General Counsel of the Merit Systems Protection Board to show cause why the Board should not seek the withholding of her pay pursuant to 5 U.S.C. § 1204(e)(2)(a).

¶10 The appellant is directed to cooperate with the agency in good faith in meeting its compliance obligations. The appellant may respond to the agency's submission. Any submission must be made in such a way so that it is **received** by the Clerk of the Merit Systems Protection Board **within 15 calendar days of the date of service of the agency's submission**. The appellant shall also serve his submission on the agency in such a way as to ensure its prompt receipt. If the appellant does not respond to the agency's evidence of compliance within 15 days, the Board may assume that he is satisfied with the compliance and dismiss the petition for enforcement.

FOR THE BOARD:

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