UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 50

Docket No. DA-0752-10-0174-C-1

Onme C. Pernell,

Appellant,

v.

Department of Veterans Affairs,

Agency.

April 6, 2012

Gregory A. Placzek, Esquire, San Antonio, Texas, for the appellant.

Erich W. Schwartze, III, Esquire, Houston, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of a compliance initial decision (CID) that denied her petition for enforcement. For the reasons set forth below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115 and REVERSE the compliance initial decision. We find the agency has not complied with the Board's order, and therefore ORDER the agency to establish its compliance with the Board's order by canceling the appellant's removal and retroactively restoring her to the position of GS-11 Prosthetic Representative.

BACKGROUND

¶2 The appellant filed an appeal challenging her termination from her position as a GS-9 Prosthetic Representative during her probationary period. DA-0752-10-0174-I-1 Initial Appeal File (IAF), Tab 1, Tab 26, Initial Decision (I-1 ID). The administrative judge reversed the agency's action, finding that the appellant was an employee who was removed without minimum due process. I-1 ID at 3. The administrative judge ordered the agency, inter alia, to cancel the appellant's termination, retroactively restore her effective December 6, 2009, pay her the appropriate amount of back pay, and adjust her benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's (OPM's) regulations. *Id.* at 4. This decision became final when neither party petitioned for review.

¶3 The appellant thereafter filed a petition for enforcement of the Board's order. Compliance File (CF), Tab 1 at 7. Therein, the appellant asserts that the agency has not complied with the Board's order because it failed to promote her to the GS-11 pay grade upon reinstatement. *Id.* at 7. Specifically, the appellant claims that the position that she held was a "Target GS-11" position, and she was scheduled for a promotion in grade on December 7, 2009, to GS-11 Step 1. Instead of the promotion in grade, however, the appellant received only a step increase from GS-9 Step 1 to GS-9 Step 2. *Id.* She attached her sworn declaration and supporting documentation indicating that she had been rated "fully successful" on December 4, 2009, and she contended that, pursuant to the terms of the governing collective bargaining agreement, she was thereby entitled to be certified for a promotion to the next pay grade effective December 6, 2009. *Id.* at 14, 21-22, 24-25.

¶4 In response to the appellant's allegations, the agency claimed that the appellant was properly returned to her GS-9 position. CF, Tab 3 at 2-3.[1] The agency acknowledged that, on December 4, 2009, Jacqueline Brown, Assistant Chief of Prosthetics, signed a VA Form 3482e, "Executive Career Field (ECF) Performance Appraisal," indicating that the appellant's performance ratings for all critical and non-critical elements, as well as her summary rating, were "fully successful" for the period December 7, 2008, to September 30, 2009. It claimed, however, that the rating was issued as a result of administrative error. *Id.* at 2, 143 (declaration of Jacqueline Brown), CF, Tab 9 at 2-3, 5. The agency claimed that because Brown was not the appellant's "rating supervisor," Brown had no authority to rate the appellant and that the rating signed by Brown therefore was not the appellant's rating of record. CF, Tab 3 at 1-2; *id.* at 15-16 (declaration of Rachonda Gonzales, Acting Chief, Human Resources Management Service); CF, Tab 9 at 7. The agency further claimed that the appellant's "official rater" was Elizabeth Shellman, Acting Chief of Prosthetics, that Shellman had rated the appellant as "unsatisfactory" on November 9, 2009, that the document signed by Shellman was the appellant's rating of record for the relevant time period, and that Shellman's rating rendered the appellant ineligible to be promoted upon her reinstatement to the GS-11 position. CF, Tab 3 at 15-16 (Gonzales declaration). In support of its claims, the agency provided a copy of a VA Form 5-4645, "Request for Review of Employee's Probationary or Trial Period" dated November 17, 2009, signed by Shellman, and indicating that the appellant's work was unsatisfactory. *Id.* at 13.[2]

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[1] The citations in this Opinion and Order to the agency file are to the pages as labeled by the agency.

[2] Although the agency contends that Shellman was the appellant's "official rater," it does not expressly state that Shellman was the appellant's first-line supervisor or that Shellman supervised her on a day-to-day basis. The appellant states in her sworn declaration, however, that only Brown oversaw her day-to-day duties from the date she was hired until she was removed. CF, Tab 5 at 13, 15.

¶5 The administrative judge thereafter denied the appellant's petition for enforcement based on the written record. CF, Tab 11, Compliance Initial Decision (CID) at 1, 6. She rejected the appellant's claim that she should have been promoted to a GS-11 position, determining that, although Brown had rated her as "fully successful" on December 4, 2009, that rating was given in error and Brown had no authority to rate the appellant. CID at 6.

¶6 On review, the appellant reiterates her arguments below that she was entitled to an in-grade promotion to a GS-11 position based on the performance appraisal signed by Brown. Petition for Review (PFR) File, Tab 1 at 1-4. The appellant also submits evidence and argument for the first time on review, contending that the agency has refused to issue her an annual performance rating for the 2009-10 rating period. *Id.* at 5-6. The agency has filed a brief response in opposition to the appellant's petition for review. *Id.*, Tab 3.

ANALYSIS

¶7 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. *New v. Department of Veterans Affairs*, 106 M.S.P.R. 217, ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008). When the Board orders an agency action cancelled, the agency must return the appellant as nearly as possible to the status quo ante. *Spates v. U.S. Postal Service*, 70 M.S.P.R. 438, 442 (1996).

¶8 Here, there is no dispute that, if the appellant had received a rating of at least fully successful for the 2008-09 appraisal period, she would be entitled to a promotion in grade to GS-11. *See* CF, Tab 9 at 2 ("The Agency would have no problem promoting Appellant to a GS 11 target if Appellant had actually performed at the fully successful level for the 2009 rating period."); *see also* CF, Tab 1 at 21 (collective bargaining agreement provision stating that "[if] an employee is rated as successful and is meeting the promotion criteria in the career

ladder plan, the Department will certify the promotion which will be effective at the beginning of the first pay period after the requirements are met").

¶9 On its face, the VA Form 3482e Brown signed on December 4, 2009, which indicates that the appellant's performance rating was "fully successful" for the period December 7, 2008, to September 30, 2009, satisfies OPM's regulations at 5 C.F.R. part 430 concerning planning, monitoring and rating performance. Specifically, 5 C.F.R. § 430.208(a) requires agencies to issue employees "a written, or otherwise recorded, rating of record" at the conclusion of the appraisal period. Further, section 430.203 explains that a "rating of record" evaluates performance over the entire appraisal period and requires the assignment of a "summary level" rating. Section 430.208(d) permits agencies to implement performance appraisal systems to include between two and five summary rating levels. Here, the VA Form 3482e is a performance rating; it was prepared at the end of the appellant's appraisal period; and it includes the assignment of a summary level of "fully successful" within a pattern of five summary rating levels. CF, Tab 1 at 19, 24-25. Thus, we find that the VA Form 3482e is a "rating of record" within the meaning of OPM's regulations.[3]

¶10 The administrative judge, however, determined that the Form 3482e signed by Brown was ineffective to serve as the appellant's official performance rating because it was issued as the result of an administrative error. CID at 6. We

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[3] Because we find that the appellant's most recent rating of record was the VA Form 3482e signed by Brown on December 4, 2009, it is not necessary to make a determination in the context of this compliance proceeding whether the agency's VA Form 5-4645, "Request for Review of Employee's Probationary or Trial Period" signed by Shellman on November 17, 2009, falls within the definition of "rating of record" at 5 C.F.R. § 430.203. We note, however, that it does not contain an "unacceptable" summary performance level as required by 5 C.F.R. § 430.208(d)(2)(ii). *See Van Prichard v. Department of Defense*, 117 M.S.P.R. 88, ¶ 14 (2011) (noting that, although OPM's regulations permit agency performance appraisal systems to include between two and five summary rating levels, under any system, the lowest rating level is "unacceptable").

disagree. Section 430.208(a)(3) of part 430 provides that, "[e]xcept as provided in § 430.208(i), a rating of record is final when it is issued to an employee with all appropriate reviews and signatures." Thus, the appellant's December 4, 2009 rating of record was final unless the agency took action falling within the provisions of section 430.208(i).

¶11 There is no indication that the agency did so here. Section 430.208(i) provides that:

> (i) When either a regular appraisal period or an extended appraisal period ends and any agency-established deadline for providing ratings of record passes or a subsequent rating of record is issued, an agency shall not produce or change retroactively a rating of record that covers that earlier appraisal period except that a rating of record may be changed—
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> (1) Within 60 days of issuance based upon an informal request by the employee;
>
> (2) As a result of a grievance, complaint, or other formal proceeding permitted by law or regulation that results in a final determination by appropriate authority that the rating of record must be changed or as part of a *bona fide* settlement of a formal proceeding; or
>
> (3) Where the agency determines that a rating of record was incorrectly recorded or calculated.

Here, there is no indication that the appellant ever made a request that her rating be changed, nor is there any suggestion that the agency took any action as the result of a grievance, complaint, or other formal proceeding. Although the agency's argument could be construed as a claim that the appellant's rating of record was "incorrectly recorded or calculated" because Brown allegedly had no authority to issue it, there is no evidence in the record that the agency ever "changed" that rating.

¶12 Indeed, it is undisputed that the agency granted the appellant a within-grade increase to GS-9 Step 2 upon reinstatement. CF, Tab 3 at 2. Such action would be permissible under OPM's regulations only if the appellant's most recent rating of record was "fully successful." 5 C.F.R. § 531.404(a). Furthermore, as

stated above, if the agency believed that the within-grade increase decision was inconsistent with the appellant's most recent rating of record, it was required to prepare a more current rating of record. 5 C.F.R. § 531.404(a)(1). Because the agency failed to do so here, we find that the appellant's December 4, 2009 summary rating of record of "fully successful" was the appellant's final rating of record for the period December 7, 2008, to September 30, 2009. 5 C.F.R. § 430.208(a)(3).

¶13 Because the appellant was rated as fully successful for the period December 7, 2008, until her removal on September 30, 2009, restoration of the status quo ante required that the agency certify her promotion to GS-11 Prosthetics Representative, effective December 6, 2009.[4]

ORDER

¶14 Accordingly, we ORDER the agency to submit to the Clerk of the Board within 20 days of the date of this Order satisfactory evidence of compliance with this decision. The agency's submission must include proof that it has complied with the Board's order by canceling the removal and retroactively restoring the

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[4] As stated above, the appellant also submits evidence and argument for the first time on review contending that the agency has refused to issue her an annual performance rating for the 2009-10 rating period. PFR File, Tab 1 at 5-6. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant claims that this evidence is new because her petition for enforcement was filed on September 20, 2010, before she was to receive her annual review, and because she only recently became aware of the agency's alleged decision not to provide her with a 2009-2010 performance review. PFR File, Tab 1 at 4 n.2. Assuming the appellant's argument is based on new evidence, we find that it is immaterial to the issues before the Board on review. That is, because the appellant's argument concerns the agency's actions occurring approximately 1 year following her retroactive reinstatement in December 2009, it is not relevant to whether the agency complied with the Board's order and returned her as nearly as possible to the status quo ante by reinstating her to a GS-9 position. Accordingly, the appellant's evidence and argument in this regard fails to state a basis for granting review.

appellant to the position of GS-11 Prosthetic Representative at her duty station in San Antonio, Texas, effective December 6, 2009. The appellant is also entitled to the pay and benefits she would have received in her GS-11 position retroactive to December 6, 2009, less deductions that would ordinarily have been taken, and an offset for the pay she actually received while in the GS-9 position. *See generally Owens v. Department of Transportation*, 99 M.S.P.R. 377, ¶ 6 (2005). The agency must serve all parties with copies of its submission.

¶15 We also ORDER the agency to identify the individual who is responsible for ensuring compliance and file the individual's name, title and mailing address with the Clerk of the Board within five days of the date of service of this Order. This information must be submitted even if the agency believes that it has fully complied with the Board's Order. If the agency has not fully complied, it must show cause why sanctions, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) and 5 C.F.R. § 1201.183, should not be imposed against the individual responsible for the agency's continued noncompliance.

NOTICE TO THE APPELLANT

¶16 You may respond to the agency's evidence of compliance within 15 days of the date of service of that evidence. If you do not respond, the Board will assume you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:

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