

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

CYNTHIA A. NEVERS,  
Appellant,

DOCKET NUMBER  
SF-0353-09-0676-X-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: July 27, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Richard Heavey, Esquire, Medfield, Massachusetts, for the appellant.

Afshin Miraly, Esquire, Long Beach, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**FINAL ORDER**

This case is before the Board pursuant to a recommendation of the administrative judge finding the agency noncompliant with the initial decision, which ordered the agency to retroactively restore the appellant to duty and pay her back pay and benefits, and became final on March 29, 2011, when neither

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

party petitioned for review. *See Nevers v. U.S. Postal Service*, SF-0353-09-0676-X-1, Recommendation (Nov. 15, 2011), Compliance Referral File (CRF), Tab 1 at 2. The administrative judge found that the agency failed to pay the appellant back pay, interest, and other benefits, explain its back pay calculations, or supply an accurate accounting of any deductions, as required by the Employee Labor Relations Manual. *Id.* at 3-4. The agency subsequently submitted evidence that it had restored the appellant's annual and sick leave and calculated the required amount of back pay, less \$8,950 withheld to offset the employment benefits the appellant received from the state of California. CRF, Tab 5. The appellant objected that the agency failed to provide evidence that it reimbursed the state \$8,950 for the appellant's unemployment compensation, leaving her potentially exposed to a claim of reimbursement from the state.

For the reasons discussed below, we find the agency in compliance and DISMISS the petition for enforcement. This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b) ([5 C.F.R. § 1201.183\(b\)](#)).

#### **DISCUSSION OF ARGUMENTS AND EVIDENCE ON COMPLIANCE**

On February 22, 2011, the administrative judge issued an initial decision finding that the agency had violated the appellant's restoration rights under [5 C.F.R. § 353.301](#)(c) and (d) when it arbitrarily and capriciously denied her restoration by reducing, and then discontinuing, her limited duty assignment eight months before it completed a search for work in the local commuting area. *See* CRF, Tab 1 at 2. The administrative judge ordered the agency to retroactively restore the appellant effective April 9, 2009, and pay her back pay and benefits due from April 9, 2009, to March 4, 2010. *Id.* The initial decision became final on March 29, 2011, after neither party petitioned for review.

On August 19, 2011, the appellant filed a petition for enforcement alleging that the agency was not in compliance with the initial decision because it failed to

pay her back pay and benefits or provide its back pay calculations. *See Nevers v. U.S. Postal Service*, SF-0353-09-0676-C-1, Compliance File (CF), Tab 1 at 4-5. On November 15, 2011, the administrative judge found the agency in noncompliance and ordered it to pay the required back pay, interest, and benefits and explain its calculations, including an accurate accounting of any deductions. CRF, Tab 1 at 4-5.

Following briefing by the parties, we found the agency in partial compliance. *See* CRF, Tab 7 at 2. We found that the appellant did not dispute the agency's leave calculations, gross pay calculations, offset of the \$32,674.86 she received in OWCP compensation, or calculation of applicable tax and voluntary deductions. *Id.* at 3. Thus, the only disputed issues were (1) whether the appellant had actually received the back pay payment, and (2) whether the agency had reimbursed the state unemployment fund for the amount of the appellant's unemployment compensation that was offset against her back pay (\$8,950). *Id.* at 4-5. On April 13, 2012, we ordered the agency to submit evidence that it had paid the back pay amount, and either evidence that it had reimbursed the state unemployment fund \$8,950 or justification for not submitting this reimbursement. *Id.*

The agency bears the burden to prove its compliance with a Board order. An agency's assertions of compliance must include a clear explanation of its compliance actions supported by documentary evidence. *Vaughan v. Department of Agriculture*, [116 M.S.P.R. 319](#), ¶ 5 (2011); *Tubesing v. Department of Health and Human Services*, [112 M.S.P.R. 393](#), ¶ 17 (2009).

On May 7, 2012, the agency submitted evidence that the appellant had received her back pay check. CRF, Tab 10 at 17. The appellant did not contest this evidence. *See* CRF, Tab 11. On June 15, 2012, the agency submitted evidence that it had reimbursed the state unemployment fund the \$8,950 previously offset against the appellant's back pay. CRF, Tab 14 at 9. The appellant subsequently submitted a letter from the state unemployment fund

acknowledging receipt of the payment and adjusting her account to reflect no balance due. CRF, Tab 16 at 3. The appellant confirmed that “this longstanding issue . . . appears to have finally been resolved.” *Id.* at 1. We agree and find that the agency has submitted the required explanations and documentary evidence of its compliance with the remaining issues disputed in the petition for enforcement. Accordingly, we find the agency in compliance with the Board’s order and dismiss the petition for enforcement.<sup>2</sup>

**NOTICE TO THE APPELLANT REGARDING  
YOUR RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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<sup>2</sup> We note that the Board recently clarified the standard for awarding back pay and other benefits when an agency arbitrarily and capriciously denies restoration by failing to conduct a legally sufficient search for work assignments. *See Tram v. U.S. Postal Service*, 2012 MSPB 92. Specifically, we found that in appeals where the agency lawfully rescinds a modified assignment, status quo ante relief for its failure to conduct a proper search does not include the employee's restoration to duty with back pay, but, rather, only requires that the agency conduct a legally sufficient search retroactive to the date that the employee was placed in a non-duty status. *Id.*, ¶ 10. If such a search establishes that there were tasks available that the employee could have performed, the employee would then be entitled to back pay. *Id.*

**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](http://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.