

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

COLIN R. FORD,
Appellant,

DOCKET NUMBER
AT-0752-11-0902-X-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: August 7, 2012

THIS ORDER IS NONPRECEDENTIAL¹

John R. Macon, Memphis, Tennessee, for the appellant.

Dana E. Morris, Esquire, Memphis, Tennessee, for the agency.

BEFORE

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

ORDER

On April 17, 2012, the administrative judge issued a Recommendation that the Board find the agency noncompliant with the December 20, 2011 Initial Decision, which became final on January 24, 2012, when neither party petitioned for review. MSPB Docket Nos. AT-0752-11-0902-C-1, Compliance File (CF),

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

Tab 7; AT-0752-11-0902-I-1, Initial Appeal File (IAF), Tab 16. The Initial Decision canceled the appellant's constructive suspension, retroactively restored him to the light duty he had been performing, effective August 2, 2011, and ordered the agency to pay him appropriate back pay, interest, and benefits. IAF, Tab 16 at 10. The appellant petitioned for enforcement, contending that the agency failed to restore him or pay him back pay, interest, or benefits. CF, Tab 1 at 2-5. For the reasons discussed below, we find the agency not in compliance with the Initial Decision and order appropriate relief.

DISCUSSION OF ARGUMENTS AND EVIDENCE OF COMPLIANCE

Following a nonjob-related injury, the appellant performed light duty within his medical restrictions from July 7, 2011, through August 2, 2011, when the agency denied him light duty work and escorted him off the premises. IAF, Tab 16 at 1-3. The Initial Decision found that the agency suspended the appellant and committed harmful procedural error because it did not give him notice or an opportunity to respond to its intention to place him "off the clock." *Id.* at 3, 5-6, 10. The Initial Decision ordered the agency to cancel the suspension, restore the appellant effective August 2, 2011, and pay him appropriate back pay, interest, and benefits. *Id.* at 10-11.

On March 5, 2012, the appellant petitioned for enforcement, contending that the agency had neither restored him nor paid him back pay, interest, and benefits. CF, Tab 1 at 2-5. The appellant alleged that the agency was attempting to accomplish a "backdoor" method of "re-hear[ing] the case without filing an appeal" and had refused to "abide by the Initial Decision." *Id.* at 4. The agency countered that the Initial Decision was "confusing in that the restoration order did not specify whether the appellant should be restored to light duty or to regular duty," and claimed that the appellant was not entitled to back pay because he was not ready, willing, and able to work. CF, Tab 4 at 5-10.

The administrative judge found that the agency had not made a good-faith effort to comply with the Initial Decision and that its purported confusion regarding light or regular duty was “disingenuous.” CF, Tab 7 at 3. The administrative judge found that the agency should have restored the appellant to the status quo ante—that is, to the light duty he was performing when he was escorted from the agency premises. *Id.* at 3-4. The administrative judge also rejected the agency’s contention that the appellant was not ready, willing, and able to work, finding it undisputed that the appellant had “repeatedly indicated that he is ready, willing, and able to perform the same light duties he was working when he was constructively suspended.” *Id.* at 4. The administrative judge therefore recommended that the Board grant the petition for enforcement, and again ordered the agency to cancel the constructive suspension, restore the appellant to the light duties he performed immediately prior to August 2, 2011 (or to other light duties within his medical restrictions), and pay him appropriate back pay, interest, and benefits. *Id.*

On May 1, 2012, the agency responded to the Recommendation. The agency noted its “reluctant[] accept[ance]” of the Recommendation and claimed to have complied with the actions specified in the Recommendation.² MSPB Docket No. AT-0752-11-0902-X-1, Compliance Referral File (CRF), Tab 3 at 2. Specifically, the agency claimed that it had canceled the constructive suspension and ordered the appellant to report for duty “to perform specified light duty tasks

² The agency also sought “clarification how the Board has authority to direct the Agency to provide permanent light duty to an employee who never requested permanent light duty and was never given permanent light duty.” CRF, Tab 3 at 2 n.1. As the Initial Decision makes plain, the Board did not direct the agency to provide the appellant permanent light duty. Rather, it directed the agency to restore him to the status quo ante—that is, to the light duty the agency itself had given him before it constructively suspended him without notice or an opportunity to respond. To the extent the agency intends its clarification request to contest the amount of back pay it owes the appellant, we note that the lengthy back pay period is a result of the agency’s own delay in restoring the appellant despite the Initial Decision’s clear directives.

within the Appellant's most recent medical restrictions"; calculated back pay from the period between August 2, 2011 (the date of the constructive suspension), and April 28, 2012³ (the date the appellant was to return to duty⁴); and forwarded the back pay paperwork for processing. *Id.* at 2-3. The agency did not specify the back pay amount or include a narrative explanation of its calculations of back pay or benefits, although it did include a chart showing the number of hours the appellant constructively worked each pay period. *Id.* at 18-19. The agency also did not appear to have paid the appellant interest on the back pay amount. *Id.* at 15 (Box C).

On June 25, 2012, the appellant responded. He stated that he received back pay on June 14, 2012, and annual and sick leave on "on pay check as of 6-22-12." CRF, Tab 5 at 1. However, he asserted that he had not received interest on the back pay amount, as required under the Initial Decision, and had not been compensated or restored for step increases lost. *Id.* He also claimed that the "Agency has refused to restore Appellant." *Id.*

On July 3, 2012, the agency responded to the appellant's submission. It claimed that it had paid the appellant interest on the back pay award in the amount of \$335.88, but did not provide proof of payment or explain how the interest amount was calculated. CRF, Tab 6 at 3. The agency also stated that it had miscalculated the back pay amount because it had calculated his night

³ The agency's submission states that the back pay was calculated to April 28, 2011. This is clearly a typographical error, and the letter sent to the appellant lists the correct date. *See* CRF, Tab 3 at 5.

⁴ On April 26, 2012, the agency delivered to the appellant a letter instructing him to report for duty two days later, on April 28. The appellant was out of town and did not receive the letter. He therefore did not report for duty until April 30. *See* CRF, Tab 3 at 3 n.2. The agency notes that it "did not take any disciplinary action against the Appellant as a result of his failure to report for work" and calculated his back pay to include April 28. We believe that the inclusion of April 28 in the back pay period was correct, as the agency's expectation that the appellant report to work after barely 48 hours' notice (following months of refusing him work) was clearly unreasonable.

differential pay incorrectly. *Id.* The agency did not explain how, if at all, this miscalculation impacted the interest calculation. Finally, the agency asserted that the appellant was not entitled to any step increases during the back pay period because he had last received an increase on July 2, 2011, and was not due a step increase during the back pay period (August 2, 2011, through April 28, 2012). CRF, Tab 6 at 17.

ANALYSIS

When the Board finds a personnel action unwarranted or not sustainable, it orders that the appellant be placed, as nearly as possible, in the situation he would have been in had the wrongful personnel action not occurred. *House v. Department of the Army*, [98 M.S.P.R. 530](#), ¶ 9 (2005). 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).

Although the agency did not provide evidence that it actually paid the appellant back pay, or even provide the back pay amount or its calculations of that amount, the appellant does not dispute that he received some amount of back pay. CRF, Tab 5 at 1. He contends, however, that the agency did not compensate him or restore him for "step increases lost." *Id.* The agency disputes this, but concedes that it incorrectly calculated the appellant's night differential pay. CRF, Tab 6 at 3. As the agency failed to provide any explanation of its back pay calculations except a chart showing constructive hours worked, we agree with the appellant that the agency has not demonstrated that it correctly calculated his back pay amount. We therefore find the agency in noncompliance, and ORDER it to submit, within **7 days** of this order, the following:

- A narrative explanation of how the back pay amount was calculated, including the number of hours the appellant constructively worked, his rate

of pay, all deductions taken and credits given, and the actual back pay amount;

- Documentary evidence supporting the narrative explanation; and
- Evidence that the agency actually paid the appellant the back pay amount stated. Evidence that the agency merely submitted the paperwork for processing does not suffice.

The appellant shall respond within **7 days** of the agency's submission.

The appellant also contends that the agency is noncompliant because it failed to pay him interest on the back pay amount. CRF, Tab 5 at 1. The agency claims to have done so. CRF, Tab 6 at 3. We agree that the agency has failed to submit evidence that it paid any interest, let alone the correct amount of interest. Accordingly, we ORDER the agency to submit, within **7 days** of this order, the following:

- A narrative explanation of the interest calculation, including the rate of interest and any formulas used in the calculation;
- Documentary evidence supporting the narrative explanation; and
- Evidence that the agency actually paid the appellant the interest owed. Evidence that the agency merely submitted the paperwork for processing does not suffice.

The appellant shall respond within **7 days** of the agency's submission.

The appellant claims he was entitled to a step increase as part of his back pay award; the agency disagrees. *See* CRF, Tab 6 at 17. We ORDER the appellant to respond to the agency's evidence on this issue within **7 days** of this order.

The appellant does not dispute that he received the correct amount of annual and sick leave (although it is unclear whether he was paid for this leave or whether it was restored). *See* CRF, Tab 5 at 1. Accordingly, we find the agency in compliance with the requirement that it restore his annual and sick leave.

Finally, although the agency provided evidence that it restored the appellant to light duty within his medical restrictions, *see* CRF, Tab 3 at 5-8, the appellant appears to claim that the agency has not restored him. CRF, Tab 5 at 1. The appellant provides no details to support or explain this claim. We ORDER him to provide such support or explanation within **7 days** of this order. The agency shall respond within **7 days** of the appellant's submission.

Failure by the agency to submit the required information may cause the Board to find it noncompliant and order appropriate action. Failure by the appellant to submit the required information may cause the Board to dismiss the petition for enforcement.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.