UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS TUBESING,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Agency.

DOCKET NUMBER
DA-315H-08-0168-X-1

DATE: August 10, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Brad M. Bowman, Esquire, Decatur, Georgia, for the appellant.

Murray Kampf and Marie T. Ransley, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

FINAL ORDER

This petition for enforcement is before the Board upon an administrative judge's recommendation, and two subsequent Board opinions, finding the agency in noncompliance with a Board order. The only outstanding compliance issues

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

are whether the agency has: (1) repaid Federal Employee Health Benefit (FEHB) premiums that were improperly withheld, with interest, and (2) restored the appellant to a position substantially equivalent to the position from which he was separated. Compliance Referral File (CRF), Tab 37 at 5. For the reasons discussed below, we find the agency has brought itself into COMPLIANCE. We therefore dismiss the petition for enforcement as MOOT.

PROCEDURAL BACKGROUND

The essential procedural facts of this case are as follows. The appellant was terminated from his GS-685-13 Public Health Advisor position with the Department of Health & Human Services, Center for Disease Control and Prevention (CDC), effective December 7, 2007. MSPB Docket No. DA-315H-08-0168-I-1, Initial Appeal File (IAF), Tab 4, Subtab 4b. In a November 25, 2008, initial decision (ID), an MSPB administrative judge reversed the agency action and ordered the agency to cancel the removal, restore the appellant, and provide him back pay, interest on back pay, and the benefits of employment in accordance with the Office of Personnel Management (OPM)'s regulations. MSPB Docket No. DA-315H-08-0168-B-1, Remand File (RF), Tab 9 at 8. The ID became the final decision of the Board when neither party filed a petition for review.

The appellant filed this petition for enforcement on January 21, 2009. MSPB Docket No. DA-315H-08-0168-C-1, Compliance File (CF), Tabs 1 and 7. The administrative judge's compliance recommendation granted the petition for enforcement in part and denied it in part. CF, Tab 10. The Board agreed with the administrative judge's recommendation in its September 30, 2009 Opinion and Order, and provided further direction to the agency. 112 M.S.P.R. 393, ¶¶ 21-25. In a December 10, 2010 Opinion and Order, the Board found that the agency had made efforts to comply with the Board's final order, but still remained in noncompliance. 115 M.S.P.R. 327. The parties have since agreed that the only outstanding compliance issues are whether the agency has: (1) repaid FEHB

premiums that were improperly withheld, with interest, and (2) restored the appellant to a position substantially equivalent to the position from which he was separated. CRF, Tab 37 at 5 (summary and order). Upon review, we answer both questions in the affirmative.

ANALYSIS

An agency bears the burden of proving its compliance with a final Board order, and compliance must be supported by relevant, material, and credible evidence in the form of documentation or affidavits. *Heath v. Department of Agriculture*, 111 M.S.P.R. 434, ¶ 5 (2009). The appellant may rebut the agency's evidence by making specific, nonconclusory, and supported allegations to the contrary. *Id.*

1. <u>The agency is in COMPLIANCE with its obligation to pay the appellant the amount of FEHB premiums that were improperly withheld, plus appropriate interest.</u>

Two time periods of FEHB premiums are at issue: (a) the back pay period, from December 7, 2007, through December 20, 2008, and (b) the approximately first six months of the post-reinstatement period, from December 21, 2008, through June 11, 2009. As shown below, there is no dispute that the agency withheld FEHB premiums from the back pay award, and has continued to withhold premiums from the appellant's paychecks after his December 21, 2008, reinstatement.

a. <u>The agency has paid the appellant the FEHB premiums that were improperly withheld from his back pay award, plus appropriate interest.</u>

Under 5 U.S.C. § 8908(a), a reinstated employee has the option to seek retroactive health coverage for the back pay period or to enroll as a new employee. Although the appellant wished to enroll as a new employee upon his reinstatement, the agency improperly withheld FEHB premiums from the appellant's back pay award under the incorrect assumption that he wanted

retroactive health coverage for the back pay period. CRF, Tab 20 at ¶¶ 15-16. The administrative judge therefore ordered the agency to repay these premiums to the appellant with appropriate interest. *Id.* at ¶ 16.

The agency has since repaid the appellant $1,164.80 for the premiums improperly withheld from his back pay award plus $106.55 in interest. CRF, Tab 38, Brf. at 6, Exh. 7 at 2-4 (agency declaration under oath).[1] The agency has provided a clear explanation of its calculations, including the rate at which the agency paid interest. *Id.* The appellant does not dispute the agency's actions in this regard. CRF, Tab 39 at 8. We therefore find the agency in COMPLIANCE with its obligation to repay the appellant the FEHB premiums that it withheld from his back pay award, plus interest.

b. <u>The appellant fails to state a claim entitling him to relief for the FEHB premiums that were withheld from his paychecks from December 21, 2008, through June 11, 2009.</u>

The appellant contends that from the beginning of the post-reinstatement period, December 21, 2008, and continuing until June 11, 2009, the agency failed to reinstate his FEHB coverage, but nonetheless withheld premiums from his paychecks as if he were covered. CRF, Tab 6 at 104. The appellant maintains that the agency therefore owes him $410.25, plus interest, for the premiums withheld during that period.[2] CRF, Tab 37 at 4. Although the agency disputes the appellant's contention and maintains that he was covered from the beginning

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[1] The agency pleadings that comprise CRF, Tab 38, are a brief and seven exhibits. However, the agency made its electronic submission in two parts, with the first set containing the brief and Exhibits 1 through 4, and the second set containing Exhibits 5 through 7. The first set is electronically numbered pages 1 through 33, and the second set is pages 1 through 45. For the sake of clarity, this opinion cites to the pages in CRF, Tab 38, by exhibit number instead of by electronic page number. However, for all tabs other than CRF, Tab 38, this opinion cites to the electronic page numbers.

[2] The appellant does not dispute that *after* June 11, 2009, and continuing to the present, he has had FEHB coverage. CRF, Tab 31 at 9.

of his post-reinstatement period, beginning December 21, 2008, the appellant responds that if that is true, he "had no way of knowing this at the time." CRF, Tab 39 at 8. Because the appellant fails to state a claim entitling him to relief for his coverage during the post-reinstatement period, we do not reach the question of whether the agency in fact failed to reinstate the appellant's healthcare coverage until more than six months after it otherwise reinstated him as an employee.

The Board's authority in this petition for enforcement stems from 5 U.S.C. § 1204(a)(2), authorizing the Board to order any Federal agency to comply with any order or decision issued by the Board. Our November 25, 2008 decision ordered the agency to cancel the appellant's removal and restore him. RF, Tab 9 at 8. The appellant's right to have FEHB coverage extends from his right to be restored. 5 U.S.C. § 8908(a). Under Section § 8908(a), a reinstated employee has two options pertaining to his FEHB coverage. Option (1) is to receive retroactive FEHB coverage for the back pay period as though the removal had not taken place. 5 U.S.C. § 8908(a). Option (2) is to enroll as a new employee for FEHB purposes. *Id.*

A reinstated employee who chooses option (1) – to receive retroactive health coverage for the back pay period – may be entitled to reimbursement from his insurance carrier for medical expenses incurred during the period of his removal. *Gutkowski v. U.S. Postal Service*, 101 M.S.P.R. 399, ¶ 10 (2006) (stating appellant should "submit any claims for those expenses to his carrier"). The Board has no authority to direct an agency to pay an employee additional or consequential expenses in connection with a back pay award. *Id.*

A reinstated employee who chooses option (2) – to enroll as a new employee for health coverage purposes – receives two benefits that are important to this case. The first benefit of option (2) is to keep the FEHB premiums that would otherwise be withdrawn from his back pay award; in exchange, the employee waives FEHB coverage for the back pay period. *Fernandez v.*

Department of Justice, 105 M.S.P.R. 443 (2007). The second benefit of option (2) is enrollment with FEHB coverage, albeit as a new employee. 5 U.S.C. § 8908(a).

In the instant case, the appellant chose option (2) – to enroll as a new employee for FEHB purposes – but the agency initially deprived him of a benefit of this option by improperly withholding the FEHB premiums from his back pay award. *See supra* p. 3. Although the agency rectified that problem, the appellant alleges that the agency also deprived him of the option's second benefit by failing to enroll him with FEHB coverage after his December 21, 2008 reinstatement until June 11, 2009. As a remedy for this alleged deprivation, the appellant asks the Board to order the agency to repay him for those premiums. CRF, Tab 31 at 9, Tab 39 at 8. Essentially, the appellant is proposing an option (3) to Section 8908(a) – namely, to allow him to enroll with FEHB coverage at a date later than reinstatement and to waive healthcare coverage for the period prior to that enrollment, even though that period includes six months of his post-reinstatement employment.

The remedy proposed by the appellant finds no support from Section 8908(a), nor from 5 U.S.C. § 1204(a)(2)'s provisions authorizing the Board to ensure that wrongfully removed employees are reinstated. Nonetheless, 5 C.F.R. § 890.103(c) contains procedures for an employee to seek retroactive correction of an enrollment code error, and 5 C.F.R. § 890.105 contains procedures to seek reimbursement from an FEHB carrier for wrongfully withheld medical expenses. We need not decide whether an appellant is free to choose a date other than his reinstatement to enroll for FEHB coverage, instead of pursuing the procedures available to him for improperly denied coverage, because such a choice would lack any connection to the Board's authority to reinstate him. Put simply, although Section 8908(a) entitles the appellant to enroll for FEHB benefits upon his reinstatement, that benefit loses its connection to this appeal if the appellant wishes for the benefit to accrue at any time later than his reinstatement. We

therefore find that the appellant fails to state a claim entitling him to reimbursement for the FEHB premiums that were withheld from his paychecks for the period between his December 21, 2008, reinstatement, and June 11, 2009. As such, the agency is fully in COMPLIANCE with its obligation to pay the appellant the amount of health benefits premiums that were improperly withheld, plus appropriate interest.

2. The agency is in COMPLIANCE with its obligation to restore the appellant to a position substantially equivalent to the position from which he was separated.

a. Analytical Framework

When the Board finds a personnel action unwarranted, the aim is to place the employee, as nearly as possible, in the status quo ante, that is, in the situation in which he would have been had the wrongful personnel action not occurred. *House v. Department of the Army*, 98 M.S.P.R. 530, ¶ 9 (2005). This means that generally, an agency must return to the employee to his "former position" and, if the agency does not, it must show that (1) it has a strong overriding interest or compelling reason requiring reassignment to a different position, and (2) it has reassigned the employee to a position which is substantially similar to the former position. *Miller v. Department of the Army*, 109 M.S.P.R. 41, ¶ 11. We look beyond the position descriptions and conduct an assessment of the actual scope of the duties and responsibilities of the new position compared with those of the former position. *Marcotrigiano v. Department of Justice*, 95 M.S.P.R.198, ¶ 7 (2003). Here, the agency reassigned the appellant from his last position as a GS-685 Public Health Advisor position to a GS-685-13 Public Health Analyst position. As explained below, we find that the agency has placed the appellant as nearly as possible in the status quo ante.

b. Facts

i. Appellant's Prior Position as a Field Assignee

In 2006, the CDC's Office of Public Health Preparedness and Response, Division of Strategic National Stockpile (DSNS), developed a pilot program to place DSNS employees in field assignments to support state health departments. CRF, Tab 38, Exh. 4 at 1. DSNS is centered in Atlanta. *Id.* The purpose behind the pilot program was to determine whether providing on-site technical expertise would help states to develop plans for receiving, distributing, and dispensing medical countermeasures more rapidly in the event of a national public health emergency. *Id.* at 1-2. CDC's policy on field assignments, issued September 20, 2006, states that its field assignments are "intrinsically impermanent." CRF, Tab 38, Exh. 2 at 4.

In December 2006, the appellant was hired by CDC's Coordinating Office of Terrorism Preparedness and Emergency Response, Office of the Director, as a GS-685-12 Public Health Analyst. CRF, Tab 38, Exh. 4 at 2. In April 2007, the appellant was promoted to a GS-685-13 Public Health Advisor position within DSNS, the division with the field assignment pilot program. *Id.* at 1-2. Effective July 1, 2007, the DSNS sent the appellant from his work station in Atlanta to a field assignment with the State of Louisiana's Department of Health and Hospitals (LDHH), in Baton Rouge. *Id.* at 2.

The agency removed the appellant effective December 7, 2007, while he was assigned to the LDHH slot. 112 M.S.P.R. 393, ¶ 2; CRF, Tab 38, Exh. 1 at 2. That slot was filled in March 2009 by Amy Stewart via a competitive merit promotion announcement. *Id.*[3] Moreover, by letter dated June 12, 2009, Dr. Roy

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[3] In March 2009, the appellant's petition for enforcement was pending before the administrative judge; the appellant filed the petition on January 21, 2009, and the administrative judge issued his recommendation on May 21, 2009. CF, Tab 10.

M. Rony Francois, who was then the Assistant Secretary of the LDHH Office of Public Heath, informed the CDC that the state was happy with Ms. Stewart's work and did not want the appellant to return to the slot. CRF, Tab 4, Exh. 1 at 4.

Thereafter, late in 2010, after a meeting between LDHH staff and Ms. Stewart's team lead, the Louisiana field slot was eliminated by a "joint decision" of the DSNS and LDHH. CRF, Tab 38, Exh. 1 at 2. Among the factors driving this decision were concerns that Ms. Stewart had expressed about communication issues and the improvement in the state of Louisiana's preparedness, as reflected in its perfect score of 100 points on the Technical Assistance Review. *Id.* at 2-3. At present, Louisiana is the only state whose field slot has been eliminated. *Id.* at 3. With the field assignment's end, Ms. Stewart was given the option of accepting a field staff vacancy in Harrisburg, Pennsylvania, or accepting a Program Service Consultant position in Atlanta. *Id.* Both of these positions were at the same series and grade (GS-685-13) as her field assignee position in Louisiana. *Id.* Ms. Stewart chose the position in Atlanta. *Id.* DSNS currently supports field assignees in ten states. *Id.* at 2.

ii. Appellant's Current Position

The appellant is currently assigned as a GS-685-13 Public Health Analyst to the Response Branch of DSNS. CRF, Tab 38, Exh. 1 at 3. This branch includes two other GS-685-13 positions. The appellant performs the duties of this position from his home in Baton Rouge. CRF, Tab 38, Brf. at 2. The appellant states that his work location is "approximately 500 miles away from the co-workers in his branch." CRF, Tab 39 at 3.[4]

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[4] *See also* CRF, Tab 27, Exh. 3 (agency affidavit stating "Tom was the only employee in Response Branch geographically located outside the state and away from his chain of command"), Tab 30 (supervisor's affidavit stating appellant "is the only Public health Analyst, GS-13, who has this remote work situation").

The agency maintains that the appellant's current duties are "equivalent to the work that field assignees perform at the state level, but has an impact nationally rather than just upon a single state." CRF, Tab 38, Exh. 1 at 4. The appellant's current duties include "managing projects, contributing to working groups, conducting document reviews," assuming a role in the Office's "situation unit," and managing the "complete re-write" of a "cornerstone document on how the Division responds to a national emergency." CRF, Tab 38, Exh. 6 at 1-2. The agency contends that although the individual work plans of the employees in the Response Branch vary, the appellant's duties and responsibilities are comparable to the other GS-13 employees in that Office. CRF, Tab 38, Exh. 5 at 1-2. The appellant does not dispute that his work is comparable to the other employees in that Office but contends that their duties are irrelevant because they were not in his original position. CRF, Tab 39 at 6. The agency submits that it has been impossible to return the appellant to his exact pre-separation position but this assignment to a GS-685-13 Public Health Analyst position in the Response Branch is "substantially equivalent" to his prior job. CRF, Tab 38 at 5.

c. Analysis

The two key issues here are (1) whether the agency had a compelling reason for reassigning the appellant, and (2) if so, whether the agency has reassigned the employee to a position that is substantially similar to his former position. *Miller*, 109 M.S.P.R. 41, ¶ 11.

Regarding issue (1), we have already found that the agency had a strong overriding interest for not returning the appellant to the field assignment because the state refused to accept him for it. *Tubesing*, 112 M.S.P.R. 393, ¶ 10. The fact that the field assignment slot has since been terminated lends only more weight to our prior finding. CRF, Tab 38, Exh. 4 at 3. *See Bullock v. Department of the Air Force*, 80 M.S.P.R. 361, ¶ 9 (1998) (stating that "the Board generally

considers the abolishment of the position as a compelling reason for not reinstating the appellant to his former position").

The remaining issue (2) is whether the actual duties of the appellant's new position – his teleworking duties with the Response Branch – are substantially similar to the duties of his prior position.[5] In using the past to establish a metric of what duties the appellant should be performing now, several factors are pertinent here. First, the aim is to place the appellant as nearly as possible in the status quo ante, that is, in the situation in which he would have been in had the wrongful personnel action not occurred. *House*, 98 M.S.P.R. 530, ¶ 9 (2005). Because the appellant's field assignment was impermanent, we must consider what his career trajectory at the agency would have been had he not been removed. Second, the abolishment of the Louisiana field assignment position requires us to widen the scope of what positions may be substantially similar to it because, as the Board has previously reasoned, "[s]ince the appellant's former position has been abolished, [the appellant]'s placement in a different position necessarily involves the performance of different duties." *Id.* at ¶ 18. Third, we consider whether there is any evidence that the agency has a position that is more comparable to the appellant's previous position than the one he currently occupies. *Gorny v. Department of the Interior*, 115 M.S.P.R. 520 at ¶ 18. Fourth, the appellant is not entitled to be placed in a better position than he would have enjoyed if he had not been removed. *Sink v. Department of Energy*, 110 M.S.P.R. 153, ¶ 19 (2008) (setting parties back to status quo ante by rescinding appellant's involuntary resignation, but allowing agency to decide on a removal proposal that was pending when the appellant resigned). We apply these factors below.

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[5] The appellant does not dispute that he is actually performing the work of his new position, albeit from his home. CRF, Tab 39 at 6.

We find that, if the appellant had not been removed, the state of Louisiana and the agency still would have terminated the field assignment, and the appellant would have been offered the choice between a field assignment to another state, if available, or a position at the agency's Atlanta headquarters, if available. Had the appellant declined both choices, he "would have no other choice than to resign." CRF, Tab 38, Exh. 4 at 4 (discussing Ms. Stewart's options). In other words, the appellant would not have been allowed to telework with a headquarters office from his Louisiana home, as he has been allowed to do now.

There is no indication that the agency has a position more comparable to the appellant's previous position than his current position. We find, to the contrary, that the appellant's current responsibilities with developing national emergency preparedness plans is the national equivalent of the work the appellant performed while on field assignment in Louisiana. Therefore, we find that the duties of the appellant's current position are substantially similar to the duties of his prior position.

The appellant, however, objects that he "is working in a location approximately 500 miles away from the co-workers in his branch." CRF, Tab 39 at 6. If there were any indication that the appellant's distance from headquarters were involuntary, then that could raise questions about the agency's compliance. *See, e.g.*, *Gorny*, 115 M.S.P.R. 520, ¶ 12 (finding separation of employee on a different floor from co-workers resulted in her isolation and constituted noncompliance with reinstatement order). However, the appellant has never indicated, and the record contains no evidence, that he has any interest in relocating back to headquarters, or that the agency has done anything to prevent him from relocating to headquarters. Under the circumstances, we find the appellant's current work location to be immaterial to the agency's compliance with its obligation to reinstate the appellant. We therefore find that the agency has reassigned the appellant to a position that is substantially similar to his former position. *Miller*, 109 M.S.P.R. 41, ¶ 11.

CONCLUSION

For the aforesaid reasons, we find the agency has brought itself into COMPLIANCE with the Board's final order and dismiss this matter as MOOT.

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.

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.