UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 103

Docket No. DE-0752-10-0078-C-1

Alvin H. Hankins,

Appellant,

v.

Department of Transportation,
Agency.

September 11, 2012

Alvin H. Hankins, Elizabeth, Colorado, pro se.

Parisa Naraghi-Arani, Esquire, Washington, D.C., and Joann Putnam, Esquire, and Karen D. Huber, Esquire, Renton, Washington, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the compliance initial decision that found the agency to be in compliance with a final Board order. For the reasons set forth below, we GRANT the appellant's petition and AFFIRM the compliance initial decision as MODIFIED to order the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and the Office of Personnel Management's (OPM's) implementing regulations.

BACKGROUND

¶2 The agency removed the appellant from his position as an Aviation Safety Inspector with the Federal Aviation Administration (FAA), effective October 16, 2009. MSPB Docket No. DE-0752-10-0078-I-1 Initial Appeal File, Tab 6, Subtab 4c. In a final order dated July 18, 2011, the Board ordered the agency to cancel the appellant's removal and to substitute in its place a 30-day suspension. *Hankins v. Department of Transportation*, MSPB Docket No. DE-0752-10-0078-I-1, Final Order at 9 (July 18, 2011). The Board also ordered the agency to pay the appellant back pay, interest, and other benefits in accordance with OPM's regulations. *Id*.

¶3 The appellant filed a petition for enforcement in which he contended that the agency was not in compliance with the Board's final order because it had not paid him back pay. Compliance File (CF), Tab 1. In her compliance initial decision denying the appellant's petition for enforcement, the administrative judge found that, by statute, the Board was not authorized to award back pay or related benefits to FAA employees. *Id*., Tab 15, Compliance Initial Decision (CID) at 2-4. The administrative judge further found that the appellant was not entitled to other damages he sought.[1] CID at 5.

¶4 The appellant filed a petition for review, Petition for Review File, Tab 1, and a timely supplement thereto. *Id*., Tab 5. In the latter, he contended that on February 14, 2012, the President signed into law a provision retroactively authorizing back pay and benefits for FAA employees in Board appeals. *Id*. The Board issued a request for briefing, asking the parties to submit argument as to whether the statutory change retroactively restored the Board's authority to award

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[1] In her compliance initial decision, the administrative judge did not find the agency in noncompliance regarding the appellant's claim that he should be reimbursed for the tax liability he incurred by withdrawing his Thrift Savings Plan funds, the expense of retaining an accountant, and the amount of unemployment compensation the agency purportedly prevented him from receiving. CID at 5. The appellant has not challenged those findings on review, and we find no error in the administrative judge's findings.

back pay to FAA employees and, if so, which forms of relief under the Back Pay Act are covered by the statutory change. *Id.*, Tab 10. The appellant responded that the 2012 statute retroactively restored the Board's authority and that the scope of that authority was dictated by the Back Pay Act and OPM's regulations. *Id.*, Tab 14 at 4-9. The agency responded in agreement with both of the appellant's positions. *Id.*, Tab 15 at 8-14

ANALYSIS

¶5 A brief history of the Board's statutory authority to adjudicate appeals of FAA employees and to award back pay is instructive. Historically, the FAA was subject to 5 U.S.C. chapter 75 in the same manner as any other component of an executive agency, and, as such, in appeals where the appellant prevailed, the Board applied the provisions of the Back Pay Act, 5 U.S.C. § 5596, to the FAA as it did to other agencies. *See generally Spezzaferro v. Federal Aviation Administration*, 24 M.S.P.R. 25 (1984). In 1995, Congress authorized the FAA to create its own personnel management system to "address[] the unique demands on the agency's workforce." Section 347(a) of the Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 104-50, 109 Stat. 436, 460 (1995) ("the 1996 Act"). The FAA did so, creating a system that exempted itself from many key provisions of Title 5, including chapter 75 and the Back Pay Act, and eliminating Board appeal rights for FAA employees, effective April 1, 1996. *Allen v. Merit Systems Protection Board*, 127 F.3d 1074, 1075-76 (Fed. Cir. 1997), *superseded by statute as stated in Roche v. Merit Systems Protection Board*, 596 F.3d 1375 (Fed. Cir. 2010).

¶6 In 2000, Congress passed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (2000) ("the Ford Act"). Section 307 of the Ford Act (codified at 49 U.S.C. § 40122(g)(3)) restored to FAA employees the Board appeal rights they had as of March 31, 1996. *Miller v. Department of Transportation*, 86 M.S.P.R. 293, ¶¶ 9, 11-13

(2000). The Board subsequently determined, however, that, while FAA employees once again had Board appeal rights, the Board did not have jurisdiction to order the FAA to pay back pay to such employees because the FAA was not subject to the Back Pay Act. *Ivery v. Department of Transportation*, 102 M.S.P.R. 356, ¶¶ 12-14 (2006); *accord Gonzalez v. Department of Transportation*, 551 F.3d 1372, 1376 (Fed. Cir. 2009).

¶7 Effective February 14, 2012, the Ford Act provision codified at 49 U.S.C. § 40122(g)(3) was amended by the following "technical correction":

> Notwithstanding any other provision of law, retroactive to April 1, 1996, the Board shall have the same remedial authority over such employee appeals that it had as of March 31, 1996.

FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 611, 126 Stat. 11 (2012).

The 2012 amendment to 49 U.S.C. § 40122(g)(3) retroactively restores the Board's authority to award back pay to FAA employees.

¶8 Our analysis of this issue begins with an examination of the language of the statutory amendment. "It is axiomatic that statutory construction begins with the language of the statute itself." *Roche*, 596 F.3d at 1380 (quoting *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144, 1148 (Fed. Cir. 1999)). Where the language is clear, it must control absent clearly expressed legislative intent to the contrary. *Hall v. Office of Personnel Management*, 102 M.S.P.R. 682, ¶ 9 (2006).

¶9 The language in question is clear and unambiguous in that it provides that the Board shall have the same remedial authority over the appeals of FAA employees as it did on March 31, 1996. The Board had authority to award back pay to FAA employees on that date, prior to passage of the 1996 Act. *See, e.g.*, *Anderson v. Department of Transportation*, 59 M.S.P.R. 585, 596 (1993); *Pickard v. Department of Transportation*, 25 M.S.P.R. 404, 407-08 (1984); *Spezzaferro*, 24 M.S.P.R. at 26. Congress's use of "shall" in the statute indicates that the

Board's exercise of its remedial authority is mandatory. *See Parrish v. Department of the Interior*, 106 M.S.P.R. 185, ¶ 12 (2007). In addition, the phrase "notwithstanding any other provision of law" has been interpreted to override conflicting provisions and to supersede other laws. *Taylor v. Department of the Army*, 107 M.S.P.R. 638, ¶ 6, *review dismissed*, 310 F. App'x 361 (Fed. Cir. 2008).

¶10 We find, therefore, that the amendment to § 40122(g)(3) retroactively restores the Board's authority to award back pay to FAA employees. *See generally Gallo v. Department of Transportation*, No. 2011-3094, 2012 WL 3113171, at *8 (Fed. Cir. Aug. 1, 2012) (awarding an FAA employee compensation under the Back Pay Act, citing to the 2012 amendment to § 40122(g)(3)). The words of the statute permit no other interpretation. Moreover, as Congress expressly prescribed the amendment's reach as "retroactive to April 1, 1996," there can be no question that it applies to this case, as it was pending before the Board on the date the amendment was enacted.

The scope of the relief available to FAA employees includes all forms of relief available under the Back Pay Act.

¶11 As noted, the statutory amendment expressly grants the Board the same remedial authority over appeals of FAA employees that the Board had as of March 31, 1996. The amendment allows for no exceptions to that authority. The Board's remedial authority at that time included full relief under the Back Pay Act, i.e., back pay, interest on back pay, and other benefits under OPM's regulations. 5 U.S.C. § 5596; *Anderson*, 59 M.S.P.R. at 596; 5 C.F.R. § 550, Subpart H (1996); *see Pickard*, 25 M.S.P.R. at 407-08; *Spezzaferro*, 24 M.S.P.R. at 26. We find, therefore, that the 2012 amendment to 49 U.S.C. § 40122(g)(3) retroactively restores the Board's authority to award to FAA employees all forms of relief under the Back Pay Act.

ORDER

¶12 With regard to the appellant's removal, which we previously ordered the agency to cancel and substitute in its place a 30-day suspension, we now ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under OPM's regulations, no later than 60 calendar days after the date of this decision.[2] We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶13 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶14 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶15 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and

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[2] We note that the administrative judge found that when the Board ordered the agency to pay the appellant back pay in its July 18, 2011 final decision in this case, it lacked the authority to do so. CID at 2-4. We acknowledge that the relief ordered in our 2011 decision was erroneous at the time, but based on the February 14, 2012 statutory amendment discussed above, the order has now become a proper statement of the appellant's entitlements.

Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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: _____
William D. Spencer
Clerk of the Board

Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.