

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

THEODORE H. GLOVER,
Appellant,

DOCKET NUMBER
AT-0752-11-0921-X-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: September 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

Shari L. Oehrle, Pensacola, Florida, 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 the administrative judge's recommendation finding the agency partially noncompliant with the December 16, 2011 Initial Decision, which reversed the appellant's removal on due process grounds. *Glover v. Department of the Navy*, MSPB Docket No. AT-0752-11-

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

0921-I-1, Initial Decision at 3 (Dec. 16, 2011). The initial decision became the Board's final decision on January 20, 2012, after neither party petitioned for review. *Id.* at 11. The initial decision ordered the agency, among other things, to pay the appellant back pay. *Id.* at 1-2. The appellant now challenges the agency's refusal to pay him hazard pay during the back pay period.

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 OF COMPLIANCE

The December 16, 2011 initial decision reversed the appellant's removal on due process grounds and ordered the agency to restore him to his position as Training Instructor with the Naval School Explosive Ordnance Disposal at Eglin Air Force Base, effective August 22, 2011. Initial Decision at 9. The initial decision also ordered the agency to pay the appellant "for the appropriate amount of back pay, with interest," for the back pay period (August 22, 2011, through December 16, 2011). *Id.*

On February 27, 2012, the appellant petitioned for enforcement, contending that the agency failed to pay him compensatory time, overtime, and hazard pay differentials for the back pay period. *Glover v. Department of the Navy*, MSPB Docket No. AT-0752-11-0921-C-1, Compliance File (CF), Tab 1 at 3. The agency conceded that it erred in failing to pay the appellant compensatory time but asserted that he was not entitled to overtime or hazard pay because none of the other instructors earned such pay during the back pay period, either from their own duties or from assuming the appellant's duties. CF, Tab 4 at 5. The appellant contended that he was entitled to hazard pay because he performed unique hazardous duties, not shared by other instructors. CF, Tab 5 at 2-3. He provided an arbitrator's award dated September 19, 2011, that found that the

agency was required to pay him hazard pay for certain duties. *Id.* at 8-20. The appellant further contended that the agency should have permitted him to elect between compensatory and overtime pay and stated that he wished to be paid overtime. *Id.* at 4. The agency subsequently corrected its records to pay the appellant overtime rather than compensatory pay. CF, Tab 6 at 6.

On April 26, 2012, the administrative judge issued a recommendation finding the agency partially noncompliant with the initial decision. As the parties no longer disputed the compensatory/overtime pay issue, the administrative judge addressed only the appellant's claim to hazard pay. Granting collateral estoppel effect to the arbitration award, he found that the appellant was entitled to hazard pay at the time of his removal, and therefore the agency was required to pay him hazard pay during the back pay period for any instance in which the agency employed the Eglin Air Force Base Explosive Ordnance Disposal (EOD) Team to deal with incidents the appellant would have dealt with had he not been removed. CF, Tab 9 at 4-5.

On May 25, 2012, the agency responded to the recommendation. The agency contended that the recommendation erred because "there were no reported incidents during the Appellant's absence which would have required the Appellant to perform hazardous duty." *Glover v. Department of the Navy*, MSPB Docket No. AT-0752-11-0921-X-1, Compliance Referral File (CRF), Tab 3 at 4. The agency asserted that the arbitrator had awarded the appellant hazard pay only for "hazardous duty work on the range related to the handling of misfires/kickouts," and not for work related to "other unexploded and questionable ordnance (UXO) as argued by appellant." *Id.* at 4-5. The agency denied that the appellant's hazardous duties had been transferred to the Eglin EOD Team, as the appellant alleged. *Id.* at 5. The agency stated that the appellant had never handled UXO, only misfires or kickouts; that the Eglin EOD Team handled all UXO and had done so since before the appellant's removal; and that, of the 12 instances of UXO reported between April 2011 (four months prior

to the appellant's removal) and April 2012, all took place on Range 51, on which the appellant had never worked. The appellant worked only on Ranges C-52N or C-52W. *Id.* at 5; CRF, Tab 9 at 7; *see also* CRF, Tab 11 at 5-6. The Eglin EOD Team handled these UXO. CRF, Tab 3 at 5; CRF, Tab 8 at 8-10. Further, no misfires or kickouts had been reported on Ranges C-52N or C-52W, the appellant's ranges, during the back pay period. *See* CRF, Tab 8 at 8.

The appellant challenged the agency's statements, contending that it was "unbelievable" that no misfires or kickouts occurred on Range 52 during the back pay period when they had previously occurred "for years." CRF, Tab 6 at 5. He asserted that the agency's response was misleading because misfires or kickouts had occurred but the agency either had the Eglin EOD Team handle them or contracted with an outside corporation, INFOPRO Corp., to perform the duties that the appellant had performed prior to his removal. *Id.* The appellant sought hazard duty pay equivalent to what "he would have earned but for [t]he agency obtaining a contractor to perform the duties during his absence." *Id.*

By order dated July 3, 2012, the Clerk of the Board requested that the agency address the appellant's contentions and define "misfires," "kickouts," and "unexploded ordnance"/UXO. CRF, Tab 7. The agency responded on July 13, 2012, explaining the differences between misfires, kickouts, and UXO and noting that the appellant's job description specifically stated that he might handle misfires and kickouts. CRF, Tab 9 at 4-5. The agency stated that none of its employees, including the appellant, had ever been authorized to handle UXO, that the Eglin EOD Team handled all UXO found on the ranges, and that it had done so before the appellant's removal. *Id.* at 5-8. The agency denied the appellant's claim that it did not report misfires or kickouts upon his departure not because such events did not occur but because it contracted with an outside corporation to handle them. The agency provided a sworn declaration from its Range Operations Manager stating that only one misfire or kickout had been reported during the previous two years (which included the back pay period), and it was

reported on Range 51, not Range 52 (the appellant's range). CRF, Tab 8 at 8; Tab 9 at 6. The agency stated that the agency had reported 12 instances of UXO handled by the Eglin EOD Team between April 2011 and April 2012, all on Range 51. The agency also stated that the appellant would not have handled them either before his removal or during the back pay period. CRF, Tab 8 at 8-10. The agency further stated that INFOPRO Corp. had contracted with Eglin Air Force Base to remove range debris and to provide maintenance services for all the ranges but that such removal and maintenance were not part of the appellant's duties. CRF, Tab 8 at 9-10.

The appellant responded on July 20, 2012, maintaining that "it made no sense" for the Eglin EOD Team to explode the UXO when the team could have detonated it, as the appellant had done; that he did not believe the agency's claim that 12 incidents of UXO occurred on Range 51, but none on Range 52; and that INFOPRO Corp. handled "disposal of misfires on Range 52 in lieu of appellant." CRF, Tab 11 at 6-7.

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).

The parties dispute only whether the appellant was entitled to hazard pay for the back pay period. The administrative judge gave collateral estoppel effect to an arbitration award providing that the appellant was entitled to hazard pay for "work related to the handling of kickouts/misfires on the range." CF, Tab 5 at

19; Tab 9 at 4-5. The agency contends that no work related to kickouts or misfires took place on Range 52, the appellant's range, during the back pay period, and so he is not entitled to hazard pay. CRF, Tab 8 at 6-10. The appellant counters that the agency concealed incidents that took place on Range 52; that the agency contracted with INFOPRO Corp. to perform duties he would have performed on Range 52; and that the agency arranged for the Eglin EOD Team to perform duties he would have performed on Range 51. CRF, Tab 11 at 6-7.

We find that the agency has produced documentary evidence supporting its explanations and thus has demonstrated compliance with the Board's order. *See Vaughan*, [116 M.S.P.R. 319](#), ¶ 5. Among other documents, the agency submitted a sworn declaration from its Range Operations Manager stating that no misfires or kickouts had occurred on Range 52, the appellant's range, during the back pay period. CRF, Tab 8 at 8; Tab 9 at 8. One misfire or kickout occurred on Range 51. CRF, Tab 8 at 8. The appellant did not work on Range 51, however, and so he would not have handled this incident either before or after his removal. *See* CRF, Tab 3 at 5. The appellant does not contest the agency's assertion that he did not work on Range 51. *See* CRF, Tab 6 at 5 (noting that appellant worked on Range 52). Accordingly, the agency has demonstrated that no misfires or kickouts entitling the appellant to hazard pay occurred during the back pay period.

The appellant appears to contend that the agency owes him hazard pay for instances of UXO that occurred during the back pay period. *See* CRF, Tab 11 at 6. However, the arbitrator awarded him back pay only for "work related to the handling of kickouts/misfires on the range," not work related to handling UXO. CRF, Tab 5 at 19. The agency asserts that UXO is categorized differently from the kickouts or misfires that appellant handles, and the appellant does not challenge this assertion. CRF, Tab 9 at 4-5. Moreover, the agency asserts, also without contradiction, that the appellant was never authorized to handle UXO prior to his

removal. *Id.* at 5. Finally, the agency provided sworn testimony that all UXO instances in the past two years occurred on Range 51, rather than on Range 52, the appellant's range.² CRF, Tab 8 at 8-10. Accordingly, the appellant would not have handled these UXO even had he not been removed. He therefore is not entitled to hazard pay for the Eglin EOD Team's handling of these ordnance.

Finally, the appellant claims that he is entitled to hazard pay for any unexploded ordnance handled by INFOPRO on Range 52 during the back pay period. CRF, Tab 11 at 7. As previously noted, however, the agency provided documentary evidence that no misfires or kickouts occurred on Range 52 during the back pay period. CRF, Tab 8 at 8; Tab 9 at 8. To the extent that the appellant claims he is entitled to back pay for the maintenance or range debris work performed by INFOPRO, *see* CRF, Tab 8 at 6-7; Tab 11 at 7, he has not demonstrated that such work either is part of his duties or was addressed by the arbitrator's hazard pay award. The appellant claims that the April 30, 2012 Performance Work Statement submitted by the agency demonstrates that INFOPRO performed his duties during the back pay period. CRF, Tab 11 at 8. The Performance Work Statement appears to be a prospective document, however, – a bid solicitation rather than a signed contract – and, moreover, postdates the back pay period by some four months. CRF, Tab 8 at 7-8; Tab 10 at 6-17. Accordingly, it cannot support the appellant's contentions.

In sum, we find that the agency has proven that the appellant is not entitled to hazard pay during the back pay period and has demonstrated compliance with the initial decision. *See Vaughan*, [116 M.S.P.R. 319](#), ¶ 5. Accordingly, we find the agency in compliance and DISMISS the petition for enforcement.

² The appellant states that it makes no sense for the Eglin EOD Team to explode UXO on Range 51 when they could have detonated it, as he does. CRF, Tab 11 at 6. His concern is irrelevant to the issue of whether he would have handled UXO incidents on Range 51 had he not been removed; as the agency demonstrated, he would not have done so.

**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.