UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARY A. MCDONALD,
Appellant,

v.

GENERAL SERVICES ADMINISTRATION,
Agency.

DOCKET NUMBER
SF-0752-11-0074-X-1

DATE: September 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Rayna S. Becker, Esquire, Roseville, California, for the appellant.

Deborah Finch, San Francisco, 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 the administrative judge's recommendation finding the agency noncompliant with the December 17, 2010 initial decision, which accepted the parties' settlement agreement into the record

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

for enforcement and became the Board's final decision on January 21, 2011. MSPB Docket No. SF-0752-11-074-X-1, Compliance Referral File (CRF), Tab 1 at 2-3. The settlement agreement provided, among other things, that the agency would change the effective date of the appellant's separation from June 19, 2010, to July 12, 2011, to enable her to complete 25 years of service. MSPB Docket No. SF-0752-11-074-I-1, Initial Appeal File (IAF), Tab 13, ¶¶ 1, 3. During this period, the appellant would be carried on the agency's rolls in the same position of record and at the same rate of pay, except that she would receive regular pay from June 19, 2010, to January 12, 2011, and would be placed on leave without pay from January 12, 2011, to July 12, 2011. IAF, Tab 13, ¶ 3. The parties now dispute whether the agency paid the appellant correctly under the terms of the settlement agreement.

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)).

BACKGROUND

On December 16, 2010, the parties agreed to settle the appellant's appeal of her separation for declination of a management-directed change in official duty station. IAF, Tab 13, ¶ 1. The settlement agreement provided, in pertinent part:

> 1. GSA will change the effective date of Ms. McDonald's separation for declination of a management-directed change in official duty station from June 19, 2010 to July 12, 2011. The period from June 20, 2010 to July 12, 2011 is referred to herein as the "reinstatement period." The intent of this change is to enable Ms. McDonald to complete 25 years of service.
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> 3. For the reinstatement period, Ms. McDonald will be carried on GSA's rolls in the same position of record, and at the same rate of pay, as at the time of her June 19, 2010 separation, except as follows:

a. Ms. McDonald hereby requests, and GSA hereby approves, leave without pay ("LWOP") for the last six months of the reinstatement period. Ms. McDonald agrees not to rescind this request, and not to change the type of leave requested for this period.

b. Ms. McDonald will receive any pay increases for which she may become eligible during the reinstatement period, on the same basis as if the June 19, 2010 separation had not occurred.

4. The parties understand that Ms. McDonald will be responsible for repayment of the amount paid to her following her June 19, 2010 separation for 324.8 hours of accrued annual leave. The parties agree that this leave will be recredited to Ms. McDonald's leave account, and that GSA will permit Ms. McDonald to carry the full 324.8 hours over into the CY 2011 leave year.

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9. This agreement constitutes full and complete settlement of the matters addressed herein. Nothing in this agreement shall be considered evidence, or an admission, that GSA or any of its officials have engaged in any form of discrimination. No interest, attorney fees, or other money is due to Ms. McDonald or to Attorney Becker from GSA, except as explicitly stated in this agreement.

IAF, Tab 13. Thus, the settlement agreement provided that the agency would cancel the appellant's separation; reinstate her for approximately 13 months so she could reach 25 years of service; pay her for approximately 7 months of the 13-month reinstatement period; and recredit her annual leave. The appellant, in turn, would repay the agency for the recredited annual leave. Because the appellant was separated for declining a management-directed transfer, she had received severance pay. The settlement agreement did not address repayment of the severance pay, however.

The administrative judge found that the settlement agreement was lawful and freely entered into by the parties and that the parties understood its terms. She therefore entered the agreement into the record for enforcement purposes and dismissed the appeal. IAF, Tab 14 at 1-2. The initial decision became final on January 21, 2011, after neither party petitioned for review.

On April 7, 2011, the appellant filed a petition for enforcement alleging that the agency had breached the settlement agreement. After multiple submissions from both parties, the administrative judge narrowed the issues to the following:

> 1. Whether the agency breached the settlement agreement because it never retroactively reinstated [the appellant] to a regular pay status from severance pay for the periods from June 20, 2010 to January 12, 2011, and from January 12, 2011 to February 12, 2011. The appellant stated that because the agency treated her wages [from the settlement agreement] as supplemental, her tax withholding was incorrect at 25%. Therefore, the appellant disputed the severance pay debt of $28,771.74;
> 2. Pursuant to the Back Pay Act, the appellant requested back pay and interest;
> 3. The appellant requested attorney fees;
> 4. The appellant raised concerns regarding three documents contained in her Official Personnel Folder (OPF); and
> 5. The appellant alleged that her W-2 Form for tax year 2010 was inaccurate.

MSPB Docket No. SF-0752-11-0074-C-1, Compliance File (CF), Tab 40 at 3-4.

With regard to issues 2 through 5, the administrative judge found that the appellant was not entitled to interest on her back pay amount; that she was not entitled to attorney fees; that the OPF issues she raised did not materially breach the settlement agreement; and that the accuracy of her W-2 Form was beyond the scope of the Board's authority in adjudicating her petition for enforcement. CF, Tab 40 at 10-15. The parties have not contested these findings. *See* CRF, Tabs 3 and 6.

With regard to issue 1, the administrative judge found that the agency properly reinstated the appellant to regular pay status because it canceled her separation. CF, Tab 40 at 6-7. The administrative judge also found that the agency properly taxed the appellant's wages from the settlement agreement as supplemental, with a federal tax withholding rate of 25%. *Id.* at 7-8. With

respect to the severance pay debt, the administrative judge found that it was undisputed that the appellant received gross severance pay totaling $80,041.74 and that she "acknowledged that she owed a debt for severance pay." *Id.* at 8. The administrative judge found, however, that the Back Pay Act, which would have permitted the agency to offset the appellant's severance pay debt against her wages from the settlement agreement, did not apply, and the agency had not identified any other statutory or regulatory procedure permitting the agency to offset the debt. CF, Tab 40 at 8-10. The administrative judge found that the agency therefore breached the settlement agreement when it offset the appellant's severance pay debt against her wages from the settlement agreement. *Id.* The administrative judge did not order the agency to take specific actions to cure the breach.

ANALYSIS

The Board enforces settlement agreements entered into the record as it does final Board decisions or orders. "Where the appellant alleges noncompliance with a settlement agreement, the agency must produce relevant material evidence of its compliance with the agreement, or show that there was good cause for noncompliance. The ultimate burden, however, remains with the appellant to prove breach by a preponderance of the evidence." *Knight v. Department of Treasury*, 113 M.S.P.R. 548, ¶ 8 (2010). A breach is material "when it relates to a matter of vital importance or goes to the essence of the contract." *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 11 (2011) (citing *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381 (Fed. Cir. 2007)).

The only issue remaining is whether the agency paid the appellant correctly under the terms of the settlement agreement. The appellant does not dispute that, following the cancellation of her separation, she was required to repay the severance pay she received in connection with her separation. CRF, Tab 10 at 2. More important, the settlement agreement is silent on this issue.

The appellant objects to the agency's calculation of her severance pay debt, however, maintaining that, under her calculations, the severance pay and the wages she received from the settlement agreement should have been equal (thus canceling each other out). *Id.* The accuracy of the agency's calculation is beyond the scope of the parties' settlement agreement and, therefore, this compliance action. Among other things, the settlement agreement did not address the amount of severance pay to be repaid, including whether the appellant owed the gross or the net amount. Nor did the settlement agreement address tax withholding or deductions to be applied to the wages provided by the settlement agreement. Because the settlement agreement essentially substituted reinstatement pay for severance pay with the "intent . . . to enable Ms. McDonald to complete 25 years of service," IAF, Tab 13, ¶ 1, it was foreseeable under the circumstances that a dispute regarding payments and offsets might arise.[2] The parties did not address these issues in the settlement agreement, however. *Cf. Sweet v. U.S. Postal Service*, 89 M.S.P.R. 28, ¶¶ 4, 12 (2001) (parties' agreement expressly stated the gross amount of money to which the appellant was entitled and that it was "subject to applicable taxes"). The Board will not read into the settlement agreement terms not specified by the parties. *See Flores v. U.S. Postal Service*, 115 M.S.P.R. 189, ¶ 10 (2010). Nor will the Board attempt to resolve tax, accounting, or other disputes that are not addressed in the settlement agreement. *See Raymond v. Department of the Navy*, 116 M.S.P.R. 223, ¶ 20 (2011) (agency's alleged delay in issuing paychecks did not breach the settlement agreement because the agreement did not address the timing of the paychecks); *Engel v. U.S. Postal Service*, 114 M.S.P.R. 541, ¶ 11 (2010) (no breach of settlement agreement where the settlement agreement did not contain any provision requiring the agency to perform the action at issue); *Quackenbush v.*

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[2] Indeed, the parties anticipated such a dispute over annual leave repayment, and expressly provided for it. *See* IAF, Tab 13, ¶ 4.

Department of Justice, 45 M.S.P.R. 543, 544 (1990) (the Board will not resolve the parties' disagreement over the amount of tax to be withheld from a payment made under a settlement agreement). This dispute therefore belongs "in another forum." *See Quackenbush*, 45 M.S.P.R. at 544.

Because the sole remaining issue – the agency's calculation of the severance pay debt – is beyond the scope of the settlement agreement, we find the agency in compliance and DISMISS the petition for enforcement.

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.