

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

SABRINA M. BEATTY,  
Appellant,

DOCKET NUMBER  
SF-0353-09-0542-X-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: September 25, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Richard Heavey, Esquire, Medfield, Massachusetts, for the appellant.

Afshin Miraly, Esquire, Long Beach, 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 on the appellant's petition for enforcement of the Board's final decision in her appeal finding that the agency violated her restoration rights and ordering the agency to retroactively restore the appellant and pay her the back pay and benefits that are due. *See Beatty v. U.S. Postal*

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

*Service*, Docket No. SF-0353-09-0542-B-1 (Initial Decision, Nov. 16, 2010). The initial decision became the Board's final decision on December 21, 2010, when neither party filed a petition for review. For the reasons stated below, we find the agency in compliance and dismiss the petition for enforcement.

### **BACKGROUND**

In her petition for enforcement, the appellant alleged that the agency had failed to pay her back pay or to credit her leave account for the annual and sick leave she would have earned during the back pay period. Compliance File (CF), Tab 1. In its initial response, the agency stated that it was in the process of computing the back pay award due the appellant, but conceded that it had not yet paid it, a delay it attributed to the appellant's mistakes in completing and filing required forms. CF, Tab 7 at 5-6. The administrative judge therefore granted the appellant's petition and recommended that the Board enforce the Board's final decision if the agency did not immediately provide evidence, with a narrative explanation, that it had paid the appellant the back pay, interest and benefits owed her and had credited her with the appropriate amounts of annual and sick leave. CF, Tab 9 at 4-5. The agency in response stated that it had restored all annual leave, sick leave and thrift savings plan benefits to the appellant, but that she was due no back pay because of the offset of the state unemployment benefits and the benefits from the Office of Workers' Compensation Programs (OWCP) that she received during the back pay period, which together exceeded the pay she would have earned. Compliance Referral File (CRF), Tab 4. The appellant replied that the agency's summary submission did not permit an assessment of the agency's determinations. CRF, Tab 5 at 3-4.

On September 28, 2011, the Board issued an order requiring the agency to submit a clear explanation of its compliance actions supported by understandable documentary evidence. CRF, Tab 6. The order stated that the agency's evidence concerning back pay must include an explanation of how it arrived at its figures

and an accurate account of any deductions. *Id.* at 2. With respect to the offset of unemployment compensation, the order stated that the agency must show that it was required to reimburse the state unemployment fund under the applicable state law and that it had done so. *Id.* In response, the agency provided specific information with supporting evidence concerning its restoration of the appellant's leave, and it submitted a back pay report with supporting evidence concerning its calculations.<sup>2</sup> CRF, Tab 8 at 4-5 & Exhibits A-C. The agency stated both that the Back Pay Act does not require it to reimburse the state for the unemployment compensation the appellant received and also that it does repay the state of California for unemployment compensation that is withheld from employees' back pay. *Id.* at 5-6. The appellant replied that the agency's submission was late and that its failure to repay the state violates its own requirements and also left the appellant exposed to a demand for repayment from the state. CRF, Tab 9 at 3-6.

On March 23, 2012, the Board issued an order noting that the appellant did not object to the amount of leave the agency credited to her account, but that she objected to its failure to provide evidence that it had reimbursed the state for the unemployment compensation withheld. CRF, Tab 10 at 2-3. The Board found that state law determines whether the agency is required to reimburse the state unemployment fund and that the agency's acknowledged procedures for reimbursement of these amounts to the state of California appeared to indicate there was such a state requirement. *Id.* at 3. Thus, the Board found that to be in compliance the agency was required to provide evidence it had made such a reimbursement in this case. *Id.* In response, the agency submitted a document that it stated was evidence of a partial reimbursement of the amount in this case, one made as part of a larger, quarterly payment to the state Employment Development Department (EDD) for 2009. CRF, Tab 13 at 4, 9-10. In reply, the

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<sup>2</sup> The back pay report showed that the appellant's gross back pay was \$93,782.91 and the total amount offset was \$99,055.42 (\$70,080.42 in OWCP benefits and \$28,975.00 in unemployment compensation). CRF, Tab 8 at 28.

appellant noted that the agency's evidence merely showed that it had received a bill from the EDD for this small amount, not that it made a payment, and the appellant stated in addition that she is receiving regular demands for reimbursement of her unemployment compensation from the EDD. CRF, Tab 14 at 3.

On May 16, 2012, the Board issued an order directing the agency to submit a response to the appellant's arguments and evidence showing what steps the agency is taking to comply with the Board's orders, including informing the EDD that the appellant is not responsible for repayment of the unemployment benefits in question. CRF, Tab 15. The agency's response asserted difficulty in determining the amount of the appropriate reimbursement of the EDD in view of its discovery that the EDD had also found an overpayment based on the appellant's receipt of OWCP benefits. CRF, Tab 16 at 4-5. The appellant responded that the agency's submission was not responsive to the Board's orders and that it was clear that the agency owed the amount of its offset from her back pay for unemployment benefits, \$23,702.49, *i.e.*, \$93,782.91 - \$70,080.42 (less any amount the agency had already reimbursed the EDD). CRF, Tab 17 at 1-5. The appellant subsequently submitted a copy of a June 8, 2012 letter from the agency's Accounting Services to the EDD stating that the agency had *not* recovered the appellant's unemployment compensation from her back pay. CRF, Tab 18, Exhibit A at 3. In light of these developments, the appellant requested a status conference. CRF, Tab 20.

A telephone status conference was scheduled for July 25, 2012, to discuss the agency's compliance with this order. Prior to the conference held on that date, the agency submitted a new June 1, 2012 back pay report, replacing the one previously issued. CRF, Tab 21. The new report continued to offset the workers compensation payments the appellant received from the OWCP, but the previous offset for unemployment compensation received from the EDD was eliminated, leaving an adjusted gross back pay amount due of \$23,702.49. *Id.* at 15. The

report shows a net amount of \$14,977.70 due the appellant after deductions for taxes, retirement contributions and union dues. *Id.* at 2. The agency stated that it sent the appellant a check for \$14,338.70,<sup>3</sup> but that the appellant had not cashed the check, an action it presumed to reflect her position that the agency should repay the offset amount directly to the EDD. *Id.* at 1.

Following the status conference, the appellant and the agency made written submissions addressing issues arising from the agency's action. The appellant objected to the agency's departure from previously acknowledged agency procedures for repaying EDD for unemployment compensation withheld from back pay and instead issuing a new back pay report and sending a check to the appellant for the amount withheld minus deductions. CRF, Tab 22 at 4-5. The appellant asserted that the agency's action was not consistent with its action in other cases, and she contended that the agency had provided no support for a policy cited at the status conference of giving different treatment to negative back pay cases like hers (where the offsets exceeded the back pay). *Id.* In its submission, the agency contended that the applicable state law, California Insurance Code § 1375, requires the employee who received an overpayment of unemployment compensation to repay the EDD and does not require the employer to do so. CRF, Tab 23 at 4-5. The agency explained that for this reason it had cancelled the withholding of unemployment compensation from the appellant's back pay and paid it directly to her, less amounts properly withheld for taxes, retirement and union dues. *Id.* On this basis, the agency asked the Board to dismiss the appellant's petition for enforcement. *Id.* at 5.

In reply, the appellant objected that both the agency's policy and California Insurance Code § 1382 require the employer to repay the EDD for unemployment benefits that have been withheld from an employee's back pay. CRF, Tab 24 at 2.

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<sup>3</sup> The agency explained that the difference of \$638.00 between the back pay report amount and the check amount was due to the withholding of an additional amount of union dues. *See* CRF, Tab 23 at 4-5.

She contended that the agency's new back pay report should not be recognized because the agency provided no evidence to support its claim that it had a policy of treating negative back pay cases like the appellant's differently. CRF, Tab 25 at 4-5. The appellant urged the Board to find the agency not in compliance until it reimburses the EDD in the amount of the \$23,702.49 originally withheld. *Id.* at 5.

### DISCUSSION

The question of whether or not an agency may deduct unemployment compensation from an award under the Back Pay Act depends on whether the agency may be liable under state law for reimbursing the state for such amounts and whether it has made the required payment to the state. *Shobert v. Department of the Air Force*, [90 M.S.P.R. 262](#), ¶¶ 12-14 (2011); *Lucas v. Department of Defense*, [64 M.S.P.R. 172](#), 181 (1994), *overruled on other grounds by Stabile v. Defense Commissary Agency*, [76 M.S.P.R. 658](#) (1997). No evidence or argument has been presented that a different rule should be applied to the appellant's award of back pay pursuant to the provisions of the agency's Employment and Labor Relations Manual. The agency correctly notes that a provision of the California Unemployment Insurance Code, § 1375, requires that when an employee receives a back pay award, the employee is required (absent specific exceptions not applicable here) to reimburse the EDD for any unemployment compensation benefits received from the state during the back pay period. The appellant also correctly notes that a related provision of the California Unemployment Insurance Code, § 1382, provides that when the employer reduces the employee's back pay award by the amount of unemployment benefits paid during the back pay period, the employer is required to repay the withheld benefits to the EDD. Read together, the two provisions indicate that the agency is authorized, but not required, to withhold unemployment benefits from the appellant's back pay and

that its obligation to reimburse the EDD for such benefits is contingent on the agency's having withheld them.

Here the agency has cancelled the previous deduction for unemployment compensation and paid the appellant the amount deducted from her back pay, less authorized deductions. The appellant has objected to the agency's prolonging of this proceeding by its several changes of position - first denying any duty to reimburse the withheld amounts, then contending that it had made reimbursement or was in the process of doing so, and now cancelling the withholding altogether. While this criticism of the agency's conduct may be fair, the agency has now paid the appellant the amount of back pay in dispute and has therefore no obligation to reimburse the EDD. Accordingly, we find that the agency is now in compliance with the Board's final decision in the appellant's appeal, and we DISMISS her 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**

This is the Board's final decision in this enforcement proceeding. [5 C.F.R. § 1201.183](#)(b). 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](http://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.