

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

2012 MSPB 124

Docket No. DA-0752-10-0388-X-2

Debra S. Litton,

Appellant,

v.

Department of Justice,

Agency.

November 8, 2012

David L. Wilson, Esquire, Stigler, Oklahoma, for the appellant.

John T. LeMaster, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board pursuant to the administrative judge's Recommendation finding the agency noncompliant with the Board's August 1, 2011 Final Order, which instructed the agency to cancel the appellant's demotion and restore her to her position of GS-12 Facilities Manager. MSPB Docket No. DA-0752-10-0388-X-2, Compliance Referral File (CRF2), Tab 1 at 1, 7; MSPB Docket No. DA-0752-10-0388-I-1, Petition for Review (PFR) File, Tab 5 at 3. This is the second compliance referral action arising out of the August 1, 2011 order. In the previous action, we found the agency compliant after it canceled its

reassignment of the appellant. We noted, however, that the appellant could file a second petition for enforcement if she believed the agency had retaliated against her or had taken further action rendering it noncompliant with the Final Order. MSPB Docket No. DA-0752-10-0388-X-1, Compliance Referral File (CRF1), Tab 5 at 5. The appellant subsequently filed the current petition for enforcement. For the reasons discussed below, we find the agency in compliance and DISMISS the petition for enforcement.

BACKGROUND

¶2 Effective April 11, 2010, the agency reduced the appellant in grade and reassigned her based on a charge of having an Inappropriate Supervisor/Subordinate Relationship. Initial Appeal File, Tab 12, Subtabs 4a, 4b. In an October 4, 2010 initial decision, the administrative judge reversed the action, finding it not in accordance with law because the proposing official listed on the proposal notice did not sign that document, authorize anyone to sign the document on his behalf, or otherwise take part in the proposal process. *Id.*, Tab 14 at 2-3. The initial decision ordered the agency to cancel the appellant's demotion and restore her to her GS-12 Facilities Manager position. *Id.* at 3. The initial decision also informed the agency that it "may file a petition for review of this initial decision in accordance with the Board's regulations." *Id.* at 8.

¶3 Consistent with this notice, the agency filed a timely November 8, 2010 petition for review asserting that the administrative judge improperly denied the request of both parties that the actual proposing official be permitted to testify, that testimony from that official would have established that the proposal notice was not an *ultra vires* act, and that the agency's procedural error was not harmful because it did not impact the appellant's response to the proposal or the deciding official's decision. PFR File, Tab 1. On August 1, 2011, the Board issued a nonprecedential Final Order denying the agency's petition for review. PFR File,

Tab 5. The Board ordered the agency to cancel the appellant's demotion and restore her to her position. *Id.* at 3.

¶4 The appellant then filed a September 19, 2011 petition for enforcement asserting that the agency had not restored her to her previous position. MSPB Docket No. DA-0752-10-0388-C-1, Compliance File, Tab 1. On October 18, 2011, the administrative judge granted the petition for enforcement and issued a recommended decision finding that the agency had failed to show compliance with the Board's order. *Id.*, Tab 6. The recommended decision informed the parties that, if the agency decided to take the actions required by the recommendation, it needed to submit evidence in that regard to the Clerk of the Board within 15 days. *Id.*, Tab 6 at 5. It also informed the parties that, if the agency decided not to take any of the actions required by the recommendation, it needed to file with the Clerk of the Board written arguments supporting its disagreement within 30 days. *Id.* Finally, the recommended decision indicated that, if the agency decided to take one or more, but not all, of the actions required by the recommendation, it must submit to the Clerk of the Board both evidence of the actions taken and arguments supporting its disagreement with the recommendation. *Id.*

¶5 After the agency submitted evidence of compliance, the Board issued a December 8, 2011 nonprecedential Final Order finding the agency in compliance and dismissing the petition for enforcement. CRF1, Tab 5. The Board informed the appellant that if she believed in the future that the agency had retaliated against her or otherwise failed to comply with the Final Order, she could file another petition for enforcement. *Id.* at 5.

¶6 The appellant filed a second petition for enforcement on February 9, 2012, claiming that the agency had not complied with the Board's December 8, 2011 Final Order and its August 1, 2011 Final Order because the agency proposed her demotion and reassignment on January 3, 2012, based on the same reasons set forth in the original demotion. MSPB Docket No. DA-0752-10-0388-C-2,

Compliance File (CF2), Tab 1. The agency filed a response, asserting that double jeopardy does not apply to administrative proceedings and an agency can renew an adverse action in a proceeding that was invalidated on procedural grounds. *Id.*, Tab 6 at 5.

¶7 The administrative judge, however, granted the petition for enforcement in a March 21, 2012 recommendation, finding that the agency had waited over 1 year after the initial decision reversing the initial action before proposing the new disciplinary action and offered no explanation for the delay. *Id.*, Tab 7 at 5. The administrative judge cited *Steele v. General Services Administration*, [6 M.S.P.R. 368](#), 372 (1981), for the proposition that, instead of filing a petition for review in 2010, the agency should have corrected the procedural failure by providing the appellant with full procedural rights in a new disciplinary action at that time. *Id.* The administrative judge found that the representations made by the agency in its reply to the appellant's first petition for enforcement were less than forthright and made in bad faith, and that the agency should have notified the Board while the first petition for enforcement was pending that it planned on proposing a second disciplinary action. *Id.* at 6-7. Thus, the administrative judge found the agency's "unexplained decision to propose disciplinary action against the appellant more than two years after the events in question and more than a year after the Initial Decision was issued reversing the agency's action on procedural grounds to be retaliatory." *Id.* at 6. As in the first recommendation, the administrative judge notified the parties of the various actions the agency needed to take if it decided to take the actions recommended by the decision or challenge the recommendation. *Id.* at 8. The agency has again decided to exercise its right not to take any of the actions required by the recommendation and to instead file written arguments supporting its disagreement with the recommendation. CRF2, Tab 3; *see* [5 C.F.R. § 1201.183](#)(a)(6)(ii).

ANALYSIS

¶8 Under [5 U.S.C. § 7701](#)(e)(1)(A), a party to a Board appeal, such as an agency, may petition the Board for review of any decision. Similarly, the Board's regulations provide that any party to a proceeding may file a petition for review. [5 C.F.R. § 1201.114](#)(a). When an administrative judge issues a recommendation that the Board enforce a final decision, the agency *must* either submit to the Clerk of the Board evidence of compliance or file a brief supporting its nonconcurrence. 5 C.F.R. § 1201.183(a)(6).

¶9 At no point during any of these proceedings, i.e., in the initial decision reversing the action, the Board's Final Order affirming the reversal, the two recommended decisions issued by the administrative judge in the compliance matters, the Board's Final Order finding agency compliance, or the two acknowledgment orders issued by the Clerk of the Board upon referral to the Board's Office of General Counsel (*see* CRF1, Tab 2, and CRF2, Tab 2) did the Board inform the agency that unless it promptly corrected its procedural failure by providing the appellant with full procedural rights in a new disciplinary action, it would forfeit its right to take such an action if it chose instead to exhaust its rights under the review processes outlined in each of the Board's notices and decisions. Moreover, nothing in the Board's regulations contemplates that an agency's pursuit of its statutory and regulatory review rights precludes it from later taking a new action.

¶10 Bad faith implies or involves actual or constructive fraud, a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation prompted by some interested or sinister motive. *Rogers v. Department of Justice*, [60 M.S.P.R. 377](#), 384 (1994). Under the circumstances in this case, in which the agency has simply followed the Board's requirements and taken full advantage of its statutory and regulatory rights under the avenues of review repeatedly explained to it by the Board, we cannot find that it engaged in bad faith or retaliation by waiting until those proceedings had concluded before

proposing the appellant's demotion anew. *Cf. Schultz v. U.S. Postal Service*, [70 M.S.P.R. 633](#), 638 (1996) (the agency is entitled to use the entire 35-day period before the initial decision is to become final to decide either to comply fully with the decision or to file a petition for review and comply on an interim basis). Indeed, it could be argued that, as a legal strategy, an agency would not want to "correct" a procedural flaw if, at the same time, it was contending that there was no procedural flaw in the first place. In this case, the agency acted promptly by issuing the new proposal notice on January 3, 2012, less than 1 month after the Board's December 8, 2011 Final Order ultimately found the agency in compliance.

¶11 We further find that the agency did not mislead or deceive the Board into finding compliance and dismissing the appellant's first petition for enforcement. The agency clearly informed the appellant that, "[a]t this time, you are advised you will remain in the Facilities Manager position, at FCI [Federal Correctional Institution] Seagoville." CRF1, Tab 3, Attach. 6. The Board correctly interpreted this sentence as a statement, not a threat. *Id.*, Tab 5 at 5. We find no evidence in the record demonstrating deceit or bad faith by the agency.

¶12 The recommended decision relies upon *Steele*, 6 M.S.P.R. at 368, 372 n.5 (1981), for the principle that, if an agency fails to comply with applicable termination procedures, its remedy is not to seek review of the reversal, but to correct the procedural failure by providing the appellant with full procedural rights in a new termination action. CF2, Tab 7 at 5-7. The Board in *Steele*, however, made the above statement in response to an argument by the appellant relating to a superseded regulation. 6 M.S.P.R. at 372 n.5. There was no attempt by the agency in *Steele* to seek review of the reversal of its action on procedural grounds. Thus, the footnote in *Steele* was mere dictum that the Board need not follow. *See Smith v. Orr*, [855 F.2d 1544](#), 1550 (Fed. Cir. 1988) (broad language unnecessary to a court's decision cannot be considered binding authority); *Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 27 (2010)

(declining to follow dictum in a Board decision). Moreover, the Board cited to no supporting authority for its statement in the *Steele* footnote. The Board did, however, apply the general principle that it is not unusual or wrongful for an agency to begin anew an adverse action based on charges that were previously brought when the initial action was invalidated on procedural grounds. *Steele*, 6 M.S.P.R. at 372.

¶13 Accordingly, we find that the agency's decision to propose a new disciplinary action under the circumstances of this case does not by itself demonstrate noncompliance with the Board's orders, bad faith, or retaliation. We therefore DISMISS the appellant's petition for enforcement.

ORDER

¶14 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)).

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.