

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

FRANK KENYATTA NELSON,
Appellant,

DOCKET NUMBER
AT-0752-10-1011-X-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: December 5, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Frank Kenyatta Nelson, Villa Rica, Georgia, pro se.

Earl L. Cotton, Sr., Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

ORDER

On May 19, 2011, the administrative judge issued a recommended decision that the Board find, under the Board's regulations in effect at that time, the agency noncompliant with the December 23, 2010 initial decision, which became final on January 27, 2011, when neither party petitioned for review. MSPB

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Docket No. AT-0752-10-1011-C-1, Compliance File (CF), Tab 14, Recommendation at 8; MSPB Docket No. AT-0752-10-1011-I-1, Initial Appeal File (IAF), Tab 34, Initial Decision; *see* [5 C.F.R. § 1201.183](#)(b) (Jan. 1, 2012). The initial decision ordered the agency to cancel the appellant's removal; restore him to his position, effective August 28, 2010; and pay him back pay, interest, and benefits. IAF, Tab 34, Initial Decision at 13. The appellant petitioned for enforcement,² contending, among other things, that the agency failed to pay him back pay and interest or restore his benefits. CF, Tab 1. For the reasons discussed below, we find the agency in partial compliance and order it to submit additional evidence regarding its restoration of the appellant's annual and sick leave.

BACKGROUND

The agency removed the appellant for violating his Last Chance Settlement Agreement, which limited his absences from work in any given quarter. IAF, Tab 34, Initial Decision at 1, 3. The administrative judge reversed the removal, finding that the agency had not proven that the appellant had violated the terms of the agreement. *Id.* at 5-6. The administrative judge ordered the agency to cancel the removal; restore the appellant to duty, effective August 28, 2010; and pay him the appropriate amount of back pay, with interest and benefits. *Id.* at 13. The initial decision became final on January 27, 2011, when neither party petitioned for review.

On April 4, 2011, the appellant petitioned for enforcement. CF, Tab 1. He contended that the agency deprived him of the opportunity to work overtime and holidays; engaged in prohibited discrimination and violated the Fair Labor

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for enforcement in this case was filed before that date. The revisions to [5 C.F.R. § 1201.183](#) do not affect our consideration of the merits of this compliance proceeding.

Standards Act regarding payment of overtime; improperly deducted health care premiums from his pay checks and his back pay award; failed to restore 64 hours of holiday work hours to which he was entitled; let his personal life insurance policy lapse due to unpaid premiums; failed to restore annual and sick leave; failed to restore leave hours available under the Family and Medical Leave Act (FMLA); failed to recertify a medical condition from which he suffered as a FMLA-qualifying condition; failed to restore sick leave charged when the agency denied him FMLA leave; failed to pay him night differential as part of his back pay award; failed to properly adjust his retirement benefits; improperly charged him military leave while he was on active duty; and discriminated against him on the basis of race. CF, Tab 14 at 4-5. The appellant also sought punitive and compensatory damages. *Id.* at 5.

After reviewing the petition for enforcement and the agency's responses, the administrative judge granted the petition for enforcement in part and ordered the agency to take the following actions:

1. Pay the appellant the proper amount of back pay with interest, including appropriate payment for overtime;
2. Submit evidence of compliance, including a narrative explanation of its back pay and benefits calculations, addressing the appellant's entitlement to overtime, holiday pay, and night differential pay;
3. Submit evidence of the compliance actions the agency has completed, along with a reasonable schedule for full compliance.

CF, Tab 14, Recommendation at 8. The administrative judge denied the petition for enforcement with respect to the appellant's other contentions (that is, those other than back pay, interest, benefits, and annual and sick leave).³

³ We have reviewed the recommendation and find no error with respect to the administrative judge's determinations.

The agency and the appellant submitted multiple responses to the recommendation and to subsequent orders from the Clerk of the Board. *See* MSPB Docket No. AT-0752-10-1011-X-1, Compliance Referral File (CRF), Tabs 3-7, 10-13, 15-16, 18-19. As explained below, we now find the agency in compliance in all respects except for restoration of the appellant's annual and sick leave.

ANALYSIS

Pursuant to [5 U.S.C. § 1204](#)(a)(2), the Board has jurisdiction to consider an appellant's claim that an agency has not complied with a Board order. *Davis v. Office of Personnel Management*, [111 M.S.P.R. 544](#), ¶ 8 (2009). 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 appellant asserts that the agency remains noncompliant with its obligation to pay him back pay because the agency has not paid him "full back pay, overtime, night differential pay," or holiday pay. CRF, Tab 12 at 1; CRF, Tab 5 at 2. The appellant claims that he would have worked all holidays during the back pay period and thus should be paid at the holiday work rate for those days (rather than the holiday leave rate). CRF, Tab 5 at 2. He also asserts that the agency failed to calculate the interest on his back pay correctly. CRF, Tab 12 at 1. Finally, he asserts that the agency failed to restore his annual and sick leave.⁴ CRF, Tab 19 at 1-2.

⁴ The appellant also renews his contentions that the agency discriminated against him regarding his FMLA leave benefits and on the basis of his race and age. CRF, Tab 5 at 1-2. The administrative judge properly rejected these claims. CF, Tab 14, Recommendation at 6. Moreover, many of these claims concern actions that occurred after the appellant's restoration to duty. *See, e.g.*, CRF, Tab 5 at 1 (denial of FMLA leave on February 4, 2011; the appellant returned to work on January 18, 2011). Accordingly, they are outside the scope of this compliance action. Indeed, several of

Back Pay

The agency submitted evidence that it paid the appellant a gross amount of \$22,006.93 in back pay (\$6,823.45 net after adjustments, withholding, and deductions) for a period spanning 21 weeks (10.5 pay periods) between August 28, 2010 (the appellant's effective restoration date) and January 18, 2011 (the date the appellant returned to work). CRF, Tab 4 at 4; CRF, Tab 3 at 12-13. This amount included night differential pay of 4.5 hours per day worked. *Id.* at 5. It also included 6 days of holiday leave pay (although 7 federal holidays occurred during this period). *Id.* at 5, 10. This amount did not include overtime. The agency separately calculated the appellant's overtime as 3.06 hours per week, derived from averaging his weekly overtime for the 22 week period prior to his removal. CRF, Tab 4 at 5. The agency paid the appellant for 3.09 hours of overtime per week (an error in the appellant's favor) during the back pay period for a gross amount of \$2,539.00 (\$1,644.01 net). *Id.*; CRF, Tab 3 at 39. After reviewing the agency's explanation and supporting documents, *see* CRF, Tabs 3 and 4, we agree that its back pay calculations are correct.

The appellant asserts that the agency did not pay him correctly for night differential payments or overtime. CRF, Tab 5 at 1-2. We disagree. The agency's explanations and documentation are thorough and appear correct, and the appellant has not pointed to any specific flaw.

The appellant also contests the payment of 6 days of holiday leave, asserting that (1) he should have been paid at the holiday work rate (double the holiday leave rate) because he would have worked each of those holidays had he not been removed, and (2) he should have been paid for 7 holidays, not 6, because

the appellant's claims, and the agency's responses thereto, relate to a subsequent Board appeal filed by the appellant, which was adjudicated separately. *See, e.g.*, CRF, Tab 6 (addressing pay periods 7 to 15 of 2011); CRF, Tab 10; MSPB Docket Nos. AT-0752-11-0523-I-1, AT-0752-11-0523-C-1.

the agency omitted Martin Luther King, Jr., Day.⁵ CRF, Tab 5 at 2; CRF, Tab 16 at 1.

We disagree with the appellant's first contention, regarding the rate of pay. The agency submitted evidence that the appellant did not work any of those same holidays in 2009-2010. CRF, Tab 15 at 4, 6-16. The appellant asserted that the agency's evidence was "outdated" and "misleading." CRF, Tab 16 at 2. After reviewing these and subsequent submissions from the parties, we agree that it was reasonable for the agency to use the appellant's prior work history in seeking to determine the appellant's work schedule had he not been removed. *Cf. Chacon v. Department of Agriculture*, [115 M.S.P.R. 313](#), ¶ 10 (2010) ("Overtime back pay may be computed based either on pre-removal overtime history or average overtime hours worked by similarly-situated employees during the removal period. The Board will not nullify the method chosen by the agency absent a showing that it is unreasonable or unworkable." (citation omitted)); *Johnson v. U.S. Postal Service*, [71 M.S.P.R. 303](#), 306-07 (1996) (same). Indeed, the agency followed the same practice with regard to calculating the appellant's overtime pay, which the appellant did not contest. *See* CRF, Tab 4 at 5. Therefore, we find that the agency's decision to pay the appellant at the holiday leave rate for any holidays occurring during the back pay period, rather than the holiday work rate, was reasonable.⁶

⁵ The appellant contends that 8 holidays occurred during the back pay period. CRF, Tab 16 at 1. As explained in the Order dated July 27, 2012, we count only 7 holidays occurring between August 28, 2010, and January 18, 2012. CRF, Tab 17 at 2.

⁶ Because we base our finding on a comparison with the previous year's holidays, we need not resolve the parties' dispute regarding whether the appellant would have worked on January 17, 2011, had the agency contacted him in time. *See* CRF, Tab 18 at 8; CRF, Tab 19 at 11. For this holiday, as for the others that occurred during the back pay period, we will not disturb the agency's reasonable decision to rely on a comparison with prior work history rather than to inquire how long the appellant would have worked on each day at issue. *See Chacon*, [115 M.S.P.R. 313](#), ¶ 10.

Further, after reviewing the back pay worksheet submitted by the agency, we find that the agency did pay the appellant for Martin Luther King, Jr., Day, albeit at the holiday leave rate, not the holiday work rate (as the appellant desired). The agency paid the appellant for 10 full pay periods and 2 days of the eleventh pay period. *See* <https://www.nfc.usda.gov/ppcalendar/ppcal2010.htm#pp22> (pay period calendars for 2010 and 2011); CRF, Tab 3 at 8. The agency appears to have erroneously paid one of the seven federal holidays as a regular work day. *See* CRF, Tab 3 at 8. Because the holiday leave rate is the same as pay for a regular work day, however, this error did not materially impact the appellant; he received the same amount of pay as if the worksheet had been coded correctly. Therefore, this error does not prevent us from finding compliance with respect to this issue.

Accordingly, we find that the agency properly accounted for night differential pay, overtime pay, and holidays occurring during the back pay period.

Interest

The agency submitted evidence that it paid the appellant \$194.66 in interest on the \$22,006.93 gross back pay amount and \$38.11 in interest on the \$2,539.00 gross back pay amount (for overtime). CRF, Tab 4 at 4-5. We have reviewed the agency's calculations and find them to be correct.

Annual and Sick Leave

The agency stated that it restored the appellant's annual and sick leave and submitted evidence that it changed the appellant's annual leave from -47.35 hours to 24.65 hours and his sick leave from 20.03 hours to 56.03 hours. CRF, Tab 4 at 5-6, 56-57. The agency did not explain how it calculated how many hours to restore, however. Accordingly, we find the agency noncompliant with respect to its obligation to restore the appellant's annual and sick leave.

Other Benefits

The recommendation ordered the agency to address the appellant's retirement benefits. CF, Tab 14, Recommendation at 8. The agency submitted evidence regarding restoration of the appellant's retirement benefits, which the appellant has not contested. CRF, Tab 4 at 6, 12. Accordingly, we find the agency in compliance with respect to these benefits.

Within **7 days** of the date of this Order, the agency shall submit a narrative explanation of how it calculated and restored the appellant's annual and sick leave. The explanation shall address the following: the rate at which the appellant earned annual and sick leave; the number of pay periods for which he earned it; his previous annual and sick leave balances; how the leave earned during the back pay period was applied to his previous balances; whether the balances were depleted by any subsequent leave; and any other pertinent information necessary to understand the agency's restoration of the appellant's annual and sick leave.

The appellant shall file any response within **7 days** of the agency's submission.

Failure by the agency to submit the required information may cause the Board to find it noncompliant and order appropriate action. Failure by the appellant to submit a response may cause the Board to find he is satisfied and dismiss the petition for enforcement.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.