

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

TERESA SANDOVAL,  
Appellant,

DOCKET NUMBER  
SF-0353-09-0552-X-1

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DATE: December 5, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL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

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

Geraldine O. Rowe, 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 to enforce<sup>2</sup> a final Board order. The administrative judge issued a recommended decision that the

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

Board find, under the Board's regulations in effect at that time, the agency in partial noncompliance with the order, and the matter was referred to the Board for its consideration. *See* [5 C.F.R. § 1201.183](#)(b) (Jan. 1, 2012).

The outstanding issue in this compliance matter is whether the agency is required to restore the appellant's health-care Flexible Spending Account (FSA) for the 2010 plan year.<sup>3</sup> FSA participants contribute money from their salary into their accounts before taxes are withheld and then use those pre-tax dollars as reimbursement for their eligible out-of-pocket health care and dependent care expenses. *See* [26 U.S.C. § 125](#).

The appellant's back pay period, April 13, 2009, to December 18, 2010, includes the 2010 FSA plan year. On Postal Service Form 8038, the appellant requested that her FSA participation be restored for the 2010 plan year. *See* Compliance File (CF), Tab 5 at 31. The agency indicated that it could not restore the appellant's FSA for 2010 because it received her Form 8038 after March 15, 2011, the deadline for reimbursement of her eligible 2010 health care expenses. *See* CF, Tab 10, Exhibit C. The administrative judge nevertheless found that the appellant was entitled to a retroactive FSA benefit for her out-of-pocket health expenses incurred during the 2010 plan year. CF, Tab 12, Recommendation at 5.

In response to the recommendation, the agency asserts that it is unable to retroactively enroll the appellant in the program. Compliance Referral File (CRF), Tab 3 at 4. The appellant responds that, "[k]nowing what it should have

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<sup>2</sup> 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.

<sup>3</sup> The administrative judge also found the agency noncompliant on the issue of whether the appellant's annual and sick leave were properly restored. Compliance File, Tab 12 at 4. In her submission, the appellant does not address the leave issue. Compliance Referral File, Tab 4. In the absence of any dispute between the parties, we find the agency in compliance on this issue.

paid the appellant in 2010, the agency should very easily be able to calculate the tax savings that the appellant would have realized by contributing pre-tax dollars into her FSA account instead of receiving that money as part of her regular compensation.” CRF, Tab 4 at 4. The problem with the appellant’s contention is that the appellant did not receive back pay for the 2010 plan year and therefore could not set aside pre-tax dollars for reimbursement of health care expenses.

The agency determined that the appellant was due \$99,954.82 in back pay, which was less than the \$108,418.99 that she had already received in wage loss benefits from the Office of Workers’ Compensation Programs (OWCP)<sup>4</sup> and unemployment benefits from the state of California. CF, Tab 10, Exhibit A. Consequently, the agency determined that the appellant was not entitled to any back pay, *see id.*, a conclusion which the appellant does not dispute, *see* CF, Tab 11 at 3. Thus, the appellant has no pay that could be reduced in order to fund her 2010 FSA, and despite her contentions to the contrary, *see* CRF, Tab 4 at 4, she could not realize tax savings.

Accordingly, 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(c)(1) ([5 C.F.R. § 1201.183\(c\)\(1\)](#)).

**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

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<sup>4</sup> The appellant received \$71,518.99 in OWCP benefits, which are excluded from taxation. *See* [26 U.S.C. § 104](#).

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](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.