

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

RICHARD E. DEOCAMPO,
Appellant,

DOCKET NUMBER
SF-0752-11-0534-C-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: January 30, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

David P. Clisham, Esquire, San Francisco, California, for the appellant.

William L. Sims, Fort Hunter Liggett, California, for the agency.

BEFORE

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

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

The appellant filed the instant petition for enforcement to enforce the agency's compliance with a settlement agreement reached between the parties in a Board appeal. The administrative judge found in her compliance initial decision that the appellant failed to prove that the agency was not in compliance with the settlement agreement. The appellant has filed a petition for review in which he contends that the agency has breached the settlement agreement in two ways. Petition for Review (PFR) File, Tab 1.

First, the appellant asserts that he has not received a full accounting of his back pay because the agency has not given him copies of the documents that the civilian personnel office provided to the payroll office, including specifically a "Command Letter." PFR File, Tab 1 at 5-8. The Board has held that satisfactory evidence of compliance with a back pay order must include an explanation of how

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 review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

the agency arrived at its figures and an accurate accounting of any deductions. *See Dougherty v. Department of Agriculture*, [99 M.S.P.R. 161](#), ¶¶ 9, 17 (2005); *Walker v. Department of the Army*, [90 M.S.P.R. 136](#), ¶ 13 (2001). The administrative judge in this case implicitly found that the agency's accounting was sufficient, Compliance Initial Decision at 6, and we agree. The agency submitted detailed spreadsheets supported by affidavits that explained the back pay calculation pay period by pay period. Compliance File, Tab 4, Attachments 1-4, Tab 11, Attachments 1-2. The appellant contends on review that he is entitled to receive his accounting in the form of a "Command Letter" and a variety of attachments. PFR File, Tab 1 at 5-8.

The settlement agreement contains no language requiring that the agency provide any particular document as part of its accounting, so the issue is whether the appellant has shown by preponderant evidence that the agency's accounting is insufficient. *See, e.g., Baumgartner v. Department of Housing & Urban Development*, [111 M.S.P.R. 86](#), ¶ 6 (2009) (as a matter of contract law, the appellant bears the burden of proving that the agency has breached the settlement agreement). The appellant's assertion that the Command Letter and attachments might permit him to identify errors in the back pay calculations is entirely speculative, and the agency has shown its good faith by cooperating with the appellant, diligently considering his challenges to its calculations, and making appropriate corrections where warranted. Under the circumstances, the appellant has presented no basis to disturb the compliance initial decision in this regard.

Second, the appellant reiterates his argument below that he separated from service with a sick leave balance of 77.20 hours and is entitled under the Back Pay Act to a lump-sum payment in the same manner as for annual leave. PFR File, Tab 1 at 9-11. The Back Pay Act requires the payment of "pay, allowances, or differentials." [5 U.S.C. § 5596](#)(b). According to the Office of Personnel Management (OPM), "*Pay, allowances, and differentials* means pay, leave, and other monetary employment benefits to which an employee is entitled by statute

or regulation and which are payable by the employing agency to an employee during periods of Federal employment.” [5 C.F.R. § 550.803](#). OPM’s regulations specifically exclude from back pay those payments payable upon an employee’s separation. *Id.* (“[L]ump-sum payments for annual leave[] are not covered.”). The appellant’s argument is based on the premise that annual and sick leave are treated exactly the same for purposes of the Back Pay Act. Because, however, lump-sum payments for annual leave are explicitly excluded from amounts payable under the Back Pay Act pursuant to OPM’s implementing regulations, see [5 C.F.R. § 550.803](#), and because there is nothing in the language of the Back Pay Act itself that authorizes lump-sum payments for sick leave, the appellant is not entitled under the Back Pay Act to such a payment.

Independent of the Back Pay Act (which governs the appellant’s entitlements under the settlement agreement), employees who separate from federal service are entitled by statute to a lump-sum payment for unused annual leave. See [5 U.S.C. §§ 5551-5552](#); 5 C.F.R. part 550, subpart L. Thus, the lump-sum payment that the appellant received for his annual leave was both authorized and required by statute. There is no similar authorization for unused sick leave balances. Because there is no statutory authority for lump-sum payments for unused sick leave and federal employees are not entitled to such payments upon separation, the appellant is not entitled either under statute or the terms of the settlement agreement to a lump-sum payment for unused sick leave.

The appellant cites³ language from [5 C.F.R. § 550.805\(d\)](#) for the proposition that he is entitled to a cash payment for his unused sick leave. However, [5 C.F.R. § 550.805\(d\)](#) merely states that the employee can choose to use available annual or sick leave during a back pay period. It means that the appellant could have chosen to exhaust his sick leave balance instead of being

³ The appellant also cites to several Board cases, but none of them stand for the proposition that employees are entitled to lump-sum payments for unused sick leave as a matter of back pay under the Back Pay Act.

placed in a regular pay status during the back pay period if he determined that to be advantageous. It does not authorize a pay-out of sick leave, or even annual leave.

**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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.