UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HARLEY D. CROSBY,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBERS
AT-0752-95-1205-C-3
AT-0752-95-1205-C-2
AT-0752-95-0733-C-1

DATE: December 22, 1999

Dolores J. Belgrave, Esquire, Philadelphia, Pennsylvania, for the appellant.

Randle Smith, Atlanta, Georgia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a dissenting opinion.

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. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made

no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

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 other related material at our web site, http:\\www.mspb.gov.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF BETH S. SLAVET

in

Harley D. Crosby v. United States Postal Service

DOCKET NOS: AT-0752-95-1205-C-3
AT-0752-95-1205-C-2
AT-0752-95-0733-C-1

¶1 The issue in this case is whether the agency complied with the terms of a settlement agreement when it withheld taxes and Social Security and Medicare contributions from payments made pursuant to the agreement. The administrative judge (AJ) concluded that the agency was in compliance with the agreement, and a majority of the Board has denied the appellant's petition for review. I dissent because I find that the key term of the settlement agreement is ambiguous and I therefore would remand the case for further adjudication.

¶2 The appellant filed appeals with the Board as well as equal employment opportunity charges with the agency concerning various personnel actions the agency had taken. The parties reached a settlement agreement, the key provision of which reads as follows:

> 6A. The Postal Service agrees to pay the sum of $400,000 minus standard deductions to Harley D. Crosby. The matter of tax liability is understood to be exclusively between Crosby and the Internal Revenue Service.

Compliance Appeal File, Tab 8, Ex. 1.

¶3 The agency paid the appellant $400,000 (plus $5,000 for claims relating to compliance issues), but withheld federal and state taxes as well as Social Security and Medicare payments. The appellant filed a petition for enforcement, claiming that the agency was in noncompliance with paragraph 6A because it treated the payment as wages and withheld the indicated moneys. The appellant claimed that the $400,000 was for "pain and suffering" and not wages, and was therefore not taxable and not subject to withholding. He pointed out that, at the time of the settlement agreement, the Board had already reversed both of the underlying

personnel actions, and determined that one of the personnel actions was taken in reprisal for the appellant's protected EEO activities. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (1997). The only issues remaining to be decided were the appellant's entitlement to compensatory damages for that personnel action under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, whether the second personnel action was also taken in reprisal for protected EEO activities and, if so, the appellant's entitlement to compensatory damages for that action. *Id.* at 105-07.

¶4 In denying the petition for enforcement, the AJ found that the reference to "standard deductions" clearly implied withholding for federal income taxes, and that the statement that tax liability is understood to be exclusively between the appellant and the Internal Revenue Service (IRS) meant only that the agency was making no representations regarding tax consequences. The AJ further concluded that even if the settlement agreement were construed to mean that the agency should not have withheld the taxes, the breach was not material because, if the moneys were wrongfully withheld, the appellant could recover the withheld money as a tax refund.

¶5 I disagree with the AJ's analysis. First, the sentence stating that the matter of tax liability is understood exclusively to be between the appellant and the IRS implies that the appellant was being made totally responsible for the payment of taxes under the agreement and that the agency was not supposed to withhold tax deductions. Secondly, the AJ mentions only the withholding of federal income taxes. The appellant, however, claims that by also withholding Social Security and Medicare payments, the agency has treated the lump-sum payment as wages, thus negatively impacting the appellant's ability to recover any of the withheld moneys from the IRS. Finally, and of greatest importance, the settlement agreement's reference to "standard deductions" is not defined, and may not necessarily refer to the deductions made by the agency. It is possible that the

term refers to insurance, dues, charitable contributions, and the like. The fact is, **we do not know what the parties intended by that phrase**, and the ramifications are significant. In *Buzitsky v. U.S. Postal Service*, 82 M.S.P.R. 388, ¶ 5 (1999), the Board noted that in construing the terms of a written settlement agreement, the words of the agreement itself are of paramount importance, and parol evidence will be considered only if the written agreement is ambiguous. *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). However, a contract is ambiguous when it is susceptible to differing, reasonable interpretations. *Gullette v. U.S. Postal Service*, 70 M.S.P.R. 569, 572-73 (1996). When a term of an agreement is ambiguous, the AJ should resolve the ambiguity in a manner consistent with the purpose and effect of the agreement and with the intent of the parties. *Vaughan v. U.S. Postal Service*, 77 M.S.P.R. 541, 546 (1998).

¶6 In construing the intended meaning of the language of paragraph 6A of the settlement agreement, we should consider applicable law. *See* Restatement (Second) of Contract § 203(a) (1981) (an interpretation that gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation that leaves a part unreasonable, unlawful, or of no effect). The federal income tax is imposed on taxable income. Generally, taxable income is gross income minus allowable deductions. 26 U.S.C. § 63(a). Section 61(a) defines gross income broadly as "all income from whatever source derived." One exclusion from gross income is "the amount of any damages (other than punitive damages) received (whether by suit or agreement . . .) on account of personal *physical* injuries or *physical* sickness. 26 U.S.C. § 104(a)(2) (emphasis added). With the exception of actual medical expenses, section 104(a) specifies that "emotional distress shall not be treated as a physical injury or physical sickness."[*] Because the appellant's

[*] The restriction of this exception to physical injuries and sickness, and the exclusion of emotional injuries, was added to the statute in 1996. Small Business Job Protection Act

claim for compensatory damages was largely for emotional injuries he claimed to have sustained, any portion of the settlement amount attributable to such injuries would appear to be taxable.

¶7 The question whether some portion of the settlement payment is subject to federal income tax is separate, however, from the question whether the payments were subject to withholding for income taxes, or withholding for Social Security and Medicare under the Federal Insurance Compensation Act. Not all taxable income is subject to withholding; only "wages," as defined in 26 U.S.C. § 3401(a), are subject to withholding. *Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 25 (1978). Section 3401(a) defines wages as "all *remuneration . . . for services performed* by an employee for his employer." (Emphasis added.) Compensatory damages under the Civil Rights Act of 1991, regardless of whether they are compensation for emotional as opposed to physical injuries, or other types of pecuniary harm, are clearly not remuneration for services performed. They are therefore not subject to withholding by the employer.

¶8 The applicable terms of the settlement agreement are ambiguous, and withholding does not appear to be proper under applicable law. Significant sums of money are involved, and arguably, the appellant's ultimate tax liability could be affected by the agency's actions. I would therefore remand the case to the AJ to consider the record evidence bearing on the intent of the relevant provisions and, if necessary, allow the parties to present additional evidence.

¶9 Accordingly, I respectfully dissent from the majority's decision to deny the appellant's petition for review.

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of 1996, Pub. L. No. 104-188, title I, § 1605, 1996 U.S.C.C.A.N. (110 Stat.) 1755, 1838 (Aug. 20, 1996). This restriction would apply to the settlement agreement in this appeal, which was executed on October 9, 1998.

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Date:

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Beth S. Slavet
Vice Chair