UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 110

Docket No. CH-0752-06-0580-X-1

George Bruton, Appellant, v. Department of Veterans Affairs, Agency.

June 12, 2009

George Bruton, Chicago, Illinois, pro se.

Paul E. Piwinski, Esquire, Hines, Illinois, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board pursuant to a recommendation of the administrative judge that the Board find the agency in noncompliance with a final Board order. For the reasons set forth below, we find that THE AGENCY IS IN NONCOMPLIANCE and ORDER the responsible agency official to appear before the General Counsel to SHOW CAUSE why sanctions should not be imposed.

BACKGROUND

¶2 The appellant was employed as a WG-2 housekeeping aid at the agency's Edward Hines, Jr. Hospital when the agency removed him effective May 12,

2006, based on attendance-related misconduct. MSPB Docket No. CH-0752-06-0580-I-1, Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4g. The appellant appealed the removal to the Board's Central Regional Office. IAF, Tab 1. After the administrative judge affirmed the removal action, and the appellant filed a petition for review, the Board reversed the removal action in a July 3, 2008 opinion and order. *Bruton v. Department of Veteran's Affairs*, 109 M.S.P.R. 271, ¶ 12 (2008). The Board based its opinion and order on a decision of the Employees' Compensation Appeals Board that the appellant was entitled to compensation as a result of a work-related injury for the period he was charged with absence without leave by the agency. *Id.* In this decision, the agency was ordered to restore the appellant effective May 12, 2006. *Id.,* ¶ 14. The agency was also ordered, among other things, to pay the correct amount of back pay, interest on back pay, and other benefits under the regulations of the Office of Personnel Management (OPM). *Id.,* ¶ 15.

¶3 On August 11, 2008, the regional office received the appellant's petition for enforcement asserting that the agency had not restored him to his position nor given him the required back pay and associated benefits. MSPB Docket No. CH-0752-06-0580-C-1, Compliance File (CF), Tab 1. In reply, the agency alleged that it was unable to return the appellant to work because he was medically disabled and had been given a disability retirement by OPM. *Id.*, Tab 4 at 4-6. The agency also asserted that it "is currently impossible for the [agency] to be in compliance with an [o]rder returning back pay and benefits…." *Id.* at 6.

¶4 On September 16, 2008, the administrative judge issued a recommendation that the Board find the agency in noncompliance with the Board's July 3, 2008 decision because the agency had not returned the appellant to work and had not provided him back pay and benefits. CF, Tab 6. Because the administrative judge recommended that the Board find the agency in noncompliance, this matter has been referred to the Board.

¶5 In an October 17, 2008 response to the recommendation by the administrative judge, the agency stated that it was "in the process of complying with the restoration of the appellant." Compliance Referral File (CRF), Tab 4 at 2. The agency also stated that it had been unable to obtain from the Office of Workers' Compensation Programs (OWCP) and OPM the information necessary for the computation of back pay. *Id*. at 4.

¶6 In a subsequent submission, the agency indicated that it had received from OPM the information it had been seeking and that it was completing the calculations regarding the appellant's back pay. CRF, Tab 11 at 3-4. Based on that statement, the Board afforded the agency until April 20, 2009, "to submit evidence showing that it ha[d] fully complied with the Board's final order in this matter, including the provision of back pay and appropriate benefits." CRF, Tab 13 at 2. The Board also directed that "[t]he agency's evidence must include a clear explanation regarding how the evidence submitted demonstrates compliance." *Id*.

ANALYSIS

¶7 The ultimate goal when the Board orders an agency to cancel an action is to, as nearly as possible, place the appellant in the status quo ante, that is, in the situation in which he would have been had the wrongful personnel action not occurred. *House v. Department of the Army,* 98 M.S.P.R. 530, ¶ 9 (2005); *Mascarenas v. Department of Defense,* 57 M.S.P.R. 425, 430 (1993); *see Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). Part of an agency's obligations in affording status quo ante relief is to provide back pay and benefits that the employee would have received but for the unwarranted personnel action. *Joos v. Department of the Treasury*, 79 M.S.P.R. 342, 347 (1998); *Hoover v. Department of the Navy,* 61 M.S.P.R. 151, 153 (1994). An agency bears the burden of proving its compliance with a final Board order, and compliance must be supported by relevant, material, and credible evidence in the form of

documentation or affidavits. *See New v. Department of Veterans Affairs*, 106 M.S.P.R. 217, ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); *Donovan v. U.S. Postal Service*, 101 M.S.P.R. 628, ¶¶ 6-7 (2006), *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006); *Brownlow v. Department of the Treasury*, 89 M.S.P.R. 223, ¶ 7 (2001). The appellant may rebut that evidence by making specific, nonconclusory, and supported allegations to the contrary. *See New*, 106 M.S.P.R. 217, ¶ 6; *Donovan*, 101 M.S.P.R. 628, ¶ 7.

The agency has failed to provide adequate evidence that it properly canceled the May 12, 2006 removal action.

¶8 As stated above, the agency was ordered to restore the appellant to his WG-2 housekeeping aid position effective May 12, 2006. *Bruton*, 109 M.S.P.R. 271, ¶ 14. The record contains in this regard a request for a personnel action canceling the removal action effective May 12, 2006. CRF, Tab 8 at 3. There is, however, no documentary evidence, such as an SF-50, or an affidavit or statement made under penalty of perjury demonstrating agency action on the request. Thus, the agency has failed to provide evidence showing that it has cancelled the May 12, 2006 removal. Accordingly, the agency is in noncompliance in this regard. To be in compliance, the agency must provide evidence, such as an SF-50, showing that it has cancelled the removal action effective May 12, 2006.

The agency has failed to restore the appellant to his position of record or shown an appropriate reason for not doing so.

¶9 In an October 22, 2008 letter, the agency informed the appellant that he was to return to duty on October 27, 2008. CRF, Tab 7 at 5. The appellant, however, requested sick leave for the period from October 27, 2008, to December 1, 2008, and provided medical documentation stating that he could work three hours a day at a desk job commencing on December 1, 2008. CRF, Tab 9 at 32 and 33. The agency explained that it assigned the appellant to desk duty in an office portion of a building containing a warehouse and the motor pool because

the position was consistent with his physical limitations. CRF, Tab 11 at 3. But, when the appellant complained about difficulty in walking to the building and refused to accept a ride offered by the agency, stating that he feared that he would be injured, the agency placed him in an authorized absence status until his physical limitations and a position within those limitations could be determined. *Id.* Effective February 25, 2009, the agency assigned the appellant to desk duty in a ward of the hospital. *Id.*, Tab 12 at 35, 90.

¶10 According to the agency, prior to his removal, the appellant was assigned to the extended care center and performed light cleaning and desk duty for three hours a day. CRF, Tab 11 at 2. The appellant agrees that, prior to his removal, he worked in the extended care center. CRF, Tab 14 at 66.

¶11 When the Board orders the cancellation of an adverse action, the goal is to place the appellant as nearly as possible in the status quo ante by, among other things, reinstating the employee to his former position. *Miller v. Department of the Army*, 109 M.S.P.R. 41, ¶ 11 (2008); *Bullock v. Department of the Air Force*, 80 M.S.P.R. 361, ¶ 5 (1998); *see Kerr*, 726 F.2d at 733. Where the agency has not reinstated the appellant to his former position and duties, the agency must have a strong overriding interest or compelling reasons for not doing so. *Miller*, 109 M.S.P.R. 41, ¶ 11; *Walker v. Department of the Army*, 90 M.S.P.R. 136, ¶ 16 (2001); *Bullock*, 80 M.S.P.R. 361, ¶ 5. If compelling reasons exist, the agency must then establish that the duties and responsibilities of the current position are substantially equivalent in scope and status to those of the position the employee held at the time of his removal. *Miller*, 109 M.S.P.R. 41, ¶ 11; *Walker*, 90 M.S.P.R. 136, ¶ 16; *Bullock*, 80 M.S.P.R. 361, ¶ 5.

¶12 As discussed above, prior to his removal, the appellant worked in the extended care center, but after his reinstatement he was assigned to two different positions. The agency has offered no explanation regarding why the appellant was not restored to his position in the extended care center. Because the agency has not provided a explanation for not restoring the appellant to his former

position, it has failed to comply with the Board's order. To be in compliance in this regard, the agency must either restore the appellant to the position he held prior to his removal or show that it has a strong overriding interest or compelling reason for assigning the appellant to another position and that the position he has been assigned to is substantially similar to the former position.

The agency has failed to provide adequate evidence that it has properly provided back pay and benefits.

¶13 In its July 3, 2008 decision in this matter, the Board ordered the agency to "pay the appellant the correct amount of back pay, interest on back pay, and other benefits." *Bruton*, 109 M.S.P.R. 271, ¶ 14. Subsequently, the agency was ordered "to submit evidence showing that it ha[d] fully complied with the Board's final order in this matter, including the provision of back pay and appropriate benefits to the appellant." CRF, Tab 13 at 2. In that order, the Board stated that "[t]he agency's evidence must include a clear explanation regarding how the evidence submitted demonstrates compliance. Where appropriate, the agency shall provide statements made under oath or penalty of perjury to support its assertions of compliance." *Id*. The order language is consistent with established Board precedent that an agency's evidence of compliance must include a clear explanation of its compliance efforts supported by understandable documentary evidence. *Johnston v. Department of the Treasury*, 100 M.S.P.R. 196, ¶ 8 (2005); *Woodson v. Department of Agriculture*, 94 M.S.P.R. 289, ¶ 6 (2003); *Walker,* 90 M.S.P.R. 136, ¶ 13 (evidence of compliance with a back pay order must include an explanation of how the agency arrived at its figures).

¶14 In its April 20, 2009 submission, the agency asserted that the appellant was due back pay in the amount of $15,564.86 for the period from May 12, 2006, to October 27, 2008. CRF, Tab 15 at 2-3. In a filing made the following day, the agency submitted a photocopy of a check payable to the appellant in the amount of $15,564.86 and indicated that the check would be hand delivered to the appellant on April 22, 2009. CRF, Tab 16 at 3. In neither of its submissions did

the agency offer any explanation regarding how it calculated the amount due to the appellant. In the April 20, 2009 filing, however, the agency did state that "[t]here is a Spreadsheet but it is long and does not print out well on regular sized paper." CRF, Tab 15 at 3.

¶15 Because the agency has failed to present any explanation regarding its calculations behind the payment made to the appellant, there is no way for the Board to determine if the agency has paid the correct amount of back pay and interest on back pay. Accordingly, the agency has failed to demonstrate compliance with the Board's order.

¶16 In addition to providing back pay and interest on back pay, the agency was required by the Board's July 3, 2008 opinion and order to provide the appellant the benefits he would have received but for the agency's unwarranted removal action. *See Bruton*, 109 M.S.P.R. 271, ¶ 14. The agency has not asserted that the appellant has been provided any benefits of employment for the back pay period. Moreover, in his response to the agency's April 20 and 21, 2009 submissions, the appellant appears to assert that: 1) the agency has failed to properly provide his Thrift Savings Plan contributions; 2) the agency has not properly restored his annual and sick leave; and 3) the agency has not provided him health insurance benefits. CRF, Tab 17 at 47-49, 60, 67. Because the agency has not provided any evidence that these benefits have been provided and because the appellant appears to assert that they have not been provided, the agency has failed to demonstrate compliance.

¶17 To be in compliance regarding the provision of back pay, interest on back pay, and benefits, the agency must provide a detailed and clear explanation of the calculations it has made in determining the amount due the appellant. Among other things, the agency must: 1) clearly set forth the gross amount due the appellant and show how that amount was determined; 2) clearly set forth the amount and reason for all deductions, reductions, and offsets from the gross

amount due the appellant;[1] 3) clearly set forth the source and amount of all checks or electronic payments already received by the appellant and provide evidence that such checks or electronic payments were received;[2] and 4) clearly set forth the amount of interest due the appellant and how that amount was calculated. The agency must also clearly set forth its calculations relating to the appellant's sick and annual leave balances, his Thrift Savings Plan account, including both the appellant's and the agency's contributions, and any other benefits of employment the appellant would have received but for the agency's unwarranted personnel action. Finally, the agency must take the appropriate steps to restore the appellant's health insurance benefits and provide evidence that it has done so. In addition to the calculations, the agency must provide a clear and detailed narrative explanation of its calculations so that the Board may understand the calculations and verify that they are correct. The agency must provide an explanation of all codes and abbreviations used in its documentation.

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[1] There is no basis for the appellant's assertion that the agency should pay all deductions from his back pay. Under the Back Pay Act, an agency is required to deduct from a back pay award the appropriate amounts for retirement, Medicare, federal and state taxes, and any payment the appellant received for accrued annual leave. *Tanaka v. Department of the Navy*, 788 F.2d 1552, 1553-54 (Fed. Cir. 1986); *Hargett v. Department of the Navy*, 82 M.S.P.R. 180, ¶ 6 (1999). Similarly, in determining the amount of back pay due the appellant, the agency may consider the compensation he has received from the Office of Workers' Compensation Programs (OWCP). *White v. U.S. Postal Service*, 110 M.S.P.R. 461, ¶ 10 (2009) (stating that an appellant is not entitled to back pay for the period he was receiving OWCP benefits); *Special Counsel ex rel. Steen v. Department of Veterans Affairs*, 81 M.S.P.R. 601, ¶ 9 (1999) (stating that the employee was only entitled to the back pay he would have received beyond the OWCP payments he already received).

[2] To the extent that the appellant has returned to the agency checks previously provided to him, the agency should either reissue those checks or incorporate the amount of those checks in any new payment to the appellant. To the extent that the appellant may have returned checks issued by other agencies, such as OWCP or OPM, to those agencies, the appellant must contact those agencies to determine if the checks can be reissued.

The appellant is not entitled to attorney fees, damages as a result of the agency's noncompliance, nor a public transportation subsidy.

¶18 In his response to the agency's evidence of compliance, the appellant asserts that he is entitled to $150 to $200 an hour for the period from July 3, 2008, to April 29, 2009, because attorney fees have been awarded in that amount in other Merit Systems Protection Board cases. CRF, Tab 17 at 50. The appellant is not represented by an attorney and is not an attorney himself. It is well settled that, under 5 U.S.C. § 7701(g)(1), attorney fees cannot be awarded to non-attorneys. *Gensburg v. Department of Veterans Affairs*, 85 M.S.P.R. 198, ¶ 16 (2000); *Drake v. Department of Commerce*, 18 M.S.P.R. 475, 478 fn.3 (1983); *Hornton v. U.S. Postal Service*, 7 M.S.P.R. 232, 234-35 (1981).

¶19 The appellant also asserts that he is entitled to $300,000 in punitive damages. Although the Board has the authority to impose sanctions for failure to comply with a Board order pursuant to 5 U.S.C. § 1204(e)(2)(A), the Board lacks the authority to impose punitive damages as the result of an agency's noncompliance. *Cunningham v. Department of Veterans Affairs,* 91 M.S.P.R. 523, ¶ 3 (2002) (the Board lacks the authority to impose monetary damages as a sanction for noncompliance and may not impose punitive damages); *Woodson*, 94 M.S.P.R. 289 (finding that in a compliance proceeding the Board lacks the authority to direct an agency to pay a sum unrelated to the calculation of the amount due).

¶20 In his response to the agency's assertions of compliance, the appellant further asserts that he is entitled to a transit subsidy for the period he was out of work. CRF, Tab 17 at 65-66. In support of his allegation, the appellant cites to a memorandum describing an agency program in which employees are reimbursed for certain expenses incurred in using public transportation to commute to and from work. *Id*. at 65. The appellant has not explained his entitlement to such a benefit for the period he was not working for the agency – and thus was not commuting to and from work -- and we are not aware of a basis for such a benefit.

Hospital Director Nathan L Geraths is the agency official responsible for compliance in this case.

¶21 As set forth above, the agency has failed to demonstrate compliance with the Board's July 3, 2008 opinion and order. In his compliance recommendation the administrative judge instructed the agency to identify the agency official responsible for compliance in this case. CF, Tab 6 at 4. The agency has failed to identify that official. Accordingly, we have determined that the Director of the Edward Hines, Jr. Hospital, Nathan L. Geraths, is the agency official responsible for compliance. 5 C.F.R. § 1201.183(a)(2).

ORDER

¶22 We find the agency in NONCOMPLIANCE with the Board's July 3, 2008 opinion and order. We ORDER Mr. Nathan L. Geraths and the agency's representative to appear before the General Counsel of the Merit Systems Protection Board at a date and time to be determined by the General Counsel and show cause why the Board should not impose sanctions for the agency's noncompliance in this case. 5 C.F.R. § 1201.183(b). The Board's authority to impose sanctions includes the authority to order that the responsible agency official "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." 5 U.S.C. § 1204(e)(2)(A).

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.