

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

2009 MSPB 192

Docket No. DA-315H-08-0168-X-1

**Thomas Tubesing,
Appellant,**

v.

**Department of Health and Human Services,
Agency.**

September 30, 2009

Frank DeMelfi, Esquire, Atlanta, Georgia, for the appellant.

Philip J. Gurrera, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board based on a recommendation of the administrative judge which found the agency in noncompliance with the Board order to cancel the appellant's removal and to retroactively restore the appellant effective December 7, 2007.¹ For the reasons set forth below, we agree with the administrative judge's recommendation and find that the agency is NOT IN

¹ The administrative judge's November 25, 2008 remand initial decision became the final decision of the Board on December 30, 2008. We note that the administrative judge erred in her Recommendation, at paragraph 1, by indicating that the Board had mitigated the removal. It is clear, however, that this is an inadvertent misstatement.

COMPLIANCE with the Board's final order. We also agree with one of the objections to the administrative judge's recommendation filed by the appellant and also find the agency NOT IN COMPLIANCE with the Board's final order regarding that matter.

BACKGROUND

¶2 The essential facts of this case are that the appellant was terminated from his GS-13 public health advisor position with the Department of Health & Human Services, Center for Disease Control and Prevention, effective December 7, 2007. MSPB Docket No. DA-315H-08-0168-I-1, Initial Appeal File, Tab 4, Subtab 4b. The appellant appealed the agency action, and in a November 25, 2008, initial decision, the administrative judge reversed the agency action and ordered the agency to cancel the termination action and provide the appellant back pay, interest on back pay, and the benefits of employment in accordance with the Office of Personnel Management's regulations. MSPB Docket No. DA-315H-08-0168-B-1, Remand File, Tab 9. The initial decision became the final decision of the Board when neither party filed a petition for review.

¶3 On January 21, 2009, the appellant filed the instant petition for enforcement and alleged, among other things, that the agency had not restored him to his position and had not paid him back pay. MSPB Docket No. DA-315H-08-0168-C-1, Compliance File (CF), Tab 1. After affording the parties the opportunity to provide evidence and argument, the administrative judge issued a compliance recommendation in which she granted the petition for enforcement in part, denied it in part, and recommended that the Board take the actions necessary to enforce compliance. *Id.*, Tab 10. Specifically, after reviewing the position descriptions, the administrative judge found that the position the agency had placed the appellant in was similar in responsibility and required expertise to the position he occupied at the time of his termination but that the agency did not provide documentation to establish a strong overriding interest or compelling

reason requiring the appellant's reassignment to a different position. *Id.* at 6. The administrative judge also found that the agency failed to show that it: 1) paid the appellant the appropriate amount of back pay; 2) made the correct contributions to the appellant's Thrift Savings Plan (TSP) account; 3) properly restored the appellant's annual and sick leave balances; and 4) restored the appellant's health insurance benefits. *Id.* at 6-7. Finally, the administrative judge found that the appellant failed to show agency noncompliance regarding his work schedule, "Individual Learning Account," and issuance of a government "Blackberry." *Id.* at 7-8.

¶4 Because the administrative judge recommended that the Board take the actions necessary to ensure that the agency fully complies with the Board's final decision, this matter was referred to the Board. The agency has filed evidence which it asserts demonstrates that it is now in full compliance. Compliance Referral File (CRF), Tab 4. The appellant has responded to the agency's submission and has objected to the administrative judge's findings regarding agency compliance. *Id.*, Tab 6.

ANALYSIS

¶5 When the Board finds a personnel action unwarranted, the aim is to place the appellant, as nearly as possible, in the situation he would have been in had the wrongful personnel action not occurred. *See 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 also Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). This is called status quo ante relief. It is the agency's burden to prove its compliance with a Board order. *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, *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006).

The agency has failed to demonstrate compliance with regard to the appellant's position.

¶6 Part of status quo ante relief requires an agency to, among other things, reinstate 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 an 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.

¶7 In the instant case, it is undisputed that the agency has not placed the appellant in the position he occupied at the time of his termination. As discussed above, however, the administrative judge found that the agency had placed the appellant in a position similar in responsibility and required expertise to the position he occupied at the time of his termination. CF, Tab 10 at 6. Nevertheless, the administrative judge concluded that the agency was in noncompliance because it had failed to show a strong overriding interest or compelling reasons justifying its assignment of the appellant to a different position. *Id.*

¶8 In its submission to the Board, the agency explains that it accomplishes its mission by, among other things, assigning agency employees to work with the various state public health departments. CRF, Tab 4 at 1-2. Prior to his termination, the appellant was assigned to work with the Louisiana Public Health Department. *Id.* According to the agency, assignees work in state public health departments at the request of the state government, and a state public health department can request that an agency assignee be reassigned out the state. *Id.* at 2. With regard to the appellant, the agency provided a copy of a letter from Dr. M. Rony Francois, Assistant Secretary of the Louisiana Department of Health and

Hospitals, specifically stating that the State of Louisiana “elects not to accept [the appellant]” as an assignee. CRF, Tab 4, Exhibit 1.

¶9 The question before us is whether the agency has now shown a strong overriding interest or compelling reasons for not restoring the appellant to his public health advisor position in Louisiana. In *Marcotrigiano v. Department of Justice*, [95 M.S.P.R. 198](#), ¶¶ 9, 16-17 (2003), the Board found that there was a compelling reason for reassigning a criminal investigator because the offices of two United States Attorneys indicated that they would not allow him to testify in criminal proceedings absent exceptional circumstances. In that case, the Board discussed a number of other cases where it had found that an agency had shown a compelling reason for not restoring an individual to his former position and identified the common element that existed in those cases as "an outside event or determination [that] rendered the appellant incapable of performing the duties of his prior position." *Marcotrigiano*, [95 M.S.P.R. 198](#), ¶ 13. For example, the Board noted that it had held that where an individual loses the security clearance required for the position he held prior to a reversed removal action, the agency may properly reassign the employee to a different position with similar duties that does not require a security clearance. *LaBatte v. Department of the Air Force*, [58 M.S.P.R. 586](#), 594 (1993); *Gray v. Department of the Navy*, [29 M.S.P.R. 281](#), 283-84 (1985). Similarly, in *Marren v. Department of Justice*, [32 M.S.P.R. 285](#), 287 (1987), the Board found that an agency was in compliance where a border patrol agent was not restored to his former position because he lacked a government drivers' license.

¶10 We discern little difference between the circumstances in *Marcotrigiano* and the other cases discussed above and the facts of the instant case. As in those cases, an outside event or determination has rendered the appellant incapable of performing the duties of his prior position. Accordingly, based on Dr. Francois's

letter, we find that the agency has shown a compelling reason for reassigning the appellant and is in compliance in that regard.²

¶11 Where a compelling reason exists for reassigning the appellant to a position other than the one he encumbered at the separation, the agency must establish that the duties and responsibilities of the position the employee has been assigned to are substantially equivalent in scope and status to those of the position the employee previously held. *Miller*, [109 M.S.P.R. 41](#), ¶ 11; *Walker*, [90 M.S.P.R. 136](#), ¶ 16; *Bullock*, [80 M.S.P.R. 361](#), ¶ 5. In analyzing such an issue, the Board must look beyond the title and grade of the positions involved and must conduct an assessment of the scope of the duties and responsibilities of the new position compared with the scope of the duties and responsibilities of the appellant's former position. *See Marcotrigiano*, [95 M.S.P.R. 198](#), ¶ 7; *Joos v. Department of the Treasury*, [79 M.S.P.R. 342](#), 347 (1998).

¶12 As mentioned above, the administrative judge reviewed the position descriptions of the public health advisor position occupied by the appellant at the time of his termination and the public health analyst position he currently occupies and found that they were similar in responsibility and expertise. CF, Tab 10 at 6. Before the Board, the appellant objects to the administrative judge's determination and asserts that the position he has been placed in is a "sham teleworking" position. CRF, Tab 6 at 10. In a statement made under penalty of perjury submitted with his objections, the appellant essentially states that he has been placed in a full-time involuntary telework status, he has not been to his

² In his submission to the Board, the appellant argues that, because Dr. Francois lacked personal knowledge of his work performance with the State of Louisiana, the letter was not sworn nor made under penalty of perjury, and it does not cite any evidence, Dr. Francois's letter was insufficient to establish a strong overriding interest or compelling reason for not restoring the appellant to his position in Louisiana. CRF, Tab 6 at 13-15. The appellant's argument is misplaced. Dr. Francois's letter establishes that the State of Louisiana did not want the appellant to serve as an agency assignee. The appellant has provided nothing questioning the agency's assertion that public health advisors serve in a particular state only with the consent of the state government.

assigned duty station nor met face-to-face with an agency employee for a year and a half, and on an average day he speaks with his supervisor for about five minutes and does little or no work commensurate with his grade and position. *Id.* at 28-29.

¶13 As set forth above, the agency bears the burden of proof regarding compliance with the Board's final order. *See New*, [106 M.S.P.R. 217](#), ¶ 6; *Donovan*, [101 M.S.P.R. 628](#), ¶¶ 6-7. An appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions of continued noncompliance. *See New*, [106 M.S.P.R. 217](#), ¶ 6; *Donovan*, [101 M.S.P.R. 628](#), ¶ 7.

¶14 The appellant's statement made under penalty of perjury regarding the purported nature of his position and duties constitutes the required specific, nonconclusory, and supported assertions of continued noncompliance. The agency has offered nothing to rebut the appellant's assertions. Thus, we conclude that the agency has failed to demonstrate compliance with the Board's final order.

The agency has failed to demonstrate compliance with regard to the payment of back pay, interest on back pay, and benefits of employment.

¶15 In her compliance recommendation, the administrative judge found that the agency failed to show that it: 1) paid the appellant the appropriate amount of back pay; 2) made the correct contributions to the appellant's TSP account; 3) properly restored the appellant's annual and sick leave balances; and 4) restored the appellant's health insurance benefits. CF, Tab 10 at 6-7. In its submission to the Board, the agency provides an affidavit from a human resources team chief explaining that: 1) on June 12, 2009, the appellant received back pay of \$84,442.93 for the period from December 9, 2007, to December 20, 2008; 2) the appellant's health benefits were reinstated effective December 7, 2007; and 3) the appellant's sick and annual leave balances were restored. CRF, Tab 4, Exhibit 2 at 1. The affidavit also explains that the agency forwarded to its finance and accounting service all necessary information regarding the appellant's TSP

deductions. *Id.* at 2. The agency also provides two one page documents which it asserts demonstrate that it paid the required back pay and reccredited the appellant's leave balances. CRF, Tab 4, Exhibits 3 and 4.

¶16 In response to the agency's submission, the appellant asserts that the agency overpaid his back pay, failed to properly restore all of the annual and sick leave due to him, failed to ensure that the accounting and finance service properly restored his TSP account, and did not properly reinstate his health insurance benefits. CRF, Tab 6 at 16-22. The appellant provides numerous exhibits demonstrating the purported errors in the agency's compliance efforts. CRF, Tab 6, Exhibits O, P, T, U, V, and W.

¶17 It is well settled under Merit Systems Protection Board law 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). For example, in *Walker*, [90 M.S.P.R. 136](#), ¶ 13, the Board held that an agency's evidence of compliance with a back pay order must include an explanation of how the agency arrived at its figures and an accurate accounting of any deductions. Similarly, in *Edwards v. Department of Justice*, [90 M.S.P.R. 537](#), ¶ 10 (2002), the Board held that to be in compliance an agency must produce evidence of the rate at which it paid interest and show its calculations so that the Board could determine if it properly paid interest on back pay.

¶18 Here, the agency has failed to provide anything but the most cursory documentation and explanation to support its assertion of compliance with the Board's final order. *See* CRF, Tab 4. Moreover, the appellant has provided detailed information supporting his specific and nonconclusory allegations of noncompliance. *Id.*, Tab 6. The agency has not responded to the appellant's filing. Accordingly, we conclude that the agency has failed to demonstrate compliance with the Board's final order.

The agency is in compliance regarding the appellant's schedule and its failure to issue the appellant a government "Blackberry."

¶19 In her compliance recommendation, the administrative judge found that the appellant was not necessarily entitled to a maxiflex schedule. CF, Tab 10 at 7-8. In his submission to the Board, the appellant objects to the administrative judge's finding and argues that restoration of a maxiflex schedule is necessary for status quo ante relief and for the appellant to perform the duties of the public health advisor position. CRF, Tab 6 at 23. The appellant's argument is inapposite because the Board has held that when an agency reinstates an appellant to duty, it has the discretion to change his work schedule in the absence of a loss of pay differential or other evidence of harm. *See Conaway v. U.S. Postal Service*, [93 M.S.P.R. 6](#), ¶ 15 (2002); *Smith v. U.S. Postal Service*, [62 M.S.P.R. 417](#), 423 (1994). The appellant has not shown how he has been harmed in his current position by changing his work schedule. In sum, we conclude that the agency is in compliance in this regard.

¶20 The administrative judge also found that the agency's failure to provide the appellant with a government "Blackberry" did not constitute noncompliance. CF, Tab 10 at 8. In his objections, the appellant argues that assignment of a "Blackberry" is necessary for restoration to the status quo ante, is required for performing the public health advisor position, and is customary for field assignees in the branch of the agency containing the public health advisors. CRF, Tab 6 at 23-24. The appellant's argument is misplaced, however, because as noted above, he has been assigned to a different position in a different branch of the agency. In any event, in the absence of a demonstrated harm, we are aware of nothing requiring an agency to provide a "Blackberry" to an employee as part of status quo ante relief. *Cf. Payne v. U.S. Postal Service*, [77 M.S.P.R. 97](#), 101 (1997) (finding the agency in compliance where an employee was not provided a private office upon reinstatement even though she had such an office prior to the wrongful removal action).

ORDER

¶21 As set forth above, the agency has failed to fully comply with the Board's final order on the merits of the appellant's appeal of his separation. Accordingly, we ORDER the agency to submit to the Clerk of the Board within 30 days of the date of this order satisfactory evidence of compliance with this decision.

¶22 To be in compliance regarding the provision of back pay, interest on back pay, and benefits of employment, 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; 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; 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 TSP 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 provide evidence that it has restored the appellant's health insurance benefits. 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.

¶23 The agency must also provide evidence that it has assigned the appellant duties and responsibilities commensurate with his position as a GS-13 public health analyst. In addition, the agency must provide evidence showing that any

telework arrangement involving the appellant is consistent with the arrangements afforded to other similarly situated GS-13 public health analysts.

¶24 The appellant may respond to the agency's evidence of compliance within 15 days of the date of service of the agency's submission. If the appellant does not respond to the agency's evidence of compliance, the Board may assume that he is satisfied with the agency's actions and dismiss the petition for enforcement.

¶25 The agency is reminded that if it fails to provide adequate evidence of compliance the responsible agency official, Management Officer Kem Williams and the agency's representative may be required to appear before the General Counsel of the Merit Systems Protection Board to 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:

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