UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 205

Docket No. SF-0752-07-0409-X-1

Fae Driscoll,

Appellant,

v.

United States Postal Service,

Agency.

October 15, 2009

Keith Goffney, Esquire, Los Angeles, California, for the appellant.

Afshin Miraly, Esquire, Long Beach, California, 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 a final Board order. For the reasons set forth below, we agree with the administrative judge's recommendation and find that the agency is NOT IN COMPLIANCE with the Board's final order. We also agree with one of the two 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 Effective March 2, 2007, the agency removed the appellant, a non-preference-eligible, from her EAS-17 supervisor customer services position. MSPB Docket No. SF-0752-07-0409-I-1, Initial Appeal File (IAF), Tab 10 at 12-18. The appellant filed an appeal with the Board's Western Regional Office, and in a February 22, 2008 initial decision, the administrative judge sustained only one of the charges against the appellant. IAF, Tab 89. The administrative judge mitigated the penalty to a demotion to a vacant non-supervisory position below the EAS-17 level with the least reduction in grade and pay. *Id*. at 28-34. The initial decision became the final decision of the Board when, in an October 7, 2008 order, the Board denied both the agency's petition for review and the appellant's cross-petition for review. MSPB Docket No. SF-0752-07-0409-I-1, Petition for Review File, Tab 28. In its decision, the Board directed the agency "to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, no later than 60 calendar days after the date of [the] decision." *Id*. at 2.

¶3 On January 16, 2009, the appellant filed a petition for enforcement. MSPB Docket No. SF-0752-07-0409-C-1, Compliance File (CF), Tab 1. After affording the parties an opportunity to submit evidence and argument, the administrative judge issued a compliance recommendation in which, among other things, she agreed with the appellant that the agency had not properly paid back pay and interest on back pay. *Id*., Tab 18 at 11-17. Contrary to the appellant's contention, the administrative judge also stated that the agency was in compliance regarding the crediting of the appellant's annual leave. *Id*. at 17-18. Finally, the administrative judge stated that the agency properly excluded from the appellant's back pay compensation an amount it previously paid the appellant. *Id*. at 10-11.

¶4 Because the administrative judge found the agency in noncompliance, this matter was referred to the Board. The appellant has also made a submission

disagreeing with the administrative judge's conclusions in the two disputed areas where she found the agency in compliance. MSPB Docket No. SF-0752-07-0409-X-1, Compliance Referral File (CRF), Tab 5.

ANALYSIS

¶5 When the Board finds a personnel action unwarranted, the aim is to place the appellant, as nearly as possible, in the situation she 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). It is the agency's burden to prove its compliance with a Board order, and assertions of 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, *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006). The 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.

The agency is in noncompliance because of its failure to pay back pay based on its erroneous assertion that the appellant did not seek outside employment during the period of her wrongful removal.

¶6 When computing back pay for a non-preference-eligible employee of the U.S. Postal Service, such as the appellant in the instant case, the provisions of the Employee Labor Relations Manual (ELM) and not the Back Pay Act govern. *House v. U.S. Postal Service*, 85 M.S.P.R. 260, 262 (2000); *Rivas v. U.S. Postal Service*, 72 M.S.P.R. 383, 389-91 (1996). Both the ELM and the Back Pay Act (and its implementing regulations) provide for paying the employee the back pay she would have earned but for an "unjustified or unwarranted personnel action." In addition, both contain a requirement that the employee be "ready, willing, and

able" to work, and both provide that there must be a causal nexus between the unjustified or unwarranted personnel action and the resulting loss of pay. C*ompare* 5 U.S.C. § 5596 and 5 C.F.R. § 550.805(c) *with* ELM §§ 436.2(b) and 436.42; *see House v. United States Postal Service*, 85 M.S.P.R. at 262.[1] The ELM, however, imposes the additional requirement that the employee have made "reasonable efforts to obtain other employment" during the back pay period. ELM § 436.2(b); *House v. United States Postal Service*, 85 M.S.P.R. at 263.

¶7 The provision of the ELM requiring that non-preference-eligible employees seek outside employment provides that: (1) "[b]ack pay is allowed, unless otherwise specified in the appropriate award or decision, provided the employee has made reasonable efforts to obtain other employment;" and (2) the separated employee is allowed 45 days before he or she must make reasonable efforts to obtain other employment. ELM § 436.2(b). The ELM also provides that, where a separated employee did not obtain outside employment for any part of the back pay period and the back pay period exceeds six months, the employee must provide documentation in support of his or her efforts to secure other employment for all parts of the back pay period beyond the first 45 days. ELM § 436.42e.3. The ELM also identifies certain Postal Service forms that an employee and/or the Postal Service must complete as part of the back pay process. ELM 436.42.

¶8 In this case, the appellant signed a Postal Service Form 8038 on January 15, 2009, and in response to the question "Did you seek outside employment during the back pay period?" checked the box for "No."[2] CF, Tab 7, Exhibit C at 1. The Form 8038 included a notice of civil and criminal penalties

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[1] The ELM may be found at www.usps.com/cpim/ftp/manuals/elm/html/welcome.htm.

[2] The appellant also checked the box for "No" in response to a question about whether she actually had any earnings from outside employment during the back pay period. CF, Tab 7, Exhibit C at 2.

for presenting a false or fraudulent claim or statement immediately above the appellant's signature on the form. *Id*. at 6.

¶9 Based on the appellant's negative response to the question about seeking outside employment, the agency asserted below that the appellant's back pay entitlement was limited to the first 45 days of the period of her wrongful removal. CF, Tab 9 at 4. In response to the agency's assertion, the appellant contended that she had mistakenly checked the wrong box on the Form 8038 and that she extensively sought outside employment while she was out of work. CF, Tab 10 at 5. The appellant submitted a declaration made under penalty of perjury explaining that she misread the question on the Form 8038 as asking if she had outside employment during the back pay period. CF, Tab 13 at 17. The appellant also provided an "Amended" Form 8038 on which she indicated that she had sought outside employment during the back pay period. CF, Tab 13, Exhibit D. The appellant attached to the revised Form 8038 a list of 34 employers with whom she had applied for employment with information such as to the application dates, positions for which she applied, manner of contact, and reason (if known) why employment was not offered. *Id*. The appellant included copies of written communications from each of the listed employers, corroborating that she had applied for, but was not offered, a position with the organization. *Id*., Exhibits 1-34. Finally, the appellant noted that on a Postal Service Form 8039, which she completed on the same date as the first Form 8038, she wrote "NA" in response to a request to identify any periods of time when she was disallowed from receiving back pay because of a failure to seek outside employment.[3] CF, Tab 13 at 11; *see id.*, Tab 9 Exhibit E.

[3] The appellant explained that on January 5, 2009, she was admonished by an agency labor relations official to quickly complete the forms necessary to compute her back pay and that she did not receive assistance in completing the forms as required by agency policy. CF, Tab 13 at 10; *see id*., Exhibit A.

¶10 In a subsequent submission to the administrative judge, the agency indicated that it would not consider the second Form 8038 submitted by the appellant. CF, Tab 16 at 4-5. The agency calculated the appellant's back pay and related payments as if the appellant had not sought employment during the period of her wrongful removal. *Id*. at 5-6.

¶11 In her compliance recommendation, the administrative judge found that, while it "seems somewhat unlikely that an employee would misread" the outside employment question on the Form 8038, the appellant "presented a plausible explanation for [her actions]." CF, Tab 18 at 15-16. The administrative judge noted that the appellant submitted detailed information concerning her efforts to obtain outside employment throughout the back pay period that was unrebutted by the agency. *Id.* at 16. Therefore, the administrative judge found that the appellant made reasonable efforts to obtain outside employment during the back pay period. *Id*.

¶12 In its submission to the Board, the agency argued that back pay claims by non-preference-eligible employees are controlled by the ELM and, because the ELM is silent regarding how to resolve the conflict when an employee submits two contradictory Form 8038s, the administrative judge erred by determining which Form 8038 to credit. MSPB Docket No. SF-0752-07-0409-X-1, Compliance Referral File (CRF), Tab 4 at 8. According to the agency, it was "within its rights to accept the first Form 8038, and to reject the second," and, because there is no legal basis for requiring the agency to accept the second Form 8038, the administrative judge exceeded her authority. *Id*. at 9.

¶13 The agency misapprehends the breadth of the Board and its administrative judge's authority to ensure compliance with final Board decisions. As stated above, when the Board finds a personnel action unwarranted, the aim is to place the appellant, as nearly as possible, in the situation she 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; *Mascarenas*, 57 M.S.P.R. at 430; *see also Kerr*, 726

F.2d at 733. The authority to restore an individual to the status quo ante is broad and far reaching. *Weed v. Social Security Administration*, 110 M.S.P.R. 468, ¶ 5 (2009); *James v. U.S. Postal Service*, 60 M.S.P.R. 504, 509 (1994). It extends to areas over which the Board would not otherwise have jurisdiction. *Clark v. Department of the Air Force*, 111 M.S.P.R. 477, ¶ 9 (2009) (finding that the Board has the authority to review an employee's entitlement to a performance award as part of determining whether the agency has provided status quo ante relief). Thus, while the agency may ordinarily have been within its rights not to accept an amended form from an employee, here the Board has the authority to determine whether the appellant has been properly restored to the status quo ante. That includes the proper provision of back pay.

¶14 As discussed above, the ELM provides that "[b]ack pay is allowed, unless otherwise specified in the appropriate award or decision, provided the employee has made reasonable efforts to obtain other employment." ELM § 436.2(b). Thus, under the ELM, the relevant question is whether the appellant made a reasonable effort to obtain other employment.[4] If the record evidence shows that the appellant made such an effort, she is entitled to back pay for the full period of her wrongful removal; if the record evidence shows that the appellant did not make such an effort, her entitlement to back pay is limited to the first 45 days of the period she was out of work. *Id.* Because the record evidence in this case is

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[4] Contrary to the agency's assertions, the dispositive issue in this case is whether the appellant sought outside employment during the back pay period as required by the ELM and not how she completed the Form 8038. In any event, the agency should have noted the inconsistency between the Form 8038 and Form 8039 completed by the appellant and promptly made inquiry of the appellant. Furthermore, the agency's failure to comply with its own procedures for completing the two forms may have contributed to the appellant initially providing the erroneous information for processing. The agency's management instructions regarding processing of back pay claims state that the employing office – and not the employee – should complete the Form 8039, and the employee "must review and agree to the information provided on Form 8039 before it is submitted" for processing. *See* CF, Tab 7, Exhibit E at 3.

inconsistent, the administrative judge correctly weighed the conflicting evidence and determined which evidence she found more credible. This was not only proper, it was essential to resolve whether the appellant did, in fact, seek outside employment during the back pay period.

¶15 While we have considered the January 15, 2009 Form 8038 on which the appellant indicated that she did not seek employment during the back pay period, as found by the administrative judge, the totality of the record evidence leads to the conclusion that the appellant, in fact, sought employment during the back pay period. CF, Tab 13, Exhibit D; *see* CF, Tab 18 at 16. The agency has provided nothing to show that the administrative judge's factual conclusion was erroneous. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam) (mere disagreement with the administrative judge's findings and credibility determinations is insufficient to establish error in the administrative judge's conclusions).

¶16 Because the appellant sought outside employment during the period of her wrongful removal, she is entitled to back pay for that period. The agency's failure to provide the appropriate back pay constitutes noncompliance with the Board's final order on the merits of this case.

The agency is in noncompliance because of its failure to credit the appellant with the annual leave she would have earned but for the agency's wrongful removal action.

¶17 The agency argued before the administrative judge that, pursuant to the agency's policies, the appellant was not entitled credit for the annual leave she would have earned during the period she was wrongly removed. CF, Tab 16 at 6. In support of this argument, the agency cited to a provision of Management Instruction EL-430-90-8 which states that "[e]mployees do not earn annual and sick leave during the period of erroneous separation." CF, Tab 16 at 14. The appellant, in contrast, argued that she is entitled to the annual leave as part of status quo ante relief and pointed to ELM § 512.91 which addresses the

recrediting of annual leave of employees who have returned to a pay and duty status following the reversal of a suspension or involuntary separation. CF, Tab 17 at 4-6.

¶18 The administrative judge stated that the provision cited by the appellant applied to the recrediting of an employee's leave balance as it existed at the time of separation and not to the crediting of the leave that an employee would have earned during the period of a wrongful removal. CF, Tab 18 at 17-18. She concluded that there was no basis to find the agency in noncompliance regarding the crediting of annual leave. *Id*. at 18. Before the Board, both parties essentially reiterate the arguments they made below.

¶19 The first paragraph of the section of the ELM addressing back pay "for the period during which an unjustified or unwarranted personnel action was in effect," states that "[f]or purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect." ELM 436.1 Thus, just as under the Back Pay Act, the overarching principle set forth in the ELM is to place the employee in the position she would have been in had the wrongful personal action not occurred. Clearly, the appellant would have earned annual leave had the agency not improperly removed her.

¶20 Contrary to the administrative judge's conclusion, the Management Instruction cited by the Postal Service has no application to the facts of the instant case. The instruction addresses situations where an employee has been erroneously separated by optional retirement and not situations where an employee was erroneously removed by the agency. CF, Tab 16 at 14. The agency has cited nothing else to cast doubt on the dictate of ELM § 436.1 that for purposes of entitlement to benefits an employee is considered as having been

employed during the period of an unwarranted removal.[5] Thus, we find that the appellant is entitled to the annual leave that she would have earned during the period of the now reversed removal. The agency's failure to provide that annual leave constitutes noncompliance with the Board's final order on the merits of this case.

The agency properly withheld from the appellant's back pay award payment for the period of time for which it previously paid the appellant.

¶21 When the agency determined the amount of back pay it believed was due to the appellant, it did not include payment for the three-week period from March 24, 2007, to April 13, 2007, because, according to the agency, it mistakenly paid the appellant for that period in 2007. CF, Tab 9 at 4-5. The appellant argued to the administrative judge that the agency was not authorized to deduct the three weeks of pay from her back pay award and that the debt collection provisions of the ELM and Management Instruction EL-430-90-8 should have been followed. CF, Tab 13 at 6-7. Those provisions require specific procedures culminating in the employee's right to a hearing. ELM § 451 *et. seq*. The administrative judge concluded, however, that "since the agency has shown that it had already (mistakenly) paid the appellant for the period March 24-April 13, 2007, it did not owe her any back pay for that period." CF, Tab 18 at 11.

¶22 In her submission to the Board, the appellant continued to complain that the agency's deduction from the back pay amount was inconsistent with proper agency procedures. CRF, Tab 5 at 9-10. Those procedures, however, apply to the collection of debts and not the payment of back pay, and there is no showing

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[5] While it is not clear from the record whether the provision cited by the appellant addresses the entitlement to leave that would have been earned during the period of a wrongful removal or the restoration of an employee's leave balance as it existed at the time of a wrongful removal, the provision in no way calls into question the appellant's entitlement to the annual leave she would have earned during the period of her wrongful removal. *See* CF, Tab 16 at 14.

that the provisions cited by the appellant are applicable to the circumstances of this case. *See* ELM § 451 *et. seq*.

¶23 The agency has provided evidence showing that it paid the appellant for the period from March 24, 2007, to April 13, 2007. CF, Tab 7, Exhibit F. The appellant has not made the required specific, nonconclusory, and supported assertion that the agency's evidence is in error. *See New*, 106 M.S.P.R. 217, ¶ 6 (an appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions of continued noncompliance); *Donovan*, 101 M.S.P.R. 628, ¶ 7 (same). Accordingly, because the agency previously paid the appellant for the period from March 24, 2007, to April 13, 2007, it need not include that period of time in the appellant's back pay award.

ORDER

¶24 As discussed above, the agency is in noncompliance with the Board's final order on the merits of the appellant's appeal of the agency's removal action. 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. The agency's submission must include a detailed and understandable explanation of the agency's calculations and payments regarding back pay, interest on back pay, contributions to the appellant's retirement account, and other benefits of employment, including the crediting of annual leave. 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 she 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, Manager of Human Resources Patty Hansen 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:

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