

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

2010 MSPB 82

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

**Fae Driscoll,
Appellant,**

v.

**United States Postal Service,
Agency.**

May 6, 2010

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

Afshin Miraly, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This matter is before the Board based on an October 15, 2009 opinion and order agreeing with the administrative judge's recommendation that the agency was in noncompliance with a final Board order. For the reasons set forth below, we find that the agency has now demonstrated full compliance and DISMISS the petition for enforcement as MOOT.

BACKGROUND

¶2 The background to this matter is more fully set forth in the Board's October 15, 2009 opinion and order, but the essential fact is that the agency

removed the appellant from her EAS-17 supervisor customer service position effective March 2, 2007. *Driscoll v. U.S. Postal Service*, [112 M.S.P.R. 498](#) (2009); see MSPB Docket No. SF-0752-07-0409-I-1, Initial Appeal File (IAF), Tab 10. On appeal to the Merit Systems Protection Board (MSPB), in a February 22, 2008 initial decision, an administrative judge sustained only one of the charges against the appellant and 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. IAF, Tab 10 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 October 2008, 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. Because the administrative judge found the agency in noncompliance, the matter was referred to the Board.

¶4 After the parties made additional submissions, the Board agreed with the administrative judge's recommendation and found that the agency remained in noncompliance regarding the payment of back pay and interest on back pay and was in noncompliance regarding the crediting of the appellant with the annual leave she would have earned during the period of her erroneous separation. *Driscoll*, [112 M.S.P.R. 498](#), ¶¶ 6-20. The Board ordered the agency to submit evidence of compliance and stated that "[t]he 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.” *Id.*, ¶ 24.

ANALYSIS

The agency is in compliance regarding the payment of back pay.

¶5 On January 5, 2010, the agency asserted that it had fully complied with the Board’s orders in this matter. Compliance Referral File (CRF), Tab 8 at 4. The agency supported its assertion of compliance with extensive documentary evidence. *Id.* at 6-44. In a January 21, 2010 submission to the MSPB’s Western Regional Office in another compliance case filed by the appellant, the appellant stated, regarding the issues in this compliance case, that she was “satisfied that the [a]gency has now followed the Board’s [d]ecision regarding her salary adjustments and [b]ack pay.”¹ CRF, Tab 9 at 3.

¶6 Despite the statement in her January 21, 2010 submission that she was satisfied with the agency’s actions regarding back pay, in a February 12, 2010 submission, the appellant asserted that the agency had failed to pay her the back pay due for the period from April 13, 2007, to April 21, 2007. CRF, Tab 10 at 5. The appellant based her assertion on a statement in the agency’s January 5, 2010 submission that the appellant was awarded back pay for the period from April 19, 2007, through April 20, 2008. *Id.*; *see* CRF, Tab 8 at 6.

¶7 The Board held in its October 15, 2009 decision that the appellant was mistakenly paid in 2007 for the period from March 24, 2007, to April 13, 2007,

¹ Despite the fact that the Board’s October 15, 2009 opinion and order directed the parties to file evidence and argument regarding the compliance issues addressed in that decision with the Clerk of the Board, the parties have made some submissions with the Board’s Western Regional Office. *See Driscoll*, [112 M.S.P.R. 498](#), ¶ 24. The Western Regional Office has forwarded the submissions to the Clerk of the Board for inclusion in the record in this matter.

and that the agency did not need to include that time period in its back pay calculations. *Driscoll*, [112 M.S.P.R. 498](#), ¶ 23. Although the agency stated in its January 5, 2010 submission that it calculated back pay commencing on April 19, 2007, the documentary evidence provided with the submission shows that the agency commenced paying back pay to the appellant effective April 14, 2007. CRF, Tab 8 at 14, 19. Thus, we find the agency in compliance regarding the payment of back pay.

The agency is in compliance regarding the payment of interest on back pay.

¶8 As noted above, in its January 5, 2010 submission, the agency asserted that it had fully complied with the Board's orders regarding compliance in this matter. CRF, Tab 8 at 4. The documentary evidence accompanying the agency's January 5, 2010 submission showed that it calculated interest on back pay using an interest rate of 2.04%. *Id.* at 35-37. In her January 21, 2010 reply to the agency's submission, the appellant asserted that the agency used the incorrect interest rate and that the proper rate was 10%. CRF, Tab 9 at 4.

¶9 In computing interest on back pay for a non-preference eligible employee of the U.S. Postal Service, the provisions of the Postal Service's Employee and Labor Relations Manual (ELM) apply. *House v. U.S. Postal Service*, [85 M.S.P.R. 260](#), 262 (2000); see *Driscoll*, [112 M.S.P.R. 498](#), ¶ 6; see also *Thrasher v. U.S. Postal Service*, [40 M.S.P.R. 582](#), 583-85 (1989) (finding that the Board has authority to assess interest on back pay against the Postal Service pursuant to the ELM). Section 436.73(a)(1)(b) of the ELM provides that, for a non-preference eligible employee, such as the appellant, the correct interest rate on a back pay award is the Federal Judgment Rate. See CRF, Tab 11 at 5, 10. The ELM also provides that the interest rate to be used "is the rate in effect 7 days prior to the date of the award." ELM, Exhibit 436.73(a) (table setting forth the means of computing interest on back pay awards), CRF, Tab 11 at 11. The means of computing the Federal Judgment Rate is codified at [28 U.S.C. § 1961](#) and that statute also provides, inter alia, that the Director of the Administrative Office of

the United States Courts shall distribute notice of the Federal Judgment Rate. [28 U.S.C. § 1961\(a\)](#). The Administrative Office has posted the weekly interest rates on its web page. See <http://www.utd.uscourts.gov/documents/judgpage.html>.

¶10 In the instant case, the administrative judge issued an initial decision on the merits of the appellant's removal appeal on February 22, 2008. IAF, Tab 10. As set forth above, the ELM provides that the Federal Judgment Rate "in effect 7 days prior to the award" is the appropriate interest rate to use when calculating the interest due to an employee. ELM, Exhibit 436.73(a). Thus, the rate in effect on February 15, 2008, is the applicable interest rate in this case. According to the web site maintained by the Administrative Office of the United States Courts, the Federal Judgment Rate for the week ending February 15, 2008, was 2.04%. As noted above, that is the rate used by the agency to calculate the interest on back pay due to the appellant.

¶11 In her February 11, 2010 submission, the appellant asserted that, contrary to the agency's contention, the appropriate interest rate was 5.05%, the rate in effect one week prior to the effective date of the administrative judge's initial decision. CRF, Tab 10 at 4. In other words, the rate in effect on February 22, 2007, one week prior to the March 2, 2007 removal action, which the administrative judge mitigated to a demotion in the February 22, 2008 initial decision.

¶12 The Board addressed the question of the proper date for determining the applicable interest rate in *Evans v. U.S. Postal Service*, [110 M.S.P.R. 58](#) (2008). In that case, the Board held that the date of the Board decision "ordering the agency to cancel the appellant's removal and substitute a demotion to the next lower-graded nonsupervisory position with the least reduction in pay or grade and to pay the appellant the correct amount of back pay, with interest," was "the relevant date for purposes of selecting the interest rate." *Id.*, ¶ 12. Thus, consistent with the decision in *Evans* and the provision of the ELM, in the instant case, the date seven days prior to the date of the initial decision is the appropriate

date for determining the rate of interest on back pay. Because that is the rate used by the agency, we find the agency in compliance.

The agency is in compliance regarding the crediting of leave and the providing of health insurance benefits.

¶13 As stated above, on January 5, 2010, the agency asserted that it had fully complied with the Board's orders in this matter. CRF, Tab 8 at 4. In her January 21, 2010 submission, the appellant stated that she agreed with the agency that "the adjustments and additions made to her annual, sick and terminal leave [were] satisfactory," and that "proper deductions and adjustments were made to for [sic] [a]ppellant's health benefits." CRF, Tab 9 at 3. Based on the agency's evidence of compliance and the appellant's assertions that she is satisfied with the agency's actions, we conclude that the agency has complied with the portion of the Board's October 15, 2009 opinion and order concerning leave and health insurance benefits.²

The appellant's allegation that the agency failed to inform the Office of Personnel Management of the adjustments to her salary is not ripe for decision at this time.

¶14 In her January 21, 2010 submission, the appellant complained that the agency had not addressed whether the adjustments to her salary for 2007, 2008, and 2009 were "adequately reported to the Agency's Retirement Board." CRF, Tab 9 at 4. The appellant noted that the amount of her retirement annuity was tied to her annual salary. *Id.*

¶15 We start by noting that, while the appellant asserted that the agency failed to address whether the adjustments to her salary were reported, she specifically did not assert that the agency had failed to inform the agency responsible for

² In her January 21, 2010 submission, the appellant also stated that the agency was in compliance regarding her salary in 2008 and the amount of her Pay for Performance salary increase for 2009. CRF, Tab 9 at 3. Thus, we need not discuss those matters further.

determining her retirement annuity, presumably the Office of Personnel Management (OPM), of the changes in her salary. *See id.* In addition, although the appellant has retired from the agency, she does not assert that her annuity benefits from OPM have been improperly calculated.

¶16 As discussed above, the agency is in compliance regarding the payment of back pay to the appellant. The record also shows that the agency made retirement deductions from the back pay award. The appellant's unsupported assertion that the agency failed to show that it reported the adjustments in her salary is insufficient to establish that the agency is in noncompliance. *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) (an appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions of noncompliance); *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) (same). If the appellant believes that her retirement annuity has been incorrectly calculated, she should raise that matter with OPM. If the agency has, in fact, failed to inform OPM of the changes in the appellant's salary, the appellant may file a new petition for enforcement with the administrative judge regarding that issue.

ORDER

¶17 The record shows that the agency has now complied with the Board's final order on the merits of this matter. Accordingly, the appellant's petition for enforcement is DISMISSED as MOOT. This is the final decision of the Merit Systems Protection Board regarding this petition for enforcement. Title 5 of the Code of Federal Regulations, section 1201.183(b)(3) ([5 C.F.R. § 1201.183\(b\)\(3\)](#)).

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 the Board's regulations and other related material, at our website, <http://www.mspb.gov>. 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.