

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

**2010 MSPB 94**

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Docket No. DC-0752-08-0070-X-1

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**Leroy Alford,  
Appellant,**

**v.**

**Department of Defense,  
Agency.**

May 21, 2010

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John J. Rigby, Esquire, Arlington, Virginia, for the appellant.

Robert H. Schapler, Esquire, and William Christopher Horrigan, Esquire,  
Washington, D.C., for the agency.

**BEFORE**

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

**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 find that the agency has demonstrated partial compliance and, therefore, DISMISS those related portions of the petition for enforcement as MOOT. We VACATE the portion of the compliance recommendation addressing whether the appellant was properly restored to his position and duties and FORWARD to the Washington Regional Office, for consideration as part of another appeal pending in that office, the appellant's

allegations that he was not properly restored to his position and duties and that the agency took reprisal against him by, among other things, taking a second removal action.

### BACKGROUND

¶2 The essential facts of this case are that the appellant was terminated from his position as a GS-15 deputy chief in a component of the Defense Intelligence Agency effective September 29, 2007, after serving 15 months with the agency. MSPB Docket No. DC-0752-08-0070-I-1, Initial Appeal File (IAF), Tab 5, Subtab L. The appellant filed an appeal with the Board, and while the appeal was pending before the administrative judge, the agency canceled the termination effective April 14, 2008. *See* MSPB Docket No. DC-0752-08-0070-I-2, IAF, Tab 7. In an August 28, 2008 initial decision, the administrative judge found that, because the agency had not fully restored the appellant to the status quo ante, the appeal was not moot. *Id.*, Tab 34. The administrative judge reversed the termination action. *Id.* The initial decision became the final decision of the Board when neither party filed a petition for review.<sup>1</sup>

¶3 On January 21, 2009, the appellant filed the instant petition for enforcement and alleged, among other things, that the agency had failed to: 1) properly calculate and pay the back pay, overtime, Thrift Saving Plan contributions, and interest due to him; 2) properly restore him to his position of record; 3) complete the paperwork necessary to cancel the removal action; 4) correct his service computation due and veterans preference status; 5) reinstate and process a grievance that was pending at the time of his removal; 6) provide him tax information and compensate him for the additional tax burden caused by

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<sup>1</sup> The administrative judge found, among other things, that, because the appellant is a preference eligible, he met the statutory definition of an employee under [5 U.S.C. § 7511\(a\)](#), and the agency violated his rights when it removed him without advanced notice and an opportunity to respond. *See* MSPB Docket No. DC-0752-08-0070-I-2, IAF, Tab 34 at 2-6.

the back pay award; 7) credit him with compensatory time for travel during the period of his removal; and 8) provide him with information concerning its compliance efforts. MSPB Docket No. DC-0752-08-0070-C-1, Compliance File (CF), Tab 1. The respondent also complained that he was subjected to reprisal following his reinstatement, including being placed on a performance improvement plan. *Id.* While the instant petition for enforcement was pending before the administrative judge, the agency removed the appellant a second time effective July 15, 2009, based on his alleged unacceptable performance. *Id.*, Tab 17, Exhibit 2. The appellant has appealed that matter. *See* MSPB Docket No. DC-0752-09-0770-I-2.

¶4 After affording the parties the opportunity to submit evidence and argument, the administrative judge issued a September 11, 2009 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 18 at 2. Specifically, the administrative judge found that the agency was not in compliance concerning the payment of interest on back pay and the payment of an additional amount to compensate the appellant for any additional income tax burdens caused by his receipt of back pay and benefits for 2007 in 2008. *Id.* at 3-6, 15-16. Regarding the other matters raised by the appellant in his petition for enforcement, the administrative judge found that: 1) the agency was in compliance with the August 28, 2008 initial decision; 2) the issues raised were moot; or 3) the issues were not matters properly raised in a petition for enforcement of the August 28, 2008 initial decision. CF, Tab 18.

¶5 Because the administrative judge recommended that the Board take the actions necessary to ensure full compliance with its final decision, this matter was referred to the Board. *Id.* at 18; Compliance Referral File (CRF), Tab 2. The parties have both made several submissions regarding compliance and the compliance recommendation, which have been considered. *Id.*, Tabs 2-8.

## ANALYSIS

¶6 When the Board finds a personnel action unwarranted, it orders that the appellant be placed, 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). 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). An agency's assertions of compliance must include a clear explanation of its compliance efforts supported by understandable documentary evidence. *Tubesing v. Department of Health & Human Services*, [112 M.S.P.R. 393](#), ¶ 17 (2009); *Bowden v. U.S. Postal Service*, [95 M.S.P.R. 505](#), ¶ 4 (2004); *Woodson v. Department of Agriculture*, [94 M.S.P.R. 289](#), ¶ 6 (2003). 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 compliance regarding the payment of interest on back pay.

¶7 In her compliance recommendation, the administrative judge found that the agency had failed to show that it had properly paid the appellant the interest due on back pay. In its submissions to the Board, the agency has provided a stream of confusing and often contradictory explanations regarding the payment of interest. *See, e.g.*, CRF, Tab 3, Exhibits 1, A-D; Tab 5 at 6-8. At one point, in its November 23, 2009 filing, the agency even appeared to acknowledge that it had not paid the correct amount of interest. CRF, Tab 5 at 8.

¶8 In its December 23, 2009 submission, however, the agency stated that, after a thorough review, it had concluded that it had fully paid the appellant. *Id.*, Tab

7 at 4. More importantly, in support of this assertion, the agency provided a spreadsheet clearly detailing, day-by-day, the back pay, overtime, and interest accrued. *Id.* Exhibit 1. The spreadsheet also clearly showed the payments made to the appellant, and the agency provided documentation showing that the payments were in fact made.<sup>2</sup> *Id.*, Exhibits 1-3.

¶9 In response to this evidence, the appellant noted the agency's previous inconsistent positions regarding the calculation and payment of interest and reiterated many of the arguments made in response to previous agency submissions. CRF, Tab 8. Regarding the agency's December 23, 2009 submission, the appellant stated that "[w]hat [the document] really shows is that the [a]gency's calculations are so fundamentally flawed that the [a]gency cannot correct them at this time." *Id.* at 5. The appellant did not, however, specifically address the substance of the agency's December 23, 2009 submission or explain how the spreadsheet and accompanying documents failed to show compliance.

¶10 We share the appellant's frustration with the agency's previous submissions regarding compliance. Until its December 23, 2009 submission, the agency had failed to provide the required clear explanation of its compliance efforts supported by understandable documentary evidence. The agency, however, has now submitted such evidence. The appellant has not rebutted the evidence with specific and nonconclusory assertions of noncompliance. Accordingly, after a thorough review of the agency's submission, we find the agency in compliance regarding the required payment of interest on back pay.

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<sup>2</sup> The agency asserts that it actually overpaid the appellant. *See* CRF, Tab 7 at 5. We need not address the overpayment issue, however, because the record shows that the appellant has been paid at least the amount due to him. There is no suggestion that the agency is initiating a collection action.

The agency is in compliance regarding the documentation of the cancellation of the appellant's termination and the status of his Official Personnel File.

¶11 In his submission to the Board, the appellant reiterated his unsuccessful argument made before the administrative judge that the SF-50 documenting the cancellation of the September 29, 2007 termination lacked the proper information indicating his reinstatement was ordered by the MSPB. CRF, Tab 4 at 18-19; CF, Tab 18 at 15. According to the appellant, the information is “mandated by OPM.” *Id.* at 19.

¶12 Regarding this issue, OPM's Guide to Processing Personnel Actions provides specific instructions to federal agencies regarding the authority and authority codes to use on a cancellation action. Specifically, where the MSPB orders the cancellation of an action and the employee is entitled to back pay, the correct authorization code is AGM and VWL and the authority is the MSPB decision number and [5 U.S.C. § 5596](#). Guide to Processing Personnel Actions, Table 32-E (<http://www.opm.gov/feddata/gppa/gppa.asp>); CF, Tab 10, Exhibit 5.

¶13 As the appellant correctly observed, the SF-50 documenting the cancellation of his termination does not contain the information set forth above. *See* CRF, Tab 4, Exhibit 5. In fact, the blocks on the appellant's SF-50 that would contain the authorization and authorization codes discussed above are blank. *See id.*

¶14 The agency has contended that, as discussed at the outset of this decision, it voluntarily canceled the termination action and, as a result, the appellant was reinstated to his position effective April 14, 2008. CF, Tab 9 at 16. This was over four months prior to the issuance of the initial decision on August 28, 2008. Thus, the cancellation of the appellant's termination was not a consequence of the initial decision.

¶15 In sum, the agency prepared an SF-50 in April 2008 canceling the appellant's termination. That SF-50 was correct at the time it was prepared. Nothing in the Guide to Processing Personnel Actions suggests that the agency

has acted improperly. Accordingly, we find the agency in compliance in this regard.<sup>3</sup>

The agency is in compliance regarding the status of the appellant's Official Personnel File.

¶16 In his October 15, 2009 submission to the Board, the appellant asserted that his Official Personnel File showed a break in service between August 18, 2007, and April 30, 2008. CRF, Tab 4 at 19. The administrative judge found in this regard that the agency had submitted evidence showing the appellant's uninterrupted employment. CF, Tab 18 at 14. The appellant has failed to demonstrate that the administrative judge erred in her finding of compliance in this regard.

The agency is in compliance regarding payment for the compensatory time off for travel that the appellant purportedly would have earned during the back pay period.

¶17 In his petition for enforcement, the appellant complained that the agency had failed to credit him with the compensatory time off for travel that he would have earned during the period that he was wrongly removed. CF, Tab 1. The agency argued before the administrative judge that the appellant would not have earned any compensatory time off for travel. CF, Tab 14 at 7, Exhibit 2. In her compliance recommendation, the administrative judge found that, because the appellant was no longer employed by the agency, there was no compliance that could be ordered concerning this issue. CF, Tab 18 at 18.

¶18 In his submission to the Board, the appellant asserted that the administrative judge erred in her finding regarding the compensatory time off for travel issue. CRF, Tab 4 at 9-11. According to the appellant, under [5 C.F.R.](#)

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<sup>3</sup> We acknowledge that the August 28, 2008 initial decision ordered the agency to cancel the appellant's removal, but, as discussed in the text, the agency had already canceled the action at the time of the initial decision.

[§ 550.114](#), the agency was required to pay him for his unused compensatory time when he left the agency, and, therefore, an effective remedy was available. *Id.*

¶19 The appellant’s argument is inapposite because he relied on an incorrect legal authority. Agencies are authorized to grant compensatory time off instead of payment for “irregular or occasional overtime work.” [5 U.S.C. § 5543\(a\)\(1\)](#). The Office of Personnel Management’s implementing regulation at [5 C.F.R. § 550.114](#), provides, among other things, that an employee should be paid for unused compensatory time upon separation. There are, however, separate and distinct statutory and regulatory provisions governing compensatory time off for travel. *See* [5 U.S.C. § 5550b](#) and implementing regulations at [5 C.F.R. §§ 550.1401-1409](#). Section 5550b(b) of Title 5 specifically provides that an employee who earns compensatory time off for travel “shall not be entitled to payment for any such hours that are unused as compensatory time.” Similarly, 5 C.F.R. § 550.1408 states that “an individual may not receive payment under any circumstances for any unused compensatory time off he or she earned.”

¶20 Thus, while there are questions regarding whether the appellant would have earned compensatory time off for travel during the back pay period and whether an individual is entitled to compensatory time off for travel as part of status quo ante relief, it is clear that, under no circumstances, may an individual receive payment for compensatory time off for travel. Thus, while our reasoning differs, we agree with the administrative judge’s conclusion that, because the appellant separated from the agency, there is no effective remedy available to him regarding compensatory time off for travel. Accordingly, this issue is moot.<sup>4</sup>

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<sup>4</sup> The appellant’s entitlement to compensatory time off for travel could become a live issue should the second removal action be reversed and he was therefore, once again, an employee. In that event, this matter may be raised as part of compliance in that case.

The Board lacks the authority to order a remedy regarding the tax consequences of the back pay award.

¶21 In his petition for enforcement, the appellant argued that he was entitled to compensation for the additional tax burden he faced because the back pay award shifted income he would have earned in 2007 to 2008. CF, Tab 1. The agency conceded before the administrative judge that the appellant was entitled to compensation for the extra tax burden caused by the “bunching” of his income, but asserted that it could not determine the amount due until the appellant provided it with copies of his 2007 and 2008 tax returns. *Id.*, Tab 6 at 17. In her compliance recommendation, the administrative judge ordered the appellant to provide the agency with copies of his 2007 and 2008 tax returns and ordered the agency to pay the appellant’s additional tax burden. CF, Tab 18 at 16-17.

¶22 In its November 23, 2009 submission to the Board, the agency argued for the first time that the administrative judge erred when she ordered it to compensate the appellant for any additional tax burden as a consequence of the back pay award. CRF, Tab 5 at 7. The appellant responded that the agency had “repeatedly promised to pay [him] the amount necessary to compensate him for [the] additional income tax burden” as a result of having received 2007 income in 2008. CRF, Tab 6 at 5.

¶23 Contrary to the administrative judge’s order, it is well settled that the Board lacks the authority to remedy the tax consequences of a back pay award. *E.g. Kinney v. Department of Veterans Affairs*, [103 M.S.P.R. 602](#), ¶ 16 (2006); *Hopkins v. Department of the Navy*, [86 M.S.P.R. 11](#), ¶ 2 (2000); *Harris v. Department of Agriculture*, [53 M.S.P.R. 78](#), 82 (1992), *aff’d*, 988 F.2d 130 (Fed. Cir. 1993) (Table). Furthermore, nothing in the record suggests that the agency’s statements regarding compensating the appellant for the tax consequences of the back pay award are enforceable before the Board. For example, there is no indication that the agency’s statements that it would pay the tax consequences were made as part of a settlement agreement entered into the record before the

Board or that the compensation is required by an agency rule, regulation, or collective bargaining agreement. We understand the appellant's frustration with the agency's change in position, but the Board lacks the authority to order the agency to offset the additional tax burden caused by the back pay payment. In sum, we agree with the agency that the administrative judge erred in her order regarding the payment of any additional tax burden as a consequence of the back pay award.

The question of whether the appellant was properly restored to his position of record is forwarded to the administrative judge in the appellant's second removal appeal.

¶24 The appellant's second removal appeal is currently pending before an administrative judge in the Merit Systems Protection Board's Washington Regional Office. The administrative judge in that matter is directed to fully consider and address the question of whether any failure by the agency to properly restore the appellant to his position and duties following the reversal of the first removal action had an impact on any issue relevant to the second removal appeal. The administrative judge shall fully develop the factual record regarding this issue and may accept whatever evidence and argument, including hearing testimony, he believes appropriate.<sup>5</sup>

The appellant's allegations that the agency took reprisal against him are forwarded to the administrative judge in the appellant's second removal appeal.

¶25 The appellant contended in his petition for enforcement that he was subjected to reprisal after his reinstatement. CF, Tab 1. In her compliance recommendation, the administrative judge found that the most significant matters complained of by the appellant, including his placement on a performance improvement plan, were issues concerning the second removal action, an appeal

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<sup>5</sup> To the extent either party disagrees with the administrative judge's actions and findings regarding this issue, those matters may be raised in a petition for review of the initial decision.

of which was pending before another administrative judge. CF, Tab 18 at 16. The administrative judge in the instant case found that the appellant should raise the matters in his appeal of the second removal. *Id.* Before the Board, the appellant complained that his reprisal claims were not being heard. *See* CRF, Tab 4 at 21.

¶26 The reprisal claims raised by the appellant are integrally connected to the affirmative defenses raised by the appellant in his second removal appeal, which is currently pending before another administrative judge in the Board's Washington Regional Office. Accordingly, we forward the reprisal claims to that administrative judge for consideration as part of the appellant's second removal appeal.

¶27 In addition to all other matters he deems appropriate, the administrative judge in that matter shall fully develop the factual record regarding whether the agency's second removal action, and the agency actions leading to that action, including the placement of the appellant on a performance improvement plan, were taken in reprisal for the appellant's first Board appeal. The administrative judge may accept whatever evidence and argument, including hearing testimony, he believes appropriate.

#### ORDER

¶28 Except for the appellant's allegation that he was not properly restored to his position and duties following the reversal of the first removal action and his allegations that the second removal action, and the matters leading to that action, were taken in reprisal for his first Board appeal, which are FORWARDED to the Washington Regional Office, the appellant's petition for enforcement is DISMISSED as MOOT. This is the final decision of the Merit Systems Protection Board regarding the portions of this petition for enforcement not forwarded to the Washington Regional Office. 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](http://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:

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