

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

**2010 MSPB 242**

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

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**Thomas Tubesing,  
Appellant,**

**v.**

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

December 10, 2010

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

Philip J. Gurrera, Atlanta, Georgia, 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. In a September 30, 2009 Opinion and Order, the Board found that the agency remained in noncompliance and ordered the agency to take specific steps to demonstrate compliance. *Tubesing v. Department of Health & Human Services*, [112 M.S.P.R. 393](#) (2009). As discussed below, we find that the agency has COMPLIED in PART but remains in NONCOMPLIANCE regarding some issues.

## BACKGROUND

¶2 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, 2008. 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 on December 30, 2008, 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 the position he occupied prior to the termination 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 dated May 21, 2009, 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 had not provided 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 complied with the Board's final decision, this matter was referred to the Board. After providing the parties an opportunity to submit additional evidence and argument, the Board issued a September 30, 2009 Opinion and Order finding that the agency remained in noncompliance regarding the placement of the appellant in a position with duties and responsibilities substantially equivalent to the duties and responsibilities of the position from which he was separated. *Tubesing*, [112 M.S.P.R. 393](#), ¶¶ 6-14. The Board also found that the agency failed to demonstrate compliance with regard to the payment of back pay, interest on back pay, restoration of sick and annual leave, restoration of the appellant's TSP account, and reinstatement of health insurance benefits. *Id.* at ¶¶ 15-18. The parties have now made additional submissions to the Board regarding compliance, which have all been considered.

#### ANALYSIS

The agency remains in noncompliance regarding the restoration of the appellant to a position substantially equivalent to the position from which he was separated.

¶5 As stated in the previous Opinion and Order in this matter, when the Board finds a personnel action unwarranted, the aim is to place the employee, as nearly as possible, in the situation he would have been in had the wrongful personnel action not occurred. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 5 (citing *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); and *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984)). Among other things, the agency

must reinstate the employee to his former position and duties absent a strong overriding interest or compelling reasons for not doing so. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 6 (citing *Miller v. Department of the Army*, [109 M.S.P.R. 41](#), ¶ 11 (2008); *Walker v. Department of the Army*, [90 M.S.P.R. 136](#), ¶ 16 (2001); and *Bullock v. Department of the Air Force*, [80 M.S.P.R. 361](#), ¶ 5 (1998)). It is the agency's burden to prove its compliance with a Board order. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 5, (citing *New v. Department of Veterans Affairs*, [106 M.S.P.R. 217](#), ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); and *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 appellant, however, may rebut an agency's evidence of compliance by making specific, nonconclusory, and supported assertions of noncompliance. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 13 (citing *New*, [106 M.S.P.R. 217](#), ¶ 6; and *Donovan*, 101 M.S.P.R. 628, ¶ 7).

¶6 In the instant case, upon his reinstatement, the agency reassigned the appellant from his GS-13 public health *advisor* position to a GS-13 public health *analyst* position. In the September 30, 2009 Opinion and Order in this case, the Board found that the agency had established a compelling reason for reassigning the appellant and, accordingly, the agency was in compliance in that regard. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 10.

¶7 As also stated in the September 30, 2009 Opinion and Order, where a compelling reason exists for reassigning an employee to a position other than the one he encumbered at the time of his separation, the agency must establish that the duties and responsibilities of the position to which the employee has been assigned are substantially equivalent in scope and status to those of the position the employee previously held. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 11 (citing *Miller*, [109 M.S.P.R. 41](#), ¶ 11; *Walker*, [90 M.S.P.R. 136](#), ¶ 16; and *Bullock*, [80 M.S.P.R. 361](#), ¶ 5). In determining whether the duties and responsibilities of the position to which the employee has been assigned are substantially equivalent in scope and status to those of the position the employee previously held, the Board looks

beyond the title and grade of the positions involved and conducts an assessment of the scope of the duties and responsibilities of the post-reinstatement position compared with the scope of the duties and responsibilities of the employee's pre-separation position. *Doe v. Department of Justice*, [95 M.S.P.R. 198](#), ¶ 7 (2003); *Joos v. Department of the Treasury*, [79 M.S.P.R. 342](#), 347 (1998). In *Doe*, for example, the Board examined the specific work assignments performed by a criminal investigator following his reinstatement and the type of work typically performed by criminal investigators in his office before concluding that the duties of Mr. Doe's post-reinstatement position were substantially equivalent in scope and status to those of the position he held prior to his removal. *Doe*, [95 M.S.P.R. 198](#), ¶¶ 8, 18. The evidence in that case included a detailed affidavit from Mr. Doe's supervisor and other evidence regarding the nature of the position. *Id.*

¶8 In the September 30, 2009 Opinion and Order, the Board observed that the administrative judge had reviewed the position descriptions of the public health advisor position and the public health analyst position and found that they were "similar in responsibility and expertise."<sup>1</sup> *Tubesing*, [112 M.S.P.R. 393](#), ¶ 12. Before the Board, however, the appellant objected to the administrative judge's determination and asserted in an undisputed statement made under penalty of perjury that: 1) he had been placed in a full-time involuntary telework status; 2)

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<sup>1</sup> In a November 27, 2009 pleading, the appellant argued for the first time that in comparing the position descriptions of the appellant's pre-separation public health advisor position and his post-reinstatement public health analyst position, the administrative judge relied on the agency's submission of an incorrect pre-separation position description. CRF, Tab 15 at 14-15. According to the appellant, at the time of his termination, he was assigned to a position with position description number 1120, but the agency submitted position description number 3016 to the administrative judge. *Id.* The record shows, however, that the agency submitted position description number 1120 to the administrative judge and it is that position the administrative judge found "similar in responsibility and expertise" to the public health analyst position. CF, Tab 9 at 13-14.

he had not been to his assigned duty station nor met face-to-face with an agency employee for a year and a half; and 3) on an average day he spoke with his supervisor for about five minutes and did little or no work commensurate with his grade and position. CRF, Tab 6 at 28-29; *Tubesing*, [112 M.S.P.R. 393](#), ¶ 12.

¶9 Because the agency offered nothing to rebut the appellant's assertions regarding the duties and nature of the position to which he had been assigned following his reinstatement, the Board found that the agency failed to demonstrate compliance with the Board's prior order. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 14. Accordingly, the Board ordered the agency to "provide evidence that it has assigned the appellant duties and responsibilities commensurate with his position as a GS-13 public health analyst." *Id.*, ¶ 23. The Board also ordered the agency to "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." *Id.*

#### Parties' Responses to the Board's September 30, 2009 Opinion and Order

¶10 In response to the September 30, 2009 Opinion and Order, the agency explained that the appellant was placed in a position commensurate with the duties and responsibilities of his previous position. CRF, Tab 13 at 2. In support of this assertion, the agency quoted a portion of the Opinion and Order where the Board stated that "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." *Id.* at 2 (quoting *Tubesing*, [112 M.S.P.R. 393](#), ¶ 12).

¶11 The agency's argument does not show compliance. While the agency is correct that the administrative judge found, in her compliance recommendation, that the position description of the appellant's new position was similar to the position description of his position at the time of his separation, the Board, on review of the administrative judge's compliance recommendation, found that the

appellant's un rebutted assertions regarding his actual duties and working conditions established that the agency was in noncompliance in this regard. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 14. Accordingly, the Board ordered the agency to, among other things, "provide evidence that it has assigned the appellant duties and responsibilities commensurate with his position as a GS-13 public health analyst." *Id.*, ¶ 23.

¶12 To be in compliance, the agency must show that the actual duties and responsibilities assigned to and performed by the appellant in his post-reinstatement position are commensurate with the duties and responsibilities assigned to and performed by the appellant in his pre-separation position. As part of its showing, 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." *See Tubesing*, [112 M.S.P.R. 393](#), ¶ 23.

¶13 The employee performance plan submitted by the agency fails to meet this requirement because it does not identify the actual tasks assigned to the appellant; rather, it states in general terms that the appellant must disseminate information and maintain key relationships in order to support the effective accomplishment of public health initiatives, manage complex projects to further the mission of the organization, and serve as emergency response coordinator. CRF, Tab 14. In contrast, the appellant submitted an affidavit stating that "[s]ince [his] return to the CDC's payroll [his] duties have, in effect, been nonexistent." CRF, Tab 15 at 29. The appellant further stated that most of his tasks consisted of updating the Branch calendar, an "uncomplicated clerical task" and that he can finish the tasks in a few minutes about once a week. *Id.* He also stated that on the occasion when he has been given documents to edit, the task takes only a few hours. *Id.* The agency has not rebutted the appellant's affidavit. For these reasons, the agency is still in noncompliance.

The agency is in noncompliance regarding the restoration of the appellant's health insurance benefits.

¶14 In the September 30, 2009 Opinion and Order, the Board directed the agency to provide evidence that it had properly restored the appellant's health insurance benefits. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 22. In a November 13, 2009 submission, the agency, without explanation, referred to a document from its finance and accounting service purporting to show that it had deducted \$892.32 from the appellant's back pay for health insurance. CRF, Tab 13 at 2, Exhibit 1. In response, the appellant asserted that the agency remained in noncompliance because it had failed to enroll him in the Federal Employees Health Benefit Program as a new employee following his reinstatement but instead erroneously deducted the cost of health insurance benefits from his back pay award, presumably to fund health insurance benefits during the back pay period. CRF, Tab 15 at 22-24.

¶15 Title Five, United States Code, Section 8908(a) provides as follows:

An employee enrolled in a health benefits plan under this chapter who is removed or suspended without pay and later reinstated or restored to duty on the ground that the removal or suspension was unjustified or unwarranted may, at his option, enroll as a new employee or have his coverage restored, with appropriate adjustments made in contributions and claims, to the same extent and effect as though the removal or suspension had not taken place.

Thus, under this provision, upon his reinstatement the appellant had the option of being enrolled in the health insurance program as a new employee or having his insurance coverage restored, with appropriate adjustments, as if he had not been separated. *See Fernandez v. Department of Justice*, [105 M.S.P.R. 443](#), ¶ 14 (2007).

¶16 The appellant has provided a copy of a June 9, 2009 e-mail to an agency human resources employee stating that he did not want to be charged for health

insurance during the back pay period.<sup>2</sup> CRF, Tab 15, Exhibit J. The agency did not challenge the validity of this e-mail. Thus, consistent with the statutory provision set forth above, following the appellant's reinstatement, the agency should have enrolled the appellant in the Federal Employees Health Benefits Program as a new employee. Because of the appellant's election, the agency should not have deducted from the appellant's back pay award health insurance premiums for the period prior to the appellant's enrollment as a new employee. *See Fernandez*, [105 M.S.P.R. 443](#), ¶ 16 (where an employee elects not to have his health insurance benefits retroactively restored, he is entitled to reimbursement of the premiums improperly deducted from his back pay). Accordingly, the agency is in noncompliance in this regard. To be in compliance, the agency must pay the appellant the amount of health insurance benefits improperly withheld from the back pay award with appropriate interest. Because it has failed to do so, the agency remains in noncompliance.

The agency is in noncompliance regarding restoration of the appellant's Thrift Savings Plan account.

¶17 The regulations implementing the Back Pay Act require an agency to correct errors affecting an employee's Thrift Savings Plan (TSP) account consistent with regulations prescribed by the Federal Retirement Thrift Investment Board (FRTIB). [5 C.F.R. § 550.805\(h\)](#); *see Madison v. Department of Defense*, [111 M.S.P.R. 614](#), ¶ 11 (2009). The FRTIB regulations address the process by which a reinstated employee's TSP account should be credited with the contributions that should have been made during the back pay period. [5 C.F.R. § 1605.13](#). Among other things, the regulations require the employing agency to deduct the appropriate TSP contributions from an employee's back pay

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<sup>2</sup> The appellant also provided an un rebutted affidavit in which he stated that he informed the agency that he did not want to pay for health insurance coverage during the back pay period. CRF, Tab 15 at 33.

award and submit the contributions to the “TSP record keeper,” a component of the FRTIB. 5 C.F.R. § 1605.13(c)(1); *Madison*, [111 M.S.P.R.](#), ¶ 11; *see* 5 C.F.R. § 1690.1.

¶18 In the September 30, 2009 Opinion and Order, the Board directed the agency to “clearly set forth its calculations relating to the appellant’s ... TSP account.” *Tubesing*, [112 M.S.P.R. 393](#), ¶ 22. In its submission in response to the Board’s Opinion and Order, the agency provided a spreadsheet purporting to show the amount of the appellant’s TSP contributions and the agency’s matching payments. CRF, Tab 13, Exhibit 4 at 2. The agency, however, offered no explanation regarding its calculations. *See* CRF, Tab 13 at 2.

¶19 In response to the agency’s submission, the appellant argued that the agency had not properly restored his TSP contributions. CRF, Tab 15 at 21-22. In support of his assertion, the appellant cited an October 14, 2009 statement from the agency’s finance and accounting service allegedly showing that nothing had been withheld from the appellant’s back pay award for TSP contributions. CRF, Tab 15, Exhibit C. Contrary to the appellant’s assertion, the October 14, 2009 statement appears to show that the agency deducted \$892.32 from his back pay award for the TSP. The agency, however, provides no explanation regarding how this figure was calculated and it appears inconsistent with the agency’s other documentary evidence regarding the appellant’s TSP account.<sup>3</sup> *Compare*, CRF, Tab 15, Exhibit C, *with* CRF, Tab 13, Exhibit 4 at 2.

¶20 To be in compliance regarding the appellant’s TSP account, the agency must show that it has complied with the FRTIB’s regulations regarding back pay

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<sup>3</sup> In its response to the Board’s Opinion and Order, the agency submitted a form entitled “Thrift Savings Plan: Request for Retroactive Contributions.” CRF, Tab 13, Exhibit 4 at 3. The form has the appellant’s name printed on it and appears to request the appellant to authorize retroactive TSP contributions. *Id.* The agency has offered no explanation of the form, whether it was sent to the appellant, or how it complies with the FRTIB’s regulations. Accordingly, the document does not show compliance.

awards, including the requirement that the agency inform the TSP record keeper of the back pay award. *See Walker*, [90 M.S.P.R. 136](#), ¶ 26. The agency must also show that it requested the FRTIB to provide a computation of interest and lost earnings in accord with the applicable regulations. *Id.* Additionally, the agency must provide a detailed explanation of its calculations regarding TSP and must show how they demonstrate compliance.

The appellant's request for the imposition of sanctions because of the agency's noncompliance is denied.

¶21 The appellant requests that the Board impose sanctions against the agency for its continued noncompliance and cites to the provisions of [5 C.F.R. § 1201.43](#) authorizing Board administrative judges to impose sanctions for noncompliance with an order, such as drawing adverse inferences, prohibiting a party from producing evidence, or not considering portions of a pleading. CRF, Tab 15 at 9-10. The appellant cites no legal authority to support the imposition of these sorts of sanctions in a compliance case. The Board's enforcement authority for non-compliance is limited to those provided in [5 U.S.C. § 1204\(e\)\(2\)\(A\)](#).<sup>4</sup> *Johnson v. Department of the Treasury*, [100 M.S.P.R. 196](#), ¶ 8 n.2 (2005). Section 1204(e)(2)(A) permits the Board to withhold the pay of the employee responsible for the lack of agency compliance. Because, as demonstrated below, the agency has made some efforts to comply with the Board's final Order, we find that it is not appropriate to apply the severe penalty provided by section 1204(e)(2)(A) at this point in the proceedings.

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<sup>4</sup> After the issuance of the Board's September 30, 2009 Opinion and Order, the appellant filed a motion to recover attorney fees incurred during the enforcement proceeding. CRF, Tab 8. Such a request is premature prior to issuance of a final decision in the compliance proceeding. [5 C.F.R. § 1201.203\(d\)](#); *Galatis v. U.S. Postal Service*, [109 M.S.P.R. 651](#), ¶ 14 (2008). The appellant is reminded that any motion for attorney fees should be filed with the administrative judge. 5 C.F.R. § 1201.203(c).

The agency is in compliance regarding the crediting of annual and sick leave.

¶22 In the September 30, 2009 Opinion and Order, the Board directed the agency to clearly set forth its calculations relating to the appellant's sick and annual leave balances. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 22. In its November 13, 2009 submission, the agency provided documentation showing the appellant's leave balances. CRF, Tab 13, Exhibit 3. In response, the appellant acknowledged that the agency "appears to have restored his sick leave properly." CRF, Tab 15 at 19. Thus, the agency is in compliance regarding the restoration of the appellant's sick leave balance.

¶23 Regarding the appellant's annual leave balance, the agency submitted documentation which it asserted demonstrated compliance. CRF, Tab 13, Exhibit 3. The appellant, however, asserted that, while "[i]t appears the total of annual and restored leave is correct," the amounts under each type of leave are incorrect. CRF, Tab 15 at 20. Specifically, the appellant contended that the agency failed to credit the leave earned by the appellant during the back pay period as restored annual leave and that, as a result, he risks losing some of the leave. *Id.*

¶24 Title Five, United States Code, Section 5596(b)(1)(B)(i) provides that annual leave credited to an employee under the Back Pay Act, "which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management."<sup>5</sup> Here, the appellant was retroactively awarded annual leave for 27 pay periods as a result of the reversal of the agency's termination

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<sup>5</sup> The relevant regulation promulgated by the Office of Personnel Management provides that a full-time employee shall use excess annual leave of 416 hours or less "by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account." [5 C.F.R. § 550.805](#)(g)(1); see *Simons v. Department of Health & Human Services*, [89 M.S.P.R. 685](#), ¶ 6 (2001). The record shows that the agency has properly afforded the appellant until the end of the 2011 leave year on December 31, 2011, to use the restored annual leave. See CRF, Tab 15, Exhibit B.

action, and he earned eight hours of annual leave per pay period. *See* CRF, Tab 13, at 2, Exhibit 3. Thus, he earned 216 hours of annual leave during the back pay period (27 x 8).

¶25 Contrary to the appellant's contention, he is not entitled to have this entire amount of annual leave credited to a separate leave account.<sup>6</sup> *See* CRF, Tab 15 at 20. Rather, only the amount of annual leave "which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account." [5 U.S.C. § 5596\(b\)\(1\)\(B\)\(i\)](#). For general schedule employees, such as the appellant, the maximum leave accumulation permitted by law is 240 hours. *See* 5 U.S.C. § 6304(a).

¶26 The agency has not provided any information regarding the appellant's annual leave balance at the time of his termination. The appellant, however, provided a detailed chart in which he listed his annual leave balance at the time of his termination as 144 hours. CRF, Tab 15, Exhibit H. The agency has not contested that representation.

¶27 Accordingly, when the appellant was reinstated, his annual leave balance was 360 hours (144 + 216). Pursuant to the statutory provision discussed above, the amount of annual leave in excess of 240, that is 120 hours, should have been credited to a separate leave account. *See* [5 U.S.C. § 5596\(b\)\(1\)\(B\)](#).

¶28 The earnings and leave statement submitted by the appellant shows that the agency credited the appellant with 128 hours in a separate restored leave account. CRF, Tab 15, Exhibit B. Thus, the agency has placed eight hours more than required in a separate leave account for the appellant's use. Accordingly, the agency is in compliance regarding the amount of annual leave credited to the appellant and how that leave has been made available for the appellant's use.

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<sup>6</sup> The appellant does not cite, and the Board is unaware of, any statute, regulation, or decision to support his contention that all of the annual leave accrued during the back pay period should be placed in a separate leave account.

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

¶29 In the September 30, 2009 Opinion and Order, the Board directed the agency to submit “a detailed and clear explanation of its calculations” regarding, among other things, the appellant’s back pay and interest on back pay. *Tubesing*, [112 M.S.P.R. 393](#), ¶ 22. In its November 13, 2009 submission, the agency asserted that the appellant was entitled to \$82,174.39 in gross back pay. CRF, Tab 13, Exhibit 1 at 1. The agency also asserted that the appellant was entitled to \$4,168.05 in interest on the gross back pay. *Id.*

¶30 In response to the agency’s submission, the appellant stated that he was due \$82,033.92 in gross back pay and, therefore, he was overpaid.<sup>7</sup> CRF, Tab 15 at 18-19. The appellant also stated that he was due \$4,049.80 in interest on back pay and, therefore, was also overpaid in that regard. *Id.* Because the appellant acknowledged that he received the amount of back pay and interest on back pay due to him (he in fact asserts that he was overpaid), we find the agency in compliance in this regard.

The agency is in compliance regarding the appellant’s individual learning account.

¶31 In the compliance recommendation, the administrative judge found that the appellant failed to show agency noncompliance regarding restoration of the appellant’s Individual Learning Account.<sup>8</sup> CF, Tab 10 at 7-8. The appellant did not object to the administrative judge’s finding prior to issuance of the Board’s

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<sup>7</sup> The appellant also asserted that he had outside earnings of \$5,873.79 from a jazz festival and that the agency failed to deduct that amount from his back pay. CRF, Tab 15 at 18-19. Because the appellant admits that he received more than the amount due to him, we need not discuss this matter further. We note that there is no suggestion in the record that the agency has initiated an action to recover the amount the appellant asserts he was overpaid.

<sup>8</sup> The administrative judge noted that neither party explained the meaning of an Individual Learning Account. CF, Tab 10 at 7.

September 30, 2009 Opinion and Order. *See* CRF, Tabs 6. Accordingly, the September 30, 2009 Opinion and Order did not direct the agency to take any action regarding the appellant's individual learning account. *Tubesing*, [112 M.S.P.R. 393](#). The appellant has now reasserted his contention that the agency has failed to restore his Individual Learning Account. CRF, Tab 15 at 24.

¶32 Because the appellant did not timely raise his objection to the administrative judge's finding and because the September 30, 2009 Opinion and Order did not direct the agency to take any action regarding the appellant's Individual Learning Account, we need not address this matter further. Accordingly, in light of the administrative judge's finding, we find the agency in compliance in this regard.

Acting Director of the Office of Public Health Preparedness and Response Daniel Sosin is the agency official responsible for compliance in this case.

¶33 As set forth above, the agency has failed to demonstrate compliance with the November 25, 2008 initial decision, which became the final decision of the Board, and with the Board's September 30, 2009 decision ordering the agency to take certain actions. In the January 23, 2009 order acknowledging receipt of the appellant's petition for enforcement, the administrative judge ordered the agency to submit the name of the official responsible for compliance with the Board's final decision. CF, Tab 2. In response to that order, the agency identified Kem Williams as the official responsible for issuance of a corrected SF-50 and payment of back pay. CF, Tab 3. Before the administrative judge, the agency did not identify an individual more generally responsible for compliance.

¶34 In her compliance recommendation, the administrative judge informed the agency that it must file with the Clerk of the Board, the name, title, and grade of the "agency official responsible for the failure to take the actions required by the recommendation for compliance." CF, Tab 10 at 9. At no point before the Board

has the agency identified the official responsible for full compliance.<sup>9</sup> Accordingly, we have determined that Daniel Sosin, Acting Director of the Office of Public Health Preparedness and Response, is the agency official responsible for compliance. [5 C.F.R. § 1201.183](#)(a)(2). If the agency fails to demonstrate compliance, the Board may seek the withholding of the responsible agency official's pay until the agency demonstrates compliance. [5 U.S.C. § 1204](#)(e)(2)(a).

### ORDER

¶35 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 20 days** of the date of this order satisfactory evidence of compliance with this decision.

¶36 To be in compliance, the agency must show that the actual duties and responsibilities assigned to and performed by the appellant in his post-reinstatement GS-13 public health analyst position are commensurate with the duties and responsibilities assigned to and performed by the appellant in his pre-separation GS-13 public health advisor position. As part of its showing, 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." *See Tubesing*, [112 M.S.P.R. 393](#), ¶ 23.

¶37 The agency must also show that it has paid the appellant the amount improperly withheld from the back pay award for health insurance premiums with appropriate interest. In addition, the agency must show that it has complied with the FRTIB's regulations regarding back pay awards, including the requirement that the agency inform the TSP record keeper of the back pay award. *See* [5](#)

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<sup>9</sup> We note that the areas over which the agency stated Kem Williams was the responsible agency official are no longer in dispute.

[C.F.R. § 1605.13](#). The agency must also show that it requested the FRTIB to provide a computation of interest and lost earnings in accord with the applicable regulations. *Id.*

¶38 The agency must produce relevant evidence, in the form of documentation and/or statements made under penalty of perjury, clearly describing its compliance efforts and 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.<sup>10</sup>

¶39 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.

¶40 The agency is reminded that if it fails to provide adequate evidence of compliance, the responsible agency official, Daniel Sosin, Acting Director of the Office of Public Health Preparedness and Response, 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

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<sup>10</sup> The agency is reminded that statements by its representative are insufficient to meet its burden of proof. *Fernandez*, [105 M.S.P.R. 443](#), ¶ 10 (statements of a party's representative in a pleading do not constitute evidence); *Hendricks v. Department of the Navy*, [69 M.S.P.R. 163](#), 168 (1995) (same).

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.