UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 15

Docket No. DA-0752-09-0563-X-1

Delisa Raymond,

Appellant,

v.

Department of the Navy,

Agency.

February 8, 2011

Charles H. Allenberg, Esquire, Virginia Beach, Virginia, for the appellant.

Michael J. Hoff, Jacksonville, Florida, 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 the administrative judge's Recommendation finding the agency in noncompliance with a settlement agreement. As detailed below, we agree with the administrative judge's Recommendation and find that the agency is NOT IN COMPLIANCE with the parties' settlement agreement.

BACKGROUND

¶2 The appellant appealed the agency's action removing her from her GS-5 lead education technician position effective May 26, 2009. *Raymond v.*

Department of the Navy, MSPB Docket No. DA-0752-09-0563-I-1, Initial Appeal File (IAF), Tab 1, Tab 5, Subtabs 4, 4a, 4b. On September 29, 2009, the parties reached an oral settlement agreement, which was recorded. IAF, Tab 15 (Compact Disc). The administrative judge entered the agreement into the record for purposes of enforcement and dismissed the appeal in an October 1, 2009 initial decision. *Id.*, Tab 16. The oral settlement agreement provided, in pertinent part:

> 1. Agency will cancel the removal actions and remove all references thereto from the appellants' Official Personnel Folder, or OPF, and the electronic OPF, and the agency will issue all appropriate Standard Form or SF-50s reflecting the agency's actions.[1]
>
> 2. The agency will reinstate the appellants in their prior positions effective their respective dates of removal, and pay the appellants back pay and back benefits effective from those dates.
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> 3. The agency will pay the appellants' attorney . . . reasonable attorney fees in the amount of $12,000[.]

Id., Tab 15 (Compact Disc).

¶3 On November 16, 2009, the appellant filed a petition for enforcement of the agreement. Compliance File (CF), Tab 1. In brief, although some of the appellant's initial allegations have been rendered moot, some of the initial allegations remain alive and new allegations have arisen. We address each allegation in turn below.

ANALYSIS

¶4 In a compliance action based on a settlement agreement, the burden of proving noncompliance rests with the party asserting that the agreement has been breached. *See Vallad v. U.S. Postal Service*, 75 M.S.P.R. 529, 532 (1997). The

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[1] The settlement agreement refers to the "appellants" in the plural because the appellant's appeal was combined for hearing purposes with another employee's appeal. The appellant's attorney also represented the other appellant and reached a joint settlement of their cases. IAF, Tab 15 (Compact Disc).

appellant, as the party asserting the breach, must show that the agency failed to abide by the terms of the settlement agreement. The agency nonetheless is required to produce evidence that it has complied with the settlement agreement. *See Perry v. Department of the Army*, 992 F.2d 1575, 1578 (Fed. Cir. 1993); *Vaughan v. United States Postal Service*, 77 M.S.P.R. 541, 546 (1998). An agency representative's statement is not evidence of compliance when not in the form of an affidavit or made under penalty of perjury. *See Sweet v. U.S. Postal Service*, 89 M.S.P.R. 28, ¶ 16 (2001).

A. The agency has failed to demonstrate its compliance with its obligation to provide the appellant back pay and benefits.

¶5 The administrative judge found that the agency had not provided the appellant back pay as it had agreed to in the settlement agreement. Recommendation at 4. The appellant subsequently reported that she received a check from the agency but that the agency had provided no calculations demonstrating the correctness of the payment. Compliance Referral File (CRF), Tab 3 at 2. Thereafter, the Board received several submissions from the agency – discussed below – that purported to prove the correctness of the payment.

¶6 The settlement agreement in this case required the agency to provide "back pay and back benefits" from the appellant's removal date to her reinstatement date. IAF, Tab 15 (Compact Disc). When a settlement agreement provides for "back pay" without further defining this term of art, the Board will apply the regulatory or statutory definition of the term, unless the agreement reveals a contrary intent. *See Galatis v. U.S. Postal Service*, 110 M.S.P.R. 399, ¶ 3 (2009). Under the Back Pay Act regulations, back pay includes "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment." 5 C.F.R. § 550.803. *See also Walker v. Department of the Army*, 90 M.S.P.R. 136, ¶ 27 (2001) (recognizing agency's obligation to restore leave balances as part of back pay). We therefore interpret

the settlement agreement to require the agency to provide each of these benefits to the appellant. As discussed below, at issue in this case are the appellant's salary, health benefits deductions, and restoration of sick and annual leave banks.

¶7 Here, where an agency is charged with failing to comply with a settlement agreement, and the agency is wholly possessed of the evidence of compliance, the agency has the duty to produce all of the evidence that it has to show that the provisions of the agreement at issue have been satisfied. *See Perry*, 992 F.2d at 1578; *Langston v. Department of the Army*, 84 M.S.P.R. 597 (1999). The agency's April 19, 2010 submission incorrectly denies the agency's obligation to submit any such evidence:

> Please note that submission of these calculations was not an Agency requirement or responsibility set forth in that Settlement Agreement.
>
> * * *
>
> [T]he Agency must dutifully point out that the Appellant has failed to provide evidence that she was not correctly paid back pay and benefits, did not receive the correct amounts of sick and annual leave, and did not receive corrections to her premiums withholding[.]

CRF, Tab 13 at 2 (emphasis in original). The agency is fundamentally mistaken. It is well-settled Board law that the agency has a duty to produce evidence of its compliance with its settlement agreements. *See Vaughn v. U.S. Postal Service*, 97 M.S.P.R. 97, ¶ 7 (2004). It is also well-settled that an agency's evidence of compliance must include a clear explanation of its compliance efforts, supported by understandable documentary evidence. *Id.* Because the agency fails to recognize that it has that burden, it is not clear whether the agency believes the evidence it has submitted would satisfy that burden. In any event, we find the agency's evidence fails to satisfy its obligations.

¶8 The agency has submitted three documents in support of its contention that it has met its obligation to provide back pay and benefits: (1) a two-page

spreadsheet (submitted to the Board on March 25, 2010)[2]; (2) a memorandum written by the Defense Finance and Accounting Service (DFAS) (submitted to the Board on April 19, 2010); and (3) an illegible, three-page spreadsheet (also submitted to the Board on April 19, 2010). CRF, Tab 8 at 48-49, Tab 13 at 6, Tab 13 at 7-9.[3] Several evidentiary gaps and contradictions preclude the Board from relying on these documents to find that the agency has given the appellant the back pay and benefits it agreed to.

The two-page spreadsheet is unsworn, vague, and inherently unreliable.

¶9 The agency did not explain the purpose of the two-page spreadsheet, nor was its purpose self-evident, as it came as part of a 49-page attachment composed mostly of intra-agency email traffic. For purposes of this Opinion and Order, we assume – but cannot be sure – that the two-page spreadsheet was prepared on December 21, 2009. We base that assumption on its placement in the agency's submission immediately following a December 21, 2009 email that purports to have a spreadsheet attached to it entitled "Raymond.xls." CRF, Tab 8 at 45. The body of the email states:

> Delisa Raymond will receive [her] back pay with PPE 19-DEC-2009 and back pay calculations have been requested . . . . Tracey Carlson

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[2] Although a certificate of service accompanying the agency submission stated that it was served on the Clerk of the Board on December 22, 2009, the Board did not recognize the agency's submission at the time, because the agency submitted it under cover of the companion compliance referral case of *Washington v. Department of the Navy*, MSPB Docket No. DA-0752-09-0575-X-1, Tab 3 at 6-10. The agency subsequently provided a copy of the December 22, 2009 submission on March 25, 2010, when its representative was contacted by the Clerk of the Board.

[3] It appears that the agency and/or its counterpart agency, DFAS, prepared all three of these documents on December 21, 2009. First, the two-page spreadsheet is undated, but seems to be an attachment to a December 21, 2009 internal email to the agency representative. CRF, Tab 13 at 45. Second, the DFAS document is dated December 21, 2009. CRF, Tab 8 at 6. Third, the illegible, three-page spreadsheet (submitted to the Board on April 19, 2010) contains a hand-written note on each page "12-21-09." CRF, Tab 13 at 7-9.

> man[ua]lly calculated the back pay . . . for us BUT this is not from DFAS. PLEASE NOTE: the attachments are not back pay audits prepared by DFAS and anything they submit will take claim over what Ms. Carlson provided.

CRF, Tab 8 at 45 (emphasis in original). Because the email asserts that the information contained in the two-page spreadsheet is not authoritative, the Board cannot rely upon it in this compliance matter.

¶10 Further complicating matters, the two-page spreadsheet seems to calculate every deduction for each of 15 paychecks for the back pay period but provides no information as to the methods of calculation, nor does it report whether the agency has, in fact, paid the appellant the net amount indicated. *Id.* at 49. To the contrary, it appears – although it is again not clear – that at the time the two-page spreadsheet was prepared, the agency only planned to make the payment, but had not made the payment yet; the December 21, 2009 email states that the appellant "will receive [her] back pay with [Pay Period Ending] 19-DEC-2009." Because the email states that the appellant "will" receive the back pay, it fails to demonstrate that the appellant has received the back pay due to her.

¶11 Even absent the aforementioned doubts, the information in the December 21, 2009 two-page spreadsheet is contradicted by the agency's other submissions. First, on the same email chain is a December 17, 2009 agency statement that "the employee will not be receiving interest due to settlement agreement not indicating interest will be paid." *Id.* at 46. The agency's December 17, 2009 statement is legally flawed; although the settlement agreement does not specify that interest will be paid, because the agreement provides back pay, the agency is required to pay interest. *See Owens v. Department of Transportation*, 99 M.S.P.R. 377, ¶ 6 (2005). Consistent with the agency's mistaken belief on December 17, 2009, the December 21, 2009 two-page spreadsheet does not appear to calculate interest for the appellant. CRF, Tab 8 at 48-49. However, a December 22, 2009 email written by the same human resources technician states, "I spoke to the clerk handling their settlement case at DFAS and found that they

will be receiving interest." *Id.* at 52. Thus, it appears that one day after the agency prepared the December 21, 2009 two-page spreadsheet, the agency may have recognized its obligation to pay interest. Nonetheless, this contradiction in the agency's submissions means that we cannot rely on the December 21, 2009 two-page spreadsheet for evidence of compliance. Moreover, the December 22, 2009 e-mail still does not prove that the agency actually paid the interest, much less that it paid the correct amount. Instead, the e-mail provides only that the appellant "*will* be receiving interest" (emphasis added).

¶12 Second, the two-page spreadsheet suggests that health benefits were deducted in the calculation. *Id.* at 48. Specifically, under column "FEHB" (which we assume refers to Federal Employee Health Benefits), it seems that deductions of $164.58 were made for all but two of the fifteen pay periods. *Id.* However, these deductions may have been inappropriate because a March 15, 2010 agency submission suggests that the agency "erroneously" made health benefit deductions: "The Agency and Appellant are currently discussing issues she has with health benefit deductions that were erroneously taken from her backpay calculations." CRF, Tab 6 at 1. The Board noted this outstanding problem in a March 30, 2010 order to the parties to submit evidence and argument regarding compliance issues. CRF, Tab 9 at 2-3. The appellant's responsive submission on April 9, 2010, claimed that the agency has still not provided any evidence that the problem was corrected. CRF, Tab 11 at 2. In response, the agency failed to rebut the appellant's contention but instead only denied that it needed to prove that it had fixed the problem: "[T]he Agency must dutifully point out that the Appellant has failed to provide evidence that she … did <u>not</u> receive corrections to her premiums withholding." CRF, Tab 13 at 2 (emphasis in original). As discussed above, the agency fails to appreciate that it has an affirmative burden to produce evidence of its compliance with the settlement agreement.

¶13 In sum, the agency's December 21, 2009 two-page spreadsheet is neither credible nor reliable evidence that the agency has complied with its obligation to provide back pay and benefits to the appellant.

The DFAS memorandum is unsworn, vague, and unreliable in light of the agency's other submissions.

¶14 The DFAS memorandum was not made under oath, nor does it contain any narrative explanation of its "breakdown" of the computation of back pay. CRF, Tab 13 at 6. For these reasons we cannot rely on the DFAS memorandum as evidence of compliance.

¶15 Even absent those deficiencies, we cannot rely on the DFAS memorandum because it appears to contradict other record evidence. In contrast to the agency's March 15, 2010 submission, the December 21, 2009 DFAS memorandum suggests that DFAS did not deduct health benefits because on the same line as "FEHB" is $0.00. *Id.* at 6.

¶16 Additionally, the DFAS memorandum fails to indicate whether the agency restored the appellant's sick and annual leave balances. *Id.* at 6. To be sure, the agency claims in an April 19, 2010 submission that the appellant's leave and earnings statements "should reflect her corrected sick and annual leave balances with a reminder that if she desires restoration of the annual leave paid out to her when she was erroneously removed, *she* must make arrangements to buy back that leave via DFAS." *Id.* at 2 (emphasis added). The agency has not provided the Board with a copy of any such statement that it issued to the appellant. Nonetheless, such evidence would not satisfy the agency's affirmative obligation in this case to actively pursue the restoration of the appellant's leave balance. An agency is obligated to restore leave balances as part of back pay. *Walker*, 90 M.S.P.R. 136, ¶ 27. The settlement agreement in this case contains no exception to this rule as it did not specify that the appellant would be required "to make arrangements to buy back" her leave through DFAS should she desire it. An agency may not add preconditions to the agency's implementation of a settlement

agreement after the agreement has already been accepted. *See Grube v. Department of the Air Force*, 41 M.S.P.R. 494, 499 (1989) (finding the agency improperly required the appellant to take a medical evaluation prior to re-employment, in spite of the settlement agreement's general language that he would be reemployed "as soon as the agreement is finalized"). Likewise here, the agency agreed to "pay the appellants back pay and back benefits," without any precondition that the appellant would have to pursue additional arrangements to buy back her leave. The agency has the burden to make these arrangements readily available to appellant and to document these actions; the agency has failed to fulfill this burden.

The three-page spreadsheet is unsworn, vague, and illegible.

¶17 The three-page spreadsheet is mostly illegible, except for the annotations at the top of each page ("Diff," "Should be Paid," and "Was Paid," respectively), which are not explained. The spreadsheets are dated "12-21-09" and signed with what appears to be the signature of a DFAS Civilian Payroll Office Supervisor. CRF, Tab 13 at 7-9. Even had the three-page spreadsheet been legible, without it being under oath and accompanied by a detailed explanation, we could not rely upon its information to determine whether the agency has complied with its obligation to provide back pay to the appellant.

B. The agency has failed to reinstate the appellant's health benefits.

¶18 On February 12, 2010, the appellant alleged that the agency breached the settlement agreement by failing to reinstate her health insurance. CRF, Tab 4 at 1. The appellant reports that even though the agency has been "taking the payment for insurance each pay check," when she went to her doctor's office they could not verify in their database that the appellant had the health coverage she had selected through the agency. *Id.* at 2. We find that as part of the agency's obligation under the settlement agreement to reinstate the appellant to her prior position, the agency has a concomitant duty to reinstate her health benefits.

However, the agency has not responded to this allegation.[4] Thus, the agency has failed to rebut it and we find the agency in non-compliance on this matter.

C. The agency has failed to reinstate the appellant's status with her Thrift Savings Plan (TSP).

¶19 On April 14, 2010, the appellant alleged that the agency breached the settlement agreement by failing to reinstate her status with the Thrift Savings Plan (TSP) as an active employee. CRF, Tab 12 at 2. We find that as part of the agency's obligation under the settlement agreement to reinstate the appellant in her prior position, the agency has a duty to reinstate her TSP status. The agency has not, however, responded to this allegation. Thus, the agency has failed to rebut it, and we find the agency in non-compliance on this matter.

D. The appellant has failed to establish a breach of the settlement agreement by the agency's delay in issuing her two paychecks.

¶20 On March 18, 2010, the appellant alleged that the agency breached the settlement agreement by issuing her paychecks four days late on February 23, 2010, and one day late on March 5, 2010. The agency responded that these pay issues are not covered by the settlement agreement and therefore not properly before the Board in this petition for enforcement. CRF, Tab 13 at 3. We agree that the settlement agreement does not contemplate this particular issue that the appellant experienced, several months after the agency reinstated her. Thus, we find no agency breach over this issue.

E. The agency is in compliance regarding its obligation to issue an SF-50 documenting the cancellation of its removal action.

¶21 On April 14, 2010, the appellant raised non-specific allegations that the agency breached the settlement agreement by failing to issue her an SF-50:

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[4] The agency has noted that the appellant specified the agency should not reinstate her health benefits during the back pay period. CRF, Tab 6 at 1. That fact, however, would not justify the agency's failure to reinstate her benefits *after* her return to work. Thus, the agency's note is not dispositive of the alleged breach at issue.

"Health benefit deductions were paid.[5] I did not received [sic] a correction SF-50 action. I did not get [a] calculation to indicate if interest was added to the money." CRF, Tab 12 at 2. Later in the same submission, she wrote: "I have not received any correction SF-50 for any of the mistakes that was [sic] made." *Id.* at 3. The appellant fails to clearly identify what SF-50 she should have received that she did not. Nonetheless, in response, the agency submitted to the Board and the appellant a copy of her SF-50 for the agency's November 23, 2009 cancellation of her removal. CRF, Tab 13 at 2, 4, 5.

¶22 The settlement agreement required the agency to "cancel the removal actions and remove all references thereto from the appellants' Official Personnel Folder, or OPF, and the electronic OPF, and [to] issue all appropriate Standard Form or SF-50s reflecting the agency's actions." Nowhere else in the agreement are SF-50s mentioned. We find that the only SF-50 contemplated by the agreement's language is one that provides notification of the agency's cancellation of the removal action and that the agency has provided this SF-50 to the appellant. We therefore find the agency to be in compliance with any obligation it had to issue an SF-50.

F. <u>The appellant's allegations that the agency failed to (1) pay agreed-upon attorney's fees, (2) return her to duty, and (3) restore her CAC card are MOOT.</u>

¶23 In the appellant's November 16, 2009 submission, she alleged the agency failed to pay agreed-upon attorney's fees to her attorney and failed to return her to duty. CF, Tab 1 at 2-3. However, these two issues became moot after a December 7, 2009 teleconference with the administrative judge and the agency, prior to the administrative judge issuing a recommended decision on the appellant's petition for enforcement. Recommendation at 4, CF, Tab 6 (Audio

[5] The appellant's statement that "Health benefit deductions were paid" does not pertain to the allegation discussed earlier in this Opinion and Order about her current lack of health coverage.

Tape). First, the appellant stated that she was returned to duty and began working again on November 30, 2009. *Id.* Second, her attorney stated that on December 5, 2009, he received the agreed-upon attorney's fees. *Id.* Thus, these two issues are MOOT.

¶24 On February 12, 2010, the appellant amended her petition for enforcement to allege that she had not received her CAC card, which is used to gain access to agency facilities and computers. CRF, Tab 4 at 1. However, by submission dated April 14, 2010, she reported that she had received her CAC card on February 25, 2010. CRF, Tab 12 at 2. Thus, this issue is MOOT.[6]

ORDER

¶25 As set forth above, the agency has failed to fully comply with the parties' settlement agreement. Accordingly, we ORDER the agency to submit to the Clerk of the Board within 15 days of the date of this order satisfactory evidence of compliance with this decision.

¶26 To be in compliance regarding the settlement agreement's provision regarding back pay, **the agency must provide detailed and clear documentation and data of the calculations it has made in determining the amount due the appellant**. Among other things, the agency must: (1) clearly set forth the gross amount due the appellant and show how that amount was determined; (2) clearly set forth the amount and reason for all deductions, reductions, and offsets from the gross amount due the appellant; (3) clearly set forth the source and amount of all checks or electronic payments already received by the appellant and provide evidence that such checks or electronic payments were received; and (4) clearly set forth the amount of interest due the appellant

[6] The appellant also claims the agency has failed to provide her with a certificate and pin recognizing her 20 years of service. The parties' settlement agreement does not require this. However, the agency represents that it intended to provide the pin and certificate to the appellant, and we expect it has done so by this date.

and how that amount was calculated. The agency must also clearly set forth its calculations relating to the appellant's sick and annual leave balances, her TSP account (including both the appellant's and the agency's contributions), and any other benefits of employment the appellant should have received but for the agency's unwarranted personnel action. If it is necessary for the appellant to buy back her leave through DFAS, the agency must provide evidence that it has made such an arrangement readily available to the appellant and that it has promptly processed any such request from the appellant and restored her leave balances. Finally, the agency must provide evidence that it has restored the appellant's health insurance benefits and TSP status.

¶27 **In addition to the calculations, the agency must provide a clear and detailed narrative explanation of its calculations so that the Board may understand the calculations and verify that they are correct.** The agency must provide an explanation of all codes and abbreviations used in its documentation.

¶28 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.

¶29 A finding of noncompliance may result in the imposition of sanctions set forth in 5 C.F.R. § 1201.183(b) and (c). 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). The agency has not identified the official responsible for compliance with the Board's acknowledgment order. Nonetheless, our review of publicly available information reveals that Capt. Thomas Luscher is the Executive Officer of the

Naval Air Station Joint Reserve Base where the appellant works.[7] **Accordingly, we find that Capt. Luscher is the agency's official responsible for compliance with the Board's order.** ***See*** **5 C.F.R. § 1201.183(a)(2). If the agency fails to provide adequate evidence of compliance, then the responsible agency official 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).

FOR THE BOARD:

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

[7] In the agency's original pre-hearing submission, the agency identified CDR Scott Laedlein, former Executive Officer, Naval Air Station-Joint Reserve Base, New Orleans, as the individual who made the decision to remove the appellant. IAF, Tab 7 at 2. Publicly available information identifies Capt. Luscher as the current Executive Officer.