

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

2011 MSPB 16

Docket No. DA-0752-09-0575-X-1

**Lisa A. Washington,
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 On June 29, 2009, the appellant appealed the agency's action removing her from her position effective May 29, 2009. *Washington v. Department of the*

Navy, MSPB Docket No. DA-0752-09-0575-I-1, Initial Appeal File (IAF), Tab 1 at 1. On September 29, 2009, the parties reached an oral settlement agreement, which was recorded. IAF, Tab 17 (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 18. 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.
3. The agency will pay the appellants' attorney . . . reasonable attorney fees in the amount of \$12,000[.]

Id., Tab 17 (Compact Disc).

¶3 On November 13, 2009, the appellant filed a petition for enforcement of the agreement. Compliance File (CF), Tab 1. The administrative judge found that the agency had not provided the appellant back pay in accordance with the settlement agreement. Recommendation at 4. The administrative judge recommended that the Board take the necessary action to ensure the agency's compliance with the terms of the settlement agreement.

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

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 17 (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).

The agency has failed to provide the appellant back pay.

¶5 The administrative judge found that the agency had not provided the appellant back pay in accordance with the settlement agreement. Recommendation at 4, Compliance Referral File (CRF), Tab 1 at 4. In response, the agency filed a brief that essentially restated the submissions it had earlier made to the administrative judge and attached 49 pages of “supporting documentation” composed mostly of intra-agency email traffic. CRF, Tab 3 at 1-5, 11-60. The agency's brief did not explain how the 49 pages proved it had provided the appropriate amount of back pay.

¶6 In response to the agency's submission, the appellant filed a brief reporting that shortly after the administrative judge found the agency in noncompliance, she received a check from the agency. However, the appellant further submitted that she received no calculations to demonstrate the correctness of the payment. CRF, Tab 4 at 2. The agency has not replied to the appellant's submission.

¶7 The settlement agreement in this case required the agency to provide, inter alia, “back pay and back benefits” from the appellant's removal date to her reinstatement date. IAF, Tab 17 (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](#). We therefore interpret the settlement agreement to require the agency to provide each of these benefits to the appellant.

¶8 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).

¶9 It is well-settled that an agency's evidence of compliance must include a clear explanation of its compliance efforts supported by understandable documentary evidence. *See Vaughan v. U.S. Postal Service*, [97 M.S.P.R. 97](#), ¶ 7 (2004). As discussed below, we find the agency's evidence fails to meet this standard.

¶10 Contained in the agency's 49-page attachment was a two-page spreadsheet. CRF, Tab 3 at 56-57. For purposes of this Opinion and Order, we assume – but cannot be sure – that the two-page spreadsheet was attached to an email that immediately precedes the spreadsheet in the agency's attachment. *Id.* at 51. The body of the email states:

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

Id. at 51 (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.

¶11 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 56-57. 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 email states that the appellant “will receive [her] back pay with [the Pay Period Ending] 19-DEC-2009.” *Id.* at 51. 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.

ORDER

¶12 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.

¶13 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 and how that amount was calculated. The agency is further reminded that an agency representative’s statement is not evidence of compliance when not in the form of an affidavit or made under penalty of perjury.

¶14 **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.

¶15 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.

¶16 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.² **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**

² 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.

the Board should not impose sanctions for the agency's noncompliance in this case. [5 C.F.R. § 1201.183\(b\)](#).

FOR THE BOARD:

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