UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 21

Docket No. DA-0752-08-0227-X-2

Sam B. Tawadrous,

Appellant,

v.

Department of the Treasury,

Agency.

February 10, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL

Sam B. Tawadrous, Plano, Texas, pro se.

Megan M. Bauer, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner issues a concurring opinion.

FINAL ORDER

In its previous decision in this proceeding, the Board determined that the agency was in compliance with the Board's back pay order with respect to all issues presented to the administrative judge, but it remanded for the administrative judge to consider a new issue that the appellant raised concerning the deduction of union dues. *Tawadrous v. U.S. Postal Service*, MSPB Docket No. DA-0752-08-227-X-1 (September 24, 2010). After consideration, the administrative judge has recommended that the Board require the agency to pay

the appellant the amount of union dues which she found it had improperly deducted from his back pay award. *Tawadrous v. U.S. Postal Service*, MSPB Docket No. DA-0752-08-0227-C-2 (November 4, 2010). The agency has submitted evidence that on its face shows that it paid the appellant a refund of the deducted union dues in the amount of $708.06 on November 19, 2010. Compliance Referral File, Tab 5. The appellant has not disputed his receipt of this payment or the amount paid. Accordingly, the Board finds that the agency is in compliance and dismisses the appellant's petition for enforcement as moot.

This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b) (5 C.F.R. § 1201.183(b)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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

CONCURRING OPINION OF ANNE M. WAGNER

in

Sam B. Tawadrous v. Department of the Treasury

MSPB Docket No. DA-0752-08-0227-X-2

In its prior pleadings below, the agency contended that it properly deducted union dues from the back pay award because it was required under 5 C.F.R. § 550.805(e)(3) to offset from gross back pay all authorized deductions that would have been made from the appellant's pay if he had continued in pay status. MSPB Docket No. DA-0752-08-0227-C-2, Compliance File, Tab at 2. In response to the administrative judge's most recent recommendation, the agency has paid the appellant the amount of dues withheld, and appears to have abandoned its objection that such payment is inconsistent with 5 C.F.R. § 550.805(e)(3). Consequently, I agree that the appellant's petition for enforcement is moot. However, I write separately in order to express my view that such payment is not warranted under the Back Pay Act.

Under the Back Pay Act, an employee, on correction of an unjustified or unwarranted personnel action, is entitled "to receive for the period for which the personnel action was in effect . . . an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred . . . ." 5 U.S.C. § 5596(b)(1)(A). Thus, the Board is required, upon correcting a wrongful personnel action, to ensure that the employee is returned, as nearly as possible, to the status quo ante. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). In other words, the remedy should place the injured party as nearly as possible in the situation that he or she would have occupied if the wrong had not been committed. *Kerr*, 726 F.2d at 733 n.3 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975)).

The Federal Service Labor-Management Relations Statute (FSLMRS) provides for a one-year period during which an employee's written consent to an automatic pay deduction for union dues is not revocable. 5 U.S.C. § 7115(a); *see, e.g.*, *In re Margaret Jackson*, 59 Comp. Gen. 666, 667 (Aug. 14, 1980) (where an employee signs an allotment form, she may not revoke that authorization before one year). Here, the record does not establish that the appellant lawfully revoked his dues deduction authorization under 5 U.S.C. § 7115(a) prior to his termination. Rather, it appears that he was in a dues-paying status as of January 18, 2008, the effective date of his removal. MSPB Docket No. DA-0752-08-0227-C-2, Compliance File, Tab 6. Thus, as of the date of his termination, the appellant's pay was subject to a lawful dues deduction authorization under 5 U.S.C. § 7115(a) that - had he not been terminated - would have been revocable only upon completion of its one-year term. While it is true that the agency appropriately terminated the dues allotment following his removal pursuant to 5 U.S.C § 7115(b), the subsequent restoration of the status quo ante under the Back Pay Act in this case voided this action and requires that the appellant's back pay award be subject to the one-year term of his irrevocable dues authorization and reduced accordingly.

I am aware that in *Samuels v. U.S. Postal Service*, 95 M.S.P.R. 30, ¶¶ 10-11 (2003) ("*Samuels I*"), *vacated in part*, 95 M.S.P.R. 512 (2004) ("*Samuels II*"), the Board deferred to the decision of the Federal Labor Relations Authority (FLRA or Authority) in *American Federation of Government Employees (AFGE), Local 1843*, 25 F.L.R.A. 523, 526 (1987), *petition denied, AFGE, Local 1843 v. FLRA*, 843 F.2d 550 (D.C. Cir. 1988), in holding that the agency's deduction of union dues from back pay was improper. In *Samuels II*, the Board vacated *Samuels I*, ¶¶ 10-11, on the basis that the FSLMRS does not apply to the U.S. Postal Service. *Samuels II*, 95 M.S.P.R. 512, ¶¶ 8-10.

Apart from its having been vacated, I otherwise do not find the Board's decision in *Samuels I* to be persuasive on the question of whether the Back Pay

Act mandates reducing a back pay award by the amount of union dues that the employee would have been obligated to pay had he not been terminated. In answering that question, the Board relied entirely on the FLRA's decision in *AFGE, Local 1843* where the issue was whether the agency's failure to deduct union dues from a back pay award constituted an unfair labor practice (ULP) under 5 U.S.C. § 7116. 25 F.L.R.A. at 523. The FLRA did not determine whether such a deduction was required under the Back Pay Act. *Id.* at 526-528.[*]

Rather, in *AFGE, Local 1843*, the Authority summarily concluded that an employee's obligation to pay union dues is a voluntary decision analogous to other optional programs, such as life insurance and health benefits, and that the employee, therefore, should be given the option to have his union membership retroactively restored upon reinstatement. 25 F.L.R.A. at 528. However, the FLRA's analysis is devoid of any discussion reconciling its position with the plain language of 5 U.S.C. § 7115(a) creating a legally binding obligation to allot dues for one year after the employee voluntarily assumes membership. *Id.* at 526-528.

In my view, the restoration of a successful appellant to status quo ante under the Back Pay Act requires that we place him as nearly as possible in the situation that he would have occupied if he had not been wrongfully removed. Thus, if the record shows that the appellant had made an irrevocable election under 5 U.S.C. § 7115(a) to have union dues withheld from his pay at the time of

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[*] Indeed, on review, the U.S. Court of Appeals for the D.C. Circuit adopted the "not [ ] unreasonable" assumption that the employee would not have been entitled under the Back Pay Act to recover the dues for the period of time covered by an irrevocable dues authorization. *See AFGE, Local 1843*, 843 F.2d at 554. The court thereafter found that "nothing in the Back Pay Act or the FSLMRS compels a conclusion that an agency payment to a reinstated employee *in excess of his Back Pay Act rights*, rather than to the union, 'interferes with' his exercise 'of any right' under the FSLMRS" for purposes of establishing an unfair labor practice. *Id.* at 555 (emphasis added).

his removal, then the agency properly withheld the union dues from the back pay award, at least until such time as the appellant could have revoked his election.

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Anne M. Wagner
Vice Chairman