

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

MARK BUMBLIS,
Appellant,

DOCKET NUMBER
SF-0752-03-0229-C-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: June 10, 2004

Steven E. Brown, Esquire, Westlake Village, California, for the appellant.

Lynn M. Rizer, San Diego, California, for the agency.

BEFORE

Anthony L. Ellison
Administrative Judge

RECOMMENDATION

The appellant petitions for enforcement of an initial decision of November 12, 2003, in which I reversed the agency's removal action. Inasmuch as the agency did not file a petition for review, that initial decision became a final and enforceable Board decision on December 17, 2003. The agency has responded to the enforcement petition. The Board has jurisdiction over the petition for enforcement. 5 C.F.R. § 1201.182. The party that is alleged to have failed to comply with an initial decision has the burden of demonstrating its compliance. 5 C.F.R. § 1201.183(a)(1). For the following reasons, the petition for enforcement is GRANTED in part and DENIED in part.

ANALYSIS AND FINDINGS

In the initial decision, I ordered the agency to cancel the removal, to restore the appellant retroactively, to pay him appropriate back pay with interest, and to afford him appropriate benefits. The appellant alleges various ways in which the agency has failed to comply with that order.

Timing of Reinstatement

The agency acknowledges the appellant's assertion that it did not reinstate him until January 12, 2004. However, there was no specific deadline for such reinstatement set forth in the Initial Decision, and that date was within 60 days of the finality date of the Initial Decision, which was the deadline for payment of back pay. In any event, now that he has been reinstated, that portion of the petition for enforcement is denied as moot.

"New Hire" medical exams

The appellant contends, and the agency denies, that the agency required the appellant to undergo two "new hire" medical examinations upon reinstatement, even though the appellant was not a "new hire." However, assuming the appellant is correct in this matter, he has not specified what damage was caused by that requirement, nor identified what remedy would be appropriate therefor. This portion of the petition for enforcement is therefore denied.

An Accounting of Back Pay

In its response to the petition for enforcement, dated March 11, 2004, the agency concedes that, as of February 17, 2004, the appellant had not received any back pay, but that it had processed his reinstatement to pay status and was awaiting exact computations of back pay from the Defense Finance and Accounting Service, "over which the Agency has no direct control." It also acknowledges there that it "has yet to accomplish compliance in its entirety," but

“encourages the administrative judge to defer any decision relative to compliance for a couple of weeks.” Addendum File (AF), Tab 3.

In his reply to the agency’s response to his petition for enforcement, the appellant states that he has received a lump sum net payment of \$27,401.85 for the pay period ending February 21, 2004. However, the appellant contends that such amount was combined with his current pay, was “incorrect as far as back pay is concerned and ... was calculated using incorrect information of various sorts.” Specifically, he contends that the agency has provided no proper accounting of the amount of back pay and interest, or any information regarding the re-crediting and restoration of sick and annual leave, or computation of compensable overtime. Such an accounting has been held to be an integral part of an agency’s obligation to comply with an Order awarding back pay. *See, e.g., Blanchard v. Department of Justice*, 40 M.S.P.R. 513, 515 (1989)(“A submission of satisfactory evidence of compliance by the agency must include an explanation of how it arrived at each of these figures, as well as a correct tallying of the total back pay award”).

Approximately three months later, the agency has yet to submit evidence that it has completed the compliance process in this regard, despite several subsequent communications from the appellant’s counsel and this office. *See* AF, Tabs 4 and 6. Thus, I find the agency not to be in compliance in this regard.

Conclusion

Based on all of the foregoing, I find that, to the extent discussed above the agency has failed to meet its burden of showing that it has complied with the Board’s final Order. 5 C.F.R. § 1201.183(a)(1).

RECOMMENDATION

The appellant’s petition for enforcement is GRANTED in part and DENIED in part. In order for the agency to be in compliance with the initial decision, it must issue the appellant a full, detailed accounting of its back pay

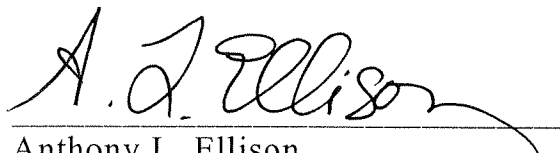
calculations including interest, leave and overtime, and any other matters as yet unresolved.

The Board's enforcement power is continuing in nature; thus, the appellant may file another petition for enforcement if he believes that subsequent agency actions evidence non-compliance with the initial decision. *Swafford v. Tennessee Valley Authority*, 26 M.S.P.R. 680, 682 (1985).

RECOMMENDATION

The appellant's petition for enforcement is GRANTED in part and DENIED in part.

FOR THE BOARD:



Anthony L. Ellison
Administrative Judge

NOTICE TO THE PARTIES

If the agency decides to take the actions required by the recommendation, it must submit to the Clerk of the Board, within 15 days after the issuance of the recommendation, evidence that it has taken those actions.

If the agency decides not to take any of the actions required by the recommendation, it must file a brief supporting its nonconcurrence in the recommendation. The brief must be filed with the Clerk of the Board within 30 days after the recommendation is issued and must identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance.

If the agency decides to take one or more, but not all, actions required by the recommendation, it must submit both evidence of the actions it has taken and, with respect to the actions that it has not taken, a brief supporting its disagreement with the recommendation. The evidence and brief must be filed

with the Clerk of the Board within 30 days after issuance of the recommendation and identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance.

The appellant may respond to any submission for the agency described above, by filing a brief with the Clerk of the Board within 20 days of the date of service of the agency's submission. The appellant's brief may contain a request that the Board review any finding of the agency's compliance.

The address of the Clerk of the Board is:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

Any submission to the Board that lacks a statement that the submission has either been mailed or hand-delivered to the opposing party will be rejected and returned.