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157 Back Pay

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M E M O R A N D U M

TO: Moe Biller
Bill Burrus
Tom Neill

FROM: Anton Hajjar

DATE: June 7, 1993

RE: Green v. USPS (MSPB June 3, 1993)

We recently won a significant handicap discrimination case before the MSPB, which held that preference eligible postal employees need not mitigate damages by seeking interim employment during the period of time that their appeals are pending. APWU member Larry Green stands to gain over 3 1/2 years of back pay (plus all his accrued annual leave), with interest -- likely to exceed \$100,000. The MSPB noted that the same rule applies to any postal employee with a meritorious EEO complaint, because the EEOC's regulations make the Back Pay Act applicable to postal EEO complaints. Myron Feine v. USPS, EEOC Dec. 04920009 (9/30/92) (cited in the Green decision at footnote 5).

The MSPB ruled that preference eligible employees are covered by the Back Pay Act by virtue of the Veteran's Preference Act, notwithstanding the fact that the Postal Reorganization Act exempts the USPS from the Back Pay Act. Therefore, ELM Section 436.22, requiring mitigation and reports of efforts to find outside employment, are irrelevant in MSPB cases (and EEOC cases) involving postal workers.¹

The facts of this case disclose exceptional callousness on the part of the USPS, and strong, continuous support for his cause by the APWU. Green, an FSM clerk, suffered from a disabling knee condition, and was on light duty. The USPS wanted to fill the FSM slot he encumbered, and ordered him to undergo a fitness for duty

¹ It is my understanding from Tom Neill that the same result may apply prospectively as a consequence of a recent settlement of a grievance challenging this ELM provision under Article 19.

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examination, which, of course, he failed. Contending that "permanent" light duty was not available to him, the USPS removed him on June 8, 1987 -- almost exactly 6 years from the date of this latest decision. Green filed an EEO complaint and a grievance. Ultimately an arbitrator upheld his termination. Because of a peculiarity in the EEOC's regulations, he was forced to file an appeal with the MSPB in order to obtain a hearing.

On October 4, 1988, an Administrative Judge denied his appeal, deferring to the arbitrator's award. Green appealed, and on April 26, 1991 -- almost 4 years after his removal -- the MSPB ruled in his favor, holding that it was improper to defer to the arbitrator's award, and finding that the USPS failed to reasonably accommodate his handicap. The USPS reinstated Green, but denied him all but about 2 weeks of back pay. He was unemployable in the Oklahoma City labor market, according to the Veteran's Administration, which placed him in a rehabilitation training program. By this time, Green had undergone successful knee replacement surgery, and on the advice of the Union, continued to apply for reinstatement or reemployment in any position in the USPS. The USPS denied all these requests, specifically citing the fact that his appeal from his initial removal was still pending. Green then filed a petition for enforcement. It took the MSPB almost 2 more years to decide this aspect of the case, including another round of hearings and briefs before an AJ (which Green won), and a USPS appeal to the MSPB.²

NBA Tom Maier, and the Oklahoma City Area Local, have been particularly supportive in representing Brother Green. When he finally gets his check, it may be worth a picture and a story about his (and the Union's) long fight for justice.

A copy of the decision is annexed.

cc: Firm

² Because this is a "mixed case" appeal, there is the remote possibility that the USPS can appeal again, but the procedures for doing so are cumbersome. I do not think the USPS will appeal further.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LARRY GREEN,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
DA0752880424X1¹

DATE: JUN 3 1993

Anton G. Hajjar, Esquire, Washington, D.C, for the
appellant.

O. D. Curry, Oklahoma City, Oklahoma, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on a petition for enforcement of the April 26, 1991, final decision of the Board canceling the appellant's removal, ordering his reinstatement and directing the agency to issue to the appellant a check for back pay, interest on back pay and other benefits. *Green v. United States Postal Service*, 47

¹ The docket number below was DA0752880424C1.

M.S.P.R. 661 (1991). For the reasons set forth below, the Board finds that the agency has NOT COMPLIED with its final decision.

BACKGROUND

The appellant was removed by the United States Postal Service (agency), effective June 8, 1987, from the position that he encumbered. He grieved the removal and filed an Equal Employment Opportunity (EEO) complaint with the agency contending that he had been subjected to discrimination on the basis of handicap. In the final decision on the EEO complaint, the agency found, inter alia, that with or without accommodation, the appellant could not perform the duties of the position. On May 31, 1988, he filed an appeal with the Board. In an initial decision that was issued on October 4, 1988, the administrative judge affirmed the agency's decision to remove the appellant. The full Board reversed the initial decision finding that the agency had discriminated against the appellant on the basis of handicap when it removed him for failure to meet the physical requirements of his position and failed to show that the accommodation the appellant was seeking was unreasonable and would impose undue hardship on the agency's operation. *Green v. United States Postal Service*, 47 M.S.P.R. at 669.

The appellant filed a petition for enforcement contending that the agency had failed to comply with the Board decision on the issue of back pay. The appellant contended that the agency did not award him back pay from

October 28, 1987, to May 23, 1991, the day that he returned to work. The agency contended that under its regulations it was not required to award back pay because the appellant had failed to make a reasonable effort to secure other employment and mitigate the amount of the back pay award. The appellant contended that, because the case involved a discrimination issue, EEOC regulations applied and there was no duty to mitigate the back pay award.

In a Recommendation that was issued on December 6, 1991, the administrative judge concluded that Postal Service regulations applied. He found that by seeking outside employment between June and October 1987, obtaining assistance from the Department of Veterans Affairs (VA), embarking on a VA-structured retraining program, and periodically seeking from the agency reinstatement to any position for which he was qualified, the appellant had made a reasonable effort to obtain employment, thereby mitigating the back pay award. The administrative judge also found that the agency did not follow its own regulations because it did not consider the job market and the unemployment rate in the local commuting area in determining whether the appellant had made a reasonable effort to secure outside employment. He recommended that the agency be found in noncompliance.

The agency has filed a response in opposition to the Recommendation contending that the appellant has not met his duty to mitigate the back pay award and that the

administrative judge erred in finding that the agency had a duty to analyze the job market if the appellant failed to apply to any other agency.² Compliance file, vol. 2, tab 1. The appellant argues that the administrative judge was correct in finding that his efforts were sufficient to mitigate the back pay award.³ Compliance file, vol. 2, tab. 2.

ANALYSIS

The Board is required, when it corrects 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). The Federal Circuit in *Kerr* referred to *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419, (1975), where the Supreme Court stated that legal remedies should place the injured party as nearly as possible in the

² The agency also argues that the appellant did not exhaust the job market between June and October 1987, as the administrative judge had stated in the Recommendation. Because the agency has awarded the appellant back pay for this period and the parties have stipulated that back pay for this period is not an issue, the matter will not be addressed.

³ The appellant argues that the agency, by not reinstating him while the removal action was still pending before the Board, was guilty of noncompliance, continuing discrimination and reprisal for the exercise of appeal rights. The initial decision affirmed the agency action and, while the matter was pending before the Board, the agency had no duty to reinstate the appellant. Reinstatement was not ordered until the Board issued its final decision. Therefore, there was no Board order requiring compliance.

situation that he or she would have occupied if the wrong had not been committed. *Kerr*, 726 F.2d at 733 n.3.

This obligation includes the enforcement of payment of back pay awards. *Spezzaferro v. Federal Aviation Administration*, 24 M.S.P.R. 25 (1984). Back pay awards to preference eligible employees of the Postal Service are governed by the Back Pay Act. *Andress v. United States Postal Service*, MSPB Docket No. CH0752890302X1 (March 10, 1993), overruling *Frazier v. United States Postal Service*, 26 M.S.P.R. 584 (1985), and its progeny to the extent that these decisions hold that the Back Pay Act is inapplicable to preference eligible employees of the Postal Service.

The agency contends that the appellant has not met his duty to mitigate the back pay award by seeking outside employment from October 28, 1987, to May 23, 1991. In support of this contention, the agency offers part 436.22 (dated May 1, 1989)⁴ of its Employee and Labor Relations Manual (ELM), which states that "back pay is allowed ... provided the person has made reasonable efforts to obtain other employment." Compliance File, tab 13. The agency also refers to Management Instruction EL-430-90-8 dated July 2, 1990, interpreting the regulation which states that employees "are responsible for mitigating damages during the

⁴ Although the back pay period in question includes the period from October 28, 1987 to May 23, 1991, the agency has not offered the regulation that was in effect prior to May 1, 1989.

period necessary to adjudicate any appeal filed." Compliance File, vol. 1, tab 4, subtab 5, page 2.

The ELM, however, is not dispositive of this case. Preference eligibles in the Postal Service are entitled to the same rights guaranteed to preference eligibles in the competitive service. 39 U.S.C. § 1005(a)(2). The Postal Service cannot by regulation alter the rules developed by construction of the Back Pay Act. *Andress v. United States Postal Service*, slip op. at 11. Part 436 of the ELM cannot be applied to wrongfully removed preference eligibles to require them to seek replacement employment while pursuing their appeals to the Board. To do so would deprive preference eligibles in the Postal Service of the rights guaranteed them under the Veterans' Preference Act of 1944, 58 Stat. 387, 390. *Id.* at 10. This was not the intention of the Postal Reorganization Act, 39 U.S.C. § 1005(a)(2). *Id.*

In *Andress*, the Board discussed the rule enunciated in *Schwartz v. United States*, 149 Ct. Cl. 145, 147 (1960), and followed in subsequent cases that an employee has reasonable grounds for not making an effort to secure other employment while seeking administrative relief, and the duty to mitigate does not arise until a final administrative decision is issued. The ELM provision at issue in *Andress* is the same one relied on by the agency in this case. Accordingly, the reasoning used in *Andress* applies to the appellant in this case. The appellant, who is a preference

eligible, was not required to seek other employment while pursuing his administrative appeal. Accordingly, the appellant's back pay award should not be diminished on the basis of an alleged failure to seek outside employment. Therefore, the appellant is entitled to back pay for the entire period from October 28, 1987, to May 23, 1991. (The record reflects that the appellant requested that annual leave be substituted for the period from February 9, 1989, to May 10, 1989. Compliance File, vol.1, tab 4, subtab 2.)

The appellant argues that the interest on the back pay award should be calculated by the method used by the National Labor Relations Board. The Back Pay Act, however, governs back pay matters when a preference eligible prevails against the Postal Service. *Andress v. United States Postal Service*, slip op at 10-11.⁵ Under the Back Pay Act, the appellant is entitled to interest. See 5 U.S.C. § 5596(b)(2)(A), (C); *Davis v. United States Postal Service*, MSPB Docket No. DA0752880436X1 (April 19, 1993). Accordingly, the agency must pay the appellant interest calculated under the Back Pay Act.

⁵ It is noteworthy that the Equal Employment Opportunity Commission (EEOC) has also recently rejected the agency's calculation of back pay in accordance with ELM 436.63, and ordered the agency to follow 5 C.F.R. § 550.805, "which sets forth a method of backpay computation under the Back Pay Act." *Myron Fiene v. United States Postal Service*, EEOC Decision 04920009 (9/30/92). The EEOC additionally ordered the agency to calculate the interest on the back pay award pursuant to the method delineated in 5 C.F.R. § 550.806 (which was drafted to "carry out" the provisions of the Back Pay Act.)

The appellant states that no mention of an award of attorney fees has been made for seeking compliance. The appellant is advised that he must file a request for attorney fees in compliance matters as he did with the removal action. See 5 C.F.R. § 1201.37.

Because we have found that the appellant had no duty to mitigate the back pay award and, therefore, the regulation is not applicable to him, we make no findings on the allegation that the agency failed to follow the regulation and consider the job market and the unemployment rate in the local commuting area in determining whether the appellant had made reasonable efforts to seek other employment.

ORDER

The agency is ORDERED to issue the appellant a check for the appropriate amount of back pay, overtime pay, interest and benefits, and no deduction may be made based on the appellant's alleged failure to seek outside employment. The agency is ORDERED to restore to the appellant all of the leave that he would have accrued but for the agency action. This restoration may be done by a lump sum payment or annual leave credit. The agency is further ORDERED to submit to the Clerk of the Board within 20 days of the date of this Order satisfactory evidence of compliance with the Board's decision. That evidence must consist of full documentation of how the agency arrived at the back pay amount.

The agency has identified C. E. Pitts, Director of Human Resources, and O. D. Curry, Labor Relations Assistant,

at Post Office Box 25998, Oklahoma City, Oklahoma 73125-9401, as the persons who are responsible for ensuring compliance. If this information is no longer correct, the agency is ORDERED to identify the individual(s) who is (are) responsible for ensuring compliance and file the name, title and mailing address of the person(s) with the Clerk of the Board within five days of the date of this Order. This information must be submitted even if the agency believes that it has fully complied with the Board's order. If the agency has not fully complied, it must show cause why sanctions, pursuant to 5 U.S.C. § 1204(a) and (e)(2)(A) (Supp. III 1991)⁶ and 5 C.F.R. § 1201.183, should not be imposed against the individual(s) responsible for the agency's continued noncompliance.

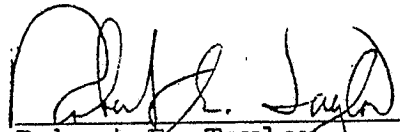
NOTICE TO THE APPELLANT

You may respond to the agency's evidence of compliance within 15 days of the date of service of that evidence. If

⁶ Section 1204(a) provides that the Board may order a federal employee to comply with its orders and enforce compliance. Section 1204(e)(2)(A) provides that the Board may order that an employee "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." The procedures for implementing these provisions are set out at 5 C.F.R. § 1201.183.

you do not respond, the Board will assume that you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.