

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2008 MSPB 104**

Docket No. AT-0752-05-0990-X-1

**Carolyn A. Miller,
Appellant,**

v.

**Department of the Army,
Agency.**

May 12, 2008

Carolyn A. Miller, McDonough, Georgia, pro se.

Stephen S. Malley, Esquire, Ft. McPherson, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on the administrative judge's recommendation, which found that the agency had not fully complied with the Board's final order. For the reasons set forth below, the Board finds that the agency is in partial noncompliance with the order.

BACKGROUND

¶2 On May 2, 2004, the appellant was promoted to the position of Inspector General Investigative Specialist at the U.S. Army Forces Command (FORSCOM), Inspections and Operations Division, Fort McPherson, Georgia. Her pay was set at general schedule (GS) grade 7, step 1, with the potential to be promoted to the

“full performance level” of grade 9. Compliance Referral File (CRF), Tab 10, Attach. A.

¶3 On August 31, 2004, the appellant contacted the Henry County Police Department and reported that she was raped by a co-worker. Initial Appeal File (IAF), Tab 10 at 4. However, after the appellant withdrew the charge on September 3, 2004, the police closed the case as unfounded. *Id.* Subsequently, the agency conducted its own investigation and determined that the appellant, who was married, had entered into a consensual relationship with her unmarried co-worker, and that the relationship was not the result of a hostile work environment or sexual harassment. *Id.* The investigative report recommended that both the appellant and her co-worker be removed from the Office of the Inspector General (OIG). On December 20, 2004, the co-worker, an Army Chief Warrant Officer 4, received a General Officer Letter of Reprimand for his misconduct and retired from the U.S. Army. *Id.*

¶4 Effective September 3, 2005, the agency removed the appellant on charges of conduct unbecoming a federal employee (adultery) and making a false and malicious statement about a co-worker. *Id.* at 1. Following a hearing, the administrative judge issued an initial decision sustaining the first charge but not the second. *Miller v. Department of the Army*, MSPB Docket No. AT-0752-05-0990-I-1 (Initial Decision, July 21, 2006). He found that the appellant’s conduct, while serious, did not justify her removal. *Id.* at 18. He determined that the maximum reasonable penalty was a 60-day suspension. *Id.*

¶5 On review, the Board denied the agency’s petition for review and the appellant’s cross petition. *Miller v. Department of the Army*, 102 M.S.P.R. 621 (2006).^{*} The Board ordered the agency to cancel the removal and substitute in its place a 60-day suspension without pay and to restore the appellant effective

^{*} Chairman McPhie issued a dissenting opinion stating his view that the Board should grant the agency’s petition for review and sustain the removal. 102 M.S.P.R. at 625-26.

September 3, 2005. *Id.* at 622. The Board ordered the agency to pay the appellant the correct amount of back pay, interest on back pay, and other applicable benefits. *Id.* The Board further ordered the agency to timely provide the Defense Finance Accounting Service (DFAS) with all documentation necessary to process payments and adjustments resulting from the Board's order. *Id.* at 623.

¶6 The appellant filed the instant petition for enforcement on September 7, 2006. Compliance File (CF), Tab 1. She alleged that she was not reinstated into her prior position at OIG but instead was placed into the position of Support Specialist, GS grade 7, target 9. She further alleged that the agency had not adequately explained its calculations of back pay and interest and the restoration of her leave. CF, Tab 6. The agency acknowledged that it had placed the appellant in the Support Specialist position and asserted that she could not be reinstated into her prior position because her misconduct disqualified her from working at OIG. CF, Tab 13 at 3. The agency stated that it was awaiting complete information from DFAS so that it could respond on the back pay, interest, and leave issues. CF, Tab 17 at 4.

¶7 The administrative judge recommended that the Board grant the appellant's petition for enforcement. *Miller v. Department of the Army*, MSPB Docket No. AT-0752-05-0990-C-1 (Recommendation, Nov. 28, 2006); CF, Tab 18. He found that the agency could not evade the Board's order by revoking an agency-imposed certification for the OIG position. *Id.* at 3. He further found that the agency failed to explain how it calculated the back pay, interest, and leave. *Id.* at 4.

¶8 The case was then forwarded to the full Board for enforcement purposes. The agency has filed a brief in disagreement with the recommendation's conclusion that the appellant must be reinstated into her prior position. CRF, Tab 3. In addition, the agency has filed evidence that it has complied with respect to back pay, interest, and benefits. The appellant has responded to the agency's brief and its evidence of compliance.

ANALYSIS

¶9 Pursuant to 5 U.S.C. § 1204(a)(2), the Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). The Board's enforcement authority includes the power to restore, as nearly as possible, the status quo ante. *Id.* This principle applies not only where the Board has ordered an action canceled, but also where, as here, the Board has mitigated the penalty. *Williams v. Department of the Navy*, 79 M.S.P.R. 364, 367 (1998).

¶10 The agency bears the burden of proving that it has complied. *See Spates v. United States Postal Service*, 70 M.S.P.R. 438, 441 (1996). Compliance must be supported by relevant, material, and credible evidence. *Id.* at 443. Here, there are two outstanding compliance issues in this case: whether the appellant was properly reinstated, and whether she received the correct amount of back pay, interest, and benefits. We address these issues in turn.

The Agency Must Reinstatement The Appellant To Her Former Position Or Reassign Her To A Substantially Similar Position

¶11 Generally, to be in compliance with a Board order to reinstate an employee, an agency must return the employee to his former position. *Walker v. Department of the Army*, 90 M.S.P.R. 136, ¶16 (2001). If the agency does not return the employee to his former position, it must show that: 1) it has a strong overriding interest or compelling reason requiring reassignment to a different position and, 2) it has reassigned the employee to a position which is substantially similar to the former position. *Id.*; *Mann v. Veterans Administration*, 29 M.S.P.R. 271, 274-75 (1985).

¶12 Here, the agency did not reinstate the appellant to her former position of Investigative Specialist, but instead reassigned her to the non-OIG position of Support Specialist. The agency states that, because it detailed the appellant to a non-OIG position prior to her removal, the status quo ante would be to place her in a similar non-OIG position. CRF, Tab 3 at 4. The agency further maintains

that it only removed the appellant after making “a distinct effort to find Appellant another position with similar grade and promotion potential” outside of the OIG. *Id.* at 6. However, the agency ultimately chose to remove the appellant. The appellant’s position of record at the time of her removal, as consistently reflected in agency documents such as its notice of proposed removal and various SF-50s, was that of Inspector General Investigative Specialist. *See, e.g.*, IAF, Vol. 1, Tab 1 (Notice of Proposed Removal); CRF, Tab 4, Ex. 17 (SF-50 canceling removal from OIG position).

¶13 The agency next argues that the appellant is unfit for her prior position based on the misconduct for which she has been disciplined. According to the agency, such misconduct precludes the appellant from contributing to the OIG’s mission, which involves “constantly look[ing] over everyone else’s shoulder” and “remain[ing] above reproach in their own department.” CRF, Tab 3 at 5. The agency’s position is consistent with the administrative judge’s findings in the initial decision. The administrative judge found as credible the agency’s testimony and documentary evidence reflecting its view that OIG personnel are held to the highest personal standards. The administrative judge determined that the appellant’s conduct was unsuitable, tended to detract from her character, and reflected a betrayal of trust. IAF, Tab 10 at 15-16. The agency’s reason for reassigning the appellant out of OIG was accepted by the Board in what became the final decision. *See, e.g., House v. Department of the Army*, 98 M.S.P.R. 530, ¶ 22 (2005) (The agency’s reasons for not restoring the appellant to his former position were accepted by the Board in its final decision). The “outside event or determination [that] rendered the appellant incapable of performing the duties of [her] prior position,” *Marcotrigiano v. Department of Justice*, 95 M.S.P.R. 198, ¶ 13 (2003), was the Board’s determination that, by her actions, the agency proved the charge that she committed conduct unbecoming a federal employee. That the penalty was mitigated does not change the fact that the first charge was sustained. Under the circumstances, the record reflects that the agency has

articulated an overriding interest or compelling reason for not returning the appellant to her position in the OIG.

¶14 Nevertheless, to be in compliance with the Board's order, the agency must also show that it has reassigned the appellant to a position which is substantially similar to her former position. Here, the responsibilities of the appellant's new position are not substantially similar to those of her former position. *See Kerr*, 726 F.2d at 733 (the Board must determine whether the actual duties and responsibilities to which the employee was returned are either the same as or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge); *Mann*, 29 M.S.P.R. at 274-75 (where the Board finds that the interests of the agency are so compelling that they override the appellant's entitlement to return to his former position, the Board must address the question of whether the position to which the appellant has been reassigned is in fact substantially similar to the former position).

¶15 While the Support Specialist position appears to include a diverse list of duties, *see* CRF, Tab 10, attachs. B (evaluation report) & D (TNG OPS Support Specialist Duties), the appellant alleges that there was no work available that pertained to the position and that she was instead asked to clean, shred documents, and run errands. CRF, Tab 10 at 6. The appellant attached an e-mail in which she requested more work and a reply to her e-mail indicating there was simply not enough work for the position. *Id.*, attach. Da (e-mail from Lesley Turner to the appellant dated Feb. 20, 2007). The agency concedes that the two positions are not similar and states that "it is illogical to expect similar tasking duties in a non-IG office." CRF, Tab 3 at 5. Based on these submissions, we conclude that the agency did not reassign the appellant to a position which is substantially similar to her former OIG position. In order to be in compliance with the Board's order, the agency must return the appellant to her former position of Inspector General Investigative Specialist or reassign her to a substantially similar position.

The Agency Has Submitted Credible Evidence That It Paid The Appellant The Correct Amount Of Back Pay, Interest On Back Pay, And Other Benefits

¶16 In his recommendation, the administrative judge found that the agency had failed to explain its back pay and interest calculations. CRF, Tab 18 at 4; *see also* 5 C.F.R. § 1201.183(a)(i) (Evidence of compliance must include a narrative explanation of the calculation of back pay and interest). In response to the recommendation, the agency supplied a narrative explanation, pay history documents, and other information. *See* CRF, Tabs 4 & 8. The appellant stated that she found these documents “incomprehensible,” CRF, Tab 5 at 9, and she questioned whether she was paid for the correct number of pay periods, *see* CRF, Tabs 11 & 12. The agency requested further review by DFAS, and based on that review the agency determined that the appellant was due an additional two days of back pay. CRF, Tab 17 (Affidavit of Joelle Garlow).

¶17 With respect to interest on the back pay, the agency stated that the appellant was entitled to interest from November 12, 2005 through January 21, 2006. CRF, Tab 4 at 16-3. The agency also responded to questions that the appellant raised concerning interest calculations. CRF, Tab 20 (E-mail from Bernice Gutierrez to Stephen Malley). In light of the agency’s submissions responding to the appellant’s questions, we find that it is in compliance with respect to the appellant’s back pay and interest computations.

¶18 The agency produced records showing that it restored the appellant’s annual leave and sick leave. CRF, Tab 11, attach. A; CRF, Tab 4, attach. 22-1-2. The appellant has not identified any errors in the agency’s leave calculations, and therefore we find the agency in compliance with respect to restoration of leave.

¶19 The appellant was also entitled to have her Thrift Savings Plan (TSP) accounts restored upon reinstatement. *See* 5 C.F.R. § 1605.13. According to the agency, in restoring the appellant’s account, there was an initial forfeiture of funds because an incorrect vesting date was used. CRF, Tab 15 (Letter from Lynn McManus to agency representative dated July 20, 2007). Subsequently, the

agency supplied evidence showing that the vesting date has been corrected and that the appellant's lost earnings have been restored. CRF, Tab 17 at 3. We find that the agency is in compliance with respect to restoring the appellant's TSP account.

ORDER

¶20 Accordingly, the agency is ORDERED to reinstate the appellant to her former position of Inspector General Investigative Specialist at the U.S. Army Forces Command, Inspections and Operations Division, Fort McPherson, Georgia, or reassign her to a position which is substantially similar to that position. Satisfactory evidence of compliance with this Opinion and Order shall be submitted to the Office of the Clerk of the Board within 10 calendar days of the date of this Opinion and Order. If evidence of compliance is not received, the agency shall show cause why sanctions, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) and 5 C.F.R. § 1201.183, should not be imposed against **Col. Shane M. Deverill (AFCG-IG)**, the responsible agency official.

NOTICE TO THE APPELLANT

Following the agency's submission of evidence, you may respond no later than 15 calendar days after the date shown on the agency's certificate of service. All submissions should be made to:

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

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

FOR THE BOARD:

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