UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT L. GRADY, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DA0752900418-X-1*
	DATE: SEP 0 2 1993

James E. Moore, Corpus Christi, Texas, for the appellant.

James T. Abbott, Esq., Corpus Christi, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

On June 3, 1992, the appellant filed a petition for enforcement contending that the agency failed to comply with the terms of the Board's Order of March 6, 1992, which required the agency to cancel the appellant's removal, to substitute a 60-day suspension, to pay the appellant appropriate back pay, interest, and other benefits, and to inform the appellant of all steps taken to comply with the Board's Order. In a Recommendation issued August 27, 1992,

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* The docket number below was DA0752900418-C-1.

the administrative judge recommended that the Board find the agency in noncompliance. The administrative judge found that in order to comply with the Board's Order, the agency must calculate and pay the appellant the appropriate amount of overtime back pay, and must calculate and pay to the appellant interest on the back pay award in accordance with 5 U.S.C. § 5596(b)(2)(B). For the reasons set forth below, we find the agency in partial NONCOMPLIANCE with the Board's Order of March 6, 1992.

ANALYSIS

1. The Overtime Back-Pay Award

The administrative judge determined that the award of back pay should be based on the amount of overtime worked during the removal period by similarly situated employees because the appellant's overtime history was not indicative of the amount of overtime the appellant would have worked during the removal period. This is because the appellant was in counseling for job-related stress, and therefore was unable to work overtime, from September, 1989, through May 4, 1990. Recommendation at 6-7.

In response to the Recommendation, the agency submitted argument that the proper basis for calculating the appellant's overtime back-pay award should be the appellant's pre-counseling overtime history. The agency submitted evidence that the appellant worked 57 hours of overtime in 1987, two hours of overtime in 1988, and 17

hours of overtime in the first eight months of 1989. The agency argued that appellant has a history of working minimal overtime hours, and therefore he should not receive an award of overtime back pay. The agency also cited the appellant's statement that he worked a weekend job, see compliance file, vol. 1, tab 19 at 2, and argued that he would have been unavailable to work overtime on weekends. The appellant reasserted that he was entitled to the shop average of overtime worked during the removal period, some 281 hours.

The Board has the duty to ensure that a prevailing appellant receives all the overtime that he or she normally would have earned had the unlawful personnel action not occurred. *Bivens v. Department of the Navy*, 48 M.S.P.R. 498, 501 (1991). At the same time, the Board must ensure that the appellant does not recover more overtime pay than he or she would have been entitled to earn had the unlawful personnel action not occurred. *Id.* The amount of an overtime back-pay award may be calculated based either on the appellant's overtime history prior to the adverse action or on the experience of similarly situated coworkers who were not removed during the relevant period. *Id.* The method employed must be the one more likely to place the appellant in the same position he would have occupied had the agency not taken the unwarranted adverse action. *Id.*

The method of calculating the appellant's overtime back pay award that would be most likely to return him to the

status quo ante is his overtime history prior to his enrollment in counseling. Because we have a clear and valid record of the appellant's personal overtime experience, we have no reason to rely on the overtime experience of other employees. The appellant worked 76 hours of overtime from January, 1987 through August, 1989, or an average of 0.55 hours of overtime per week. The appellant is entitled to overtime back pay for the period from July 9, 1990, through December 4, 1990, a period of approximately 22 weeks. Accordingly, we find that the appellant is entitled to 12.10 hours of overtime. We award the appellant 13 hours of overtime back pay because it appears that the agency permits employees to work overtime only in hour increments. *See* compliance file, vol. 2, tab 4.

2. The Interest Calculation

Interest on a back-pay award must be calculated using the interest rate in effect under section 6621(a)(1) of the Internal Revenue Code and compounded daily. 5 U.S.C. § 5596(b)(2)(B) (1988). In the Recommendation, the administrative judge found that the agency's submissions reflected that the agency computed the interest under a simple interest method rather than compounding daily. Recommendation at 7-8. Accordingly, the administrative judge ordered the agency to pay interest to the appellant in accordance with the terms of section 5596(b)(2)(B). In response, the agency argues that it calculated the amount of interest by using a computer program provided by the Defense

Finance and Accounting Service (DFAS), and it showed the daily interest rates used.

The appellant submitted an interest rate schedule prepared by the Internal Revenue Service which shows the penalty interest rates set forth under the Internal Revenue Code for the relevant period. The appellant also submitted an interest calculation based on that rate schedule. Compliance file, vol. 2, tab 5. We find that the appellant's calculation is not in accordance with section 5596(b)(2)(B). The appellant employed the underpayment rate shown on the schedule. However, the underpayment rate, calculated under section 6621(a)(2) of the Internal Revenue Code, is not the correct rate under the Back Pay Act. Rather, the overpayment rate, calculated under section 6621(a)(1), is the correct rate. *See* 5 U.S.C. § 5596(b)(2)(B). Further, the appellant's calculation is not compounded daily. Rather, it appears that the appellant employed a simple interest method, applying the annual rate set forth in the IRS schedule. Further, the appellant sought the annual rate of interest for periods substantially less than a year.

In response to the appellant's submission, the agency asserts that it calculated the interest on the back pay award using interest rates provided by DFAS, which it argues is the correct source for its interest rates, not the Internal Revenue Service. Compliance file, vol. 2, tab 6. The agency, however, provides no legal support for its

apparent assertion that it is not covered by the Back Pay Act. We find that the Department of the Army is covered by the Back Pay Act and must calculate interest on back pay awards under the method set forth in section 5596(b)(2)(B), applying the interest rate set forth in section 6621(a)(1) of the Internal Revenue Code. *See* 5 U.S.C. § 5596(a)(1) (1988).

We find that the agency has computed the interest on the appellant's back pay award as required by the Back Pay Act. The agency submitted the daily interest rates it used to compute the interest on the appellant's back pay award. Compliance file, vol. 1, tab 13, attach. I. These daily rates correspond to the annual rates set forth in the rate schedule submitted by the appellant. *See* compliance file, vol. 2, tab 5. Thus, the record reflects that the agency computed the interest applying the interest rate set forth in section 6621(a)(1) of the Internal Revenue Code, compounded daily. Accordingly, we find the agency in compliance with the Board's Order in this regard.

ORDER

For the reasons stated above, we hereby find the agency in partial NONCOMPLIANCE with the Board's Order of March 6, 1992. Accordingly, we hereby ORDER the agency to pay the appellant 13 hours of overtime back pay and the appropriate amount of interest. We further ORDER the agency to submit to the Clerk of the Board within 20 days of the date of this

Opinion and Order proof that it has complied with the Board's decision. If the agency does not submit proof of compliance with the Board's decision, it must submit the name of the agency official responsible for the agency's noncompliance. Failure to comply with the Board's decision may result in the imposition of sanctions against that official pursuant to 5 U.S.C. § 1204(a)(2), (e)(2)(A) (Supp. III 1991) and 5 C.F.R. § 1201.183 (1992).

NOTICE TO APPELLANT

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