UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JACOB ROGINSKY, Complainant,	)	
UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION RELATED UNFAIR EMPLOYMENT PRACTICES Intervenor,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 90200168
DEPARTMENT OF DEFENSE, Respondent.	)	

FINAL DECISION AND ORDER
(June 4, 1992)

Appearances:

Michael Wolf, Esq., for Complainant.
Daniel W. Sutherland, Esq., for the Intervenor.
Richard D. Hipple, Esq., Sophie A. Krasik, Esq.,
and Harriet J. Halper, Esq., for Respondent.

Discussion

The May 5, 1992 Decision and Order (2 OCAHO 426) approved the Settlement Agreement and General Release submitted by the parties. That action fully disposed of this proceeding except that I acceded to the request of the parties to "retain jurisdiction for the limited purpose of resolving" allocation of Thrift Savings Plan accruals. TSP allocation was the single identified backpay issue. I stated that

> [I]t should be recognized that this forum claims no special expertise in that particular, and would defer to appropriate Thrift Savings Board determinations. However, to the extent provided in this Decision and Order, I will accommodate the parties in adjudicating this lingering backpay issue in aid of fully disposing of this litigation.

Id. at 16.

The Decision and Order specified that,

> This case is retained on the docket for the exclusive purpose of adjudicating TSP allocations to the extent that the parties jointly or one authorized on behalf of both, in writing, advise of such a need. If no such advice is filed by May 22, 1992, or if by that date no written filing requests postponement of such deadline, I will promptly issue a final order of dismissal, settled.

Id.

On May 21 I granted a motion filed that day by Complainant and supported by OSC and Respondent which requested that the May 22 deadline be extended to June 2, 1992. By telephone request on May 29, Respondent on behalf of all the parties asked that a status conference be held the following week in lieu of a filing by the deadline date. Counsel represented that two disputes had arisen independent of the TSP issue. In response, I orally scheduled a telephonic status conference to be held at 2:30 p.m., EDT, on June 2, 1992.

Immediately prior to the conference, Respondent forwarded several documents by facsimile telecopy, advising that ordinary mail copies would be sent that day. The documents forwarded are a copy of a June 2, 1992 letter from Respondent's counsel to Complainant's counsel, with enclosures. Except for enclosure #1, the enclosures appear to reflect pro forma biweekly salary calculations for Dr. Roginsky for the period beginning 10/5/87 through 3/8/92, except that the first week of each October is set out separately; the period, 3/6/92 to 3/15/92, ended the day before he began employment with Respondent, i.e., March 16, 1992, is also set out separately.

Enclosure #1 is a May 27, 1992 letter from Respondent's counsel to Complainant's counsel which contains Respondent's calculations to satisfy paragraph 4 of the Settlement Agreement and General Release. Paragraph 4 stipulated that Complainant would be "made whole" with respect to TSP entitlements during the pro forma employment period. As appears from Dr. Roginsky's signature on the May 27 letter, he has accepted the calculations set out there. The parties having agreed to the lump sum payment in lieu of TSP contributions, including agency matching contributions, as adjusted for income taxes, the TSP issue identified in the May 5 Decision and Order appeared settled.

Consistent with the undertakings of the parties reflected in the May 27 letter, and with a recitation in the June 2 letter, the June 2 conference confirmed that the TSP issue was fully resolved. Two new

issues were identified in the June 2 letter and discussed at the conference.

The first new issue is a claim by Respondent that it erroneously computed Dr. Roginsky's backpay entitlement by $670.96, the difference between $60,702,05 originally calculated as his entitlement net of outside earnings and appropriate deductions, and $60,031.09 as now computed by Respondent. The second disagreement involves uncertainty as to the proper methodology for calculating Social Security and Medicare deductions from gross backpay. Respondent's counsel reported that the Social Security Administration (SSA) advised as to an interim solution subject to final calculations to be made by SSA after the close of calendar year 1992 on the basis of year end earnings data to be submitted by the employing agency to SSA. The sum by which Respondent may have overestimated Social Security and Medicare deductions to Complainant's account is stated in the June 2 letter at $1,546.79. The June 2 letter undertakes that "in one week or such other agreed upon time period," the Navy will explain its overpayment calculation and issue a check for excess Social Security deductions offset by the claimed backpay overpayment.

Both Complainant and Respondent have asked that I dismiss the case,

> subject to reopening for the sole purpose of ensuring compliance with that portion of paragraph 1 of the Settlement Agreement and General Releases of February 27, 1992, which states that:
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> > The monies deducted for Social Security, Basic Benefits Plan, and Medicare shall be deposited in Dr. Roginsky's Social Security, Medicare, and Federal Employee Retirement System accounts reflecting a start of employment date of October 5, 1987.

Ltr. June 2, 1992.

As I suggested during the conference, the practical result of a dis-missal "subject to reopening" would be to retain this case on the open docket. Such a retention would be inconsistent with sound and efficient management of judicial resources. I have been cited to no backpay law or other authority which argues for retention of this case to resolve the newly stated issues, nor does there appear to be any reason pursuant to 8 U.S.C. §1324b to retain jurisdiction. Moreover, the May 5 Decision and Order to which no party took exception retained the case on the docket "for the exclusive purpose of adjudicating TSP allocations . . ." I retained jurisdiction in order to "accommodate the parties in adjudicating this lingering backpay issue in aid of fully disposing of this litigation." Id. at 16.

The Settlement Agreement and General Release explicitly contemplated that there might be errors in computing backpay, a prospect not at all unlikely in view of the need to finalize calculations of gross backpay, gross interim earnings, taxes, Social Security, Medicare, and Basic Benefits Plan contributions to the Federal Employee Retirement System. At Paragraph 1 the parties,

> agree to make any adjustments which may be necessitated by mathematical errors occurring in the computations, and neither party waives its right to contest inaccurate computations.

As pointed out in the conference, I do not understand that the admin-istrative law judge has a necessary role in enforcement of the agreement of the parties. Particularly, as here, where the parties anticipate that adjustments might become necessary, approval of their agreement does not require or anticipate continued judicial participation. As discussed, in a case under 8 U.S.C. §1324b disposed of by adjudication absent a settlement, the administrative law judge typically has no role in the effectuation of the backpay award.

The parties obtained approval of their settlement by the May 5 Decision and Order, subject to the TSP issue which they identified as the only lingering dispute. This case is ripe for final disposition. There is no clear purpose to be served by keeping the docket open until some date after 1992 when SSA will effect final calculations. Whether any other disputes will materialize is between the parties, to be resolved between them or in an appropriate forum. Nothing in this Decision and Order should be understood, however, as prejudging whether on an appropriate application an administrative law judge may have jurisdiction with respect to implementation of an 8 U.S.C. §1324b final order or settlement disposition.

The Settlement Agreement General Release having been approved, and the sole reservation in the May 5 Decision and Order to final disposition having been satisfied, this proceeding is dismissed, settled.

SO ORDERED.

Dated and entered this 4th day of June 1992.

MARVIN H. MORSE
Administrative Law Judge