

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

60 M.S.P.R. 659

Docket Number SF-0752-90-0042-C-1

Robert L. Del Balzo, Appellant,

v.

Department of the Interior, Agency.

Date: February 15, 1994

Peter B. Broida, Arlington, Virginia, for the appellant.

Clementine Berger, Sacramento, California, for the agency.

BEFORE

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

OPINION AND ORDER

The appellant has petitioned for review of a compliance initial decision in which an administrative judge denied the appellant's petition for enforcement of a settlement agreement. For the reasons stated below, we GRANT the appellant's petition and REVERSE the compliance initial decision.

BACKGROUND

The agency in this case removed the appellant, a Criminal Investigator, for falsifying travel vouchers. See Appeal File, Tab 3, Subtab 4b. The appellant appealed that action to the Board's San Francisco Regional Office. See *id.*, Tab 1. The parties then settled the appeal by entering into an agreement that provided, *inter alia*, that the agency would: (1) Substitute, for the form documenting the removal, a form reflecting that the appellant resigned; (2) remove all documents and records related to the removal from the appellant's official personnel file; and (3) direct all employment inquiries to the appellant's former second-level supervisor or, in that official's absence, to the Deputy Assistant Inspector General for Investigations. See Appeal File, Tab 17 (Settlement Agreement at 2-3). The agency further agreed that the official to whom the inquiries were directed would provide only the information described in the settlement agreement--i.e., the official would say that the appellant had resigned from his position for personal reasons, and he would advise the inquirer of the dates on which the appellant's employment with the agency began and ended, and of the type of work he

performed. *See id.* (Settlement Agreement at 3). Finally, the parties agreed that the Board would have the authority to enforce the agreement. *See id.* (Settlement Agreement at 5).

The appellant subsequently applied for the position of Investigator in the Department of Housing and Urban Development (HUD). An official of that agency offered the position to the appellant, but the offer was contingent on the results of a suitability inquiry. *See* Compliance File, Tab 7 (Brickley affidavit at 2). In connection with that inquiry, the appellant signed a document authorizing and directing his former employing agency to release information regarding his activities, including information regarding his "achievement, performance, . . . personal history, [and] disciplinary . . . records," to "any [HUD] investigator or duly accredited representative" of that agency. *Id.*, Tab 9, Exh. 1.

A HUD investigator interviewed one of the officials named in the agreement, Thomas Sheehan, who had been the appellant's second-level supervisor. *See id.*, Tab 7 (Gilbert affidavit at 3, Sheehan affidavit at 1-2). Mr. Sheehan initially provided the investigator with only the information described in the settlement agreement. *See id.* (Gilbert affidavit at 4-5, Sheehan affidavit at 2). After the investigator showed him the release the appellant had signed, however, Mr. Sheehan allowed the investigator to review an investigative file the agency maintained in connection with the appellant's employment--a file that Mr. Sheehan knew included information regarding the charge on which the removal was based. *See id.*, Tab 7 (Sheehan affidavit at 3-4); Appeal File, Tab 3, Subtab 4j (agency investigative report).

The investigator also contacted the appellant's former immediate supervisor. *See* Compliance File, Tab 7 (Gilbert affidavit at 6). Although that supervisor declined to provide information about the appellant to the investigator, he granted the investigator's request that he be allowed to ask the appellant's former coworkers about the appellant. *See id.* Those coworkers provided negative comments about the appellant and his suitability for an Investigator position. *See id.*, Tab 7 (Berta affidavit at 3-4, DeCarlo affidavit at 4-6, Schwedler affidavit at 5-7), Tab 1 (HUD Report of Investigation at 1a). Based on the information the investigator gathered, the HUD official who had made the conditional job offer to the appellant withdrew that offer. *See id.*, Tab 7 (Brickley affidavit at 2-4), Tab 1 (Memorandum from R. Brickley to K. Darnall, July 5, 1991).

The appellant filed a petition for enforcement in which he alleged that the agency violated the settlement agreement by providing the investigator with access to its investigative file, and by allowing him to interview the appellant's coworkers.* The

* The appellant also alleged below that Mr. Sheehan violated the agreement by referring the investigator to the appellant's immediate supervisor and by referring to the settlement agreement when declining to answer questions the investigator had asked regarding the appellant's employment. *See* Petition for Enforcement at 3. He does not appear to raise the former issue in his petition for review. He does seem to allege, however, that the administrative judge erred in referring, in connection with the latter issue, to the agency's allegation that a provision prohibiting disclosure of the settlement agreement had been deleted at the appellant's request. *See* Petition for Review File, Tab 2 (Letter from appellant's representative to Office of

administrative judge found that the appellant, by signing the release described above, had authorized the agency to disclose its investigative file to the investigator. See Compliance Initial Decision at 7-9. He also found that the agreement did not address situations in which a potential employer sought to interview the appellant's coworkers, that it did not direct the agency to prevent disclosure of information by those coworkers, and that "[i]t must have been apparent to the appellant when he signed the release that [the investigator] . . . would likely speak to the appellant's co-workers as well as his superiors." *Id.* at 10. Accordingly, the administrative judge found that the agency had not violated the agreement, and he denied the petition for enforcement. See *id.* at 11.

ANALYSIS

The appellant again argues on petition for review that the agency violated the settlement agreement when it gave the investigator access to its investigative file concerning the appellant. The agency argues that this action was proper for two reasons. First, it asserts that the agreement itself permitted the agency to release information from that file. The agreement does include a provision that information maintained by the agency's Office of the Inspector General could be "subject to release under the Privacy Act." Appeal File, Tab 17 (Settlement Agreement at 3-4). The same provision requires, however, that any such information "be requested in writing pursuant to the Privacy Act and/or the Freedom of Information Act (FOIA). . . ." *Id.* (Settlement Agreement at 4). The agency does not contend, and the record does not indicate, that it received any written Privacy Act or FOIA request for the investigative file. Instead, the record shows that the agency provided the file to the HUD investigator after he made an oral request for the file and showed the agency the release the appellant had signed--a release that clearly did not constitute a Privacy Act or FOIA request. See Compliance File, Tab 7 (Sheehan affidavit at 3). Furthermore, although the agreement permits the agency to disclose certain other information "with respect to security clearances or background checks conducted by the Federal Bureau of Investigation (FBI), Office of Personnel Management (OPM), or by another agency or organization pursuant to delegation by OPM, or workmens' [sic] compensation, unemployment or retirement claims," Appeal File, Tab 17 (Settlement Agreement at 4), this provision also is not applicable here. The agency does not allege that the HUD investigator was investigating the appellant's background pursuant to any OPM delegation, and it clearly did not provide the file in connection with any unemployment claim, retirement claim, or inquiry conducted by the FBI or OPM.

The agency's second argument concerning the investigative file is that the appellant, by signing the release, authorized the agency's action. We find this argument unpersuasive. As we have indicated above, the form the appellant signed authorized

the Clerk, Jan. 15, 1992). We see no need to reach the question of whether the administrative judge erred as the appellant has suggested. Even if the settlement agreement prohibited the agency from disclosing to prospective employers the existence of the settlement agreement, the record indicates that the appellant himself had disclosed the existence of the settlement agreement to HUD before Mr. Sheehan did so. See Compliance File, Tab 7 (Gilbert affidavit at 10-11).

the release of information regarding his "achievement, performance, . . . personal history, [and] disciplinary . . . records. . . ." Compliance File, Tab 9, Exh. 1. The settlement agreement does not prohibit the release of this information, however. Instead, it prescribes the manner in which information of this nature will be disclosed. See *id.*, Tab 1 (settlement agreement at 2-3). Nothing in the release form modified the terms of the settlement agreement that are related to the disclosure of this kind of information. Instead, the form simply provided, in effect, that HUD was to be given the information authorized under the settlement agreement. See *id.*, Tab 9, Exh. 1.

We note further that construing the release form's provisions broadly enough to authorize disclosures inconsistent with the settlement agreement's provisions would be inconsistent with the purpose of the settlement agreement. Virtually all prospective employers seek information concerning an applicant's work record. Accordingly, appellants and agencies entering into agreements like the one at issue here can expect prospective employers to ask for permission to contact the appellants' former employers. A refusal to grant such a request would be fatal to the appellant's employment prospects. Adverse information and negative references from the former employer can be just as damaging to those prospects, as the facts of this case show. An important purpose of an agreement such as this one is to give the appellant a clean record and a neutral or positive reference upon inquiry by a prospective employer, so that the appellant is not forced to choose between losing an employment opportunity by refusing to allow the prospective employer to check his work record and losing that opportunity because of adverse information provided by his former employer. When an employee signs a release such as the one at issue here, he is entitled to assume that his former employer will live up to the terms of any agreement with him that is not inconsistent with the terms of the release. In this case, the agency violated the settlement agreement by disclosing information beyond that described in the agreement.

The agency argues further that it could not prohibit the appellant's coworkers from talking to the HUD investigator because those coworkers were not parties to the agreement and therefore were not bound by its provisions; and it argues that, even if the coworkers had been bound by the agreement, the form the appellant signed released them from this bond. See Agency Response to Petition for Review at 18-19. We disagree.

First, for the reasons stated above, the authorization form did not relieve the agency of its obligation to comply with the agreement's provisions limiting disclosure of information regarding the appellant. Furthermore, we see no merit to the agency's other argument regarding this matter. As the appellant has suggested, the agreement does not appear to prohibit coworkers from responding to questions asked of them at their homes, without agency knowledge of the inquiries. See Petition for Review at 5. Those circumstances, however, are not present here. Instead, as we have indicated above, the investigator requested and obtained permission from the appellant's former supervisor to interview the appellant's coworkers. Furthermore, the interviews were conducted at the coworkers' work site, during working hours, and over agency telephones. Before the interviews began, the supervisor told the investigator he was free to talk to the employees, see Compliance File, Tab 7 (Peterson affidavit at 5,

Gilbert affidavit at 6), and he even appears to have placed the telephone call to the employees and introduced them to the investigator, *see id.* (Peterson affidavit at 6, in which the supervisor stated that he "basically went to the employees, advised them [sic] that [the investigator] was on the phone, that he was asking to speak to them, .. [and that it] was entirely up to them, whether they wanted to say anything to [the investigator]"). This is not a situation in which the agency played no part in its employees' disclosures; the agency here knowingly facilitated the disclosure of information that was not covered in the agreement and that was provided by sources other than those identified in the agreement. An agency may not circumvent the provisions of a binding contract in this manner.

Finally, we note that condoning actions such as those taken by the agency in this case would have a chilling effect on attempts to settle appeals by providing appellants with clean records and neutral or positive employment references. Agreements such as the one at issue here are common methods of settling appeals, and they undoubtedly have provided beneficial results in many cases. Finding that the agency actions at issue here were permitted by the settlement agreement would give appellants little or no incentive to agree to similar settlements.

ORDER

For the reasons stated above, we find that the agency violated the settlement agreement. We therefore RESCIND the settlement agreement. The administrative judge shall reinstate the appeal for processing. See *Betterly v. Department of Veterans Affairs*, 47 M.S.P.R. 63, 66 (1991) (when one party breaches a settlement agreement, the nonbreaching party may rescind the agreement and go forward with the original claim); Petition for Review at 21 (request that the appeal be returned to the regional office for "litigat [ion] to its conclusion in the absence of other meaningful relief structured to repair the effects of the breach").

For the Board
Robert E. Taylor, Clerk
Washington, D.C.