

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

2008 MSPB 42

Docket No. SF-0752-04-0058-X-1

**Darriel K. Caston,
Appellant,**

v.

**Department of the Interior,
Agency.**

March 4, 2008

Darriel K. Caston, Sacramento, California, pro se.

Kevin D. Mack, Esquire, Sacramento, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Member Sapin did not participate in the adjudication of this appeal.

OPINION AND ORDER

¶1 This case is before the Board on the recommendation of the administrative judge, who found that the agency breached the confidentiality provision of the parties' settlement agreement. *Caston v. Department of the Interior*, MSPB Docket No. SF-0752-04-0058-C-2 (July 26, 2007), Compliance File 2, Tab 15. The administrative judge recommended that the Board grant the appellant's petition for enforcement, rescind the settlement agreement, and reinstate the appellant's initial appeal. *Id.* at 7. For the reasons set forth below, the Board

DOES NOT ADOPT the recommendation, finds the agency in COMPLIANCE, and DISMISSES the appellant's petition for enforcement.

BACKGROUND

¶2 The appellant was removed from his position as an Electrical Engineer with the agency's Bureau of Reclamation effective October 1, 2003. He filed a timely appeal of his termination in which he alleged that the agency's action was based on reprisal for filing protected complaints and on discrimination on the bases of religion, race and sex. The parties resolved the appeal by a written settlement agreement that was entered into the record for enforcement purposes, and the appeal was dismissed on April 9, 2004. Compliance File 2 (CF2), Tab 15 at 1.

¶3 In the settlement, the appellant agreed to withdraw his appeal and not to file additional administrative or judicial actions concerning the subject matter of the appeal (other than an enforcement action). The agency agreed to cancel the appellant's removal and restore him to duty status from the date of his removal to the date of the agreement with back pay and benefits and reimbursement of his attorney fees. The agency agreed to place him thereafter on administrative leave followed by leave without pay until the appellant obtained other federal employment or until January 1, 2005, at which time he agreed to resign from the agency for personal reasons. Initial Appeal File (IAF), Tab 21.

¶4 With respect to records of its action, the agency agreed to remove all information or materials concerning the removal from the appellant's personnel file and other supervisory files under its control. The parties also agreed that all requests for information about the appellant from prospective employers would be referred to an individual chosen by the appellant, with specific limitations on the character of the information to be released. The agreement prohibited the agency from providing any information about the appellant's removal or any other negative information about him to any other federal agency. The parties agreed not to disclose the terms of the agreement or the contents of the case file except

as necessary to effectuate the agreement or as evidence in a later proceeding in which a party alleges breach of the agreement. *Id.*

¶5 On June 22, 2004, the appellant notified the agency that he believed the agency breached a 1997 agreement settling a discrimination complaint. He claimed that the agency did so by making information from documents that the 1997 agreement required to be destroyed available to the union and other employees. The agency found that the appellant's complaint was untimely and that, in any event, the 1997 agreement did not require the documents to be destroyed. The agency's decision was affirmed by the Equal Employment Opportunity Commission (EEOC). CF2, Tab 5, Exhibit 3. Thereafter the appellant filed a request for reconsideration by the EEOC. *Id.*, Exhibit 4.

¶6 On September 8, 2004, the appellant filed an EEO complaint contending that he was subjected to a hostile working environment between June 2003 and March 2004 that was caused by discrimination on the basis of religion and/or prior EEO activity. In support of his claim, the appellant cited harassment by his supervisor's use of offensive and threatening language, the refusal of the agency and his union representative to permit him to file a grievance concerning this behavior, and the alteration of his official personnel file by supervisors and their use of information from it in violation of EEOC regulations. CF2, Tab 13, Exhibit A.

¶7 On November 8, 2006, an EEOC administrative judge concluded that the appellant failed to prove that the conduct to which he objected was attributable to his religion or EEO activity or that it was sufficiently severe or pervasive to constitute a hostile working environment. He also rejected the appellant's contention that the alleged hostile environment created by the agency led to his termination. He found instead that the record showed that the appellant was removed for documented misconduct unrelated to his religion or prior EEO activity, and that he appealed his removal to the MSPB, but settled the case, agreeing to resign from the agency as part of the settlement. CF2, Tab 5, Exhibit

5. The agency adopted the administrative judge's decision, *id.*, Exhibit 6, and the appellant filed an appeal to the EEOC.

¶8 Meanwhile, on November 23, 2005, the appellant filed a petition for enforcement with the Board alleging that an agency manager had violated the 2004 settlement agreement resolving his MSPB appeal by discussing specific details of the settlement with other employees. Compliance File 1 (CF1), Tab 1. However, the appellant ultimately conceded the issues he raised concerning the agency's compliance with the agreement, and the Board's administrative judge dismissed his petition for enforcement as withdrawn. CF1, Tab 9.

¶9 Then, on March 28, 2007, the appellant filed a second petition for enforcement of the 2004 settlement agreement, the petition at issue here. He contended that the agency violated the agreement by submitting in the EEOC proceedings discussed above information that was covered by the agreement's confidentiality provisions. CF2, Tab 1. He cited as a violation the agency's submission in the first proceeding of a copy of the 2004 agreement and a letter dated May 10, 2006, stating that it had removed him for disciplinary and performance problems. He also relied on a March 1, 2007 letter containing the details of his removal appeal that the agency submitted in the EEOC proceeding concerning his hostile environment claim. *Id.*, Attachments 1 and 2. In a second submission the appellant asked the Board to rescind the settlement agreement because of the nature of the material breach he alleged. CFR, Tab 3.

¶10 In response, the agency argued that the appellant's petition was untimely because it was not filed within a reasonable time of the appellant's receipt of the May 2006 letter, which was served on him. On the merits, the agency urged that its breach of the 2004 agreement by its reference to the appellant's termination was not material because the agency was entitled to defend itself in the EEO proceedings brought against it by the appellant.

¶11 The administrative judge found that the principal issues presented were whether the agency's reference to the appellant's removal in its response to the

EEO complaint filed by the appellant subsequent to the April 2004 settlement agreement violated the agreement and, if so, whether it was a material breach.¹ CF2, Tab 15 at 3. However, she also addressed the issue of whether the appellant breached the 2004 agreement by filing an EEO complaint alleging harassment and a hostile environment from June 2003 to March 2004 due to discrimination because of religion and prior EEO activity. She found that in filing this complaint the appellant violated provision 1 of the agreement that precluded him from filing an action regarding the subject matter of the removal appeal since in that appeal the appellant raised discrimination defenses based on the same grounds as those presented in the complaint. *Id.* at 4.

¶12 Addressing the alleged breach raised by the appellant, the administrative judge noted that he asserted that the agency violated provision 7 of the agreement, which states that "[t]he agency shall not provide any information about Mr. Caston's removal or any negative information about Mr. Caston to any other branch or subdivision of the U.S. Government." The administrative judge cited the agency's admission that it had inadvertently disclosed in its May 10, 2006 letter to the EEOC's Office of Federal Operations the chronology of the appellant's removal and its subsequent rescission together with his resignation as terms of the agreed settlement of his removal appeal. The administrative judge found that the agency therefore violated the plain language of provision 7 of the agreement. *Id.* at 4-5.

¶13 The administrative judge then noted that she must determine whether the agency's breach was a material one, which allows the nonbreaching party to elect

¹ In her decision, the administrative judge focused on the appellant's EEO complaint on September 8, 2004, alleging a hostile working environment. The complaint began the proceeding in which the agency submitted the March 1, 2007 letter that is alleged by the appellant to have breached the 2004 settlement agreement. As noted above, the appellant also filed an action alleging breach of the 1997 EEO settlement agreement on June 22, 2004, and in his petition for enforcement he cited an agency letter submitted in that proceeding on May 10, 2006, as a breach of the 2004 MSPB settlement agreement.

between enforcement of the agreement or rescission of the agreement and reinstatement of the appeal. She noted that a breach is material when it relates to a matter of vital importance or goes to the essence of the contract. She recognized that the Board has consistently held that confidentiality or nondisclosure agreements are of vital importance and provide a major benefit to appellants who, in exchange, agree to withdraw appeals and resign from their positions. Thus she concluded that the agency's breach was a material one. *Id.* at 5-7.

¶14 The administrative judge addressed the agency's argument that it was the appellant who prompted the agency to defend itself by reference to the 2004 agreement. She noted the appellant's acknowledgement that, in support of his hostile environment claim, he had provided the Secretary of the Interior with information gathered in his MSPB appeal. Thus she found that the appellant's action would appear to violate provision 11 of the 2004 settlement, under which the parties agreed not to disclose the contents of the case file. She also noted that in his EEO complaint the appellant made reference to his termination case and alleged that his union representative contributed to a hostile environment by providing information to the deciding official in that case. However, she concluded that the agency's failure to file a petition for enforcement to remedy any breach by the appellant precluded the agency's arguing that the appellant's own actions caused the breach or that its breach was therefore not material. Finding that the appellant, as the nonbreaching party, had exercised his right to have the settlement agreement rescinded and his initial appeal reinstated, the administrative judge recommended that the Board grant his petition for enforcement and reinstate the appeal. *Id.* at 6-7.

¶15 In response to the administrative judge's recommendation, the agency stated that it inadvertently violated the 2004 settlement's confidentiality provision when, due to confusion or an editing error, it included in its May 2006 letter to the EEOC a reference to the appellant's MSPB removal appeal and its subsequent

settlement. The agency argued that the administrative judge erred in finding its breach material because any harm caused by it was very limited or inconsequential in that the disclosure was only to the EEOC and the parties and not to prospective employers. In the absence of irreparable harm, the agency contended that its breach was only technically material. The agency also argued that the administrative judge erred by giving insufficient weight to the fact that the breach occurred in the midst of the appellant's numerous related appeals in different forums and to her own finding that the appellant committed similar violations of the settlement agreement on his own behalf in the course of these cases. Compliance Referral File (CRF), Tab 3.

¶16 In his response, the appellant asserted that the administrative judge correctly found that the agency violated the confidentiality provisions of the settlement agreement that barred it from speaking about the issues covered by the agreement and from providing information about the appellant's removal or any negative information about him to any other branch of government. He noted that the agency's response ignored its March 2007 submission to the EEOC, which also provided detailed information about the appellant's removal and the settlement of the appeal and so made it clear that its May 2006 breach was not inadvertent. The appellant contended that the administrative judge erred in finding that he breached the settlement agreement by filing his EEO complaint in 2004 because the issue was not timely brought to the Board by the agency, as she recognized in the end by not giving any weight to her finding that he breached it in her enforcement recommendation. He also objected to her conclusion that his providing material from the MSPB case file to the Secretary of the Interior breached the agreement. He noted that he provided the documents to the Secretary four months before the settlement agreement and argued that he therefore could not have violated it by doing so. CRF, Tab 4.

ANALYSIS

¶17 The Board has the authority to enforce a settlement agreement which has been entered into the record in the same manner as any final Board decision or order. *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981). A settlement agreement is a contract, and the Board will therefore adjudicate a petition to enforce a settlement agreement in accordance with contract law. *See Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). Under contract law, substantial performance by one party is sufficient to require the other party to perform, and a party's performance is considered substantial when there is no material failure of performance. *Muzziapa v. Department of Veterans Affairs*, 63 M.S.P.R. 559, 562 (1994), citing Restatement (Second) of Contracts § 237, cmt. d (1981). Whether there has been a material failure to perform depends on the extent to which the injured party is deprived of the benefit reasonably expected from the contract. *Id.* at § 241. A party's breach of an agreement is material when it relates to a matter of vital importance or goes to the essence of the contract. *Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997).

¶18 In her recommendation, the administrative judge determined that both the agency and the appellant violated the settlement agreement in the appellant's MSPB removal appeal. She found that the appellant violated provision 1 of the agreement by filing an EEO complaint that concerned the subject matter of his appeal because it presented discrimination claims raised as defenses in that case.² CF2, Tab 15 at 4. She also found that he appeared to have violated section 11 of the agreement by referring in his complaint to the termination appeal and submitting material gathered during the appeal in support of his hostile

² Provision 1 provides in pertinent part: "The appellant also agrees not to file any additional administrative or judicial actions regarding the subject matter of this appeal except that he may seek enforcement of this Agreement."

environment claim.³ *Id.* at 6. The administrative judge determined that the agency violated provisions 7 and 11 of the agreement during the EEO proceedings on the appellant's complaint.⁴ She found that it breached the agreement in its responses to the appellant's contentions by providing information about the appellant's removal to the EEOC and by disclosing the terms of the settlement agreement that resolved his appeal of the removal. *Id.* at 4-5.

¶19 We agree with the administrative judge's determination that the appellant breached the agreement in bringing his EEO complaint alleging that the agency created a hostile working environment during the period from June 2003 to March 2004. The appellant's removal was effective during this period, on October 1, 2003, and the complaint attributed the hostile environment to a supervisor's harassment based on religion and prior EEO activity, the same conduct that was alleged as the basis of the agency's action in his removal appeal. The formal complaint initiating the proceeding objected to his representative's having supplied damaging, confidential information to the agency deciding official in his termination case, and it linked the charged hostile environment to his termination. CF2, Tab 13, Exhibit A at 4. The appellant's argument that his termination was a result of the hostile environment created by the agency's improper use of information from his EEO files was noted by the EEOC administrative judge in his decision on the appellant's complaint. CF2, Tab 5, Exhibit 5 at 3-4. Thus we find that the appellant breached provision 1 of the settlement agreement. We also find that his submission of material from the case file of his Board appeal with

³ Provision 11 provides in pertinent part: "The parties to this Agreement will not discuss or disclose the terms and conditions of this Agreement, or the contents of the case file, except as necessary to effectuate the terms and conditions of this Agreement."

⁴ Provision 7 provides in pertinent part: "The agency shall not provide any information about Mr. Caston's removal or any negative information about Mr. Caston to any other branch or subdivision of the U.S. Government."

his complaint, CF2, Tab 13, Exhibit A at 1, violated provision 11 of the agreement.⁵

¶20 Although the administrative judge found that the appellant breached the agreement, she found that the agency's failure to file a petition for enforcement based on the breach precluded any further consideration of it. This was error. It is well established that a material breach of a contractual promise by one party discharges the other party from his contractual duty to perform what was exchanged for the promise. *See Thomas*, 124 F.3d at 1442, *citing* Restatement (Second) of Contracts, § 237, cmt. a (1979). In *Thomas* the employing agency's material breach of a settlement agreement's confidentiality provision was found to have discharged the employee from his contractual duty under the agreement to resign from his position. *Id.* *See also Muzzipapa*, 63 M.S.P.R. at 562 (the appellant's failure to render substantial performance of his promise to have knee surgery removed agency's obligation to reinstate him with back pay). *Cf. Farrero v. National Aeronautics & Space Administration*, 78 M.S.P.R. 382, 388 (1998) (a material breach by the appellant of his obligations under the settlement agreement could have precluded his obtaining enforcement of a provision of the agreement violated by the agency, but his delay in performance did not show such bad faith here as to deny him a remedy for the agency's breach), *rev'd on other grounds*, 194 F.3d 1328 (Fed. Cir. 1999) (Table).

¶21 In this case, there can be no doubt that the appellant's promise not to bring further actions concerning the subject matter of his removal appeal was of vital importance to the agency and related to the essence of the parties' contract. The agency's submission in the EEO proceeding of information about the appellant's removal and the subsequent settlement of his appeal was prompted by the

⁵ The fact that he may have submitted this material to the Secretary of the Interior prior to the agreement does not affect his obligation not to disclose it once the agreement was signed.

appellant's raising of the same matter in that proceeding in violation of the settlement agreement. Certainly it would be inequitable to require the agency to remain silent concerning the removal in order to adhere to the agreement's confidentiality provision when the appellant has also violated that provision as well as his obligation under provision 1 of the settlement agreement not to bring further actions concerning the subject matter of his MSPB appeal. Accordingly, we find that the appellant's breach of the agreement was a material one that discharged the agency from its obligation to perform. We find that the agency is in compliance, and we deny the appellant's request for rescission of the settlement agreement and reinstatement of his appeal.

ORDER

¶22 The petition for enforcement is DISMISSED. This is the final decision of the Board. 5 C.F.R. § 1201.183(b)(3).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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