

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

2009 MSPB 37

Docket No. SF-0752-06-0167-C-1

**Fernando S. Eagleheart,
Appellant,**

v.

**United States Postal Service,
Agency.**

March 13, 2009

Paul E. Maille, Reno, Nevada, for the appellant.

Robert E. O'Connell, Esquire, San Francisco, California, 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 petition for review from a compliance initial decision denying the appellant's petition for enforcement and finding that the agency had not materially breached the terms of a settlement agreement. For the reasons set forth below, we GRANT the appellant's petition under [5 C.F.R. § 1201.115](#), VACATE the compliance initial decision, and REMAND this appeal to the Denver Field Office for further adjudication.

BACKGROUND

¶2 In December 2005, the appellant filed an appeal challenging the agency's decision to remove him from his position as a PS-03 Custodian. Initial Appeal

File (IAF), Tab 1 at 1-13, 21-24. On December 22, 2005, the parties reached a settlement agreement in which the appellant agreed to withdraw his appeal in exchange for the agency's agreement to, among other things, rescind the removal and allow the appellant to resign for personal reasons. Paragraph 5 of the Agreement states:

(a) The Notice of Proposed Removal and the Letter of Decision listed above will be rescinded, and removed from your record of employment with the Postal Service.

(b) Fernando Eagleheart will resign from the Postal Service immediately for "personal reasons."

IAF, Tab 6, Exhibit A. The administrative judge (AJ) determined that the settlement agreement was lawful, that the parties understood the agreement, and that it was entered into freely by both parties. IAF, Tab 7, Initial Decision at 1-2. She therefore accepted it into the record and dismissed the appeal as settled on December 23, 2005. *Id.* at 2.

¶3 On the same day that the parties executed the settlement agreement, the appellant executed a Postal Service Form (PS) 2574, Resignation from the Postal Service, wherein he stated that he was resigning from the agency for personal reasons effective December 22, 2005. Compliance Appeal File (CAF), Tab 4, Subtab 2. Thereafter, on December 28, 2005, the agency processed a PS-50 documenting a Nature of Action (NOA) Code 317 "Resignation All Other," effective December 22, 2005. CAF, Tab 15 at 7. The "Remarks" section of the PS-50 states: "Last Day In Pay Status Pending Inspection Service Case # 0746-1536564-MTL (2)." *Id.*

¶4 More than 3 months later, on April 7, 2006, the agency issued two additional PS-50s related to the appellant's employment. One PS-50 contains a notation stating, "Cancels NOA 317 Effective 2005-12-22. . . . To Correct Remar [sic] Code per LRS." CAF, Tab 12 at 6. The second PS-50 documents a NOA Code 317 "Resignation All Other," effective December 22, 2005, and contains a notation stating, "Resignation--Voluntary for Personal Reason." *Id.* at 3.

¶5 At some point after signing the settlement agreement, the appellant applied for, and was hired by, the Department of Veterans Affairs (VA). CAF, Tab 15 at 10. The VA subsequently proposed the appellant's removal on December 28, 2007, based on his failure to disclose that he had resigned from the agency by mutual agreement because of specific problems. *Id.* The appellant and the VA thereafter entered into a "last chance agreement" on February 28, 2008, wherein the appellant's removal was held in abeyance for an 18-month period. *Id.* at 10-12.

¶6 The appellant thereafter filed the instant petition for enforcement of the settlement agreement, which alleges that the agency breached the agreement by issuing a PS-50 indicating that he resigned pending an inspection service case, and thereby failing to issue, for over 3 months, a PS-50 showing a resignation for personal reasons, and requests that his removal appeal be reinstated. CAF, Tab 1 at 2-3, Tab 6, Tab 15 at 1-6.

¶7 In an August 26, 2008 compliance initial decision, the AJ denied the appellant's petition for enforcement based on the written record, finding that he failed to establish that the agency materially breached the settlement agreement. IAF, Tab 17, Compliance Initial Decision (CID) at 1, 4-7.

¶8 The appellant has filed a petition for review of the CID, and the agency has filed a response in opposition to the petition. Petition for Review File, Tabs 1, 4.

ANALYSIS

¶9 The Board has the authority to enforce the terms of a settlement agreement entered into the record. *Vaughn v. U.S. Postal Service*, [97 M.S.P.R. 97](#), ¶ 7 (2004). In this case, it is undisputed that the settlement agreement between the parties was entered into the record and that the Board has jurisdiction to enforce its terms. IAF, Tab 7. An agency must produce relevant, material, and credible evidence of its compliance with an agreement upon the filing of a petition for enforcement by an appellant, but the ultimate burden is on the appellant, as the

party seeking enforcement, to show that an agency failed to fulfill the terms of an agreement. *Vaughn*, [97 M.S.P.R. 97](#), ¶ 7. An agency's assertions must include a clear explanation of its compliance efforts supported by understandable documentary evidence. *Id.*

¶10 A settlement agreement is a contract, the interpretation of which is a matter of law. *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). In construing the terms of a settlement agreement, the words of the agreement itself are of paramount importance, and parol evidence will be considered only if the agreement is ambiguous. *Id.*; *West v. Department of the Army*, [96 M.S.P.R. 531](#), ¶ 10 (2004). Here, the agency agreed that the notice of proposed removal and the letter of decision would be rescinded and removed from the appellant's record of employment with the agency, and that the appellant would resign for "personal reasons." CAF, Tab 4, Subtab 1 at 1. In return, the appellant agreed to withdraw his appeal and not institute any further appeals on the matters raised in the case. *Id.* Notably, however, the settlement agreement does not specifically address the agency's obligation to issue an updated PS-50 documenting the appellant's voluntary resignation from the agency as part of the agency's agreement to cancel and rescind the removal action. *Id.* When the appellant withdrew his Board appeal in exchange for the agency's cancellation and rescission of his removal, his goal was to eliminate this negative information as it may affect future employment with the government or elsewhere; no other reasonable meaning has been proposed. *See King v. Department of the Navy*, [130 F.3d 1031](#), 1033 (Fed. Cir. 1997) ("When an employee voluntarily resigns in exchange for purging of the records that show the prior adverse action, the employee's goal . . . is to eliminate this information as it may affect future employment."). Thus, the Board has ruled under similar circumstances that such an agreement requires the agency to provide the appellant with an updated Standard Form (SF) 50. *See, e.g., Wells v. Department of the Treasury*, [89 M.S.P.R. 228](#), ¶¶ 13-17 (2001) (although the settlement agreement did not call upon the agency to issue an

updated SF-50 documenting the appellant's resignation in lieu of a negative suitability determination, the only reasonable interpretation of the agreement was that it required the agency to issue an updated SF-50 documenting the voluntary resignation). Therefore, under the circumstances of this case, it would be reasonable to interpret the agreement as requiring the agency to provide an updated PS-50 documenting the appellant's voluntary resignation for personal reasons.

¶11 As noted, there was a 3-month delay in the agency's issuing a PS-50 documenting the appellant's voluntary resignation for personal reasons. Although the agreement is silent as to the time of performance, a reasonable time under the circumstances will be presumed. *Mincey v. U.S. Postal Service*, [91 M.S.P.R. 247](#), ¶ 11 (2002). What is reasonable in a particular case is a question of fact and parol evidence on this issue is admissible. *Id.*; see *Ortega v. U.S. Postal Service*, [85 M.S.P.R. 422](#), ¶¶ 3-4, 7 (2000) (the AJ's finding that 2½ months was a reasonable time under the circumstances for the agency to continue the appellant in the limited-duty assignment he held before filing his Board appeal is a factual finding). Six days after the settlement agreement was executed, the agency issued a PS-50 which stated that the appellant resigned "pending [an] inspection service case." CAF, Tab 15 at 7. Issuance of that PS-50 shows that the agency was capable of issuing a revised PS-50 in a relatively short period of time and also indicates that the parties intended that the agency would do so. Moreover, given that the appellant's goal in executing the agreement was to eliminate negative information as it may affect his search for future employment, there is no indication that the parties contemplated waiting more than 3 months after the agreement was executed to implement its provisions. On the contrary, the portion of the agreement requiring the appellant to resign and withdraw his appeal was implemented immediately, and the appellant had a right to expect that the agency would meet its end of the bargain well before 3 months had passed. See, e.g., *Graff v. Department of the Air Force*, [39 M.S.P.R. 639](#),

643-44 (1989) (30 days was a reasonable period of time under the circumstances for the agency to complete its obligations under the terms of a settlement agreement, including the expungement of performance data from his official personnel record). The agency has offered no countervailing explanation for its delay in issuing a PS-50 documenting the appellant's voluntary resignation for personal reasons. Under the circumstances of the instant case, therefore, the agency's delay in meeting its obligations under the agreement would constitute a breach, despite its belated attempt to cure that breach. *See Mullins v. Department of the Air Force*, [79 M.S.P.R. 206](#), ¶ 9 (1998).

¶12 A material breach 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); *Wells*, [89 M.S.P.R. 228](#), ¶ 18. Although the AJ correctly interpreted the agreement to require the agency to provide an updated and timely-issued PS-50, she found that the agency's delay in processing the PS-50 to reflect the appellant's voluntary resignation for personal reasons did not constitute a material breach of the agreement because the delay did not have a material effect on the appellant's ability to secure employment with the VA. CID at 6. In this case, the agency's breach of the agreement would be material because it relates to a matter of vital importance and goes to the essence of this contract. *Thomas*, 124 F.3d at 1442. Rescission of the removal, as well as providing the appellant with a clean personnel file showing that he had voluntarily resigned for personal reasons, were major benefits the appellant sought. *See Wells*, [89 M.S.P.R. 228](#), ¶ 18.

¶13 That would be the case even though the appellant was able to find other employment despite the agency's breach. In *Mullins*, we found that the breach of a "clean records" settlement agreement was material, not because it resulted in a monetary loss, but because the breached provision was material to the agreement. [79 M.S.P.R. 206](#), ¶¶ 2, 11. There is no dispute that the appellant's current employer is aware that his employment with the agency ended under unfavorable

circumstances. CAF, Tab 15 at 10. As in *Mullins*, “[e]ven if the agency’s breach has not resulted in a monetary loss to the appellant, it is clearly an undesirable thing for his new employer to know, and, more importantly, it is not what the appellant bargained for with the agency.” [79 M.S.P.R. 206](#), ¶ 11; *see also Thomas*, 124 F.3d at 1442 (even if testimony were believed from Department of Justice officials that their learning of the fact that the appellant had been the subject of an Inspector General investigation would not influence their view of his employability, “that knowledge at a minimum would put a responsible employing official on inquiry notice, which was exactly what [the appellant] wanted to avoid.”); *Poett v. Department of Agriculture*, [98 M.S.P.R. 628](#), ¶ 17 (2005) (“An appellant need not show actual harm, such as a failure to obtain a position or other form of monetary loss, in order to establish a breach of a non-disclosure provision.”). Here, the provision at issue was material, and the appellant would not be required to establish that the breach had an effect on his ability to apply for, or obtain, other employment. *See Mullins*, [79 M.S.P.R. 206](#), ¶ 11.

¶14 Notwithstanding the above analysis, there is a preliminary issue not addressed below that is significant, and that is the timeliness of the petition for enforcement. An enforcement petition alleging a breach of a settlement agreement must be filed within a reasonable time after the petitioner becomes aware of the breach. *Kasarsky v. Merit Systems Protection Board*, [296 F.3d 1331](#), 1335 (Fed. Cir. 2002) (citing *Adamcik v. U.S. Postal Service*, [48 M.S.P.R. 493](#), 496 (1991)). The appellant’s petition was filed on May 8, 2008. CAF, Tab 1. It is unclear from the current record, however, when the appellant became aware of the alleged breach so as to trigger his obligation to file a petition. *See Poett v. Merit Systems Protection Board*, [360 F.3d 1377](#), 1381 (Fed. Cir. 2004) (the petitioner must have “actual knowledge of a specific act that constitutes a breach, not merely an unsubstantiated suspicion”). Therefore, the enforcement petition

must be remanded and the AJ must direct the parties to submit evidence and argument regarding timeliness.*

¶15 If, on remand, the AJ finds that the enforcement petition was timely filed, she must then address the merits of the petition. If she finds that the agency materially breached the settlement agreement, she must consider the appropriate remedy. When one party commits a material breach of a settlement agreement, the other party is entitled to either enforce the settlement agreement or to rescind it and to reinstate his or her appeal. *See Mullins*, [79 M.S.P.R. 206](#), ¶ 12. Although the appellant requested below that his appeal be reinstated, CAF, Tab 15 at 6, he does not so request in his petition for review. Nevertheless, he may wish to reconsider his request that the appeal be reinstated in light of the fact that reinstatement of the appeal could only occur if the agreement is rescinded. If the agreement is rescinded, the settlement terms become inoperative, and the parties are essentially restored to the status quo ante. *See id.* at ¶ 13; *Stipp v. Department of the Army*, [64 M.S.P.R. 124](#), 127 n. 1 (1994), *overruled in part on other grounds*, *Wisdom v. Department of Defense*, [78 M.S.P.R. 652](#) (1998). The appellant would thus risk losing any benefits he has received under the agreement. Accordingly, on remand, if the merits of the petition are addressed, the appellant must be permitted to make an informed choice between rescinding and enforcing the agreement. *See Mullins*, [79 M.S.P.R. 206](#), ¶ 13. If the appellant chooses to rescind the agreement, then the removal appeal must be adjudicated on its merits.

* The timeliness of a petition for enforcement may be raised *sua sponte* by the Board. *Kasarsky*, 296 F.3d at 1335.

ORDER

¶16 We REMAND this appeal to the Denver Field Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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