UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 238

Docket No. DC-0752-07-0694-C-3

Caulton D. Allen,

Appellant,

v.

Department of Veterans Affairs,

Agency.

December 29, 2009

Jennifer D. Marshall, Richmond, Virginia, for the appellant.

Gia Marie Chemsian, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the compliance initial decision (CID) that denied his petition for enforcement (PFE) of a settlement agreement. We DENY the PFR for failure to meet the review criteria under 5 C.F.R. § 1201.115(d); REOPEN the compliance matter on the Board's own motion pursuant to 5 C.F.R. § 1201.118; and AFFIRM the CID AS MODIFIED herein.

BACKGROUND

¶2 The appellant filed a Board appeal challenging his removal from his Equal Employment Opportunity Investigator position with the Office of Resolution Management in Washington, D.C. *See Allen v. Department of Veterans Affairs*, MSPB Docket No. DC-0752-07-0694-I-1; Compliance File (CF), Tab 4, subtab E at 23. During the appeal process, the parties executed a settlement agreement. CF, Tab 4, subtab A. The relevant portions of the settlement agreement provide that:

> 4. Appellant shall immediately effect his resignation from the Agency by executing the SF-52 Request for Personnel Action form attached hereto as Exhibit "A". . . .
>
> . . . .
>
> 6. Appellant agrees to use the attached letter, attached hereto as Exhibit "B", as agency's reference with prospective employers. If Appellant is asked to provide a contact at the Agency for reference purposes, he agrees to provide only the name and telephone number of the Human Resources Officer, Jeanette Anderson, or her successor(s) . . . . Appellant specifically agrees that the Agency shall not be responsible for any information provided to an employment inquiry or reference source by anyone other than the Human Resources Officer, Jeanette Anderson, or her successor(s).
>
> . . . .
>
> 10. . . . [T]he Agency will remove any and all information related to Appellant's removal action from Appellant's Official Personnel File (OPF), change his removal to voluntary resignation, and make the following changes:
>
> > a. SF 50-B Notification of Personnel Action, Removal, dated May 26, 2007, will be canceled and removed, and VA will substitute a form SF 50-B Notification of Personnel Action reflecting Appellant's resignation pursuant to the SF-52 Request for Personnel Action attached hereto as Exhibit "A".

> b. SF-50-B Notification of Personnel Action, Suspension, dated August 28, 2006, will be cancelled and removed.
>
> . . . .
>
> 12. . . . Human Resources Officer, Jeanette Anderson, or her successor(s) . . . if contacted for any employment inquiry or reference for the Appellant will provide the information contained in Exhibit "C", and will truthfully respond regarding those matters required by law. The Agency shall not be responsible for any information disseminated about the Appellant by any of its agents, employees, or representatives, other than the Human Resources Officer, Jeanette Anderson, or her successor(s).

Id. at 3-5. The administrative judge (AJ) who presided over the removal appeal issued an ID dismissing the appeal, and entered the agreement into the record for enforcement purposes. *See Allen*, MSPB Docket No. DC-0752-07-0694-I-1 (Initial Decision, Sept. 6, 2007).

¶3 The appellant resigned and applied for disability retirement, which the Office of Personnel Management (OPM) approved on December 23, 2008. CF, Tab 4, subtab C at 13, Tab 5 at 45. On December 30, 2008, the appellant filed a claim with the Department of Labor, Office of Workers' Compensation Programs (OWCP), asserting that he sustained a compensable, work-related "mental disorder/psychiatric illness" as a result of his supervisor allegedly yelling at him after "bursting" into his office, and therefore, he is entitled to benefits under the Federal Employees' Compensation Act (FECA). CF, Tab 1, subtab B at 1. On January 27, 2009, the agency wrote to OWCP indicating that it had not received documentation that causally linked the appellant's alleged medical condition to his work. CF, Tab 4, subtab C at 10.

¶4 OWCP sent the agency a letter dated March 6, 2009, requesting specific information, including but not limited to, the agency's position on the appellant's allegations regarding entitlement to OWCP benefits, the appellant's ability to perform his required duties, and whether he had any performance or conduct

problems. CF, Tab 1, subtab C. On March 27, 2009, the Human Resources Officer, Ms. Anderson, sent OWCP a narrative response and enclosed documents regarding the appellant's disciplinary history, which included copies of the proposal and decision notices from the rescinded removal action. CF, Tab 4, subtab E.

¶5 The appellant filed a PFE alleging that the agency breached the settlement agreement by providing OWCP with the proposal and decision notices, and in failing to expunge all removal-related documents. CF, Tab 1 at 3-4. The AJ issued a CID denying the PFE, finding that the appellant failed to prove that the agency breached the settlement agreement, and determining that even if the agency had breached the agreement, the breach was not material. CID at 1-5. The appellant has filed a PFR of this decision. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition. PFRF, Tab 4.

ANALYSIS

¶6 The appellant's arguments on review fail to meet the review criteria under 5 C.F.R. § 1201.115(d). However, we reopen this compliance matter on the Board's own motion pursuant to 5 C.F.R. § 1201.118 to clarify the existing case law regarding whether an agency breaches a settlement agreement by disclosing information concerning settled adverse actions to a third party, when the agency has agreed to provide the employee with a clean record by issuing a new SF-50 and expunging all of the adverse-action related documents from the OPF.

The agency expunged all removal-related documents from the appellant's OPF.

¶7 A settlement agreement is a contract, and, as such, will be enforced in accord with contract law. *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 9 (2009) (citing *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988)). The Board will enforce a settlement agreement which has been entered into the record in the same manner as a final Board decision or order. *Torres*, 110 M.S.P.R. 482, ¶ 8. Where the appellant alleges

noncompliance with a settlement agreement, the agency must produce relevant material evidence of its compliance with the agreement, or show that there was good cause for noncompliance. *Id.*; *Crook v. Department of Housing & Urban Development*, 102 M.S.P.R. 340, ¶ 5 (2006). The ultimate burden, however, remains with the appellant to prove breach by a preponderance of the evidence. *Crook*, 102 M.S.P.R. 340, ¶ 5.

¶8 The United States Court of Appeals for the Federal Circuit (Federal Circuit) and the Board have construed a settlement agreement that calls for rescission of a removal and issuance of an SF-50 showing resignation to also contain implied provisions for expungement of removal-related documents from the employee's OPF and non-disclosure to third parties – in other words, a "clean record" settlement. *See Conant v. Office of Personnel Management*, 255 F.3d 1371, 1374, 1376 (Fed. Cir. 2001); *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1371-72 (Fed. Cir. 1999); *Torres*, 110 M.S.P.R. 482, ¶¶ 10-11; *Principe v. U.S. Postal Service*, 100 M.S.P.R. 66, ¶¶ 6-9 (2005). A clean record means that the agency must return one's personnel record "to its former state" prior to the effected adverse action. *Torres*, 110 M.S.P.R. 482, ¶ 10 (citing *Pagan*, 170 F.3d at 1370).

¶9 Paragraphs 4 and 10 of the settlement agreement in this appeal are materially similar to the clean record provisions of the settlement agreement in *Torres*, which expressly mandated that the agency replace the SF-50 showing removal with an SF-50 showing resignation, and expunge all removal-related documents from the OPF. CF, Tab 4, subtab A at 3-4; *Torres*, 110 M.S.P.R. 482, ¶ 3. The appellant has not presented any evidence on review or in his PFE to establish that the agency failed to expunge all removal-related documents from his OPF. He merely submitted copies of the removal-related documents provided by the agency to OWCP. *See* CF, Tab 1, subtab D.

¶10 To demonstrate its compliance with the clean record provisions, the agency submitted a sworn declaration from Ms. Anderson averring that she instructed the

Health Resource Center (HRC), which maintains the agency's OPFs, to expunge all removal-related documents from the appellant's OPF, including the proposal and decision notices, and to replace the information with an SF-50 reflecting the appellant's resignation; to the best of her knowledge, these documents were removed. CF, Tab 4, subtab F at 1-2; *see Galloway v. Department of Agriculture*, 110 M.S.P.R. 311, ¶ 10 (2008) (to show compliance, the agency must present an affidavit or other evidence to support its claim). This evidence in itself is sufficient to show compliance with the settlement agreement. *See Allen v. Department of Defense*, 108 M.S.P.R. 275, ¶¶ 2, 5-6 (2008) (the Board found that the agency showed its compliance with the clean record settlement by submitting affidavits from agency officials that verified there were no longer any references to the employee's positive drug test or the rescinded removal action in any of the agency's files where the agency had agreed to remove such references from all its records). On review, the agency also submits a July 17, 2009 sworn declaration of Assistant Human Resources Officer Jennifer LuttJohann of HRC, which confirms that Ms. Anderson's directives were completed, and avers that "there is no other documentation in the Appellant's OPF that shows he was disciplined or removed."[1] PFRF, Tab 4, subtab F. Thus, we find that the agency expunged all of the removal-related documents from the appellant's OPF in compliance with the settlement agreement.

The agency was not required to expunge documents from agency-maintained files other than the appellant's OPF.

¶11 In response to the PFE, the agency admitted that it provided information regarding the appellant's removal to OWCP, but stated that the information "was

[1] In her sworn declaration, Ms. Anderson identified Ms. LuttJohann as the official charged with expunging the removal-related documents from the appellant's OPF. CF, Tab 4, subtab F at 2. Ms. Anderson declared that the agency requested the appellant's OPF from HRC, but apparently the agency did not receive it or Ms. LuttJohann's sworn declaration until after the close of the record below. CF, Tab 4 at 5 n.2 and subtab F at 2.

not information contained within Appellant's OPF." CF, Tab 4 at 5. On review, the appellant contends that the settlement agreement is ambiguous concerning the files from which the agency was required to expunge the removal-related documents, and that there was no meeting of the minds regarding the agency's maintenance of "secret" files containing the removal-related documents. PFRF, Tab 1 at 6-7. However, the plain language of the settlement agreement only specifies that the agency was required to "remove any and all [removal-related information] from the appellant's [OPF]," and does not contemplate expungement from all agency-maintained files. CF, Tab 4, subtab A at 4. We analogize this provision to the clean record provision in *Musick v. Department of Energy*, 339 F.3d 1365, 1367, 1369 (Fed. Cir. 2003), which provided that the agency would remove "all documentation relating to and culminating in Mr. Musick's removal . . . from his position from his [OPF]," including all documentation proposing to remove Mr. Musick from his position. The Federal Circuit found that "the only reasonable reading of the [provision] is that the agency only obligated itself to remove pertinent material from Mr. Musick's OPF." *Id.* at 1369. Applying *Musick*, we discern no ambiguity in Paragraph 10 of the settlement agreement, which specifically identifies the appellant's OPF as the sole location from which the agency was required to expunge the removal-related documents.

¶12 The appellant argues that the AJ should have applied *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997), in which the Federal Circuit found that the agency should have expunged removal-related documents from OPFs in the hands of other agencies, although the settlement agreement did not expressly provide for it. PFRF, Tab 1 at 3, 7-8. However, the Federal Circuit set forth the following explanation in *Musick*:

> We stated [in *King*] that, in entering into a settlement agreement like Ms. King's, 'the employee's goal, to which the agency has agreed, is to eliminate th[e] information [related to the adverse action] as it may affect future employment with the government or elsewhere' . . . We concluded that '[b]y correcting only those files in the hands of

> the Navy, and by retaining references in official government personnel files to the action that was subsequently revoked, Petitioner was denied the benefit of her agreement.' . . . The critical difference between *King* and this case is that Mr. Musick has not alleged that records were maintained outside the agency in violation of the settlement agreement. For that reason, *King* does not help Mr. Musick.

Musick, 339 F.3d at 1369-70; *see King*, 130 F.3d at 1033-34. Similarly, *King* does not help the appellant in this case because the appellant does not contend that other OPFs were maintained by other agencies. *See* PFRF, Tab 1 at 3, 6; CF, Tab 1 at 3-4. Furthermore, the Federal Circuit did not hold that the agency should have expunged all removal-related documents in all files – it only limited expungement to documents in the personnel files. *See King*, 130 F.3d at 1033-34.

¶13 We agree with the AJ that the plain language of the settlement agreement only mandates that the agency expunge removal-related documents from the appellant's OPF. *See* ID at 3-4. Because the clean record provisions do not require the agency to expunge documents from other agency-maintained files, the agency's maintenance of removal-related documents in files other than the appellant's OPF does not breach the agreement.

<u>The agency did not breach the settlement agreement in disclosing removal-related information to OWCP.</u>

1. The general rule precludes disclosure of information regarding rescinded adverse actions to third parties when the agency has agreed to provide the employee with a clean record.

¶14 In his PFE and on review, the appellant argues that the agency breached the settlement agreement by disclosing removal-related documents to OWCP in response to OWCP's March 6, 2009 inquiry. PFRF, Tab 1 at 3, 6; CF, Tab 1 at 3-4. It is undisputed that Ms. Anderson, the Human Resources Officer, provided OWCP with copies of the proposal and decision notices, and submitted additional information regarding the appellant's removal. CF, Tab 4 at 5-6 and subtab E. In Paragraphs 4, 10 and 12 of the settlement agreement, the agency essentially

agreed to provide the appellant with a clean record. *Id.*, subtab A at 3-4; *see Pagan*, 170 F.3d at 1371; *Torres*, 110 M.S.P.R. 482, ¶¶ 10-12.

¶15 Where the agency has contractually agreed to provide an employee with a clean record, the Federal Circuit and the Board have consistently held that the clean record agreement contains an implied provision that precludes the agency's disclosure of information regarding the rescinded adverse action to third parties. *Conant*, 255 F.3d at 1376; *Pagan*, 170 F.3d at 1371-72; *Felch v. Department of the Navy*, 112 M.S.P.R. 145, ¶¶ 12, 14 (2009); *Torres*, 110 M.S.P.R. 482, ¶¶ 11-12; *Principe*, 100 M.S.P.R. 66, ¶¶ 6-10. According to the Federal Circuit, the agency is required to "destroy [removal-related documents], erasing 'removal' and all reasons for such a removal from [the employee's] professional record with the agency," and to issue a new SF-50 of resignation to replace the removal, so "that the only legal document recording the end of [his] employment with the agency would henceforth be the SF-50 stating [he] resigned for personal reasons." *Conant*, 255 F.3d at 1376; *see Principe*, 100 M.S.P.R. 66, ¶ 9. Under this rationale, it is seemingly impossible to disclose information about an adverse action that has been rescinded without reneging on the bargain. We therefore interpret *Conant* as creating the general rule that if an agency discloses information regarding the rescinded adverse action to any third party, then the agency has materially breached the clean record settlement. *See Conant*, 255 F.3d at 1376; *Principe*, 100 M.S.P.R. 66, ¶ 9. Any reservations that we might entertain about *Conant* are beside the point since we are bound by our reviewing court's decisions. *Principe*, 100 M.S.P.R. 66, ¶ 7.

¶16 If we based our breach analysis solely on the clean record language set forth in Paragraphs 4 and 10, and the agency's admitted disclosure of removal-related information to OWCP, then under *Conant*, the agency would have materially breached the clean record settlement agreement. CF, Tab 4, subtab A at 3-4. However, as set forth below, the presence of other pertinent contract

provisions changes the essence of the contract, and thereby distinguishes this case from *Conant*.

2. The settlement agreement contains an explicit exception to the general rule precluding disclosure of removal-related information to third parties.

¶17 Under the general principles of settlement construction, the words of the agreement itself are of paramount importance. *See Felch*, 112 M.S.P.R. 145, ¶ 8. In construing the terms of a settlement agreement, the Board examines the four corners of the agreement to determine the parties' intent. *Id.* The contract provisions must be read "as part of an organic whole, according reasonable meaning to all of the contract terms" to identify and give weight to the "spirit" or essence of the contract as intended by the parties. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997); *see LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002)); *Coker v. Department of Commerce*, 111 M.S.P.R. 523, ¶ 8 (2009).

¶18 Under *Conant*, we must read the general clean record provisions of the settlement agreement as broadly prohibiting the agency from disclosing removal-related information to *any* third party. *See* CF, Tab 4, subtab A at 3-4. However, the parties included language that was not contained in the *Conant* agreement, which expressly provides that the agency's Human Resources Officer "will truthfully respond regarding those matters required by law" if contacted for any employment inquiry or reference. *Id.*, subtab A at 4. This provision may reasonably be interpreted as permitting disclosure of removal-related information to a third party as required by law. We therefore find *Conant* distinguishable, and find that the plain language of this settlement agreement provides an exception to the general rule regarding disclosures to third parties. Under *Lockheed* and *Coker*, the clean record provisions in this agreement should not be read in isolation but read as a part of the organic whole. We therefore examine the four corners of the agreement to determine the parties' intent.

3. The parties did not intend to preclude disclosure of removal-related information to OWCP.

a. The parties permitted third party disclosures made as required by law.

¶19 By including express language that unequivocally permits the Human Resources Officer to truthfully respond regarding those matters required by law, it appears that the parties contemplated possible scenarios that would necessitate disclosure of the removal-related information to third parties.[2] CF, Tab 4, subtab A at 4. Thus, although the general clean record provisions implicitly mandate agency non-disclosure of removal-related information to all third parties, the parties have carved out an exception. The Board analyzed a similar issue in *Felch*, where the parties included clean record provisions, and carved out an exception to a general confidentiality provision for "those who may have a need to know . . . or as otherwise required by law or regulation." *Felch*, 112 M.S.P.R. 145, ¶ 2. When reading the contract as a whole, the Board held that:

> [i]f the agency informed the [Unemployment Insurance Board (UIB)] of the appellant's suspension while the settlement agreement was in effect, then the agency materially breached the settlement agreement, *unless it was required by law or regulation to disclose that information to the UIB.*

Felch, 112 M.S.P.R. 145, ¶ 15 (emphasis added). The exception to the general non-disclosure provision in *Felch* is materially similar to the one in this

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[2] In the CID, the AJ analogizes the parties' intent to permit truthful responses as required by law, to the parties' intent in *Baig v. Department of the Navy*, 66 M.S.P.R. 269, 275, *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table). CID at 4. In *Baig*, the Board found that the parties could not have intended to expunge the appeal or litigation file of the adverse action related information, as it would have left the agency defenseless in future litigation in the event of the appellant's breach. *Baig*, 66 M.S.P.R. at 275-76. Although the alleged agency breach in *Baig* arose from the agency's disclosure of removal-related information to the Equal Employment Opportunity Commission, the Board focused its discussion on whether the agency was required to expunge removal-related documents from its appeal or litigation file. *Id.* at 274-76. In contrast, the primary issue for adjudication here is whether the disclosure itself means that the agency breached the clean record agreement. Thus, we do not rely on *Baig* in our analysis.

settlement agreement. *See* CF, Tab 4, subtab A at 4. In *Felch*, the Board remanded the case to the regional office for the AJ to determine whether the agency had in fact informed the UIB of the rescinded adverse action, and whether the agency was required by law or regulation to disclose the information to the UIB; consequently, the Board did not make a breach determination on review. *Felch*, 112 M.S.P.R. 145, ¶ 16. However, the *Felch* decision strongly suggests that if the parties contemplated and expressly permitted agency disclosure of the settled adverse action to a third party as required by law, then the agency's disclosure under these circumstances would not constitute a breach of the settlement agreement. Based on *Felch* and the parties' inclusion of express language that permits the agency to respond as required by law, we find that the parties intended to permit disclosure of removal-related information as required by law.

b. The agency was required by law to truthfully respond to OWCP's request for information regarding the appellant's performance and conduct issues.

¶20 The issue of an appellant's entitlement to FECA benefits is within the exclusive jurisdiction of OWCP. *Miller v. U.S. Postal Service*, 26 M.S.P.R. 210, 213 (1985). As the designated administrator of FECA, 5 U.S.C. §§ 8101-8193, OWCP seeks truthful information regarding the facts underlying the employee's claim in order to make its benefit determinations. *See Pueschel v. United States*, 297 F.3d 1371, 1372 (Fed. Cir. 2002); 20 C.F.R. § 10.117. As set forth in its mission statement, "OWCP seeks to protect the interests of eligible workers, employers and the Federal Government by ensuring timely and accurate claims adjudication and provision of benefits, by *responsibly administering the funds authorized for this purpose*, and by restoring injured workers to gainful work when permitted by the effects of the injury." http://www.dol.gov/esa/owcp/owcipmiss.htm (emphasis added).

¶21 To responsibly administer benefits under FECA, OWCP applies the law, regulations, and its procedures to the facts as reported or obtained upon

investigation. *See Pueschel*, 297 F.3d at 1372-73. The regulation at 20 C.F.R. § 10.117, provides that:

> (a) An employer who has reason to disagree with any aspect of the claimant's report *shall* submit a statement to OWCP that specifically describes the factual allegation or argument with which it disagrees and provide evidence or argument to support its position. The employer may include supporting documents as witness statements, medical reports or records, or any other relevant information.
>
> (b) . . . If the employer does not submit a written explanation to support the disagreement, OWCP may accept the claimant's report of injury as established.

(emphasis added). Therefore, an employer is required to disclose to OWCP information that challenges an employee's claim of entitlement to FECA benefits. Furthermore, 20 C.F.R. § 10.16 provides that it is a crime to file a false or fraudulent claim or statement in connection with a FECA claim and cites 18 U.S.C. § 1001, 1920, and 1922. *See also* 20 C.F.R. § 22.3. Pursuant to 18 U.S.C. § 1001, anyone in any matter within the jurisdiction of any branch of the federal government who "knowingly and willfully falsifies, conceals, or covers up" a material fact, or makes any materially false statement or representation "shall be fined . . . [and/or] imprisoned." The statute at 18 U.S.C. § 1920 specifically addresses false statements made to obtain FECA benefits and provides that "[w]hoever knowingly and willfully falsifies, conceals, or covers up a material fact," or makes a false statement or representation shall be guilty of perjury and shall be fined and/or imprisoned. Additionally, 18 U.S.C. § 1922 provides that whoever is charged with making the immediate superior's report for FECA compensation, as specified in 5 U.S.C. § 8120, and who "willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report," shall be fined and/or imprisoned. We also note that the language below the signature block of the OWCP Notice of Occupational Disease and Claim for Compensation completed by the appellant broadly warns that concealment of facts that enables an employee to obtain compensation under FECA is subject to civil and criminal

penalties. IAF Tab 1, subtab B at 1. Thus, we find that an employer has a legal obligation to provide OWCP with truthful information that could plausibly support or refute the employee's claim for FECA benefits.

¶22 To read the settlement agreement as prohibiting the agency from disclosing removal-related information to OWCP would contravene the rationale behind these statutory and regulatory provisions; in effect it would prevent OWCP from performing its duties and obligations by impeding OWCP's ability to obtain accurate information that it has deemed necessary to investigate and analyze the appellant's claim for FECA benefits. OWCP was not a party to the settlement agreement, and thus, it would be unreasonable to interpret the contract executed by the agency and the appellant in a manner that would dictate OWCP's obligations. *Cf. Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶¶ 4-6, 15-21 (2003) (the employing agency and Mr. Parker entered a settlement agreement in which the agency agreed to award Mr. Parker the requisite service credit in order to make him eligible to receive a retirement annuity; however, OPM denied Mr. Parker's application; the Board held that a settlement agreement may not impose duties or obligations on a third party without that party's agreement; thus, because OPM was not a party to the settlement agreement, it was under no obligation to find that Mr. Parker had the requisite service credit to be entitled to a retirement annuity), *aff'd*, 91 F. App'x 660 (Fed. Cir. 2004).

¶23 Here, the agency disagreed with the appellant's claimed entitlement to FECA benefits, as set forth in its January 27, 2009 letter to OWCP. CF, Tab 4, subtab C at 10. Consequently, the Human Resources Officer was required under 18 U.S.C. §§ 1920, 1922, 1001; 20 C.F.R. §§ 10.16, 22.3, and 10.117 to provide OWCP with accurate information regarding the appellant's performance and conduct issues in response to OWCP's March 6, 2009 request for such information. *Id.*, subtab D. Because OWCP crafted a broad request for information concerning the appellant's performance and conduct issues, it is unclear what documentation would sufficiently respond to the request. As

OWCP's benefit determinations are "final and conclusive for all purposes and with respect to all questions of law and fact," 5 U.S.C. § 8128(b)(1), and may not be second guessed by a reviewing court or by the Board, it logically follows that OWCP is the best judge to determine the relevancy and sufficiency of the information necessary to make its benefits determinations. Consequently, neither the Board, nor an employing agency, is in a position to narrow OWCP's broad request. Although it is possible that the Human Resources Officer could have provided OWCP with information regarding the appellant's repeated unauthorized absences, failure to follow leave-request procedures, and failure to follow instructions, CF, Tab 4, subtab E at 26-29, without submitting copies of the proposal and removal notices, *Id.*, subtab E, we believe that the disclosures did not exceed the bounds of the settlement agreement based upon OWCP's broad request and the mandates of OWCP-related statutes and regulations. Therefore, we believe that the agency truthfully responded, as required by law, to OWCP's request.

c. The parties did not bargain for non-disclosure to OWCP.

¶24 Another way of looking at the issue is to examine whether the parties "receive[d] that for which they bargained." *Torres*, 110 M.S.P.R. 482, ¶ 11; *see Pagan*, 170 F.3d at 1371-72; *Felch*, 112 M.S.P.R. 145, ¶ 13. By including terms that specifically require the agency to provide potential employers with agreed-upon materials that are exhibits to the settlement agreement, the parties clearly bargained for non-disclosure to potential employers, except as required by law. CF, Tab 4, subtab A at 3-4; *see Conant*, 255 F.3d at 1376; *Pagan*, 170 F.3d at 1371; *Torres*, 110 M.S.P.R. 482, ¶¶ 11-12. However, the parties did not include any express language that places an affirmative obligation on the agency to facilitate and advance any potential claims with OWCP. *Cf. Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1379, 1381-82 (Fed. Cir. 2007) (the agency had an express obligation to facilitate the appellant's disability retirement claim before OPM, and thus, it was one of the benefits bargained for by the appellant in

voluntarily retiring; thus, the essence of the contract was to prevent prejudice to the appellant's disability proceedings); *Conant*, 255 F.3d at 1374, 1376 (the agency violated its agreement to use its "best efforts" to effectuate the appellant's disability retirement application when it took affirmative steps to prejudice the process).

¶25 Furthermore, there is no evidence in the record that at the time of executing the agreement, the agency foresaw that the appellant might file a claim for FECA benefits with OWCP approximately a year and three months later. The parties executed the settlement agreement in August 2007. CF, Tab 4, subtab A. It was only after the appellant received OPM's December 23, 2008 letter approving his disability retirement claim, that he filed his December 30, 2008 claim with OWCP for FECA benefits. *Id.*, subtab B at 1, subtab C at 13. Thus, although the agency's disclosure to OWCP may compromise his claim for FECA benefits, there is no evidence that the parties bargained for non-disclosure to OWCP.

¶26 Moreover, we note that the agency must reimburse OWCP for its FECA expenditures on the appellant's behalf. *See* H.R. Rep. No. 105-836 at 56-57; FECA Q&A; http://www.dol.gov/esa/owcp/dfec/about.htm. OWCP may award FECA benefits that cover lost wages and lost wage-earning capacity or permanent physical disability, and such benefits are paid out of the Employees' Compensation Fund. H.R. Rep. No. 105-826 at 56 (1998); OWCP, Questions and Answers about the FECA (FECA Q&A), http://www.dol.gov/esa/owcp/dfec/reg-library.html. Depending on whether OWCP determines that the injured employee is totally or partially disabled and entitled to FECA benefits, the employee may be entitled to compensation as great as 75 percent of the employee's basic monthly pay. *See* 20 C.F.R. §§ 10.400-10.406. Because the agency ultimately would be responsible for reimbursing OWCP for its FECA expenditures, and because it does not appear that the agency had notice at the time the parties executed the settlement agreement that the appellant might file an OWCP claim, we find that for the Board to construe the agreement as prohibiting the agency

from disclosing removal-related information to OWCP in order to disagree with the appellant's claimed entitlement to benefits would deprive the agency of the benefit of its bargain. To so interpret the agreement would create a potentially open-ended financial liability on the part of the agency and for the benefit of the appellant that, from the plain language of the agreement, was clearly not contemplated.

¶27 Based on the foregoing reasons, we find that the parties did not intend to require non-disclosure of removal-related information to OWCP. We therefore find that the agency did not breach the settlement agreement, and that the AJ properly denied the PFE. *See* CID at 1, 4-5. Thus, we AFFIRM the CID AS MODIFIED.

ORDER

¶28 This is the final decision of the Merit Systems Protection Board in this compliance matter. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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, www.cafc.uscourts.gov. 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.