UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 165

Docket No. DE-0752-08-0356-X-1

Karen S. Engel,

Appellant,

v.

United States Postal Service,

Agency.

August 17, 2010

Karen S. Engel, Clarks, Nebraska, pro se.

Judith Homich Sandoval, Denver, Colorado, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board based on the administrative judge's Recommendation finding the agency in partial noncompliance with the terms of a settlement agreement between the parties. For the reasons set forth below, we FIND the agency is now in compliance with the settlement agreement and therefore DISMISS the petition for enforcement as moot.

BACKGROUND

¶2 On April 28, 2008, the agency removed the appellant from her Postmaster, EAS-15, position. MSPB Docket No. DE-0752-08-0356-I-1, Initial Appeal File

(IAF), Tab 1. The appellant filed an MSPB appeal of this removal on May 27, 2008. *Id.* On September 25, 2008, the parties reached an oral settlement agreement resolving all disputed issues in the appeal. IAF, Compact Disc (digital recording of oral agreement), and IAF, Tabs 13, 14 (memorandum of oral settlement and prior drafts of settlement). On September 25, 2008, the administrative judge issued an initial decision dismissing the appeal as settled, and accepting the settlement agreement into the record for enforcement purposes.[1] IAF, Tab 15. The initial decision became the final decision of the Board on October 30, 2008, when neither party filed a petition for review with the Board.

¶3 The settlement agreement provided in pertinent part:

> 3. The Agency agrees to rescind the Notice of Proposed Removal dated April 25, 2008, and the Letter of Decision dated March 10, 2008[.]
>
> * * *
>
> 5. The Appellant agrees that she will not reapply for employment with the USPS in any capacity for a period of one year. This date is to be calculated from the date of the Decision Letter, or April 28, 2008.

IAF, Compact Disc.[2]

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[1] The administrative judge accepted the settlement agreement into the record after finding that: (1) the Board had jurisdiction over the appeal; (2) the parties understood the terms of the agreement; (3) the parties wanted the agreement entered into the record so that the Board would retain jurisdiction to enforce its terms; and (4) the agreement was lawful on its face. IAF, Tab 15 at 1-2.

[2] We note the parties confused the dates of the two removal-related documents when they settled this case; however, in no party submission has this been the source of any dispute as to the intended meaning of the agreement. The proper date of the Notice of Proposed Removal is March 10, 2008 (not April 25), and the proper date of the Letter of Decision is April 25, 2008 (not March 10 or April 28). IAF, Tab 6, Subtabs 4a and 4c. The administrative judge's Recommendation impliedly recognized the mistake: when quoting from the agreement, she inserted an ellipsis in place of the incorrect dates, and when later recommending agency corrective action, she referred to the correct dates. Recommendation at 3 & 5.

¶4 On October 13, 2009, the appellant filed a petition for enforcement of the agreement, and in a subsequent submission alleged, among other things, that the agency: (1) failed to rescind the Notice of Proposed Removal and Letter of Decision, and (2) failed to select her for several positions with the USPS for which she applied after the agreement was reached. MSPB Docket No. DE-0752-08-0356-C-1, Compliance File (CF), Tabs 1 & 7. After affording the parties the opportunity to submit evidence and argument regarding the compliance issue, the administrative judge found that the agency failed to rebut the appellant's uncontroverted statement that as of November 20, 2009, the proposal and decision letters remained in the appellant's Official Personnel File (OPF). CF, Tab 8 (Recommendation) at 5. Regarding the non-selection issue, the administrative judge found the appellant failed to establish a material breach of the settlement agreement. *Id.* at 6.

¶5 Because the administrative judge found the agency in breach regarding the rescission of documents from the appellant's OPF, she granted the petition for enforcement in part. Accordingly, this matter has been referred to the Board to obtain compliance.

ANALYSIS

¶6 The Board has broad authority to enforce the terms of a settlement agreement entered into the record. *See McClain v. United States Postal Service*, 40 M.S.P.R. 66, 70 (1989); *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981), *as modified*, *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 590-91 (1989). Because a settlement agreement is a contract, the Board will adjudicate an enforcement proceeding relevant to a settlement agreement in accordance with contract law. *See McClain*, 40 M.S.P.R. at 69-70, *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). Under settled contract law, the party alleging breach of a settlement agreement has the burden of proving such breach. *See Reniere v. Department of Agriculture*, 62

M.S.P.R. 648, 651 (1994). However, under case law and the Board's regulations, the agency also has a heavy burden of production regarding compliance. *Id.*; *Golsby v. Department of Homeland Security*, 100 M.S.P.R. 25, ¶ 7 (2005); 5 C.F.R. § 1201.183(a)(1)(i)-(iii).

The agency is now in compliance with the rescission provision of the settlement agreement.

¶7 Consistent with Board law, in her compliance recommendation the administrative judge found that the provision in the settlement agreement requiring the rescission of the proposal and decision letters constituted an implied agreement to expunge the documents from the appellant's Official Personnel File (OPF). Recommendation at 5; *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 8 (2009). Because the appellant claimed that the documents were still in her OPF, and the agency had not rebutted that assertion with an affidavit or any other evidence, the administrative judge found the agency in non-compliance with the settlement agreement. CF, Tab 7 at 2, Recommendation at 5. The administrative judge recommended that the agency submit an affidavit from a human resources officer or other appropriate agency official showing that the appellant's OPF no longer contains the proposal letter and decision letter. Recommendation at 5.

¶8 Before the Board, the agency submitted a declaration made under penalty of perjury from a human resources officer explaining that "all references to the March 10, 2008 Proposal Letter and April 25, 2008 Decision have been deleted from [the appellant's] personnel records." MSPB Docket No. DE-0752-08-0356-X-1, Compliance Referral File (CRF), Tab 3 at 4-5. The appellant does not rebut

this declaration.[3] CRF, Tab 4. The Board has held that unrebutted affidavits are sufficient to establish the matters asserted. *Hardin v. Treasury*, 95 M.S.P.R. 416, ¶ 9 (2004); *Shaefer v. U.S. Postal Service*, 42 M.S.P.R. 592, 595 (1989). Accordingly, the agency is in compliance with the rescission provision of the settlement agreement.[4]

The appellant has failed to show a material breach of the agreement regarding the agency's failure to select her for a specific position with the agency.

¶9 Before the administrative judge, the appellant alleged that the agency was not in material compliance with the settlement agreement because it failed to select her for several positions. CF, Tab 7. Subsequent to filing her petition for enforcement, she was appointed to a position with the agency, but she complained that she desired a position closer to her residence, most particularly, a position in Polk, Nebraska. *Id.*

¶10 In the Recommendation, the administrative judge found that the appellant failed to show that any specific term of the settlement agreement required the agency to interview or reemploy her at a location closer to her residence. Recommendation at 6. Further, the administrative judge found that the agency

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[3] In response to the agency's submission, the appellant asserts she is unable to view her electronic OPF because the file is identified as "Restricted Information." CRF, Tab 4 at 2. To the extent the appellant is asserting that this constitutes noncompliance by the agency, we note that the settlement agreement does not address the issue of access to the appellant's electronic OPF. In a proceeding to enforce a settlement agreement, a party is entitled to no more than the terms of the agreement. *See, e.g., Anthony v. Department of Justice*, 76 M.S.P.R. 45, 53 (1997) (holding agreement to cancel removal action did not require agency also to provide appellant with copy of the SF-50 documenting the cancellation, and agreement to pay money to appellant did not require agency also to send the payment by certified mail). *See also Godwin v. Department of Defense*, 228 F.3d 1332, 1335 (Fed. Cir. 2000) (holding agreement to remove negative references from OPF did not require agency also to retain positive references in OPF).

[4] If the appellant later obtains access to her e-OPF and objects to its contents because she believes it violates the terms of the settlement agreement, then she may then file a new petition for enforcement with the Denver Field Office based on such new evidence.

gave a reasoned justification for its decision not to interview the appellant for the Polk position. *Id.* Before the Board, the appellant filed a statement in disagreement with the administrative judge's findings on this issue and essentially repeated several of her previous arguments. CRF, Tab 4.

¶11 We agree with the administrative judge that the appellant failed to establish the agency violated any provision of the settlement agreement when it did not select her for her most preferred position. Significantly, the settlement agreement did not contain any provision requiring the agency to select her for any position, much less a particular position of her choice. Because of this fact, we need not reach the parties' factual dispute over the agency's justifications for not selecting the appellant for the Polk position. Without the need for further analysis, we affirm the administrative judge's finding of no breach on this issue.

ORDER

¶12 We DISMISS the petition for enforcement as moot. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.183(b) (5 C.F.R. § 1201.183(b)).

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:

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