

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

2010 MSPB 201

Docket No. DC-0752-08-0733-C-1

**Reginald E. Vance,
Appellant,**

v.

**Department of the Interior,
Agency.**

September 30, 2010

David A. Branch, Esquire, Washington, D.C., for the appellant.

Kerry E. Creighton, 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 petitions for review of a compliance initial decision denying his petition for enforcement. For the reasons discussed below, we GRANT the appellant's petition, VACATE the November 20, 2008 initial decision dismissing the appeal as settled, and REMAND the appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency proposed the appellant's removal on 22 specifications of misuse of a government-issued charge card. *Vance v. Department of the Interior*,

MSPB Docket No. DC-0752-08-0733-I-1 (I-1 File), Tab 4, Subtab 4e at 2-5. The deciding official found that the charge was supported by preponderant evidence and that the penalty of removal was both appropriate and promoted the efficiency of the service. *Id.*, Subtab 4c at 1. The appellant appealed and the parties subsequently executed an agreement settling the appeal. I-1 File, Tabs 1, 10 at 4-7. The agency agreed to rescind, expunge, and remove the proposal notice, decision, and Standard Form 50 (SF-50) reflecting the appellant's removal from the appellant's Official Personnel File (OPF) and from all of the agency's electronic and paper files. I-1 File, Tab 10 at 5. The agency also agreed to issue a new SF-50 indicating that the appellant had resigned. *Id.* In communications concerning the appellant's employment with the agency, the agency agreed to maintain that he resigned voluntarily and to provide him a neutral reference. *Id.* The administrative judge found that the Board had jurisdiction over the appeal and that the settlement agreement was lawful on its face. I-1 File, Tab 11 at 1. The administrative judge further found that the parties had entered into the agreement freely, understood its terms, and intended to have the agreement entered into the record for enforcement by the Board. *Id.* Accordingly, he accepted the agreement into the record and dismissed the appeal as settled. *Id.* at 1-2.

¶3 The appellant filed a petition for enforcement (PFE) arguing that the agency had breached the settlement agreement by failing to expunge and remove documents from its files related to his removal. Compliance File (CF), Tab 1 at 3. He further contended that, "beginning in October 2008 and continuing to the present," the agency breached the agreement by publishing a report on its Inspector General's website that includes information about the appellant's termination, and specific details of the agency's unsubstantiated charges against him. *Id.*, *see* CF, Tab 3, Exhibit B, Office of the Inspector General, U.S. Department of the Interior, Semiannual Report to the Congress at 32 (October

2008); *see also* <http://www.doioig.gov/images/stories/reports/pdf/Semiannual-OCT2008SAR.pdf>.

¶4 The administrative judge denied the appellant's petition for enforcement, finding that the appellant failed to prove that the agency breached the settlement agreement. CF, Tab 10, Compliance Initial Decision (CID) at 7. The administrative judge found that the agency had purged the appellant's OPF of all removal-related documents in compliance with the parties' agreement. CID at 4-5. The administrative judge also found that the Inspector General's report did not breach the settlement agreement because the report was published prior to the date of the parties' agreement. CID at 6. Moreover, the administrative judge determined that, because the Office of the Inspector General was required by law to set forth the results of its investigations in its semiannual report to Congress, and "the parties contemplated and expressly permitted disclosure of the settled adverse action to a third party as required by law," no breach occurred. *Id.*

¶5 In his petition for review, the appellant reasserts his claim that the agency has failed to "state in all communications concerning his employment that he voluntarily resigned." PFR File, Tab 1, PFR at 4. He argues that the agency failed to cite any law or regulation requiring the Inspector General to report his removal. *Id.*, PFR at 5. The appellant further argues that although "[t]he settlement agreement permitted disclosure of the **settled adverse action** if required by law, it did not permit disclosure of the false statement" that he was removed. *Id.* at 5-6. The agency responds that the appellant's petition for review fails to meet the Board's criteria for review. PFR File, Tab 3 at 4.

ANALYSIS

¶6 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. *Torres v. Department of Homeland Security*, [110 M.S.P.R. 482](#), ¶ 8 (2009); *Haefele v. Department of the Air Force*, [108 M.S.P.R. 630](#), ¶ 7 (2008). 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); *Caston v. Department of the Interior*, [108 M.S.P.R. 190](#), ¶ 17 (2008). Where, as here, an appellant files a petition for enforcement of a settlement agreement over which the Board has enforcement authority, the agency must produce relevant, material, and credible evidence of its compliance with the agreement. *Eagleheart v. U.S. Postal Service*, [110 M.S.P.R. 642](#), ¶ 9 (2009); CF, Tab 2 at 1-2. Still, the ultimate burden of proof is on the appellant, as the party seeking enforcement, to show that an agency failed to fulfill the terms of an agreement. *Eagleheart*, [110 M.S.P.R. 642](#), ¶ 9; *Perkins v. Department of Veterans Affairs*, [106 M.S.P.R. 425](#), ¶ 4 (2007), *aff'd*, 273 F. App'x 957 (Fed. Cir. 2008); CF, Tab 2 at 1. It is not enough, however, to show that a party has acted in a manner that is inconsistent with a settlement agreement term; rather to prevail a party “must show material non-compliance” with a term of the contract. *Lutz v. U.S. Postal Service*, [485 F.3d 1377](#), 1381 (Fed. Cir. 2007). 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); *Caston*, [108 M.S.P.R. 190](#), ¶ 17. Further, when a petition for enforcement unmistakably challenges the validity of the settlement agreement, the Board will treat it as a petition for review. *Miller v. Department of the Army*, 112 M.S.P.R. 689, ¶ 12 (2009).

¶7 For the following reasons, we GRANT the appellant’s petition for review. Because the agency’s Office of the Inspector General had already published the details of the appellant’s removal at the time the parties executed their settlement agreement, the goal of that agreement, a clean employment record for the appellant, was not possible. As the following discussion indicates, the settlement agreement must therefore be set aside. Thus, we REMAND the appeal for further adjudication consistent with this Opinion and Order.

The goal of the parties' settlement agreement was a clean record.

¶8 The United States Court of Appeals for the Federal Circuit and the Board have construed a settlement agreement that, like here, calls for rescission of a removal and issuance of a SF-50 showing resignation, to constitute a promise by the agency to “eras[e] ‘removal’ and all reasons for such a removal from [the employee’s] professional record with the agency” – in other words, provide the employee with a “clean record.” *See, e.g., Principe v. U.S. Postal Service*, [100 M.S.P.R. 66](#), ¶ 6 (2005) (citing *Conant v. Office of Personnel Management*, [255 F.3d 1371](#), 1374, 1376 (Fed. Cir. 2001)). Thus, the Board has found that such a “clean record” settlement agreement not only required the expungement of removal-related documents from the employee’s personnel file but also “prohibited the agency from disclosing removal-related documents to third parties.” *See id.*, ¶ 9 (citing *Pagan v. Department of Veterans Affairs*, [170 F.3d 1368](#), 1371-72 (Fed. Cir. 1999)); *see also Allen v. Department of Veterans Affairs*, [112 M.S.P.R. 659](#), ¶ 8 (2009) *Torres*, [110 M.S.P.R. 482](#), ¶¶ 10-11. The Board’s key concern in such cases is to “see to it that the parties receive that for which they bargained.” *Torres*, [110 M.S.P.R. 482](#), ¶ 11 (citing *Pagan*, 170 F.3d at 1372).

¶9 In this matter, it is obvious that the essence of the parties’ November 17, 2008 settlement agreement was the appellant’s agreement to resign his position in exchange for a clean record as defined above. *See* I-1 File, Tab 10 at 4-7. The administrative judge found that the agency had appropriately purged the appellant’s Official Personnel File “of all removal-related documents in compliance with the settlement agreement.” CID at 4-5. We agree with the administrative judge that the declaration the agency filed in response to the appellant’s petition for enforcement established that the agency purged the appellant’s Official Personnel File. CID at 4-5; *see* CF, Tab 3, Exhibit E. This alone, however, is not sufficient to provide an employee with a clean record. *See, e.g., Principe*, [100 M.S.P.R. 66](#), ¶ 9 (clean record settlement agreement also

prohibited the agency from disclosing removal-related documents to third parties). First of all, the text of the agreement requires that: “In communications concerning Appellant’s employment with the Agency, the Agency will maintain that Appellant resigned voluntarily, effective July 25, 2008, and provide a neutral reference.” I-1 File, Tab 10 at 5. Similarly, the Board has held that a “clean record” settlement like the one involved here requires that “the agency’s communications with third parties reflect what the replacement SF-50 shows, i.e., that [the employee] resigned, and that it not disclose the circumstances of the removal.” *Torres*, [110 M.S.P.R. 482](#), ¶ 12. Thus, under the parties’ settlement agreement, the agency “was required to act, in matters relating to the appellant, as if he had a ‘clean record.’” *Id.* (citing *Pagan*, 170 F.3d at 1371). However, as noted above, at the time that the parties entered into the settlement agreement at issue, the agency’s Office of Inspector General had already published the details of the appellant’s removal. *See* CF, Tab 3, Exhibit B.

¶10 The Inspector General Act requires the Inspector General of each covered agency to furnish the head of that agency with semiannual reports of its activities, and that individual must transmit the report to Congress. 5 U.S.C. Appendix 3, § 5. Pursuant to that authority, the agency’s Inspector General released a Semiannual Report to Congress on October 30, 2008. *See* CF, Tab 3, Exhibit B. That report included the details of the appellant’s removal. *Id.* at 32. However, the Inspector General’s report predated the parties’ November 17, 2008 settlement agreement. I-1 File, Tab 10. Thus, we agree with the administrative judge that the publication of the Inspector General’s semiannual report did not violate the parties’ subsequently executed settlement agreement. CID at 6.

¶11 Moreover, regardless of whether the Inspector General was required by law to publish the information in question, once the Office of the Inspector General decided to publish it in its semiannual report, the agency could not compel the Inspector General to stop its publication or to demand that it be corrected to reflect what really happened. The report of the Senate Governmental Affairs

Committee on the Inspector General Act notes that the head of the agency “may not generally prevent the [Inspector General’s] report from going to Congress or alter or delete the report.” *See* S. Rep. No. 95-1071, 1978 USCCAN 2677. Further, to the extent that the appellant argues that the agency’s continued publication of the Inspector General’s report on the internet following the execution of the settlement agreement is a continuing breach of the settlement agreement, the same point would apply. The independence of the Office of the Inspector General with regard to the statutory requirement to report its activities to Congress precludes the head of the agency from changing the content of that report. *See id.* Although we see no reason why the Inspector General would continue to publicly report incorrect private information about the appellant’s employment with the agency, given the independence accorded to Inspector Generals, we see no authority for the Board or the agency to order that the information either be corrected or excised from the report. This is not to say that the agency officials responsible for negotiating the settlement agreement could not have asked the Inspector General to correct the report to reflect that the appellant was not removed from his position. However, the record does not indicate that they did so.

The settlement agreement must be set aside.

¶12 It is well-settled that a settlement agreement is a contract between the parties that may be set aside or voided only on the basis of certain limited grounds, including, inter alia, fraud or a mutual mistake of material fact under which both parties acted. *See Harris v. Department of Veterans Affairs*, [142 F.3d 1463](#), 1468 (Fed. Cir. 1998); *Hamilton v. Department of Veterans Affairs*, [92 M.S.P.R. 467](#), ¶ 7 (2002). A mutual mistake of fact is a shared, mistaken belief of the parties regarding a material assumption of fact underlying their agreement. *Brown v. Department of the Army*, [108 M.S.P.R. 90](#), ¶ 5 n.1 (2008); *Garcia v. Department of the Air Force*, [83 M.S.P.R. 277](#), ¶ 10 (1999) (citing *As'Salaam v.*

U.S. Postal Service, [65 M.S.P.R. 417](#), 421 (1994), *appeal dismissed*, 47 F.3d 1184 (Fed. Cir. 1995) (Table)).

¶13 Further, implicit in any contract is the requirement that the parties fulfill their respective obligations in good faith, and acting in bad faith may constitute breach. *Adams v. U.S. Postal Service*, [72 M.S.P.R. 6](#), 11 (1996); *Kuykendall v. Department of Veterans Affairs*, [68 M.S.P.R. 314](#), 323 (1995). The Board has defined “bad faith” as “the conscious doing of a wrong because of dishonest purpose or moral obliquity.” *Adams*, 72 M.S.P.R. at 11.

¶14 As described above, the parties’ settlement agreement was premised on the basic assumption that, by taking the steps outlined in the agreement, the appellant would have a clean employment record. I-1 File, Tab 10. The Inspector General’s semiannual report, which included information about the appellant’s removal, made that goal unachievable, unless the report was either altered or redacted. Thus, the parties may have executed their settlement agreement under a mutual mistake of fact, i.e., that it was possible at that time the parties executed their agreement to give the appellant a clean employment record. *Cf. Woodjones v. Department of the Army*, [89 M.S.P.R. 196](#), ¶ 12 (2001) (a shared misunderstanding about whether a decision on that appellant’s disability retirement application had been made, and the time to challenge it had passed, would be a mutual mistake of fact).

¶15 On the other hand, if the individuals who negotiated the agreement on behalf of the agency knew or had reason to know that the Inspector General would publish, or already had published, the details of the appellant’s removal, then, at the very least, the agency would have negotiated the agreement in bad faith, keeping to itself the knowledge that the appellant could never have the benefit of the bargain he made. *See Adams*, 72 M.S.P.R. at 11-12 (agency may have acted in bad faith if it knew or had reason to know at the time it entered into settlement that the light-duty assignment it offered was not viable). However, there is nothing in the record to indicate whether, at the time the parties executed

their settlement agreement, either one knew or had reason to know that the Inspector General had already published the details of the appellant's removal, putting the goal of their agreement out of reach, absent some action by the Inspector General's office to either rescind or redact its report.

¶16 Nevertheless, under either alternative, mutual mistake or bad faith on the part of the agency in negotiating the settlement agreement, the settlement agreement must be set aside. *See, e.g., Farrell v. Department of the Interior*, [86 M.S.P.R. 384](#), ¶ 8 (2000) (“A settlement agreement must be set aside if it is tainted with invalidity either by fraud practiced upon a party or by a mutual mistake under which both parties acted.”). Ordinarily, a finding that a settlement agreement must be set aside results in the reinstatement of the underlying appeal. *Gullette v. U.S. Postal Service*, [70 M.S.P.R. 569](#), 577 (1996) (citing *Stipp v. Department of the Army*, [61 M.S.P.R. 415](#), 420 (1994)). However, where a settlement agreement must be set aside because of the failure of an essential part of that agreement, but the appellant has obtained other benefits pursuant to that agreement, the Board has found it appropriate to offer the appellant a choice between reinstating his appeal or accepting the settlement agreement as is. *See Gullette*, 70 M.S.P.R. at 576-77.

¶17 Accordingly, remand is necessary. Upon remand, the administrative judge shall inquire whether the appellant wishes to reinstate his removal appeal or accept the parties' settlement agreement notwithstanding the Inspector General's publication of the details of his rescinded removal. Alternatively, the parties may choose to negotiate a new settlement agreement. The administrative judge shall then issue a new initial decision.

ORDER

¶18 The appellant's petition for review is GRANTED. The November 20, 2008 initial decision dismissing the appeal as settled is VACATED and the appeal is

REMANDED to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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