UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 45

Docket No. CH-0752-08-0412-C-1

John Doe,

Appellant,

v.

Department of the Army,

Agency.

March 25, 2011

John Doe, pro se.

Jennifer M. Payton, Louisville, Kentucky, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of a compliance initial decision that denied his petition for enforcement. For the reasons discussed below, we GRANT his petition under 5 C.F.R. ¶ 1201.115, VACATE the compliance initial decision, and REMAND the case for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from his position based on serious charges of misconduct. Initial Appeal File (IAF), Tab 4 at 20-24. On appeal, the

parties entered into a settlement agreement. IAF, Tab 5 at 1-2. The agreement provides, in relevant part:

> 1. The Army agrees to allow [Doe] to resign effective February 5, 2008.
>
> 2. The army agrees to amend [Doe's] official personnel records to reflect a resignation, rather than a removal effective February 5, 2008.
>
> 3. The Army agrees to delete all mention of [Doe's] removal and the basis therefore from [Doe's] official personnel records.
>
> 4. Employment inquiries will be referred to the . . . Civilian Personnel Advisory Center [CPAC], that will limit its response to date, position, and length of employment.

Id. By initial decision dated April 22, 2008, the administrative judge dismissed the initial appeal as settled, finding that the agreement was lawful on its face, that it was entered into freely by the parties, and that it was a full and complete settlement of all the issues in the appeal. IAF, Tab 6 at 1-2. The administrative judge accepted the settlement agreement into the record for enforcement purposes. *Id.* at 2.

¶3 The appellant filed a petition for enforcement approximately 2 years later in which he asserted that the agency had breached the settlement agreement. Compliance File (CF), Tab 1. Specifically, he claimed that the agency violated the settlement agreement when, in response to a question from an agency criminal investigator, his former supervisor stated that the appellant had been terminated from employment. *Id.* at 3. Although it is not entirely clear from the record below, the agency apparently conducted an investigation on referral from the U.S. Office of Special Counsel (OSC). *See* CF, Tab 1 at 3, Tab 3 at 4-5. The former supervisor's written answer, which was provided to an investigator from the employing agency's Criminal Investigation Command (CID), is attached to the petition for enforcement, and provides, in relevant part:

> Q: Why do you believe this [travel fraud allegation] has been reported?

> A: Retaliation by [Doe]. [Doe] was terminated in February 2008 for falsifying a letter of recommendation by his supervisor to obtain a USCG Master License.

CF, Tab 1 at 9-10. The appellant indicates in his petition for enforcement that the agency provided his former supervisor's statement to OSC, and expresses his concern that when the OSC investigation is completed, it "will be made public on the OSC website which can be searched and [the supervisor's] statements will be there." *Id.* at 3. The appellant did not specify in his petition for enforcement or in any subsequent pleading below what relief he was seeking, and he did not request a hearing.

¶4 The agency filed a response in opposition of the appellant's petition for enforcement, asserting that it satisfied its obligations under the settlement agreement. CF, Tab 3 at 4. The agency attached a sworn statement from a Senior Human Resources Specialist, attesting that the agency had amended the appellant's official personnel records to reflect a resignation rather than a removal effective February 5, 2008, that it deleted all mentions of the appellant's removal and the basis therefore from his official records, and to her knowledge, "all employment inquiries regarding [the appellant] have been referred to the CPAC that limits its response to date, position and length of employment." *Id.*, Exhibit B. With respect to the appellant's former supervisor, the agency explained in its response that he had been interviewed by an "Army CID Special Agent" concerning one of his other employees "who had prepared dummy receipts for lodging," that the supervisor was "unrepresented and under oath," that he was not representing the agency during his interview, and that he believed "the interview was being conducted in confidence and [he] had no idea that another agency would broadcast it over the internet." CF, Tab 3 at 4-5. The agency argued that, "if [the appellant] has a grievance against anyone for violating his privacy, it would be the Special Counsel, not the [agency]," and that

"[the former supervisor's] utterance was in violation of no term of the Settlement Agreement." *Id.* at 5.

¶5 The administrative judge denied the petition for enforcement based on the parties' written submissions, finding that the agency had demonstrated compliance with the settlement agreement. CF, Tab 8, Compliance Initial Decision (CID) at 3. With respect to the appellant's contentions concerning his former supervisor, the administrative judge stated that the settlement agreement "details the nature of the separation, the disposition of records, and employment inquiries. Nothing in the settlement agreement covers the content of disclosures to criminal investigators." CID at 3.

¶6 On review, the appellant reiterates the arguments he made below and requests that "[t]he settlement be restructured in clearer language to prevent this action from repeating." Petition for Review (PFR) File, Tab 1 at 4.

ANALYSIS

¶7 The Board will enforce a settlement agreement that has been entered into the record in the same manner as a final Board decision or order. *Young v. U.S. Postal Service*, 113 M.S.P.R. 609, ¶ 10 (2010); *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, as such, will be enforced in accord with contract law. *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 alleges noncompliance with a settlement agreement, the agency must produce relevant, material, and credible evidence of its compliance with the agreement, or show that there was good cause for noncompliance. *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 7 (2009); *Eagleheart v. U.S. Postal Service*, 110 M.S.P.R. 642, ¶ 9 (2009). The ultimate burden, however, remains with the appellant to prove breach by a preponderance of the evidence. *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 (Fed Cir. 2008).

¶8 Both the Federal Circuit and the Board have construed settlement agreements that call for rescission of a removal and issuance of a Standard Form (SF) 50 reflecting a resignation to also contain implied provisions for expungement of removal-related documents from the employee's Official Personnel File and non-disclosure to third parties - in other words, a "clean record" settlement. In *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368 (Fed. Cir. 1999), the court addressed a settlement providing for a "clean record" and for confidentiality as to the terms of the agreement. The court held in that case that a clean record means one's personnel record is "returned to its former state." *Id.* at 1371; *see Torres*, 110 M.S.P.R. 482, ¶ 10 (citing *Pagan*); *see also Principe v. U.S. Postal Service*, 100 M.S.P.R. 66, ¶¶ 6-9 (2005). In *Conant v. Office of Personnel Management*, 255 F.3d 1371 (Fed. Cir. 2001), the court considered an agreement that did not include a confidentiality clause but provided for a resignation in lieu of removal and for support in obtaining disability retirement. The court held that by agreeing to replace the SF-50 reflecting the employee's removal with one showing her resignation, the employer "promised that the only legal document recording the end of [her] employment with the agency would henceforth be the SF-50 stating she resigned for personal reasons." *Id.* at 1376.

¶9 When an agency has contractually agreed to provide an employee with a clean record, both the Federal Circuit and the Board have also 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; *Allen*, 112 M.S.P.R. 659, ¶ 15; *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 reflecting a resignation 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.

¶10 In the context of a clean record settlement agreement, the Board has interpreted *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." *Allen*, 112 M.S.P.R. 659, ¶ 15.[1] Furthermore, the Board has found that the appellant need not show actual harm to establish that the agency's disclosure of such information constituted a material breach. *See Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 17 (2009); *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶ 17 (2005).[2] Rather, a breach of a settlement agreement is material when it relates to a matter of vital importance or goes to the essence of the contract. *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381 (Fed. Cir. 2007); *Torres*, 110 M.S.P.R. 482, ¶ 9. Although "the Federal Circuit has recognized the difficult position an agency may be placed in by entering into a clean record or nondisclosure agreement, the Court has also made clear that it will not allow an agency that has willingly entered into such an agreement to breach it without being held responsible." *Poett*, 98 M.S.P.R. 628, ¶ 19 (citing *Thomas v.*

---

[1] As we observed in *Allen*, any reservations that we might entertain about *Conant* are beside the point since we are bound by our reviewing court's decisions. *Allen*, 112 M.S.P.R. 659, ¶ 15.

[2] Although *Fomby-Denson v. Department of the Army*, 247 F.3d 1366 (Fed. Cir. 2001) and *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269 (2001) provide for limited exceptions to the rule of nondisclosure, these exceptions have been narrowly construed, *see Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶¶ 13-16 (2009); *Markey v. Department of Transportation*, 110 M.S.P.R. 196, ¶ 10 (2008).

Department of Housing & Urban Development, 124 F.3d 1439, 1442 (Fed. Cir. 1997)). As noted by the Board in *Principe*, agencies are in a better position to understand the potential problems "clean record" agreements may create and to ensure that employees understand them and that agreements adequately address them. *Principe*, 100 M.S.P.R. 66, ¶ 8.

¶11 In this appeal, the settlement provided for cancellation of the appellant's removal action and effectively a clean record, i.e., replacement of the official personnel records showing his removal with records showing that he resigned and expungement of all mention of the removal in his personnel records. IAF, Tab 5 at 1-2. The appellant does not appear to dispute the agency's evidence that it amended the appellant's official personnel records to reflect a resignation, that it deleted all mentions of his removal and the basis therefore from his official records, and that all employment inquiries regarding the appellant have been referred to its CPAC, which has limited its response to the appellant's date, position and length of employment. CF, Tab 3 at 4; *id.* Ex. B. The enforcement decision at issue here, however, contains no analysis or discussion of the foregoing legal precedent as it applies to the question of whether the disclosure of information regarding the rescinded adverse action constituted a material breach of the implied provision of the settlement agreement that precludes the agency's disclosure of information to third parties regarding the rescinded adverse action. This was error. An enforcement decision, just like any other initial decision, must disclose the evidentiary basis for the factual findings, set forth those findings clearly, and explain how credibility issues were resolved. *Fredendall v. Veterans Administration*, 38 M.S.P.R. 366, 370 (1988); *see Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

ORDER

¶12 Accordingly, we remand this case to the Central Regional Office for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall address the issues discussed above and allow the parties to submit further evidence and argument as necessary to decide the material issues raised by the appellant's petition for enforcement.

FOR THE BOARD:

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