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

**2012 MSPB 2**

Docket No. AT-0752-09-0177-X-1

**Joan M. Young,**

**Appellant,**

**v.**

**United States Postal Service,**

**Agency.**

January 11, 2012

Joan M. Young, Columbia, Tennessee, pro se.

Dana E. Morris, Esquire, Memphis, Tennessee, for the agency.

**BEFORE**

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

## OPINION AND ORDER

¶1 This matter is before the Board based on the administrative judge's Recommendation finding the agency in noncompliance with the parties' settlement agreement. We AFFIRM the administrative judge's Recommendation finding the agency in noncompliance, and ORDER specific performance of the settlement agreement as explained below.[1]

[1] In his Recommendation, the administrative judge required the agency "to reimburse the appellant for the costs she incurred with respect to [her doctor's] examination." The Board, however, lacks the authority to order the agency to pay such costs or "damages" for a breach of a settlement agreement, and we VACATE this part of the administrative

## BACKGROUND

¶2 On December 30, 2008, the appellant filed a Board appeal challenging her placement on enforced leave by the agency from the position of Rural Carrier. *Young v. U.S. Postal Service*, MSPB Docket No. AT-0752-09-0177-I-1, Initial Appeal File (IAF), Tab 1. The parties reached a written settlement agreement on March 31, 2009. IAF, Tab 26; Compliance File (CF), Tab 5 at 25. The administrative judge entered the agreement into the record for purposes of enforcement and dismissed the appeal on April 2, 2009. IAF, Tab 27.

¶3 The appellant filed this petition for enforcement on May 14, 2009. CF, Tab 1. The administrative judge denied the appellant's petition for enforcement on September 11, 2009. CF, Tab 35. The appellant petitioned for review, and on May 21, 2010, we vacated the initial decision and remanded the appeal to the Atlanta Regional Office for further adjudication. *Young v. U.S. Postal Service*, 110 M.S.P.R. 609, ¶ 1 (2010).

¶4 The administrative judge conducted a hearing on December 2, 2010. Remand File (RF), Vol. 4, Hearing Tapes (HT) 1-2. On February 2, 2011, the administrative judge issued a Recommendation finding that the agency had materially breached the settlement agreement, granting the petition for enforcement, and recommending that the Board order specific performance of the settlement agreement. RF, Tab 60 at 17. Accordingly, this matter has been referred to the Board to obtain compliance. The agency has filed an opposition to

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judge's Recommendation. In the absence of express language in the settlement agreement requiring the agency to reimburse the appellant for the costs of the psychiatric exam, or an express waiver of sovereign immunity, the Board lacks the authority to award damages for breach of a settlement agreement. *See Foreman v. Department of the Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001); *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 18 n.3 (2009); *Principe v. U.S. Postal Service*, 101 M.S.P.R. 626, ¶ 3 (2006); *cf. Johnston v. Department of the Treasury*, 100 M.S.P.R. 196, ¶ 8 n.2 (2005) (Board sanctions limited); *Cunningham v. Department of Veterans Affairs*, 91 M.S.P.R. 523, ¶ 3 (2002) (same).

the administrative judge's Recommendation. Compliance Referral File (CRF), Tab 4.

## ANALYSIS

¶5 The settlement agreement provided, in pertinent part, that the agency would reinstate the appellant to her former Rural Carrier position in Columbia, Tennessee, if (1) she submitted to "an independent medical examination," by a Board-certified, forensic psychiatrist, and (2) that psychiatrist determined that she was medically capable of returning to duty in her former position. IAF, Tab 26 at 1-2. The agreement required the appellant to "provide releases for any medical documentation from prior medical examiners for the same condition at issue in this case from April 5, 2006, to date for analysis and consideration by the independent medical examiner." *Id.* at 1-2. The agreement also specified that the appellant could choose between (a) selecting the examining psychiatrist without consultation with the agency, in which case she would bear the cost of the examination, and (b) jointly selecting the psychiatrist with the agency, in which case the agency would pay for the examination. *Id.*

¶6 The appellant chose to select a psychiatrist without consultation with the agency, and submitted to the psychiatric fitness for duty examination on April 15, 2009. CF, Tab 1 at 11. Also on April 15, 2009, the agency's Associate Area Medical Director faxed to the examining psychiatrist a letter, dated April 13, 2009, that identified specific "conditions" for which the agency believed the appellant "has been treated or evaluated;" this letter further asked the psychiatrist to provide his "forensic analysis on" those conditions. RF, Tab 42.[2] Attached to

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[2] *See* RF, Tab 42 at 5 (agency "Statement of Facts"); at 9 (identifying Agency Exhibit 4 as "Information Supplied to [Examining Psychiatrist]" by agency on "4/15/09"); and at 21 (exhibit of April 13, 2009 letter). *See also* RF, Tab 34 at 16 (the appellant's submission of same April 13, 2009 letter).

the agency's letter were call logs and correspondence related to the appellant's worker's compensation claim and medical reports regarding the appellant. *Id.*

¶7 By letter dated April 27, 2009, the psychiatrist concluded that the appellant suffered from "persisting psychiatric difficulties that would prohibit [her] from resuming [her] earlier employment." CF, Tab 1 at 12, Tab 35 at 7. Subsequently, on May 11, 2009, the appellant filed a petition for enforcement, alleging that the agency's April 15, 2009 fax interfered with the independence of the medical examination and thereby deprived her of a material benefit of her bargain. CF, Tab 1 at 2. The psychiatrist acknowledged in a June 3, 2009 letter to the Kentucky Board of Medical Licensure that "a lengthy fax came to my office containing some records pertaining to Mrs. Young," but stated that the records "arrived while the examination was in progress; therefore, I did not have the opportunity to read them." CRF, Tab 4 at 21.

¶8 In granting the appellant's petition for enforcement, the administrative judge's Recommendation interpreted the settlement agreement essentially as (1) allowing the agency to communicate with examining psychiatrist to the extent necessary to provide the appellant's job requirements and the standards she must meet to be deemed medically capable of returning to her former position, but (2) otherwise precluding the agency from providing the examining psychiatrist with agency records regarding the appellant. CRF, Tab 1 at 17. The administrative judge also found that at a minimum, on April 15, 2009, the agency faxed the letter to the psychiatrist that included call logs and correspondence related to the appellant's workers' compensation claim and medical reports. *Id.* at 16 n.9. Thus, the administrative judge found the agency in breach of the settlement agreement. *Id.* Moreover, the administrative judge found the breach went to the essence of the agreement and was therefore material. *Id.*

¶9 As an initial matter, the agency concedes that "an ***independent*** medical examination" was of "vital importance and went to the essence of the contract." CRF, Tab 4 at 13-14 (emphasis in original). We agree, and therefore adopt the

administrative judge's reasoning that if the agency interfered with the independent nature of the medical examination, then it materially breached the settlement agreement. However, the agency disputes that: (1) The appellant's interpretation of the phrase "independent medical examination," described below, is valid, *id.* at 8-9; 11-12; and (2) the agency interfered with the independent nature of that medical examination. *Id.* at 14-17.

The "independent" nature of the medical examination required by the settlement agreement precluded the agency from providing the questioned agency records regarding the appellant to the examining psychiatrist.

¶10 In our May 2010 remand order, we found that the settlement agreement's reference to "independent" was ambiguous and that it was thus necessary for the parties to present extrinsic evidence of their understanding of the settlement agreement. *Young*, 110 M.S.P.R. 609, ¶¶ 12, 19. As directed by the Board, the administrative judge conducted a hearing on December 2, 2010, to determine the parties' intended meaning of the term "independent medical examination" at the time they signed the settlement agreement. RF, Vol. 4, Hearing Tapes (HT) 1-2.

¶11 The appellant and her husband, who had participated in settlement negotiations, both testified that at the time they signed the agreement, they never considered the possibility that the agreement could be interpreted to allow the agency to release medical documents regarding the appellant to the examining psychiatrist. CRF, Tab 1 at 3-4, 6-7. Consistent with that assertion, the appellant testified that when she first realized the agency intended to submit medical information to the examining psychiatrist, she generated a letter giving the agency permission to speak to the examining psychiatrist only for the purpose of determining the job requirements, standards, and criteria the appellant needed to meet in order to return to work. *Id.* at 7.

¶12 Carolyn Chambers, the agency manager who signed the agreement on behalf of the agency, testified that at the time she signed the settlement agreement she did not interpret the settlement agreement to preclude the agency from

providing any relevant information it might have to the examining psychiatrist. *Id.* at 4-5. However, for three key reasons, the administrative judge found the agency's interpretation to be "not objectively reasonable under the circumstances presented." *Id.* at 10. First, the settlement agreement contained an integration clause that precluded consistent additional terms. *Id.* at 10. Second, the agency did not have a standard practice regarding what documents it released to examining physicians conducting fitness for duty examinations. *Id.* at 12-13. Third, the agency official's interpretation is disfavored because, under the facts of this case, it could violate the Privacy Act. *Id.* at 14. Having concluded that the agency's interpretation was not objectively reasonable, the administrative judge determined "that the Board should apply the appellant's interpretation of the phrase in determining whether the agency breached the terms of the contract." *Id.* at 16.

¶13 In the agency's opposition, the agency "wonders whether there is really a settlement agreement to be breached if the parties had differing interpretations of the term 'independent medical examination' and how the administrative judge can retroactively apply a meaning to an essential term of the settlement agreement when he has concluded that the parties shared no common understanding of the term." CRF, Tab 4 at 8. The agency apparently misunderstands the contract principles at issue.

¶14 In our earlier remand order, we instructed the administrative judge to consider setting aside the settlement agreement if he found that the parties had differing *reasonable* interpretations of the term "independent medical examination," and if other specified conditions for invalidating the settlement agreement were met. *See Young*, 110 M.S.P.R. 609, ¶ 20 (citing *Gullette v. U.S. Postal Service*, 70 M.S.P.R. 569, 575-77 (1996)); *see also Restatement (Second) of Contracts* §§ 20, 201 (1979). The administrative judge, though, did not find the parties had differing *reasonable* interpretations of the questioned term. Instead, he found that one of the party's interpretations, the agency's, was

*unreasonable*. CRF, Tab 1 at 16. Moreover, although the administrative judge did not explicitly find that the appellant's interpretation was reasonable, we find, based on the record as well as the appellant's hearing testimony, that her interpretation was reasonable. *See id.* We also conclude the settlement agreement is not void for lack of mutual consent, and we will apply its reasonable interpretation as presented by the appellant under the circumstances. *Cf. Coker v. Department of Commerce*, 324 F. App'x 912, 916 (Fed. Cir. 2009) (finding no lack of mutual consent because the appellant's interpretation of the settlement agreement was not a reasonable one). Thus, we agree with the administrative judge that the settlement agreement's requirement for an "independent medical examination" precluded the agency from providing the examining psychiatrist with agency records regarding the appellant except "to the extent necessary to provide the examining psychiatrist with the appellant's job requirements and the standards she must meet to be deemed medically capable of returning to her former position." CRF, Tab 1 at 17-18.

The agency interfered with the independent nature of the agreed-upon medical examination, and thereby materially breached the settlement agreement.

¶15 A material benefit of the appellant's bargain was her right to retain a psychiatrist of her choosing to conduct an "independent medical examination," provided that she paid for the examination. *See Felch v. Department of the Navy*, 112 M.S.P.R. 145, ¶¶ 13-14 (2009) (finding that preventing third parties from knowing about an employee's adverse actions was a "major benefit that the appellant obtained in exchange for his voluntary retirement and withdrawal of his appeal," and thus ordering the agency to eliminate those references). As noted above, the agency was obligated in this bargain to respect the independence of the examination, regardless of whether the appellant chose to pay for the privilege of selecting her own psychiatrist, or to let the agency pay for the privilege of participating in the selection of the psychiatrist. IAF, Tab 26 at 1-2. The administrative judge found that at a minimum, on April 15, 2009, the agency

faxed the examining psychiatrist documents that included call logs and correspondence related to the appellant's workers' compensation claim and medical reports. CRF, Tab 1 at 16 n.9. We reviewed these documents and have confirmed that they identify specific medical concerns and diagnoses for which the appellant received medical attention. RF, Tab 34 at 16-17.

¶16 In opposition to the administrative judge's Recommendation, the agency contends that the appellant cannot show that the examining psychiatrist "considered any of the information provided to him by the Agency." CRF, Tab 4 at 15. Indeed, the psychiatrist asserted that the documents "arrived while the examination was in progress; therefore, I did not have the opportunity to read them." CRF, Tab 4 at 21. The agency further contends that it was improperly denied the opportunity "to delineate in full the meaning and essence of [the psychiatrist's] 'non-consideration'" when the administrative judge denied the psychiatrist's appearance as a requested witness of the agency at hearing. *Id.* at 17. The agency's reliance on these alleged evidentiary uncertainties is misplaced.

¶17 In cases involving disclosures of information in violation of a settlement agreement, the Board has consistently held that 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 that a nondisclosure provision has been materially breached. *See Doe v. Department of the Army*, 116 M.S.P.R. 160, ¶ 10 (2011); *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶¶ 15–17 (2009); *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶ 17 (2005). In this case, as acknowledged by the agency, the independence of the medical examination is of vital importance to the agreement. We therefore find that the agency's release of medical records concerning the appellant to the examining psychiatrist, by itself, constitutes a material breach of the agreement. We will not require the appellant to prove actual harm, i.e., to also prove that her examining psychiatrist actually considered, read or reviewed the offending records he admittedly received from the agency.

## ORDER

¶18 We ORDER the agency to allow the appellant to submit to a new independent medical examination.

¶19 In accordance with the settlement agreement, the appellant may choose to select a Board-certified forensic psychiatrist jointly with the agency, in which case the agency must bear the cost of the examination, or to submit to an examination by a Board-certified forensic psychiatrist of her choosing, for which the appellant must bear the cost. With respect to this new examination, we also ORDER the appellant to comply with her obligations under the agreement, including providing the releases of medical information specified in the terms of the agreement.[3]

¶20 The agency may communicate with the examining psychiatrist to the extent necessary to provide the job requirements and standards that the appellant must meet to be deemed medically capable of returning to her former position. The agency is otherwise precluded, however, from presenting information regarding the appellant for consideration and evaluation by the examining psychiatrist. In the event that the new examining psychiatrist concludes that the appellant may return to work in her regular Rural Carrier position in the Columbia, Tennessee Post Office, the agency must reinstate the appellant to this position, with appropriate back pay and benefits, retroactive to the date on which she would

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[3] The administrative judge noted in his Recommendation that the appellant retained a second doctor in June 2009 to examine her, but that the appellant conceded that she did not provide this second doctor with all of the medical records for which she was required to provide releases under the terms of the settlement agreement. CRF, Tab 1 at 18 n.10. The administrative judge thus recommended that the Board not accept the results of that second examination as adequate to meet the appellant's obligations under the settlement agreement. *Id*. We see no basis to disturb the administrative judge's finding that the second examination did not meet the appellant's obligations under the settlement agreement. Ordering a new independent medical examination is therefore appropriate.

have been reinstated under the terms of the settlement agreement if the April 2009 psychiatric examination results had reflected such a conclusion.

## 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.