

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

**2012 MSPB 48**

---

Docket No. DC-0752-09-0342-C-1

---

**Jan S. Stasiuk,  
Appellant,**

**v.**

**Department of the Army,  
Agency.**

April 4, 2012

---

Jan S. Stasiuk, Colonial Heights, Virginia, pro se.

Alison E. Bruenjes, Fort Lee, Virginia, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of the initial decision that denied his petition for enforcement. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision and REMAND the compliance matter to the Washington Regional Office for further adjudication.

**BACKGROUND**

¶2 The appellant filed a Board appeal of his removal from his General Physician position, alleging whistleblower reprisal. MSPB Docket No. DC-0752-09-0342-I-1, Initial Appeal File (IAF), Tab 1, Tab 8, subtab 4a. The parties executed a settlement agreement in which the agency agreed, among other things,

to rescind the removal action, expunge from the appellant's official personnel file (OPF) the SF-50 documenting the removal and the decision notice of removal, reinstate the appellant to his Medical Officer (Family Practice) position, and detail him to a clinical support position under the supervision of the Deputy Commander of Clinical Services. IAF, Tab 32; MSPB Docket No. DC-0752-09-0342-C-1, Compliance File (CF), Tab 5 at 7-9. Pursuant to this agreement, the administrative judge dismissed the removal appeal and retained jurisdiction to enforce the terms of the agreement. IAF, Tab 33.

¶3 The appellant filed a petition for enforcement alleging, among other things, that the agency breached the settlement agreement by allowing Deputy Commander for Clinical Services Martin Doperak to treat him with hostility following his reinstatement and in failing to remove from his OPF "derogatory statements" upon which the agency relied in deciding to remove him. CF, Tab 1. The agency responded that it had complied with the terms of the settlement agreement. CF, Tab 5. The appellant clarified that the agency's breach was in failing to protect him from retaliation and harassment following his reinstatement. CF, Tabs 6, 7.

¶4 The administrative judge denied the petition for enforcement, finding that the appellant's allegations regarding the agency's failure to protect him from Doperak's hostility were insufficient to prove that the agency breached the settlement agreement and that the agency proved its compliance with the terms of the agreement. CF, Tab 10, Compliance Initial Decision (CID) at 1-4. The appellant has filed a petition for review of this decision.<sup>1</sup> Petition for Review

---

<sup>1</sup> On review the appellant alleges that he entered into the settlement agreement largely because the administrative judge informed him that, if he settled his removal appeal, he would be protected from hostility and retaliation. Petition for Review File, Tab 1 at 2, 4. To the extent he is challenging the validity of the settlement agreement, such an attack cannot be raised in a compliance proceeding; it must be alleged in a petition for review of the initial decision that dismissed the appeal pursuant to the settlement. *Wofford v. Department of Justice*, [115 M.S.P.R. 367](#), ¶ 9 (2010); cf. *Vance v.*

(PFR) File, Tab 1. The agency has responded in opposition. PFR File, Tab 3. The appellant has replied to the agency's response brief.<sup>2</sup> PFR File, Tabs 4, 5.

### ANALYSIS

¶5 The Board has the authority to enforce a settlement agreement that has been entered into the record in the same manner as any final Board decision or order. *Vance v. Department of the Interior*, [114 M.S.P.R. 679](#), ¶ 6 (2010). A settlement agreement is a contract, and the Board will therefore adjudicate a petition to enforce a settlement agreement in accordance with contract law. *Id.* Where, as here, the 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. *Id.* 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. *Id.*

¶6 Here, the appellant alleges on review, as he did below, that the agency breached the agreement, acting in bad faith by failing to protect him from Doperak's hostility following his reinstatement. PFR File, Tab 1 at 5-6; CF, Tabs 1, 6, 7. He asserts that, in retaliation for successfully achieving rescission of the removal action, causing the agency embarrassment and humiliation, Doperak took actions to force him to resign or to negatively impact his work performance. PFR File, Tab 1 at 5; CF, Tabs 6, 7. Additionally, the appellant alleges that Doperak

---

*Department of the Interior*, [114 M.S.P.R. 679](#), ¶ 6 (2010) (when a petition for enforcement unmistakably challenges the validity of the settlement agreement, the Board will treat it as a petition for review).

<sup>2</sup> The appellant replied to the agency's response brief on November 1, 2011, after the record on review closed on October 18, 2011. PFR File, Tabs 2, 4; see [5 C.F.R. § 1201.114\(i\)](#). Because he has not shown that his reply presents new evidence and arguments that were unavailable prior to the close of the record despite his due diligence, the Board need not consider the appellant's reply. See [5 C.F.R. § 1201.114\(i\)](#).

stated that he would not have negotiated a settlement agreement that reinstated the appellant. CF, Tab 1 at 2, Tab 7 at 3.

¶7 Although the appellant has not expressly stated that his allegations of retaliation and harassment are related to the settlement term requiring his reinstatement, the allegations themselves imply as much. *See* PFR File, Tab 1; CF, Tabs 1, 6, 7. An agency's obligation to implement a settlement term regarding reinstatement is not necessarily fully satisfied the moment it technically and facially reinstates the employee to the position in question. *See* CF, Tab 6 at 4; *Kuykendall v. Department of Veterans Affairs*, [68 M.S.P.R. 314](#), 322 (1995). The Board has held that every settlement agreement contains an implicit requirement that the parties fulfill their respective contractual obligations in good faith. *Kuykendall*, 68 M.S.P.R. at 323. Even if an agreement does not specifically prohibit retaliation or harassment, an agency's post-settlement harassment and retaliation against an appellant may constitute bad faith in implementing a reinstatement term and thereby establish agency noncompliance with the settlement agreement. *Id.* at 322-24; *Diehl v. U.S. Postal Service*, [82 M.S.P.R. 620](#), ¶ 12 (1999). To establish a breach of the settlement agreement based on an implied covenant of good faith with respect to the reinstatement term,<sup>3</sup> it is the appellant's burden to show that the agency's proven retaliatory/harassing actions, under the totality of the circumstances, amounted to an unjustified and substantial deprivation of rights as an incumbent of the position in question. *Kuykendall*, 68 M.S.P.R. at 324-25. A mere showing of some frictions, misunderstandings, or unpleasantness between the appellant and other employees or managers is insufficient to meet this burden. *Id.*

---

<sup>3</sup> “Bad faith” is the opposite of “good faith” and refers to a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive; it is not simply bad judgment or negligence, but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. *Kuykendall*, 68 M.S.P.R. at 323 n.6.

¶8 We agree with the appellant that the administrative judge failed to construe his claims of post-settlement retaliation and harassment as allegations of bad faith in implementing the reinstatement settlement term.<sup>4</sup> See PFR File, Tab 1 at 9-10; *Kuykendall*, 68 M.S.P.R. at 322-25 (finding the administrative judge erred in not considering the appellant's allegations of retaliation and harassment, which were relevant to whether the agency breached the settlement agreement by failing to implement the reinstatement term in good faith). As a result of this error, the appellant was not apprised of the means to establish noncompliance based on bad faith. See CF, Tab 2.

¶9 Additionally, the appellant alleged that Doperak informed him that, if the appellant was permitted to perform gynecological exams, he would send all women complaining of chest pain to the hospital. CF, Tab 1 at 2. The appellant asserted that this accusation was one of the bases for the rescinded removal action and implicitly alleged that Doperak learned of these accusations from documents in his OPF that should have been expunged pursuant to the settlement agreement. *Id.* The administrative judge did not address this claim. Further, contrary to the administrative judge's findings, the agency has not proven that it expunged the decision notice of removal from the appellant's OPF. See CID at 4. The agency merely showed that it ordered the cancellation of the removal and suspension actions. CF, Tab 5 at 10-22; see *Vance*, [114 M.S.P.R. 679](#), ¶ 6.

¶10 Based on the foregoing, we VACATE the initial decision and REMAND the compliance matter to the Washington Regional Office for further adjudication. See *Ortega v. U.S. Postal Service*, [85 M.S.P.R. 422](#), ¶¶ 11-12 (2000) (remanding the compliance matter for further adjudication because the administrative judge failed to properly identify or provide proper notice of the

---

<sup>4</sup> We make no findings regarding whether the appellant has established that Doperak took retaliatory acts against him.

parties' burdens regarding the issues of breach and whether the agency entered into the settlement agreement in bad faith).

ORDER

¶11 On remand, the administrative judge shall afford the parties an opportunity to submit evidence in the form of documentation or affidavits showing breach or compliance with the terms of the settlement agreement requiring the appellant's reinstatement and the expungement of the decision notice of removal from his OPF. The administrative judge shall then issue a new compliance initial decision that comports with the requirements under *Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980).

FOR THE BOARD:

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