



# CLEAN RECORD SETTLEMENT AGREEMENTS AND THE LAW

A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES  
BY THE U.S. MERIT SYSTEMS PROTECTION BOARD



DECEMBER 2013





U.S. MERIT SYSTEMS PROTECTION BOARD  
1615 M Street, NW  
Washington, DC 20419-0001

The President  
President of the Senate  
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board (MSPB) report, *Clean Record Settlement Agreements and the Law*. In the Federal civil service, a clean record agreement (CRA) is a contract between a Federal agency and a past or current employee in which the agency agrees to remove potentially negative information from the employee's record in exchange for the resolution of employment-related claims against the agency. This report discusses the importance of agencies carefully choosing the language of CRAs and fully understanding the parties' obligations—both explicit and implied.

MSPB—and its reviewing court—have often been presented with CRAs that fail to address important aspects of how the parties intend for the agreement to operate. Some Federal agencies appear to be unaware that, in the absence of specific language, the adjudicator may find implied obligations in many clean record agreements. An agency that fails to comply with these implied obligations may unintentionally breach a CRA. Such a breach can lead to both parties losing the benefits of the agreement, which means that if the agreement settled litigation, such litigation may resume and back pay with interest may apply.

The report also discusses how a CRA affects an agency's ability to discuss an individual's employment history with others, including officials conducting suitability or security clearance investigations for the Government or its contractors. For example, in the absence of criminal conduct, an explicit authorization in the agreement, or a specific waiver signed by the individual, an agency may be unable to disclose conduct or performance issues to an official conducting a security clearance investigation.

I believe that you will find this report useful as you consider issues affecting the Federal Government's ability to select and maintain a high-quality workforce.

Respectfully,

A handwritten signature in black ink, appearing to read "Susan Tsui Grundmann", with a horizontal line extending to the right.

Susan Tsui Grundmann





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# EXECUTIVE SUMMARY

More than two-thirds of adverse action appeals before the U.S. Merit Systems Protection Board (“MSPB” or “the Board”) in which the Board has jurisdiction are resolved by settlement agreements. Of those, more than half are clean record agreements (CRAs). The Board and its reviewing court, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), have addressed a variety of situations involving CRAs. An examination of the case law shows how nuances in the language of CRAs and the specific facts of the cases have brought about different results in seemingly similar situations. The case law also reveals the various consequences for parties that can arise from the breach of a CRA.

Our goal in this report is to help parties to become more informed so that they may draft agreements that are valid, workable, and clearly express their intentions. This in turn will help the Board and its reviewing court to ensure that the parties receive the benefit of their bargain.

This report covers the following broad categories of issues:

- What items the CRA states or implies will be cleaned from a record.
- What systems of records the CRA states or implies will be cleaned.
- What obligations an agency has to support the record in communications with others.
- Which persons or entities are bound by the commitments made in the CRA.
- How entities, rules, and laws outside the agreement can affect the ability of parties to meet their obligations or benefit from the agreement as they intended.

This report may be helpful in identifying cases and topics that should be addressed when negotiating and drafting CRAs but it is not a substitute for consulting the full content of Board and court opinions.





# INTRODUCTION

A majority of the adverse action cases filed with the U.S. Merit Systems Protection Board (“MSPB” or “the Board”)<sup>1</sup> within its jurisdiction are resolved by a negotiated settlement agreement (NSA).<sup>2</sup> Ninety-five percent of surveyed agency representatives reported that they had entered into a settlement agreement in the preceding three years.<sup>3</sup> Eighty-nine percent of those who used NSAs were involved in one or more NSAs with a clean record provision.<sup>4</sup>

For the purpose of this report, a clean record provision is a term in an NSA under which the agency is obligated to change, remove, or withhold potentially negative information about an individual in exchange for the resolution of employment-related claims against the agency. NSAs with clean record provisions will be referred to as clean record agreements (CRAs).

From Fiscal Year 2007 to Fiscal Year 2011, more than half of the settlement agreements filed with the Board for actions taken under 5 C.F.R. §§ 432 or 752 included a clean record provision.<sup>5</sup> In our 2012 survey of agency representatives involved in §§ 752 and 432 cases, 3 out of every 10 respondents indicated that *more than half* of their settlement agreements included a clean record provision.<sup>6</sup> Seventy-five percent of those who used CRAs reported that CRAs “are often the only way to get an appellant/employee to agree to settle.”<sup>7</sup>

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<sup>1</sup> The practice of the U.S. Merit Systems Protection Board is to refer to the agency as “MSPB” and the three-member Board as “the Board”. However, others often use these terms interchangeably when referring to the agency or its leadership.

<sup>2</sup> See U.S. Merit Systems Protection Board, *Annual Report for Fiscal Year 2012*, at 36 (68 percent of adverse action initial decisions with jurisdiction resulted in settlement); *Annual Report for Fiscal Year 2011*, at 28 (68 percent); *Annual Report for Fiscal Year 2010*, at 26 (71 percent); *Annual Report for Fiscal Year 2009*, at 22 (65 percent). Annual reports are available at <http://www.mspb.gov/publicaffairs/annual.htm>.

<sup>3</sup> See *Appendix B*, Question 1. For more on the survey, see *Appendix A*. As explained in *Appendix A*, the data discussed in this report excludes responses of don’t know or not applicable.

<sup>4</sup> See *Appendix B*, Question 2.

<sup>5</sup> Data is from a questionnaire given to MSPB administrative judges. For more on the questionnaire, see *Appendix A*.

<sup>6</sup> See *Appendix B*, Question 2.

<sup>7</sup> See *Appendix B*, Question 5.

However, CRAs may also be used to settle other types of cases, including individual right of action (IRA) appeals claiming retaliation for whistleblower activity.<sup>8</sup> In addition to adjudicating adverse action appeals, whistleblower IRA appeals, and a variety of other types of cases, the Board adjudicates appeals of decisions by the Office of Personnel Management (OPM) regarding applications for retirement benefits.<sup>9</sup> In such cases, CRAs may affect OPM's processing of retirement applications.<sup>10</sup>

The Board's reviewing court, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), has noted regarding CRAs that "[t]he Board has a difficult job sorting through some of these enforcement agreements, particularly those that are not well-drafted, but. . . it is the Board's job to see to it that the parties receive that for which they bargained."<sup>11</sup>

In response to our questionnaire for agency representatives, 28 percent of the representatives who had used CRAs reported that they strongly agreed that they considered themselves "knowledgeable about MSPB and court decisions regarding the interpretation of clean record agreements."<sup>12</sup> Only 41 percent strongly agreed that before recommending or signing a clean record agreement, they "perform additional research to determine how various clauses in that agreement may be interpreted by MSPB or courts."<sup>13</sup>

The purpose of this report is to explain the state of the law regarding CRAs to aid parties in drafting agreements that will increase the potential that they will obtain from the Board and its reviewing court that for which they thought they had bargained. The goal is to highlight case law that may help parties to craft appropriate language and adhere to the agreements that they make, thereby promoting mutual understanding between the parties and avoiding subsequent litigation related to alleged breach. To this end, the report identifies several clean record-related issues that parties should consider addressing with specificity, using language tailored to avoid ambiguity and to reflect their intentions.

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<sup>8</sup> For more on whistleblower law before MSPB, see U.S. Merit Systems Protection Board, *Whistleblower Protections for Federal Employees*, available at [www.mspb.gov/studies](http://www.mspb.gov/studies). See also Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (WPEA), available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ199/content-detail.html>.

<sup>9</sup> OPM's initial decision on a request for benefits is not appealable, but the individual can ask OPM to reconsider that initial decision. U.S. Office of Personnel Management, *CSRS/FERS Handbook*, Ch. 3A2.1-1. OPM's reconsideration decision is appealable to MSPB. *Id.*; see also *Lewis v. Merit Systems Protection Board*, 301 F.3d 1352, 1354 (Fed. Cir. 2002) (explaining that 5 U.S.C. § 8347(d)(1) (CSRS) and 5 U.S.C. § 8461(e)(1) (FERS) authorize individuals whose rights or interests are affected by OPM decisions under CSRS or FERS to appeal those decisions to MSPB).

<sup>10</sup> See, e.g., *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1376 (Fed. Cir. 2001) (the agency breached the agreement by releasing the original SF-50 to OPM).

<sup>11</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999).

<sup>12</sup> Another 60 percent considered themselves somewhat knowledgeable about MSPB and court decisions regarding the interpretation of clean record agreements. See *Appendix B*, Question 15.

<sup>13</sup> Another 42 percent somewhat agreed that before recommending or signing a clean record agreement, they perform additional research to determine how various clauses in that agreement may be interpreted by MSPB or courts. See *Appendix B*, Question 17.

This report presumes a level of familiarity with contract law and Federal human resources (HR) processes.<sup>14</sup> The next chapter contains a brief primer on MSPB settlement law. For readers who are not familiar with contract law, *Appendix C* contains a discussion of some of the legal terminology used in this report.

The primary resource for this report is case law, but the report also includes and was informed by: questionnaires completed by MSPB administrative judges (AJs) regarding cases; a review of a sample of settlement agreements containing a clean record provision; a 2012 survey of agency representatives; a questionnaire for unions and management associations; interviews of appellant attorneys; and responses to a questionnaire that MSPB sent to the OPM. Additional information on our methodology can be found in *Appendix A*.

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<sup>14</sup> The U.S. Government Printing Office (GPO) instructs that the words “Federal” and “Government” are to be capitalized in Government documents. *U.S. Government Printing Office Style Manual*, at 3.19, available at <http://www.gpo.gov/fdsys/pkg/GPO-STYLEMANUAL-2008/pdf/GPO-STYLEMANUAL-2008.pdf>. However, in decisions issued by the Board and the Federal Circuit, these words are often not capitalized. *See e.g., King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) (using lowercase of “government”). As a result, throughout this report, capitalization of these words inside quotations may vary, but outside of quotations, the report comports with the GPO instructions.







# A BRIEF PRIMER ON MSPB SETTLEMENT LAW

A settlement agreement is a contract and the interpretation of its terms is a question of law.<sup>15</sup> Under the general principles of settlement construction, the words of the agreement itself are of paramount importance.<sup>16</sup> In construing the terms of a settlement agreement, the Board examines the four corners of the agreement to determine the parties' intent.<sup>17</sup> Extrinsic evidence of intent will be considered only if the terms of the agreement are ambiguous. A contract is ambiguous when it is susceptible to differing yet reasonable interpretations.<sup>18</sup> Additionally, the contract provisions will be read as part of an organic whole, giving reasonable meaning to all of the contract's terms in order to identify and give weight to the spirit of the contract as intended by the parties.<sup>19</sup>

Oral settlement agreements are valid before MSPB and the same requirements apply to oral settlements that apply to written settlements.<sup>20</sup> This includes that the terms must be memorialized for the record.<sup>21</sup> Agreements may be memorialized without being fully reduced to a written and signed document.<sup>22</sup> While parties may find it challenging to

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<sup>15</sup> *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶ 20 (2012).

<sup>16</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 5 (2011).

<sup>17</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997); *Felch v. Department of the Navy*, 112 M.S.P.R. 145 (2009); *Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶ 7 (2001).

<sup>18</sup> *Mital v. Department of Agriculture*, 116 M.S.P.R. 589, ¶ 6 (2011); *Sweet v. U.S. Postal Service*, 89 M.S.P.R. 28, ¶ 9 (2001).

<sup>19</sup> *Young v. U.S. Postal Service*, 113 M.S.P.R. 609, ¶ 15 (2010); see *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659 (2009), *aff'd*, 420 F. App'x. 980 (Fed. Cir. 2011).

<sup>20</sup> See *Parks v. U.S. Postal Service*, 113 M.S.P.R. 60, ¶ 11 (2010); *Brown v. Department of the Navy*, 60 M.S.P.R. 461, 462-63 (1994).

<sup>21</sup> *Parks v. U.S. Postal Service*, 113 M.S.P.R. 60, ¶ 11 (2010). See *Tiburzj v. Department of Justice*, 269 F.3d 1346 (Fed. Cir. 2001) (“no written agreement is forthcoming, the oral agreement still governs”); but see *Mabboob v. Department of the Navy*, 928 F.2d 1126, 1130 (Fed. Cir. 1991) (the parties oral negotiations did not constitute a contract because they did not intend for it to be binding until it was reduced to writing).

<sup>22</sup> See *Gill v. Department of Veterans Affairs*, 85 M.S.P.R. 541, ¶ 4 (2000) (methods for memorialization can include verbatim transcripts of the agreed upon terms or a tape recording); *Brown v. Department of the Navy*, 60 M.S.P.R. 461, 462-63 (1994) (the memorialization does not have to be in writing).

enforce the terms of an agreement if the memorialization is flawed,<sup>23</sup> it is well-settled “that if no written agreement is forthcoming, the oral agreement still governs.”<sup>24</sup>

Before accepting a settlement agreement into the record for enforcement purposes, the Board must determine whether the agreement is lawful on its face, whether the parties freely entered into it, and whether the subject matter of this appeal is within the Board’s jurisdiction.<sup>25</sup>

An appellant’s waiver of appeal rights in a settlement agreement is enforceable and not against public policy if the terms of the waiver are comprehensive, freely made, and fair, and the execution of the waiver was not the result of duress or bad faith on the part of the agency.<sup>26</sup>

In cases involving disclosures of information that purportedly violate the terms of a settlement agreement, the Board has consistently found 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.<sup>27</sup>

The Board has broad authority to enforce the terms of a settlement agreement entered into the record.<sup>28</sup> If a party believes that the other party has breached a settlement agreement that is under MSPB’s jurisdiction, the aggrieved party may file a petition for enforcement (PFE) (also known as a compliance action) with MSPB.<sup>29</sup> The PFE is filed with the field

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<sup>23</sup> See, e.g., *Neal v. Department of Justice*, 65 M.S.P.R. 207 (1994). In *Neal*, the parties reached an oral settlement agreement and the appeal was dismissed as settled. *Id.* at 211. Subsequently, efforts to reduce the oral agreement to writing failed and the appellant filed a petition for enforcement (PFE). *Id.* The parties orally settled again, the appeal was dismissed, and then the parties once again failed to reduce the agreement to writing. *Id.* The parties had recorded the second oral agreement, but the recording was inaudible. *Id.* The appellant filed a second PFE, which led to a third oral agreement, which in turn led to a third PFE when the parties could not agree on its content. *Id.* The third PFE was resolved when the parties finally created a written settlement agreement. *Id.* at 211-13. The appellant then sued for attorney fees and was found to be the prevailing party entitled to reasonable attorney fees for one of the PFEs. *Id.*

<sup>24</sup> *Tiburzi v. Department of Justice*, 269 F.3d 1346, 1352 (Fed. Cir. 2001); but see *Mabboob v. Department of the Navy*, 928 F.2d 1126, 1130 (Fed. Cir. 1991) (the parties’ oral negotiations did not constitute a contract because they did not intend for it to be binding until it was reduced to writing).

<sup>25</sup> *Groeser v. Department of the Army*, 114 M.S.P.R. 118, ¶ 4 (2010); see *McCarter v. Department of the Navy*, 114 M.S.P.R. 599, ¶ 11 (2010). See also *Mansfield v. National Mediation Board*, 103 M.S.P.R. 237, ¶ 21 (2006) (in which the Board declined to accept a settlement agreement in which it was “plain that the parties [were] attempting to misuse [a Government] program for a purpose for which it was not intended” resulting in “a combination of pay and benefits not authorized by law”); *Adkins v. U.S. Postal Service*, 86 M.S.P.R. 671 ¶ 10 (2000) (finding it was error for the administrative judge to have accepted an NSA into the record for enforcement without first determining whether the underlying appeal was within the Board’s jurisdiction, and that the NSA must therefore be set aside and the initial decision that dismissed the appeal be vacated).

<sup>26</sup> *Simmons v. Small Business Administration*, 108 M.S.P.R. 325, ¶ 6 (2011); *Lawrence v. Office of Personnel Management*, 108 M.S.P.R. 325, ¶ 6, *aff’d*, 318 F. App’x 895 (Fed. Cir. 2008); *Wyatt v. U.S. Postal Service*, 101 M.S.P.R. 28, ¶ 18 (2006).

<sup>27</sup> *Young v. U.S. Postal Service*, 117 M.S.P.R. 211, ¶ 17 (2012); 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).

<sup>28</sup> *Littlejohn v. Department of the Air Force*, 69 M.S.P.R. 59, 61 (1995).

<sup>29</sup> 5 C.F.R. § 1201.182(a).

or regional office that handled the earlier action.<sup>30</sup> The allegedly noncomplying party then must file either: (1) evidence of full compliance; (2) evidence of partial compliance with a statement regarding what remains to be done and what the party is doing about it; or (3) a statement showing good cause for a failure to completely meet its obligations.<sup>31</sup> A hearing may be held if the administrative judge determines it is necessary.<sup>32</sup> The administrative judge then will issue an initial decision which will be subject to the petition for review (PFR) and judicial review processes if a party seeks higher review.<sup>33</sup>

When one party materially breaches a Board-enforceable settlement agreement, the other party is entitled either to enforce the settlement agreement or to rescind it and reinstate the underlying action.<sup>34</sup> If a breach of a NSA results in a lost job opportunity, the Board lacks authority to grant damages for wages the appellant may have earned with the prospective employer.<sup>35</sup>

The choice of seeking enforcement or rescission of a settlement agreement belongs to the non-breaching party and the breaching party does not have the right to select the remedy.<sup>36</sup> If the agreement is rescinded, the settlement terms become inoperative, and the parties are essentially restored to the *status quo ante*.<sup>37</sup> Rescission must be total as there is no remedy of partial rescission or partial enforcement.<sup>38</sup> Therefore, if back pay is ordered, the Board will not limit such payment to the period from the breach forward. Rather cover the entire period in which pay would have been received—which can be several years or more.<sup>39</sup>

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<sup>30</sup> 5 C.F.R. § 1201.182. A PFE for a settlement agreement reached under the Board's original jurisdiction is filed with the Clerk of the Board. *Id.*

<sup>31</sup> 5 C.F.R. § 1201.183(a)(1).

<sup>32</sup> 5 C.F.R. § 1201.183(a)(3).

<sup>33</sup> 5 C.F.R. § 1201.183(a)(4)-(6).

<sup>34</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶¶ 11-12 (2011); *Eagleheart v. U.S. Postal Service*, 113 M.S.P.R. 89, ¶ 16 (2009). The Board has noted that breaches of a non-disclosure provision cannot be fully cured. *Littlejohn v. Department of the Air Force*, 69 M.S.P.R. 59, 62 (1995).

<sup>35</sup> *Cardoza v. Department of Justice*, 53 M.S.P.R. 264, 267 (1992); *Miller v. Department of Health & Human Services*, 41 M.S.P.R. 385, 392 (1989). For more on the meaning of the word breach, see *Appendix C: Legal Terminology*.

<sup>36</sup> *Lutz v. U.S. Postal Service*, 108 M.S.P.R. 695, ¶ 11 (2008).

<sup>37</sup> *Eagleheart v. U.S. Postal Service*, 113 M.S.P.R. 89, ¶ 16 (2009).

<sup>38</sup> *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶ 20, n.3 (2005); see *Capps v. Department of Agriculture*, 97 M.S.P.R. 381, ¶ 20 (2004).

<sup>39</sup> See *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶¶ 20-21, n.3 (2005) (rejecting the agency's argument that it should only pay for the period from the breach forward and instead ordering back pay for a period of approximately 10 years).





# “CLEANING” THE RECORD

As the Federal Circuit has explained, “[w]hen an employee voluntarily resigns in exchange for purging of the records that show the prior adverse action, the employee’s goal, to which the agency has agreed, is to eliminate this information as it may affect future employment with the government or elsewhere.”<sup>40</sup> The cases below discuss the extent to which an agency may be required to purge those records to eliminate negative information and the circumstances under which that obligation may be broadened or limited by the terms in the CRA.

## CLEANING THE OFFICIAL PERSONNEL FILE

The Official Personnel File (OPF) is a single personnel folder that documents all Federal civilian service for a particular individual.<sup>41</sup> A notification of personnel action (SF-50) is put into the OPF for all appointments and separations (as well as many other types of personnel actions).<sup>42</sup> OPFs are a system of records subject to both the Privacy Act and the Freedom of Information Act (FOIA).<sup>43</sup> “Agencies are authorized to respond to requests for information from the public on all Official Personnel Folders[.]”<sup>44</sup>

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<sup>40</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).

<sup>41</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping* (Jun. 1, 2011), at Ch. 2-1 available at [www.opm.gov/feddata/recguide2011.pdf](http://www.opm.gov/feddata/recguide2011.pdf). OPM is the official owner of the system of records containing notifications of personnel action and OPM’s term to describe it is the “Official Personnel Folder.” 5 C.F.R. § 293.303. However, it is the practice of the Board to refer to such records as the “Official Personnel File.” For the sake of consistency with the cases being discussed in this report, the term Official Personnel File may be used in this report. Both terms are abbreviated as OPF and refer to the same system of records used to maintain notifications of personnel action.

<sup>42</sup> Office of Personnel Management, *Guide to Processing Personnel Actions*, at Ch. 1-4, 1-5, available at [www.opm.gov/feddata/gppa/gppa.asp](http://www.opm.gov/feddata/gppa/gppa.asp).

<sup>43</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 6-4. “Requests from the public for information from personnel and medical folders must be handled in compliance with both the Privacy Act of 1974, as amended (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552). The Privacy Act restricts access to records in a system of records. The Freedom of Information Act establishes the public’s right to information contained in Government records. Agencies are authorized to respond to requests for information from the public on all Official Personnel Folders and Employee Medical Folders in their possession.” *Id.*

<sup>44</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 6-4. See *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) (the appellant learned of the agency’s non-compliance with a CRA through a FOIA request for her records).

An OPF is retained for 65 years from the date of the individual's last separation from Federal employment.<sup>45</sup> Thus, if an individual separates from the civil service at age 18, the OPF will be retained until the individual reaches the age of 83.

When an individual transfers to a new job within the executive branch, the OPF is transferred to the new employer.<sup>46</sup> Typically, the new agency sends the new appointment SF-50 to the old agency with a request for the OPF.<sup>47</sup> Under OPM policies, the OPF should be sent to the new employer within 5 working days after the old agency receives a request for the OPF.<sup>48</sup>

As shown in several cases in this report, in order to avoid breach, agencies that enter into CRAs should account for the longevity of OPFs and the extent to which the documents in the OPF are retained.

### Broad OPF Cleaning Obligation

A seminal case for the issue of cleaning OPFs is *Conant v. Office of Personnel Management*.<sup>49</sup> In *Conant*, an employing agency stipulated in a settlement agreement that it would "rescind" an individual's removal SF-50 and issue a new SF-50 stating that the individual resigned for personal reasons.<sup>50</sup> The Federal Circuit found that, by agreeing to "rescind" the removal SF-50, the agency had promised to erase the removal *and all reasons for the removal* from the agency's records.<sup>51</sup> The court determined that by agreeing to issue a new SF-50 in its place, the agency had promised that the *only* document in its records regarding the end of the individual's employment with the agency would be the SF-50 stating that

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<sup>45</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 7-1. When not in the possession of an agency, these records are stored by the National Archives and Records Administration, National Personnel Records Center. *Id.*

<sup>46</sup> This rule applies when the individual transfers within his or her agency, or transfers to another agency operating under OPM's recordkeeping authority (which is most of the executive branch). U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 7-2, 7-4. Employers who are outside OPM's recordkeeping authority *and do not transfer folders* should receive a "transcript of service rather than a folder[.]" *Id.* at 7-4. However, some non-executive entities do receive the OPF, such as the U.S. Senate. *Id.*

<sup>47</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 7-2.

<sup>48</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 7-2.

<sup>49</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371 (Fed. Cir. 2001).

<sup>50</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1373 (Fed. Cir. 2001). The *Conant* case is also pertinent for issues related to CRA provisions that may conflict with obligations that an agency cannot contractually waive. To avoid repetitiousness, the specific facts surrounding the terms of the *Conant* agreement and the reasons why the agency shared the initial SF-50 with the agency will be discussed as a part of the chapter titled *External Restrictions on the Effect of a CRA*.

<sup>51</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1376 (Fed. Cir. 2001).

the individual had resigned for personal reasons.<sup>52</sup> When the agency later provided a copy of the original SF-50 to OPM as a part of retirement proceedings, the agency was in material breach of the agreement.<sup>53</sup>

In *Kitt v. Department of the Navy*, the Board explained what it means to “clean” a record in light of *Conant*.<sup>54</sup> In *Kitt*, the parties agreed that the appellant’s removal would be mitigated to a 30-day suspension.<sup>55</sup> The terminology used in the CRA was that the agency would “change the nature” of the employee’s SF-50.<sup>56</sup> The agreement did not explicitly promise to expunge all mention of the removal action from the OPF, and it made no mention of other recordkeeping systems.<sup>57</sup>

The Board discussed *Conant* at length and noted that the word “change” means “to replace with another.”<sup>58</sup> The Board found that when the Navy agreed to “change” the nature of the action on the SF-50 from a removal to a suspension, and provided no express language permitting other disclosures of the removal, it was agreeing to remove any record of the appellant’s removal from the OPF.<sup>59</sup>

The Board also noted that this holding was consistent with OPM’s *Guide to Processing Personnel Actions*, which instructs agencies that when they substitute a new personnel action for the original action, the agency shall “remove from the OPF the personnel action (SF-50) being cancelled.”<sup>60</sup> Thus, under OPM’s regulations, to change meant to cancel and to cancel meant that the agency had the implied obligation to remove the original SF-50 from the OPF.<sup>61</sup>

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<sup>52</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1376 (Fed. Cir. 2001). In *Principe v. U.S. Postal Service*, 100 M.S.P.R. 66 (2005), the Board noted that, on first glance, *Conant* appears to be at odds with the general principles of settlement construction that silence as to a matter does not mean the agreement is ambiguous and that the Board will not imply a term into an agreement that is unambiguous. *Id.* ¶ 7. However, the Board noted that any reservations it might entertain about *Conant* are beside the point, because the Board is bound by the decisions of the Federal Circuit. *Id.*

<sup>53</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1376 (Fed. Cir. 2001).

<sup>54</sup> See *Kitt v. Department of the Navy*, 116 M.S.P.R. 680 (2011).

<sup>55</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 2 (2011).

<sup>56</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 9 (2011).

<sup>57</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 9 (2011).

<sup>58</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 9 (2011); see Webster’s Ninth New Collegiate Dictionary 225 (9th ed. 1985).

<sup>59</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 9 (2011).

<sup>60</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶ 9 (2011); see Office of Personnel Management, *Guide to Processing Personnel Actions*, at Ch. 32-6.

<sup>61</sup> *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶¶ 9-10 (2011). The Board noted that the term at issue in *Conant* was “rescind” and that the dictionary definition of rescind includes to “cancel”. *Id.* at ¶ 8.

This cleaning of OPFs has been read into agreements even when there has been no reference to SF-50s or an OPF.<sup>62</sup> In *Wells v. Department of the Treasury*, the appellant was terminated from the agency during his probationary period for a negative suitability determination.<sup>63</sup> The parties resolved the matter with an NSA in which the agency agreed to cancel the negative suitability determination and document that three training classes had been completed.<sup>64</sup> In exchange, the appellant agreed not to “reapply” for employment with the agency.<sup>65</sup> The Board found that the agreement did not explicitly address the employee’s status following the agreement, but that, since the NSA stated the appellant would not apply to work for the agency, some manner of separation was clearly intended.<sup>66</sup>

The “common sense” interpretation that the Board gave to the CRA was that the parties must have intended for the OPF to reflect that the appellant resigned, as any other separation would not afford the appellant with the benefit that he clearly sought from the cancellation of the negative suitability determination and the issuance of training documentation.<sup>67</sup> Thus, when the agency failed to cancel the removal and issue an updated SF-50, the agency materially breached the CRA and the appellant was offered the opportunity to rescind the agreement.<sup>68</sup>

As noted earlier, OPFs are maintained for 65 years after an employee’s separation from the civil service.<sup>69</sup> If an agency fails to clean the OPF in accordance with the terms of an agreement, it may be years before the individual learns of the breach.<sup>70</sup> Yet, the agency may still be held liable for the breach if the appellant files a timely PFE upon learning of the problem.<sup>71</sup>

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<sup>62</sup> See *Wells v. Department of the Treasury*, 89 M.S.P.R. 228 (2001).

<sup>63</sup> *Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶ 2 (2001).

<sup>64</sup> *Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶ 8 (2001).

<sup>65</sup> *Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶ 8 (2001).

<sup>66</sup> *Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶ 9 (2001).

<sup>67</sup> *Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶¶ 14-16 (2001).

<sup>68</sup> *Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶¶ 15, 18-19 (2001).

<sup>69</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 7-1.

<sup>70</sup> See, e.g., *Eagleheart v. U.S. Postal Service*, 113 M.S.P.R. 89, ¶¶ 3, 8, 14 (2009) (the agency breached the agreement when the appellant discovered in 2008 that the agency had failed to modify his OPF in accordance with a 2005 clean record settlement agreement).

<sup>71</sup> A petition for enforcement alleging a breach of a settlement agreement must be filed within a reasonable time after the petitioner becomes aware of the breach. *Kasarsky v. Merit Systems Protection Board*, 296 F.3d 1331, 1335 (Fed. Cir. 2002); *Eagleheart v. U.S. Postal Service*, 113 M.S.P.R. 89, ¶ 12 (2009).



### Narrowing the OPF Cleaning Obligation

Despite the cases above, OPFs can contain negative information after the parties agree to a CRA if the parties explicitly agree that the OPF may contain negative information.<sup>72</sup> For example, in *Lowe v. Department of Veterans Affairs*, the parties agreed that “the agency would “[a]mend the Official Personnel Action (SF-50) dated May 19, 1995, to read “Resignation (ILIA-In Lieu of Impending Action) and remove the Official Personnel Action (SF-50) dated May 19, 1995, Removal, from the Official Personnel Folder.”<sup>73</sup> The NSA also explicitly stated that “[i]n the remarks area of the Official Personnel Action, Resignation (SF-50) it will reflect that the resignation was a settlement offer to Ms. Lowe by the agency during the pendency of Ms. Lowe’s MSPB appeal of her removal.”<sup>74</sup>

The appellant later filed a PFR asserting, among other things, that the remarks on the OPF’s SF-50 referring to the proposed removal were negative and therefore needed to be deleted.<sup>75</sup> The Board found that the SF-50 used the “precise language” that had been agreed upon, and therefore the mention of a proposed removal action did not constitute a breach of the agreement.<sup>76</sup>

## CLEANING BEYOND THE OFFICIAL PERSONNEL FILE

Personnel information can exist in systems of records other than the OPF.<sup>77</sup> While the cases above demonstrate the extent to which CRAs can bind agencies to clean the OPF or release them from that obligation, the cases below illustrate the extent to which agencies may be bound or released from the obligation to clean other records as well.

### Broad Cleaning Obligation Beyond the OPF

In addition to maintaining an OPF for notifications of personnel actions, agencies are responsible for maintaining other systems of records containing information about an employee. For example, an agency must maintain performance-related forms in an Employee Performance File (EPF).<sup>78</sup> Such a file contains appraisals, performance-related training information, individual development plans, and other documents.<sup>79</sup> The terms of a CRA may require agencies to modify the EPF.<sup>80</sup>

<sup>72</sup> See *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶¶ 3, 9 (2000) (permitting negative information in the OPF).

<sup>73</sup> *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶¶ 3-4 (2000).

<sup>74</sup> *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶ 4 (2000).

<sup>75</sup> *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶ 6 (2000).

<sup>76</sup> *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶ 6 (2000). In *Appendix D: Additional Information About Official Personnel Files*, we discuss other rules about what can and what cannot be in an OPF.

<sup>77</sup> See, e.g., 5 C.F.R. § 293.403 (employee performance files); 5 C.F.R. § 293.505 (employee medical files).

<sup>78</sup> Compare 5 C.F.R. § 293.302 with 5 C.F.R. § 293.403 (EPFs).

<sup>79</sup> 5 C.F.R. § 293.403.

<sup>80</sup> See *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶ 5 (2000).

In *Fernandez v. Department of Justice*, the agency had agreed to expunge an appellant's personnel and disciplinary action files with respect to a demotion based on performance by removing the proposal and decision letters and all other information relating to the underlying demotion.<sup>81</sup> The appellant filed several enforcement petitions, arguing that the agency had failed to comply with the settlement agreement because it had not expunged all information relating to the demotion from its records.<sup>82</sup>

The agency repeatedly maintained that it had complied by purging her OPE.<sup>83</sup> The agency claimed that it did not remove the appraisal at issue from the EPF because the agency believed that OPM regulations required the retention of her last three performance ratings in connection with reduction in force (RIF) procedures.<sup>84</sup>

The Board found that the agency's "performance file" was a subset of the performance record system, and was therefore a personnel record.<sup>85</sup> Accordingly, the agency was found in breach of the CRA because it had not removed the appraisal at issue from the appellant's performance file.<sup>86</sup>

This obligation to clean—or at least attempt to clean—the record can extend to records not in the agency's direct control.<sup>87</sup> In *King v. Department of the Navy*, the Navy agreed to "cancel the removal action of the appellant. . . and remove all reference to the removal action from [the appellant's] Official Personnel File."<sup>88</sup> In response to a FOIA request, the appellant was informed that both OPM and the Defense Finance and Accounting Service (DFAS) had records that contained references to the removal action.<sup>89</sup> The appellant subsequently filed a PFR alleging breach of the CRA, even though the CRA made no mention of OPM or DFAS files.<sup>90</sup>

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<sup>81</sup> *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶¶ 2-3 (2000).

<sup>82</sup> *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶ 2 (2000).

<sup>83</sup> *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶ 2 (2000).

<sup>84</sup> *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶ 3 (2000); see 5 C.F.R. § 351.504(b)(1) ("[a]n employee's entitlement to additional retention service credit for performance [in a reduction in force] shall be based on the employee's three most recent ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices.")

<sup>85</sup> *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶ 5 (2000).

<sup>86</sup> *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶ 5 (2000). The Board also noted in dicta that in the event of a RIF, the removed appraisal would be treated as a "missing" appraisal – something that OPM regulations have a provision to address. *Id.* at ¶ 6; see 5 C.F.R. § 351.504(c). *But see Baig v. Department of the Navy*, 66 M.S.P.R. 269, 275 (1995) (even if a settlement agreement states that all references to an action must be expunged from its records, an agency is still permitted to retain pertinent documents in its litigation files).

<sup>87</sup> See, e.g., *King v. Department of the Navy*, 130 F.3d 1031, 1033-34 (Fed. Cir. 1997).

<sup>88</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).

<sup>89</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).

<sup>90</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).

The Federal Circuit found that “[i]t appears to be undisputed that the mutual intent was to purge the personnel records that are officially kept and thus might be available to a future employer; no other reasonable meaning has been proposed.”<sup>91</sup> To limit the cleaning of the record to the OPF in the possession of the agency would deny the appellant the benefit of the agreement, which is to eliminate this information as it may affect future employment with the Government or elsewhere.<sup>92</sup> The court found that it was “highly unlikely that the parties bargained for the purging of only local personnel records” while intending to permit the files at OPM and DFAS to hold the removed information.<sup>93</sup>

While *Fernandez* applied the cleaning obligation to agency records other than the OPF, and *King* addressed Government records in the hands of other Federal agencies, in *Phillips v. Department of Homeland Security*, the Board was presented with a case in which the records were in the hands of a private sector company.<sup>94</sup>

In *Phillips*, the parties resolved an appeal through an NSA in which the agency agreed that it would “[e]xpunge all documents related to Appellant’s removal from her Official Personnel [F]older. In the event anything else relating to the removal action should arise in any other files, it will likewise be destroyed.”<sup>95</sup> The only exception was that the agency could maintain copies of the original documents in its litigation file in the legal and employee relations offices for possible use in “future litigation[.]”<sup>96</sup>

The Department of Homeland Security (DHS) employed a private sector contractor to communicate on its behalf with state unemployment offices.<sup>97</sup> Prior to reaching the NSA, DHS gave the contractor records reflecting the appellant’s removal.<sup>98</sup> The agency did not inform the contractor of the change in circumstances or ask the contractor to update its records.<sup>99</sup> The contractor’s subsequent actions led to a PFE in which the appellant argued that DHS breached the NSA.<sup>100</sup>

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<sup>91</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1034 (Fed. Cir. 1997).

<sup>92</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).

<sup>93</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1034 (Fed. Cir. 1997). The court expressly stated that its decision did not reach the question as to whether the agency had the authority to enter into an agreement that would bind DFAS or OPM. *Id.* Rather, it noted that there had been no assertion that OPM or DFAS had received a request from Navy and then refused to comply with the settlement agreement. *Id.* For a discussion of the extent to which a contract may or may not bind third parties, see the subsection titled *Effects of CRA Provisions on Actions of Third Parties* in a later chapter of this report.

<sup>94</sup> See *King v. Department of the Navy*, 130 F.3d 1031, 1033-34 (Fed. Cir. 1997) (other agencies); *Fernandez v. Department of Justice*, 84 M.S.P.R. 666, ¶ 5 (2000) (other systems of records); *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 13-14 (2012) (holding the agency accountable for failing to clean the records of its agent).

<sup>95</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 4 (2012).

<sup>96</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 4 (2012).

<sup>97</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 3 (2012).

<sup>98</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 3 (2012).

<sup>99</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 5 (2012).

<sup>100</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 6-7 (2012).

The Board found that the CRA could have specified – but did not – that copies could be kept by other components, by agents of agency offices or components, or for reasons other than future litigation.<sup>101</sup> Because the CRA's limited provision regarding where the removal records could be kept did not include the contractor, the agency breached the agreement by not instructing the contractor to clean its records.<sup>102</sup>

### Narrowing the Cleaning Obligation Beyond the OPF

While the cases above highlight how broad the obligation may be to clean the record, the obligation can be contractually narrowed by the terms of the CRA.<sup>103</sup> In *Knight v. Department of the Treasury*, the agency agreed to remove from the appellant's OPF the SF-50 documenting the appellant's removal and instead insert an SF-50 indicating that the appellant had either resigned or retired.<sup>104</sup> The CRA stated that "[e]xcept as expressly provided for in this Agreement, the Appellant waives any and all rights to seek . . . personnel records adjustment[s]" or "other remedies[.]"<sup>105</sup> The appellant also agreed that he would neither seek nor accept employment with any "bureau, department or subagency" within the Department of the Treasury.<sup>106</sup> As discussed in *Appendix D*, a "no return" clause of this kind is a fairly common CRA provision.<sup>107</sup>

Mr. Knight later applied for another position within the Department of the Treasury. When the agency investigated him in connection with his application, the agency reviewed its internal records. Through these records, the agency learned of his three prior suspensions, a report of investigation regarding alleged misconduct, and "the fact that he faced a removal action[.]"<sup>108</sup> The appellant filed a PFE alleging that the settlement was intended to provide him with a clean record and the retention of these records breached the CRA.<sup>109</sup>

The Board denied the PFE, finding that the expungement provision was expressly limited to the OPF and that the CRA in *Knight* was distinguishable from other CRAs that the

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<sup>101</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 14 (2012).

<sup>102</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 14 (2012).

<sup>103</sup> See *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 11 (2010).

<sup>104</sup> *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 2 (2010).

<sup>105</sup> *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 2 (2010).

<sup>106</sup> *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 2 (2010).

<sup>107</sup> Prohibitions on future employment were present in more than 40 percent of the CRAs filed with MSPB to settle an initial appeal between FY 2007 and FY 2011. Eighty-four percent of the agency representatives who reported using CRAs said that they had included this term in one or more of their CRAs. Eighty-seven percent of agency representatives reported that when they decided to recommend or oppose a CRA, it was either very or somewhat important to them that they be able to prevent future employment with the office, agency or other identified employer(s). For more on the methodology by which this data was collected, see *Appendix A*. For a copy of the survey and its results, see *Appendix B*.

<sup>108</sup> *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶¶ 4-5, 14 (2010).

<sup>109</sup> *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 4 (2010).

Board and the Federal Circuit had read more broadly, such as those discussed above.<sup>110</sup> Because the OPF was the only system of records expressly named to be cleaned, and because the CRA stated that “[e]xcept as expressly provided for in this Agreement, the Appellant waives any and all rights to seek” adjustments to personnel records, the Board found that the appellant had “clearly and unambiguously” waived the cleaning of any other system of records.<sup>111</sup>

The outcomes of the cases in this chapter regarding records were a result of the distinguishing aspects of the CRAs and the specific actions of the agencies in the particular cases. The next chapter demonstrates the extent to which distinguishing characteristics in CRAs and agency actions can also determine whether a *disclosure* of the original history constitutes a breach of the CRA.

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<sup>110</sup> *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 11 (2010). In its decision, the Board recognized that both it and the Federal Circuit had construed CRAs that provide for rescission of the original removal SF-50s and issuance of new SF-50s as also requiring expungement of other removal-related documents from an employee’s OPF. *Id.*

<sup>111</sup> *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 11 (2010). One of our survey questions asked agency representatives what they had done that worked well and should be done by others. Several respondents recommended expressly limiting the cleaning obligation to the OPF. As one respondent put it: “I attempt to restrict clean record agreements to the OPF only. It is virtually impossible for an agency to remove all documentation of a personnel action. There is always a piece of paper or a misspoken employee. Agencies do their best to abide by agreements but a true clean record is difficult to achieve unless there are agreed parameters.”





# DISCLOSING THE RECORD

When communicating with others, agencies that have entered into CRAs have an obligation to support the modified record and act as if the appellant’s history was, in fact, clean.<sup>112</sup> The promise to clean the record automatically implies the promise to act as if the clean record is the only record.<sup>113</sup> There are at least two important aspects of meeting this obligation: (1) *what* is being communicated; and (2) *who* is doing the communicating. Each of these aspects has an implied rule that is broad and each can be narrowed by the explicit terms of the agreement.

## WHAT IS COMMUNICATED

An agency cannot explicitly or by implication signal that there is something odd about the appellant’s record.<sup>114</sup> However, this obligation to support the modified record can be narrowed by the explicit language of the CRA.<sup>115</sup>

### Broad Obligation for Limited Communication

In *Pagan v. Department of Veterans Affairs* (DVA), the parties reached a CRA resolving the applicant’s removal appeal.<sup>116</sup> The agreement included that “[t]he appellant will receive a clean record. All charges and actions will be removed from the appellant’s personnel file.”<sup>117</sup> There was also a clause in which the agency agreed “not to disclose the terms to any prospective employer.”<sup>118</sup> However, “the agreement did not spell out the nature of the reference the DVA was to provide upon request from Mr. Pagan’s potential employers.”<sup>119</sup>

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<sup>112</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1371-72 (Fed. Cir. 1999).

<sup>113</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1371-72 (Fed. Cir. 1999); *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 12 (2009).

<sup>114</sup> See *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999) (explaining that by crossing out questions on a form, the agency signaled that something was off about the appellant).

<sup>115</sup> See *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 23 (2009) (permitting a disclosure when language in the CRA authorized such disclosures).

<sup>116</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370 (Fed. Cir. 1999).

<sup>117</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370 (Fed. Cir. 1999).

<sup>118</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370 (Fed. Cir. 1999).

<sup>119</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1371 (Fed. Cir. 1999).

The appellant applied for a position with the U.S. Postal Service (USPS), which contacted the Department of Veterans Affairs (DVA) for references. In its decision, the Federal Circuit noted:

[T]hough the purpose of the settlement agreement was clear, exactly how to respond to the question: “Would you rehire this individual?” was less so. On the basis of a “clean record” in Mr. Pagan’s personnel file, [the agency official] could check “yes,” but on the basis of the facts as he knew them, to be honest he should check “no.”<sup>120</sup>

The agency official did not provide a yes or no answer, but stated he could not answer the question due to circumstances beyond his control.<sup>121</sup> The agency was also asked to rate the appellant’s “attendance, work performance, behavior, and attitude using an excellent to unsatisfactory scale.”<sup>122</sup> The agency official crossed out the whole scale and did not rate the appellant.<sup>123</sup>

The court found that “although the agency did not promise to provide a favorable reference, or even any reference at all, it was required to act, in matters relating to Mr. Pagan, as if he had a ‘clean record.’”<sup>124</sup> The court found that returning the questionnaire with the questions about the appellant’s conduct and performance crossed out “would have strongly suggested to any recipient of the form that Mr. Pagan did not have a ‘clean record’ with the DVA.”<sup>125</sup> Accordingly, the agency was found in breach of the CRA.<sup>126</sup>

While *Pagan* involved a CRA with a confidentiality clause, its principles apply even when there is no such clause.<sup>127</sup> For example, in *Torres v. Department of Homeland Security*, the agency and the appellant entered into a CRA to resolve an appeal involving the appellant’s removal. The agreement stated that the agency would remove from the OPF all documentation regarding the appellant’s removal and replace the removal SF-50 with a resignation SF-50.<sup>128</sup> According to the appellant, he then applied for a position with an American company to serve as a contractor in Iraq.<sup>129</sup> He asserted that as part of the

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<sup>120</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1371 (Fed. Cir. 1999).

<sup>121</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370 (Fed. Cir. 1999).

<sup>122</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370 (Fed. Cir. 1999).

<sup>123</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370 (Fed. Cir. 1999).

<sup>124</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1371-72 (Fed. Cir. 1999).

<sup>125</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999).

<sup>126</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999).

<sup>127</sup> *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶¶ 6, 12 (2009).

<sup>128</sup> See *Torres v. Department of Homeland Security*, MSPB Docket No. DA-0752-07-0066-C-1, Initial Decision (Aug. 20, 2008), at 4.

<sup>129</sup> *Torres v. Department of Homeland Security*, MSPB Docket No. DA-0752-07-0066-C-1, Initial Decision (Aug. 20, 2008), at 5.



company's background investigation, he informed the company that he had never been fired for "payroll issues".<sup>130</sup> The appellant claimed that he later learned that several agency employees had told the investigator that the appellant had resigned in lieu of termination due to payroll issues.<sup>131</sup>

The appellant filed a PFE.<sup>132</sup> The AJ found that even if the appellant's allegations could be proven, there was no breach because "the agreement did not contain any confidentiality clause that would preclude agency employees from providing information to an investigator."<sup>133</sup>

On PFR, the Board reversed the initial decision.<sup>134</sup> The Board found that the key concern in clean record cases is that the Board "see to it that the parties receive that for which they bargained."<sup>135</sup> For this to occur, the agreement must be construed as requiring that the agency's communications with third parties reflect what the agreed upon record shows—regardless of whether the CRA contained an explicit confidentiality clause.<sup>136</sup> Because the agency agreed to a clean record, it was required to act as if the appellant had a clean record.<sup>137</sup> Thus, if the agency disclosed the appellant's alleged misconduct to the investigator, it was in breach of the CRA.<sup>138</sup>

The Board recently decided an appeal that hinged on a similar issue, i.e., whether a general disclosure prohibition applies to intra-agency communications that are not necessary to carry out the terms of the agreement. In *Shirley v. Department of the Interior*, the parties settled a removal appeal with a CRA.<sup>139</sup> The CRA provided in relevant part that:

The Parties, to the extent permitted by law, agree that the terms and conditions of this Agreement, including the identity of the Parties, and the facts surrounding the Agreement are to be deemed confidential and are not to be disclosed to anyone, with the exception of disclosure of the contents of the Agreement when required by law; disclosures made by the Appellant to his immediate family members; and disclosures made

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<sup>130</sup> *Torres v. Department of Homeland Security*, MSPB Docket No. DA-0752-07-0066-C-1, Initial Decision (Aug. 20, 2008), at 5.

<sup>131</sup> *Torres v. Department of Homeland Security*, MSPB Docket No. DA-0752-07-0066-C-1, Initial Decision (Aug. 20, 2008), at 5.

<sup>132</sup> *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 4 (2009).

<sup>133</sup> *Torres v. Department of Homeland Security*, MSPB Docket No. DA-0752-07-0066-C-1, Initial Decision (Aug. 20, 2008), at 8.

<sup>134</sup> *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 11 (2009).

<sup>135</sup> *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 11 (2009) (citing *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999)).

<sup>136</sup> *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 12 (2009).

<sup>137</sup> *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 12 (2009).

<sup>138</sup> *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 12 (2009). On remand, the AJ was instructed to develop the record to determine if the alleged communications with the investigator had occurred. *Id.* at 13.

<sup>139</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 8.

by the Parties for the limited purposes of implementing or enforcing the terms of this Agreement.<sup>140</sup>

The CRA did not prevent the appellant from reapplying for a new job the same agency.<sup>141</sup> The appellant did so and accepted an appointment at a different agency office.<sup>142</sup> Shortly after the appointment, however, the appellant's new office contacted his former office to obtain the information necessary to effect a law enforcement commission for him.<sup>143</sup> During the course of those discussions, the officials at the appellant's new office learned of his removal, Board appeal, and settlement.<sup>144</sup> The appellant filed a PFE, arguing among other things that the agency breached the nondisclosure provision of the CRA.<sup>145</sup>

The Board found, however, that these intra-agency communications did not breach the CRA nondisclosure provision as written. Specifically, the “parties” to the agreement were the appellant and the agency—not any particular agency office or official.<sup>146</sup> “As the term ‘disclosure’ is ordinarily understood, a party cannot disclose information to itself, because any information the party could disclose is already in its possession.”<sup>147</sup> Accordingly, the Board found that “[a]bsent clear indications to the contrary, we must infer that when ‘[t]he Parties’ agreed that information about the agreement would not be disclosed to anyone, they committed themselves not to reveal such information to third parties.”<sup>148</sup> The Board contrasted the general nondisclosure provision in *Shirley* with the more specific nondisclosure provision in *Sena v. Department of Defense* which explicitly restricted the intra-agency disclosures that could occur.<sup>149</sup>

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<sup>140</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 8.

<sup>141</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 9.

<sup>142</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 11.

<sup>143</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 11.

<sup>144</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶¶ 12-25.

<sup>145</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 15. The appellant also argued that the agency breached the clean record provision by not purging the adverse action-related documents from his law enforcement commission file. *Id.*, ¶ 18. The Board disagreed, finding that the agency only agreed to remove such information from the appellant's OPF, and that the clean record provision was similar to the one in *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659 (2009), discussed above. *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶¶ 20-23

<sup>146</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 25.

<sup>147</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 25.

<sup>148</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 25.

<sup>149</sup> *Shirley v. Department of the Interior*, 2013 MSPB 76, ¶ 27 (citing *Sena v. Department of Defense*, 66 M.S.P.R. 458 (1995)).

## Narrowing the Obligation to Limit Communications

As with issues regarding cleaning the record, non-disclosure obligations can be narrowed by the terms of the agreement.<sup>150</sup> In *Godwin v. Department of Defense*, the CRA stated that the appellant would “direct any potential future employers seeking an employment reference” to one of two specific people or their designees.<sup>151</sup> These individuals would then, in response to any inquiry by future employers, “advise” the inquiring entity that the appellant “resigned from the agency for personal reasons, and that Appellant was rated at the highly successful level. No negative statement [would] be made.”<sup>152</sup>

One of the designated officials was contacted by a potential employer who sent a form containing 12 questions.<sup>153</sup> The official “returned the form without filling it out, but she attached a cover letter stating that Ms. Godwin had ‘left for personal reasons’ and that she had ‘performed at a highly successful level.’”<sup>154</sup> The official also “stated that she could not answer specific questions regarding Ms. Godwin.”<sup>155</sup> In a separate incident, when contacted by a potential employer, the official stated that the appellant “met standards” for a variety of tasks but declined to answer other questions, including whether the agency would be willing to rehire the appellant.<sup>156</sup>

While the facts in *Godwin* are similar to those in *Pagan*, discussed earlier, slight differences in the facts and more substantial differences in the CRAs brought a different result.<sup>157</sup> In *Pagan*, the CRA did not specify what the agency would say, and when asked about the appellant, the agency official drew lines through the questions on a form that asked about the appellant’s conduct and performance.<sup>158</sup> The Federal Circuit found that by crossing out the questions, the agency had, in effect, “strongly suggested” that there was a problem with the appellant and thereby breached the agreement.<sup>159</sup>

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<sup>150</sup> Compare *Knight v. Department of the Treasury*, 113 M.S.P.R. 548, ¶ 11 (2010) (narrowing the obligation to clean the record) with *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659 (2009) (narrowing the obligation to support the record).

<sup>151</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1334 (Fed. Cir. 2000).

<sup>152</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1334 (Fed. Cir. 2000).

<sup>153</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1335 (Fed. Cir. 2000).

<sup>154</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1335 (Fed. Cir. 2000).

<sup>155</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1335 (Fed. Cir. 2000).

<sup>156</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1336 (Fed. Cir. 2000).

<sup>157</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1336 (Fed. Cir. 2000) (discussing *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370-71 (Fed. Cir. 1999)).

<sup>158</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370-71 (Fed. Cir. 1999).

<sup>159</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999).

In *Godwin*, the Federal Circuit found that:

Upon being asked a question falling outside the specific areas covered by . . . the settlement agreement, as to which an honest answer would be negative, [the agency official] had three choices: to give a false favorable answer, thereby deceiving the inquirer; to give a truthful negative answer, thereby breaching the provision of the agreement prohibiting negative statements; or to decline to answer the question. In that situation, it was perfectly permissible for [the agency official] to choose the third option, thereby avoiding either lying or breaching an express term of the agreement. We decline to interpret the “negative statement” provision of the agreement to impose an affirmative obligation on [the agency official] to lie to any prospective employer if a truthful answer would be negative.<sup>160</sup>

The Federal Circuit emphasized its “discomfort” with agreements that pose such dilemmas, but stated that it would “construe such agreements strictly according to their terms” and would “not readily construe such an agreement to require an agency to deceive prospective employers.”<sup>161</sup> It reiterated that it would “not assume that silence in response to particular inquiries necessarily constitutes a ‘negative comment’ on the employee’s performance.”<sup>162</sup>

The ability to make a disclosure can also be narrowed based on the circumstances surrounding the inquiry.<sup>163</sup> In *Allen v. Department of Veterans Affairs*, the agency agreed to remove from the appellant’s OPF a suspension SF-50 and a removal SF-50.<sup>164</sup> A resignation SF-50 would be inserted in their place.<sup>165</sup> The agreement also stated that if the Human Resources Officer was “contacted for any employment inquiry or reference for the Appellant [the official] will. . . truthfully respond regarding those matters *required by law*.”<sup>166</sup> The appellant then applied to the Office of Workers’ Compensation Programs (OWCP) for Federal benefits for an alleged workplace injury.<sup>167</sup>

OWCP sent to the agency a request for information that included questions about whether the appellant had any conduct or performance problems during his employment.<sup>168</sup> The

<sup>160</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1337 (Fed. Cir. 2000).

<sup>161</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1338 (Fed. Cir. 2000).

<sup>162</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1338 (Fed. Cir. 2000).

<sup>163</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 23 (2009).

<sup>164</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 2 (2009).

<sup>165</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 2 (2009).

<sup>166</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 2 (2009) (emphasis added).

<sup>167</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 3 (2009).

<sup>168</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 4 (2009).

agency replied to OWCP with a narrative response and enclosed documents regarding the appellant’s disciplinary history, including copies of the proposal and decision notices from the rescinded removal action.<sup>169</sup> The appellant then filed a PFE alleging that the information the agency sent to OWCP constituted a breach of the CRA.<sup>170</sup>

The Board noted the seeming applicability of *Conant*, in which the agency breached the CRA when it sent a rescinded SF-50 to OPM.<sup>171</sup> However, the Board distinguished *Allen* from *Conant* because contract provisions must be read as part of an organic whole, according reasonable meaning to all of the contract terms and giving weight to the spirit or essence of the contract as intended by the parties.<sup>172</sup> As explained above, the CRA in *Allen*, contained a clause permitting the agency to make disclosures when required by law.<sup>173</sup>

The Board found that an employer is legally required to disclose to OWCP information that challenges an employee’s claim of entitlement to FECA benefits.<sup>174</sup> The Board also analyzed the False Claims Act and found that if the responding agency official had willfully failed, neglected, or refused to make any of the reports, or knowingly filed a false statement or representation, or concealed any material facts, the official could be fined or imprisoned.<sup>175</sup> The Board found that because of the agency’s legal obligations to OWCP, and the clause that permitted the making of disclosures required by law, the agency was not in breach of the CRA.<sup>176</sup>

However, in *Phillips v. Department of Homeland Security*, a case using similar CRA language, an important difference in the facts of the case resulted in the opposite outcome for the agency when it disclosed the appellant’s history.<sup>177</sup> In *Phillips*, discussed earlier for issues related to cleaning the record of an agency’s contractor, the CRA also had an exception for disclosures required by law.<sup>178</sup>

In *Phillips*, the CRA included a provision that enabled the agency to discuss the original record if the appellant signed a waiver or applied for a “law enforcement officer position[,]”

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<sup>169</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 4 (2009).

<sup>170</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 4 (2009); see *Conant v. Office of Personnel Management*, 255 F.3d 1371 (Fed. Cir. 2001).

<sup>171</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 16 (2009).

<sup>172</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 16 (2009).

<sup>173</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 2 (2009).

<sup>174</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 21 (2009).

<sup>175</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 21 (2009); see 31 U.S.C. § 3729 (False Claims Act).

<sup>176</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 23 (2009).

<sup>177</sup> Compare *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 20, 23 (2012) with *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 23 (2009).

<sup>178</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 17, 22-23 (2012).

but was otherwise unable to discuss the record except as “required by law, court order, or government regulation.”<sup>179</sup> The agency’s private sector contractor later informed a Maryland state unemployment agency that the appellant had been removed.<sup>180</sup>

Among several different defenses, the agency asserted that the disclosure did not breach the settlement agreement because the agreement contained an exception for disclosure of removal-related information when required by law.<sup>181</sup> The agency claimed that both Board precedent (including the *Allen* case discussed above) and Maryland law required it “to truthfully respond to the Maryland Unemployment Division’s request for separation information about the Appellant.”<sup>182</sup>

The Board distinguished the facts of *Phillips* from those in *Allen*.<sup>183</sup> In *Phillips*, the Board found that it was possible for the agency to comply with Maryland law without making the disclosure.<sup>184</sup> Thus, the agency in *Phillips* had breached the CRA while the agency in *Allen* had not.<sup>185</sup>

These cases, when looked at together, highlight an important point about the use of boilerplate language. Whatever language the parties agree to put into the contract, the contract will still be applied to the specific *facts* of the case at hand.<sup>186</sup> It therefore behooves parties to tailor the language of their CRAs to accommodate the situation at hand and thereafter to conduct themselves in accordance with the *situation where the settlement contract is operating*.<sup>187</sup>

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<sup>179</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 4 (2012).

<sup>180</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 6 (2012). Prior to the settlement, the contractor had informed a Virginia unemployment agency about the removal. *Id.* at ¶ 3.

<sup>181</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 17 (2012).

<sup>182</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 17 (2012). The agency also cited *Felch v. Department of the Navy*, 112 M.S.P.R. 145, ¶ 16 (2009), in which the Board found that if an agency with a CRA that permitted disclosures required by law was, in fact, required by law to disclose to a state unemployment office, then the agency would not be in breach of the CRA. In *Felch*, the Board remanded the case back to the AJ to determine, among other things, whether the law required a disclosure. *Id.* at ¶ 17.

<sup>183</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 20 (2012).

<sup>184</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 22-23 (2012).

<sup>185</sup> Compare *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 20, 23 (2012) with *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 23 (2009).

<sup>186</sup> Compare *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 20, 23 (2012) with *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 23 (2009).

<sup>187</sup> Compare *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 20, 23 (2012) with *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 23 (2009).

## WHO DOES THE COMMUNICATING

The question of whether or not the agency will be held accountable for the actions of an individual has been read quite broadly in the absence of narrowing language.<sup>188</sup> However, as with the cases discussed previously, narrowing language can be an option.

### Broad Agency Actors

In *Thomas v. Department of Housing and Urban Development*, there was a CRA between the Department of Housing and Urban Development (HUD) and the appellant to resolve a demotion action.<sup>189</sup> As a term of the agreement, the appellant resigned from the agency.<sup>190</sup> The CRA stated that no agency employee could directly *or indirectly* refer to the demotion which had been predicated on an investigation into the appellant.<sup>191</sup> The appellant later expressed interest in employment with the Department of Justice (DOJ), so a DOJ official called a friend at HUD to ask about the appellant.<sup>192</sup> The HUD employee, who admitted that she did not know the appellant personally, spoke with another HUD employee to obtain information about the appellant and then passed on to her DOJ friend what the second HUD employee had told her.<sup>193</sup> This information included that the appellant had been the subject of an investigation.<sup>194</sup>

When the case reached the Federal Circuit, the court opined that:

It may well be that it is virtually impossible for agencies to ensure that settlement agreements such as this, requiring the whitewashing of an employee's disciplinary record, can be performed to the letter. Even if some agency officials are willing to palm off their problems on others, including sister agencies, without revealing the truth about an

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<sup>188</sup> Compare *King v. Department of the Navy*, 130 F.3d 1031, 1033-34 (Fed. Cir. 1997) (reading record cleaning obligations broadly) and *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1370 (Fed. Cir. 1999) (the agency breached the CRA by drawing lines through questions about the appellant because it sent a message that would make the recipient suspicious) with *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 14 (2012) (the agency was liable for the communications of its agent).

<sup>189</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1440 (1997).

<sup>190</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1440 (1997).

<sup>191</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1440-41 (1997).

<sup>192</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1440 (1997).

<sup>193</sup> *Thomas v. Department of Housing and Urban Development*, 71 M.S.P.R. 181, 188-89 (1996).

<sup>194</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1440-42 (1997); *Thomas v. Department of Housing and Urban Development*, 71 M.S.P.R. 181, 188-89 (1996).

employee, there is always the risk that another person who knows the facts will not remain silent.<sup>195</sup>

However, it also found that it could not “permit the agency that willingly entered into such an arrangement to breach it without being held responsible. To do so would be to condone what would be essentially an empty promise made by the government.”<sup>196</sup> The court found in 1997 that the agency’s breach of the CRA permitted the appellant to withdraw his 1992 resignation.<sup>197</sup>

Similarly in *Powell v. Department of Commerce*, the parties agreed that the agency would not discuss any aspect of the settlement agreement, or the incidents leading up to the agreement, with any other person or entity, except as necessary to implement the agreement or as ordered by a court or administrative body of competent jurisdiction.<sup>198</sup> The agreement specified that employment-related inquiries would not be directed to the appellant’s Commerce supervisor, Mr. Levitt.<sup>199</sup> The appellant filed an EEO complaint at her new agency, and the new agency proffered as a witness Mr. Levitt, who it stated would testify negatively about the appellant’s prior EEO activity and “abusive” treatment of coworkers at Commerce.<sup>200</sup>

The appellant filed a PFE alleging breach.<sup>201</sup> In reply, Commerce did not dispute that the proffer occurred but “explained that Mr. Levitt was not familiar with all the terms of the agreement. The agency further stated that it had taken corrective measures immediately after the disclosure occurred.”<sup>202</sup> These measures included informing the EEOC administrative judge that the proffered testimony was “unauthorized”.<sup>203</sup> Commerce argued there had been no breach as Mr. Levitt did not actually testify, having been rejected as a witness by the EEOC.<sup>204</sup> The Board found that by communicating the negative information to the new employer, Commerce had deprived the appellant of the “clean slate” that she had

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<sup>195</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1442 (1997). While this case referred to the original history as “the truth,” we note that in *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1377 (Fed. Cir. 2001), the Federal Circuit deemed it an “abuse of discretion” when the Board allegedly accepted as true allegations that the agency had not proven before a third party adjudicator because the case was settled.

<sup>196</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1442 (1997).

<sup>197</sup> *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1441-43 (1997).

<sup>198</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 3 (2005).

<sup>199</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 2 (2005).

<sup>200</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 5 (2005).

<sup>201</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 5 (2005).

<sup>202</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 6 (2005).

<sup>203</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 12 (2005).

<sup>204</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 12 (2005).



bargained for under the agreement.<sup>205</sup> Thus, even though the employee that caused the breach may not have “been familiar with all the terms” of the CRA, his communications with the new employer constituted an incurable material breach.<sup>206</sup>

The obligation of the agency to avoid “the risk that another person who knows the facts will not remain silent” is not limited to the employees of the agency.<sup>207</sup> In *Phillips*, discussed earlier, the agency breached its contractual obligations to the appellant through the actions of its contractor.<sup>208</sup> The agency’s clean record obligations applied to not only the paper record in the contractor’s possession, but also to disclosures made by its contractor.<sup>209</sup>

### Narrowing Agency Actors

The language of a CRA can narrow an agency’s obligation to control the speech of those under its control.<sup>210</sup> In *Godwin v. Department of Defense*, discussed earlier, the CRA stated that the appellant would “direct any potential future employers seeking an employment reference” to one of two specific people or their designees.<sup>211</sup> However, a prospective employer contacted the appellant’s supervisor, who was not one of the two individuals named.<sup>212</sup> In response to questions from the prospective employer, the supervisor allegedly laughed and “took the 5th.”<sup>213</sup>

The court found that the supervisor’s action was “troubling” but that, because he was not a designee of either of the two people indicated in the CRA as individuals to whom the appellant was to direct interested parties, he was not bound by the limits that had been placed on the speech of those two individuals.<sup>214</sup>

In order to provide sufficient protection to both parties, a point-of-contact provision must also be specific and complete. In *Allison v. Department of Transportation*, the CRA stated that requests “for employment references are to be directed only to: Human Resource [sic]

<sup>205</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 13 (2005).

<sup>206</sup> *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶¶ 6, 13 (2005).

<sup>207</sup> The quote is from *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1442 (1997). See *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶ 14 (2012) (holding the agency accountable for the actions of its contractor).

<sup>208</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 3-6, 13-14 (2012).

<sup>209</sup> *Phillips v. Department of Homeland Security*, 118 M.S.P.R. 515, ¶¶ 3-6, 13-14 (2012).

<sup>210</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1336 (Fed. Cir. 2000).

<sup>211</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1334 (Fed. Cir. 2000).

<sup>212</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1334-36 (Fed. Cir. 2000).

<sup>213</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1336 (Fed. Cir. 2000).

<sup>214</sup> *Godwin v. Department of Defense*, 228 F.3d 1332, 1338 (Fed. Cir. 2000). As the court explained, “The agency was thus protected against the risk that a prospective employer would obtain a negative recommendation from someone other than [a designated official] – perhaps someone who was not aware of the settlement agreement or was not schooled in the proper manner of responding to inquiries governed by the agreement.” *Id.* at 1336.

Division, Federal Aviation Administration, 2300 East Devon Ave., Des Plaines, Illinois 60018, phone 847 294 \*\*\*\*, Facsimile (847) 294 \*\*\*\*.”<sup>215</sup> The CRA included a footnote that the “\*” digits would be provided by January 24, 2007.<sup>216</sup> However, the agency failed to provide those numbers.<sup>217</sup> The CRA also specified the content of the neutral references to be given but did not contain the names of any individuals who would give the neutral references.<sup>218</sup>

On June 20, 2008, a secretary in the Federal Aviation Administration’s (FAA’s) Human Resources Division (HRD) received a request for “employment verification, the reason for separation, and any other details regarding Mr. Allison’s time at the FAA.”<sup>219</sup> The secretary then provided printouts from an automated system that indicated that the appellant had been removed and the removal action was cancelled due to a settlement agreement.<sup>220</sup>

The agency argued that it was not liable for the breach because the appellant was purportedly responsible for the disclosure due to his failure to: (1) obtain more specific contact information for references from the agency; and (2) instruct the prospective employer to contact the “Employment Services Branch” within HRD, which allegedly was the only office that was supposed respond to requests for employment information.<sup>221</sup>

The Board found that, to the extent that it was the agency’s intent to limit the employees who would provide an employment reference by providing the telephone number for a particular employee or branch as part of the settlement agreement, the agency’s failure to promptly provide the numbers as required by the agreement could not allow it to escape responsibility when someone else in HRD was contacted.<sup>222</sup>

The agreement also did not specify the names of the individuals in HRD who would reply or which branch in HRD would respond to inquiries.<sup>223</sup> Unlike *Godwin*, where there was a specific individual charged with responding and the agency was not liable for a disclosure by someone else, in *Allison*, by narrowing the non-disclosure obligation to all of HRD,

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<sup>215</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 3 (2009).

<sup>216</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 3 (2009).

<sup>217</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 8 (2009). The agency finally provided the digits after the appellant filed his PFE. *Id.*

<sup>218</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 3 (2009).

<sup>219</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 4 (2009).

<sup>220</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶¶ 4-5, 10 (2009).

<sup>221</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶¶ 12-13 (2009).

<sup>222</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶¶ 12, 14 (2009).

<sup>223</sup> *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶¶ 13-14 (2009).

the agency was responsible for the actions of the HRD secretary who released the negative information and thereby was responsible for the breach of the agreement.<sup>224</sup>

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<sup>224</sup> Compare *Godwin v. Department of Defense*, 228 F.3d 1332, 1336 (Fed. Cir. 2000) with *Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 14 (2009).





# WAIVING CONFIDENTIALITY

Below we discuss two cases in which the agency provided to an outsider information about the appellant that had been cleaned from the official record and permitted the appellant's coworkers to speak about the appellant. Both cases involved a waiver signed by the appellant authorizing discussion of the appellant's work history. Yet, the outcomes were different because the waivers differed in specificity.

In *Del Balzo v. Department of the Interior*, the appellant was a Criminal Investigator removed for allegedly falsifying travel vouchers.<sup>225</sup> The parties entered into a CRA, which stated that the agency would direct all employment inquiries to the appellant's former second-level supervisor or, in that official's absence, to the Deputy Assistant Inspector General for Investigations.<sup>226</sup> The agency further agreed that the official to whom the inquiries were directed would only communicate that the appellant had resigned from his position for personal reasons, the dates on which the appellant's employment with the agency began and ended, and the type of work he performed.<sup>227</sup>

The appellant subsequently applied for the position of Investigator in the Department of Housing and Urban Development (HUD) and was given a tentative job offer conditional upon a successful suitability determination.<sup>228</sup> When HUD first contacted the Department of the Interior (DOI), one of the individuals authorized by the agreement to speak about the appellant (Sheehan) responded, and his response comported with the CRA.<sup>229</sup>

However, HUD then showed Sheehan a waiver signed by the appellant "authorizing and directing his former employing agency to release [to HUD investigators] information regarding his activities" including his performance and disciplinary history. Sheehan then provided HUD with access to a file about the investigation into the appellant that included information related to charges in the appellant's removal.<sup>230</sup>

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<sup>225</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 660 (1994).

<sup>226</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 660-61 (1994).

<sup>227</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 661 (1994).

<sup>228</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 661 (1994).

<sup>229</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 661 (1994).

<sup>230</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 661 (1994).

The appellant's supervisor also was contacted by HUD, and while he refused to discuss details about the appellant, he gave HUD access to DOI employees who had been the appellant's coworkers.<sup>231</sup> This access was at the work site, during working hours, and over agency telephones.<sup>232</sup> The coworkers provided negative references.<sup>233</sup> The Board found that construing the release form's provisions broadly enough to authorize either the investigation file or the discussions with coworkers would be inconsistent with the purpose of the settlement agreement and the agency therefore violated the settlement agreement by disclosing information beyond that described in the agreement.<sup>234</sup>

A few years later, the Interstate Commerce Commission faced a similar situation involving a general waiver.<sup>235</sup> In *Hosey v. Interstate Commerce Commission*, the CRA stated that the agency would designate a contact for prospective employment references sought on behalf of the appellant and that the contact would release only certain information such as dates of employment.<sup>236</sup> When the appellant was selected for a position requiring a top secret clearance, the investigator was stymied in his efforts because all of the individuals he contacted referred him to the designated person, and that person informed the investigator that the general release signed in the appellant's application for the security clearance was not adequate to authorize the release of the desired information.<sup>237</sup> The agency said that it would only provide further information or permit interviews with other employees if the agency received a more specific release authorization signed by the appellant.<sup>238</sup>

The investigator informed the appellant of the need for a more specific release in order to conduct the investigation for the required clearance level, and the appellant signed such a release, which expressly mentioned the ability to interview supervisors and co-workers as well as access to records.<sup>239</sup> The agency then allowed the investigator to speak with former coworkers and supervisors and granted access to the litigation file containing negative information about the appellant.<sup>240</sup>

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<sup>231</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 661, 664 (1994).

<sup>232</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 664 (1994).

<sup>233</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 661 (1994).

<sup>234</sup> *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 663-65 (1994).

<sup>235</sup> Compare *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605 (1997) (in which there was a CRA that specified who would respond to contacts, that a neutral reference would be given, and in which a general waiver was then presented to the agency) with *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659 (1994) (in which there was a CRA that specified who would respond to contacts, that a neutral reference would be given, and in which a general waiver was then presented to the agency).

<sup>236</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 607 (1997).

<sup>237</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 607-08 (1997).

<sup>238</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 608 (1997).

<sup>239</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 608 (1997).

<sup>240</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 608 (1997).

The appellant asserted that this release of negative information constituted a breach of the agreement.<sup>241</sup> The Board found that a valid waiver requires: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit that may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish it.<sup>242</sup> The Board found that all three elements were met in *Hosey*, and therefore the appellant had waived his right to require the non-disclosure of negative information.<sup>243</sup>

Similarly in *Lowe v. Department of Veterans Affairs*, discussed earlier, the agency entered into a CRA and was later presented with a request for information from an attorney for the City of Jacksonville, Arkansas, accompanied by a “Release of Employment Information” signed by the appellant.<sup>244</sup> The agency then released the appellant’s OPF to the requestor.<sup>245</sup> The Board, citing *Hosey*, applied the test from that case to the facts of *Lowe* and found that the release satisfied all three elements. The Board therefore found that the agency had not breached the CRA.<sup>246</sup>

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<sup>241</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 608 (1997).

<sup>242</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 609 (1997).

<sup>243</sup> *Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 609-10 (1997).

<sup>244</sup> *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶¶ 3, 5 (2000).

<sup>245</sup> *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶ 5 (2000).

<sup>246</sup> *Lowe v. Department of Veterans Affairs*, 85 M.S.P.R. 219, ¶¶ 11-12 (2000). In *Lowe*, the NSA stated that the “agreement will be kept confidential and the terms herein shall not be disclosed by either party, except to authorized officials responsible for implementing the agreement[.]” *Id.* at ¶ 3. However, it also stated that the agency “reserves the right to discuss the circumstances of [the appellant’s] resignation with prospective employers.” *Id.* at ¶ 3. In her PFE, the appellant asserted that the agency broke the confidentiality clause of the NSA when it disclosed the resignation in lieu of removal to an attorney for the City of Jacksonville. *Id.* at ¶ 3. The agency argued that it was permitted to send the information under the “prospective employers” clause while the appellant argued that the City of Jacksonville was not a prospective employer. *Id.* at ¶ 11, n.4. The Board held that, because the waiver issue was dispositive, there was no need to address whether the prospective employer clause was met by the facts of the case. *Id.*







# EXTERNAL RESTRICTIONS ON THE EFFECT OF A CRA

There are limits to the contractual promises that a court can enforce.<sup>247</sup> A court cannot require a party to take actions that violate the law, even if the parties have contracted to do so.<sup>248</sup> A court cannot use a settlement agreement to “impose duties or obligations on a third party without that party’s agreement.”<sup>249</sup> This means that it cannot compel a third party to accept particular facts or alter the third party’s separate entitlement to receive or disclose facts.<sup>250</sup> This chapter discusses various cases in which issues as to the enforceability of the agreement arose because of restrictions on what a contract between two parties can achieve when a third party is involved.

## PUBLIC POLICY LIMITATIONS

Certain situations can require an agency to make disclosures regardless of the terms of a CRA.<sup>251</sup> For example, in *Fomby-Denson v. Department of the Army*, the appellant was a U.S. citizen employed with the U.S. Army at a duty station in Germany.<sup>252</sup> The appellant was removed for alleged child neglect and forgery.<sup>253</sup> The appellant filed an appeal and a CRA was reached in which the agency agreed that the OPF would be cleaned and the terms of

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<sup>247</sup> See *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) (“The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.”)

<sup>248</sup> See *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

<sup>249</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 17 (2003).

<sup>250</sup> See, e.g., *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 21 (2003) (OPM is not required to accept the alleged facts presented to it when those facts are the result of a settlement agreement); *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 11 (2006) (the agency was “obligated to provide” certain information to OPM “regardless of the terms of the settlement agreement”); *Vance v. Department of Interior*, 114 M.S.P.R. 679 (2010) (because of the independence accorded to Inspectors General, neither the Board nor an agency has the authority to order an OIG to remain silent about the results of an investigation conducted by the OIG); *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 159-60 (1997) (the appellant was obligated to report to a new employer that he had left a position by mutual agreement and failure to disclose this was grounds for removal and debarment), *aff’d* 155 F.3d 565 (1998).

<sup>251</sup> See, e.g., *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1376 (Fed. Cir. 2001) (holding that the United States cannot contractually bind itself not to refer criminal misconduct); *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 23 (2001) (holding that an agency cannot contract to withhold from OPM police or criminal records pertinent to a background or suitability investigation). *But see* *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 16 (2009) (explaining that the holding in *Gizzarelli* is limited to situations where an agency discloses police or criminal information to OPM for a suitability determination and does not apply to information about performance or non-criminal conduct issues).

<sup>252</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1368 (Fed. Cir. 2001).

<sup>253</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1369 (Fed. Cir. 2001).

the agreement would “not be publicized or divulged in any manner, except as is reasonably necessary to administer its terms.”<sup>254</sup> Approximately one month after the agreement was signed, the Army forwarded to local officials its allegations for possible investigation and prosecution.<sup>255</sup> A few days after that, the Army notified immigration officials that the appellant was no longer an Army employee who could benefit from the Status of Forces Agreement (SOFA) and informed them of the appellant’s alleged criminal conduct.<sup>256</sup>

When contacted by local officials about her conduct, the appellant contacted the Army to ask if they requested that the local officials investigate her, and if so, to ask that the request be withdrawn.<sup>257</sup> The Army replied:

We have always had an obligation to the German government to report suspected criminal violations of German law and only refrained, in your client’s case, because the MSPB case was pending and we believed she would be losing her eligibility to remain in Germany as a result of those proceedings. . . . Other than making a truthful report of what had happened, the US Army has had no involvement in any German investigation. . . . Moreover, we have no authority to interfere now in the German government’s investigation of an incident that they apparently also consider serious enough to take action on.<sup>258</sup>

The appellant filed a PFE alleging that the referral of the criminal charges to the local authorities constituted a breach of the CRA. The AJ found that the agreement did not prohibit such referrals.<sup>259</sup> The Federal Circuit agreed as to the result, but on a different basis. Specifically, it found that, although the agreement was ambiguous as to the referrals, the issue was immaterial to the outcome because under the appellant’s proffered interpretation, the agreement would be void on public policy grounds.<sup>260</sup>

The court held that to “declare a contract unenforceable on public policy grounds. . . courts must first determine that the public policy at issue is well defined and dominant.”<sup>261</sup> The court then noted that, for more than 700 years, it has been public policy to require citizens to notify the authorities when a crime is committed—it was called raising a “hue

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<sup>254</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1369 (Fed. Cir. 2001).

<sup>255</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1369 (Fed. Cir. 2001).

<sup>256</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1369-70 (Fed. Cir. 2001).

<sup>257</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1370 (Fed. Cir. 2001).

<sup>258</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1370 (Fed. Cir. 2001).

<sup>259</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1371 (Fed. Cir. 2001).

<sup>260</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1373, 1378 (Fed. Cir. 2001).

<sup>261</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001).

and cry.”<sup>262</sup> On this basis, the court found that an agreement that requires a party to not disclose a crime is contrary to public policy and is therefore unenforceable.<sup>263</sup>

Another case concerning a CRA’s public policy implications is *Gizzarelli v. Department of the Army*. In *Gizzarelli*, the appellant and the Army entered into a CRA in which the agency agreed that it would “not disclose any information to prospective employers which would indicate that [the appellant] was removed” and would provide only certain neutral information authorized in 5 C.F.R. § 293.311(a) such as the appellant’s grades, duty stations, and position descriptions.<sup>264</sup> The appellant later received an appointment from the Social Security Administration (SSA), which required a background check.<sup>265</sup> Acting in its role performing such checks, OPM asked the Army’s Crime Records Center for “pertinent information” about the appellant, at which time the Army informed OPM that the appellant had admitted that she “had stolen agency property, transported the stolen property in government-owned vehicles, and used agency employees to remodel her home.”<sup>266</sup> The Army also notified OPM that the “Military Police found probable cause to believe that the appellant had committed the criminal offenses of receiving stolen property, larceny and embezzlement, and fraud.”<sup>267</sup>

The appellant filed a PFE arguing that the agency breached the agreement by giving OPM information that was not authorized by 5 C.F.R. § 293.311(a).<sup>268</sup>

The Board found that the Federal Circuit’s reasoning in *Fomby-Denson* was “instructive” for *Gizzarelli*.<sup>269</sup> It noted that there was a “well defined and dominant” public policy issue at stake in protecting the citizenry from misconduct by public servants who were in a position of trust and that OPM’s investigation regulations were intended to protect that public interest.<sup>270</sup> Accordingly, the Board found that the Army could not contractually bar

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<sup>262</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001).

<sup>263</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1378 (Fed. Cir. 2001).

<sup>264</sup> *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 2 (2001) (indicating that the only information that would be released was that which is permitted under 5 C.F.R. § 293.311(a)); see 5 C.F.R. § 293.311(a) (describing neutral information to include grades, duty stations, position descriptions, etc.).

<sup>265</sup> *Gizzarelli v. Department of Army*, 90 M.S.P.R. 269, ¶ 3 (2001).

<sup>266</sup> *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 3-4 (2001).

<sup>267</sup> *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 4 (2001).

<sup>268</sup> *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 5-6 (2001).

<sup>269</sup> *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 10 (2001).

<sup>270</sup> *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 12 (2001).

itself from reporting alleged criminal activity to OPM if OPM's inquiry was related to a background or suitability investigation.<sup>271</sup>

However, in *Cunningham v. Office of Personnel Management*, the Board distinguished cases such as *Gizzarelli* from those in which there were no allegations of criminal activity. In *Cunningham*, the appellant was a criminal investigator who was removed during his probationary period for unspecified reasons.<sup>272</sup> The parties entered into a CRA under which the agency agreed that it would keep the “terms, amount, and facts of [the] Agreement completely confidential, except to the extent disclosure may be required by law, regulation, subpoena or court order.”<sup>273</sup> The appellant then obtained a position with a private contractor who performed investigations for the agency.<sup>274</sup> Due to the duties of the position with the contractor, the appellant was subject to a background check.<sup>275</sup> OPM told the private sector investigator that the appellant: (1) was separated from the agency; (2) filed an MSPB appeal; (3) reached a settlement agreement with the agency; and (4) “now” had a record that showed a resignation.<sup>276</sup>

The appellant filed a PFE arguing that the communication of this information constituted a breach of the CRA.<sup>277</sup> The Board noted that it decided *Gizzarelli* on narrow grounds and had explicitly stated that it was “not finding that OPM can obtain personnel records related to misconduct or performance where a settlement agreement prevents the release of such

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<sup>271</sup> *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 15, 33 (2001). This issue has also arisen, but not been fully addressed, in the context of the duties of the Office of Special Counsel (OSC) and criminal investigators acting based on referrals from OSC. See *Doe v. Department of the Army*, 116 M.S.P.R. 160 (2011). In *Doe*, the employing agency and the appellant reached a CRA in which the agency was obligated to “amend” Doe’s records to reflect a resignation instead of a removal. *Id.* at ¶ 2. OSC referred a travel fraud allegation to Army’s Criminal Investigation Division (CID), which asked a question of the appellant’s supervisor, who was purportedly under oath and disclosed the removal in response to the question. *Id.* at ¶ 3. CID then purportedly gave the information to OSC, leading to the appellant’s concern that OSC might publish it. *Id.* In response to the appellant’s PFE for breach, the agency asserted that if anyone violated the appellant’s privacy, it was OSC, not the agency. *Id.* at 4. The Board remanded the case back to the Central Regional Office to address the question of whether there had been a breach of the CRA in the particular context of this case. *Id.* at ¶ 11-12.

<sup>272</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 2 (2009). Typically, the Board does not have jurisdiction over the termination of a probationer. See 5 U.S.C. § 7511; but see *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1342-43 (Fed. Cir. 2002) (a probationer has appeal rights if he or she has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less). However, actions based upon partisan politics or marital status can be appealed to the MSPB, as can procedural issues for terminations based upon pre-appointment causes. See *Von Deneen v. Department of Transportation*, 33 M.S.P.R. 420 (1987); 5 C.F.R. § 315.805, 315.806. Probationers may also appeal whistleblowing reprisal personnel actions to the Board. See *Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995); *Eidmann v. Merit Systems Protection Board*, 976 F.2d 1400, 1407-08 (Fed. Cir. 1992). Jurisdiction in *Cunningham* was based upon the appellant’s nonfrivolous allegations of marital status discrimination. *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 2 (2009); but see *Burton v. Department of the Air Force*, 118 M.S.P.R. 2010, ¶¶ 8 n.1, 9-11, n.2 (2012) (under Federal Circuit precedent and the Board’s regulations, jurisdiction over a part 315 appeal is established by preponderant evidence – not by nonfrivolous allegations).

<sup>273</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 3 (2009).

<sup>274</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 4 (2009).

<sup>275</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 4 (2009).

<sup>276</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 18 (2009) (from the Board’s findings of facts).

<sup>277</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 5 (2009).

personnel records.”<sup>278</sup> The Board found that *Cunningham* fell into the broader category of CRAs in which a disclosure was not permitted because the agency did not disclose criminal conduct.<sup>279</sup> As the agency had materially breached the CRA, the appellant was, in 2009, given the option to reinstate his 2005 appeal.<sup>280</sup>

The decisions in *Gizzarelli* and *Cunningham* illustrate that the nature of the details being disclosed can matter regardless of the words of the contract.<sup>281</sup> The public policy exception is based upon the “well defined and dominant” public interest in what is being disclosed.<sup>282</sup> Thus, while much of this report discusses broad implied obligations and the importance of using clear and narrowing language in any attempts to narrow those obligations, it is important to recognize that the content of the CRA will not always determine the outcome—the information that the parties seek to keep confidential can determine whether confidentiality is possible.<sup>283</sup>

Below we discuss a case from the U.S. Court of Appeals for the First Circuit. Decisions of the Federal Circuit are binding on the Board, but decisions of the other circuits are only persuasive—meaning the Board can allow itself to be persuaded by the legal reasoning of such courts, yet is not bound to follow their decisions.<sup>284</sup> In *Gizarrelli*, the Board discussed a case from the First Circuit which it found persuasive on the question of whether an NSA requiring confidentiality was void as a matter of public policy—*Equal Employment Opportunity Commission v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996).<sup>285</sup> Because the Board found *Astra* persuasive in *Gizzarelli*, we discuss those aspects of *Astra* below, yet we remind readers that *Astra* itself is not binding precedent on the Board.<sup>286</sup>

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<sup>278</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 15 (2009) (quoting *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 23 (2001)).

<sup>279</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 16 (2009).

<sup>280</sup> *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶¶ 1, 21 (2009).

<sup>281</sup> Compare *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 23 (2001) (an agency cannot contract to withhold from OPM police or criminal records pertinent to a background or suitability investigation) with *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 16 (2009) (the holding in *Gizzarelli* is limited to situations where an agency discloses police or criminal information to OPM for a suitability determination and does not apply to information about performance or non-criminal conduct issues).

<sup>282</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1375 (Fed. Cir. 2001).

<sup>283</sup> See *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1378 (Fed. Cir. 2001) (agencies cannot contract to hide a crime); *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 23 (2001) (an agency cannot contract to withhold from OPM police or criminal records pertinent to a background or suitability investigation); *Cunningham v. Office of Personnel Management*, 110 M.S.P.R. 389, ¶ 16 (2009) (the holding in *Gizzarelli* is limited to situations where an agency discloses police or criminal information to OPM for a suitability determination and does not apply to information about performance or non-criminal conduct issues).

<sup>284</sup> *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39 (decisions of the U.S. Court of Appeals for the Federal Circuit are controlling authority for the Board, and decisions of other Federal circuit courts may be persuasive, but are not controlling authority), *aff'd*, 844 F.2d 775 (Fed. Cir. 1987).

<sup>285</sup> See *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 18-22 (2001).

<sup>286</sup> See *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 18-22 (2001).

In *Astra*, the employer, Astra USA, Inc., entered into settlement agreements with at least 11 of its employees who claimed to have been subjected to, or to have witnessed, sexual harassment.<sup>287</sup> Under one of the terms of the agreements, the settling employees promised not to assist the EEOC in its investigation of such charges for other employees.<sup>288</sup> The First Circuit found that: (1) Congress entrusted the EEOC with “significant enforcement responsibilities” regarding Title VII discrimination matters; (2) for EEOC to fulfill its role, it was “crucial” that EEOC’s ability to investigate charges of discrimination “not be impaired”; (3) EEOC’s investigatory mission and authority would be “sharply curtailed” and “severely hampered” if the non-assistance clauses in the agreements were enforced; and (4) such interference in the EEOC’s fact-gathering function via private contracts “sows the seeds of harm to the public interest.”<sup>289</sup>

Upon weighing the “significant public interest in encouraging communication with EEOC against the minimal adverse impact that opening channels of communication would have on settlement,” the First Circuit “wholeheartedly” concurred with the district court’s determination that the non-assistance provisions were “void as against public policy.”<sup>290</sup>

## EFFECTS OF CRA PROVISIONS ON ACTIONS OF THIRD PARTIES

A settlement agreement cannot impose duties or obligations on a third party without that party’s agreement.<sup>291</sup> The cases below discuss situations in which the terms of the CRA affected an entity which did not have a representative sign the agreement. These cases

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<sup>287</sup> *Gizzearelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 18 (2001) (citing *Equal Employment Opportunity Commission v. Astra USA, Inc.*, 94 F.3d 738, 741 (1st Cir. 1996)).

<sup>288</sup> *Equal Employment Opportunity Commission v. Astra USA, Inc.*, 94 F.3d 738, 740-41 (1st Cir. 1996); see *Gizzearelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 18 (2001).

<sup>289</sup> *Gizzearelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 19 (2001) (quoting *Equal Employment Opportunity Commission v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996)).

<sup>290</sup> *Gizzearelli v. Department of the Army*, 90 M.S.P.R. 269, ¶ 21 (2001) (quoting *Equal Employment Opportunity Commission v. Astra USA, Inc.*, 94 F.3d 738, 744-45 (1st Cir. 1996)). When applying the logic from *Astra* to the facts in *Gizzearelli*, the Board found that when OPM operates in its role as investigator to protect the public’s interest in having trustworthy public servants, for an agency to withhold the appellant’s criminal history from OPM would violate public policy. *Gizzearelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 22-23 (2001). The parties could not be permitted, “through a private agreement, to thwart the public’s interest” and thus the agency could not be compelled to withhold from OPM the information that it needed to perform its duties. *Gizzearelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 22-23, 33 (2001).

<sup>291</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 17 (2003) (citing *Jordan v. Office of Personnel Management*, 77 M.S.P.R. 610, 616 (1998)).

illustrate the importance of determining who is a third party and what rights a third party has that cannot be taken away by a contract between the two other parties.<sup>292</sup>

### Retirement Benefits and CRAs

Retirement is often an important issue for at least one of the parties negotiating a CRA.<sup>293</sup> Half of our surveyed agency representatives reported that they had “been involved in an agreement where the agency changed the type of action taken or the reason for the action in order to potentially assist the individual to obtain” a Government benefit such as retirement.<sup>294</sup> However, as discussed below, the interaction between a CRA and an agency’s responsibilities when the appellant files for retirement can be complicated.

#### *OPM as Administrator of Retirement Benefits*

One of the most important cases on the issue of NSAs interacting with retirement applications is *Parker v. Office of Personnel Management*, which was within the Board’s jurisdiction to adjudicate appeals of OPM retirement decisions.<sup>295</sup> In *Parker*, the agency and employee used an NSA to resolve a dispute about reemployment.<sup>296</sup> The agency agreed to provide the appellant with an appointment (and by implication an SF-50 showing this appointment) and the appellant, among other things, agreed to waive his right to advanced notice before being terminated.<sup>297</sup> On the same day that it appointed the appellant (Feb. 28, 1992), the agency notified the appellant that he would be removed effective Mar. 2, 1992 (which was the next business day) for a failure to maintain a condition of that employment.<sup>298</sup>

The appellant then contacted OPM about a retirement annuity and was told that these SF-50s did not give him the right to an annuity because he had not been employed in a covered position for at least one of the two years preceding his application.<sup>299</sup> The agency

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<sup>292</sup> See, e.g., *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 21 (2003) (OPM is not required to accept the alleged facts presented to it when those facts are the result of a settlement agreement); *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 11 (2006) (the agency was “obligated to provide” certain information to OPM “regardless of the terms of the settlement agreement”). Compare *Vance v. Department of Interior*, 114 M.S.P.R. 679 (2010) (because of the independence accorded to Offices of the Inspectors General (OIGs), neither the Board nor an agency has the authority to order an OIG to remain silent about the results of an investigation conducted by the OIG) with *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 12 (2012) (an OIG official committed a breach of a CRA when he disclosed a rescinded personnel action).

<sup>293</sup> See Appendix B, Question 7.

<sup>294</sup> See Appendix B, Question 7.

<sup>295</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 18 (2003) (OPM’s authority to question a personnel action taken as a result of a settlement agreement applies whether the statutory provisions at issue implicate filing deadlines or substantive criteria for entitlement to a retirement benefit).

<sup>296</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 4 (2003).

<sup>297</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 4 (2003).

<sup>298</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 5 (2003).

<sup>299</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 5 (2003).

then issued an SF-50 showing that the appellant purportedly had been appointed nearly two years earlier.<sup>300</sup> OPM examined the new evidence and determined that it was impossible for the employee to have been appointed to the civil service at that time as he was unavailable due to active duty in the military.<sup>301</sup> OPM applied the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) to the situation but found that the appellant was not eligible for the requested benefits because the appellant had not been employed in the pertinent period and the SF-50s were, instead, “effected pursuant to a settlement agreement.”<sup>302</sup>

After various levels of appeal, the Board found that, with respect to a settlement agreement to which OPM is not a party, OPM has the authority to determine whether dates established by the agreement are “an artifice designed to evade the statutory requirements for entitlement to an annuity.”<sup>303</sup> The Board found that “OPM’s authority to question a personnel action taken as a result of a settlement agreement applies whether the statutory provisions at issue implicate filing deadlines. . . or substantive criteria for entitlement to a retirement benefit, as in this case.”<sup>304</sup> The agency’s retroactive appointment documents “were designed for no other purpose than to give the appearance that the appellant had the service necessary for him to receive a CSRS annuity, so that the cost of the settlement would be paid from” the retirement funds rather than the agency’s own funds.<sup>305</sup> Accordingly, when reaching its decision on the appellant’s entitlement to retirement benefits, OPM was not required to recognize the period of service alleged in those documents.<sup>306</sup>

In *Stevenson v. Office of Personnel Management*, the Board applied *Parker* to a different set of facts and came to a similar conclusion about OPM’s freedom to disregard assertions from parties made as a result of a settlement agreement.<sup>307</sup> In *Stevenson*, the appellant was removed for misconduct, but a CRA was reached in which the employing agency, the Department of Agriculture (USDA), agreed to cancel the removal action, substitute it with an SF-50 showing a medical inability to perform the essential duties of his position, and assist the appellant with his disability retirement application.<sup>308</sup>

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<sup>300</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 5 (2003).

<sup>301</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶¶ 5, 7 (2003).

<sup>302</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 9 (2003).

<sup>303</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 18 (2003). In its non-precedential decision affirming *Parker*, the court observed that the settlement “agreement appears to have simply been an invalid attempt to create entitlement to a retirement annuity under CSRS. The agreement was also contrary to law because it voluntarily arranged a supposedly ‘involuntary’ separation as a basis for discontinued service retirement under 5 U.S.C. § 8336(d)(1).” *Parker v. Office of Personnel Management*, 91 F. App’x 660, 665 n.5 (Fed. Cir. 2004).

<sup>304</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 18 (2003).

<sup>305</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 20 (2003).

<sup>306</sup> *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶ 21 (2003).

<sup>307</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 12 (2006) (reiterating that OPM, in carrying out its statutory responsibility of deciding claims for disability retirement, may look behind a settlement agreement to which it was not a party).

<sup>308</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 2 (2006).



The language used in the new SF-50 is critically linked to the issue of a disability retirement because the general rule for individuals seeking a retirement annuity is that the burden of proving entitlement to an annuity is on the applicant for benefits.<sup>309</sup> However, an employee's removal for medical inability to perform the essential functions of his position constitutes prima facie evidence that he is entitled to disability retirement; the burden of production then shifts to OPM to produce evidence sufficient to support a finding that the applicant is not entitled to disability retirement benefits; and if OPM produces such evidence, the applicant must then come forward with evidence to rebut OPM's assertion that he is not entitled to benefits.<sup>310</sup> In other words, Mr. Stevenson's new SF-50 shifted the burden from the appellant to prove his entitlement to the annuity to OPM, which was given the burden to disprove it.<sup>311</sup>

The appellant filed for a disability annuity, but OPM denied the application, noting, among other things, that the appellant had been removed for misconduct and that he had not shown any nexus between his misconduct and his alleged medical condition.<sup>312</sup> The appellant filed a PFE against USDA (presumably for letting OPM know of the removal action), and the appellant and the agency reached a new agreement in which USDA agreed to send OPM a letter stating its position that the appellant's medical conditions prevented him from performing his essential job duties.<sup>313</sup> However, in its reconsideration decision, OPM again found that the appellant's alleged misconduct was his principal service deficiency and thus he was not entitled to a disability retirement.<sup>314</sup>

The appellant filed an appeal of OPM's reconsideration decision.<sup>315</sup> On PFR, the Board cited *Parker*, above, and found that if OPM, in carrying out its statutory responsibility of deciding claims for disability retirement, may look behind a settlement agreement to which it was not a party, then it follows that the Board, in carrying out its statutory responsibility of reviewing an OPM final decision, may also look behind a settlement agreement to which OPM was not a party.<sup>316</sup> The Board then found that the fact that the appellant did not file for a disability retirement until after he was removed for misconduct was a relevant

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<sup>309</sup> See *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 14041 (Fed. Cir. 1986) (applying the rule to survivor annuities); 5 C.F.R. § 1201.56(a)(2)(iii) (“in appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits”).

<sup>310</sup> *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993).

<sup>311</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 2 (2006).

<sup>312</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶¶ 3-4 (2006).

<sup>313</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 5 (2006).

<sup>314</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 5 (2006).

<sup>315</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 6 (2006).

<sup>316</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 12 (2006).

factor that detracted from his argument that he was eligible for a disability retirement.<sup>317</sup> After analyzing other issues raised in the case, the Board concluded that the appellant had failed to show his entitlement to a disability retirement.<sup>318</sup> In other words, the agency may have contracted that it would support the appellant's retirement request, but neither OPM nor the Board were obliged to accept such claims.<sup>319</sup>

Because *Stevenson* preceded the Board's guidance in *Allen* regarding false statements, which has not yet been raised directly in a retirement case, we cannot state how *Allen* would apply to a CRA case involving retirement applications and statements from supervisors about applicants for benefits.<sup>320</sup> As with all cases discussed in this report, similarities or distinguishing features in a specific case may result in a similar or different outcome. However, in *Stevenson*, the Board noted that the law regarding CRAs and OPM has been "refined" since the *Conant* decision in 2001.<sup>321</sup> The Board's findings in *Allen*, and its holding regarding the legality of an agency official knowingly making a false statement or representation, or concealing material facts, may be another step in that evolution.<sup>322</sup>

### *Obligations Regarding Retirement Applications*

A disability retirement application requires a statement from the agency about the appellant.<sup>323</sup> Unlike a typical request for an employment reference, the supervisor's statement for disability retirement applications is made on an official Government form approved by the Office of Management and Budget and requires the supervisor to certify that he or she is telling the truth to the best of his or her knowledge and belief. The form also instructs the supervisor to attach relevant documents.<sup>324</sup> Silence by the agency official, which may be permitted in some CRA reference checks, is not an option for this form.

Occasionally, parties will settle an appeal with the expectation that the appellant will apply for disability retirement. Under these circumstances, the parties should anticipate

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<sup>317</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 12 (2006).

<sup>318</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 15 (2006).

<sup>319</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶¶ 5, 12 (2006).

<sup>320</sup> Within the packet of forms for a disability application (SF-3112), the form that is signed by the employee includes, next to the signature block, the statement: "**WARNING:** Any intentionally false statement in this application or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both. (18 U.S.C. 1001)". U.S. Office of Personnel Management, Applicant's Statement of Disability, SF-3112(A) (May 2011) (emphasis in original), available at <http://www.opm.gov/forms/standard-forms/>.

<sup>321</sup> *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 12 (2006).

<sup>322</sup> *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659 (2009); *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481 (2006). See *Volpe v. Trim*, 708 F.3d 688, 702 (6th Cir. 2013) ("The law evolves over time with experience"); *Derman v. United States*, 298 F.3d 34, 40 (1st Cir. 2002) ("the law, by its nature, evolves over time").

<sup>323</sup> See *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 11 (2006); U.S. Office of Personnel Management, Supervisor's Statement, SF-3112(B) (May 2011), available at <http://www.opm.gov/forms/standard-forms/>.

<sup>324</sup> U.S. Office of Personnel Management, Supervisor's Statement, SF-3112(B).

that the agency’s obligation to provide a truthful supervisor’s statement may conflict with the general disclosure limitations of the CRA. A well-drafted CRA should take this into account and address the supervisor’s statement separately, adjusting the parties’ expectations of what the supervisor’s statement may (and must) contain, and defining any limitations on the information that the agency may provide. As discussed below, parties have taken different approaches to this matter, including promises to support an application, promises not to oppose an application, and promises to refrain from including negative remarks in the supervisor’s statement. The parties may decide that any one of these approaches is appropriate for their particular needs, but whatever limitations the parties agree to, the agency must be sure that it is making a promise that it can keep and take care to confine its disclosures to the parameters of the CRA.

In *Conant*, discussed above, the agency promised in the CRA that it would “utilize its best efforts to effectuate the Grievant’s application for disability retirement[.]”<sup>325</sup> The agency later submitted a negative supervisor’s statement to OPM and supporting documentation that included the removal SF-50.<sup>326</sup> The Federal Circuit found that this act “sabotage[ed]” the retirement application and the agency had taken “affirmative steps to impede and to prejudice the process.”<sup>327</sup> Making “unproven allegations of misconduct” and providing OPM with a copy of the rescinded removal SF-50 was inconsistent with the agency’s promise to make its “best efforts” to help the appellant obtain approval of her retirement application.<sup>328</sup>

In *Lutz v. U.S. Postal Service*, the agreement provided that:

Within 30 days of the date this Settlement Agreement is fully executed, Appellant agrees to take all necessary steps to apply for disability retirement with [OPM]. The Agency agrees to take all necessary steps to cooperate and facilitate the acceptance of Appellant’s application and agrees not to place negative statements in the supervisor’s statement.<sup>329</sup>

Nevertheless, the agency submitted to OPM a supervisor’s statement asserting, among other things, that the appellant was “supposedly” injured and had repeatedly “refused” to work when he was medically able to do so according to a fitness for duty examination.<sup>330</sup> OPM denied the appellant’s application for a disability retirement.<sup>331</sup> In a later overruled

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<sup>325</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1374 (Fed. Cir. 2001).

<sup>326</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1374 (Fed. Cir. 2001).

<sup>327</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1376 (Fed. Cir. 2001).

<sup>328</sup> *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1376 (Fed. Cir. 2001).

<sup>329</sup> *Lutz v. U.S. Postal Service*, 108 M.S.P.R. 695, ¶ 2 (2008).

<sup>330</sup> *Lutz v. U.S. Postal Service*, 100 M.S.P.R. 600, ¶ 5 (2005).

<sup>331</sup> *Lutz v. U.S. Postal Service*, 100 M.S.P.R. 600, ¶ 9 (2005).

decision, the Board, assuming *arguendo* that the agency had breached the CRA by providing negative information, held that the breach was not material because the Board determined that OPM's basis for denying the application was "the appellant[s] fail[ure] to supply the required medical documentation to support his claim of disability."<sup>332</sup>

The Federal Circuit reversed.<sup>333</sup> The court found that the supervisor's statement the agency submitted to OPM was "indisputably negative in tone," and "rife" with innuendo[.]<sup>334</sup> Because the agency agreed to avoid being "negative" and then characterized the appellant's actions in a negative manner, the agency breached the agreement.<sup>335</sup> The court found that, "[w]hile it is impossible to know precisely to what extent these statements colored the analysis of OPM, it is clear that the statements did discourage OPM's acceptance of Mr. Lutz's disability retirement application. Therefore, the breach was not immaterial[.]"<sup>336</sup> The court remanded the case to the Board for further proceedings.<sup>337</sup>

On remand, the Board noted that the agency's action was not a curable breach, because OPM "is not a party to either to the settlement agreement or this appeal. . . . We therefore lack the authority, in the context of this case, to compel OPM to reconsider the appellant's application for disability retirement or to expunge the initial supervisor's statement from its record."<sup>338</sup> Accordingly, the CRA was rescinded and the appellant's demotion appeal was reinstated for adjudication.<sup>339</sup>

In *Miller v. U.S. Postal Service*, the agency likewise agreed not to affirmatively oppose the appellant's disability retirement application.<sup>340</sup> However, the CRA in *Miller* also addressed the possibility that the agency might be put in the position where being truthful to the best of its knowledge on the supervisor's statement could impede the appellant's ability to obtain a disability retirement.<sup>341</sup> It expressly did "not require the agency to provide incorrect information to the Office of Personnel Management."<sup>342</sup>

<sup>332</sup> *Lutz v. U.S. Postal Service*, 100 M.S.P.R. 600, ¶ 9 (2005).

<sup>333</sup> *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1382 (Fed. Cir. 2007).

<sup>334</sup> *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381 (Fed. Cir. 2007).

<sup>335</sup> *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381-82 (Fed. Cir. 2007).

<sup>336</sup> *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1382 (Fed. Cir. 2007).

<sup>337</sup> *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1382 (Fed. Cir. 2007).

<sup>338</sup> *Lutz v. U.S. Postal Service*, 108 M.S.P.R. 695, ¶ 12 (2008).

<sup>339</sup> *Lutz v. U.S. Postal Service*, 108 M.S.P.R. 695, ¶¶ 14-15 (2008).

<sup>340</sup> Compare *Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, ¶ 10 (2002) with *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1374 (Fed. Cir. 2001) (promising the agency's best efforts to help the appellant); *Lutz v. U.S. Postal Service*, 108 M.S.P.R. 695, ¶ 2 (2008) (promising no negative statements).

<sup>341</sup> *Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, ¶ 10 (2002).

<sup>342</sup> *Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, ¶ 13 (2002).

The appellant filed a PFE, arguing that the agency breached the settlement agreement by informing OPM of the modified assignments that it had offered the appellant. The agency informed OPM of modified positions that it had offered to the appellant.<sup>343</sup> The Board disagreed, finding that the agency had not affirmatively opposed the appellant's application and that the agency was required to disclose information about the modified assignments.<sup>344</sup> The information that the agency provided to OPM showing that it offered the appellant work that she could medically perform was consistent with the record and thus fell into the exception in the CRA that the agency was not required to provide incorrect information.<sup>345</sup> Because the agency's disclosure fell within the parameters of the CRA, there was no breach.<sup>346</sup>

Similarly, in *Komiskey v. Department of the Army*, the agreement recognized that OPM rules were likely to pose a problem for a retirement application and specifically addressed the conflict in the agreement.<sup>347</sup> In *Komiskey*, the appellant wanted a discontinued service retirement, which, under the particular circumstances of the case, required an involuntary separation for performance.<sup>348</sup> However, she also wanted a clean record, which was not consistent with being involuntarily separated for performance.<sup>349</sup> The CRA expressly stated OPM was unlikely to permit both, but the agency would "make all efforts" to process the retirement in "such a way" that the appellant would have the clean record.<sup>350</sup>

The appellant later filed a PFE, arguing that the agency had breached the agreement by processing her retirement without obtaining a clean record for her.<sup>351</sup> The Board found that the agency had met its obligations because it asked OPM to process the retirement in a manner that would not refer to the performance-based action and by requesting from OPM that no records be maintained with negative information about the appellant.<sup>352</sup> The Board noted that OPM responded by asserting "its firm position that statutory requirements cannot be waived to accommodate settlement agreements," and found that the Army was not accountable for the decisions of OPM.<sup>353</sup> The agency's obligation under

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<sup>343</sup> *Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, ¶ 10 (2002).

<sup>344</sup> *Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, ¶ 10 (2002). OPM's form to be completed by supervisors for disability retirement applications specifically asks the supervisor about efforts to accommodate the employee. U.S. Office of Personnel Management, Supervisor's Statement, SF-3112(B).

<sup>345</sup> *Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, ¶ 10 (2002).

<sup>346</sup> *Miller v. U.S. Postal Service*, 90 M.S.P.R. 550, ¶ 13 (2002).

<sup>347</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 608 (1996).

<sup>348</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 608 (1996).

<sup>349</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 608 (1996).

<sup>350</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 608 (1996).

<sup>351</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 609 (1996).

<sup>352</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 610 (1996).

<sup>353</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 610 (1996).

the agreement was to ask for the clean record in addition to the retirement, but under the terms of the agreement it was not obligated to succeed with that request.<sup>354</sup>

### Office of the Inspector General

As explained in the previous section, OPM, as a third party, is not bound by the terms of a CRA signed by another agency.<sup>355</sup> Depending on the facts of the case, the Office of the Inspector General (OIG) may be treated as a third party whose actions also cannot be bound by the contract, or it may be considered a part of the agency bound by the CRA.

In *Vance v. Department of Interior*, the agency's OIG was involved in an audit of the appellant's Government credit card use that resulted in findings of misuse that led to the appellant's removal.<sup>356</sup> The agency entered into a CRA with the appellant under which 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."<sup>357</sup> However, the OIG published the results of its investigation in its semiannual report to Congress and the report naming the appellant remained available to the public on the OIG's website.<sup>358</sup> The appellant filed a PFE alleging that this publication on the website constituted a breach of the CRA.<sup>359</sup>

The Board found that, once the OIG decided to issue the report, the agency could not compel the Inspector General to stop its publication or to demand that it be corrected because "the head of the agency may not generally prevent the Inspector General's report from going to Congress or alter or delete the report."<sup>360</sup> The Board found that it also lacked the authority to order the OIG to alter its report.<sup>361</sup>

Therefore, regardless of whether the agreement's provision was a result of a mutual mistake by both parties as to what control the agency could exercise over the OIG, or whether

<sup>354</sup> *Komiskey v. Department of the Army*, 70 M.S.P.R. 607, 610 (1996).

<sup>355</sup> See *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481, ¶ 12 (2006) (neither OPM, nor the Board when reviewing OPM decisions, is bound by the terms of a CRA to which they are not parties).

<sup>356</sup> *Vance v. Department of Interior*, 114 M.S.P.R. 679, ¶¶ 2, 10 (2010).

<sup>357</sup> *Vance v. Department of Interior*, 114 M.S.P.R. 679, ¶¶ 2-3 (2010) (emphasis added).

<sup>358</sup> *Vance v. Department of Interior*, 114 M.S.P.R. 679, ¶ 3 (2010).

<sup>359</sup> *Vance v. Department of Interior*, 114 M.S.P.R. 679, ¶ 3 (2010).

<sup>360</sup> *Vance v. Department of Interior*, 114 M.S.P.R. 679, ¶ 11 (2010) (internal punctuation and citations omitted).

<sup>361</sup> *Vance v. Department of Interior*, 114 M.S.P.R. 679, ¶ 11 (2010); but see *Kramer v. Department of the Navy*, 46 M.S.P.R. 187, 191-92 (1990) (holding that when an agency representative signs an agreement, it binds the agency as a whole, including other commands within the agency).

the agency had negotiated in bad faith something it knew it could not accomplish, the agreement had to be set aside because the provision could not be put into effect.<sup>362</sup>

However, in *Zumwalt v. Department of Veterans Affairs*, the Board found that an OIG was responsible for complying with the agency's CRA.<sup>363</sup> The parties in that case entered into a CRA under which the agency was obligated to cancel a 3-day suspension for misusing the Utah Bureau of Criminal Identifications (BCI) database.<sup>364</sup> The agreement provided that the parties would keep the terms of the agreement confidential and that the agency would disclose the terms of the agreement only to those management officials that it determined needed to know specific terms to implement them.<sup>365</sup> After the CRA was signed, an OIG official, Morse, heard a rumor about misuse of the BCI database, investigated further, and when later asked by Utah officials what had happened to the appellant, Morse told those officials about the 3-day suspension.<sup>366</sup> The appellant filed a PFE, arguing that the disclosure by Morse violated the agreement.<sup>367</sup>

The Board found that, regardless of his position in the agency's organizational structure, Morse was an agency employee representing the interests of the agency when he disclosed the appellant's suspension, thereby denying the appellant the benefit of the clean record that the agency promised him in exchange for the withdrawal of his IRA appeal.<sup>368</sup> Therefore, the disclosure constituted a breach of the agreement.<sup>369</sup> In a dissenting opinion, Member Robbins expressed that, because of the OIG's independence, he would have found that the OIG was not a party to the CRA.<sup>370</sup>

## RESPONSES ON OPM FORMS ABOUT AN INDIVIDUAL'S BACKGROUND

Several of the cases that we have discussed include examples of occasions when agencies were put in difficult positions when they were asked about the conduct or performance of individuals covered by a CRA. However, employees can also be put into a difficult position

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<sup>362</sup> *Vance v. Department of Interior*, 114 M.S.P.R. 679, ¶¶ 16 (2010). The parties later entered into yet another settlement agreement. *Vance v. Department of the Interior*, 119 M.S.P.R. 275 at 3-4 (2013) (NP). As of June 2013, the report on the OIG's website has the repeated use of the letter "X" in place of the appellant's name and notes that the individual's identity has been "redacted due to a 2010 settlement agreement." Department of the Interior, Office of Inspector General, Semiannual Report to the Congress, at 40, October 2008, available at <http://www.doi.gov/oig/reports/upload/SemiannualOct2008revision.pdf>.

<sup>363</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 12 (2012).

<sup>364</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 3 (2012).

<sup>365</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 3 (2012).

<sup>366</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 4 (2012).

<sup>367</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 4 (2012).

<sup>368</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 12 (2012).

<sup>369</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 13 (2012).

<sup>370</sup> *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574 (2012) (dissenting opinion, Robbins, ¶ 5).

when they are asked about their own record.<sup>371</sup> “The Declaration for Federal Employment Optional Form (OF) 306 is completed by applicants who are under consideration for Federal or Federal contract employment.”<sup>372</sup> On the OF-306, Question 12 asks:

During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management or any other Federal agency?<sup>373</sup>

The Questionnaire for Public Trust Positions (SF-85P) asks if the individual has been fired, quit after being told he or she would be fired, left under mutual agreement following allegations of misconduct or unsatisfactory performance, or under other “unfavorable circumstances.”<sup>374</sup> The Questionnaire for National Security Positions (SF-86) goes further, inquiring about written warnings, reprimands, suspensions or other discipline.<sup>375</sup>

We asked OPM what answer an individual should give on the OF-306 if the person has, in the preceding 5 years, signed a CRA by which a removal for cause was changed to a

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<sup>371</sup> Office of Personnel Management, OF-306, Declaration for Federal Employment, question 12, available at <http://www.opm.gov/forms/>.

<sup>372</sup> U.S. Office of Personnel Management, “Submission for Review: Declaration for Federal Employment, OF 306,” 75 Fed. Reg. 20399 (Apr. 19, 2010) (internal punctuation omitted). See 59 Fed. Reg. 65086 (Dec. 16, 1994) (“Before anyone can be appointed or converted to a new appointment in the competitive service, the excepted service, or the Senior Executive Service, he or she must execute a Declaration for Federal Employment. In addition, the form may be needed in position changes, for example, for agency determinations concerning nepotism and for OPM background investigations”); Office of Personnel Management, Delegated Examining Operations Handbook, 2007, at 79, available at <http://www.opm.gov/deu/> (explaining that the use of this form is mandatory for new appointments under competitive examining).

<sup>373</sup> Office of Personnel Management, OF-306, Declaration for Federal Employment, question 12. Private sector employers may ask a similar question. See David P. Willis, *Jobs Experts: Being Honest If You're Fired*, Daily Record (Morristown, NJ), Mar. 26, 2011.

<sup>374</sup> SF-85P, Question 12, available on line at <http://www.opm.gov/forms/>. The form requires the individual to assert that the statements on the form are “true, complete, and correct” and warns that a “knowing and willful false statement” can result in a fine or imprisonment under 18 U.S.C. § 1001. *Id.* In *United States v. Ahmed*, 472 F.3d 427, 431, 433, 436 (6th Cir. 2006), the court upheld a sentence of 18 months of imprisonment for an individual who made a false statement on the SF-85P regarding the terms of his separation from an employer and an additional false statement in response to a question on the form regarding the revocation of a past security clearance.

<sup>375</sup> SF-86, Question 13C, available on line at <http://www.opm.gov/forms/>. Clean record agreements can have a consequence for the effectiveness of security clearance checks even when the individual does not return to Federal service. In a recent article, the *Federal Times* discussed a situation involving an individual who was permitted to resign with a clean record “after an internal probe found he’d [allegedly] run up tens of thousands of dollars in dubious government credit card charges, violated weapons laws and obstructed an internal affairs investigation[.]” Jim McElhatton, *CBP secret deal to bury investigator's past misconduct questioned*, Jul. 7, 2013, available at <http://www.federaltimes.com/article/20130707/ACQUISITION03/307070009/CBP-secret-deal-bury-investigator-s-past-misconduct-questioned>. According to the article, a few months later the individual “applied for – and received – a contract investigator job vetting top secret government clearances.” *Id.* The individual was later charged with 23 counts of false statements involving top secret clearance investigations. *Id.*



resignation.<sup>376</sup> OPM responded that the individual must respond “yes” to Question 12 and noted a case in which the Board upheld OPM’s decision to bar an individual from Federal employment because he answered “no” to a similar question on the SF-86 despite the fact that he had left a position by mutual agreement.<sup>377</sup>

As mentioned in OPM’s response to our questionnaire, and as described in the cases below, when an appellant departs an agency under the terms of a mutual agreement, the agreement does not relieve the appellant of the obligation to be candid when asked about the circumstances under which the appellant departed past employment—particularly when asked if the departure was by mutual agreement.<sup>378</sup>

The Federal Circuit has noted that, when an appellant signs a CRA, one of the appellant’s goals is often to eliminate the negative information that may “affect future employment with the government[.]”<sup>379</sup> Several of the appellant attorneys we spoke with indicated that the primary reason why appellants seek clean records is to aid them in their efforts to obtain another Federal position. However, 80 percent of the respondents to our agency representative survey agreed with the statement: “Appellants/employees who enter into clean record agreements may have an unrealistic idea of how well their past can be kept a secret.”<sup>380</sup>

In *Pappas v. Office of Personnel Management*, the appellant left employment with the New York State Police (NYSP) as a result of a “mutual agreement” between the employer and the appellant “that he should resign after allegations of unsatisfactory performance” rather

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<sup>376</sup> U.S. Office of Personnel Management, *Response to MSPB Questionnaire for OPM Regarding Clean Record Settlement Agreements*, Oct. 9, 2012, Question 2(a) at 3.

<sup>377</sup> U.S. Office of Personnel Management, *Response to MSPB Questionnaire for OPM Regarding Clean Record Settlement Agreements*, Oct. 9, 2012, Question 2(a) at 3; *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152 (1997). See also *Riggsbee v. Office of Personnel Management*, 111 M.S.P.R. 129, ¶¶ 2, 11 (2009) (removal and debarment were appropriate for a false statement in response to question 12); *Wolfbauer v. Office of Personnel Management*, 283 Fed. App’x 803, 804-05 (Fed. Cir. 2008) (NP) (upholding removal for a false statement on question 12).

<sup>378</sup> U.S. Office of Personnel Management, *Response to MSPB Questionnaire for OPM Regarding Clean Record Settlement Agreements*, Oct. 9, 2012, Question 2(a) at 3. See, e.g., *Horton v. Nicholson*, 435 F. Supp. 2d 429, 436-37 (E. D. Pa. 2006) (finding the appellant “lied” when he answered no to question 12 after settling an earlier EEO case with a resignation in lieu of a termination, and that the “lie” was a legitimate reason for his new agency to remove him); *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 161 (1997) (the appellant was obligated to report that he had left a position by mutual agreement and failure to disclose this was grounds for removal and debarment); *Forma v. Department of Justice*, 57 M.S.P.R. 97, 105 (1993) (removal was appropriate for a failure to disclose that the appellant left a job by mutual agreement). See also *Harrison v. Department of Agriculture*, 411 F. App’x 312, 315 (Fed. Cir. 2010) (NP). In *Harrison*, the court found that the appellant was obligated to answer truthfully a question about her departure from her prior agency. *Id.* Accordingly, her removal by her new agency for, among other things, making a false statement regarding her departure was affirmed. *Id.*

<sup>379</sup> *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).

<sup>380</sup> See *Appendix B*, Question 8.

than “face possible termination proceedings for unsatisfactory performance.”<sup>381</sup> He applied for a position as a Border Patrol Agent.<sup>382</sup> The appellant was asked the following questions:

During the last 10 years, were you fired from any job for any reason, did you quit after being told that you would be fired, or did you leave by mutual agreement because of specific problems?<sup>383</sup>

Has any of the following happened to you in the last 15 years? (1) Fired from a job; (2) Quit a job after being told you’d be fired; (3) Left a job by mutual agreement following allegations of misconduct; (4) Left a job by mutual agreement following allegations of unsatisfactory performance; [or] (5) Left a job for other reasons under unfavorable circumstances.<sup>384</sup>

In his response to these questions, the appellant failed to disclose the circumstances surrounding his resignation.<sup>385</sup> OPM debarred the appellant from Federal employment for three years for his “deception or fraud” in the examination process.<sup>386</sup>

The Board found that under the facts of the case, “the appellant reasonably should have known that he had left his NYSP job under unfavorable circumstances, and it was not reasonable for him” to fail to disclose it.<sup>387</sup> The Board explained that a failure to disclose information in response to a question on an SF-86, coupled with the lack of a plausible explanation for that failure, warranted an inference of an intent to deceive.<sup>388</sup> The Board found that the appellant’s falsification offense was enough by itself to uphold the debarment because it directly implicated his honesty and fitness for employment.<sup>389</sup>

In *Forma v. Department of Justice*, the appellant left an employer who documented his departure as follows:

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<sup>381</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 159 (1997).

<sup>382</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 154 (1997).

<sup>383</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 155 (1997).

<sup>384</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 155-56 (1997).

<sup>385</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 155-56 (1997).

<sup>386</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 155 (1997).

<sup>387</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 159 (1997).

<sup>388</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 160 (1997).

<sup>389</sup> *Pappas v. Office of Personnel Management*, 76 M.S.P.R. 152, 161 (1997). The penalty imposed for an inaccurate response on the OF-306 will depend, in part, on whether the offense was intentional, technical, or inadvertent. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981). In response to our questionnaire, OPM clearly expressed that if an individual has been removed for cause and later enters into a settlement agreement, the answer to the OF-306 question 12 should be “yes.” U.S. Office of Personnel Management, *Response to MSPB Questionnaire for OPM Regarding Clean Record Settlement Agreements*, Oct. 9, 2012, Question 2(a) at 3. However, OPM also noted in its questionnaire response that “whether a misstatement or omission in response to this question is intentional requires a separate, individualized assessment.” *Id.*

We agree that there is a mismatch between your interests and strengths and the requirements of your current position that makes it unlikely that you will be content or successful in the job. Therefore, as we agreed, your last day of work will be August 3, 1990 and you will be coded as an involuntary termination. The ‘Remarks’ section of your records will reflect this mismatch.<sup>390</sup>

The appellant applied for a position with the Department of Justice but failed to report on his application and security questionnaires that he had been fired, left a job by mutual agreement due to specific problems, or under other unfavorable circumstances.<sup>391</sup> The appellant was removed for falsifying these forms.<sup>392</sup> On appeal, the Board found that the appellant was required to answer “yes” to the questions about leaving a job by mutual agreement because the appellant did not dispute there was an agreement that he would leave the old employer and the “mismatch” was a specific problem.<sup>393</sup> The Board found that the appellant had deliberately given incorrect responses to the questions on OPM’s forms with the intent to deceive the DOJ.<sup>394</sup> Accordingly, the Board upheld the appellant’s removal.<sup>395</sup>

An appellant also cannot avoid disclosure by failing to mention past employers.<sup>396</sup> In *Hanker v. Department of the Treasury*, the appellant was required to list his previous employers on the SF-86 but omitted two employers from the list.<sup>397</sup> Under its delegated suitability authority, the agency found that this failure to disclose made the appellant unsuitable for the position.<sup>398</sup> The Board agreed and upheld the agency’s decision.<sup>399</sup>

In *Ly v. Department of the Treasury*, the appellant was discharged from two different employers and was not eligible for rehiring with either.<sup>400</sup> The appellant was removed for

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<sup>390</sup> *Forma v. Department of Justice*, 57 M.S.P.R. 97, 99-100 (1993).

<sup>391</sup> *Forma v. Department of Justice*, 57 M.S.P.R. 97, 99 (1993).

<sup>392</sup> *Forma v. Department of Justice*, 57 M.S.P.R. 97, 99 (1993).

<sup>393</sup> *Forma v. Department of Justice*, 57 M.S.P.R. 97, 103 (1993).

<sup>394</sup> *Forma v. Department of Justice*, 57 M.S.P.R. 97, 104-05 (1993).

<sup>395</sup> *Forma v. Department of Justice*, 57 M.S.P.R. 97, 105 (1993); see also *Horton v. Nicholson*, 435 F. Supp. 2d 429, 436-37 (E.D. Pa. 2006) (finding the appellant “lied” when he answered no to question 12 after settling an earlier EEO case with a resignation in lieu of a termination, and that the “lie” was a legitimate reason for his new agency to remove him).

<sup>396</sup> See *Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶ 16 (2012) (upholding removal for failure to disclose past employers); *Hanker v. Department of the Treasury*, 73 M.S.P.R. 159, 168 (1997) (upholding removal for failure to disclose past employers).

<sup>397</sup> *Hanker v. Department of the Treasury*, 73 M.S.P.R. 159, 161 (1997).

<sup>398</sup> *Hanker v. Department of the Treasury*, 73 M.S.P.R. 159, 161, n.1 (1997).

<sup>399</sup> *Hanker v. Department of the Treasury*, 73 M.S.P.R. 159, 168 (1997).

<sup>400</sup> *Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶¶ 2-3 (2012).

failure to disclose each of these discharges on her OF-306.<sup>401</sup> The appellant appealed the removal and penalty.<sup>402</sup> In its decision, the Board noted that it “has consistently held that the penalty of removal for falsification of government employment documents is within the bounds of reasonableness because such falsification raises serious doubts regarding the appellant’s honesty and fitness for employment” and upheld the removal.<sup>403</sup>

We asked appellant attorneys what they tell individuals to do in this situation and what they think most people actually do.<sup>404</sup> Several attorneys told us that they advise clients to explain what really happened because of the risk that the clients might later be removed for lack of candor. However, multiple attorneys also stated that they think that most people will not make the disclosure. One appellant attorney admitted that, with respect to answers provided on the OF-306, “I think there is a lot of game playing that is probably happening.”

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<sup>401</sup> *Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶ 2 (2012).

<sup>402</sup> *Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶¶ 6, 8 (2012).

<sup>403</sup> *Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶ 16 (2012).

<sup>404</sup> For more on the methodology by which this data was collected, see *Appendix A*.



# CONCLUSION

Clean record settlement agreements are a complex area of the law. The question of whether a breach has occurred depends heavily on the specific promises made in the CRA and the particular facts of a case in which breach is alleged. Additionally, external forces beyond the control of the contracting parties can determine whether the confidentiality provisions in the agreement are enforceable and whether the parties can get what they intended to get out of the agreement.

Public policy favors settlement agreements to avoid unnecessary litigation and to encourage fair and speedy resolution of issues. The Board favors settlement agreements that are consistent with law, equity, and public policy.

The Federal Circuit has noted, regarding CRAs, that “[t]he Board has a difficult job sorting through some of these enforcement agreements, particularly those that are not well-drafted, but. . . it is the Board’s job to see to it that the parties receive that for which they bargained.”<sup>405</sup> Once parties have entered into a CRA, the Board will hold them responsible for meeting their obligations regardless of any difficulty in accomplishing those tasks.<sup>406</sup> Applying the lessons contained in the cases discussed in this report may help parties to improve the drafting of such agreements and to form realistic expectations about the benefits that they can expect to receive, while at the same time helping the Board and its reviewing court to enforce those agreements consistent with the parties’ intent.

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<sup>405</sup> *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999).

<sup>406</sup> *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶ 19 (2005).





# APPENDIX A: METHODOLOGY DETAILS

The sources of information that were used in this report or that influenced this report include: case law, a survey of agency representatives, questionnaires completed by MSPB AJs regarding cases, a review of a sample of settlement agreements containing a clean record provision, a questionnaire sent to OPM, a questionnaire for unions and management associations, and interviews of appellant attorneys. Several of these sources of information are described in greater depth below.

## **Agency Representatives' Survey:**

We identified 1,193 individuals who appeared before MSPB as an agency representative from May 1, 2011 to April 30, 2012 in an adverse action case.<sup>407</sup> We contacted this population by letter and then sent e-mail reminders to those individuals for whom we had an e-mail address. We received 621 responses, for a response rate of 52 percent.

In order to capture data relevant to the management of the civil service as a whole, this survey asked respondents to include their “experiences with settlement agreements for potential EEO complaints or union/administrative grievances as well as actions appealable to MSPB.” As a result, while we identified the agency representative survey respondents through their past appearance before MSPB, this data should not be read to apply only to cases before MSPB. Furthermore, responses of “don’t know” or “not applicable” have been removed from the discussion of data from this survey in order to show only responses of those who had experience with the issue at hand or were in a position to form an opinion. *See Appendix B* for the full list of questions and responses.

## **AJ Questionnaires:**

MSPB AJs were asked to answer questionnaires about certain outcomes in cases (such as the use of a clean record settlement agreement). For the AJ data, the response rate may be measured against docket numbers for a given fiscal year. We utilized data from case docket numbers that began in FY 2007-FY 2011. Overall, the response rate from the AJs was 61.5 percent.

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<sup>407</sup> By statute, MSPB has the authority to survey Federal employees. 5 U.S.C. § 1204(e)(3). Because we do not have a similar authority for former employees, and because such individuals are less likely to be able to address concepts across multiple cases, we did not survey appellants.

### **Settlement Agreement Reviews:**

We reviewed 50 settlement agreements that were submitted to the Board for inclusion in a case record for the purpose of enforceability. Due to the costs and administrative burden involved in requesting individual, paper case files from the National Archives and Records Administration, we reviewed only settlement agreements contained in MSPB's electronic filing system. We reviewed such agreements for a random selection of cases filed in FY 2010-2011.

### **Other Sources:**

We provided OPM with a written list of open-ended questions. We also wrote to nine organizations that represent Federal or U.S. Postal Service employees or supervisors and invited them to respond to a list of questions. Six organizations responded. Finally, we interviewed by telephone attorneys from seven private sector law firms who frequently appear before the Board on behalf of appellants.





# APPENDIX B: AGENCY REPRESENTATIVE SURVEY

Dear Agency Representative:

Thank you for responding to the notification that we sent to you! As we explained, in accordance with 5 U.S.C. § 1204, we are currently conducting a study about settlement agreements in which an agency agrees to modify or “clean” an individual’s record as a material term of the agreement. A report from this study will be prepared for the President and the Congress and distributed to other Federal officials.

Your response to this survey is voluntary and will be kept strictly confidential. The data will be reported only in the aggregate and no individuals will be identified. Only MSPB staff and our survey host will have access to the surveys and no personal information about respondents has been disclosed to the host. Our survey is brief, and should take less than 15 minutes to complete.

In response to our questions, please include your experiences with settlement agreements for potential EEO complaints or union/administrative grievances as well as actions appealable to MSPB. For convenience, the term “appellant” or “employee” may be used throughout this survey to refer the individual with whom you may negotiate such an agreement.

Thank you for your participation!<sup>408</sup>

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<sup>408</sup> This survey was administered electronically. While the content below is consistent with the survey that was provided to agency representatives, the layout is different. The below also includes responses of “don’t know” or “not applicable,” even though these responses were removed from the body of this report to assist with the discussion of views held by those respondents with opinions. Narrative responses are not provided.

1. During the past 3 years, in approximately how many settlement agreements for adverse personnel actions have you had a role? (This includes drafting, reviewing, **advising upon, or signing the agreement.**)

5.0%	None
26.5%	1-3
21.5%	4-6
19.3%	7-10
7.4%	11-15
20.2%	More than 15

2. Approximately what percentage of these settlement agreements included a commitment that the agency will clean any of its records or modify/limit what it states in response to reference checks?

11.1%	None
23.3%	1-15 percent
16.6%	16-30 percent
18.4%	31-50 percent
12.7%	51-75 percent
17.8%	More than 75 percent

3. Why haven't you recommended/approved any clean record agreements? (Select all that apply.)

57.6%	The issue has never come up.
10.6%	I don't think cleaning records to reach a settlement is in the public interest.
3.0%	Human resources staff oppose clean record agreements.
6.1%	Management opposes clean record agreements.
21.2%	It is not practical to reach such an agreement because it is too hard for the agency to meet its end of the bargain.
15.2%	None of the above.
13.6%	Other

4. Which of the following best describes your role in settlement agreements with employees or appellants?

4.7%	I often or always have the authority to decide what the agency will agree to do.
92.3%	I often or always have the authority to make recommendations but someone else usually decides what the agency will agree to do.
0.6%	I am rarely involved in recommendations or decisions for settlement agreements.
2.5%	Other

**Please indicate your level of agreement or disagreement with each of the following statements:**

5. Clean record agreements are often the only way to get an appellant/employee to agree to settle.

18.8%	Strongly Agree
54.7%	Somewhat Agree
17.4%	Somewhat Disagree
7.3%	Strongly Disagree
1.8%	Not Applicable/ Don't Know

6. I consider the seriousness of the appellant's/employee's conduct when deciding whether to recommend/agree that the agency will clean a record that documents misconduct.

66.5%	Strongly Agree
27.9%	Somewhat Agree
3.6%	Somewhat Disagree
1.0%	Strongly Disagree
1.0%	Not Applicable/ Don't Know

7. I have been involved in an agreement where the agency changed the type of action taken or the reason for the action in order to potentially assist the individual to obtain Government benefits. (Examples of such benefits include, but are not limited to, workplace injury compensation, retirement, social security, or unemployment benefits.)

15.1%	Strongly Agree
27.0%	Somewhat Agree
12.5%	Somewhat Disagree
29.4%	Strongly Disagree
16.1%	Not Applicable/ Don't Know

8. Appellants/employees who enter into clean record agreements may have an unrealistic idea of how well their past can be kept a secret.

29.2%	Strongly Agree
40.8%	Somewhat Agree
13.5%	Somewhat Disagree
4.0%	Strongly Disagree
12.5%	Not Applicable/Don't Know

9. When I recommend/agree to a clean record it is often because I think the agency should not risk losing the case on a legal technicality.

12.7%	Strongly Agree
37.3%	Somewhat Agree
27.8%	Somewhat Disagree
18.1%	Strongly Disagree
4.2%	Not Applicable/Don't Know

10. When I recommend/agree to a clean record it is often because I think the appellant/employee did not engage in the charged conduct or performance deficiency.

2.0%	Strongly Agree
6.7%	Somewhat Agree
21.2%	Somewhat Disagree
66.1%	Strongly Disagree
4.0%	Not Applicable/Don't Know

11. When I recommend/agree to a clean record it is often because I think litigating the case will take up more time or money than the litigation would be worth to the agency.

29.7%	Strongly Agree
47.7%	Somewhat Agree
12.3%	Somewhat Disagree
8.7%	Strongly Disagree
1.6%	Not Applicable/ Don't Know

12. Clean record agreements between agencies and appellants/employees are usually in the interest of the agency.

12.6%	Strongly Agree
48.7%	Somewhat Agree
26.5%	Somewhat Disagree
10.2%	Strongly Disagree
2.0%	Not Applicable/ Don't Know

13. Clean record agreements between agencies and appellants/employees are usually in the interest of the appellant/employee.

46.7%	Strongly Agree
47.3%	Somewhat Agree
3.8%	Somewhat Disagree
0.6%	Strongly Disagree
1.6%	Not Applicable/ Don't Know

14. Clean record agreements between agencies and appellants/employees are usually in the interest of the general public.

4.4%	Strongly Agree
32.3%	Somewhat Agree
34.1%	Somewhat Disagree
19.0%	Strongly Disagree
10.2%	Not Applicable/ Don't Know

15. I consider myself knowledgeable about MSPB and court decisions regarding the interpretation of clean record agreements.

27.7%	Strongly Agree
59.8%	Somewhat Agree
8.6%	Somewhat Disagree
1.8%	Strongly Disagree
2.0%	Not Applicable/Don't Know

16. Before entering into a clean record agreement, I consult with someone from human resources.

60.3%	Strongly Agree
26.5%	Somewhat Agree
6.6%	Somewhat Disagree
3.2%	Strongly Disagree
3.4%	Not Applicable/Don't Know

17. Before recommending or signing a clean record agreement, I perform additional research to determine how various clauses in that agreement may be interpreted by MSPB or courts.

40.5%	Strongly Agree
41.5%	Somewhat Agree
12.4%	Somewhat Disagree
3.6%	Strongly Disagree
2.0%	Not Applicable/Don't Know

18. I suspect that many appellants/employees who are given clean records go on to be problem employees elsewhere.

25.0%	Strongly Agree
39.3%	Somewhat Agree
15.2%	Somewhat Disagree
3.0%	Strongly Disagree
17.6%	Not Applicable/Don't Know

**How important to you are the following when you decide whether you will recommend/approve or oppose a clean record agreement?**

19a. Resolving or precluding litigation in other forums (such as EEO complaints or union grievances).

65.9%	Very Important
26.5%	Somewhat Important
4.6%	Slightly Important
2.6%	Not Important
0.4%	Not Applicable/Don't Know

19b. Finality (eliminating further review such as a petition for review or appeal to the Federal Circuit).

68.3%	Very Important
23.6%	Somewhat Important
5.4%	Slightly Important
2.0%	Not Important
0.6%	Not Applicable/Don't Know

19c. The costs of continued litigation of the appeal.

50.9%	Very Important
33.4%	Somewhat Important
10.9%	Slightly Important
4.6%	Not Important
0.2%	Not Applicable/Don't Know

19d. The penalty's result remains in effect (e.g., termination of the employment relationship).

67.5%	Very Important
24.0%	Somewhat Important
5.6%	Slightly Important
1.2%	Not Important
1.6%	Not Applicable/Don't Know

19e. Preventing future employment with the office, agency or other identified employer(s).

56.3%	Very Important
30.2%	Somewhat Important
10.5%	Slightly Important
2.2%	Not Important
0.8%	Not Applicable/Don't Know

19f. Your (or management's) desire to provide the individual with the best chance for future employment or benefits.

4.8%	Very Important
24.1%	Somewhat Important
35.1%	Slightly Important
33.9%	Not Important
2.0%	Not Applicable/Don't Know

19g. The individual's desire to have the best chance for future employment or benefits.

11.2%	Very Important
28.5%	Somewhat Important
32.1%	Slightly Important
26.5%	Not Important
1.8%	Not Applicable/Don't Know

9h. The ability of agency officials to be candid about the individual in the future.

24.4%	Very Important
39.8%	Somewhat Important
21.0%	Slightly Important
12.7%	Not Important
2.0%	Not Applicable/Don't Know

19i. Agency records will reflect the truth.

32.2%	Very Important
36.9%	Somewhat Important
19.8%	Slightly Important
8.1%	Not Important
3.1%	Not Applicable/Don't Know

19j. Ensuring that the agency can comply with the terms of the agreement.

89.0%	Very Important
9.1%	Somewhat Important
1.0%	Slightly Important
0.2%	Not Important
0.6%	Not Applicable/Don't Know

19k. Ensuring that the individual can comply with the terms of the agreement.

48.9%	Very Important
28.0%	Somewhat Important
14.4%	Slightly Important
7.3%	Not Important
1.4%	Not Applicable/Don't Know

19l. The potential consequences for other employers in the future.

20.0%	Very Important
37.2%	Somewhat Important
28.9%	Slightly Important
12.3%	Not Important
1.6%	Not Applicable/Don't Know

20. Have you recommended or approved a clean record agreement which prohibited the individual from applying for—or being employed with—a particular office or agency?

81.6%	Yes
15.8%	No
2.6%	Don't Know or Not Applicable

25. What other drawbacks are there to using clean record agreements that were not addressed in this survey?

Narrative Text Box

21. Why did the agency include the condition that the individual could not work for the office or agency?

Narrative Text Box

26. Is there anything else that you would like to tell us about clean record agreements?

Narrative Text Box

22. What do you think are the most common or avoidable mistakes made by parties regarding clean record agreements?

Narrative Text Box

23. What have you done with respect to clean record agreements that you think worked well that others should consider doing?

Narrative Text Box

24. What other benefits are there to using clean record agreements that were not addressed in this survey?

Narrative Text Box



# APPENDIX C: LEGAL TERMINOLOGY

There are a few legal terms used frequently in this report that are central to understanding CRAs.

CRAs are contracts.<sup>409</sup> The promises being made in the contract are called **consideration**.<sup>410</sup> Consideration can be an obligation regarding a physical thing (like money), or it can be the performance of an act (such as withdrawing an appeal or providing a certain type of reference in the future).<sup>411</sup> To be valid, a contract must have mutual consideration, which means each side must promise to do something or to refrain from doing something that the party had a right to do.<sup>412</sup>

In contract law, a **breach** means a party failed to meet its contractual obligations.<sup>413</sup> 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.<sup>414</sup> When one party commits a material breach of a

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<sup>409</sup> See *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶ 20 (2012).

<sup>410</sup> Consideration is “something having value in the eye of the law. It may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other[.]” *Kemp v. National Bank*, 109 F. 48, 52 (4th Cir. 1901). “A consideration consists of some benefit or advantage accruing to the promisor, or of some loss or disadvantage incurred by the promisee. A consideration is an essential ingredient to the legal existence of every simple contract.” *Eastman v. Miller*, 85 N.W. 635, 636 (Iowa 1901). “It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is, in a legal sense, injured. The injury may consist of a compromise of a disputed claim or forbearance to exercise a legal right, the alteration in position being regarded as a detriment that forms a consideration independent of the actual value of the right forborne.” *Rector, Church Wardens & Vestrymen v. Teed*, 24 N.E. 1014, 1015 (N.Y. 1890).

<sup>411</sup> See *Kemp v. National Bank*, 109 F. 48, 52 (4th Cir. 1901); *Eastman v. Miller*, 85 N.W. 635, 636 (Iowa 1901); *Rector, Church Wardens & Vestrymen v. Teed*, 24 N.E. 1014, 1015 (N.Y. 1890).

<sup>412</sup> See Corbin on Contracts, *Mutuality of Obligation, Mutuality of Consideration*, § 6.1, LexisNexis, 2013; Ballentine’s Law Dictionary, *Consideration*, LexisNexis, 2010.

<sup>413</sup> See *Lujan v. G and G Fire Sprinklers*, 532 U.S. 189, 198 (2001) (one way that breach has been defined is the “‘unjustified or unexcused failure to perform’ contractual duties); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1263 (11th Cir. 2004) (quoting *Black’s Law Dictionary* 200 (8th ed. 2004), defining “breach of contract” as “violation of a contractual obligation by failing to perform one’s own promise”); Restatement 2d of Contracts, § 235 (“[w]hen performance is due. . . anything short of full performance is a breach”).

<sup>414</sup> “A breach 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) (citing 5 Arthur L. Corbin, *Corbin on Contracts* § 1104 (1964)). An appellant is not required to show actual harm to establish that an agency’s disclosure of information covered by the agreement constitutes a material breach. *Doe v. Department of the Army*, 116 M.S.P.R. 160, ¶ 10 (2011). Thus, an appellant need not show that a disclosure resulted in a lost job opportunity or other harm in order to prevail in litigation over whether the agency breached a CRA. 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).

settlement agreement that was put into MSPB's record for enforcement purposes, the other party is entitled either to enforce the settlement agreement or to rescind it and reinstate the underlying appeal.<sup>415</sup>

A **mutual mistake of fact or law** tends to bring about a similar result.<sup>416</sup> A mutual mistake occurs if, at the time that the contract is formed, both parties operate from an erroneous assumption that has a material effect on what the parties have agreed to do.<sup>417</sup> This can include an erroneous assumption about the facts or about what the parties are able to do by law.<sup>418</sup> For example, the parties may be mutually mistaken about an individual's eligibility for a retirement pension, and such eligibility can be a major consideration for parties when assessing whether to enter into a particular settlement agreement.<sup>419</sup> When a settlement agreement is based on a mutual mistake about a material fact in existence at the time of the agreement, or a law permitting the implementation of a material provision of the agreement, then the agreement may be set aside by the Board.<sup>420</sup>

If an allegation of breach or mutual mistake is proven, then the agreement as a whole is lost, as if it had never been put into effect at all and the parties are freed from their contractual obligations.<sup>421</sup> This cancellation of the contract is called **rescission**.<sup>422</sup> When rescission occurs, the parties are back where they started, although time will have passed.<sup>423</sup>

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<sup>415</sup> See *Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381, n.2 (Fed. Cir. 2007); *Kitt v. Department of the Navy*, 116 M.S.P.R. 680, ¶¶ 11-12 (2011).

<sup>416</sup> See *Garcia v. Department of the Air Force*, 83 M.S.P.R. 277, ¶ 7 (1999) (a settlement agreement may be avoided if it was based on a mutual mistake of material fact); *Potter v. Department of Veterans Affairs*, 111 M.S.P.R. 374, ¶ 9 (2009) (settlement agreement must be set aside if it is tainted with invalidity by a mutual mistake of law under which both parties acted).

<sup>417</sup> The famous case used to teach this principle to law students is *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), in which an agreement was reached to sell a specific barren cow. However, it turned out to be possible that the cow could get pregnant. As the deal was for a barren cow, if the cow named in the deal was not barren then the parties had been mutually mistaken about the consideration named in the deal (the cow) and the contract was voidable. See also Black's Law Dictionary 1017 (7th Ed. 1999) (mutual mistake is a mistake that is shared and relied on by both parties to a contract; mistake of fact is a mistake about a fact that is material to a transaction; mistake of law is a mistake about the legal effect of a known fact or situation).

<sup>418</sup> See *Garcia v. Department of the Air Force*, 83 M.S.P.R. 277, ¶¶ 11, 15 (1999) (discussing how a mutual mistake of fact led to a mutual mistake of the lawfulness of a material provision of the agreement, resulting in the agreement being set aside).

<sup>419</sup> Compare *Thomas v. United States Postal Service*, 87 M.S.P.R. 512, ¶ 10 (2001) (raising the possibility of setting aside the contract if both parties were mistaken about the appellant's eligibility for disability retirement because of her years of service) with *Farrero v. National Aeronautics & Space Administration*, 83 M.S.P.R. 487, ¶¶ 7-9 (1999) (explaining that because the agreement stated that "nothing in this Settlement Agreement warrants that Appellant will receive any retirement or other benefit[.]" the appellant's entitlement to a retirement was not a fact about which a mutual mistake could have been formed).

<sup>420</sup> See *Thomas v. United States Postal Service*, 87 M.S.P.R. 512, ¶ 10 (2001) (addressing mutual mistakes of fact); *Adkins v. United States Postal Service*, 86 M.S.P.R. 671, ¶ 9 (2000) (addressing mutual mistakes of law); see also *Garcia v. Department of the Air Force*, 83 M.S.P.R. 277, ¶¶ 11, 15 (1999) (discussing how a mutual mistake of fact led to a mutual mistake of the lawfulness of a material provision of the agreement, resulting in the agreement being set aside).

<sup>421</sup> See *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 14 (2012) (explaining that if the agreement is rescinded, the settlement terms become inoperative, and the parties are essentially restored to the status quo ante).

<sup>422</sup> See *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶ 14 (2012).

<sup>423</sup> See *Zumwalt v. Department of Veterans Affairs*, 118 M.S.P.R. 574, ¶¶ 3, 14 (2012) (finding in 2012 that the appellant may reinstate his 2009 appeal).



Portions of this report discuss the interaction between contracts and public policy. **Public policy** is the relationship between the public interest and the law.<sup>424</sup> Public policy has been described as:

[T]hat principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. . . . But it is also a well-established principle of law and public policy, that where a person is engaged in. . . legitimate pursuits, he shall not be unreasonably fettered in the exercise of such [pursuits.]”<sup>425</sup>

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<sup>424</sup> See *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288 (1932) (when contract “enforcement conflicts with dominant public interests” it is contrary to public policy and a party will therefore not be held to his contractual promise).

<sup>425</sup> *Consumers’ Oil Co. v. Nunnemaker*, 41 N.E. 1048, 1050 (Ind. 1895) (punctuation modified). The U.S. Supreme Court has stated that “the public interest can never be promoted by encouraging unfair, inequitable or dishonorable practices[.]” *Int’l News Serv. v. AP*, 248 U.S. 215 (1918).





# APPENDIX D: ADDITIONAL INFORMATION ABOUT OFFICIAL PERSONNEL FILES

The Official Personnel Folder is the central repository for Notifications of Personnel Actions (SF-50s) for a given individual.<sup>426</sup> Agencies have been moving from a paper-based OPF system to an electronic OPF (e-OPF) system.<sup>427</sup> However, regardless of which type of OPF is used, OPFs are the property of OPM, although they are in the physical custody of an employing agency.<sup>428</sup> Therefore, OPM sets the rules for OPFs.<sup>429</sup>

As explained below, there are some modifications that agencies are authorized to make to OPFs, but there are limits to an agency's power over an OPF.<sup>430</sup>

Put simply, the civil service was designed to be open and merit-based.<sup>431</sup> Processes have been crafted around the assumption that the Government should not hide information from those with a need to know and that any anomalies will have a reasonable explanation that need not be hidden from view.<sup>432</sup> Thus, acting in the normal course of business

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<sup>426</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at 1-7.

<sup>427</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at 1-1; see U.S. Office of Personnel Management, <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/enterprise-human-resources-integration/> (explaining that “the Office of Management and Budget (OMB) mandated all Executive Branch agencies eliminate paper Official Personnel Folders. . . by December 2013”).

<sup>428</sup> 5 C.F.R. § 293.303(a).

<sup>429</sup> 5 C.F.R. § 293.303(e); see U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*.

<sup>430</sup> See U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*.

<sup>431</sup> The Pendleton Act that ended the spoils system and created the civil service required the Civil Service Commission (CSC) to keep a record of “the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals and of the date thereof[.]” Pendleton Act of 1883, § 2-8. Shortly before the duties of the CSC were given to OPM, the CSC explained that its system of records contained reprimands and decisions on charges, and that the information could be “[u]sed in the selection process by the agency maintaining the record in connection with appointments, transfers/promotions, or qualifications determinations. To the extent relevant and necessary, it will be furnished upon request to other agencies for the same purpose.” 40 Fed. Reg. 54356, 54361-62, Nov. 21, 1975. This information also could be “[d]isclosed to other Government agencies maintaining relevant enforcement or other information if necessary to obtain from these agencies information pertinent to decisions regarding hiring or retention.” *Id.*

<sup>432</sup> See U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at Ch. 6-4. “Requests from the public for information from personnel and medical folders must be handled in compliance with both the Privacy Act of 1974, as amended (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C 552). The Privacy Act restricts access to records in a system of records. The Freedom of Information Act establishes the public’s right to information contained in Government records. Agencies are authorized to respond to requests for information from the public on all Official Personnel Folders and Employee Medical Folders in their possession.” *Id.*

tends to create a paper trail of events, even if that is not the desire of the agency or the employee.<sup>433</sup> The OPF or e-OPF will—overtly or discretely—record that a change has been made.<sup>434</sup>

When an SF-50 is cancelled and replaced by a new notification of a personnel action (such as a removal being replaced by a resignation), the personnel office must:

Issue Standard Form 50 with the nature of action, authority, and effective date that would have been used if action had been processed properly to begin with. Identify in blocks 46-50 the office that processes the replacement action, *the date it is approved by the appointing official in that office*, and the title of that official.<sup>435</sup>

In other words, if an employee is removed and a year later a settlement agreement is reached to change the nature of the separation to a resignation, the SF-50 will indicate that the resignation SF-50 was approved a year after the effective date of the resignation.<sup>436</sup> Similarly, if the agency alters its records to reflect that an individual who was removed technically remained employed for a period, any annual increases, within-grade increases, or other regularly generated documents may either be missing or display an approval date so distant from the effective date as to raise questions in the minds of experienced human resources specialists who may one day see the OPF.<sup>437</sup>

In our questionnaire to OPM, we asked if a difference in the approval and effective dates on a SF-50 could be an issue in an investigation.<sup>438</sup> OPM replied that, “depending on the type of background investigation being conducted, the OPF/e-OPF of the person being investigated may be reviewed as part of the investigative process.”<sup>439</sup> Additionally, “investigators may seek clarification of information contained within the file if the information as presented appears to have been altered or revised in some manner.”<sup>440</sup>

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<sup>433</sup> See U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at 1-1.

<sup>434</sup> See U.S. Office of Personnel Management, *Guide to Processing Personnel Actions*, Ch. 32-10 (explaining the information placed on a notification of personnel action for a cancellation).

<sup>435</sup> U.S. Office of Personnel Management, *Guide to Processing Personnel Actions*, Ch. 32-10 (emphasis added).

<sup>436</sup> See U.S. Office of Personnel Management, *Guide to Processing Personnel Actions*, Ch. 32-10.

<sup>437</sup> See U.S. Office of Personnel Management, *Guide to Processing Personnel Actions*, Ch. 32-10.

<sup>438</sup> U.S. Office of Personnel Management, *Response to MSPB Questionnaire for OPM Regarding Clean Record Settlement Agreements*, Oct. 9, 2012, Question 3(a) at 4.

<sup>439</sup> U.S. Office of Personnel Management, *Response to MSPB Questionnaire for OPM Regarding Clean Record Settlement Agreements*, Oct. 9, 2012, Question 3(a) at 4.

<sup>440</sup> U.S. Office of Personnel Management, *Response to MSPB Questionnaire for OPM Regarding Clean Record Settlement Agreements*, Oct. 9, 2012, Question 3(b) at 4.

There are indications that, in effectuating CRAs, some agencies may not be following the rules set by OPM regarding what OPFs may—and may not—contain. In particular, some agencies appear to be placing copies of the settlement agreements inside the appellant’s OPF—something expressly prohibited by OPM’s rules for OPFs.<sup>441</sup> The *Guide to Personnel Recordkeeping* specifically states that copies of decisions and agreements must *not* be filed in the personnel folder.<sup>442</sup>

For example, one settlement agreement that we examined as part of the sample of reviewed agreements contained the following term:

The Agency will remove all documents referring to any discipline related to attendance from the Appellant’s Official Personnel File. However, the Agency will be allowed to place a copy of this agreement in a sealed envelope in the Appellant’s Official Personnel File marked “To be opened only in the event [the appellant] seeks employment or restoration with the [agency].”<sup>443</sup>

This CRA also included the statement that the appellant “agrees that he will not seek employment or restoration to employment with the [agency] in the future.”<sup>444</sup> This is a relatively common CRA provision. Prohibitions on future employment were present in more than 40 percent of the CRAs filed with MSPB to settle an initial appeal between FY 2007 and FY 2011.<sup>445</sup> Eighty-four percent of the agency representatives who reported using CRAs said they had included this term in one or more of their CRAs.<sup>446</sup> In our survey, 87 percent of agency representatives reported that when they decided to recommend or oppose a CRA, it was either very or somewhat important to them that they be able to prevent future employment with the office, agency or other identified employer(s).<sup>447</sup>

Whatever solution agencies seek to address the challenge of enforcing no return clauses, putting a copy of the agreement inside the OPF cannot be the answer—even if the parties agree upon it.<sup>448</sup> The content of an OPF is not theirs to negotiate.<sup>449</sup>

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<sup>441</sup> See U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at 3-24.

<sup>442</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at 3-24.

<sup>443</sup> For more on the methodology by which this data was collected, see *Appendix A*.

<sup>444</sup> One agreement that we reviewed went so far as to state that the individual could not even be employed as a contractor performing duties for the agency. For more on the methodology by which this data was collected, see *Appendix A*.

<sup>445</sup> Data is from a questionnaire given to MSPB administrative judges. For more on the questionnaire, see *Appendix A*.

<sup>446</sup> See *Appendix B*, Question 20.

<sup>447</sup> See *Appendix B*, Question 19e.

<sup>448</sup> U.S. Office of Personnel Management, *Guide to Personnel Recordkeeping*, at 3-24.

<sup>449</sup> 5 C.F.R. § 293.303.





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