

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

**99 M.S.P.R. 161**

DEIDRE DOUGHERTY,  
Appellant,

DOCKET NUMBER  
DE-0432-03-0147-C-2

v.

DEPARTMENT OF AGRICULTURE,  
Agency.

DATE: July 12, 2005

Deidre Dougherty, Westminster, Colorado, pro se.

Cleveland C. Hall, Alexandria, Virginia, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Barbara J. Sapin, Member

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review (PFR) of an April 30, 2004 compliance initial decision (CID) that dismissed her petition for enforcement (PFE) of the parties' April 7, 2003 settlement agreement resolving her appeal of her removal for unacceptable performance. For the reasons set forth below, we GRANT the PFR pursuant to 5 C.F.R. § 1201.115(d); AFFIRM the CID regarding the agency's delay in processing the appellant's health benefit form; VACATE the CID with respect to the issues involving the expungement provision of the settlement agreement and the agency's delay in issuing the appellant an updated Standard Form (SF) 50; and REMAND the appeal for further proceedings consistent with this Opinion and Order.

## BACKGROUND

¶2 The appellant was employed as a GS-12 Computer Specialist with the agency's Food and Nutrition Mountain Plains Regional Office, located in Denver, Colorado. *Dougherty v. Department of Agriculture*, MSPB Docket No. DE-0432-03-0147-I-1 Initial Appeal File (IAF), Tab 1 at 2; Tab 6, subtab 4f. Effective December 6, 2002, the agency removed the appellant based upon a charge of unacceptable performance following her placement on a 90-day performance improvement plan. *Id.*, Tab 6, subtabs 4f, 4g, 4i. The appellant filed an appeal with the Board. *Id.*, Tab 1. On April 7, 2003, the parties entered into a written agreement to settle the appeal. *Id.*, Tabs 18-20. The terms of the settlement agreement are as follows:

1. The [a]ppellant shall withdraw the ... appeal and agrees to waive her rights to make any issue relative to the [a]gency's removal action and this agreement part of any future appeal or grievance or [equal employment opportunity] [()EEO()] complaint (formal or informal) on any other third party proceedings, proving the [a]gency complies with the provisions of this agreement.
2. The [a]gency will cancel and rescind [the] [a]ppellant's removal action[,] effective December 6, 2002, and provide her back pay[] within the meaning of the Back Pay Act, retroactive to that date. The [a]gency will make every reasonable effort to provide [the] [a]ppellant with ... back pay within 30 days of the date of this agreement.
3. The [a]gency will give the [a]ppellant a management directed geographic reassignment outside of the Denver, Colorado commuting area[,] which [the] [a]ppellant agrees to decline.
4. The [a]ppellant's declination of the reassignment will entitle her to severance pay. The [a]gency will make every effort to provide [the] [a]ppellant severance pay within 30 days of the date of this agreement. The [a]ppellant's declination of the reassignment will also afford her whatever placement and/or reemployment rights with the federal government that she would have had in connection with any ordinary management directed reassignment that an employee declines.
5. The [a]ppellant agrees not to seek reemployment with the [a]gency's Denver Regional Office.

6. The [a]gency agrees to expunge from [the] [a]ppellant's official personnel file [(OPF)] and any other employment records, all documents generated as a result of her removal[,] including, but not limited to, the appraisal that led to her being placed on a performance improvement plan, the performance improvement plan, the documents generated concerning [the] [a]ppellant's performance during the performance improvement plan, the document generated to appraise [the] [a]ppellant's performance after the performance improvement plan, the proposed removal, the reply, the decision to remove[,] and all documents generated by the [Board] appeal. The [a]gency's records shall not reflect any unacceptable performance by the [a]ppellant.

7. The [a]gency agrees to pay [the] [a]ppellant's reasonable attorney's fees ... in the amount of \$28,000.00. The [a]gency will make every reasonable effort to pay this amount to the [a]ppellant's attorney[] within 30 days of the date of this agreement ....

8. The [a]gency agrees that any and all inquiries from perspective [sic] employers shall be directed to the Employee Labor Relations Branch, Human Resources Division, FNS[,] wherein they will be provided a neutral reference that shall consist of only dates of employment, positions held, salaries earned[,] and the fact that the [a]ppellant was performing acceptably at the time of her resignation.

9. This agreement shall be placed [into] the ... record and the [Board] shall retain jurisdiction for purposes of enforcement.

*Id.*, Tab 20.

¶3 In an April 8, 2003 initial decision, the administrative judge (AJ) dismissed the appeal as settled and incorporated the agreement into the record for enforcement purposes. *Id.*, Tab 21. The AJ found that the settlement agreement was lawful on its face and freely entered into by the parties in a matter over which the Board has jurisdiction and that the parties understood its terms. *Id.*

¶4 Proceeding pro se, the appellant filed a PFE of the parties' settlement agreement. *Dougherty v. Department of Agriculture*, MSPB Docket No. DE-0432-03-0147-C-1 Initial Compliance File (CF-1), Tabs 1, 4. Therein, she alleged that the agency failed to comply with the terms of the settlement agreement by failing to pay her back pay with interest and to make corrections to her SF-50, performance appraisals, health insurance card, and thrift savings plan.

*Id.*, Tab 1 at 2. The appellant subsequently withdrew her PFE and, as a result, the AJ dismissed the PFE as withdrawn. *Id.*, Tabs 4, 5.

¶5 The appellant thereafter filed a second PFE of the settlement agreement. *Dougherty v. Department of Agriculture*, MSPB Docket No. DE-0432-03-0147-C-2 Second Compliance File (CF-2), Tab 1. She asserted the following: (1) The agency's alleged 7-month delay in issuing an updated SF-50 documenting her separation interfered with her ability to apply for other federal jobs; (2) its failure to comply with the settlement agreement prevented her from obtaining health insurance coverage, and her inability to obtain health insurance coverage prevented her from obtaining medical treatment; (3) negative information pertaining to her removal is still on various payroll documents in her OPF; (4) the agency has not complied with her requests for a copy of her employment records and OPF; and (5) the agency has failed to pay her back pay with interest. *Id.*

¶6 The agency responded, acknowledging a delay in issuing the appellant's updated SF-50, as well as in processing the appellant's health benefit form. *Id.*, Tab 4, subtab 1. With respect to the health benefit form, it provided evidence that it had made several efforts to provide the appellant with the applicable form and alleged that the delay in processing was caused by the appellant's error in completing the form. *Id.*, subtabs 1, 3-10. It further asserted that any "negative information" pertaining to the appellant's removal had been expunged from her OPF. *Id.*, subtab 1. Finally, the agency acknowledged an error with respect to the payment of interest on the appellant's back pay, but submitted a Payroll Action Request, Form AD-343, directing that such interest be paid. *Id.*, subtabs 1, 2.

¶7 In an April 30, 2004 compliance initial decision, the AJ denied the appellant's PFE. *Id.*, Tab 15, CID at 2, 5. The AJ noted first that the appellant had failed to respond to his March 11, 2004 order directing her to identify any

areas of continuing noncompliance by the agency. CID at 2-3.\* He found this to be “at least an implicit admission that the agency is currently in compliance with the settlement agreement.” CID at 3. Next, the AJ concluded that, although there was a delay by the agency in complying with the settlement agreement, the agency had complied, and there was no law, rule, or regulation that would support the imposition of damages or sanctions, monetary or otherwise, upon the agency for the delay. *Id.* With respect to the appellant’s claim that she could not obtain a health insurance card because the agency failed to provide her with the applicable health benefit form, the AJ found that the appellant eventually did obtain a health insurance card, and she currently has health insurance coverage that is retroactive to her December 6, 2002 separation. CID at 4. The AJ further found the settlement agreement to be silent on the issue of the appellant’s health insurance. *Id.* Thus, there was no health insurance provision to enforce, and, additionally, the Board has no authority to review whether the appellant was required to pay back insurance premiums as an offset to her back pay award. CID at 4 & n.4. Finally, the AJ found that any references to the appellant’s removal in the agency’s various payroll documents do not constitute a material breach of the settlement agreement. CID at 5.

¶8 The appellant has filed a pro se PFR, in which she essentially reasserts all of her claims from below. Petition for Review File (PFRF), Tab 1. The agency has filed a response in opposition to the petition. *Id.*, Tab 3.

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\* The appellant asserts on PFR that she never received the AJ’s March 11, 2004 order. Petition for Review File, Tab 1 at 2. However, the AJ certified that the order was sent by certified mail to the same mailing address used by the appellant on appeal and PFR. *Id.*, Tab 2 at 2; IAF, Tab 1 at 1; CF-2, Tab 14 at 2. We need not resolve this matter. The appellant essentially raises the same contentions she raised below on PFE, and we address those claims in this Opinion and Order.

## ANALYSIS

¶9 The Board has the authority to enforce the terms of a settlement agreement entered into the record. *Vaughn v. U.S. Postal Service*, 97 M.S.P.R. 97, ¶ 7 (2004); *McClain v. U.S. Postal Service*, 40 M.S.P.R. 66, 70 (1989). In this case, it is undisputed that the settlement agreement between the parties was entered into the record and that the Board has jurisdiction to enforce its terms. IAF, Tabs 20, 21. In a proceeding to enforce a settlement agreement, the party alleging noncompliance, the appellant in this case, has the burden of proof. *See Herring v. Department of the Navy*, 90 M.S.P.R. 165, ¶ 6 (2001). However, where, as here, the appellant makes specific allegations of noncompliance, it is the agency's burden to produce relevant evidence within its control showing compliance with the agreement or good cause for its failure to comply. *See id.* An agency's assertions must include a clear explanation of its compliance efforts supported by understandable documentary evidence. *Woodson v. Department of Agriculture*, 94 M.S.P.R. 289, ¶ 6 (2003).

¶10 We address first the appellant's claim on review relating to the agency's delay in issuing her an updated SF-50. PFRF, Tab 1; IAF, Tab 20. Notably, the settlement agreement does not address specifically the agency's obligation to timely issue an updated SF-50 documenting the appellant's separation in exchange for the agency's agreement to cancel and rescind the removal action. IAF, Tab 20. However, the agreement makes no sense without an understanding that the agency would timely provide the appellant with an updated SF-50. Indeed, common sense dictates that the concessions the appellant sought in the form of the agency's rescission of her removal would afford her almost no benefit without an updated SF-50 documenting a voluntary separation from the agency. When the appellant declined the directed reassignment and withdrew her Board appeal in exchange for the agency's cancellation and rescission of her removal, her goal was to eliminate this negative information as it may affect future employment with the government or elsewhere. PFRF, Tab 1 at 2. Thus, it is

reasonable to interpret the agreement to require the agency to provide an updated and timely-issued SF-50 in this case. *See Wells v. Department of the Treasury*, 89 M.S.P.R. 228, ¶¶ 13-14 (2001) (although the settlement agreement did not call upon the agency to issue an updated SF-50 documenting the appellant's resignation in lieu of a negative suitability determination, it was reasonable to interpret the agreement as requiring the agency to issue an updated SF-50 documenting the voluntary resignation); *cf. King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) ("When an employee voluntarily resigns in exchange for purging of the records that show the prior adverse action, the employee's goal ... is to eliminate this information as it may affect future employment ....").

¶11 It is somewhat unclear, however, whether the agency's delay in issuing an updated SF-50 constitutes a material breach of the settlement agreement. *See Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997) (a material breach relates to a matter of vital importance or goes to the essence of the contract). It is clear that one of the major benefits sought by the appellant in agreeing to withdraw her appeal was the cancellation of her removal and a clean personnel record documenting her voluntary separation from service. She has not established, however, that the agency's undisputed delay in issuing her an updated SF-50 had a material effect on her ability to apply for, or obtain, other employment. CF-2, Tab 1; Tab 4, subtab 1; Tab 9 at 2-3; Tab 11, subtab 1. For example, she asserts only that the agency's delay in that regard interfered with her ability to apply for federal jobs because an SF-50 is generally required to be submitted with an application for federal employment. CF-2, Tabs 1, 9, 13; PFRF, Tab 1. In support of her assertion, she submits two documents indicating "the importance" of submitting an SF-50 with an application for employment with the Department of Energy and the Department of Health and Human Services. CF-2, Tab 9, subtabs A1, A2. She has not shown that she: (1) ever attempted to apply for positions with those agencies and had her

applications rejected because she did not include an SF-50; (2) failed to obtain employment because a prospective employer obtained her old SF-50; or (3) refrained from applying for available jobs because the old SF-50 would have been made available to a prospective employer. CF-2, Tabs 1, 9, 13; PFRF, Tab 1. On remand, the appellant shall be afforded the opportunity to present additional argument and evidence pertaining to the material impact, if any, of the agency's delay in issuing an updated SF-50.

¶12 We now turn to the appellant's claim that the agency's failure to timely provide her with a health benefit form prevented her from obtaining a health insurance card, and, consequently, medical treatment. PFRF, Tab 1 at 3; CF-2, Tab 1 at 2. The appellant claimed below that the agency's failure in that regard prevented her from obtaining medical treatment since July 2003. CF-2, Tab 1 at 2. Notably, however, the appellant asserts on review that, despite a delay in receiving her health benefit form from the agency, her health insurance coverage was restored retroactively. PFRF, Tab 1 at 3. Further, aside from her bare assertions, there is no record evidence that the appellant's health insurance carrier denied her medical coverage or that she was unable to seek medical treatment. CF-1, Tabs 1-4; CF-2, Tabs 1-14; PFRF, Tabs 1, 3. Rather, the evidence is that the agency made a good faith attempt to continue the appellant's health care coverage and provide her with the necessary forms to do so. CF-2, Tab 4, subtabs 1, 3-10. Moreover, any problem with the appellant's health insurance coverage for that time frame should be directed to the insurer or to OPM's procedures at 5 C.F.R. § 890.105 governing appeals of a health care provider's denial of a claim for benefits. *See Kolassa v. Department of the Treasury*, 59 M.S.P.R. 151, 156 & n.5, *review dismissed*, 52 F.3d 340 (Fed. Cir. 1993) (Table).

¶13 We next consider the appellant's contention that the agency has failed to comply with Paragraph 6 of the settlement agreement requiring that the agency expunge from the appellant's OPF "and any other employment records" all documents generated as the result of her removal, and that its records "not reflect

any unacceptable performance by the [a]ppellant.” IAF, Tab 20; CF-2, Tab 1 at 2; Tab 9 at 3; Tab 12 at 2, ex. B; PFRF, Tab 1 at 3. In support of her argument, the appellant submitted a May 6, 2003 Payroll Action Request, Form AD-343, stating, in pertinent part, the following:

[The appellant's] removal action, effective 12/06/2002 has been cancelled and back pay has been granted (approximately \$24,156.40) from 12/07/2002 (PP#24) thru 04/19/2003 (PP#07) in accordance with MSPB settlement agreement dated 04/07/2003.

...

Due to the financial hardship created by the removal action, please expedite this request quickly.

CF-2, Tab 12, ex. B (errors in original). She also cited to additional agency documents that referred to the parties’ “settlement.” Id., exs. C-E. The AJ concluded that reference to the appellant’s removal in the various agency payroll documents was insignificant and not a material breach of the settlement agreement because “the documents in question would simply not be documents that would ever be made available to prospective employers of the appellant.” CID at 5. He further noted that “the appellant has not alleged that the continuing existence of these documents actually prejudiced her in any way.” Id. The agency argues on review that the payroll documents are not maintained as part of the appellant’s OPF. PFRF, Tab 3 at 2.

¶14 A plain reading of Paragraph 6 of the parties’ agreement clearly precludes reference to the appellant’s removal in any documents in her OPF file as well as “any other employment records.” IAF, Tab 20. Indeed, based on the language of the settlement agreement, it can be assumed reasonably that the appellant’s purpose in bargaining for the expungement of references to her removal from her employment records was to ease her search for employment with other federal agencies or elsewhere, and to ensure that future employers would not have access to information related to the removal. *See Modrowski v. Department of Veterans Affairs*, 97 M.S.P.R. 224, ¶ 11 (2004). We note the agency’s assertion below

that, “[c]onsistent with the agreement[,] all documents relative to the removal were removed shortly after all parties signed the agreement[,]” CF-2, Tab 4, subtab 1, as well as its assertion on review that the payroll documents at issue are not maintained as part of the appellant’s OPF, PFRF, Tab 3 at 2. Based on the record evidence, however, it is unclear whether the payroll documents at issue have since been cleaned of any reference to the appellant’s removal, and, if they have not, whether they are part of any “employment records” covered by Paragraph 6 of the agreement. Thus, we vacate the portion of the CID addressing the aforementioned expungement provision and direct the AJ to explore the issue on remand. *See Musick v. Department of Energy*, 339 F.3d 1365, 1370 (Fed. Cir. 2003).

¶15 We next address the appellant’s claim, raised below, that the agency failed to provide her with the correct amount of back pay and interest pursuant to Paragraph 2 of the parties’ agreement. PFRF, Tab 1 at 3; IAF, Tab 20; CF-2, Tab 1 at 2; Tab 9 at 3, subtab I; Tab 12 at 2. That paragraph requires the agency to pay back pay in accordance with the Back Pay Act. IAF, Tab 20. The Act defines back pay as “all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period [at issue] if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period.” 5 U.S.C. § 5596(b)(1); *see Jackson v. U.S. Postal Service*, 81 M.S.P.R. 286, 290 (1999). The Act further provides that back pay “shall be payable with interest” and states that the interest shall be computed at the rate set forth in the Internal Revenue Code at 26 U.S.C. § 6621(a)(1). *See* 5 U.S.C. § 5596(b)(2); *Jackson*, 81 M.S.P.R. at 290. The AJ did not address the issue of back pay in his CID. CID at 1-5.

¶16 As proof of its purported compliance with the back pay provision in the settlement agreement, the agency submitted a Payroll Action Request, Form AD-343, indicating that: The appellant “was paid settlement/back pay from pay period 24, 2002[,] through pay period 7, 2003. [The appellant] should have

received interest on this settlement.” CF-2, Tab 4, subtab 2. The Form AD-343 described the action to be taken, stating: “Please go back and pay [the appellant] interest on monies received for settlement from pay period 24, 2002[,] through pay period 7, 2003.” *Id.* In further support of its contention that it has “essentially” complied with the settlement agreement, the agency also submitted a document showing that the appellant received interest on back pay for pay period 24, 2002, through pay period 7, 2003, in the amount of \$1,232.21. CF-2, Tab 11, subtabs 1, 2. In addition, it submitted a document reflecting the appellant’s “lump sum and separation/nonpay status information.” *Id.*, subtab 4. As noted above, the appellant submitted a Form AD-343 reflecting that she received back pay in the form of a lump-sum payment of \$24,156.40 for the period from December 7, 2002, through April 19, 2003. CF-2, Tab 12, ex. B.

¶17 The evidence submitted by the agency, however, does not constitute “understandable documentary evidence” showing that the appellant received the appropriate amount of back pay or interest. *See Woodson*, 94 M.S.P.R. 289, ¶ 6. Nowhere, either below or on review, has the agency explained or established how it calculated the amount of the appellant’s back pay award or interest. CF-2, Tabs 4, 11; PFRF, Tab 3. Accordingly, it has not established that the appellant was ever properly awarded back pay or interest under the Back Pay Act, as necessary for its compliance with the parties’ agreement. *Id.*; IAF, Tab 20. Consequently, we are unable to determine whether the appellant was paid the correct amount of back pay or interest.

¶18 Because the record is unclear regarding the issues of back pay and whether any documents referring to the appellant’s removal remain in the appellant’s OPF or other employment records, we remand these matters to the AJ for further adjudication. *See Musick*, 339 F.3d at 1370 (the Federal Circuit remanded the case to the Board for a factual determination as to whether the agency retained a document related to the employee’s removal in his OPF in violation of the settlement agreement); *Guinn v. Department of Labor*, 93 M.S.P.R. 316, ¶¶ 9-11

(2003) (remanding the case because the Board was unable to ascertain from the agency's evidence whether the appellant received the correct amount of back wages, what deductions were taken from the wages, and whether the deductions were proper). On remand, the AJ shall determine whether the agency has awarded the appellant the correct amount of back pay and interest and, additionally, expunged any references related to her unacceptable performance and removal from all documents in her OPF and "any other employment records." The AJ should convene a hearing pursuant to 5 C.F.R. § 1201.183(a)(3), if such a hearing "is necessary to resolve matters at issue." *Vaughn*, 97 M.S.P.R. 97, ¶ 9 (quoting *Vitanza v. U.S. Postal Service*, 94 M.S.P.R. 385, ¶ 13 (2003)).

¶19 Finally, if the appellant establishes a material breach of the settlement agreement on remand, she shall be afforded the opportunity to make an informed decision as to whether she wishes to elect either enforcement of the agreement or rescission of the agreement and reinstatement of her claim on appeal. *See West v. Department of the Army*, 96 M.S.P.R. 531, ¶ 12 (2004) (where an appellant establishes that an agency is in breach of a settlement agreement, he may elect either enforcement of the agreement or rescission of the agreement and reinstatement of his claim on appeal; the Board lacks the authority to award damages for the breach); *Wonderly v. Department of the Navy*, 68 M.S.P.R. 529, 532 (1995).

## ORDER

¶20 Accordingly, we remand this case to the Denver Field Office for adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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Bentley M. Roberts, Jr.  
Clerk of the Board

Washington, D.C.