UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DONALD G. McDAVID, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DA075287C9039-1 DATE: DEC 13 1991

Ralph J. Bernsen, Sr., Esquire, San Antonio, Texas, for the appellant.

Edward R. Harriman, Jr., Esquire, Fort Sam Houston, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on the issue of compliance. Specifically at issue is whether the agency has complied with the terms of a settlement agreement it entered into with the appellant. For the reason set forth below, we find that the agency has not complied with a Board decision incorporating that agreement and hereby ORDER its compliance.

BACKGROUND

The agency removed appellant, effective July 13, 1987, from the position of supervisory aircraft pilot, GM-13, citing medical disqualification. Appellant filed an appeal of the removal, and in the course of its adjudication, he and the agency reached a settlement. The parties drafted a settlement agreement that provided a mutually acceptable method of determining appellant's medical fitness for flight duty. The agreement provided that:

> a. Appellant shall immediately submit a duplicate copy of all his medical records . . . to the Commander, USAAMC[1] . . . That activity shall review and evaluate appellant's fitness for flying Army aircraft, and shall make a final determination whether to recommend that a DA Form 4186 (Medical Recommendation for Flying Duty) be issued to appellant. Should USAAMC deem it necessary, appellant shall report for further medical examination at government expense. If a positive recommendation is made, the agency shall approve it, and reinstate appellant to his former position of Supervisory Aircraft Pilot, GM-2181-13 ($46,670 per annum) and agrees to pay attorney fees in the amount of $1,200. If the recommendation is negative, the agency has no further obligations to appellant, and appellant agrees that his termination for disability is final, and that no further appeal shall be made, nor attorney fee claimed.

It was incorporated into an initial decision dismissing the appeal. That decision became final on December 8, 1987.

Appellant's medical records were evaluated by the USAAMC, and it sent the agency a memorandum on December 21, 1987, recommending that appellant be disqualified for

[1] United States Army Aeromedical Center.

further aviation service. The agency apprised appellant of this determination in a notice dated January 22, 1988. On January 21, 1988, however, the USAAMC met to reconsider appellant's medical condition. This meeting resulted in a February 1, 1988, memorandum to the agency noting the mildness and stability of appellant's medical condition and recommending that appellant be considered for a waiver of the medical requirements. In an ensuing memorandum to the agency, dated April 6, 1988, the USAAMC specifically recommended that appellant be issued a DA Form 4186 and reevaluated every two months for the first year, then annually thereafter. The agency's civilian personnel officer (CPO) denied the recommended waiver. On May 6, 1988, appellant filed a petition for enforcement.[2]

Before the administrative judge, the agency argued that the December 21, 1987, memorandum was the "final determination" anticipated in the settlement agreement. Appellant argued that the April 6, 1988, memorandum was the USAAMC's final determination. The administrative judge agreed with appellant and determined that the agency had not complied with the terms of the settlement agreement. In a Recommendation issued October 23, 1990, the administrative judge ordered that the agency submit to the Clerk of the

[2] This petition was resolved pursuant to a second settlement agreement. Ultimately, the full Board determined that the second settlement agreement was unlawful and set it aside. The case was remanded to the Board's Dallas Regional Office for resolution of the dispute over the interpretation of the terms of the original settlement agreement.

Board evidence that it had complied with the Board's decision, or reasons why it had not. The agency submitted a brief arguing that it had complied with the Board's decision, to which appellant filed a response.

ANALYSIS

In its brief to the Board, the agency argues anew that the December 21, 1987, memorandum issued by the USAAMC was the final determination described in the settlement agreement. This argument, however, is belied by the subsequent determinations and recommendations of the USAAMC. For whatever reason, the USAAMC saw fit to revise its initial determination regarding appellant's medical condition, and its final determination was set out in the April 6, 1988 memorandum.

The agency argues additionally that although the USAAMC ultimately recommended a waiver of the applicable medical qualifications and the issuance of a DA Form 4186, it found that appellant was not medically qualified to operate Army aircraft. As the administrative judge notes in the Recommendation, however, a USAAMC recommendation that appellant be issued a DA Form 4186 was written into the settlement agreement as the operative event that would evoke appellant's right to reinstatement. The agreement states, clearly and without equivocation, that the USAAMC "shall make a final determination whether to recommend that a DA Form 4186 (Medical Recommendation for Flying Duty) be issued to appellant." The agreement is equally clear and

unequivocal where it states that if the USAAMC makes the recommendation that appellant be issued the DA Form 4186 "the agency shall approve it, and reinstate appellant to his former position of Supervisory Aircraft Pilot."

It is well-established that in construing the terms of a settlement agreement, the words of the agreement itself are of paramount importance in determining the intent of the parties at the time they contracted. *Grube* v. *Department of the Air Force*, 41 M.S.P.R. 494, 499 (1989); *Miura* v. *Department of the Navy*, 39 M.S.P.R. 663, 668 (1989). Only where there is ambiguity in the terms of the agreement will any extrinsic evidence or argument be considered. *Id*. As we note above, the terms of this agreement regarding the issuance of the DA Form 4186 contain no such ambiguity.

The agency also argues that the CPO's denial of the recommended waiver is the "final determination" described in the settlement agreement, and that the USAAMC's recommendation of the waiver was an effective transfer to the CPO of the final determination authority contemplated in the settlement agreement. It is plain, however, that the agreement contemplated just the opposite. The clear import of the settlement agreement is to transfer this authority to the USAAMC and to be bound by its recommendation. Its recommendation that appellant be issued the DA Form 4186 to

which the agreement specifically refers was, as stated in the agreement, to be adopted by the agency.[3]

The agency argues finally that the settlement agreement should be set aside "due to mutual mistake on the part of the parties." It is well established that a party seeking to set aside a settlement agreement due to mutual mistake bears a heavy burden. *Asberry* v. *United States Postal Service*, 692 F.2d 1378, 1380 (Fed. Cir. 1982); *Thompson* v. *General Services Administration*, 38 M.S.P.R. 45, 47 (1988). Here, the agency argues that there must have been a mutual mistake because its understanding of the USAAMC review clause was different from that of appellant. This claim does not meet the agency's heavy burden to show mutual mistake. The agency does not cite any mistaken view of any law or fact that caused the parties to include this provision in the agreement. Its argument merely reflects the agency's disagreement with the administrative judge's finding on the meaning of the clause. At most, the agency may have made a unilateral mistake, but a unilateral mistake is insufficient to set aside a settlement agreement. *Brown* v. *County of Genesee*, 872 F.2d 169, 174-75 (6th Cir. 1989); *Cheyenne-Arapaho Tribes of Indians of Oklahoma* v. *United States*, 671 F.2d 1305 (Ct. Cl. 1982). We find, therefore,

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[3] The Board is not, in this ruling, stating that the agency may not impose the additional conditions set out by the USAAMC. They are also a part of its recommendation.

that the agency has not complied with the terms of the agreement.

The agency contends that it cannot comply with the settlement agreement because it has abolished appellant's former position, Supervisory Aircraft Pilot (pilot), and replaced it with the position of Supervisory Helicopter Flight Instructor (instructor), a position for which the appellant is allegedly not qualified. The agency, however, has failed to prove that the pilot position has been abolished. The only evidence the agency submitted is copies of two position descriptions. The first is a copy of the position description of the pilot position. Appeal File, Volume 6, Tab 1, Exhibit 13. Nothing on the face of that position description indicates that the position was abolished. The second position description is for the instructor position. Appeal File, Volume 6, Tab 1, Exhibit 14. But this position description does not show that it has ever been classified, approved by the agency's management or substituted for appellant's former position. Given this evidence, it cannot be concluded that appellant's position has been abolished.

Even if the appellant's position were abolished at some point in time, the evidence indicates that it was not abolished at the time the appellant was entitled to be reinstated under the settlement agreement. In its May 17, 1988, memorandum notifying appellant of its decision

not to reinstate him to his former position, the agency did not mention that the pilot position had been abolished. Appeal File, Volume 6, Tab 1, Exhibit 11. Instead, it stated that it would not reinstate the appellant to the pilot position, despite USAMMC's April 6, 1988, determination, because it did not consider him medically qualified for it. *Id.* Accordingly, it is clear that the pilot position existed as of May 17, 1988, and therefore, that the appellant is entitled to reinstatement to that position.

This is not to say that the appellant is entitled to encumber the pilot position for the remainder of his career if the agency in good faith and in fact abolished the position. However, if the position were abolished sometime after May 17, 1988, appellant would have to be provided his reduction-in-force rights and be advised of his right to file a reduction-in-force appeal before the agency would be considered in compliance with the settlement agreement. *Cf. Washington v. Tennessee Valley Authority*, 22 M.S.P.R. 377 (1984) (approving a retroactive reduction in force after a Board-ordered reinstatement).

Accordingly, the agency is hereby ORDERED to submit to the Clerk of the Board within 10 days of the issuance of this Opinion and Order evidence that it has complied with the Board's decision. If the agency fails to submit such evidence it shall submit the name of the official responsible for its noncompliance, and it must show cause why that official shall not be subject to sanctions imposed by the Board pursuant to 5 U.S.C. §§ 1204(a)(2) and 1204(e)(2)(A). *See* 5 C.F.R. § 1201.83(b).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.