

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

66 M.S.P.R. 458

Docket Number DE-0752-94-0208-I-1

ROSEMARIE W. SENA, Appellant,

v.

DEPARTMENT OF DEFENSE, Agency.

Date: February 13, 1995

Michael Calvin Jordan, Esquire, and Patrick Larkin Fogel, Esquire,
Albuquerque, New Mexico, for the appellant.

Captain Jefferson D. Reynolds, Esquire, Bolling Air Force Base,
Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued May 23, 1994, that dismissed her appeal pursuant to a settlement agreement. For the reasons discussed below, we GRANT the appellant's petition, RESCIND the settlement agreement, and REMAND the case to the Dallas Regional Office for adjudication on the merits.

BACKGROUND

The appellant filed an appeal with the Board's Dallas Regional Office from the agency's action removing her from her position as a Budget Officer at Kirtland Air Force Base, New Mexico (Kirtland). Prior to hearing, the parties executed a written settlement agreement resolving all matters in controversy. Among the terms of the agreement were that the appellant would withdraw with prejudice her Board appeal and two EEO complaints she had filed at Kirtland. Initial Appeal File (IAF), Tab 21. The administrative judge accepted the agreement into the record for enforcement purposes, and issued an initial decision dismissing the appeal.

The appellant seeks rescission of the settlement agreement and reinstatement of her appeal based on her contentions that: (1) the agreement is invalid because it was the result of duress and psychological impairment that rendered her incapable of making a rational or knowing decision; [1] and (2) the agency has materially breached the terms of the agreement regarding confidentiality. The settlement agreement contains the following terms relating to confidentiality:

7. Both parties agree that it is in the best interest of all to keep confidential the terms and conditions of this settlement. Both parties agree that the nature and terms of this agreement will remain confidential and that neither shall divulge the nature or terms of this agreement except as ordered in a court or administrative body of competent jurisdiction. The terms will only be disclosed after giving the opposing party notice that the terms are likely to be disclosed so that the other party has an opportunity to respond. Should either the Agency or Appellant be questioned about the nature or extent of this settlement agreement, it will not be a breach of this provision for either party to respond that this matter has been settled to the mutual satisfaction of both parties or words to that effect.

8. Agency further agrees that any dissemination or review of this Agreement within Agency shall be limited to the undersigned Agency legal representatives, civilian personnel and Dr. John Wiles.

Initial Appeal File (IAF), Tab 21.

In support of her contention that the agency breached these provisions, the appellant states by affidavit that she received a letter from Bettie Tapscott Spencer, an EEO Counselor at Kirtland, on or about June 13, 1994, informing her that a copy of the settlement agreement had been released to Spencer and that Spencer was withdrawing the appellant's pending EEO claim. Petition for Review File (PFRF), Tab 1, Exh. B. The appellant states that she investigated the circumstances of the transmission of the agreement, and learned that it had first been sent by facsimile to the agency's Office of Complaint Investigations (OCI), which sent a copy to the EEO Office at Kirtland. *Id.* She further stated that she visited the EEO Office at Kirtland after receiving the letter from Ms. Spencer, where she talked to Efren Medrano, another EEO Counselor, who advised her that he was aware of the agreement and its terms. She added that Mr. Medrano pulled the agreement from her file and gave it to a secretary to copy for her. *Id.* The appellant contends that the dissemination of the agreement to OCI and the Kirtland EEO Office violated the agreement because the agency did not provide her with the notice and opportunity to respond required by paragraph (7).

The agency admits that a copy of the settlement agreement was transmitted by Captain Amy Johnson, an Assistant Staff Judge Advocate in

Washington, D.C., [2] to Dr. Charles Solberg, an OCI Discrimination Complaints Investigator in Dayton, Ohio, who transmitted a copy of the agreement to the EEO Counseling Office at Kirtland. PFRF, Tab 4, at 4. Dr. Solberg, who had been assigned to investigate one of the appellant's EEO claims, stated by affidavit that the transmission of the agreement to OCI was done pursuant to OCI's longstanding policy and requirement that there be written verification when a complaint has been resolved. PFRF, Tab 4, Exh. 6. He averred that the case file was then returned to Kirtland and the investigation closed. *Id.* The agency states that the settlement agreement has not been released beyond OCI and the Kirtland EEO Office, and that both offices retain strict confidentiality of all records in their possession. PFRF, Tab 4, at 5.

ANALYSIS

When one party commits a material breach of a settlement agreement, the other party is entitled either to enforce the settlement agreement or to rescind the agreement and reinstate his or her appeal. *Holmes v. Department of Veterans Affairs*, 57 M.S.P.R. 115, 119 (1993); *Betterly v. Department of Veterans Affairs*, 47 M.S.P.R. 63, 67 (1991). We first consider whether it is appropriate for us to adjudicate this issue on petition for review, or whether the appellant's petition for review should be forwarded to the regional office as a petition for enforcement under 5 C.F.R. §§ 1201.181-.183.

The Board has stated that a pleading which alleges that the other party breached a settlement agreement, but which does not contend that the administrative judge erred in dismissing the appeal pursuant to the agreement, is in substance a petition for enforcement, which should be considered initially by the regional office. *See Butanowicz v. Department of the Treasury*, 48 M.S.P.R. 550, 555 (1991); *Willis v. U.S. Postal Service*, 32 M.S.P.R. 580, 582 (1987). Our compliance regulations do not, however, provide for exclusive jurisdiction by the regional office when a party seeks rescission of a settlement agreement and reinstatement of his or her appeal, rather than enforcement of the agreement. Indeed, those regulations directly address only petitions seeking to enforce Board orders. *See* 5 C.F.R. §§ 1201.181-.183. We also note that the Board considers petitions for review seeking to set aside settlement agreements on grounds of fraud or mutual mistake. *See De Luna v. Department of the Navy*, 58 M.S.P.R. 526, 528-29 (1993).

Remand to the regional office is appropriate where the factual record is insufficiently developed to enable us to adjudicate the agency's compliance with the settlement agreement. *See, e.g., Forston v. Department of the Navy*, 60 M.S.P.R. 154, 161-62 (1993); *Betterly v. Department of Veterans*

Affairs, 47 M.S.P.R. 63, 67 (1991). In the instant case, both parties have filed extensive submissions, including affidavits, documentary evidence, and legal argument regarding the agency's compliance with or breach of the settlement agreement. We therefore find it appropriate under the circumstances to adjudicate the matter here. See *De Luna*, 58 M.S.P.R. at 529. Cf. *Forston*, 60 M.S.P.R. at 162 (Board did not follow usual practice of adjudicating fraud issues and forwarding compliance issues to regional office in light of circumstances and interest in judicial efficiency).

A settlement agreement is a contract and the interpretation of its terms is a question of law. *Dati v. Department of the Navy*, 41 M.S.P.R. 397, 400 (1989). In construing the terms of the agreement, the words of the agreement are of paramount importance in determining the intent of the parties at the time that they contracted, *id.*, and the Board may not modify those terms through its decision. *Colonel v. Department of the Air Force*, 38 M.S.P.R. 285, 291 (1988), *aff'd*, 980 F.2d 743 (Fed. Cir. 1992) (Table). The settlement agreement is quite specific as to permissible dissemination within the agency: "Agency further agrees that any dissemination or review of this Agreement within Agency shall be limited to the undersigned Agency legal representatives, civilian personnel and Dr. John Wiles." IAF, Tab 21. The sole signatory to the settlement agreement for the agency was Randall Kehl, Acting General Counsel. *Id.*[3] Accordingly, the dissemination of the agreement to the Office of Complaint Investigations in Dayton, Ohio, and to the EEO Counseling Office at Kirtland, would be consistent with the settlement agreement only if these offices are part of "civilian personnel."

Although the words "civilian personnel" are not capitalized, the apparent reference is to the agency's Civilian Personnel Office.[4] We note that both the initial appeal file and the agency's affidavits on review contain a number of references to the Civilian Personnel Offices at Kirtland and in Washington, D.C. See IAF, Tab 4 (cover letter); *id.* at Subtabs 2 & 3a; PFRF, Tab 4, Exhs. 2-4. The agency has presented no evidence that either OCI or the Kirtland EEO Office is a part of or under the administrative control of the Civilian Personnel Office. It instead contends that nothing in the agreement contemplated a limitation on disclosure where enforcement and execution of its terms are in question, and that the disclosures to OCI and the Kirtland EEO Office were necessary to such enforcement and execution. PFRF, Tab 4, at 5-9. The agreement contains no general exception for disclosures related to enforcement or execution, however; the only exceptions are for disclosures to the legal representatives in the adverse action appeal, to Dr. John Wiles, and to "civilian personnel."

Even if the term "civilian personnel" could be construed to mean all personnel necessary to enforcement and execution of the agreement, the agency has failed to establish that dissemination of the settlement agreement to OCI or the Kirtland EEO Office was necessary to enforce or

execute the agreement. In his affidavit, Dr. Solberg stated that OCI has a longstanding policy requiring written verification that a complaint has been resolved before it can close out an EEO complaint. PFRF, Tab 4, Exh. 6. Written verification would not have required a copy of the settlement agreement itself, however. A written statement that the EEO complaint had been settled to the parties' mutual satisfaction, and that, pursuant to the settlement, the appellant was withdrawing that complaint with prejudice, would have both met OCI's needs and complied with paragraph (7) of the agreement. Such a statement, whether supplied by the agency's representative in the adverse action appeal, by the appellant, or both, would similarly have enabled the Kirtland EEO office to close out its files.

Accordingly, we conclude that the agency breached the terms of the agreement regarding confidentiality. We next consider whether this breach was a material one justifying rescission of the settlement agreement. A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract. See 5 Arthur L. Corbin, *Corbin on Contracts* § 1104 (1964).

The appellant stated in her affidavit that the confidentiality of the terms of the agreement was extremely important to her because of her concern that friends and co-workers would lose their esteem for her if they learned of the allegations of misconduct against her. PFRF, Tab 1, Exh. B. She said she would agree to resign from her position only if the terms of the agreement were kept strictly confidential, and that she spent almost an entire day discussing the confidentiality of the settlement with the agency representatives and her attorney.[5] *Id.* She said she was upset that Ms. Spencer had seen the agreement because Ms. Spencer is a personal friend of hers. *Id.*

The Board has viewed the violation of nondisclosure provisions in settlement agreements seriously, because condoning such violations would have a chilling effect on attempts to settle appeals by providing appellants with clean records and neutral or positive employment references. See *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659, 665 (1994). We further note that, because the breach of a nondisclosure provision cannot be fully cured, limiting an appellant's remedy to "enforcement" in such a case would be of limited usefulness. Accordingly, we find that the confidentiality provisions were vital elements parts of the settlement agreement that went to its essence, and that the agency's breach of the settlement agreement was a material one justifying rescission of the agreement and reinstatement of the appeal.

ORDER

Accordingly, we remand the case to the Dallas Regional Office for adjudication of the merits of the appeal.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

1 We need not address this contention in light of our finding below that the appellant established that the agency breached the settlement agreement.

2 According to Captain Johnson's affidavit, she was the management representative in one of the EEO cases referenced in the settlement agreement. PFRF, Tab 4, Exh. 1. The agency's submission does not indicate that Captain Johnson had any involvement in the settlement process. See *id.* at Exhs. 2-4. In light of our finding below that the dissemination of the agreement to OCI and the Kirtland EEO Office violated the terms of the agreement, we need not determine whether the dissemination of the agreement to Captain Johnson also violated the agreement.

3 There was a signature line for Captain Jefferson Reynolds, but he did not sign the agreement.

4 Given the specificity and extent of the terms relating to confidentiality, it is obvious that the parties were not authorizing dissemination of the settlement agreement to any and all civilian personnel.

5 The appellant further states that her concern that employees at Kirtland would discover the contents of the agreement was so great that it was agreed that the payment of funds provided for in the agreement would be disbursed from Washington, D.C., not from Kirtland. *Id.* Although the settlement agreement does not specify that funds to be paid the appellant would be distributed from Washington, the agency has not contested the existence of this arrangement, which would support the appellant's claim that she did not want the terms of the agreement to be known by Kirtland employees.