

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

100 M.S.P.R. 66

VERONICA M. PRINCIPE,
Appellant,

DOCKET NUMBER
CH-0752-97-0243-C-1

v.

UNITED STATES POSTAL SERVICE,
Agency.

DATE: April 25, 2005

Donald D. Schwartz, Esquire, Arnold and Kadjan, Chicago, Illinois, for the appellant.

John H. Behnke, Carol Stream, Illinois, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of a compliance initial decision that denied her petition for enforcement. For the reasons discussed below, we GRANT her petition under 5 C.F.R. § 1201.115, VACATE the compliance initial decision, and REMAND the case for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 After the appellant appealed her removal to the Board, the parties entered into an oral settlement agreement. MSPB Docket No. CH-0752-97-0243-I-4,

Refiled Appeal File (RAF), Tabs 7, 8; Compliance File (CF), Tab 1, Exhibit 1. In an initial decision that became final when no petition for review was filed, the administrative judge (AJ) dismissed the appeal as settled and entered the agreement into the record for enforcement purposes. RAF, Tab 8. The record shows, and it is undisputed, that the initial decision accurately memorialized verbatim, in material part, the audiotaped settlement terms, as follows: (1) The agency would “*rescind* the appellant’s December 14, 1996 removal” and would “*issue* a Postal Form 50 indicating the appellant resigned” the same day; (2) “the terms and conditions of this agreement [would] remain confidential ... except before the ... Board in the event either party files a petition for enforcement”; and (3) the agreement would be entered into the record for enforcement purposes. *Id.* at 2 (emphasis added).

¶3 The appellant, who was pro se at the time she entered into the settlement agreement, subsequently filed this petition for enforcement through her current attorney. CF, Tab 1. She asserted that the agency violated the agreement by advising her current employer, the Social Security Administration (SSA), that she was “fired” from the agency. *Id.* After allowing the parties to submit additional evidence and argument, the AJ issued the compliance initial decision denying the appellant’s petition for enforcement. CF, Tab 12. The AJ found that, even if the agency did provide SSA with information regarding the appellant’s removal, the agency did not breach the settlement agreement since the agreement does not contain “a neutral employment reference” provision or make any “reference whatsoever to the appellant’s future employment or employers....” *Id.* at 4.

¶4 The appellant has timely filed a petition for review, arguing that the agency breached the settlement agreement by failing to “rescind [the removal] from [her] personnel file” and by providing copies of removal-related documents to SSA in

connection with a background investigation.¹ Compliance Petition for Review File (CPRF), Tab 1. She contends that the “entire reason for the settlement was to clean [her] employment file so that there could be no impediment to her obtaining future employment” and that, as a result of the agency’s actions, she was forced to “submit the settlement agreement to retain employment with [SSA].” *Id.* The agency has not filed a response.

ANALYSIS

¶5 An oral settlement agreement is binding on the parties, particularly when, as here, the terms are memorialized into the record. *Sargent v. Department of Health & Human Services*, 229 F.3d 1088, 1090 (Fed. Cir. 2000). A settlement agreement is a contract, the interpretation of which is a matter of law. *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). In construing the terms of a settlement agreement, the words of the agreement itself are of paramount importance, and parol evidence will be considered only if the agreement is ambiguous. *Id.*; *West v. Department of the Army*, 96 M.S.P.R. 531, ¶ 10 (2004).

¶6 The settlement terms at issue here are similar to those in *Conant v. Office of Personnel Management*, 255 F.3d 1371 (Fed. Cir. 2001). There, the employee entered into a settlement agreement with her employing agency, the Internal Revenue Service (IRS). *Id.* at 1373. The agreement provided that IRS would

¹ The appellant further claims, for the first time on review, that the agency also breached the settlement agreement by failing to “issue” a PS-50 documenting her resignation. We will not consider this claim because the appellant has not alleged or shown that she was unaware of the basis for this claim, stemming from her February 1999 settlement agreement, by the time she filed her petition for enforcement in April 2003. *See Edwards v. Department of Justice*, 90 M.S.P.R. 537, ¶ 8 (2002); *cf. Harris v. U.S. Postal Service*, 59 M.S.P.R. 222, 225 (1993) (where the appellant alleged on review that “agency actions unrelated to those raised in his original petition for enforcement, and occurring after the record closed on that petition, constituted a breach of the settlement agreement,” the Board forwarded the allegation to the regional office for adjudication).

“*rescind* the SF-50 reflecting that [she] had been removed, and w[ould] *issue* a new SF-50 reflecting that [she] resigned for personal reasons.” (Emphasis added.) In connection with her subsequent application for disability retirement filed with the Office of Personnel Management (OPM), IRS submitted to OPM derogatory information, including the original SF-50 documenting her removal. *Id.* at 1374. The court held that, “[b]y agreeing to ‘*rescind*’ the Removal SF-50, the IRS promised in effect to destroy it, erasing ‘removal’ and all reasons for such a removal from [her] professional record with the agency” and that “[b]y agreeing to *issue* a new SF-50 in its place, the IRS promised that the only legal document recording the end of [her] employment with the agency would henceforth be the SF-50 stating she resigned for personal reasons.” *Id.* at 1376 (emphasis added). “[B]y submitting the original Removal SF-50 with [her] disability application, the IRS breached the agreement....” *Id.* *Conant* thus stands for the proposition that a settlement term providing for “rescission” of a removal and “issuance” of a SF-50 reflecting resignation should be interpreted as further requiring, “in effect,” the expungement of removal-related documents from the employee’s personnel file and nondisclosure of such documents to third parties.

¶7 On first glance, the holding in *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, *De Luna v. Department of the Navy*, 58 M.S.P.R. 526, 529-30 (1993), and that the Board will not imply a term into an agreement that is unambiguous, *Davis v. Department of Veterans Affairs*, 69 M.S.P.R. 627, 630 (1996). *Cf. Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 28-31 (2001) (distinguishing settlement agreements that explicitly provide for a “clean record,” “expungement,” or “purging” of records from the settlement agreement there, in which “no term in the settlement agreement ... [explicitly] provides for the expungement or removal of any documents ...”). Any reservations we might entertain about *Conant* are beside the point, however, since we are bound by our

reviewing court's decisions. *See 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), *aff'd*, 844 F.2d 775 (Fed. Cir. 1987). And although *Conant* involved an application for disability retirement, rather than a petition for enforcement as here, we cannot discern any justification for refusing to apply it here merely on that basis.

¶8 Moreover, *Conant* is consistent with the court's previously expressed concern in *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999), regarding "uninformed or unwary employee[s]" who enter into "clean record"-type settlement agreements. The court noted in *Pagan*, 170 F.3d at 1372, that "[t]he agency is in a better position to know and appreciate the potential problems such agreements present, both for the employee and for the employer; at a minimum the agency has the responsibility to ensure that the employee understands the problems, and that the agreement adequately addresses them." *Id.* The court thus held that, although the settlement agreement did not require "the agency ... to provide a favorable reference, or even any reference at all, it was required to act [in responding to reference requests] ... as if [the employee] had a 'clean record'." *Id.* at 1371-72. The court added that "it is the Board's job to see to it that the parties receive that for which they bargained." *Id.* at 1372.

¶9 The settlement terms here are materially similar to those in *Conant*, in requiring the agency to "rescind" the removal and to "issue" a new PS-50 reflecting the appellant's resignation, without explicitly requiring the agency to clean, expunge, purge, or delete removal-related documents from her personnel file or explicitly precluding disclosure of such documents to third parties. We therefore find, based on *Conant*, that the settlement agreement here required the agency to "destroy [removal-related documents], erasing 'removal' and all reasons for such a removal from [her] professional record with the agency," and to replace the removal with the resignation, so "that the only legal document recording the end of [her] employment with the agency would henceforth be the

[PS]-50 stating she resigned” *Conant*, 255 F.3d at 1376. We further find that the agreement prohibited the agency from disclosing removal-related documents to third parties. *See id.*; *see also Pagan*, 170 F.3d at 1371-72 (although the settlement agreement did not address the type of references the agency was required to provide, the agency was required to provide references as if the appellant had a “clean record,” which it had agreed to provide). We therefore conclude that the AJ erred by finding that the settlement agreement did not impose such obligations on the agency and by finding it unnecessary to adjudicate whether the agency breached such obligations.

¶10 We note that in *Conant* the court described an additional settlement term that required the agency to use its “best efforts” to “effectuate” the employee’s disability retirement. *Conant*, 255 F.3d at 1376. The court stated that, by disclosing removal-related documents to OPM, the agency breached its obligation under the settlement term. *Id.* The settlement agreement here included an additional settlement term which precluded disclosure of the settlement “terms and conditions” to third parties. This term, like that in *Conant*, is somewhat ambiguous relative to the question at issue -- whether the settlement agreement precluded the agency from disclosing removal-related documents to third parties. Just as the court in *Conant* treated the additional settlement term as providing further support for its conclusion that the agency was precluded from disclosing removal-related documents to OPM, *Conant*, 255 F.3d at 1376, we find that the additional settlement term here requiring confidentiality provides further support for our conclusion that the agency was generally precluded from disclosing removal-related documents to third parties. For the reasons discussed below, however, we find that the record must be further developed before we can determine whether the agency in fact breached the settlement agreement by disclosing removal-related documents to SSA or other parties.

¶11 The agency alleged below that the appellant, “after ... enter[ing] into the subject settlement agreement [in February 1999], ... personally came to the

Northern Illinois District in Carol Stream, Illinois, and reviewed her Official Personnel Folder [OPF] to assure that the Notice of Proposed Removal and Letter of Decision were removed.” CF, Tab 7 at 3. The agency further alleged that her OPF was thereafter sent to the National Postal Records Center in July 1999. *Id.* The agency also submitted a September 3, 2003 statement by Raymond Janicek, Manager of the agency’s Carol Stream, Illinois, Personnel Department, averring that neither he nor his staff had “any knowledge of receiving a request” for employment references regarding the appellant. *Id.* at 6-7. On the other hand, the appellant submitted purported copies of documents from her current personnel file at SSA, which included removal-related documents, and also submitted an affidavit in which she averred that these copies were obtained from her SSA personnel file and that her entire SSA personnel file could be subpoenaed if necessary. CF, Tabs 8, 10. She also submitted on review a government form entitled “Investigative Request for Employment Data and Supervisor Information,” which OPM sent to the agency’s Personnel Office at Carol Stream, Illinois, requesting certain information “to assist in completing a background investigation” on the appellant’s “suitability for employment or security clearance.” CPRF, Tab 1, Exhibit 3.²

¶12 It thus appears from the record that SSA indeed has removal-related documents in the appellant’s current personnel file, but it is unclear whether, from whom, and how SSA obtained such documents from the agency. Since it appears from the record that SSA might have obtained the documents from OPM after the agency released them to OPM in the course of a suitability investigation,

² Although the appellant has not alleged or shown why this document could not have been submitted below, despite her due diligence, *see Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980) (under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time on petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence), the AJ shall consider it on remand, as appropriate.

we note that the Board has stated that an agency may not disclose employment records to OPM in the course of a suitability investigation, where a settlement agreement prohibits the disclosure of such records. *Gizzarelli*, 90 M.S.P.R. 269, ¶¶ 15, 23.³ It also appears from the record that the agency might have released the derogatory documents from its litigation file after expunging them from the appellant's personnel file. CF, Tab 8 (the documents purported to be from the appellant's personnel file at SSA include Board documents related to her appeal regarding her removal).⁴ The Board has stated in this regard that, even where a settlement agreement does not provide for expungement of the litigation file, the agency must nevertheless "observe appropriate safeguards so as not to injure the appellant's employment prospects or otherwise affect the confidentiality of the MSPB appeal file." *Baig v. Department of the Navy*, 66 M.S.P.R. 269, 275, *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table). Finally, it appears from the record that, in conducting a suitability investigation, OPM submitted to "each supervisor shown on the [appellant's] application" a request for information form, noting that the appellant "ha[d] given written consent for this investigative inquiry." CPRF, Tab 1, Exhibit 3. If the appellant provided OPM with a specific release authorizing OPM to obtain information from the agency beyond that retained in her personnel file, she would have waived her right to nondisclosure under the settlement

³ The Board held in *Gizzarelli*, 90 M.S.P.R. 269, ¶¶ 22-33, that OPM, on public policy grounds, may obtain adverse personnel records pertaining to *criminal* history, notwithstanding any settlement provision. Records regarding criminal history are not involved here.

⁴ We note that these documents do not include a copy of the initial decision dismissing the Board appeal as settled and setting forth the terms of the settlement agreement. The agency's disclosure of the initial decision to OPM or SSA was explicitly prohibited by the settlement term requiring that the terms and conditions of the settlement agreement shall remain confidential. The appellant has stated on review that she disclosed to SSA the terms of the settlement agreement in order to retain her job after the agency disclosed her removal to SSA; the agency has not claimed that the appellant's actions constituted a breach of the settlement agreement, however.

agreement. *See Hosey v. Interstate Commerce Commission*, 74 M.S.P.R. 605, 607-10 (despite a neutral reference provision in the settlement agreement, the agency did not breach the agreement by providing derogatory information from its litigation file where the appellant provided OPM with a “Specific Release” form granting the OPM investigator “permission to interview all previous supervisors and co-workers,” with “[r]ecords included,” in conducting his suitability investigation), *aff’d*, 132 F.3d 53 (Fed. Cir. 1997) (Table). Based on the clarification of the potential issues, as set forth above, the AJ shall afford the parties an opportunity to submit additional evidence and argument, and shall exercise his discretion to afford them an opportunity for discovery and a hearing, if necessary, before readjudicating the merits of the appellant’s petition for enforcement. *See Amos v. U.S. Postal Service*, 84 M.S.P.R. 186, ¶¶ 9-11 (1999); *Williams v. Department of the Navy*, 79 M.S.P.R. 364, 368 (1998).

¶13 Before readjudicating the merits of this compliance case, however, the AJ shall address the timeliness of the appellant’s petition for enforcement. The appellant filed her petition for enforcement on April 8, 2003, and appeared to claim that she discovered the alleged breach by the agency on or before June 6, 2002, when she responded to SSA’s inquiry regarding “security maladies in [her] personnel folder,” such as whether she in fact resigned from the agency. CF, Tab 1 & Exhibit 1. The question thus arises whether the appellant filed her petition for enforcement within a reasonable period of time from the date of the alleged breach of the agreement, taking into consideration the date of her knowledge of the alleged breach. *See Adamcik v. U.S. Postal Service*, 48 M.S.P.R. 493, 496 (1991) (a petition for enforcement of a settlement agreement must be filed within a reasonable period of time after the appellant discovers the asserted noncompliance); *see also Kasarsky v. Merit Systems Protection Board*, 296 F.3d 1331, 1335 (Fed. Cir. 2002) (approving the timeliness standard set forth in *Adamcik*). The timeliness of a petition for enforcement may be raised sua sponte by the Board. *Kasarsky*, 296 F.3d at 1335. Because the AJ did not adjudicate the

timeliness issue or afford the parties notice and opportunity to address it, it must also be remanded to the AJ for adjudication. *See Warren v. Department of the Navy*, 68 M.S.P.R. 244, 246 (1995); *Adamcik*, 48 M.S.P.R. at 497.

ORDER

¶14 On remand, the AJ shall afford the parties an opportunity to submit evidence and argument addressing the timeliness issue. If the AJ decides not to dismiss the petition for enforcement as untimely filed, he shall readjudicate the merits of the appellant's allegations of noncompliance, consistent with this Opinion and Order.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.