

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

**2010 MSPB 72**

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Docket No. DC-0752-08-0066-X-1

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**Ramona Williams,  
Appellant,**

**v.**

**Department of Health and Human Services,  
Agency.**

April 22, 2010

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Ramona Williams, Gaithersburg, Maryland, pro se.

Clayton G. Brewer, Rockville, Maryland, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 This case is before the Board based on a recommendation of the administrative judge finding the appellant in noncompliance with a settlement agreement between the parties that had been entered into the record for purposes of enforcement by the Board and recommending that the Board order the appellant to return the monetary consideration provided to her pursuant to the terms of the settlement agreement. For the reasons set forth below, we agree with the administrative judge's recommendation that the appellant is in noncompliance with the terms of the settlement agreement, but disagree with the administrative

judge's recommendation that the Board order the appellant to return the monetary consideration provided to her pursuant to the terms of the settlement agreement. The agency must elect between enforcement of the terms of the settlement agreement and rescission of the settlement agreement.

### BACKGROUND

¶2 On October 24, 2007, the appellant filed with the Washington Regional Office of the Merit Systems Protection Board (MSPB) an appeal of her September 25, 2007 separation from the agency. MSPB Docket No. DC-0752-08-0066-I-1, Initial Appeal File (IAF), Tab 1. While that appeal was pending before the Washington Regional Office, the parties reached a January 16, 2008 settlement agreement that provided, among other things, that: 1) the agency would pay the appellant and her attorney a total of \$48,052.90; 2) the appellant would withdraw, with prejudice to refiling, "any and all" pending equal employment opportunity complaints and MSPB appeals; 3) the appellant would "not initiate or pursue any" matters under the Civil Service Reform Act of 1978 "with respect to any action raised in her employment claims filed against the Agency" as of the date of the agreement; and 4) if the parties failed to fully comply with the terms of the agreement, either party would "take any and all actions necessary to recover funds disbursed as a result of this agreement as well as any fees or costs associated with the enforcement of this agreement." *Id.*, Tab 14. In addition to the agency officials who signed the agreement, the agreement was signed by the appellant and the attorney who represented her at that time. *Id.* Pursuant to the terms of the settlement agreement, the administrative judge in that appeal entered the agreement into the record for purposes of enforcement in a January 25, 2008 initial decision. *Id.*, Tab 15.

¶3 On April 20, 2009, the appellant filed an MSPB appeal form with the Washington Regional Office in which she appeared to challenge her September 25, 2007 separation from the agency as both a removal and an involuntary

retirement. MSPB Docket No. DC-0752-08-0066-C-1, Compliance File (CF), Tab 1 at 45-48. The appellant indicated on the appeal form that she wanted a hearing. *Id.* at 47. The case was assigned to a new administrative judge who docketed the removal and involuntary retirement claims as two separate appeals.<sup>1</sup> *See* MSPB Docket Nos. DC-0432-09-0477-I-1 and DC-0752-09-0478-I-1.

¶4 On May 13, 2009, the agency petitioned for enforcement of the January 16, 2008 settlement agreement, asserting that the appellant’s April 20, 2009 appeal constituted a breach of the settlement agreement. CF, Tab 1. The agency’s petition indicated that it was seeking “full enforcement and compliance with the terms of the agreement,” and included a request that the funds disbursed by the agency pursuant to the settlement agreement be returned to the agency. *Id.* at 14, 22-23.

¶5 After affording the parties an opportunity to file evidence and to present argument regarding the compliance issue, the administrative judge issued a September 10, 2009 recommendation. CF, Tab 10. In his decision, the administrative judge recommended that the Board find that the appellant had materially breached the parties’ January 16, 2008 settlement agreement and recommended that the “Board order the appellant to return all of the monetary consideration the agency provided to her pursuant to the agreement, which constitutes a total of \$48,052.90.” CF, Tab 10 at 7. Because the administrative

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<sup>1</sup> The administrative judge dismissed the involuntary retirement appeal for lack of jurisdiction in a May 21, 2009 initial decision, finding that the appellant had failed to make a nonfrivolous allegation that her retirement was coerced. MSPB Docket No. DC-0752-09-0478-I-1. In a separate initial decision, also issued on May 21, 2009, the administrative judge dismissed the removal appeal for lack of jurisdiction, citing the doctrine of *res judicata*. MSPB Docket No. DC-0432-09-0477-I-1. The appellant filed a petition for review in the involuntary retirement appeal, and in a November 2, 2009 opinion and order, the Board denied that petition for review, reopened the involuntary retirement appeal on its own motion, joined the case with the appellant’s concurrent removal appeal, and reopened that case. *Williams v. Department of Health & Human Services*, [112 M.S.P.R. 628](#) (2009). The Board vacated both May 21, 2009 initial decisions and dismissed the joined appeal for lack of jurisdiction. *Id.*

judge recommended that the Board find the appellant in noncompliance, this matter was referred to the Board for a decision.

#### ANALYSIS

¶6 The Board has the authority to enforce a settlement agreement which, like the agreement in this case, has been entered into the record, in the same manner as any final Board decision or order. *Perkins v. Department of Veterans Affairs*, [105 M.S.P.R. 289](#), ¶ 7 (2007); *Richardson v. Environmental Protection Agency*, [5 M.S.P.R. 248](#), 250 (1981). Because a settlement agreement is a contract, the Board will adjudicate an enforcement proceeding relevant to a settlement agreement in accordance with contract law. *Kinney v. Department of Veterans Affairs*, [103 M.S.P.R. 602](#), ¶ 13 (2006); see *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). As the party asserting noncompliance, the agency bears the burden of proving by preponderant evidence that the appellant breached the settlement agreement. *Perkins*, [105 M.S.P.R. 289](#), ¶ 7; *Vaughan v. U.S. Postal Service*, [77 M.S.P.R. 541](#), 546 (1998).

The administrative judge correctly found that the appellant breached the settlement agreement.

¶7 The settlement agreement reached between the appellant and the agency in January 2008 provided, among other things, that:

Ms. Williams agrees to not initiate or pursue any complaints, grievances, requests for investigation, claims under other administrative procedures, appeals, or lawsuits against the agency, its Secretary, and/or any of its current or former employees, and/or any other Agency or employee of the United States, under the Civil Service Reform Act of 1978, as amended; Title VII of the Civil Rights Act of 1978, as amended; the Whistleblower Protection Act, as amended; the Age Discrimination in Employment Act, as amended; the Constitution of the United States; any other state or federal law or regulation; or the common law, with respect to any action raised in her employment claims filed against the Agency as of the effective date of this agreement.

IAF, Tab 14 at 3. As discussed above, on April 20, 2009, the appellant filed an appeal form with the Washington Regional Office in which she contested her September 25, 2007 separation from the agency. CF, Tab 45-48. Thus, contrary to the clear language of the settlement agreement, the appellant filed a new appeal with the Board about an action – her September 25, 2007 separation from the agency – that she raised in a previous employment claim filed against the agency – her October 24, 2007 MSPB appeal. Accordingly, we agree with the administrative judge that the appellant breached the terms of the parties' settlement agreement.

¶8 In her September 12, 2009 filing with the Board, the appellant asserted, as she did before the administrative judge, that she filed her April 20, 2009 appeal because she believed that the SF-50 documenting her September 25, 2007 separation from the agency incorrectly characterized that separation as voluntary when, in her view, it was involuntary. MSPB Docket No. DC-0752-08-0066-X-1, Compliance Referral File (CRF) Tab 2 at 3, 5; CF, Tab 9. The January 16, 2008 settlement agreement entered into by the appellant precluded her from filing an appeal with the MSPB about her September 25, 2007 separation from the agency, and her challenge to the nature of that separation was clearly covered by that preclusion. The appellant also asserted in her submission to the Board that on May 14, 2009, she requested that her “request for a hearing be disregarded,” but that the proceedings continued despite her submission. CF, Tab 3 at 2. While the appellant may have believed that she was terminating the matters initiated by her April 20, 2009 filing with the Washington Regional Office, the withdrawal of her request for a hearing simply meant that the appeals resulting from the April 20, 2009 filing would be decided on the written record without a hearing. In any event, the withdrawal of her hearing request did not alter the fact that the

appellant breached the agreement by filing her April 20, 2009 appeal with the Washington Regional Office.<sup>2</sup>

The administrative judge correctly found that the breach of the settlement agreement was material.

¶9 A breach of a settlement agreement is material when it relates to a matter of vital importance, or goes to the essence of the agreement. *Eagleheart v. U.S. Postal Service*, [110 M.S.P.R. 642](#), ¶ 10 (2009); *Galloway v. Department of Agriculture*, [110 M.S.P.R. 311](#), ¶ 7 (2008); see *Thomas v. Department of Housing & Urban Development*, [124 F.3d 1439](#), 1442 (Fed. Cir. 1997). In the instant case, a key provision of the settlement agreement was the appellant's contractual promise not to further litigate actions raised in her October 24, 2007 MSPB appeal. She gave up little else as consideration in the settlement agreement in exchange for the agency's substantial monetary payments. See IAF, Tab 14. Thus, the administrative judge correctly found that the appellant's attempt to relitigate issues raised in her prior MSPB appeal constituted a material breach of the settlement agreement.

The agency may take steps to recover what it paid to the appellant under the terms of the settlement agreement.

¶10 Generally, where one party commits a material breach of a settlement agreement, the other party is entitled to either enforce or rescind the settlement agreement. *Eagleheart*, [110 M.S.P.R. 642](#), ¶ 15; *Fuller v. U.S. Postal Service*, [45 M.S.P.R. 611](#), 614 (1990). As discussed above, the appellant materially breached the settlement agreement between the parties. In its May 13, 2009 petition for

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<sup>2</sup> The agency filed the instant petition for enforcement using the MSPB's e-appeal system on May 13, 2009. CF, Tab 1. The appellant maintains that she withdrew her hearing request in a letter dated May 14, 2009. CRF, Tab 3 at 2. Thus, contrary to the appellant's assertions, the agency filed its petition for enforcement before she withdrew her hearing request. In any event, as discussed in the text, the appellant breached the settlement agreement when she filed an appeal with the Washington Regional Office on April 20, 2009.

enforcement, the agency stated that it sought “full enforcement and compliance with the terms of the agreement.” CF, Tab 1 at 14. Thus, the agency appears to have chosen enforcement of the settlement agreement rather than rescission of the agreement.

¶11 In its petition for enforcement, the agency also argued, however, that, under a term of the settlement agreement, it is entitled to the return of the monetary payment of \$48,052.90 that it made to the appellant and her attorney. CF, Tab 1 at 20-21. Because a settlement agreement is a contract, the Board will analyze the provision at issue under contract law. *Eagleheart*, [110 M.S.P.R. 642](#), ¶ 10; *Fuller*, 45 M.S.P.R. at 613-14; *see Greco*, 852 F.2d at 560. In construing the terms of a settlement agreement, the words of the agreement are of paramount importance. *Felch v. Department of the Navy*, [112 M.S.P.R. 145](#), ¶ 8 (2009); *Bables v. Department of the Army*, [86 M.S.P.R. 171](#), ¶ 14 (2000); *Greco*, 852 F.2d at 560.

¶12 In support of its position that it is entitled to both enforcement of the settlement agreement and the return of the monetary payments made to the appellant and her attorney, the agency relies on paragraph seven of the settlement agreement. That provision states as follows:

If the parties fail to fully comply with the terms of this agreement, they understand that either party will take any and all actions necessary to recover funds disbursed as a result of this agreement as well as any fees or costs associated with the enforcement of this agreement.

IAF, Tab 14. According to the agency, this provision requires the appellant to return the monetary consideration paid to her as a consequence of her breach of the agreement and is “crystal clear and lacks any room for ambiguity or misinterpretation.” CF, Tab 1 at 21.

¶13 Contrary to the agency’s view, we do not interpret paragraph seven of the settlement agreement as meaning that if there is a breach that the funds paid under the agreement will automatically be returned. Rather, based on a plain

reading of the settlement agreement, if there is a breach, the opposing party is entitled to take the actions necessary to recover the funds paid under the agreement. In other words, because the appellant breached the settlement agreement, the agency may take steps to recover what it paid to the appellant and her attorney.

The step the agency may take to recover what it paid to the appellant under the terms of the settlement agreement is to seek rescission of the settlement agreement.

¶14 As stated above, where one party commits a material breach of a settlement agreement, the other party is entitled to either enforce or rescind the agreement. *Eagleheart*, [110 M.S.P.R. 642](#), ¶ 15; *Fuller*, 45 M.S.P.R. at 614. Rescission of a settlement agreement involves the parties returning the benefits obtained under the agreement and restoring the parties to the positions they were in prior to the execution of the agreement. See *Hernandez v. Department of Defense*, [112 M.S.P.R. 262](#), ¶ 9 (2009) (if a settlement agreement is rescinded it becomes inoperative); *Stipp v. Department of the Army*, [64 M.S.P.R. 124](#), 127-28 (1994) (stating that “inherent in the Board's authority to set aside a settlement agreement is the authority to order a party to take action necessary for the restoration of the status quo ante; otherwise, the setting aside of the agreement would be without effect”); *overruled in part on other grounds, Wisdom v. Department of Defense*, [78 M.S.P.R. 652](#) (1998). Thus, if a party breaches a settlement agreement, and the nonbreaching party wishes to recover the contractual consideration provided to the breaching party, the nonbreaching party must seek rescission of the settlement agreement.

¶15 Accordingly, under the settlement agreement in the instant case, the step the agency may take to recover what it paid to the appellant and her attorney is rescission of the settlement agreement. Such a step would also entail reinstating

the appellant's appeal that was dismissed as settled in the January 25, 2008 initial decision.<sup>3</sup>

The agency must elect between enforcement of the settlement agreement and rescission of the agreement.

¶16 Because the appellant has materially breached the terms of the settlement agreement between the parties, the agency is entitled to either enforcement of the settlement agreement or rescission of the settlement agreement. In its petition for enforcement and subsequent submissions, the agency has essentially sought both enforcement and rescission. Because a party is not entitled to both enforcement and rescission, *see Strange v. U.S. Postal Service*, [48 M.S.P.R. 674](#), 677 (1991) (holding that if a party seeks both enforcement and rescission, the judge must determine from the party the remedy of choice), the agency is directed to file its

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<sup>3</sup> The agency contends that the Federal Circuit's decision in *King-Roberts v. U.S. Postal Service*, 215 F.3d 1348 (Fed. Cir. 1999) (Table), supports its view that it is entitled to both enforcement of the settlement agreement and the return of the monetary payments made to the appellant and her attorney. First, because the *King-Roberts* decision was unpublished, it is not binding on the Board. *Omites v. U.S. Postal Service*, [87 M.S.P.R. 223](#), ¶ 13 (2000); *McDonnell v. Office of Personnel Management*, [43 M.S.P.R. 400](#), 402 & note (1990) (unpublished judicial opinions are nonprecedential and may only be cited to support a claim of res judicata, collateral estoppel, or law of the case). Moreover, contrary to the agency's assertions, the decision in *King-Roberts* does not stand for the proposition that a party can seek both enforcement of a settlement agreement and rescission of its key terms. Rather, the Federal Circuit in *King-Roberts* addressed the question of whether the monies received pursuant to a settlement agreement must be returned prior to reinstatement of the underlying appeal, or if the monies may be returned after the conclusion of the reinstated appeal. Similarly, in *Bables*, [86 M.S.P.R. 171](#), ¶¶ 13-16, another decision cited by the agency, the Board addressed whether the appellant in that case was required to repay the money she received under a settlement agreement before litigating a dispute involving the interpretation of the settlement agreement. Nothing in either *King-Roberts* or *Bables* addressed whether a party may seek both enforcement of a settlement agreement and the return of money paid under the terms of the settlement agreement.

election of a remedy with the Clerk of the Board within 15 days of the date of this decision.<sup>4</sup>

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.

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<sup>4</sup> If the agency elects to rescind the settlement agreement, this matter will be returned to the administrative judge for adjudication of the underlying appeal. If the agency elects enforcement, the Board will issue an order for the appellant to promptly withdraw all filings in violation of the terms of the settlement agreement.