UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 80

Docket No. CH-0752-08-0824-C-1

John M. Knight,

Appellant,

v.

Department of the Treasury,

Agency.

April 28, 2010

John M. Knight, Walkerton, Indiana, pro se.

Russ Eisenstein, Esquire, Chicago, Illinois, for the agency.

William P. Lehman, Esquire, Chicago, Illinois, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the compliance initial decision that denied his petition for enforcement of a settlement agreement. For the reasons set forth below, we GRANT the PFR and AFFIRM the compliance initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant, proceeding pro se, filed a Board appeal of his removal. Initial Appeal File (IAF), Tab 1 at 1-2. While the appeal was pending, the parties

entered into a settlement agreement. IAF, Tab 12. The relevant portions of the settlement agreement provide:

> 1. The agency agrees to remove the [Standard Form 50 (SF-50)] from the Appellant's Official Personnel File reflecting the Appellant's removal for misconduct, effective August 26, 2008, and to replace it with a SF-50 reflecting that the Appellant voluntarily retired from the Agency, effective August 26, 2008, or alternatively with a SF-50 reflecting that the Appellant voluntarily resigned from Agency employment for personal reasons effective August 26, 2008 . . . .
>
> 2. The Appellant agrees:
>
> . . .
>
> d. that following his retirement or resignation from the Agency, either pursuant to this Agreement or otherwise, the Appellant will neither seek nor accept any employment with any bureau, department or subagency that is . . . part of the Department of the Treasury . . . .
>
> 4. Except as expressly provided for in this Agreement, the Appellant waives any and all rights to seek . . . personnel records adjustment . . . or any other remedies for any matters arising out of or related to the Appellant's employment with the Agency . . . .
>
> 10. The parties agree to direct any future prospective employers to utilize the Agency's automated employment verification system . . . for employment references. Information will be provided to the extent authorized by 5 C.F.R. § 293.311. Under that provision, such information consists of the Appellant's name, positions held, pay grades, annual salary rates, duty stations, position descriptions, and job elements. The Appellant understands that the Agency may be unable to control the dissemination of other employment information if it is contacted through other means.

Id. at 4-6, 8.

¶3 The administrative judge accepted the agreement into the record for enforcement purposes and issued an initial decision dismissing the appeal as settled. IAF, Tab 13 at 1-2.

¶4 The appellant subsequently filed a petition for enforcement, alleging that the settlement was intended to provide him with a "clean record," but that the

agency's Office of Professional Responsibility (OPR)[1] had denied his application for "enrolled agent" status because the agency represented that, during his tenure as an agency employee, he was "rude and discourteous to the general public." Compliance File (CF), Tab 1 at 1.[2] In a subsequent submission, the appellant further alleged that during settlement discussions, he "was offered the early retirement option and what was termed as a 'clean 50,'" that he "repeatedly stated [during those discussions] that the reason for [the settlement] agreement was because of his desire to obtain the status of an Enrolled Agent," but that, after the agreement was executed, the agency disclosed inaccurate information to OPR concerning "unprofessional conduct toward taxpayers, unauthorized absence, and aggressive behavior toward management," which "insure[d] that [he] would never receive the Enrolled Agent status." CF, Tab 4 at 1-2.

¶5 In its response, the agency asserted that it had complied with the settlement agreement by revising the appellant's Official Personnel File (OPF) in accordance with the agreement's terms. CF, Tab 3 at 3. In support of its assertion, the agency submitted an SF-50 documenting the appellant's voluntary retirement, a report concerning the appellant's employment status which was generated from one of the agency's automated employment verification systems, and a sworn declaration of an agency Workforce Relations Consultant stating that the report reflects that the appellant "voluntarily retired from service effective August 26,

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[1] The appellant's initial submission apparently inadvertently refers to OPR as "O.P.M." *Compare* Compliance File, Tab 1 at 1 *with id.*, Tab 4 at 2.

[2] OPR is a division of the Internal Revenue Service (IRS) that administers laws and regulations governing the practice of attorneys, certified public accountants, enrolled agents, and enrolled actuaries who represent taxpayers before the agency and the IRS. The Case Development and Licensure Branch of OPR processes applications of former IRS employees who wish to become enrolled agents. This Branch conducts an investigation of each applicant to determine whether the applicant is technically qualified and otherwise fit to represent taxpayers as an enrolled agent. CF, Tab 3 at 4; *id.*, Ex. 2 at 1-2 (Declaration of Nadine F. McPhail, Branch Chief, OPR Case Development & Licensure Branch).

2008, contains no reference to any removal action, and does not reflect that any agency action was ever effected." CF, Tab 3, Ex. 1 (Declaration of Kathie A. Rudd); *id.*, Exs. A-B. The agency acknowledged that OPR had conducted an investigation of the appellant in connection with his application for enrolled agent status which disclosed information concerning three prior suspensions, a report of investigation regarding alleged misconduct, as well as "the fact that he faced a removal action," and further, that OPR had denied the appellant's application based on the results of its investigation and the appellant's failure to disclose his prior disciplinary record on his application. CF, Tab 3 at 4; *id.* Ex. 2 at 2-3; *id.*, Exs. 4–5. The agency disputed the appellant's contention that the settlement agreement required it to provide him with a "clean" employment record, however, stating that

> [t]he Parties did not agree to purge the Appellant's record of all disciplinary/adverse actions. Furthermore, the appellant did not request nor could the Agency have agreed to keep relevant information regarding the Appellant's numerous acts of misconduct from an office in its own internal organization charged with determining the fitness of individuals to represent taxpayers. The Appellant bargained for and received a change in his OPF and a "neutral" reference for prospective employers. The settlement agreement does not guarantee the Appellant enrolled agent status.

CF, Tab 3 at 4-5.

¶6 The administrative judge thereafter issued a compliance initial decision denying the petition for enforcement, finding that the OPR "investigation uncovered 'various acts of misconduct' that were not finally adjudicated based on the appellant's voluntary retirement and that he had a past disciplinary record including three suspension actions,"[3] but that "the agency complied with the pertinent portion of the settlement agreement requiring it to remove the SF-50

[3] The compliance initial decision does not refer to the agency's acknowledgment that OPR's investigation also revealed that the appellant had faced the removal action that was the subject matter of his Board appeal.

reflecting the appellant's removal and replacing it with an SF-50 showing his voluntary retirement." CF, Tab 5, Compliance Initial Decision (CID) at 1-3.

¶7 The appellant has filed a petition for review, arguing in essence that, although the administrative judge's construction of the settlement agreement may be consistent with its express terms, it nonetheless deprived him of the benefit of his bargain by failing to give effect to the "essence" of the agreement, which he asserts was to provide him with "clean records [and facilitate his] future employment" as an enrolled agent. PFR File, Tab 1 at 4-6. The agency has filed a response addressing the appellant's arguments. *Id.*, Tab 3.

ANALYSIS

¶8 The Board will enforce a settlement agreement which has been entered into the record in the same manner as a final Board decision or order. *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 7 (2009). Where the appellant alleges noncompliance with a settlement agreement, the agency must produce relevant material evidence of its compliance with the agreement, or show that there was good cause for noncompliance. *Id.* The ultimate burden, however, remains with the appellant to prove breach by a preponderance of the evidence. *Id.*

¶9 As stated above, as part of the instant settlement agreement, the agency expressly agreed to "remove the SF-50 from the Appellant's Official Personnel File reflecting the Appellant's removal for misconduct, effective August 26, 2008, and to replace it with a SF-50 reflecting that [he] voluntarily retired . . . ." IAF, Tab 12 at 4. The appellant does not appear to dispute on review the administrative judge's finding that the agency complied with this express provision by removing the SF-50 reflecting his removal and replacing it with an SF-50 reflecting his voluntary retirement. CID at 2. Further, that finding is supported by the record. *See* CF, Tab 3, Exs. A-B. We have granted the appellant's petition for review, however, to consider the appellant's contentions

in light of several relevant provisions in the instant settlement agreement that were not addressed in the initial decision. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

¶*10* The appellant contends on review, as he did below, that the agreement entitles him to further personnel records adjustment beyond issuance of an SF-50 reflecting his voluntary retirement agreement, and obligates the agency to provide him with a "clean" employment record devoid of any reference to his removal or his prior disciplinary record. PFR File, Tab 1 at 3; CF, Tab 1 at 1; *id.* Tab 3 at 2. For the reasons stated below, we find that the appellant's contentions in this regard are inconsistent with the express terms of the agreement itself.

¶*11* When interpreting a settlement agreement, the Board first ascertains whether the agreement clearly states the parties' understanding. *Conant v. Office of Personnel Management*, 255 F.3d. 1371, 1376 (Fed. Cir. 2001). Thus, in construing the terms of a written settlement agreement, the words of the agreement itself are of paramount importance. *Saunders v. U.S. Postal Service*, 75 M.S.P.R. 225, 229 (1997). We recognize that both the Board and our reviewing court have construed settlement agreements that provide for rescission of the original removal SF-50s and issuance of new SF-50s reflecting resignation for personal reasons as also requiring expungement of other removal-related documents from an employee's OPF. *E.g.*, *Conant*, 255 F.3d at 1376; *Principe v. U.S. Postal Service*, 100 M.S.P.R. 66, ¶¶ 6, 9 (2005). There is no indication in the two cases cited above, however, that the agreements in those cases contained express terms limiting the appellants' right to seek further adjustment of their personnel records. The agreement in this case does contain such terms. It provides that, "[e]xcept as expressly provided for in this Agreement, the Appellant waives any and all rights to seek . . . personnel records

adjustment . . . .” IAF, Tab 12 at 6. No provision in the agreement expressly requires the agency to adjust the appellant’s personnel records beyond replacing the SF-50 documenting his removal with a new SF-50 documenting his voluntary retirement. Thus, we find that the express terms of the agreement clearly and unambiguously waive the appellant’s right to seek adjustment of his personnel records beyond the rescission of his removal SF-50 and the replacement of that document with an SF-50 indicating that he voluntarily retired. *See Davis v. Department of Veterans Affairs*, 69 M.S.P.R. 627, 630 (1996) (the Board will not imply a term into an agreement that is unambiguous); *cf. Allen*, 112 M.S.P.R. 659, ¶ 18 (distinguishing *Conant* and interpreting a settlement agreement as permitting disclosure of removal-related information to a third party where the agreement included an express term permitting disclosure of such information as required by law).

¶12 On review, the appellant appears to argue that the intent of the settlement agreement was to enable him to “get on with life” as an enrolled agent, and that the agency’s release of information to OPR was contrary to that intent. PFR File, Tab 1 at 3. We disagree. In construing the terms of a settlement agreement, the Board examines the agreement to determine the parties’ intent. *Conant*, 255 F.3d at 1376. The contract provisions must be read “as part of an organic whole, according reasonable meaning to all of the contract terms” to identify and give weight to the “spirit” or essence of the contract as intended by the parties. *Allen*, 112 M.S.P.R. 659, ¶ 17 (quoting *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997)). The key concern is that the Board “see to it that the parties receive that for which they bargained.” *Principe*, 100 M.S.P.R. 66, ¶ 8.

¶13 As stated above, by its terms, the non-disclosure provision in paragraph 10 of the settlement agreement restricts the information that the agency may provide to “future prospective employers,” specifically limiting it to “the Appellant’s name, positions held, pay grades, annual salary rates, duty stations, position

descriptions, and job elements." IAF, Tab 12 at 8. It is undisputed that the information to which OPR had (or was given) access went beyond that described in paragraph 10. CF, Tab 3 at 4; *id.* Ex. 2 at 2-3; *id.*, Exs. 4–5. Despite OPR's ability to affect the appellant's future employment prospects as an enrolled agent, it is not a "future prospective employer." Thus, the provisions of paragraph 10 did not restrict OPR's access to the information at issue here.[4]

¶14 Other provisions in the agreement also indicate that the parties did not intend to require the agency to expunge information concerning the appellant's employment history from the agency's internal records. Thus, in addition to the express term in the agreement discussed above restricting further modifications of the appellant's personnel records, the agreement also provides that "[t]he Appellant understands that the Agency may be unable to control the dissemination of other employment information if it is contacted through other means." IAF, Tab 12 at 8. This provision indicates that the parties contemplated that the agency would retain "other employment information" concerning the appellant. Although the settlement agreement expressly restricts disclosure of that information to future prospective employers, nothing in the four corners of the settlement agreement restricts OPR's access to, or consideration of, that information.

¶15 The appellant also contends, in the alternative, that if the settlement agreement did not restrict OPR from considering internal agency records

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[4] Although the Board has construed settlement agreements containing neutral employment reference provisions to prohibit disclosure of removal-related information to background investigators, the agreements in those cases were construed to require expungement of that information and the disclosures in those cases were to third party investigators. *See, e.g, Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶¶ 11-12 (2009) (the agency's disclosure to an Office of Personnel Management (OPM) background investigator of removal-related information would constitute a material breach); *Principe*, 100 M.S.P.R. 66, ¶¶ 10, 12 (remanding the case for a determination as to whether the appellant's current employer had obtained its removal-related documents through an unauthorized disclosure to an OPM investigator).

concerning his disciplinary history, "[t]he agency should be required to add that statements against [him] by individuals of [management] were not actual fact, but he[ar]say." PFR File, Tab 1 at 4. We find no basis in the settlement agreement for imposing such an obligation. In this regard, we note that paragraph 9 of the settlement agreement provides that it "constitutes the full and complete agreement of the Parties," and that "[n]o other promises or agreements shall be binding unless placed in writing, signed, and dated by the Parties." IAF, Tab 12 at 8.

¶16 Finally, the appellant contends on review that the administrative judge erred in failing to conduct a hearing in this matter. PFR File, Tab 1 at 2. There is no indication in the record below, however, that the appellant requested a hearing. In any event, the Board's regulations provide that the decision to hold a hearing in a compliance matter is discretionary and there is no right to a hearing regarding a petition for enforcement. *King v. Department of the Navy*, 98 M.S.P.R. 547, ¶ 9 (2005), *aff'd*, 167 F. App'x 191 (Fed. Cir. 2006); 5 C.F.R. § 1201.183(b)(3).

¶17 We therefore find that the agency did not breach the settlement agreement, and that the administrative judge properly denied the petition for enforcement. Thus, we AFFIRM the compliance initial decision AS MODIFIED.

ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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