UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 92

Docket No. AT-0752-09-0177-C-1

Joan M. Young,

Appellant,

v.

United States Postal Service,

Agency.

May 21, 2010

Joan M. Young, Columbia, Tennessee, pro se.

Cynthia R. Eggleston, Esquire, Memphis, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of a compliance initial decision denying her petition for enforcement. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and REMAND the appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal with the Board asserting that the agency placed her on enforced leave from her position as a Rural Carrier at the agency's Columbia, Tennessee Post Office for more than fourteen days, effective November 21, 2008. Initial Appeal File (IAF), Tab 1 at 3, 5-6. The agency asserted that it placed the appellant on enforced leave because she was medically unable to perform the duties of her regular assignment and she declined its offer of a reasonable accommodation, consisting of a similar job at a post office in Murfreesboro, Tennessee. IAF, Tab 8, Subtabs 4g, 4l.

¶3 Prior to the hearing in the appellant's enforced leave appeal, the parties executed a written settlement agreement in which the appellant agreed to withdraw her appeal, and the agency agreed to pay the appellant back pay for half of the period she was on enforced leave. IAF, Tab 26, Tab 27, Initial Decision (ID) at 1-2. The agency agreed to reinstate the appellant to her former Rural Carrier position in Columbia, Tennessee, if she submitted to a psychiatric fitness for duty examination and the psychiatrist determined that she was medically capable of returning to duty in her former position. ID at 2; IAF, Tab 26 at 1-2. The parties agreed that if they jointly selected the psychiatrist, the agency would pay for the independent medical examination; alternatively, if the appellant chose to select the examining psychiatrist without consultation with the agency, she would bear the cost of the independent medical examination. IAF, Tab 26 at 1-2. Regardless of the appellant's choice, she was required to "provide releases for any medical documentation from prior medical examiners for the same condition at issue in this case from April 5, 2006, to date for analysis and consideration by the independent medical examiner." *Id*. at 1-2.

¶4 Because the parties settled prior to the hearing, the administrative judge issued an initial decision, without holding a hearing, that dismissed the appeal as settled. ID at 1-3. The administrative judge found that the Board has adverse action jurisdiction over the underlying subject matter because the appellant is a

preference eligible who was placed on enforced leave for more than fourteen days. ID at 2. Further, the administrative judge found that the settlement agreement was lawful on its face, both parties understood the terms of the agreement, and the parties entered into it voluntarily. ID at 2. The administrative judge entered the settlement agreement into the record for enforcement purposes and the initial decision became final. ID at 3.

¶5 Following her psychiatric fitness for duty examination, the appellant filed a petition for enforcement asserting, inter alia, that the agency interfered with her independent psychiatric fitness for duty examination. Compliance File (CF), Tab 1 at 2-8. The appellant chose to select and pay for her psychiatric fitness for duty examination, and she chose forensic psychiatrist Douglas D. Ruth, M.D., to conduct the independent medical examination. *Id*. at 2. The appellant contended that: the agency disclosed documents concerning her to Dr. Ruth; Dr. Ruth informed her in an April 27, 2009 letter of his conclusion that she has persisting psychiatric difficulties that prohibited her from resuming her Rural Carrier position; and because Dr. Ruth's evaluation of her was "negative to her interests in such a dramatic way," she believes that his opinion was "influenced" and "biased" by the amount and scope of material sent by the agency to Dr. Ruth. *Id*. at 3.

¶6 The administrative judge issued an acknowledgment order informing the appellant of her burden to establish that the agency breached the settlement agreement. In the acknowledgment order, the administrative judge also notified the agency of its obligation to submit evidence of compliance or to show that good cause exists for its noncompliance with the agreement. CF, Tab 2. In response to the administrative judge's order, the agency asserted that it issued a back pay check to the appellant but did not restore her to duty because she failed to satisfy the terms of the settlement agreement that would require the agency to return her to duty. CF, Tab 5 at 1. The appellant subsequently amended her

petition for enforcement to allege that the agency failed to timely pay her back pay in accordance with the terms of the agreement. CF, Tab 7 at 9, Tab 10 at 2.

¶7 The administrative judge issued a written summary of a telephonic status conference that set forth the following three issues for adjudication: (1) whether the agency failed to pay the appellant back pay in accordance with the terms of the settlement agreement; (2) whether the agency breached the settlement agreement by improperly interfering with the appellant's psychiatric examination by submitting documents to Dr. Ruth; and (3) whether the agency breached the settlement agreement by improperly interfering with the appellant's psychiatric examination through its interactions with Dr. Ruth. CF, Tab 15 at 2. The administrative judge noted the appellant's objection to his exclusion of her claim that the agency violated the terms of the settlement agreement by providing documents concerning her to Dr. Ruth without first obtaining her consent to release these documents. *Id*. at 2-3. The administrative judge denied the appellant's request for a hearing. *Id*. at 3. The appellant submitted numerous motions concerning discovery, CF, Tabs 19, 21, 22, 24, 28, 31, which the administrative judge granted in part and denied in part. CF, Tabs 20, 25, 26, 29. The administrative judge denied the appellant's motions for sanctions against the agency. CF, Tabs 12, 14, 30, Tab 35, Compliance Initial Decision (CID) at 11-13.

¶8 Based on the written record, the administrative judge issued a compliance initial decision that denied the appellant's petition for enforcement. CID at 1, 13. The administrative judge found that, although the agency breached the settlement agreement by failing to timely pay the appellant her back pay, the agency's noncompliance is moot because the agency has now paid the appellant her entitled back pay and the settlement agreement specifically states that a breach of the agreement is not a basis for rescission of the agreement. CID at 5-7. The administrative judge further found that the appellant failed to prove that the agency improperly interfered with Dr. Ruth's examination by providing him with

documents for his consideration and through the interactions of its Associate Area Medical Director, Dr. Bruce Butler, M.D., with Dr. Ruth regarding the appellant's examination. CID at 7-11. Specifically, the administrative judge found that: it was necessary for Dr. Butler to communicate with Dr. Ruth so that Dr. Ruth had the information necessary to conduct the appellant's fitness for duty examination and to assess whether the appellant was medically capable of returning to her regular duties as a Rural Carrier at the Columbia Post Office; and the appellant failed to prove that Dr. Butler's interactions with Dr. Ruth and/or Dr. Ruth's assistant were for some purpose other than providing Dr. Ruth with the necessary information to conduct his examination of the appellant. CID at 7-10. The administrative judge also found that the agency did not breach the agreement by providing Dr. Ruth with information and documents concerning, inter alia, the appellant's job description, medical conditions, and communications between the appellant and the Office of Workers' Compensation Programs (OWCP). CID at 10-11. The administrative judge found that, while the settlement agreement did not expressly provide that the agency would provide these documents to the doctor conducting the independent medical examination, the agreement also did not preclude such action. The administrative judge reasoned that the documents all relate to the appellant's medical conditions and are not so "irrelevant, prejudicial, or inflammatory" that they could be deemed as interfering with Dr. Ruth's independent medical examination of the appellant. CID 10-11.

¶9 The pro se appellant filed a petition for review of the compliance initial decision and a supplement to her petition for review, as well as numerous documents in support of her petition for review. Petition for Review File (PFR File), Tabs 1, 7. The Board has not considered the documents the appellant submits on review because she has not shown that the documents or the information contained therein were unavailable before the record closed below and that the documents are material to the outcome of this compliance

proceeding. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The agency responds in opposition to the appellant's petition for review. PFR File, Tab 8. The appellant filed a response to the agency's submission, which the Board need not consider because it was filed after the record on review closed on November 16, 2009, and the appellant has not shown that it is based on evidence that was not readily available before the record closed. *Id.*, Tabs 2, 9; *see* 5 C.F.R. § 1201.114(d), (i).

ANALYSIS

¶10 The Board has the authority to enforce a settlement agreement which has been entered into the record in the same manner as any final Board decision or order. *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 8 (2009); *Haefele v. Department of the Air Force*, 108 M.S.P.R. 630, ¶ 7 (2008). A settlement agreement is a contract, and the Board will therefore adjudicate a petition to enforce a settlement agreement in accordance with contract law. *See Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *Caston v. Department of the Interior*, 108 M.S.P.R. 190, ¶ 17 (2008). Where, as here, an appellant files a petition for enforcement of a settlement agreement over which the Board has enforcement authority, the agency must produce relevant, material, and credible evidence of its compliance with the agreement. *Eagleheart v. U.S. Postal Service*, 110 M.S.P.R. 642, ¶ 9 (2009); CF, Tab 2 at 1-2. Still, the ultimate burden of proof is on the appellant, as the party seeking enforcement, to show that an agency failed to fulfill the terms of an agreement. *Eagleheart*, 110 M.S.P.R. 642, ¶ 9; *Perkins v. Department of Veterans Affairs*, 106 M.S.P.R. 425, ¶ 4 (2007), *aff'd*, 273 F. App'x 957 (Fed. Cir. 2008); CF, Tab 2 at 1. It is not enough, however, to show that a party has acted in a manner that is inconsistent with a settlement agreement term, but rather to prevail a party "must show material noncompliance" with a term of the contract. *Lutz v. U.S. Postal Service*,

485 F.3d 1377, 1381 (Fed. Cir. 2007). A party's breach of an agreement is material when it relates to a matter of vital importance or goes to the essence of the contract. *Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997); *Caston*, 108 M.S.P.R. 190, ¶ 17.

¶11 In deciding the ultimate issue in this case, whether the agency materially breached the settlement agreement when it communicated with and disclosed documents concerning the appellant to Dr. Ruth, it is necessary to resolve three issues: (1) what the parties intended and understood by the term "independent medical examination," as set forth in the settlement agreement; (2) which documents the agency disclosed to Dr. Ruth; and (3) whether the disclosures made by the agency constitute a breach of the agreement. There is insufficient evidence in the record, however, to make a determination on these issues. Therefore, for the reasons articulated below, the compliance initial decision must be vacated and the case must be remanded for the administrative judge to make explained findings on these issues. *See, e.g.*, *Torres*, 110 M.S.P.R. 482, ¶ 13 (remanded because the record, as developed, did not contain sufficient evidence to determine whether a breach occurred). The administrative judge will be able to adequately address whether the agency's disclosures resulted in a material breach of the settlement agreement only after these questions have been answered.

Because the settlement agreement contains an ambiguous term, we must remand the appeal for the parties to present further evidence of their understanding of that term at the time they entered into the agreement.

¶12 The appellant asserts on review, as she did below, that the agency breached the settlement agreement by interfering with the independent medical examination conducted by Dr. Ruth. She claims the agency tainted the process when it communicated with Dr. Ruth and disclosed documents concerning her to Dr. Ruth without her permission. PFR File, Tab 1 at 30-35, 38-40, 44-46, 52-55; CF, Tab 1 at 1-5. The appellant also contends that the agency violated the

Privacy Act when it disclosed documents to Dr. Ruth without her consent, and she asserts, as she did below, that the administrative judge erred by excluding this issue from adjudication. PFR File, Tab 1 at 16-17, 49-50; CF, Tab 15 at 2-3.

¶13 As set forth in the settlement agreement, the parties agreed that the appellant would attend an independent psychiatric fitness for duty examination, and the agency would return the appellant to duty in Columbia, Tennessee only if the board-certified forensic psychiatrist conducting the examination determines that the appellant is fit for such duty. IAF, Tab 26. The parties further agreed that the appellant "must provide releases for any medical documentation from prior medical examiners for the same condition at issue in this case from April 5, 2006, to date for analysis and consideration by the independent medical examiner."[1] *Id*. The above-noted provision requiring the appellant to sign releases for her medical records is the only reference in the settlement agreement regarding the release of medical documents. Indeed, the agreement is silent on the issue of whether the agency may or may not communicate with and/or release documents, medical or other, to the psychiatrist conducting the independent psychiatric fitness for duty examination. *Id*.

¶14 Although the agreement does not define "independent" in reference to the term "independent medical examination," it is clear that "independent" does not mean that the examining psychiatrist will not be able to review any of the appellant's medical records and/or other documentation. This conclusion is supported by the parties' inclusion of language that the examining psychiatrist

---

[1] The agreement requires the appellant to provide releases whether she and the agency jointly selected a physician for the independent psychiatric fitness for duty examination or whether she solely chose and paid for the examining psychiatrist, but the agreement does not set forth the manner by which the psychiatrist would receive the appellant's medical records. CF, Tab 5, Ex. 1. Based on the parties' submissions, it appears that the agency wanted the appellant to provide it with a signed release for medical records, whereas the appellant personally delivered a release to each of her prior medical providers authorizing them to forward records to Dr. Ruth. CF, Tab 1, Ex. M, Tab 5, Ex. 6 at 2, Ex. 7.

would review the appellant's medical records related to the conditions at issue. *Id*. The appellant, however, contends that the agency, by disclosing documents to Dr. Ruth without her permission, has tainted the "independence" of the "independent medical examination," which is the bargain she received from the agency by settling her appeal. PFR File, Tab 1 at 29-31, 37-38, 40.

¶15 The administrative judge found that, although the settlement agreement did not specify that the agency would provide documents to the examining psychiatrist, the terms of the agreement did not specifically preclude the agency from submitting such documentation either. CID at 11; *see Galatis v. U.S. Postal Service*, 109 M.S.P.R. 651, ¶ 10 (2008) (the Board will not read a nonexistent term into a settlement agreement that is unambiguous). The absence in the agreement of any specific terms prohibiting the agency from disclosing documents to the examining psychiatrist is not, however, dispositive because 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. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997); *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 17 (2009). The Board is responsible for ensuring that "the parties receive that for which they bargained." *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999); *Principe v. U.S. Postal Service*, 100 M.S.P.R. 66, ¶ 8 (2005).

¶16 In the instant case, however, the term "independent medical examination" appears to be ambiguous for the reasons discussed more fully below. When a settlement term like here is ambiguous, it is appropriate to consider extrinsic evidence. Extrinsic evidence of intent should be considered only if the terms of the agreement are ambiguous. *Brown v. Department of the Interior*, 86 M.S.P.R. 546, ¶ 17 (2000); *see also Greco*, 852 F.2d at 560. A contract is ambiguous when it is susceptible to differing, reasonable interpretations. *Johnson v. U.S. Postal Service*, 108 M.S.P.R. 502, ¶ 8 (2008), *aff'd*, 315 F. App'x 274 (Fed. Cir. 2009).

If ambiguity is found, then the fact finder's role is to implement the intent of the parties at the time the agreement was made. *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997); *Raymond v. Department of the Army*, 102 M.S.P.R. 665, ¶ 8 (2006).

¶17 As stated above, the term "independent medical examination" is not defined in the settlement agreement. *See* IAF, Tab 26. In construing a settlement agreement, words are assigned their ordinary meaning, unless it is shown that the parties intended otherwise. *Weber v. Department of Agriculture*, 86 M.S.P.R. 25, ¶ 10 (2000). Black's Law Dictionary defines the term "independent" as "[n]ot subject to the control or influence of another." *Black's Law Dictionary* 617 (7th ed. 2000). Thus, one reasonable interpretation of the term "independent medical examination" is, as the appellant contends, that the examination is wholly independent from any involvement or influence by the agency. Under this interpretation of the term "independent medical examination," the agency's disclosure of documents to Dr. Ruth concerning the appellant would likely constitute a breach of the agreement.

¶18 However, the agency appears to contend that "independent medical examination" has a specific meaning within this context like a term of art, a meaning different from the one proffered by the appellant. Specifically, the agency's representative asserted during a status conference below that it is the agency's pattern and practice to submit relevant medical information, and any relevant information concerning the employee's job and his ability to perform his job, with or without reasonable accommodation, to the doctor conducting the fitness for duty examination for his review and consideration. CF, Tab 13, Status Conference Tape, Side A; *see also* PFR File, Tab 1 at 38-39. The agency's representative further contended during the status conference that the physician conducting an independent medical examination is "independent" in that the physician does not work for either of the parties and has not evaluated the employee in the past, and the physician should take into consideration any

materials submitted for his review, and giving consideration to such materials does not compromise the independence of the physician's examination. CF, Tab 13, Status Conference Tape, Side A. While the statements of the agency's representative during the status conference below do not constitute evidence, the agency's disclosure of documents to Dr. Ruth is consistent with its apparent understanding of what constitutes an independent medical examination. *See Spradlin v. Office of Personnel Manage*ment, 84 M.S.P.R. 279, ¶ 8 (1999); *McDavid v. Department of the Army*, 58 M.S.P.R. 673, 678 (1993) (the parties' conduct after they have entered into a settlement agreement may be relevant to an interpretation of terms in the agreement). Thus, it appears that the agency interprets the term "independent medical examination" as an examination conducted by a physician who is "independent" of the parties, i.e., not employed and/or under the "control" or "influence" of the agency or the appellant, but the agency does not interpret this term as prohibiting it from providing additional documentation to the examining physician for his consideration. CF, Tab 13, Status Conference Tape, Side A; CF, Tab 5, Att. B, Ex. 10, Tab 23 at 8-9, 11, Ex. 1.

¶19 We find that, because the term "independent medical examination" is susceptible to more than one reasonable interpretation, it is ambiguous. *See, e.g., Hammons v. Department of the Air Force*, 68 M.S.P.R. 54, 57-58 (finding the term "correspondence relating to this case" ambiguous and relying on parol evidence to determine the intent of the parties as to the meaning of this term), *review dismissed*, 66 F.3d 346 (Fed. Cir. 1995) (Table). Therefore, to interpret this term of the agreement, which is pertinent in resolving whether the agency materially breached the agreement, extrinsic evidence should be used to determine the intent of the parties at the time of the agreement. The record as developed to date, however, does not contain the evidence necessary to resolve this issue. Accordingly, this case must be remanded to allow the parties to submit extrinsic evidence into the record regarding what each party meant by the

term "independent medical examination."[2] This will enable the administrative judge to determine the intent of the parties at the time they entered into the settlement agreement. Specifically, the administrative judge should consider whether the parties understood and agreed that: (1) the agency would have no involvement with the examining psychiatrist, i.e. that it would not communicate with the examining psychiatrist or provide him with additional documentation concerning the appellant; or (2) the agency could release the types of materials it routinely releases in fitness for duty examinations, consistent with its own rules or established practice, to provide the examining psychiatrist a complete understanding of the nature of the agency's concerns in ascertaining the employee's psychiatric fitness for duty. While the record as developed to date suggests that these are the prevailing interpretations of the parties with regard to the term "independent medical examination," the administrative judge is not precluded from finding yet another interpretation based on extrinsic evidence provided by the parties on remand. *See Sweet v. U.S. Postal Service*, 89 M.S.P.R.

---

[2] We have considered the appellant's assertions on review that the administrative judge is biased against her. PFR File, Tab 1 at 3, 17, 22-23. The record shows that, although the appellant made assertions of bias during the proceedings below, she specifically stated that she was not asking the administrative judge to disqualify himself. CID at 4 n.3; CF, Tab 34 at 15; see 5 C.F.R. § 1201.42(b) ("[a] party may file a motion asking the judge to withdraw on the basis of personal bias or other disqualification"). However, the appellant asserts on review that she is now seeking to have the administrative judge recused because of the "biased arguments, which lacked judicial fairness" that he presented in the compliance initial decision. PFR File, Tab 1 at 3. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Galloway v. Department of Agriculture*, 110 M.S.P.R. 311, ¶ 13 (2008). The appellant's assertions of bias, based on the administrative judge's rulings and his findings that the agency did not breach the settlement agreement through its communications with Dr. Ruth, are insufficient to overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See, e.g., Caracciolo v. Department of the Treasury*, 105 M.S.P.R. 663, ¶ 14 (2007) (the fact that an administrative judge has made rulings in an appellant's previous appeal with which the appellant does not agree does not form a sufficient basis to require an administrative judge to recuse himself). Thus, the appellant's unsupported allegations do not establish any bias by the administrative judge and do not present a basis to have the administrative judge disqualified from this case on remand.

28, ¶ 15 (2001). The administrative judge may hold a hearing if he finds it necessary to resolve credibility issues concerning these issues. *See Madison v. Department of Defense*, 111 M.S.P.R. 614, ¶ 8 (2009) (although an employee is not entitled to a hearing to establish his allegations in an enforcement proceeding, the administrative judge may grant one in his discretion, if necessary to resolve disputed facts), *aff'd*, No. 2009-3285 (Fed. Cir. Jan. 22, 2010) (NP); 5 C.F.R. § 1201.183(a)(3). If the administrative judge finds that one meaning of the term prevails over the other, then the administrative judge shall further adjudicate the appellant's petition for enforcement as instructed below.

¶20 If the administrative judge finds, however, that the parties did not have a meeting of the minds with respect to the meaning of the term "independent medical examination," then there is no reason for choosing one interpretation rather than the other, as no party has reason to rely on the understanding of the other party. *See Gullette v. U.S. Postal Service*, 70 M.S.P.R. 569, 575-77 (1996). The Board has held that, if there is failure of mutual assent to a particular term of the contract, and the term in question goes to the heart of the contract, then the agreement should result in the invalidation of the entire agreement. *Id*. at 577. Therefore, if the administrative judge finds that: (1) the parties had differing, but reasonable interpretations of the term "independent medical examination;" (2) neither party had reason to know of the meaning attached by the other; and (3) the term in question is an essential part of the settlement agreement, then the administrative judge should allow the appellant the opportunity to: (1) set aside the settlement agreement and reinstate her enforced leave appeal; or (2) accept the settlement agreement under the agency's interpretation of the term "independent medical examination." *See, e.g.*, *Gullette* 70 M.S.P.R. at 576-77 (where the parties had differing and reasonable views of the term "anniversary date" in an settlement agreement, and neither party knew or had reason to know of the meaning attached by the other, the Board gave the appellant the opportunity to reinstate her removal appeal or to accept the settlement agreement

under the agency's interpretation of the term because the term in question was an essential part of the agreement).

The record is not sufficiently developed to determine when and what documents the agency disclosed to Dr. Ruth.

¶21 After the administrative judge resolves the issue of what constitutes an "independent medical examination," then the administrative judge must make specific findings regarding which documents the agency disclosed in order to determine the ultimate issue of whether the agency materially breached the agreement. For example, even if the settlement agreement prohibited the agency from having any involvement in the independent medical examination, there may be some generic documents disclosed by the agency, such as the appellant's position description, which could not be construed as tainting the "independence" of the medical examination. Conversely, even if the parties understood and agreed that the agency was permitted to provide the examining psychiatrist with additional information concerning the appellant, it is possible that the agency's disclosures may have deprived the appellant of the "independent" medical examination for which she bargained if the disclosures made by the agency are not consistent with the type and scope of documents routinely disclosed by the agency in accordance with its own rules or practice.

¶22 Although the administrative judge exercised his discretion below to allow the parties to conduct discovery, CF, Tab 15 at 3, the record supports the appellant's contention that the agency has not been forthcoming in identifying and producing all the documents it disclosed to Dr. Ruth. PFR File, Tab 1 at 4, 40-42; CF, Tabs 21, 24, 28, 30, 31; *see Ernst v. Department of the Treasury*, 69 M.S.P.R. 133, 139 (1995) (in an enforcement proceeding, an employee is not entitled to discovery to establish his allegations, although the administrative judge may grant discovery in his discretion, if necessary to resolve disputed facts), *aff'd*, 92 F.3d 1208 (Fed. Cir. 1996) (Table). Thus, in resolving whether the agency materially breached the settlement agreement, it is essential that the

administrative judge make clear findings regarding what documents the agency disclosed to Dr. Ruth and the dates and means through which these disclosures occurred. We have summarized the agency's submissions into the record and the appellant's attempts to discern the precise nature and timing of the agency's disclosures for the purpose of showing what questions still remain unanswered regarding the agency's disclosures to Dr. Ruth.

The agency's verbal communications with Dr. Ruth

¶23 The agency asserted that Trish Wilson, Manager of the agency's Health and Resource Management office in Nashville, Tennessee, and Dr. Butler were the only individuals who communicated with Dr. Ruth. Specifically, Ms. Wilson communicated with Dr. Ruth and the appellant via telephone on April 7, 2009; and Dr. Butler spoke with Dr. Ruth's assistant on the telephone on April 29, 2009. CF, Tab 5, Att. B, Tab 23 at 8-9, Ex. 1. The agency submitted a copy of a summary Dr. Butler wrote of the telephone call he had with Dr. Ruth's assistant on April 29, 2009. In that call, Dr. Butler learned that: Dr. Ruth was at a "stand still" with the appellant regarding what information she would allow him to submit to the agency; and although the appellant initially allowed Dr. Ruth to review some of her past medical records, she rescinded that permission and "instructed Dr. Ruth to omit reference to various parts of the current and past history." *Id.*, Ex. 1.

The dates on which the agency disclosed documents to Dr. Ruth

¶24 The appellant asserts that the agency sent documents, by mail and/or facsimile, to Dr. Ruth on April 7, 13, 14, 15, 2009. The appellant's assertion that the agency sent Dr. Ruth documents on April 7, 2009, is based on a bill she received from Dr. Ruth charging her for document review on this date. CF, Tab 1, Ex. A. She asserted below that, because she did not send Dr. Ruth any documents on this date, the documents reviewed by Dr. Ruth must have been sent by the agency. *Id.* at 2-3. The record as developed does not show that the agency

sent any documents to Dr. Ruth on this date, and the agency has not explicitly addressed this particular assertion in any of its submissions.

¶25 The agency submitted a copy of an April 13, 2009 letter written by Dr. Butler to Dr. Ruth, and the agency asserted that it sent this letter "before Dr. Ruth's examination of the [appellant] . . . in preparation of [Dr. Ruth's] examination." CF, Tab 5, Ex. 10, Tab 23 at 11, Ex. 1 at 3-5. On April 14, 2009, Dr. Ruth informed the appellant that he had not received from the agency the appellant's job requirements and criteria required for her to return to duty. CF, Tab 1, Ex. G-2. Therefore, it appears that Dr. Ruth did not receive this letter prior to examining the appellant on April 15, 2009.

¶26 The appellant also asserted that the agency sent a facsimile to Dr. Ruth on April 14, 2009. CF, Tab 7 at 12-14, Ex. N. The administrative judge found that the appellant's assertion that the agency faxed Dr. Ruth documents on April 14, 2009, was "based on facsimile machine headers imprinted on some of the documents the appellant received in response to her various requests to the agency for the documents it submitted to Dr. Ruth which indicated that the documents were part of a 43-page facsimile transmission." CID at 11-12. The administrative judge found that the facsimile number imprinted on these pages (615-872-5579) presumably refers to the receiving facsimile machine, not the sending facsimile machine, which, therefore, does not indicate that a facsimile was sent on that date to Dr. Ruth, whose facsimile number is 859-296-1559. CID at 12.

¶27 The record shows that the 615-872-5579 facsimile number, to which the appellant refers, is the facsimile number used by Michelle Edmonson in the agency's Health and Resource Office in Nashville, Tennessee. CF, Tab 23, Ex. 2 at 1. Additionally, the record shows that the facsimile number imprinted on facsimiles sent by the appellant to the administrative judge list the appellant's facsimile number, i.e. the sending facsimile number. *See, e.g.*, CF, Tabs 33-34. While this does not affirmatively establish that Ms. Edmonson faxed anything to

Dr. Ruth on April 14, 2009, the record appears to show that Ms. Edmonson may have faxed documents concerning the appellant to someone on April 14, 2009. Whether Ms. Edmonson or any other agency official faxed anything to Dr. Ruth on this date is a matter for further development by the administrative judge on remand.

¶*28* Finally, the appellant asserts that, during her April 15, 2009 examination, Dr. Ruth received a lengthy facsimile from the agency, which Dr. Ruth appears to corroborate in his assertions that he received a lengthy facsimile from the appellant's employer while he was examining the appellant on April 15, 2009. CF, Tab 1, Ex. J, Tab 7 at 5, Ex. O-1, Tab 19 at 10-11. In its response to the appellant's request for the production of documents, the agency asserted that, although it has inquired about the "lengthy fax" that the appellant asserts it sent to Dr. Ruth during her April 15, 2009 examination, it has "yet to locate" this alleged facsimile. CF, Tab 23 at 2-3. The appellant also asserted that the agency did not produce a copy of this facsimile following the administrative judge's order granting in part her motion to compel the production of documents for April 15, 2009. CF, Tab 30 at 2-3.

The nature of the agency's document disclosures to Dr. Ruth

¶29 In his April 13, 2009 letter to Dr. Ruth, Dr. Butler requested that Dr. Ruth provide a forensic analysis of the appellant's conditions of bipolar affective disorder, anxiety disorder, and attention deficit hyperactivity disorder. Dr. Butler further requested that Dr. Ruth confirm that he received documentation from the appellant's previous medical providers regarding treatment she received for the listed conditions since April 5, 2006. In addition, Dr. Butler listed a series of questions for Dr. Ruth to address in determining whether the appellant is capable of resuming her duties as a Rural Carrier. CF, Tab 5, Ex. 10, Tab 23, Ex. 1 at 3-4. Dr. Butler informed Dr. Ruth in this letter that "there may be more records coming for your review from [OWCP]," but nowhere in its submissions did the agency state and identify whether it or any other office sent Dr. Ruth additional

OWCP records. CF, Tab 23, Ex. 1 at 3. Moreover, the April 13, 2009 letter included a list of eleven documents that were purportedly attached to the letter. The agency, however, failed to include four of the eleven documents in its submissions to the Board: (1) a January 23, 2009 phone call log documenting two calls from the appellant to Jennifer Valdivieso, Assistant District Director, OWCP; (2) a January 10, 2009 letter from the appellant to Ms. Valdivieso; (3) an October 24, 2009 letter from the appellant to the claims examiner at OWCP; and (4) the October 20, 2008 response by the appellant to the agency's "proposal to execute enforced leave." CF, Tab 5, Ex. 10, Tab 23, Ex. 1 at 4-5.

¶30 The appellant also filed a Freedom of Information Act (FOIA) request with the agency requesting copies of all documents the agency sent to Dr. Ruth, and the agency responded to the appellant's FOIA request on June 1, 2009. CF, Tab 7, Ex. M; *see Christofili v. Department of the Army*, 81 M.S.P.R. 384, ¶¶ 16-17 (1999) (in addition to the discovery process, an appellant may obtain the disclosure of relevant information from the agency and its employees through any lawful means, including through FOIA). The appellant, however, did not submit into the record all of the documents she received pursuant to her FOIA request. Instead, she only listed the documents. CF, Tab 7 at 11-14. It appears from the appellant's list that the documents she received pursuant to her FOIA request are identical to the documents submitted by the agency into the record in its June 11, 2009 submission, with the exception of documents described by the appellant as an OWCP work capacity evaluation completed by Dr. Arney on June 16, 2008, and a September 5, 2008 page titled "Full, Detailed Statement of Undisputed Facts." *Id*. at 14; *see* CF, Tab 5.

¶31 In addition, the appellant filed an August 7, 2009 motion to compel the agency to respond to her interrogatories. The agency responded on August 18, 2009 by resubmitting its original response to the appellant's discovery requests and a clarification of its response. CF, Tabs 21, 23. As part of this submission, the agency submitted a series of documents that referred to an individual named

"Jacqueline Young." CF, Tab 23, Ex. 4. It is not clear whether the agency intended to submit additional documents concerning the appellant that it sent to Dr. Ruth, and inadvertently sent documents referring to an individual who is not a party to this proceeding but shares the same last name as the appellant, or whether this entire portion of the submission was in error. The agency has not explained or clarified this apparent error. *See* CF, Tab 32.

¶32 The appellant filed a detailed response to the agency's August 18, 2009 submission asserting that the agency has still not fully responded to her discovery requests. CF, Tab 24. The administrative judge issued an August 20, 2009 order granting, in part, the appellant's motion to compel.[3] CF, Tab 26. The administrative judge ordered the agency to, inter alia, respond to the appellant's request for the production of documents that it sent to Dr. Ruth between April 7 and 15, 2009. *Id*. at 3. The administrative judge specifically instructed the agency that, if it produced all documents to the appellant responsive to that request, then it need not produce such documents again, but it must identify each document and the date and means by which it sent such documents to Dr. Ruth. *Id*.

¶33 The appellant then filed a September 3, 2009 motion for sanctions based on her assertion that the agency still had not responded to her discovery requests and the administrative judge's order compelling the agency to respond. CF, Tab 30. Specifically, the appellant asserted that the agency failed to provide her with the documents that it allegedly faxed to Dr. Ruth on April 15, 2009, as the agency's response referred only to documents it mailed to Dr. Ruth on or about April 14, 2009. *Id*. at 2. In its final response to the appellant's petition for enforcement, the agency asserted that it mailed the appellant, via discovery, FOIA request, and

---

[3] The appellant filed a motion requesting that the administrative judge reconsider his order denying in part her motion to compel, CF, Tab 28, which the administrative judge denied. CF, Tab 29.

as a result of her motion to compel, all documents that it sent to Dr. Ruth. CF, Tab 32 at 3. This, as well as the prior agency submissions, however, failed to comply with the administrative judge's order that it identify each document it disclosed to Dr. Ruth and the date and means it disclosed each document.

¶34 In sum, the record is not sufficiently developed as to what documents the agency sent to Dr. Ruth, as well as when and how it sent these documents. Accordingly, on remand, the administrative judge shall instruct the agency to submit into the record a detailed list addressing, at a minimum: whether it sent any documents to Dr. Ruth on April 7, 13, 14, or 15, 2009, or any other dates not included therein; the identity of such documents; and the means by which it sent such documents. If the agency identifies any documents not previously submitted into the record, the administrative judge shall instruct the agency to submit such documents so that the administrative judge has the ability to review the contents of such documents. Additionally, the administrative judge may, in his discretion, provide the agency with an opportunity to clarify or supplement its previous submissions regarding its verbal communications with Dr. Ruth if the administrative judge determines that the record is not sufficiently developed on that issue.

¶35 If the agency fails to fully comply with the administrative judge's order, the administrative judge may, as he finds appropriate, draw an inference in favor of the appellant with regard to the information that the appellant seeks. *See Simon v. Department of Commerce*, 111 M.S.P.R. 381, ¶ 14 (2009); *Taylor v. U.S. Postal Service*, 75 M.S.P.R. 322, 326 (1997); 5 C.F.R. § 1201.43(a)(1).

The administrative judge must determine whether the agency's disclosures to Dr. Ruth constitute a material breach of the settlement agreement.

¶36 After the administrative judge answers the first two questions discussed above, i.e.: (1) what the parties understood the agency's role to be with respect to communicating with and sharing information with Dr. Ruth, and (2) the nature and extent of those communications and disclosures, then the administrative

judge must determine whether the agency's disclosures constitute a material breach of the agreement. As previously stated, in determining whether a party has materially breached a contract, the pertinent question is whether the breach relates to a matter of vital importance or goes to the essence of the contract. *Thomas*, 124 F.3d at 1442; *Caston*, 108 M.S.P.R. 190, ¶ 17.

¶37 In finding that the agency did not materially breach the settlement agreement by disclosing documents to Dr. Ruth, the administrative judge found it relevant, inter alia, that Dr. Ruth did not consider any of the records he received from the agency in formulating his opinion that the appellant is not fit to return to duty. CID at 12-13; CF, Tab 7, Ex. O-1 - O-2, Tab 19 at 10. Whether Dr. Ruth considered the agency's documents in formulating his opinion is not, however, dispositive in determining if the agency materially breached the agreement. Instead, the pertinent question in determining whether the agency's breach is material is whether its actions, i.e. its disclosures to Dr. Ruth, relate to a matter of vital importance or go to the essence of the settlement agreement. *See, e.g.*, *Eagleheart*, 110 M.S.P.R. 642, ¶¶ 12-13 (although the agency's failure to timely process a PS-50 to reflect the appellant's resignation for personal reasons did not have a material effect on the appellant's ability to secure employment with a different federal agency, the agency's action still constituted a material breach of the agreement because the major benefits sought by the appellant included, inter alia, a clean personnel file showing that he had voluntarily resigned for personal reasons); *Mullins v. Department of the Air Force*, 79 M.S.P.R. 206, ¶¶ 8-11 (1998) (the agency materially breached a settlement agreement when it failed to clear the appellant's personnel records of any reference of its attempt to involuntarily remove the appellant, even though the breach did not result in a monetary loss, because the purpose of this provision of the settlement agreement was to ensure that such information was kept confidential).

¶38 Here, the material benefit sought by the appellant is the opportunity to have an independent psychiatric fitness for duty examination. CF, Tab 5, Ex.1. Thus,

there appear to be at least two scenarios in which the agency's disclosure of documents to Dr. Ruth could constitute a material breach of the agreement. If the administrative judge finds that the term "independent medical examination," as agreed to by the parties, prohibits the agency from disclosing any documents concerning the appellant to Dr. Ruth, then the agency's mere act of disclosing these documents constitutes a material breach of the settlement agreement. Alternatively, even if the parties understood and agreed that the agency's standard practice is to disclose additional documentation to the physician conducting the independent fitness for duty examination, the agency may have breached the agreement if the documents it disclosed to Dr. Ruth are not consistent with the scope and type of documents that it routinely provides in such circumstances. Under that scenario, the agency's disclosures deprived the appellant of an "independent" medical examination. *See, e.g., Pierson v. Department of the Army*, 86 M.S.P.R. 203, ¶¶ 2-4 (2000) (adopting the administrative judge's findings that the agency breached a settlement agreement because it "violated its duty to fulfill its contractual obligations in good faith" when it provided "misleading and irrelevant" information to the psychiatrist conducting the independent medical examination and the documents provided significantly affected the psychiatrist's findings and recommendation).

The appellant's contentions regarding the Privacy Act are not material to determining whether the agency breached the settlement agreement.

¶39 Subject to twelve limited exceptions, the Privacy Act prohibits agencies from disseminating any record pertaining to an individual if the record is maintained in a system of records, absent the written consent of the subject individual. 5 U.S.C. § 552a(b); 39 U.S.C. § 410(b)(1) (the provisions of 5 U.S.C. § 552a apply to the Postal Service); *Hall v. Department of Veterans Affairs*, 67 M.S.P.R. 622, 627-28 (1995). The appellant asserts on review, as she did below, that the agency violated the Privacy Act when it disclosed documents to Dr. Ruth without her consent, and she asserts that the administrative judge erred by

excluding this issue from adjudication.[4] PFR File, Tab 1 at 16-17, 49-50; CF, Tab 15 at 2-3. She further asserts on review that she is not asking the Board to adjudicate whether the agency violated the Privacy Act per se; instead, she contends that the agency "was shirking its duty when it neglected to obtain [her] written permission to send whatever [it] had in [its] file . . . to Dr. Ruth." PFR File, Tab 1 at 17.

¶40 As the administrative judge correctly found, the Board does not have jurisdiction to adjudicate Privacy Act claims. *Calhoon v. Department of the Treasury*, 90 M.S.P.R. 375, ¶ 15 (2001) (the federal district courts, not the Board, are the appropriate forum for adjudication of a Privacy Act claim); 5 U.S.C. § 552a(g)(1) (an individual may bring a civil action in the district courts of the United States against an agency for a violation of the Privacy Act). The Board has, however, considered issues involving the Privacy Act where the Act is implicated in matters over which the Board has jurisdiction. *See, e.g., Gill v.*

---

[4] Although the settlement agreement cites the Privacy Act with regard to what medical information, concerning the appellant, Postmistress Kathy Hinkle would be "privy" to, the agreement does not expressly require that the agency otherwise abide by the Privacy Act with respect to any disclosures it makes concerning the appellant. IAF, Tab 26. It is a well-settled principle in contract law, however, that because parties are presumed to be aware of applicable statutes and regulations and intend to incorporate them, the law existing at the time a contract is executed becomes a part of the contemporaneous circumstances of the contract's execution and is incorporated, without reference, into the agreement itself. *See, e.g., Miura v. Department of the Navy*, 39 M.S.P.R. 663, 669 n.5 (1989) ("[a] contract is deemed to incorporate all the rights conferred upon the parties by the laws of the state in which the contract was executed") (citing *N.C. Freed Co. v. Board of Governors of Federal Reserve System*, 473 F.2d 1210, 1215 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973)); *Ocean View Towers Associates v. United States*, 88 Fed. Cl. 169, 176 (2009) (the parties' failure to specifically incorporate a federal regulation into the contract had no bearing on the regulation's applicability to that contract because "the law becomes a part of the contemporaneous circumstances of the contract's execution and is incorporated, without reference, into the agreement itself"); *Dart Advantage Warehousing, Inc. v. United States*, 52 Fed. Cl. 694, 700 (2002) (same). Thus, the appellant was not required to expressly bargain for the agency's compliance with the Privacy Act, or with any other laws, rules, or regulations that the agency is otherwise bound to obey.

Department of Defense, 92 M.S.P.R. 23, ¶¶ 21-24 (2002) (finding in a demotion appeal that the agency failed to prove its charge that the appellant violated the Privacy Act); *King-Roberts v. U.S. Postal Service*, 79 M.S.P.R. 464, 468-70 (1998) (considering whether an agency was required by the Privacy Act to release a settlement agreement to the Office of Personnel Management despite the express terms of the agreement allowing only the appellant to release the agreement to OPM), *rev'd on other grounds*, 215 F.3d 348 (Fed. Cir. 1999) (Table).

¶41 It is not necessary, however, to consider the appellant's assertions implicating the Privacy Act because such contentions have no bearing on the material issue here, whether the agency breached the settlement agreement. Instead, the relevant question, as set forth above, is whether the agency's disclosure of documents to Dr. Ruth is consistent with the terms negotiated by the parties and incorporated into the written settlement agreement. Thus, if the parties understood the term "independent medical examination" to prohibit the agency from supplementing Dr. Ruth's examination with any documents specifically concerning the appellant, then the agency breached the agreement if it disclosed these types of documents. This is true regardless of the appellant's rights under the Privacy Act limiting the disclosure of personal information. If, however, the parties agreed and understood that the agency, consistent with its own rules or standard practice, could disclose to Dr. Ruth documents concerning the appellant, and the administrative judge finds on remand that the agency's disclosure of documents concerning the appellant to Dr. Ruth was consistent with that practice, then the agency did not breach the agreement. Finally, if the agency breached the agreement by disclosing documents concerning the appellant to Dr. Ruth that are inconsistent with the types of documents it routinely discloses to physicians conducting independent fitness for duty examinations, then the agency's breach is not the result of any alleged violation of the Privacy

Act, but, rather, because such disclosures constitute a breach of the terms of the agreement.

Conclusion

¶42 In sum, because there are numerous issues which the administrative judge must resolve on remand, there are several possible outcomes for this case. If the administrative judge finds that the parties did not have a meeting of the minds with respect to the term "independent medical examination," that neither party had reason to know of the meaning attached by the other, and that this term is an essential part of the agreement, then the administrative judge shall allow the appellant the opportunity to: (1) set aside the settlement agreement and reinstate her enforced leave appeal; or (2) accept the settlement agreement under the agency's interpretation of the term.

¶43 If, however, the administrative judge finds that: (1) the parties did not have a meeting of the minds and the appellant accepts the agency's interpretation of the term "independent medical examination," or (2) the record evidence establishes that one interpretation of the term controls over another, then the administrative judge shall determine whether the agency's communications with and disclosures to Dr. Ruth were permissible in light of the governing interpretation. If the agency's disclosures to Dr. Ruth were consistent with the terms of the agreement, then the agency has not breached the agreement and the appellant's petition for enforcement must be denied.

¶44 Alternatively, if the administrative judge finds that the agency's communications with and disclosures to Dr. Ruth were inconsistent with the terms agreed upon by the parties, in light of the parties' mutual understanding of what constitutes an "independent medical examination," then the administrative judge must determine whether the agency's actions constitute a material breach of the settlement agreement. If the administrative judge finds that a material breach occurred, then the administrative judge shall determine the appropriate remedy for such breach. Under normal circumstances, a material breach of a settlement

agreement entitles the non-breaching party to elect between enforcement of the breached provision or rescission of the settlement agreement and reinstatement of the original appeal. *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶ 20 (2005); *see also Lutz*, 485 F.3d at 1382 (when an agency breaches a settlement agreement, the typical result is to rescind the agreement and reinstate the original claim for adjudication).

¶45 Here, however, the settlement agreement expressly provides that, should a dispute arise regarding the implementation of a term of the agreement, the appellant is restricted to seeking specific enforcement of the agreement and cannot seek to rescind the agreement as a result of any breach by the agency. CF, Tab 5, Ex. 1 at 4; *see Gonzales v. U.S. Postal Service*, 93 M.S.P.R. 391, ¶ 5 (2003) (where the agreement provided that neither party would seek to set aside the agreement, the administrative judge correctly declined to set the agreement aside when the appellant materially breached the agreement). Moreover, the appellant does not appear to want her enforced leave appeal reinstated, but, rather, she appears to want the option of having another fitness for duty examination performed by a different examining psychiatrist. CF, Tab 1 at 24; PFR File, Tab 1 at 10-11.

¶46 Thus, in the event that the administrative judge finds that a material breach has occurred, the administrative judge shall make specific findings regarding how the parties are to proceed in light of the settlement agreement's provision that the agreement cannot be rescinded by the appellant but, rather, must be specifically enforced.

ORDER

¶47 Accordingly, we remand this case to the Atlanta Regional Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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