

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

2010 MSPB 180

Docket No. DE-0752-08-0286-X-1

**Pamela S. Winston,
Appellant,**

v.

**Department of the Treasury,
Agency.**

September 1, 2010

Pamela S. Winston, Denver, Colorado, pro se.

Emily Urban, Esquire, San Francisco, California, 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 on a petition for enforcement filed by the agency. The agency asks the Board to enforce the terms of a settlement agreement which was the basis for dismissal of the appellant's appeal of the agency's removal action.¹ For the reasons set forth below, the agency's petition for enforcement is hereby DISMISSED.

¹ The administrative judge presiding over the case issued an initial decision in which she found the settlement agreement appeared lawful and freely reached, and that the parties acknowledged that they understood the terms of the agreement. She then

BACKGROUND

¶2 The appellant filed an appeal of her removal from her Customer Service Representative position, GS-0962-08, effective December 7, 2007. MSPB Docket No. DE-0752-08-0286-I-1, Initial Appeal File (IAF), Tab 1. Subsequently, the appellant filed an application for disability retirement benefits with the Office of Personnel Management and requested a delay of the MSPB proceedings, which was not opposed by the agency. *Id.* at Tab 11. As a result, the Board dismissed her appeal without prejudice and indicated it would be refiled *sua sponte*. Consistent with its May 23, 2008 order, on September 23, 2008, the appellant's appeal was refiled as DE-0752-08-0286-I-2. IAF2, Tab 1.

¶3 On November 25, 2008, the parties reached an oral settlement agreement mutually resolving the disputed issues. *See* IAF2, Compact Disc. The appellant agreed to withdraw her Board appeal based on the terms of the settlement agreement, in pertinent part, as follows:

1. The agency agrees:

a. to rescind and remove from appellant's Official Personnel Folder (OPF) the Standard Form 50 reflecting her removal effective December 7, 2007, and replace it with a Standard Form 50 reflecting her resignation for personal reasons, effective December 7, 2007; and

* * *

2. In consideration for paragraph 1, appellant agrees:

* * *

b. she will neither seek, nor apply for, nor accept any employment whatsoever with the Internal Revenue Service. Appellant understands that if she applies for or accepts such employment, she will be considered in breach of this agreement, and the agency will reinstate her termination for the reasons set forth in the decision letter of December 4, 2007, sustaining the October 4, 2007 proposal letter,

entered the settlement agreement into the record for purposes of enforcement. Initial Appeal File 2, Tab 12 at 1-2.

and Appellant will have no right of appeal in the event the agency takes such action.

*Id.*²

¶4 On February 5, 2010, the agency filed a petition for enforcement of the settlement agreement, seeking permission to reinstate the appellant's termination based on its belief that the appellant had materially breached the terms of the settlement agreement by applying for a position with the agency as a seasonal Contact Representative in Austin, Texas. Compliance File (CF), Tab 1. The appellant did not dispute that she applied for employment with the Internal Revenue Service, but contends that she misunderstood the terms of the agreement because she initially believed that the settlement agreement permitted her to apply for Internal Revenue Service employment in offices other than the office from which she was removed. CF, Tabs 5 and 8. Upon further review of the agreement, the appellant concedes that "the points are clarified and the conditions are completely clear." Thus, she apologized for the misunderstanding and requested that her termination not be reinstated. *Id.*

¶5 The administrative judge found the appellant in breach of the settlement agreement. CF, Tab 9 at 4. Noting the agency's wishes, the administrative judge recommended that the Board (1) order reinstatement of the appellant's removal, and (2) declare that the appellant will have no right of Board appeal from the removal. *Id.* at 5.

² This settlement language is not a verbatim transcript of the oral terms that the administrative judge entered into the record on November 25, 2008. IAF2, Compact Disc. Instead, this language comes from a memorandum of settlement issued by the administrative judge on November 26, 2008. IAF2, Tab 11. Nonetheless, the parties have not raised, and we find, no material difference between the oral agreement and the administrative judge's subsequent memorandum of it. In fact, on December 1, 2008, the parties submitted a copy of the administrative judge's memorandum and styled it a new settlement agreement signed by all parties. IAF2, Tab 13. However, in the administrative judge's initial decision on November 26, 2008, she had already held that the oral agreement is "the enforceable agreement of record." IAF2, Tab 12.

ANALYSIS

¶6 In recommending that the Board (1) order the agency to convert the appellant's resignation into a removal, and (2) declare that she has no right of Board appeal from such a removal action, the administrative judge has erred. *See Eaton v. U.S. Postal Service*, 50 M.S.P.R. 377, 380 (1991); *Moseley v. U.S. Postal Service*, 48 M.S.P.R. 667, 668 (1991). As the Board held in *Eaton* and *Moseley*, that relief is not within the Board's jurisdiction to grant, and, consistent with the Board's limited jurisdiction, that relief was not specified in the settlement agreement.

¶7 First, the relief requested – permission to reinstate the appellant's termination – is not within the Board's jurisdiction to grant. The jurisdiction of the Board is not plenary. It has only that jurisdiction granted it by law, rule, or regulation. *See Noguera v. Office of Personnel Management*, 878 F.2d 1422 (Fed. Cir. 1989). Although the Board has broad authority to enforce the terms of a settlement agreement entered into the record, *McClain v. United States Postal Service*, 40 M.S.P.R. 66, 70 (1989), the Board's appellate jurisdiction does not include the power to remove an employee of another agency, the relief requested here. 5 U.S.C. § 7501 *et seq.*; 5 U.S.C. § 7701 *et seq.* Moreover, because the power to remove in this case is outside the Board's appellate jurisdiction, any decision pertaining to the appellant's removal would be advisory. Such advisory opinions are prohibited by 5 U.S.C. § 1204(h) (West Supp. 1991). *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 591 (1989), *overruled on other grounds*, *Joyce v. Department of the Air Force*, 74 M.S.P.R. 112 (1997).

¶8 Second, the settlement agreement does not contemplate the relief requested by the agency. In regard to the agency's request that the Board order the agency to convert the appellant's resignation into a removal, the settlement agreement provides only that "the agency" – not the Board – "will reinstate her termination." IAF2, Compact Disc. Specific performance of a contract may be denied if the party requesting it has an adequate remedy available through non-

judicial means, including some type of self-help, whether provided by the terms of the contract itself or by some other means. *Bales v. Department of Transportation*, 54 M.S.P.R. 187, 191 (1992); 5A Corbin on Contracts, § 1158 (1964). Because the settlement agreement gives the agency the remedy to itself reinstate the appellant's termination, the Board's involvement is not required. However, even if the settlement agreement had specified that the Board would reinstate the appellant's removal in these circumstances, such a provision would be void as contrary to the principles discussed in *Eaton*. The Board does not have the authority to remove an employee or to advise an agency to do so, but only to review an agency's decision to take such action. *Eaton*, 50 M.S.P.R. at 380. In sum, an order from the Board to reinstate the appellant's termination would be neither authorized by the settlement agreement nor within the Board's jurisdiction.

¶9 In regard to the agency's request that the Board declare that the appellant has no right of Board appeal from such a removal action, the settlement agreement states only that if the agency reinstates the appellant's removal, the "Appellant will have no right of appeal in the event the agency takes such [removal] action." Even if the agency had already converted the appellant's resignation into a removal, the agreement does not specify that the Board would then preemptively declare the appellant to have no right of MSPB appeal. Moreover, even if the settlement agreement had specified that the Board would issue such a direction, a provision of that kind would be void because the Board lacks the authority to issue advisory opinions. *Eaton*, 50 M.S.P.R. at 380.

¶10 For the above reasons, the agency's petition for enforcement is DISMISSED.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board regarding the agency's petition for enforcement. 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.