

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

2010 MSPB 227

Docket No. DA-3443-06-0531-X-1

**Eloy J. Hernandez,
Appellant,**

v.

**Department of Defense,
Agency.**

November 17, 2010

Arthur G. Vega, Esquire, San Antonio, Texas, for the appellant.

Michael Walby, Esquire, Battle Creek, Michigan, 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 the administrative judge's recommendation, which found that the agency had not fully complied with the parties' settlement agreement. For the reasons stated below, we find that the agency is now in compliance with the agreement and, therefore, we DENY the appellant's petition for enforcement.

BACKGROUND

¶2 On June 30, 2006, the appellant was separated from the agency pursuant to a reduction in force. Initial Appeal File (IAF), Vol. 1, Tab 7, Subtabs 4a & 4b.

At that time, the appellant was not enrolled in the agency's Priority Placement Program (PPP), which matches participants with agency job opportunities. IAF, Vol. 2, Tab 27 at 4. The appellant appealed his separation to the Board, and in February 2007 the parties entered into a settlement agreement resolving the appeal. IAF, Vol. 2, Tab 32. The agreement provided, in pertinent part, that "[t]he appellant will be re-considered for placement in the PPP for a period of one year beginning 7 calendar days after the last signature on this Agreement." *Id.* at 1. The last signature on the agreement was dated February 17, 2007, *id.* at 2, and therefore seven days thereafter would be February 24, 2007. Pursuant to the agreement, the administrative judge dismissed the appeal on February 16, 2007. IAF, Vol. 2, Tab 33.

¶3 Subsequently, the appellant filed a petition for enforcement alleging, inter alia, that the agency failed to comply with the agreement because it enrolled him in the PPP for only four and one-half months, from February 20, 2007, to July 2, 2007. Compliance File (CF), Tab 1. The administrative judge denied the petition, CF, Tab 5, and the Board denied the petition for review of the administrative judge's decision. Petition for Review File, Tab 3. On review, the U.S. Court of Appeals for the Federal Circuit reversed and remanded. *Hernandez v. Department of Defense*, 325 F. App'x 905 (Fed. Cir. 2009). The Federal Circuit held that the agency was obligated under the settlement agreement to enroll the appellant in the PPP for 12 months following the agreement, and that it breached the agreement by placing him on the PPP for only four and one-half months. *Id.* at 908. The court instructed the Board, on remand, to determine the appropriate remedy for the agency's breach. *Id.*

¶4 On remand, the Board determined that the agency's obligation to enroll the appellant in the PPP for 12 months after the effective date of the settlement agreement was a matter of vital importance to the contract, and therefore the agency's breach was a material one. *Hernandez v. Department of Defense*, [112 M.S.P.R. 262](#), ¶ 6 (2009). The Board found that the agency could retroactively

enroll the appellant in the PPP for the period between July 3, 2007, the day after the agency canceled the appellant's enrollment, and February 24, 2008, exactly one year and 7 days after the last signature on the agreement. *Id.*, ¶ 8. The Board remanded the case to the regional office and directed that the appellant be given the option to (1) rescind the agreement and proceed with the appeal challenging his RIF separation or (2) enforce the agreement. *Id.*, ¶ 10.

¶5 In the proceedings before the administrative judge, the appellant elected to enforce the settlement agreement. Board Remand File (BF), Tab 4. The administrative judge ordered the agency to file a written response concerning its compliance with the parties' agreement. BF, Tab 5. The agency responded that it retroactively enrolled the appellant in the PPP from July 3, 2007, to February 24, 2008, found that he would have been referred for two vacancies during that time period, and determined that neither position could be offered to the appellant because he had not been deemed well-qualified by the registering human resources office. BF, Tab 6. The appellant filed a reply arguing that the agency's conclusion that he was not well-qualified for the positions was unsupported by any evidence. BF, Tab 8 at 2. He also alleged that he should have been referred for at least eight additional vacancies during the relevant period. *Id.* at 6-7.

¶6 In her recommendation, the administrative judge found that the record did not support the appellant's contention that he should have been considered for the additional positions that he identified in his response. BF, Tab 11 at 4. With regard to the two positions identified by the agency, the administrative judge found that the agency failed to support its assertions that the appellant was not well-qualified with sufficient evidence. *Id.* at 6. The administrative judge ordered the agency to determine whether the appellant was well-qualified for the two positions and, if so, to place him in one of the positions. *Id.* The administrative judge further directed that, if the agency finds that the appellant is not well-qualified for either position, it must explain its findings in affidavits from the individuals who made that determination. *Id.* at 6-7.

¶7 The case was then forwarded to the Board for enforcement purposes. Compliance Referral File (CRF), Tab 2. The agency submitted an affidavit from a Human Resources Specialist explaining why the agency did not consider the appellant well-qualified for the two positions. CRF, Tab 3. The appellant filed a reply contending that he was well-qualified for both positions. CRF, Tab 4.

ANALYSIS

¶8 Because a settlement agreement is a contract, the Board will adjudicate an enforcement proceeding relevant to a settlement agreement in accordance with contract law. *See Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). Under settled contract law, the party alleging breach of a settlement agreement has the burden of proving such breach. *Kramer v. Department of the Navy*, [46 M.S.P.R. 187](#), 190 (1990).

¶9 Here, the agreement provided, in relevant part, that “[t]he appellant will be re-considered for placement in the PPP for a period of one year beginning 7 calendar days after the last signature on this Agreement.” IAF, Tab 32 at 1. The Federal Circuit construed this language to mean that the appellant must be enrolled in the PPP for 12 months following the agreement. *Hernandez*, 325 F. App’x at 908. The agency previously enrolled the appellant from February 20, 2007, to July 2, 2007, and it now states that it has retroactively enrolled the appellant in the PPP from July 3, 2007, to February 24, 2008. BF, Tab 6 at 5. The agency states that the appellant would have been referred for two vacancies, but neither position could be offered to him because he is not well-qualified for the positions as required by the agency’s PPP regulations. *Id. See* IAF, Tab 27, Ex. 10 (DoD Instruction 1400.25, SC1800.3.13). The agency has submitted an affidavit from Candace Meckley, a human resources specialist, who avers that she has analyzed the appellant’s qualifications and determined that he is not well-qualified for either vacancy. CRF, Tab 3 at 7-9. We find, therefore, that the agency has complied with the administrative judge’s recommendation that it

provide an explanation of its findings and support that explanation with affidavits from the individuals who made that determination. *See* BF, Tab 11 at 6-7.

¶10 The appellant responds with his own detailed affidavit in which he lists his qualifications for the two positions and states that he is well-qualified for either position. CRF, Tab 4, Ex. 3. The agency’s regulations state that “[r]egistrants who contend that mistakes have been made, such as in determination of qualifications or entitlements, may request reconsideration in accordance with procedures established in DoD 1400.20-1-M (reference (d)).” IAF, Tab 27, Ex. 10 (DoD Instruction 1400.25, SC1800.3.13). To the extent that the appellant believes that the agency has erred in its determination of his qualifications, his remedy lies with the agency’s reconsideration procedures.

¶11 The appellant also alleges that the agency has acted in bad faith. CRF, Tab 4 at 4. He contends that Ms. Meckley’s affidavit is “subjective” and “nothing more than window dressing.” *Id.* at 2-5. It is well-settled that implicit in any settlement agreement, as under other contracts, is a requirement that the parties fulfill their respective contractual obligations in good faith. *See Link v. Department of the Treasury*, [51 F.3d 1577](#), 1582 (Fed. Cir. 1995). “Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.” Restatement (Second) of Contracts, § 205 cmt. a (1979). The appellant’s mere disagreement with the agency’s conclusions is not sufficient to show that the agency has taken actions that fall within the range of conduct characterized as “bad faith.” Under these circumstances, we find that the agency has complied with its obligation to place the appellant in the PPP for a period of one year pursuant to the settlement agreement.

ORDER

¶12 Accordingly, the Board finds the agency in compliance and DENIES the appellant's petition for enforcement. 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.ca9c.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.