UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 82

Docket No. AT-0752-07-0985-C-1

Sylvia M. Kitt,

Appellant,

v.

Department of the Navy,

Agency.

September 2, 2011

Sylvia M. Kitt, Jacksonville, Florida, pro se.

Obisia Rodriguez, Gulfport, Mississippi, 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 appellant's petition for review of the initial decision that denied her petition for enforcement of a settlement agreement. For the reasons set forth below, we GRANT the appellant's petition for review and REMAND the case to the Atlanta Regional Office for further adjudication consistent with this order.

BACKGROUND

¶2 The agency removed the appellant from the federal service effective August 11, 2007. *See* Initial Appeal File, Docket No. AT-0752-07-0985-I-1

(IAF-1), Tab 4, Subtabs 4a, 4b. The appellant filed a timely appeal with the Atlanta Regional Office. *See id.*, Tab 1. On March 18, 2008, the parties mutually entered into a "last chance/settlement agreement" that was the joint product of the employee, her representative, and the agency. *See* Initial Appeal File, Docket No. AT-0752-07-0985-I-2 (IAF-2), Tab 10 at 5. One of the terms of the agreement was that the agency agreed "[t]o change the nature of Employee's Standard Form [SF] 50 bearing effective date 11 August 2007 from Removal to a 30-days Suspension." *See id*. at 1 (internal punctuation omitted).

¶3 By letter dated April 15, 2009, the agency informed the appellant that she was being denied a security clearance, in part because her history included the fact that her command "issued [her] a Notice of Removal from federal service" and because her "employment records" reflect that she received a 30-day suspension. *See* Compliance Appeal File (CAF), Tab 1 at 23-24. On October 25, 2010, the appellant filed a petition for enforcement asserting that the agency breached the agreement because documentation of her removal remained in her Official Personnel File (OPF). *See id*. at 45. In response, the agency asserted that the appellant's petition was untimely and that the agreement did not require that the agency purge documents related to the removal from the appellant's OPF. *See id*., Tab 3 at 3-5.

¶4 Based upon the written record, the administrative judge determined that the petition for enforcement was timely filed but that the agreement had not been breached because it did not include any language requiring the agency to expunge the removal from the appellant's OPF or other records. *See* CAF, Tab 8, Compliance Initial Decision (CID). The appellant filed a timely petition for review, to which the agency filed a timely response in opposition. *See* Petition for Review (PFR) File, Tabs 1, 5, 6. On June 21, 2011, the Clerk of the Board ordered the agency to provide a copy of all documents in the appellant's OPF from 2006 to the present. *See* PFR File, Tab 9. The agency's response shows

that the SF-50 documenting the appellant's August 11, 2007 removal action remains in the appellant's OPF. *See* PFR File, Tab 10 at 63.

ANALYSIS

¶5 Under the general principles of settlement construction, the words of the agreement itself are of paramount importance. *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 17 (2009), *aff'd*, 420 F. App'x 980 (Fed. Cir. 2011). In construing the terms of a settlement agreement, the Board examines the four corners of the agreement to determine the parties' intent. *Id.*; *Kelley v. Department of the Air Force*, 50 M.S.P.R. 635, 642 (1991). The parties are bound by the terms of their settlement. *Kelley*, 50 M.S.P.R. at 641.

¶6 This case is analogous to the case that the administrative judge relied upon, *Cutrufello v. U.S. Postal Service*, 56 M.S.P.R. 99 (1992). In *Cutrufello*, the settlement agreement provided that the agency would "cancel [the] appellant's removal" and place him in a leave without pay status. *See id*. at 101. The Board held that because the appellant did not identify any provision of the agreement that required the agency to expunge references to his removal from any files, the agency did not breach the agreement by retaining references to the removal action in its records. *See id.* at 101-02. In this case, the administrative judge relied on *Cutrufello* when reaching her decision. *See* CID at 4.

¶7 However, in *Conant v. Office of Personnel Management*, 255 F.3d 1371 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit reached a different conclusion when confronted with similar facts. In *Conant*, the employing agency, the Internal Revenue Service (IRS), reached an agreement with an employee whereby:

> [T]he IRS stipulated that it would "rescind" the original Removal SF-50 and issue a new SF-50 stating that Ms. Conant resigned for personal reasons. By agreeing to "rescind" the Removal SF-50, the IRS promised in effect to destroy it, erasing "removal" and all reasons for such a removal from Ms. Conant's professional record with the agency. By agreeing to issue a new SF-50 in its place, the

> IRS promised that the only legal document recording the end of Ms. Conant's employment with the agency would henceforth be the SF-50 stating she resigned for personal reasons.

Id. at 1376.

¶8 In light of our reviewing court's decision in *Conant*, we find that the administrative judge incorrectly relied on *Cutrufello*. *See id*.; *Cutrufello*, 56 M.S.P.R. at 101; CID. The word "cancel," which was used in *Cutrufello*, means "to bring to nothingness," to "omit" or "to remove."[*] *See* Webster's Ninth New Collegiate Dictionary 200 (9th ed. 1985); *Cutrufello*, 56 M.S.P.R. at 101. Given our reviewing court's view of the meaning of the analogous word "rescind," which the dictionary defines as to "remove" or "cancel," the word "cancel" does not permit a record of a canceled SF-50 to remain in an OPF. *See* Webster's Ninth New Collegiate Dictionary 1002 (9th ed. 1985). To the extent that *Cutrufello* held otherwise, it is expressly overruled.

¶9 In the appellant's case, the agreement stated that the agency would "change the nature" of the employee's SF-50 and place the employee in a leave without pay status. *See* IAF-2, Tab 10 at 1. The agreement did not explicitly promise to expunge all mention of the removal action from the OPF, and it made no mention of other recordkeeping systems. *See id*. at 1-6. However, the word "change" means "to replace with another." *See* Webster's Ninth New Collegiate Dictionary 225 (9th ed. 1985); IAF-2, Tab 10 at 1. In the context of this appeal and in light of the Federal Circuit's holding in *Conant*, we hold that when the agency agreed to "change" the nature of action on the SF-50 from a removal to a suspension, and provided no express language permitting other disclosures of the removal, it was agreeing to remove any record of the appellant's removal. *See* IAF-2, Tab 10; *but see Allen*, 112 M.S.P.R. 659, ¶ 19 (holding that if an agreement includes "express

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[*] When determining the meaning of a word, the "dictionary" and "common sense" must be followed. *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999).

language" permitting the disclosure of removal-related information to third parties, the carved out exception will be recognized).

¶10 This holding is consistent with the Office of Personnel Management's (OPM's) Guide to Processing Personnel Actions, which instructs agencies that when they process a cancellation SF-50 to substitute a new action for the original action, the agency shall "remove from the OPF the personnel action (SF 50) being cancelled." *Id*. at Ch. 32-6. One example provided in the guide of a situation in which a cancellation SF-50 is warranted is "when a 15-day suspension is substituted for a 30-day suspension." *See id*., Ch. 32-4. If OPM's guide instructs agencies to remove an SF-50 from the OPF when the length of a suspension is reduced, then it is consistent with the guide to hold that the removal of the SF-50 from the OPF is warranted when a removal action is mitigated to a suspension. However, despite the agency's agreement to change the SF-50, and the instructions in OPM's guide, the removal SF-50 currently resides within the appellant's OPF. *See id*., Ch. 32-6; PFR File, Tab 10 at 63. The agency has therefore breached the agreement.

¶11 A breach of a settlement agreement is material when it relates to a matter of vital importance or goes to the essence of the contract. *Doe v. Department of the Army*, 116 M.S.P.R. 160, ¶ 10 (2011); *see Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381 (Fed. Cir. 2007). In this case, the agreement to "change" the SF-50 was the first sentence in the first of 16 numbered items in the agreement. *See* IAF-2, Tab 10 at 1. As the personnel action being appealed was the appellant's removal, we hold that changing the SF-50 that reflected this action went to the essence of the contract, and that the agency's breach was therefore material. *See* IAF-1, Tab 1.

¶12 When one party commits a material breach of a settlement agreement, the other party is entitled to either enforce the settlement agreement or to rescind it and to reinstate her appeal. *Eagleheart v. U.S. Postal Service*, 113 M.S.P.R. 89, ¶ 16 (2009); *Hernandez v. Department of Defense*, 112 M.S.P.R. 262, ¶ 7 (2009).

If the agreement is rescinded, the settlement terms become inoperative, and the parties are essentially restored to the status quo ante. *Eagleheart*, 113 M.S.P.R. 89, ¶ 16; *see Mullins v. Department of the Air Force*, 79 M.S.P.R. 206, ¶ 13 (1998). The appellant would therefore risk losing any benefits that she received under the agreement if she rescinds it. *Eagleheart*, 113 M.S.P.R. 89, ¶ 16; *Mullins*, 79 M.S.P.R. 206, ¶ 13. As the appellant did not elect enforcement of the agreement or the reinstatement of her initial appeal, her enforcement appeal is remanded to the Atlanta Regional Office in order to permit the appellant to make an informed choice. *See* PFR File, Tab 1, Tab 11 at 3. If the appellant chooses to rescind the agreement, then the removal appeal must be adjudicated on its merits. *See Eagleheart*, 113 M.S.P.R. 89, ¶ 16; *Mullins*, 79 M.S.P.R. 206, ¶ 13.

ORDER

¶13 We remand this appeal to the Atlanta Regional Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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