UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GEORGE VANOVER,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
DE-0752-09-0052-X-1

DATE: July 2, 2012

THIS ORDER IS NONPRECEDENTIAL[1]

George Vanover, Willcox, Arizona, pro se.

Gary M. Gilbert, Esquire, and Nicholas H. Sikon, Esquire, Silver Spring, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate concurring opinion.

ORDER

This case is before the Board based on the administrative judge's Recommendation finding the agency in partial non-compliance with the terms of a settlement agreement. Docket No. DE-0752-09-0052-C-2, Compliance File

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

(CF) Tab 6; Docket No. DE-0752-09-0052-X-1, Compliance Referral File (CRF) Tab 1 (Recommendation). For the reasons set forth below, we find the agency remains in non-compliance with one matter and order the agency to take the actions necessary to bring itself into compliance.

BACKGROUND

The appellant filed a Board appeal challenging his removal from the position of Administrative Assistant, GS-303-06, effective September 27, 2008. Docket No. DE-0752-09-0052-I-1, Initial Appeal File (IAF), Tab 1. On June 26, 2009, the parties executed a settlement agreement resolving the appeal. IAF, Tab 42 at 3-8.[2]

Under Section 1 of the settlement agreement, the agency agreed to: reinstate the appellant retroactive to September 27, 2008, the date of his termination (Section 1, Clause 1); pay the appellant back pay and benefits covering September 27, 2008, through April 27, 2009, (Clause 1(b)); place the appellant in Leave Without Pay (LWOP) status from April 28, 2009, until six months after the effective date of the agreement, "upon which Appellant agrees to resign" (Clause 2); rescind and expunge from the appellant's Official Personnel File (OPF) "any reference to the removal action," except certain records noted in the agreement (Clause 3); and provide a neutral reference for the appellant in response to employment inquiries (Clause 4). *Id.* at 4-5.

Under Section 2 of the agreement, the appellant agreed to "[r]esign from the Agency no later than six months from the effective date of this Agreement. If Appellant fails to submit his notice of resignation by that time, this Agreement shall serve as such notice." *Id.* at 6 (Section 2, Clause 5).

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[2] The administrative judge accepted the settlement agreement into the record and retained jurisdiction for enforcement purposes after finding that the agreement was lawful and that the parties understood and freely accepted the terms of the agreement. IAF, Tab 43 at 2.

Under Section 3, Clause 3, the parties agreed that the agreement resolves all claims against the agency arising up to and including the effective date of the agreement, except for EEOC No. 541-2007-00091X, "any OWCP [Office of Workers' Compensation Programs] claims, and/or claims specifically involving disability retirement with OPM [Office of Personnel Management] or non-employment matters with SSA [Social Security Administration]." Further, under Section 3, Clause 4, the parties agreed: "There are no other Agreements between the parties, either expressed or implied, oral or written relating to the events that gave rise to MSPB Docket No. DE-0752-09-0052-I-1." *Id.* at 7.

The parties' settlement agreement, executed on June 26, 2009, became effective on July 3, 2009. *Id.* at 8, Recommendation at 4. Six months after July 3, 2009, was January 3, 2010. *Id.* On January 13, 2011, the appellant filed this petition for enforcement. CF, Tab 1.[3] The administrative judge recommended granting the petition in part and denying it in part. Recommendation at 7.

ANALYSIS

The appellant claimed the agency was in non-compliance with the settlement agreement by: (1) failing to process his resignation with an effective date of no later than January 3, 2010 (Claim 1); (2) failing to advise the Thrift Savings Plan (TSP) Fund of his resignation (Claim 2); (3) failing to notify the appellant that the agency had changed representatives responsible for providing neutral references for his employment history (Claim 3); and (4) failing to rescind and expunge his OPF of references to the removal action, which allegedly contributed to OPM's June 8, 2010 denial of his August 14, 2009 application for disability retirement (Claim 4). Recommendation at 3-4.

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[3] This was the appellant's second petition for enforcement in this case. Recommendation at 1 n.1. On July 28, 2009, the appellant filed a petition for enforcement, but withdrew it on August 12, 2009, based on the agency's post-petition actions complying with portions of the settlement agreement. MSPB Docket No. DE-0752-09-0052-C-1, Tab 6.

Claim 1. The appellant's claim that the agency failed to implement his resignation is MOOT.

The administrative judge found that the agency was obligated to implement the appellant's resignation with an effective date of no later than January 3, 2010. Recommendation at 5, citing settlement agreement, Section 1, Clause 2, and Section 2, Clause 5. The administrative judge found that the agency fulfilled its obligation "to implement the appellant's resignation" – "albeit belatedly" – after the appellant filed his January 13, 2011 petition for enforcement. Recommendation at 5. We therefore find Claim 1 to be MOOT.[4]

Claim 2. The appellant's claim that the agency failed to advise the TSP Fund of his resignation is MOOT.

The administrative judge found that the agency failed to advise the TSP Fund of the appellant's resignation and thereby violated Section 1, Clause 2, and Section 2, Clause 5, of the settlement agreement. Recommendation at 6. The administrative judge noted the appellant's allegation that "as of January 11, 2011," the agency's inaction was preventing him from withdrawing money from his TSP account. Recommendation at 4. The administrative judge found that the agency failed to submit any evidence that the TSP Fund had been advised "that their records need to be corrected or that the TSP Fund records actually have been corrected." *Id.* at 6.

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[4] The appellant seeks damages of $105,000 for the loss of his home, allegedly due to his inability to withdraw his TSP funds, $209,699.09 for medical expenses incurred, allegedly due to the agency's retroactive implementation of his resignation, and $300,000 for "other consequential and emotional damages for the stress that caused Appellant[']s wife's August 7, 2011 near fatal heart attack." CRF, Tab 12 at 9. However, the Board lacks the authority to order the agency to pay such costs or damages for a breach of a settlement agreement, in the absence of express language in the settlement agreement requiring it, or an express waiver of sovereign immunity. *See Foreman v. Department of the Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001); *Young v. U.S. Postal Service*, 117 M.S.P.R. 211 n.1 (2012).

Subsequently, the agency submitted evidence that it has notified the TSP Fund of the appellant's resignation and also that the appellant has fully withdrawn his TSP account. CRF, Tab 11 at 6-7, 18-19. The agency's submission does not make clear when it notified the TSP Fund of the resignation, but the appellant has not disputed – in any of his multiple filings subsequent to the agency's submission – that he has fully withdrawn his TSP account. Because the appellant has obtained all available relief for this matter, we find Claim 2 to be MOOT.

Claim 3. The appellant's claim that the agency failed to notify him of a change in designated point of contact for a neutral reference did not establish a breach.

> Section 1, Clause 4 of the settlement agreement required the agency to:
>
> Provide a neutral employment reference in response to inquiries regarding the Appellant's employment with the Agency. The designated representative to whom Appellant should direct employment inquiries is Alex Montano, Albuquerque Service Center[.]

IAF, Tab 42 at 5. The appellant alleged that the agency failed to notify him that it had changed representatives responsible for providing neutral references. Recommendation at 4. However, the administrative judge found no claim that the appellant had referred a potential employer to Montano, or that any referral was mishandled by the agency to the appellant's detriment. Recommendation at 7. Therefore, the administrative judge found no agency breach, to date, of Section 1, Clause 4. Further, the appellant has not provided any evidence or argument disputing that finding. We find the administrative judge's ruling on Claim 3 was appropriate and therefore find no violation of Section 1, Clause 4.

Claim 4. The agency is in PARTIAL NON-COMPLIANCE with its obligation to expunge the appellant's personnel records.

The administrative judge found the agency in non-compliance with Section 1, Clause 3 of the settlement agreement, which required the agency to:

> Rescind and expunge from Appellant's Official Personnel File (excepting only those records necessary to effect the terms of this Agreement and other records necessary to litigate Appellant's pending EEO complaint and/or necessary for defending the instant MSPB appeal) any reference to the removal action at issue in this case within thirty (30 days) of the effective date of this Agreement.

IAF, Tab 42 at 5, Recommendation at 6-7. The Recommendation finds the agency's evidence of compliance with this provision to be "insufficient," but does not specify the nature of the agency's obligation or how the agency was non-compliant. Recommendation at 6. The Recommendation suggests the agency either (a) failed to expunge the OPF, or (b) had a duty to rescind and expunge related information in OPM's possession, but failed to fulfill that duty. Recommendation at 4, 6-7.

The effective date of the settlement agreement was July 3, 2009. Recommendation at 4. The agency had 30 days from July 3, 2009, to expunge the OPF, which was until August 2, 2009. Section 1, Clause 3. According to a sworn declaration by an agency employee relations specialist, any evidence of the appellant's removal was expunged from his OPF "prior to August 3, 2009." CF, Tab 11, subtab 11 (August 10, 2009 declaration). Unrebutted affidavits are sufficient to establish the matters asserted. *Engel v. U.S. Postal Service*, 114 M.S.P.R. 541, ¶ 8 (2010). As the agency observes, the appellant has never claimed to have reviewed his OPF on or after August 3, 2009, and found any reference to his removal. CRF, Tab 14 at 4. Thus, the agency's affidavit, on its face, satisfies the agency's obligations under Section 1, Clause 3.

The compliance dispute arises from events surrounding the appellant's application for disability retirement. On August 14, 2009, OPM received the appellant's application. Recommendation at 4, CF, Tab 8 at 139. On June 8, 2010, OPM sent the appellant a letter denying his application. Recommendation at 6, CF, Tab 8 at 146-51. OPM's letter stated in part:

> A review of the file shows you were removed from Federal service effective September 27, 2008. Therefore, our determination is limited to the status of your conditions prior to the date of your removal. We note the file does not include a copy of the Proposed Removal letter and Removal letter for our review.

Id. at 148. OPM's letter also refers to a "Supervisor Statement" that "did not document a service deficiency," the results of a functional capacity evaluation, the fact that "it appears [the appellant was] able to perform the physical demands of [his] position prior to [his] removal," and a lack of evidence that the appellant's "condition warranted accommodation or reassignment." *Id.* The appellant alleged that OPM's June 8, 2010 denial of his application was "based in part on records documenting his removal from the federal service effective September 28, 2008." Recommendation at 4.[5] The administrative judge did not directly substantiate that allegation, but found the agency's August 10, 2009 declaration to be "insufficient due to OPM's findings." Recommendation at 6. The administrative judge suggested that her finding of non-compliance might have been different if the agency had submitted to the Board "a copy of any of the documentation provided to OPM by the agency regarding the appellant's separation or executed by the agency as part of the appellant's disability application, for example, the certified payroll record, SF-3112B (Supervisor's Statement), and SF-3112D (Certification of Accommodation)." *Id.*

The agency assigns error to the administrative judge's inferences that (a) the settlement agreement obligated the agency to expunge records other than the OPF and (b) OPM factored the appellant's removal into its decision denying his disability retirement application. CRF, Tab 11 at 12 n.12.

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[5] It appears the administrative judge intended to refer to September 27, 2008, not September 28. The administrative judge's citation is to OPM's letter, which identifies the removal as being "effective September 27, 2008." Recommendation at 4; CF, Tab 8 at 148.

(a) The agency is **ORDERED** to request that OPM amend its records of the appellant.

Although neither the administrative judge nor the agency cited to the case, we take guidance from our reviewing court's interpretation of a similar settlement agreement in *King v. Department of the Navy*, 130 F.3d 1031 (Fed. Cir. 1997) (remanding to Board); MSPB Docket No. SE-0752-92-0328-X-1, 80 M.S.P.R. 466 (1998) (Table) (dismissing petition as moot); 178 F.3d 1313 (Fed. Cir. 1999) (Table) (affirming Board). The *King* settlement agreement provided that the agency would cancel its removal action and "remove all reference to the removal action from her Official Personnel File," while the appellant would resign. 130 F.3d at 1033. Vanover's settlement agreement is identical to the *King* agreement in all respects relevant to this claim; the agency agreed to retroactively reinstate the appellant and rescind and expunge from his OPF "any reference to the removal action," while the appellant agreed to resign. IAF, Tab 42 at 4-5.

In *King*, our reviewing court found that the settlement agreement required the Navy not only to purge local personnel records, but also to pursue the same with the records kept by OPM and the Defense Finance and Accounting Service (DFAS). 130 F.3d at 1033. The court reasoned that to interpret the agreement more narrowly would deny the petitioner the benefit of her bargain, which the court inferred to be a clean slate to pursue future employment. *Id.* The court disposed of the Navy's argument that it lacked control over OPM and DFAS's records, because there was no assertion that OPM and DFAS had refused to comply with the settlement agreement. *Id.* at 1034. The court stated: "We assume that [OPM and DFAS] have not so refused, and thus do not reach the issue of the Navy's, or the Board's, authority to enter into and to enforce this settlement agreement." *Id.* The Federal Circuit remanded *King* to the Board. *Id.*

On remand, as later summarized by our reviewing court in an unpublished decision, the administrative judge found that the only document in the record referring to King's removal was a retirement register maintained by DFAS. 178

F.3d 1313 at *2. For the first time on remand, the appellant asked the administrative judge to rescind the agreement. *Id.* The administrative judge recommended that the agency request the amendment of King's retirement record by DFAS, *id.*, but determined that rescission was not appropriate because the agency's breach of the settlement agreement had been immaterial; there was no evidence that the retirement register had been released to anyone and the obscure nature of the record made it unlikely that potential employers would seek it. *Id.* The Navy complied with the administrative judge's recommendation; DFAS acceded and amended the record to show that King's separation was the result of a resignation rather than a removal. *Id.* Thereafter, the Board dismissed King's petition for enforcement as moot. *Id.* The Federal Circuit affirmed the Board's finding that the agency had brought itself into compliance and that rescission was inappropriate. *Id.* at *3. The Federal Circuit noted King's apparent argument that the Navy should have searched for other uncorrected records but stated it was confident that if the Navy or Ms. King discovers other uncorrected records, the Navy will continue to comply with the settlement agreement and promptly correct or request correction of the relevant records." *Id.*

In the instant matter, the agency contends that its obligation to expunge records was limited to only the appellant's OPF. The agency observes that any requirement for the agency to expunge records beyond the OPF can only be inferred because the agreement contains no such explicit requirement. *Id.* at **4, 9. The agency suggests that inferring such an obligation to expunge records beyond the OPF is inappropriate where OPM records are neither controlled nor maintained by the agency. CRF, Tab 11 at 4 n.4 and 9 n.9, Tab 15 at 2. The agency also highlights the settlement agreement's language that requires the agency to expunge the OPF but exempts the agency from expunging "records necessary to effect the terms of this agreement;" the agency contends that OPM's records "do not fall within the scope of this term of the settlement agreement as the term specifically identifies Appellant's OPF and excludes 'records necessary

to effect the terms' of the agreement." CRF, Tab 15 at 3. However, the agency fails to explain how OPM's records could be "necessary to effectuate the terms" of the agreement, if the agency has no control over those records.

Because Vanover's settlement agreement is the same in all relevant respects to the *King* agreement, we find *King*'s rationale applicable here. We therefore find that the agency was required to pursue the expungement of OPM's relevant records in order to ensure that the appellant receives the benefit of his bargain. The agency's suggestion that OPM has already done so is unsupported by the record. Although the agency asserts that "OPM was automatically notified" of the cancellation of the appellant's removal, it concedes, with supporting documentation, that "references to a canceled removal remain in the electronic EmpowHR system" and that "[a]ccordingly, the TSP fund and OPM likely retain references to a canceled removal." CRF, Tab 11 at 9 n.9. OPM's having references to a canceled removal is not identical to OPM's having clean references to LWOP and a subsequent resignation. Moreover, as the Federal Circuit ruled in *King*, we assume that OPM has not refused to expunge the records. 130 F.3d at 1034. We therefore **ORDER** the agency to request OPM to amend its records of the appellant to show that his separation was the result of a resignation rather than a removal.[6]

(b) The agency's failure to pursue the expungement of the appellant's OPM records did not harm the appellant's retirement application.

Our review of this particular issue is limited to determining whether the agency materially harmed the appellant's retirement application by not fully pursuing the expungement of OPM's records pertaining to his removal. This

[6] Although the agency acknowledges that the TSP Fund may have records referring to the appellant's removal, CRF, Tab 11 at 9 n.9, our order does not reach the TSP Fund, because as previously stated, the appellant has fully withdrawn his TSP account and that matter is therefore moot.

opinion therefore does not constitute a review of the merits of OPM's decision denying the appellant's disability retirement application, a matter for which, to our knowledge, the appellant has never requested reconsideration, despite being notified of the right to do so. CF, Tab 8, subtab 11 at 149.[7]

OPM's June 8, 2010 letter denying the appellant's disability retirement application contains no indication that OPM relied on the fact that he was removed in denying his application. To the contrary, OPM's letter identifies the removal date only in explaining that its "determination is limited to the status of your conditions prior to the date of your removal." *Id.* at 148. Identifying such a date was appropriate to enable OPM to verify that the applicant was not alleging a disability that arose after his separation. *Hardy v. Office of Personnel Management*, 98 M.S.P.R. 323, ¶ 11 (2005) (holding disability must pre-date employee's separation). Nor is there any indication that the appellant was relying on any disability that arose between his September 27, 2008 removal and his August 14, 2009 retirement application. A separation by removal is not supposed to be analyzed differently than a separation by resignation, and there is no indication that OPM did so here. *Heller v. Office of Personnel Management*, 32 M.S.P.R. 204, 206 (1987).[8] Therefore, we do not find that the agency's failure to pursue the expungement of the appellant's OPM records harmed his retirement application.

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[7] We observe that OPM's notice to the appellant of his right to request reconsideration within OPM does not seem to spell out that the appellant would ultimately acquire the right to appeal OPM's denial to the MSPB. Nonetheless, it is beyond the purview of this petition for enforcement to review the appellant's due process rights in seeking disability retirement.

[8] OPM's letter notes that "the file does not include a copy of the Proposed Removal letter and Removal letter for [its] review." CF, Tab 8, subtab 11 at 148.

ORDER

As set forth above, the agency has failed to fully comply with the parties' settlement agreement. Accordingly, we ORDER the agency to submit to the Clerk of the Board within 15 days of the date of this order satisfactory evidence of compliance with this decision.

The appellant may respond to the agency's evidence of compliance within 15 days of the date of service of the agency's submission. If the appellant does not respond to the agency's evidence of compliance, the Board may assume that he is satisfied with the agency's actions and dismiss the petition for enforcement.

A finding of non-compliance may result in the imposition of sanctions set forth in 5 C.F.R. § 1201.183(b) and (c). The Board's authority to impose sanctions includes the authority to order that the responsible agency official "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." 5 U.S.C. § 1204(e)(2)(A).

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF MEMBER MARK A. ROBBINS

in

George Vanover v. Department of Agriculture

MSPB Docket No. DE-0752-09-0052-X-1

¶1 I concur in the decision to order the agency to ask the Office of Personnel Management (OPM) to delete from its records any references to the appellant's removal. I write separately, however, to express my concern over the state of the law in this area.

¶2 In *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1373-78 (Fed. Cir. 2001), the court held that a settlement agreement in which the agency promised to cancel a removal for cause, separate the appellant by resignation, and provide her with a clean employment record could not be interpreted to preclude the agency from sharing information with law enforcement authorities about potential criminal conduct allegedly committed by the appellant and related to her removal; such an interpretation would contravene public policy favoring detection of crimes and enforcement of criminal laws. In *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶¶ 20-23 (2009), *aff'd*, 420 F. App'x 980 (Fed. Cir. 2011), the Board held that a similar agreement could not be interpreted to require the agency to withhold evidence from the Department of Labor (DoL) that would weaken the appellant's claim for workers' compensation benefits because, among other things, the agency had a general legal duty to provide DoL with truthful information relevant to a workers' compensation claim. In *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269, ¶¶ 9-15 (2001), the Board held that a similar agreement could not be interpreted to require the agency to withhold negative information about the appellant from OPM in a later background investigation into the appellant's suitability for another federal job; such an interpretation would contravene the public policy underlying the

suitability rules, which are geared toward excluding otherwise qualified individuals from the federal civil service when, if hired, such individuals' character and conduct show that they would pose an unacceptable risk to the integrity of government programs. Finally, in *Parker v. Office of Personnel Management*, 93 M.S.P.R. 529, ¶¶ 4-6, 15-21 (2003), *aff'd*, 91 F. App'x 660 (Fed. Cir. 2004), the Board held that OPM was not required to give effect to a retroactive personnel action taken pursuant to a settlement agreement between the appellant and his former employing agency, where OPM was not a party to the agreement and the retroactive personnel action was designed solely to give the appearance that the appellant had the requisite service to qualify for a retirement annuity.

¶3 In *Lutz v. U.S. Postal Service*, 485 F.3d 1377 (Fed. Cir. 2007), and *Conant v. Office of Personnel Management*, 255 F.3d 1371 (Fed. Cir. 2001), agencies entered into clean record settlement agreements with former employees who had been separated for cause. The agreements contained additional express promises that reasonably could be interpreted as obligating the agencies to support the former employees' applications for disability retirement. *Lutz* and *Conant* can thus be squared with *Fomby-Denson*, *Allen*, and *Gizzarelli*, inasmuch as the settlement agreements in the latter cases did not include express promises by the agencies to help the former employees obtain retirement benefits. The same can be said of the agreement in the present case.

¶4 In light of the caselaw discussed above, the decision in *King v. Department of the Navy*, 130 F.3d 1031 (Fed. Cir. 1997), appears to be an outlier. There, the court held that a clean-record settlement agreement between an individual and her former employing agency that did not contain any express promise regarding records concerning the individual held by other agencies nevertheless required the employing agency to attempt to persuade other agencies to amend their records. *King* cuts against the grain of *Fomby-Denson*, *Allen*, and *Gizzarelli*, which stand for the principle that an agency whose only relationship with an

individual was that of employer cannot bind itself to hinder the work of other agencies whose relationship with that individual is different, and who have their own legal obligations that are incompatible with the employing agency's willingness to erase records that reflected reality at the time they were created. *King* cuts against the grain of *Parker* as well, which stands for the principle that an agency that was not a party to a settlement agreement should not be expected to take actions consistent with the agreement that it otherwise would not have taken and that, if taken, would undermine that agency's ability to administer a government program.

¶5 Amending OPM files to bring them into conformity with a clean record settlement agreement between an individual and an employing agency could hinder OPM's ability to administer programs within its areas of responsibility. Indeed, amending OPM files raises the possibility that OPM will reach a faulty determination on an application for retirement benefits. *Parker* tells us that OPM is not required to decide a claim for retirement benefits according to a version of events that was reconstructed under an agreement to which OPM was not a party, so it is not clear that in this case OPM will accede to the agency's request to amend its records. Nevertheless, the binding precedent in *King* obligates the agency to try to persuade OPM to amend its records.

¶6 Finally, I agree with the majority that the agency's failure to attempt to persuade OPM to amend its records was not a material breach of the settlement agreement. The fact that an individual waits until after being removed to apply for disability retirement may weaken the application, *Anderson v. Office of Personnel Management*, 96 M.S.P.R. 299, ¶ 22 (2004), *aff'd*, 120 F. App'x 320 (Fed. Cir. 2005), but in this case the appellant has not shown that OPM considered his removal as a factor weighing against his application. Moreover, even if OPM's knowledge of the appellant's removal was a factor supporting OPM's denial of his application, the agency's breach still was not material

because the appellant has not shown that if the agency had asked OPM to amend its records OPM would have agreed to do so.

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Mark A. Robbins
Member