UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 115

Docket No. DE-1221-08-0449-C-3

Ryan Zumwalt,

Appellant,

v.

Department of Veterans Affairs,

Agency.

September 28, 2012

James R. Tanner, Esquire, Tooele, Utah, for the appellant.

Scott B. Davis, Esquire, Salt Lake City, Utah, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of a compliance initial decision that denied his petition for enforcement.[1] For the

[1] Originally the appellant filed multiple appeals: the present appeal, regarding alleged noncompliance with a settlement agreement entered into by the parties to an individual right of action (IRA) appeal; and two others, one regarding his removal, *Zumwalt v. Department of Veterans Affairs*, MSPB Docket No. DE-0752-10-0100-I-2, and another regarding a subsequent IRA appeal, *Zumwalt v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-10-0101-W-2. These three appeals had been joined by the administrative judge, but this compliance action is now separate. This Opinion and Order only addresses the alleged noncompliance with the settlement agreement. We

reasons discussed below, we GRANT the appellant's petition for review and REMAND the appeal to the regional office for additional findings consistent with this Opinion and Order.

BACKGROUND

¶2 In December 2006, the appellant found a packet of materials containing credit card statements of one of his supervisors that, the appellant believed, showed misuse of a government issued credit card. Hearing Transcript (HT), November 3, 2010 at 93-94. The appellant forwarded the statements to the Federal Bureau of Investigation, which forwarded them to the agency's Office of Inspector General (OIG). *Id*. at 97. OIG concluded its investigation with the finding that the supervisor's son had stolen and misused the credit card and appropriate action had been taken against the supervisor. *Id*. at 100-03.

¶3 The appellant, however, made additional allegations against the supervisor, including that the supervisor had a drunken driving offense. *Id*. at 109. To support his assertion regarding the drunken driving allegation, the appellant ran a criminal background check on the supervisor, using the Utah Bureau of Criminal Identifications (BCI) database. *Id*. at 113. The agency suspended the appellant for 3 days for misusing the BCI database to investigate his supervisor. *Id*. at 127. The appellant filed a complaint with the Office of Special Counsel (OSC), and subsequently, an individual right of action (IRA) appeal alleging that the agency suspended him in retaliation for his whistleblowing. Initial Appeal File (IAF), Tab 1. The parties entered into a settlement agreement of the IRA appeal on February 9, 2009. IAF, Tab 23. The agreement provided in relevant part that the agency would cancel the 3-day suspension and purge all documents related to it from the appellant's personnel file. *Id*. The agreement further provided that the

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addressed the appellant's removal and IRA appeals in a decision issued on September 20, 2012. *Zumwalt v. Department of Veterans Affairs*, MSPB Docket Nos. DE-0752-10-0100-I-2, DE-1221-10-0101-W-2 (Final Order, Sept. 20, 2012).

parties would "keep the terms of the agreement confidential" and the agency would disclose the terms of the agreement only to those management officials that it determined needed to know specific terms to implement them. *Id*.

¶4 Shortly after the parties entered into this agreement, on February 26, 2009, Michael Morse, an agent with the agency's OIG, heard a rumor that the appellant and two other employees had accessed the BCI database for personal reasons. HT, November 1, 2010 at 134-35. On his own initiative, Morse investigated the rumor. *Id*. at 138. During the course of the investigation, Morse contacted Utah officials to request the appellant's BCI database records. *Id*. at 141-42. When the officials, who were familiar with the appellant's earlier use of the BCI database to check on his supervisor, asked Morse what had happened as a result of that BCI database search by the appellant, Morse informed them that the appellant had received a 3-day suspension for that improper access. *Id*. at 330-31. The appellant filed a petition for enforcement, alleging that Morse's statement to the Utah officials constituted a breach of the settlement agreement. Compliance Appeal File (CAF) C-1, Tab 1 at 3. The appellant further alleged that the settlement agreement precluded Morse from investigating BCI database access that occurred prior to the date of the agreement. *Id*. at 2-3.

¶5 Based on the record developed by the parties, the administrative judge found that the appellant did not show that Morse's statement violated the terms of the settlement agreement. CAF C-3, Tab 5.[2] He found that Morse was not in the supervisory chain of command at the appellant's facility and therefore, in implementing the agreement, the responsible manager could not be reasonably expected to inform Morse that the suspension was cancelled and purged. *Id*. at 18. He also found that Morse was unaware of the settlement agreement when he

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[2] The appellant's first-filed and refiled petitions for enforcement were dismissed without prejudice. The initial decision adjudicating the petition for enforcement appears in the second refiled petition for enforcement file, *Zumwalt v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-08-0449-C-3.

decided to initiate his investigation. *Id*. at 19. The administrative judge further found that the investigation did not violate the agreement because the agreement contains no language prohibiting the agency from disciplining the appellant for misconduct that was unknown to the agency when it entered into the agreement and uncovered by an investigation that management at the appellant's facility did not initiate or control. *Id*.

¶6 The appellant has petitioned for review of the compliance initial decision. Petition for Review File (PFR File), Tab 3. The agency has responded in opposition to the petition. PFR File, Tab 7.

ANALYSIS

¶7 The Board will enforce a settlement agreement that has been entered into the record in the same manner as a final Board decision or order. *Young v. U.S. Postal Service*, 113 M.S.P.R. 609, ¶ 10 (2010); *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, as such, will be enforced in accordance with contract law. *Caston v. Department of the Interior*, 108 M.S.P.R. 190, ¶ 17 (2008). Where, as here, an appellant alleges noncompliance with a settlement agreement, the agency must produce relevant, material, and credible evidence of its compliance with the agreement, or show that there was good cause for noncompliance. *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 7 (2009), *aff'd*, 420 F. App'x 980 (Fed. Cir. 2011); *Eagleheart v. U.S. Postal Service*, 110 M.S.P.R. 642, ¶ 9 (2009). The ultimate burden, however, remains with the appellant to prove breach by a preponderance of the evidence. *Doe v. Department of the Army*, 116 M.S.P.R. 160, ¶ 7 (2011); *Eagleheart*, 110 M.S.P.R. 642, ¶ 9.

¶8 When an agency has contractually agreed to provide an employee with a clean record, both the U.S. Court of Appeals for the Federal Circuit and the Board have consistently held that the clean record agreement contains an implied

provision that precludes the agency's disclosure of information regarding the rescinded adverse action to third parties. *Allen*, 112 M.S.P.R. 659, ¶ 15; *see Conant v. Office of Personnel Management*, 255 F.3d 1371, 1376 (Fed. Cir. 2001). According to the Federal Circuit, the agency is required to destroy discipline-related documents, erasing the discipline and all reasons for such from the employee's professional record with the agency. *Conant*, 255 F.3d at 1376. Although most clean record settlements arise in the context of removal actions, the Board has applied the same standards to settlement agreements providing for the cancellation of suspensions. *See Felch v. Department of the Navy*, 112 M.S.P.R. 145, ¶¶ 2, 12-14 (2009) (applying the clean record standards to an indefinite suspension). We see no reason to distinguish the agreement in this case, which provided for cancellation of a 3-day suspension, from those involving removals or more lengthy suspensions.

¶9 In the context of a clean record settlement agreement, the Board has interpreted *Conant* as "creating the general rule that if an agency discloses information regarding the rescinded adverse action to any third party, then the agency has materially breached the clean record settlement." *Allen*, 112 M.S.P.R. 659, ¶ 15. Furthermore, the Board has found that the appellant need not show actual harm to establish that the agency's disclosure of such information constituted a material breach. *See Allison v. Department of Transportation*, 111 M.S.P.R. 62, ¶ 17 (2009); *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶ 17 (2005). Rather, 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. *Torres*, 110 M.S.P.R. 482, ¶ 9. Although "the Federal Circuit has recognized the difficult position an agency may be placed in by entering into a clean record or non-disclosure agreement, the [c]ourt has also made clear that it will not allow an agency that has willingly entered into such an agreement to breach it without being held responsible." *Poett*, 98 M.S.P.R. 628, ¶ 19 (citing *Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir.

1997)). Agencies are in a better position to understand the potential problems "clean record" agreements may create and to ensure that employees understand them and that agreements adequately address them. *Principe v. U.S. Postal Service*, 100 M.S.P.R. 66, ¶ 8 (2005).

¶10 As noted, the settlement entered into by the appellant and the agency provided for cancellation of the appellant's suspension action and a clean record, i.e., replacement of the official personnel records showing his suspension. There is no dispute that, after the agency entered into the settlement agreement with the appellant, Morse, an agency employee, informed individuals outside the agency that the appellant had received a 3-day suspension for misuse of the BCI database. Thus, Morse's disclosure violated the parties' clean record settlement.

¶11 Our reviewing court has recognized a limited exception to the general rule that a clean record settlement prohibits disclosure of the cancelled action to third parties. In *Fomby-Denson v. Department of the Army*, 247 F.3d 1366 (Fed. Cir. 2001), the Federal Circuit found that public policy concerns prevailed over the terms of a settlement agreement where the settlement agreement inhibited the release of information related to criminal activity. Specifically, the court held that, as a matter of public policy, an agreement between an agency and a former employee in settlement of an appeal from an adverse action cannot be construed as barring the United States from making criminal referrals based on the underlying conduct. *Id.* at 1369, 1377-78. We find that the *Fomby-Denson* exception does not apply in this case, however. Although the appellant's misuse of the BCI could have resulted in criminal prosecution, Morse was not making a criminal referral when he revealed that the appellant had received a 3-day suspension. Instead, Morse was merely responding to the question posed by BCI officials. HT, November 1, 2010 at 330-31. We find no compelling public policy

in favor of Morse's disclosure that prevails over the terms of the settlement agreement.[3]

¶12 The administrative judge's reliance on the fact that Morse was not in the supervisory chain of command at the appellant's facility, and therefore not among the individuals the responsible managers could be reasonably expected to inform that suspension was cancelled and purged, is misplaced. Regardless of his position in the agency's organizational structure, Morse was an agency employee[4] representing the interests of the agency when he disclosed the appellant's suspension, thereby denying the appellant the benefit of the clean record the agency promised him in exchange for the withdrawal of his IRA appeal. The U.S. Supreme Court has found that,

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[3] The Board has recognized an additional exception to the general rule prohibiting disclosure of the cancelled action to third parties for situations in which the settlement agreement itself contains an explicit exception to the non-disclosure rule. *Allen*, 112 M.S.P.R. 659, ¶¶ 17-23. Such an explicit exception is not present in the settlement agreement in this case, however.

[4] Although Morse indicated during his hearing testimony that the Inspector General does not report to any agency official, and that OIG is independent of the agency, HT, November 1, 2010 at 128-29, the agency's published organizational chart indicates that the Inspector General reports directly to the Secretary and that OIG is therefore a component of the agency. *See* http://www.va.gov/ofcadmin/docs/vaorgchart.pdf. In his dissent, Member Robbins states that he would deny the petition for enforcement on the ground that OIG personnel cannot be bound by an agreement between an employee and non-OIG personnel. Although the Member cites *Jones v. Lujan*, 936 F.2d 583 (10th Cir. 1991) (unpublished), as support for this proposition, we note that the court in *Lujan* remanded to the district court for a determination of whether the plaintiff knowingly took the risk that the settlement agreement at issue in that case could not be enforced so as to prohibit an OIG investigation. There, the court observed that "[w]here the parties intended a result that was not in their power to accomplish, a settlement agreement may not be enforceable." The court thus concluded that if the plaintiff did not knowingly take that risk, he was entitled to have the settlement agreement set aside and move for reinstatement of his original complaint. Here, the agency does not contend that the appellant knowingly took the risk that the settlement agreement could not be enforced to limit OIG employees from disclosing his suspension, and we find no indication in the record that he assumed such a risk. Therefore, even assuming that OIG personnel cannot be bound by the terms of the settlement agreement, this compels the conclusion that the settlement agreement is not enforceable and that the appeal in this case should be reinstated.

> [i]n conducting their work, Congress certainly intended that the various OIG's would enjoy a great deal of autonomy. But unlike the jurisdiction of many law enforcement agencies, an OIG's investigative office, as contemplated by the [Inspector General Act], is performed with regard to, and on behalf of, the particular agency in which it is stationed.

National Aeronautical and Space Administration v. Federal Labor Relations Authority, 527 U.S. 229, 240 (1999) (holding that an OIG investigator is an agency "representative" for the purposes of establishing an employee's right to union representation during an investigatory interview under 5 U.S.C. § 7114(a)(2)(B)). Although it might be difficult for an agency to predict which of its employees might disclose the existence of an action that was the subject of a clean record settlement agreement, disclosures such as the one at issue in this case are among the risks agencies take when entering into this type of settlement agreement. *See Poett*, 98 M.S.P.R. 628, ¶ 19.

¶13 Although we find that Morse's disclosure of the appellant's suspension violated the settlement agreement, we agree with the administrative judge that Morse's investigation did not violate the agreement. Under the general principles of settlement construction, the words of the agreement itself are of paramount importance. *Allen*, 112 M.S.P.R. 659, ¶ 17. 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. As the administrative judge found, the agreement contains no language prohibiting the agency from disciplining the appellant for misconduct that was unknown to the agency when it entered into the agreement and uncovered by an investigation that management at the appellant's facility did not initiate or control. The investigation was the proper procedure to determine whether discipline was warranted for misconduct that was not the subject of the settlement agreement.

¶14 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 the appeal. *Eagleheart v. U.S. Postal Service*, 113 M.S.P.R. 89, ¶ 16 (2009). If the agreement is rescinded, the settlement terms become inoperative, and the parties are essentially restored to the status quo ante. *Id*. The appellant would therefore risk losing any benefits that he received under the agreement if he rescinds it. *Id*. As the appellant did not elect enforcement of the agreement or the reinstatement of his initial appeal, his enforcement appeal is remanded to the Denver Field Office to permit the appellant to make an informed choice. If the appellant chooses to rescind the agreement, then the IRA appeal must be adjudicated on its merits. *Id*.

ORDER

¶15 We remand this appeal to the Denver Field 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.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

Ryan Zumwalt v. Department of Veterans Affairs

MSPB Docket No. DE-1221-08-0449-C-3

¶1 For the reasons given below, I would find that the agency did not breach the parties' settlement agreement because Inspector General (IG) personnel cannot be bound by an agreement between an employee and non-IG personnel.

¶2 The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, established Offices of Inspector General in designated executive-branch departments and agencies as "independent and objective units" whose responsibilities are: "[T]o conduct and supervise audits and investigations" of agency programs and operations; to improve agency programs and operations by promoting "economy, efficiency, and effectiveness" and preventing and detecting fraud and abuse; and to keep agency heads and Congress informed about "problems and deficiencies" in agency programs and operations, as well as the "necessity for and progress of corrective action." 5 U.S.C. App. III, § 2. An IG is appointed by the President with the advice and consent of the Senate without regard to political affiliation. *Id.*, § 3(a). An IG is under the "general supervision" of the head of the agency involved, or the "officer next in rank below such head." *Id.* An IG "shall not report to, or be subject to supervision by, any other officer" of the agency. *Id.* Neither the agency head nor "the officer next in rank below" "shall prevent or prohibit the [IG] from initiating, carrying out, or completing any audit or investigation." *Id.* An IG reports to Congress on his or her activities, *id.*, § 5, and reports suspected violations of criminal law to the Attorney General, *id.*, § 4(d). An IG has unfettered access to agency records, *id.*, § 6(a)(1), and may issue subpoenas, enforceable in federal court, to obtain information during an investigation, *id.*, § 6(a)(4). An IG may be removed only

by the President, and in that event the President must provide a written reason for the removal to both houses of Congress. *Id*., § 3(b).

¶3 It is plain from the foregoing that an IG, although associated with an agency, is independent from agency line managers. Furthermore, although an IG is under the nominal supervision of an agency head, an IG is independent from the agency in significant respects; an agency head may not influence an IG's conduct of an investigation, deny an IG access to information, control what an IG says to Congress or the Attorney General, or remove an IG. These principles entail the conclusion that IG personnel cannot be bound by an agreement between an employee and non-IG personnel.

¶4 This conclusion is supported by *Jones v. Lujan*, 936 F.2d 583 (10th Cir. 1991) (unpublished).[1] There, the Department of the Interior entered into an agreement with an employee in settlement of the employee's disability discrimination complaint. Later, the employee claimed that under the agreement, the Department IG was required to cease its investigation of the employee's alleged violations of Department rules. The court rejected this claim because the IG was not a party to the agreement, and thus, the Inspector General Act prohibited enforcement of the settlement agreement to the extent that it purported to limit the IG's investigative powers. *See* 5 U.S.C. App. III, § 3(a).

¶5 In the present case, as in *Jones*, the IG was not a party to the settlement agreement. The thrust of the Inspector General Act, which allows an IG to pursue its activities independent of the wishes or instructions of agency

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[1] Although a 10th Circuit rule in effect when *Jones* was decided provided that an unpublished decision had no precedential value and could not be cited before the 10th Circuit except in limited circumstances, there is no reason why an administrative agency such as the Merit Systems Protection Board cannot rely on the reasoning in *Jones* if it finds the reasoning therein persuasive, as I do. *Cf. Worley v. Office of Personnel Management*, 86 M.S.P.R. 237, ¶ 8 (2000) (the Board may follow the reasoning of a non-precedential Federal Circuit decision if it finds such reasoning persuasive).

management, compels the conclusion that an agreement between agency management and an employee to which an IG is not a signatory is not binding on the IG. To hold otherwise is to permit an agency to interfere with an IG's investigatory activities, and indeed, the disclosure that the majority finds was a breach of the parties' settlement agreement was made by IG staff in the course of an investigation.[2]

¶6 Because the IG investigator did not breach the agreement between the appellant and agency management, the appellant should not be permitted to elect between accepting the status quo or rescinding the agreement. *Cf. Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659 (2009) (there was no remedy for the agency's disclosure of certain information about the appellant to another government agency because the disclosure did not breach the settlement agreement between the parties; the appellant's petition for enforcement was denied), *aff'd*, 420 F. App'x 980 (Fed. Cir. 2011) (Table). I would deny the petition for enforcement.

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Mark A. Robbins
Member

[2] My analysis is not inconsistent with *National Aeronautics & Space Administration v. Federal Labor Relations Authority*, 527 U.S. 229 (1999), where the court held that an IG investigator is bound by statutory requirements governing an agency "representative's" conduct of an interview of an employee who is covered by a collective bargaining agreement and who reasonably believes that the interview could lead to discipline. The court's decision finds that Congress, in enacting 5 U.S.C. § 7114 -- which is part of the Federal Service Labor-Management Relations Statute (FSLMRS) -- intended for IG personnel to be bound by some of the same strictures that cover non-IG personnel who conduct investigatory interviews. By contrast, in this case there is no language in the FSLMRS or in any other law suggesting that Congress intended to allow non-IG agency personnel to enter into an agreement with an employee that affects the IG's conduct of an investigation.