MARJORIE KUYKENDALL, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency

DOCKET NUMBER DC-0752-94-0074-C-1

MERIT SYSTEMS PROTECTION BOARD

68 M.S.P.R. 314; 1995 MSPB LEXIS 1368

July 26, 1995

COUNSEL:
[**1]

Leizer Z. Goldsmith, Esquire, Washington, D.C., for the appellant.

Bob G. Gates, Esquire, Washington, D.C., for the agency.

OPINION:
[*317]

BEFORE

Ben L. Erdreich, Chairman

Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of a compliance initial decision that dismissed her compliance appeal. For the reasons set forth below, we DENY the petition for failure to meet the criteria for review under 5 C.F.R. ß 1201.115. We REOPEN this compliance appeal on our own motion under 5 C.F.R. ß 1201.117, however, VACATE the compliance initial decision, and DENY the appellant's petition for enforcement, except with respect to the claims raised after the record closed below, which we FORWARD to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

The agency removed the appellant from her GS-7 position of Teller (Office of Administration), on the basis that she was permanently physically disabled from performing her job duties. Initial Appeal File (IAF), Tab 3, Subtabs 4b, 4d, 4k. On appeal from the removal action, the administrative judge (AJ) dismissed the appeal as settled [*318] [**2] and entered the parties' settlement agreement into the record for enforcement purposes, as agreed to by the parties, after finding that the agreement was lawful on its face, was understood by the parties, and was freely and voluntarily entered into by the parties in a matter over which the Board had jurisdiction. IAF, Tab 33. The AJ's initial decision became final on April 5, 1994, when neither party filed a petition for review.

The settlement agreement provided, in pertinent part, as follows:

2. The Agency Agrees [sic] to reinstate the Appellant with all back pay to her former position within the Fiscal Service, as a Voucher Examiner, n1 effective from the date of her removal on October 31, 1993.

n1 The appellant had worked in the Voucher Examiner position before working in the Teller position. IAF, Tab 3, Subtab 4e.

* * *

11. The Agency agrees that any future requests for employment references regarding the Appellant[] will not be addressed in any manner or form by Mr. [Manuel] Saleta, [Chief of the Fiscal Service,] but will be responded to by the Assistant Fiscal Officer, Maria Nelson. IAF, Tab 32.

On August 16, 1994, the appellant filed a petition for enforcement, [**3] asserting that the agency failed to restore her to the "pre-removal status quo ante" by engaging in an immediate and continual campaign of harassment and retaliation against her following her reinstatement to the Voucher Examiner position. She requested a hearing. Compliance File (CF), Tab 1.

The agency moved to dismiss the appellant's petition, asserting that the agency was in compliance with all of the terms and conditions of the settlement agreement as of May 11, 1994, and that the appellant had not submitted any evidence to support her contentions. CF, Tab 3. In support of this motion, the agency submitted documentary evidence and an August 29, 1994 declaration by Saleta, under penalty of perjury, showing the manner in which the agency had complied with the specific terms of the settlement agreement. *Id.* In another August 29, 1994 declaration, under penalty of perjury, Saleta responded to the appellant's allegations of retaliation/harassment. *Id.*

The appellant then filed a motion for permission to engage in discovery. CF, Tab 4. The agency opposed the motion. CF, Tab 5. On September 7, 1994, the day before the record closed below, the appellant submitted a September 2, 1994 affidavit, [**4] under penalty of perjury, in which she reiterated the allegations in her petition for [*319] enforcement, and presented additional details and allegations. CF, Tab 6.

After the record closed on September 8, 1994, the appellant filed a motion to reopen it, asserting that she was not selected for a Program Assistant position and that she believed the reason for this nonselection was that Saleta told Jim Sweat, the selecting official, that she could not "handle high pressure positions." She argued that such a statement by Saleta was in violation of item 11 of the settlement agreement, which prohibited Saleta from discussing her with prospective employers, and that "even if some other official made the false and defamatory statement," it constituted prohibited retaliation. In support of this motion, the appellant submitted her declaration under penalty of perjury and documentary evidence apparently related to her application for the Program Assistant position. CF, Tab 8. The agency opposed this motion, contending that her claim was "premature" because the Program Assistant position remained unfilled and that her allegations were otherwise frivolous. CF, Tabs 9-10.

In a December 14, 1994 compliance [**5] initial decision, the AJ denied the appellant's requests for discovery and a hearing, and dismissed her petition for enforcement. CF, Tab 11. The AJ found that the appellant had failed to "cite the agency's failure to comply with any provision of the parties' settlement agreement" and that the agency's evidence indicated it had "fully complied with its responsibilities under the settlement agreement." *Id.* at 2. The AJ further found that the appellant's allegations of retaliation/harassment, not explicitly covered by the settlement agreement, were beyond the scope of the Board's jurisdiction. *Id.* Finally, the AJ denied the appellant's motion to reopen the record to address the agency's breach of item 11 of the settlement agreement, and noted that the Board similarly had no jurisdiction over that retaliation claim, in any event. *Id.* n.1.

The appellant has timely filed a petition for review, arguing, inter alia, that the AJ erred by refusing to consider her allegations of retaliation/harassment under a *status quo ante* analysis. She also argues that 5 U.S.C. ß 2302(b)(1) and (9) provide the basis for the Board's consideration of such allegations. [**6] Compliance Petition for Review File (CPRF), Tab 1. The agency has timely filed a response. CPRF, Tab 5.

ANALYSIS

TThe agency's motion for sanctions is denied.

On petition for review, the agency has renewed its request below that the appellant be sanctioned for bringing a frivolous compliance appeal. *See* CF, Tab 5; CPRF, Tab 5. Because the AJ did not [*320] address this matter in the compliance initial decision, we do so here. Although the Board may impose sanctions on a party "as necessary to serve the ends of justice," it will not do so because of a frivolous appeal. *See generally* 5 C.F.R. ß 1201.43. Since the Board's regulations contemplate that dismissal of an appeal is the ultimate sanction, *see* 5 C.F.R. ß 1201.43(a),(b), and a frivolous appeal will be dismissed, an appellant need not be separately sanctioned for bringing such an appeal. *Cf. Hutch-*

craft v. Department of Transportation, 60 M.S.P.R. 299, 304-05 (1994) (the Board lacks the authority to impose a monetary sanction against a party, and there is otherwise no effective sanction for the filing of a frivolous petition for review by the appellant). We therefore DENY [**7] the agency's request.

A status quo ante analysis is not per se applicable in enforcing settlement agreements, and the appellant has not shown that it is otherwise applicable here.

As the AJ noted, the Board held in *Baughman v. Department of the Army,* 45 M.S.P.R. 580, 587 (1990), that, in enforcing a settlement agreement that was silent as to retaliation, it would nevertheless consider the appellant's allegations of retaliation because "[a]n employee who is being retaliated against for having filed an appeal with the Board has not been returned to the status quo ante. . . ." This holding was based on *Gaydon v. U.S. Postal Service,* 37 M.S.P.R. 276, 279 (1988), which, in turn, was based on *Kerr v. National Endowment for the Arts,* 726 F.2d 730, 733 (Fed. Cir. 1984), in which the Board held that when a personnel action is reversed, the agency must "place the employee as nearly as possible in the *status quo ante."* 726 F.2d at 733.

In *Kelley v. Department of the Air Force,* 50 M.S.P.R. 635, 640-42 (1991), however, the Board rejected a *status quo ante* analysis of settlement terms, [**8] and thus refused to imply back pay into a settlement term that simply provided for cancellation of the personnel action. Contrary to the appellant's argument on petition for review that, for purposes of applying the *status quo ante* analysis, there is no reason to distinguish between enforcing the Board's reversal of an agency's action, such as in *Kerr,* and enforcing the parties' settlement agreement, as here, *see* CPRF, Tab 1 at 9, there are fundamental differences between the two. Unlike the Board's adjudication in the former situation, the settlement agreement in the latter situation generally does not specify or imply that the underlying personnel action was wrong, n2 and the Board is not enforcing its own determinations but rather the parties' bargained-for agreement, based on contract law [*321] principles. *See McDavid v. Department of the Army,* 58 M.S.P.R. 673, 675 (1993); *Kelley,* 50 M.S.P.R. at 640-42; *see also, e.g., Jones v. Department of Health and Human Services,* 56 M.S.P.R. 311, 315 (1993). Therefore, the rationale for applying a *status quo ante* analysis to the former situation -- that "when a wrong [**9] has been done . . . [t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed" -- generally does not apply to the latter situation. *Kerr,* 726 F.2d at 733 n.3; *see Kelley,* 50 M.S.P.R. at 640-42. Hence, the Board concluded in *Kelley* that "in construing the terms of a settlement agreement, the four corners of the agreement itself shall be examined to determine the parties' intent." *Id.* at 642; *see also Beard v. Department of Defense,* 57 M.S.P.R. 355, 357-58 (1993).

n2 In fact, the settlement agreement here specifies that the agreement "does not constitute an admission of guilt, fault or wrongdoing by any party." IAF, Tab 32, Item 1.b.

Although, as the appellant appears to argue on petition for review, *Kelley* did not explicitly overrule *Baughman, see* CPRF, Tab 1 at 10, it did so implicitly, to the extent that *Baughman per se* applied a *status quo ante* analysis in enforcing a settlement agreement. We reaffirm here that the Board will not *per se* apply a *status quo ante* analysis to settlement terms, n3 and we [**10] find that the appellant has shown no basis for applying such an analysis to any settlement term here. Because *Kelley* did not involve allegations of retaliation, however, it did not necessarily overrule the conclusion in *Baughman,* nor does it preclude the possibility here, that the Board could consider allegations of retaliation on grounds other than the *status quo ante* analysis.

n3 A *status quo ante* analysis would apply, needless to say, if the settlement agreement included a term specifying that the employee should be returned to the *"status quo ante."* We note that in *Greco v. Department of the Army,* 852 F.2d 558, 559, 561 (Fed. Cir. 1988), the court, in the context of interpreting a settlement term requiring the agency's payment of the appellant's attorney fees, stated that the settlement agreement there "required, as far as possible, a return to the status quo ante." In making this statement, the court cited the rationale, applicable to fully adjudicated cases, that "[a]n injured party must be placed, as nearly as possible, in the position he would have occupied had the wrong not been committed." 852 F.2d at 561 n.4. Because *status quo ante* is a broad and imprecise concept that, in general, should not be implied into specific settlement terms, *cf. Kelley,* 50 M.S.P.R. 640-42, and because as discussed in the text above, the Board has since determined that such a rationale is inapplicable to settlement agreements, *see id.,* we decline to extend the above-quoted "status quo ante" statement in *Greco* beyond the particular settlement terms and facts there at issue.

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The AJ should have considered the appellant's allegations of retaliation/harassment because they are relevant in determining whether the agency failed to implement in good faith the settlement term requiring her reinstatement and thereby breached the agreement.

A settlement agreement is a contract, to be construed based on principles of contract law. *See Greco v. Department of the Army,* [*322] 852 F.2d 558, 560 (Fed. Cir. 1988); *Hicks v. U.S. Postal Service,* 52 M.S.P.R. 561, 564 (1992). Since it is undisputed that the settlement agreement here did not mention retaliation/harassment by the agency, the question is whether the agreement nevertheless should be construed as covering the appellant's allegations of retaliation/harassment. Although the appellant has not specified that those allegations are related to the settlement term requiring her reinstatement to the Voucher Examiner position ("the reinstatement term"), the allegations themselves, as well as her related arguments, have implied as much. n4 Because, in enforcing a settlement agreement, the Board may consider any allegation that is relevant in determining noncompliance [**12] with a particular settlement term, we will examine whether the appellant's allegations are relevant in determining the agency's noncompliance with the reinstatement term. *See generally, e.g., Nance v. Department of Transportation,* 55 M.S.P.R. 68, 70, 72 (1992) (the appellant's allegations that the agency's post-settlement actions constituted whistleblower reprisal and retaliation, prohibited by 5 U.S.C. ß 2302(b)(8), (9), may be considered "to the extent" that they "pertain to breach of the agreement"); *cf. Bales v. Department of Transportation,* 54 M.S.P.R. 187, 190 (1992) (the Board refused to consider the appellant's allegations of retaliation "because they d[id] not relate to any provision of the settlement agreement").

n4 The allegations on their face, concerning her working environment, are pertinent to the reinstatement term, as further discussed in the text below. Moreover, it is apparent from her albeit-misguided *status quo ante* arguments that she believes the allegations are pertinent to her reinstatement to the Voucher Examiner position, just as if the Board had reversed the agency's action on the merits and ordered her reinstatement to that position. [**13]

In construing settlement terms similar to the reinstatement term here, i.e., those requiring the agency to assign the employee to a particular position, the Board has found in effect that the agency's obligation to implement the settlement term is not necessarily fully satisfied the moment it technically and facially reinstates the employee to the position in question. *See Keenan v. U.S. Postal Service,* 62 M.S.P.R. 307, 308-10 (1994) (the Board found that the agency's obligation to comply with a settlement term requiring the appellant's assignment as a part-time flexible clerk extended beyond merely assigning him to that position and included not unjustifiably depriving him of 40 hours of work per week); *Hicks,* 52 M.S.P.R. at 563-64 (where the agency agreed to assign the appellant to a particular position as part of a settlement agreement, its compliance obligation existed for a "reasonable time under the circumstances"); *cf. Norris Concrete and Dodson,* 282 N.L.R.B. 289, No. 45, 123 L.R.R.M. (BNA) 1329, 1331 (1986) (despite the employer's facial compliance with the settlement term requiring the employee's reinstatement, [**14] its retaliatory [*323] post-settlement actions that negated the purpose of the term constituted noncompliance with it). Construing such a settlement term as obligating the agency merely to technically and facially reinstate the appellant would be unreasonable, in general, because it would render the term largely meaningless in terms of any substantial benefit to the employee. n5

n5 Just as a settlement agreement could explicitly broaden the agency's obligation with respect to a reinstatement term by specifying that the agency would ensure against all retaliation/harassment on the job, *see Womack v. U.S. Postal Service,* 63 M.S.P.R. 213, 216-18 (1994), *interlocutory appeal after remand,* MSPB Docket No. CH-0752-89-0372-B-1, slip op. (Mar. 13, 1995), the agreement could potentially narrow the agency's obligation in this regard. The settlement agreement here did not explicitly broaden or narrow the agency's obligation in this regard.

Moreover, 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* [**15] *of the Treasury,* No. 93-3354, slip op. at 10-12 (Fed. Cir. Mar. 31, 1995); *McCall v. U.S. Postal Service,* 839 F.2d 664, 667 (Fed. Cir. 1988); *see also Hicks,* 52 M.S.P.R. at 565. "Good faith performance . . . 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, ß 205 comment a (1979). Thus, a party may breach a settlement agreement by acting in bad faith n6 with respect to a settlement term, *see Link,* slip op. at 11, and the appellant may

establish that the agency breached the settlement agreement by showing that the agency's retaliatory/harassing actions constituted bad-faith noncompliance with the reinstatement term. *See Keenan,* 62 M.S.P.R. at 308 (the agency's failure to assign the employee 40 hours of work per week constituted failure to comply in good faith with the settlement term requiring his reinstatement to a "part-time flexible" Postal position); [**16] *see also Brown v. Department of the Navy,* 57 M.S.P.R. 621, 626 (1993) (the employee's allegations of whistleblower reprisal and general animosity towards him were considered in determining whether the agency acted in bad faith in enforcing the last-chance settlement agreement); n7 Restatement (Second) [*324] of Contracts, ß 205 comment a, illustration 2; *cf. Solar Turbines, Inc. v. United States,* 23 Cl. Ct. 142, 156 (1991) (in every contract there is an "implied covenant of good faith and fair dealing" that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"); *Hicks,* 52 M.S.P.R. at 565 (where there was no showing that the agency acted in bad faith when it reassigned the appellant 10 months after he was reinstated pursuant to a settlement term, the agency did not breach the settlement agreement).

n6 "Bad faith" is the opposite of "good faith" and refers to a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive; it is not simply bad judgment or negligence, but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. *Silva v. U.S. Postal Service,* 59 M.S.P.R. 268, 272 (1993), *aff'd,* 40 F.3d 1250 (Fed. Cir. 1994) (Table).

n7 Although *Brown* involved a last-chance agreement reached prior to a Board appeal, the contract law principles applicable to determining its breach are similarly applicable to determining a breach of a settlement agreement, reached following a Board appeal. *See generally Link,* slip op. at 11-12 ("A last-chance agreement is a settlement agreement, and a settlement agreement is a contract").

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We recognize that allowing employees to raise, via enforcement proceedings, any and all complaints about perceived retaliation/harassment following their reinstatement would, as the agency argues, allow litigation to continue "ad nauseam," contrary to the purpose of settlement agreements to bring "closure [to] disputes between the parties." n8 CPRF, Tab 5 at 7; *cf. De Luna v. Department of the Navy,* 58 M.S.P.R. 526, 529 (1993) (settlement agreements serve to encourage fair and speedy resolution of issues). On the other hand, for the Board to refuse any review of an agency's conduct that effectively deprives an employee of the fruits of the settlement agreement would denigrate the integrity of settlements, which play an integral role in resolving federal employment disputes, and would allow agencies to profit from their misconduct. *See Norris Concrete,* 282 N.L.R.B. 289, No. 45, 123 L.R.R.M. at 1332; *cf. Special Counsel v. Harkins,* 60 M.S.P.R. 646, 648 (1994) (the Board favors settlement agreements).

n8 We note that the Equal Employment Opportunity Commission (EEOC) treats allegations of post-settlement retaliation as separate EEO claims, rather than as part of a petition for enforcement, even if retaliation was explicitly prohibited by the settlement agreement. *See* 29 C.F.R. ß 1614.504(c); *Hunter v. West,* EEOC Appeal No. 01941115, slip op. at 7 (Aug. 4, 1994) ("allegations of reprisal or further discrimination in violation of a settlement agreement's 'no reprisal' clause, are to be processed as separate complaints and not as a breach of settlement"); *Fagone v. Runyon,* EEOC Petition No. 04930008, slip op. at 4 (Apr. 21, 1994) (similar holding). The EEOC's rationale for this rule is that a contrary rule "would, in essence, permit an appellant to reopen his complaint endlessly" and destroy the finality of settlement agreements and "would permit new allegations to be raised without regard to counseling requirements or time limitations, a result neither expressly nor implicitly sanctioned by the EEO Regulations." *Fagone,* slip op. at 4 (quoting *Bindal v. Department of Veterans Affairs,* EEOC Request No. 05900225 (Aug. 9, 1990)). Unlike the EEOC, however, the Board lacks jurisdiction to hear allegations of retaliation under 5 U.S.C. ß 2302(b)(1) and (9) that are unrelated to an otherwise appealable action, so that such allegations could not be pursued as separate Board appeals.

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We therefore find that an agency's post-settlement harassment and retaliation against an appellant could establish its noncompliance with a settlement term requiring her reinstatement. To establish a [*325] breach of the settlement agreement based on this implied covenant of good faith with respect to the reinstatement term, however, it is the appellant's burden to show that the agency's proven retaliatory/harassing actions, under the totality of the circumstances, amounted to an unjustified and substantial deprivation of her rights as an incumbent of the position in question. *Cf. Norris Concrete,* 282 N.L.R.B. 289, No. 45, 123 L.R.R.M. at 1330-31 (despite the employer's facial compliance with

the settlement agreement, its actions including assigning the employee a dangerous truck, reprimanding him for an incident that never occurred, and other unjustified actions that resulted in his constructive discharge established its noncompliance with the settlement term requiring his reinstatement). It is to be expected that affected agency personnel and the appellant might feel awkward and sensitive toward each other following their participation in an [**19] employment dispute before a body such as the Board, even after resolving their differences in a settlement agreement, and we emphasize that we cannot and will not redress within the confines of enforcement proceedings every perceived, or even real, slight. Therefore, a mere showing of some frictions, misunderstandings, or unpleasantness between the appellant and other employees or managers will not be sufficient to meet this burden. *Cf. Lizut v. Department of the Army,* 30 M.S.P.R. 119, 127-28 (1986) (following the Board's reversal of the employee's removal action, an allegation that coworkers and supervisors were not congenial or enthusiastic with respect to his return to work did not show that the agency failed its good faith obligation with respect to his reinstatement).

We thus conclude that the appellant's allegations that the agency management instituted a campaign of harassment and retaliation against her, immediately and continually after her reinstatement to the Voucher Examiner position, are relevant to the issue of whether the agency breached the settlement agreement by failing to implement in good faith the reinstatement term. n9 Hence, we find that [**20] the AJ erred by refusing to consider the appellant's allegations of retaliation/harassment here. For the reasons discussed below, however, we find that the AJ's adjudicatory error did not prejudice the appellant's substantive rights. *See Panter v. Department of the Air Force,* 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

n9 Although the agency's obligation with respect to the reinstatement term extends only for a reasonable period of time, the duration of the agency's obligation is not an issue before us because the agency's alleged actions here were taken within days and months after the appellant's reinstatement. *Cf. Hicks,* 52 M.S.P.R. at 563-64 (if the settlement agreement does not specify a time period for performance of a settlement term, a reasonable time will be implied).

[*326] *The appellant did not establish that the agency failed to implement in good faith the reinstatement term and thereby breached the settlement agreement.*

The appellant's initial unsworn allegations of retaliation/harassment are [**21] set forth below, in italics, followed by Saleta's sworn responses, under penalty of perjury.

(1) *On February 28, 1994, her first day back at work, Saleta told her "she could not take any leave whatsoever."* Saleta did not specifically refute this allegation, but generally averred that her "claims of being . . . harassed by [him] are totally false."

(2) *She was placed in a work station with "little room to work" between two employees who were smokers, when Saleta knew she was allergic to cigarette smoke.* Saleta averred that she was "returned to the Voucher Audit Section in the only available space . . . between two employees who are occassional [sic] smokers, but who do not smoke in their work environment and/or the VA building."

(3) *She was not given a key to the area, when "all other voucher examiners ha[d] keys."* Saleta averred that she was "not provided a key because other employees begin work earlier than [she] and the areas are unlocked when [she] arrives at work," so that there is no need for her to have a key, and because "confidential information is contained in the payroll section and [she] does not have [Saleta's] trust and confidence. [**22] "

(4) *Later that morning, she was told to leave and not to come back until March 6, 1994.* Saleta averred that she was sent home because she failed to present the necessary medical certification specified by the settlement agreement, but was returned to work without incident when she provided the requisite certification on March 7. n10

n10 The settlement agreement provided in this regard, as follows:

16. The Appellant agrees that prior to returning to employment she will obtain a written certification from her personal physician, Dr. Charles Franklin[,] and Psychologist Dr. Nancy Davis which will confirm that:

a) Appellant is physically and mentally capable of returning to work in the position of Voucher Examiner and

b) they have no objection to placing her in the physical location designated by the Agency.

IAF, Tab 32.

(5) *After she returned to work in March, Saleta "assaulted [her] by smashing a file into her chest."* Saleta averred that he had "very limited contact" with her, that her first-line supervisor, Joann Johnson, and second-line supervisor, Marie Nelson, were "responsible for her daily work activities," and that her "claims of being physically [**23] assaulted" by him were "totally false."

[*327] (6) *On July 15, 1994, Saleta placed her on leave restriction based on her use of 54 hours of sick leave since she returned to work, and required that she obtain his personal approval of her leave requests, when other employees "used an equal or greater amount of sick leave" and were not placed on leave restriction.* Saleta averred that, although her physicians certified she was fit for duty and could work without restrictions, she "continued to abuse her sick leave by continually being absent from work," which absences required her coworkers to complete many of her duties and made it difficult to schedule work and leave for other employees, and she was therefore placed on leave restriction status, under which he must personally approve her leave requests, in accordance with the policy of the Fiscal Service.

(7) *Joann Johnson, the lead voucher examiner, told her to stop eating at her desk since Saleta would not allow it.* Saleta averred that "it is Fiscal Service policy that employees are not allowed to eat at their desks" and that she was found "eating at her desk in violation of the policy on several occassions [**24] [sic]."

(8) *Johnson also selected her for surveillance of her telephone usage.* Saleta averred that Johnson noted that the appellant, "on at least on one occassion [sic] spent one and [a] half hours on a personal [telephone] call."

Notwithstanding Saleta's failure to specifically refute the first allegation listed above, it is undisputed that the appellant had since taken 54 hours of sick leave, thus tending to diminish the accuracy of this allegation. As to the remaining allegations, we find under the circumstances that Saleta's explanations are sufficiently plausible and credible to overcome the appellant's vague and uncorroborated allegations that the agency's actions were unjustified and motivated by an intent to retaliate and harass, particularly considering that she was represented by an attorney throughout. In fact, some of the appellant's allegations are specious. For instance, her complaint that, on her first day back at work, she was told to go home is completely frivolous when compared with the record evidence showing that she was required under the settlement agreement to provide medical certification prior to her return to work, but failed to provide [**25] the requisite certification upon her initial return to work.

Although the appellant subsequently provided, a few days before the record closed below, her declaration under penalty of perjury including additional details and allegations to supplement her initial unverified allegations, she has not alleged or shown that Saleta's responses were materially untrue. For instance, although she averred in her sworn declaration that Saleta knew she was "allergic to cigarette smoke and the symptoms can develop even from close contact with smokers not [*328] presently smoking," she did not specify whether, when, or how often she did in fact become so symptomatic or that Saleta knew, in addition to the fact that she was "allergic to cigarette smoke," that she could become symptomatic merely by sitting next to smokers not presently smoking. She also contended that she could use an available work space in the "accounting area," but she did not deny that she was placed in the "only available work space" in the designated Voucher Audit Section area. In fact, based on item 16 of the settlement agreement, n11 it appears that her physicians had approved her work space and location. In addition, [**26] although she contended that Saleta was "simply trying to bully [her] by inconveniencing [her] on the matter of the key," she did not specify a single instance when she was inconvenienced due to her lack of a key. We therefore find that the record evidence is insufficient to establish that the agency failed to implement in good faith the reinstatement term.

n11 *See supra,* n.10.

Although an agency bears a heavy burden of production to submit all of the relevant, material, and credible evidence of its compliance responsive to an appellant's allegations, the appellant has the ultimate burden of establishing that the agency breached the settlement agreement. *See Perry v. Department of the Army,* 992 F.2d 1575, 1578 (Fed. Cir. 1993); *Fredendall v. Veterans Administration,* 38 M.S.P.R. 366, 371 (1988). We find it telling that the appellant here has not submitted any independent documentation, such as statements by witnesses, to support any of her numer-

ous allegations of continual and overwhelming retaliation/harassment. Unlike the situation in *Perry,* the agency here was not "wholly possessed of the [relevant] evidence." *Id.* at 1578. [**27] Nor was she entitled to her requested discovery and hearing to establish her allegations. An employee is not entitled to them in enforcement proceedings, although the AJ may grant them in his discretion. *See* 5 C.F.R. ß 1201.183(a)(3); *Forston v. Department of the Navy,* 60 M.S.P.R. 154, 158 (1993); *Covert v. Department of the Navy,* 31 M.S.P.R. 376, 382 (1986). Because the appellant failed to specify below any genuine issue of material fact for which discovery and a hearing were warranted, n12 the AJ did not abuse his discretion in denying them. *Cf. Briscoe v. Department of Veterans Affairs,* No. 94-3507, slip op. at 5-6 (Fed. Cir. May 31, 1995) (where the appellant presented no evidence to support her "bald allegations" of jurisdiction, those allegations were "frivolous" and thus [*329] did not warrant a jurisdictional hearing). We therefore find that the appellant failed to meet her burden of establishing that the agency breached the settlement agreement by failing to implement in good faith the reinstatement term.

n12 In requesting discovery below, the appellant simply contended that the agency had "generally denie[d]" her allegations, that the "true facts" could only be revealed through discovery, and that she wished to "ascertain what the Agency ha[d] done in similar situations regarding other employees who ha[d] not filed mixed case appeals with the Board." CF, Tab 4.

[**28]

The Board will not consider the appellant's claims under 5 U.S.C. ß 2302(b)(1) and (9) because they are immaterial to the issue of whether the agency breached the settlement agreement.

The appellant appears to presume that the issue of whether the agency breached the settlement agreement and the issue of whether the agency committed prohibited personnel practices under 5 U.S.C. ß 2302(b)(1) and (9) are one and the same, or at least inextricably intertwined here. *See* CPRF, Tab 1 at 8-15. We find that they are not. To establish a breach of the settlement agreement, the agency's alleged retaliatory/harassing actions need not amount to prohibited personnel practices under 5 U.S.C. ß 2302(b). If the agency took unjustified actions substantially depriving the appellant of her rights as an incumbent of the Voucher Examiner position, such actions may establish its noncompliance with the reinstatement term, as discussed above, even though they may not involve a "personnel action" under 5 U.S.C. ß 2302(a)(2)(A) or otherwise constitute a prohibited personnel practice under 5 U.S.C. ß 2302 [**29] (b). n13

n13 Some of the alleged retaliatory actions by the agency, such as the alleged denial of leave, may constitute a "personnel action" within the meaning of 5 U.S.C. ß 2302(a)(2)(A) and, thus, may be covered by section 2302(b).

Contrary to the appellant's argument, 5 U.S.C. ß 2302(b) is not an independent source of the Board's jurisdiction. *See Wren v. Department of the Army,* 2 M.S.P.R. 1, 2 (1980), *aff'd,* 681 F.2d 867, 871-73 (D.C. Cir. 1982); CPRF, Tab 1 at 8. Furthermore, a breach of a settlement agreement is not an independently "appealable action." *King v. Reid & MSPB,* No. 94-3271, slip op. at 5 (Fed. Cir. July 3, 1995). The Board's authority to enforce a settlement agreement is merely "[a]ncillary" to its authority to adjudicate an "appealable action," and is limited to determining whether either party has breached the settlement agreement. *Id.* at 3, 5-6. Because the appellant's claims under 5 U.S.C. ß 2302(b)(1) and (9) are immaterial to the issue of whether the agency breached the settlement agreement, we will not consider them here. n14 [**30] *See Bales,* 54 M.S.P.R. at 190.

n14 The appellant implicitly raised these claims below by contending that the agency retaliated against her for filing a mixed-case Board appeal. *See* CF, Tab 6. On petition for review, the appellant has submitted new evidence in support of her now-explicit section 2302(b)(1) and (9) claims, in the form of an affidavit in which she contends that an equal employment opportunity counselor told her to raise her retaliation claims before the Board. *See* CPRF, Tab 1, Appellant's Affidavit. Even assuming that this new evidence was not previously available despite the appellant's due diligence, we find that it is not material to our disposition of her section 2302(b)(1) and (9) claims. *See generally* 5 C.F.R. ß 1201.115(c).

[*330] *The appellant's claim that the agency violated item 11 of the settlement agreement must be forwarded to the regional office.*

After the record closed below, the appellant raised a new claim that the agency violated item 11 of the settlement agreement prohibiting Saleta from addressing employment inquiries regarding the appellant. This claim was apparently based on new evidence not [**31] available before the record closed on September 8, 1994, since the appellant's September 22, 1994 affidavit was based on her conversation with Sweat, the selecting official, on September 21, 1994. *See* 5 C.F.R. ß 1201.58(c); CF, Tab 8. If, as the appellant alleges, Saleta spoke to Sweat about his consideration of the appellant for the position in question, the agency would have explicitly breached item 11 of the settlement agreement. Because the AJ, in refusing to reopen the record, erroneously found that this allegation could not establish a breach of the settlement agreement, it will be forwarded for further consideration. *See generally Patterson v. Department of Agriculture,* 55 M.S.P.R. 499, 502-03 (1992) (unfavorable information provided by former supervisor to another agency official at a time when that official was considering the employee for a job violated the settlement agreement in which the agency agreed to make no statements that would hinder the employee's ability to compete for future federal employment). The appellant may raise before the AJ the additional claims of breach, based on events that occurred after the record closed below, which she [**32] has raised after the record closed on petition for review. n15 *See* CPRF, Tab 7; *see also* CPRF, Tab 8 (Agency's Response).

n15 We note that her allegations regarding her nonselection for various positions (not implicating item 11 of the settlement agreement) are not explicitly or implicitly related to any settlement term and, thus, need not be considered by the AJ.

ORDER

Accordingly, we DENY the appellant's petition for enforcement except with respect to her claim regarding item 11 of the settlement agreement. As to that claim and any subsequent claims, we FORWARD this case for further proceedings as discussed above.

Inasmuch as the appellant's compliance case continues, this decision, although dispositive as to certain matters, constitutes an interlocutory [*331] determination. Notice of further appeal rights will be provided when the issues forwarded to the regional office are finally decided.

Legal Topics:

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