UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 215

Docket No. SF-0752-09-0308-C-1

Genevieve J. Flores,

Appellant,

v.

United States Postal Service,

Agency.

November 3, 2010

Genevieve J. Flores, Covina, California, pro se.

Monique L. Rutter, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the compliance initial decision that denied her petition for enforcement of the parties' settlement agreement. For the reasons set forth below, we GRANT the petition for review, VACATE the portion of the compliance initial decision regarding the position assignment terms of the parties' settlement agreement, AFFIRM the remainder of the compliance decision, and REMAND to the Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal of the agency's action removing her from her position as an EAS-19 Manager Customer Services effective January 18, 2009. Initial Appeal File (IAF), Tab 1, Tab 6, Subtabs 4B, 4E, 4M. The parties entered into a settlement agreement disposing of the appeal, and the administrative judge entered the agreement into the record for the purposes of enforcement by the Board. IAF, Tab 10 at 1-2. The agreement contained the following relevant terms:

> THIRD: (a) Appellant's January 18, 2009 removal is retroactively converted to a voluntary downgrade, to the following position: Job ID# 95677592 P/L 026, Clerk Job#25, South Downey Station, Sales Service & Distribution Associate, South Downey[,] 7911 Imperial Hwy, Downey[,] C[a.] 90242, with Sunday and Tuesday off, and 8:00 A.M. – 5:00 P.M. reporting time, effective January 23, 2009. Appellant will receive customary and required Sales Service and Distribution Associate training. Appellant understands that it is a requirement of the Sales and Service Distribution Associate position that she successfully pass the training.
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> . . .
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> (c) Appellant will report to on [sic] Saturday, April 4, 2009, for orientation and training, at 5:00 A.M., Downey Main Office, 811 Firestone Blvd., Downey, C[a.] 90241, to Supervisor Melissa Luna . . . (note the different reporting time and location for orientation and training).
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> (d) Appellant may use annual leave for the days she did not work between January 18, 2009[,] and April 3, 2009, upon her submission of PS Form 3971 within two weeks of signing this Agreement. In the event Appellant does not have sufficient annual leave to cover the above time frame, any remaining dates will be recorded as Leave Without Pay (LWOP).
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> . . .
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> NINTH: This Agreement shall be interpreted in accordance with the plain meaning of its terms and not strictly for or against any of the Parties hereto.
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> . . .

> ELEVENTH: This Agreement constitutes the full and complete agreement between the Parties and fully supersedes any and all prior agreements or understandings between the Parties pertaining to the subject matter hereof. There are no oral side agreements or understandings. No other promises or agreements shall be binding unless signed by the Parties.
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> . . .
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> THIRTEENTH: The parties agree that the MSPB will enter this Agreement into the record of this appeal and will dismiss the appeal as settled, with the MSPB retaining jurisdiction for enforcement purposes only. Should a dispute arise regarding the implementation of this Agreement, it is expressly agreed that Appellant will not file any petition for enforcement until thirty (30) days after [s]he has contacted the Deputy Managing Counsel of the United States Postal Service Law Department, or his/her designee, in writing at the following address: United States Postal Service, 300 Long Beach Boulevard, Room 240, Long Beach, C[a.] 90802-2496. It is the intent of this subparagraph to allow the Postal Service a reasonable time to correct any real or perceived difficulties arising from the implementation of this Agreement.

IAF, Tab 9 at 3-8; Compliance File (CF), Tab 1, Ex. B.

¶3 When the appellant reported on April 4, 2009, to the Main Downey Station for the training she needed for the position as set forth in the settlement agreement, she was informed that she had been placed in a part-time flexible position, that she would be working at the Main Downey Post Office on Saturday, Monday, and Wednesday, that Tuesday would be her day off, and that she should report to the South Downey Station on Thursdays for her training. CF, Tab 1, Ex. C. Rather than working from "8:00 A.M. – 5:00 P.M.," the appellant worked irregular hours, at different positions, and she had to ask at the end of each day what her schedule would be for the next day. *Id.* As required by the settlement agreement, the appellant informed the agency that it was in breach of the position, training, and annual leave provisions of the settlement agreement. CF, Tab 1, Exs. F-G. Although the agency's position was that the settlement agreement had only provided for a part-time flexible Clerk position, the agency

ultimately offered the appellant full-time Clerk positions at three other facilities where there were only full-time positions and no part-time flexible positions. CF, Tab 8 at 15-17, 29-30, 56-59. The appellant declined the alternative full-time positions due to her concerns about a longer commute and working at a facility where she had previously been robbed. CF, Tab 1, Ex. F, Tab 6 at 2, Tab 8 at 30.

¶4 The appellant filed a petition for enforcement of the settlement agreement in which she asserted that the agency was in breach of the position, training, and annual leave terms of the agreement and she sought specific performance of those terms. CF, Tab 1 at 1-4 & Ex. C. The appellant asserted that she accepted the settlement agreement as a result of the regular (full-time) Clerk position specifically described in the settlement agreement. CF, Tab 1 at 2. The appellant subsequently acknowledged that, while her petition for enforcement was pending, she had completed the training specified in the settlement agreement. CF, Tab 6 at 1. The appellant continued to request specific performance of the terms of the settlement agreement regarding placement in the full-time regular Clerk position allegedly specified in the agreement and payment of annual leave.[1] *Id.* at 2-4.

¶5 The agency presented evidence and argument in support of its assertions that it only intended the settlement agreement to offer the appellant a part-time flexible position and she was placed in that position, that there was never any discussion between the parties about whether the position offered was a full-time or part-time position and, further, that it was in compliance with the training and annual leave terms of the settlement agreement. CF, Tab 8. The agency also asserted that under Article 7.3.C of the collective bargaining agreement (CBA) between the agency and the American Postal Workers Union, AFL-CIO, and the

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[1] Through her former counsel, the appellant initially indicated her willingness to consider other full-time positions that do not create hardships in commuting or safety concerns, CF, Tab 6 at 2; however, her former counsel subsequently informed the administrative judge that the appellant was not willing to accept a duty assignment at another location, CF, Tab 9 at 1.

interpretations of that article set forth in the "Joint Contract Interpretation Manual" (dated June 2007), the agency was prohibited from placing the appellant in a position at the South Downey facility other than a part-time flexible position. *Id.* at 5, 9, 15-16, 29-30, 37-38, 53-54.

¶6 The administrative judge found that the appellant had acknowledged the agency's compliance with the training term of the settlement agreement and that the training issue was no longer in dispute. CF, Tab 10 at 3. The administrative judge reviewed the agency's evidence and arguments regarding its efforts to comply with the annual leave term and the position assignment terms of the settlement agreement. *Id.* at 3-7. The administrative judge found that full compliance with the annual leave term would be attained shortly, if it had not already occurred. *Id.* at 6-7. The administrative judge found that the issue of whether the position offered in the settlement agreement was full-time or part-time was never directly addressed by the parties prior to entering into the settlement agreement, that the language of the settlement agreement identified a specific position and location, and that the appellant had been placed into that position. *Id.* at 7. She determined that a part-time flexible Clerk will work on an anticipated schedule, subject to change, and that despite the agreement's terms used to describe the specific work schedule for the position and the appellant's understanding of those terms, the settlement agreement is unambiguous. *Id.* Thus, the administrative judge concluded that the agency had fully complied with the terms of the settlement agreement. *Id.* The administrative judge further found that, to the extent that the agency could be found not to be in compliance with the position assignment terms of the settlement agreement, the agency had shown good cause for its failure to comply due to the provisions of the CBA and because the agency had offered the appellant other full-time positions, which she had declined to accept. *Id.* The administrative judge found that the appellant had not made any allegations that rebutted the agency's evidence and arguments of

compliance and, thus, she denied the appellant's petition for enforcement. *Id.* at 1, 7-8.

¶7 The appellant has filed a petition for review and the agency has filed a response in opposition. Petition for Review File (PFR File), Tabs 1, 3.

ANALYSIS

¶8 The appellant has not challenged the administrative judge's findings regarding the training and annual leave terms of the settlement agreement. We therefore affirm those findings. CF, Tab 10 at 3, 6-7; *see* 5 C.F.R. § 1201.114(b) ("The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review."). The appellant solely reasserts on review that the agency is in breach of the position assignment terms of the settlement agreement.[2] PFR File, Tab 1 at 7. The appellant asserts, in effect, that the only reason she accepted the settlement agreement was the agency's offer of a regular (full-time) Clerk position at the South Downey Post Office and she seeks specific performance of the position assignment terms or to be returned to her former position as an EAS-19 Manager Customer Services. *Id.*

¶9 In order to prevail, the appellant bears the ultimate burden of showing material noncompliance by the agency with the terms of the settlement agreement. *See Lutz v. U.S. Postal Service*, 485 F.3d 1377, 1381 (Fed. Cir. 2007). A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract. *Id.*; *Torres v. Department of Homeland Security*, 110 M.S.P.R. 482, ¶ 9 (2009). A party may establish a breach of an agreement "by proving that the other party failed to comply with a provision of

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[2] We note that the issue before the Board is whether the agency is in compliance with the settlement agreement. The administrative judge informed the parties that in order to set aside the settlement agreement as invalid, either party could file a petition for review of the administrative judge's prior decision dismissing the appeal as settled. CF, Tab 10 at 7 n.2. Despite this notice from the administrative judge, neither party has filed such a petition.

the contract in a way that was material, regardless of the party's motive." *Link v. Department of the Treasury*, 51 F.3d 1577, 1582 (Fed. Cir. 1995). Where, as here, the facts are undisputed, the determination of whether there has been material noncompliance with the terms of the agreement necessarily reduces to a question of law. *Lutz*, 485 F.3d at 1381.

¶10 A settlement agreement is a contract, and, as such, it will be enforced in accordance with contract law. *Allen v. Department of Veterans Affairs*, 112 M.S.P.R. 659, ¶ 7 (2009); *see Lutz*, 485 F.3d at 1381. In construing the terms of a settlement agreement, the words of the agreement are of paramount importance. *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *Galatis v. U.S. Postal Service*, 109 M.S.P.R. 651, ¶ 10 (2008). The Board has no authority to unilaterally modify the terms of the parties' settlement agreement, *Galatis*, 109 M.S.P.R. 651, ¶ 10, or to read a nonexistent term into an agreement that is unambiguous, *Hamilton v. Department of Veterans Affairs*, 92 M.S.P.R. 467, ¶ 6 (2002). The Board will consider parol evidence only if the agreement is ambiguous. *Galatis*, 109 M.S.P.R. 651, ¶ 10; *Haefele v. Department of the Air Force*, 108 M.S.P.R. 630, ¶ 11 (2008). The terms of an agreement are ambiguous as a result of differing interpretations as to the meanings or intent given to those terms by the parties only when the respective interpretations are both reasonable. *See Alexander v. U.S. Postal Service*, 94 M.S.P.R. 237, ¶ 7 (2003). When an agreement's words and meaning are unambiguous, its terms are not subject to variation. *Slattery v. Department of Justice*, 590 F.3d 1345, 1347 (Fed. Cir. 2010).

¶11 The Board has the authority to enforce the terms of a settlement agreement that has been entered into the record in the same manner as any final Board decision or order. *Lary v. U.S. Postal Service*, 493 F.3d 1355, 1357 (Fed. Cir. 2007); *Allen*, 112 M.S.P.R. 659, ¶ 7. If an appellant alleges noncompliance with a settlement agreement, the agency must produce relevant material evidence of its compliance with the agreement, or show that there was good cause for

noncompliance. *Allen*, 112 M.S.P.R. 659, ¶ 7; *see Haefele*, 108 M.S.P.R. 630, ¶ 7.

¶12 The settlement agreement required the agency to place the appellant in "Job ID# 95677592 P/L 026, Clerk Job#25, South Downey Station, Sales Service & Distribution Associate, South Downey[,] 7911 Imperial Hwy, Downey[,] C[a.] 90242, with Sunday and Tuesday off, and 8:00 A.M. – 5:00 P.M. reporting time." CF, Tab 1, Ex. B at 2. The appellant asserts, in effect, that these terms indicate a full-time Clerk position at the South Downey Post Office, working 5 days per week from 8:00 a.m. to 5:00 p.m., with Sunday and Tuesday off. PFR File, Tab 1 at 7. The agency asserts that the settlement agreement does not indicate whether the agency would place the appellant in a part-time flexible or full-time Clerk position, but rather provides that the appellant would be assigned to a specific position identified in the agreement by a job identification number, which is a part-time flexible position. PFR File, Tab 3 at 2; CF, Tab 8 at 5-8, 15-16. The agency submitted parol evidence, in the form of affidavits and e-mails of its managers and attorney representative, and portions of its CBA, in support of its assertions that the agency only intended to offer the appellant a part-time flexible position and that placing the appellant in a full-time Clerk position at the South Downey facility would violate the applicable CBA. CF, Tab 8 at 4-44, 47-54. For the following reasons, we find that the clear, specific, and unambiguous terms of the agreement provide that the appellant would be placed in a full-time position with a specific schedule and duty station.

¶13 First, the fact that the agreement does not use the terms part-time flexible or full-time regular does not mean that the agreement was ambiguous regarding the nature of the position specified in the agreement.[3] *See Galatis*, 109 M.S.P.R.

[3] We note that the agency conceded that "[a] job number cannot tell someone whether or not a position is a [part-time flexible position] or a regular clerk position because both [part-time flexible] and regular clerk positions have job numbers." CF, Tab 8 at 6, 29.

651, ¶ 10 (an assertion that an agreement is silent as to a particular matter does not necessarily make an agreement ambiguous); *Haefele*, 108 M.S.P.R. 630, ¶¶ 9-11 (the absence of a term in an oral settlement agreement indicating that the agreement was conditioned upon it being reduced to writing and signed by the parties did not mean that the agreement was ambiguous on that point, and the Board refused to consider the agency's evidence regarding the parties' intent or understanding at the time they entered into the agreement). Paragraph nine of the settlement agreement states that the "[a]greement shall be interpreted in accordance with the plain meaning of its terms and not strictly for or against any of the Parties hereto." CF, Tab 1, Ex. B at 4. The terms of the settlement agreement state a specific position, at a specific location, with specific duty hours providing for 8-hour days, and 2 specific days off per week. CF, Tab 1, Ex. B at 2. The plain meaning of these terms is that the appellant would be working a full-time position with a specific work schedule at the South Downey facility. Nothing in the agreement indicates that the specific terms regarding the appellant's schedule would be subject to the variability associated with part-time flexible positions with the agency. Thus, the clear and specific terms of the agreement are unambiguous and are not subject to variation. *See Slattery*, 590 F.3d at 1347; *Galatis*, 109 M.S.P.R. 651, ¶ 10; *Haefele*, 108 M.S.P.R. 630, ¶¶ 9-11. In these circumstances, we will not consider the agency's parol evidence regarding the agency's intent at the time it entered into the settlement agreement. *See Galatis*, 109 M.S.P.R. 651, ¶ 10; *Haefele*, 108 M.S.P.R. 630, ¶ 11.

¶14 Second, the agency's asserted interpretation of the agreement would violate the "general rule of contract interpretation that terms of a contract should not be interpreted so as to render them ineffective or superfluous." *Abraham v. Rockwell Int'l Corp.*, 326 F.3d 1242, 1254 (Fed. Cir. 2003). Specifically, the agency's asserted interpretation would render the terms providing for particular duty hours and days off ineffective and superfluous. *See id.* Thus, we find the

agency's asserted interpretation of the position assignment terms is not reasonable.

¶15 The agency does not dispute that it has required the appellant to work in different positions, at different locations, and at different times than as specifically stated in the settlement agreement. Thus, the agency has breached the terms of the settlement agreement concerning downgrading the appellant to a specified full-time position with a specific schedule and duty station. *See, e.g.*, *Carson v. Department of Energy*, 77 M.S.P.R. 453, 457-58 (1998) (finding that the agency breached a settlement agreement when it "could not or did not" provide the appellant with a dispute resolution process specified in the agreement). We further find that the agency's obligation to downgrade the appellant to a full-time Clerk position was a matter of vital importance to the contract, and we therefore conclude that the agency has committed a material breach. *See Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997); *Hernandez v. Department of Defense*, 112 M.S.P.R. 262, ¶ 6 (2009). Although the agency has offered substitute positions at other facilities, the appellant has not found these positions to be acceptable for various reasons, and the parties have not agreed to modify the terms of their settlement agreement. *See Carson*, 77 M.S.P.R. at 458 ("A contract may be modified if there is mutual assent to the modification.").

¶16 Generally, when a party to a settlement agreement materially breaches the agreement, the non-breaching party may elect to enforce the terms of the agreement or to rescind the agreement and reinstate the underlying appeal. *See Lary v. U.S. Postal Service*, 472 F.3d 1363, 1368-69 (Fed. Cir. 2006), *pet. for reh'g denied*, 493 F.3d 1355 (Fed. Cir. 2007); *Sanchez v. Department of Homeland Security*, 110 M.S.P.R. 573, ¶ 7 (2009). The appellant has requested specific performance of the position assignment terms of the settlement agreement, or a return to her former position as EAS-19 Manager Customer Services, by which she may mean that she wishes to rescind the agreement and

reinstate her removal appeal if the agency cannot implement the specific terms of the agreement. CF, Tab 1 at 2-4; PFR File, Tab 1 at 7. The agency has asserted that it is prevented from placing the appellant in the full-time Clerk position as set forth in the express terms of the settlement agreement because doing so would allegedly require it to violate the CBA. The Board has generally declined to order an agency to do something that would, in fact, violate the terms of an agency's CBA, because CBA provisions carry the same weight as an agency's regulations and an agency is therefore required to comply with the terms of a CBA in the same manner as it is required to comply with its regulations. *See Gutkowski v. U.S. Postal Service*, 505 F.3d 1324, 1327-28 (Fed. Cir. 2007); *Smith v. U.S. Postal Service*, 55 M.S.P.R. 348, 356-57 (1992); *Hicks v. U.S. Postal Service*, 52 M.S.P.R. 561, 564 (1992). As pertinent to the facts of this case, the Board has also generally declined to order an agency to do something that would violate the rights of third parties under the agency's CBA.[4] *See Gullette v. U.S. Postal Service*, 70 M.S.P.R. 569, 574 n.6, 577 n.10 (1996); *Hicks*, 52 M.S.P.R. at 563-65.

¶17 The agency submitted some evidence below in support of its argument that downgrading the appellant to a full-time regular Clerk position at the South Downey facility as specified in the agreement would violate the CBA and potentially impair the rights of other employees under the agreement, including

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[4] In *Saunders v. U.S. Postal Service*, 75 M.S.P.R. 225, 227-30 (1997), the Board ordered the agency to comply with the express terms of the parties' settlement agreement providing that the agency was to return the appellant to duty immediately following his submission of evidence of his completion of a drug treatment program. The agency had refused to reinstate the appellant until he had undergone a fitness-for-duty examination that it claimed it was entitled to require under applicable statute, regulation, and/or the CBA. *Id.* at 228-29. The Board found, in pertinent part, that the express terms of the settlement agreement were such that the terms of the settlement agreement superseded any prior agreements, including the CBA, and therefore controlled the subject matter of the agreement. *Id.* at 229-30. However, requiring the agency to comply with the terms of the settlement agreement over the CBA in that case did not implicate an actual violation of a third party's rights under the CBA.

part-time flexible Clerks at the South Downey facility with more seniority than the appellant. CF, Tab 8. However, the record is inconclusive. For instance, the agency has relied on an excerpt from the Joint Contract Interpretation Manual for the proposition that the appellant cannot be assigned to full-time status at the South Downey facility. CF, Tab 8 at 9, 53-54. However, the provision cited by the agency contains a qualifier that an employee returning to the Clerk craft after more than 1 year at certain postal facilities "[n]ormally" is "assigned to the bottom of the part-time flexible roll." *Id.* at 54. The "[n]ormally" qualifier suggests that this rule does not apply in all cases. The record is not developed regarding whether an exception to the general rule might be applicable here. Under the circumstances, we find it appropriate to remand this matter for further development of the record. *See generally Adams v. U.S. Postal Service*, 72 M.S.P.R. 6, 11-12 (1996) (remand is appropriate if the factual record is insufficiently developed to enable the Board to make findings on material issues related to compliance with a settlement agreement).

¶18 On remand, the administrative judge shall require the parties to submit further evidence and argument on the issues of whether compliance with the assignment provisions of the settlement agreement would necessarily violate the CBA, or any other law, rule, or regulation, and whether the Board may order specific performance in this matter. The administrative judge will then determine whether specific performance is an available remedy for the appellant under the facts of this case, keeping in mind that a Board order of specific performance need not mirror the performance contemplated by the settlement agreement; rather, it should be drawn so as best to effectuate the purposes for which the contract was made and upon such terms as justice requires. *See Sanchez*, 110 M.S.P.R. 573, ¶ 8 & n.4 (citing *Lary*, 493 F.3d at 1357; *Lary*, 472 F.3d at 1369). The appellant may then make an informed choice regarding whether she wishes to pursue any available remedies. *See Mullins v. Department of the Air Force*, 79 M.S.P.R. 206, ¶ 13 (1998) (remanding to permit the appellant to make an

informed choice between rescinding and enforcing the agreement); *see also*, *e.g.*, *Hernandez*, 112 M.S.P.R. 262, ¶ 9 ("If the agreement is rescinded, the settlement terms become inoperative. The appellant would thus risk losing any benefits he has received under the agreement." (citations omitted)); *cf. Gullette*, 70 M.S.P.R. at 576-77 & n.10 (where the appellant could not obtain enforcement of a settlement term as she reasonably interpreted it because enforcement would violate a CBA, she had the option of rescinding the agreement and reinstating her appeal, or accepting the agreement under the agency's interpretation of the agreement). If the appellant chooses to rescind the agreement, then her removal appeal must be adjudicated. *See Hernandez*, 112 M.S.P.R. 262, ¶ 9; *Eagleheart v. U.S. Postal Service*, 110 M.S.P.R. 642, ¶ 15 (2009).

ORDER

¶19 We VACATE the portion of the compliance initial decision finding the agency in compliance with the position assignment terms of the parties' settlement agreement, AFFIRM the remainder of the compliance decision, and REMAND this case to the Regional Office for further adjudication as set forth in this Opinion and Order.

FOR THE BOARD:

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