

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

[REDACTED],

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

APPELLEE

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CASE NO. 23-13

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DECISION CONCERNING ENFORCEMENT OF SETTLEMENT AGREEMENT

On June 27, 2018, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board) concerning Appellant’s suspension pending investigation. On January 10, 2019, the parties filed a fully executed settlement agreement with the Board resolving the appeal. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15(b), the Board issued an Order Accepting Settlement Agreement retaining jurisdiction to interpret and enforce the terms of the settlement agreement. [REDACTED] v. *Montgomery County*, MSPB Case No. 18-33 (January 16, 2019).

On April 27, 2023, Appellant filed what appears to be, in part, a request for enforcement with the Board, alleging that the County has failed to comply with the terms of the Settlement Agreement by failing to fully reimburse her for the costs of insurance and attorney’s fees. Appellant also objects to the online publication of a report by the County Office of Inspector General that she claims is defamatory, the failure of the County to return boxes of documents that she claims are hers, and the return of flexible spending account funds. *See* Appellant’s “Update” received April 27, 2023; Appellant’s Response received August 28, 2023.

Before making a determination regarding the need to seek enforcement of the Settlement Agreement in MSPB Case No. 18-33, the Board provided the County with the opportunity to respond to Appellant’s enforcement request. On May 31, 2023, the County filed a response arguing that the County had fully complied with the Board’s Order Accepting Settlement Agreement in MSPB Case No. 18-33. Appellant had the right to file a response on or before June 22, 2023, but did not do so until August 28. The Board has reviewed the record and considered the arguments of the parties.

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APPLICABLE LAW AND REGULATIONS

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, June 30, 2015, and June 1, 2020), Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, which states in applicable part:

§ 35-15. MSPB may enforce settlement agreements.

- (a) If a settlement agreement is before the MSPB in connection with an appeal, the MSPB may interpret and enforce the agreement.
- (b) If the parties settle a case while in proceedings before the MSPB, the parties may agree to enter the settlement agreement into the record. If requested to enter the agreement into the record, the MSPB will retain jurisdiction to enforce the terms of the agreement.

ANALYSIS AND CONCLUSIONS

The Board's Jurisdiction

As this Board has ruled in numerous cases, the Board's jurisdiction is not plenary but is rather limited to that which is granted to it by statute or regulation. MSPB Case No. 10-09; MSPB Case No. 10-12; MSPB Case No. 10-16. *See, Blakehurst Lifecare Community v. Baltimore County*, 146 Md. App. 509, 519 (2002) ("An administrative agency is a creature of statute, which has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute."); *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit Systems Protection Board's jurisdiction is only over actions which are specifically provided for by some law, rule, or regulation); *Monser v. Dep't of the Army*, 67 M.S.P.R. 477, 479 (1995). As a limited tribunal whose jurisdiction is derived from statute, the Board is obligated to ensure that it has jurisdiction. *Schwartz v. USPS*, 68 M.S.P.R. 142, 144-45 (1995).

As noted above, Montgomery County regulations specifically provide that the MSPB may interpret and enforce a settlement agreement. MCPR §35-15(a). The parties filed the Settlement Agreement with the Board on January 10, 2019. On January 16, 2019, the Board issued an Order Accepting Settlement Agreement. Accordingly, the Board has jurisdiction over Appellant's enforcement request and continues to have the authority to interpret and enforce the Settlement Agreement. MSPB Case No. 16-06 (2015).

Appellant Has the Burden of Proof

It is well established that a settlement agreement is a contract between the parties. MSPB Case No. 16-06 (2015); MSPB Case No. 10-01 (2009); MSPB Case No. 08-14 (2008). In construing and enforcing the Settlement Agreement this Board must thus apply basic principles of contract law. It is also a settled principle of Maryland contract law that the party seeking to enforce a contract has the burden of proof. MSPB Case No. 16-06 (2015) *citing Bd. of Trustees, Community College of Baltimore City v. Patient First Corp.*, 444 Md. 452, 471-72 (2015); *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001); *Glen Alden Corp. v. Duvall*, 240 Md. 405, 422

(1965); *The Fischer Org., Inc. v. Landry's Seafood Restaurants, Inc.*, 143 Md. App. 65, 75 (2002)). The U.S. Merit System Protection Board also adheres to the same principle. MSPB Case No. 16-06 (2015) citing *Leeds v. U.S. Postal Service*, 108 M.S.P.R. 113 (2008); *Kolassa v. Department of the Treasury*, 59 M.S.P.R. 151, 154 (1993).

Thus, Appellant has the burden of proving by a preponderance of the evidence of record that there was a contractual obligation and that there was a material breach of that duty. MSPB Case No. 16-06 (2015); Montgomery County Administrative Procedure Act, §2A-10(b).

Appellant Has Failed to Carry Her Burden of Proof

In her filings Appellant makes claims that may be considered requests for settlement agreement enforcement. A primary claim is that she did not receive reimbursement of insurance premiums and attorney's fees:

Despite an agreement reached with MSPB, the OCA [Office of the County Attorney] insisted that I re-pay 50% of insurance costs. This incurred additional legal fees of \$1000. I want this money returned to me.

MSPB determined that the full insurance premium would be paid to me. The OCA determined otherwise costing me funds directly and in legal fees.

I incurred substantial personal and expenses, was denied the full refund of insurance (as per MSPB) and flex spending funds.

I would like to have your support in having the funds returned to me related to the insurance and legal fees.

Appellant also seeks to have boxes of documents from her office returned to her if they do not contain privileged information or protected health information, *i.e.*, information that can be used to identify an individual and that is protected by federal or State law:

Secondly, those boxes and files of documents that I collected need to be returned to me.

At this time, what is necessary is for me to be allowed access to my files and cartons that were packed from my office space at the Pre-Release Center. I believe I have the right to retrieve what is mine and not privileged or protected health information. For me, that is essential in the interest of fairness.

Appellant also alleges that a report of the Office of Inspector General has defamed her in violation of the Settlement Agreement, which she believes prohibits the parties from taking "further action":

I recently viewed the OIG site for Montgomery County and found a reference to an investigation (2019) and finding (2020) that obviously references me. This is defamation. . . The legal settlement includes language barring both parties from further action against each other. This is a clear violation. I could sue for defamation.

The OIG posting on the website is slander. It needs to be removed. Per a settlement agreement, all parties agreed not to pursue further action. However, I will file suit unless this is removed.

With regard to reimbursement of insurance premiums, ¶ 3 of the settlement agreement provides that the County agreed “to reimburse [Appellant] \$1,749.83 for the 60 days of insurance premiums she had to pay out of pocket.” Appellant alleges that she did not receive “the full insurance premium” and has had to incur legal fees. Appellant Response, ¶ 4.

The County has provided evidence that Appellant received the promised \$1,749.83 pursuant to the settlement agreement, including confirmation of receipt from Appellant’s attorney and a copy of an endorsed check. County Exhibits (CX) 8-10. Appellant provided no evidence to the contrary.

In ¶ 4 of the settlement agreement the County agreed to “pay the reasonable attorneys’ fees of [Appellant’s] attorneys, ██████████, for fees and costs related to the appeal in Case Number 18-33, in the amount of \$7,500.00” within 30 days. The County provided documentation that it issued a check payable to ██████████ dated January 23, 2019, in the amount of \$7,500, obtained email confirmation from the law firm of receipt, and received an endorsed copy of the check from the bank. CX 9, p. 3 (“We have received the check for our attorney fees.”); CX 11 (endorsed check). Again, Appellant did not produce any evidence to show that the attorney’s fees required under the settlement agreement were not paid.

Since pursuant to the settlement agreement the County paid Appellant \$1,749.83 for out-of-pocket insurance costs and \$7,500 for her attorney’s fees, we infer that Appellant’s reference to not being paid for insurance and attorney’s fees likely concerns the erroneous backpay and benefits overpayments the County recouped.

Under ¶ 2 of the settlement agreement the County agreed to pay Appellant “back pay for the dates of September 6, 2018 through, and including, December 21, 2018.” The County Submission and exhibits document that the County made direct deposits of back pay to Appellant’s bank accounts on January 4th and 11th, 2019. County Submission, p. 4; CX 6; CX 12. However, the County Department of Finance Payroll Section did not withhold health benefits contributions and deductions because Appellant’s backpay was issued before the OHR health benefits office had updated Appellant’s status in their records. CX 19, ¶s 8-10. As a result, Appellant was overpaid and had to make a direct COBRA payment of \$1,434.30 to maintain her health insurance benefits. County Submission, p. 4; CX 15, ¶9.

The Office of the County Attorney and Appellant’s attorney engaged in discussions over the best way to resolve the failure to withhold health insurance benefit premiums from Appellant’s backpay and to make Appellant whole. County Submission, p. 5. The County had initially doubled the amount it would normally withhold for Appellant’s portion of the benefits contributions from her January 19, 2019, and February 1, 2019, pay checks. CX 19, ¶13. Appellant’s counsel and the County decided that the remaining overpayment balance of \$2,482.33, would be deducted from Appellant’s February 15, 2019, and March 1, 2019, paychecks (\$1,241.17 per paycheck). CX 9, pp. 8-9, CX 17 CX 19, ¶14. Appellant’s COBRA payment of \$1434.30 was also refunded to her. CX 9; CX 14.

As the County was attempting to correct the payroll error the time within which it was required to certify to the Board that it had fully complied with the terms of the settlement agreement was about to expire on March 2, 2019. On February 19, 2019, Counsel for the County contacted the Board's Executive Director by email to provide a status update on compliance with the settlement agreement. CX 13. Counsel also explained the payroll error and the steps being taken to resolve the overpayment. Counsel also stated that Appellant's attorneys, who were copied on the email, did not believe that the County could certify that it was in compliance with the terms of the agreement until they had been able to see the March 15, 2019, paycheck. The County's position was that it had fully implement the settlement, and counsel asked if they should provide certification or wait until after the March 15 paycheck. *Id.* The Board's Executive Director replied on February 21, 2019, saying:

If the County believes that it may legitimately certify full compliance with the terms of the settlement agreement, it is free to do so. If the Appellant feels that there is a breach of the agreement she may seek to enforce the terms by filing with the Board. However, given the circumstances, the Board suggests that the County wait until March 20, after the parties have confirmed that the payroll deductions are correct, to certify compliance with the settlement agreement. *Id.*

On March 19, 2019, after confirming that the deductions on Appellant's March 15, 2019, paycheck had returned to the proper amount, the County provided the Board with a certification that it had complied with the terms of the settlement agreement. CX 4.

Appellant's attorneys sent the County an invoice for \$550 in attorney's fees related to discussions over the recoupment of overpayments to Appellant. CX 21. Effective May 6, 2019, the parties amended the settlement agreement to acknowledge the error in processing Appellant's backpay and benefits and the additional \$550 in attorney's fees that were incurred by Appellant in order to resolve the issue. CX 2. Shortly thereafter the County paid the attorney's fees. CX 22.

We see no evidence that the County failed to provide Appellant with the correct amounts of backpay and reimbursement her for attorney's fees. Nor is there evidence that she was improperly charged for insurance premiums.

Although the settlement agreement contains no provision concerning flexible spending account (FSA) monies, the County provided documentation rebutting Appellant's suggestion that she was denied flexible spending account (FSA) funds. CX 15, ¶s 15 – 18, and CX 19, ¶ 21. Indeed, it appears that Appellant received \$1,600 for FSA health claims despite only paying \$799.89 through withholdings from her 2018 paychecks. CX 15, ¶ 16 and CX 19, ¶ 21. Appellant has submitted no evidence to indicate that she was denied FSA funds to which she was entitled.

With regard to the report of the Office of Inspector General that Appellant claims defames her, we see no term of the settlement agreement that is implicated. Contrary to Appellant's allegation that the "settlement includes language barring both parties from further action against each other" the agreement clearly contemplates the possibility of further action against Appellant by the County under certain circumstances. CX 1, ¶s 6- 8. Further, while non-disparagement clauses may be contained in some settlement agreements, there is no such language in the settlement agreement at issue. Thus, even if the OIG report could be considered an action against

Appellant or defamatory, which we do not so find, there would be no violation of the settlement agreement.

As to the documents Appellant claims are personal and should be returned to her, Appellant provides no evidence that her personal property has been retained by the County and points to no provision of the settlement agreement that may have been violated.

Moreover, in January 2021, Appellant and the County entered into another settlement agreement to resolve a federal lawsuit. CX 24. In that agreement Appellant released all claims against the County. *See* CX 24, ¶12 (“all claims, demands, debts, causes of action or suits of any kind of nature whatsoever, including claims for compensatory, statutory or punitive damages, costs, expenses, attorney's fees, and compensation that may have accrued to (including on) the date this Agreement is executed in connection with any issues raised in [Appellant’s] suit against the County, including any other charges or complaints in any other administrative forum, or state or federal court.”).

Appellant has not carried her burden of proof to show a breach of the settlement agreement requiring Board enforcement action. In any event, any such claims were likely released by the subsequent settlement. For these reasons Appellant’s request for enforcement is **DENIED**.

For the Board
October 10, 2023


Harriet E. Davidson
Chair