BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{Grievant}	Record of Proceedings FSGB No. 2003-035
And	Date: March 10, 2006
Broadcasting Board of Governors	**DECISION - EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:	Warren R. King
Board Members:	Garber Davidson Edward A. Dragon
Special Assistant:	Joseph Pastic

Representative for the Grievant:	*Pro se*
Representative for the Agency:	Mary Poggioli Chief, LR/ER BBG
Employee Exclusive Representative:	American Foreign Service Association

OVERVIEW

Grievant {Grievant}, a Technical Foreign Service Officer with the International Broadcasting Bureau (IBB), Broadcasting Board of Governors (BBG)[1] at the time of the filing of this grievance, sought the reversal of an IBB decision which upheld the validity of a settlement agreement of a previous grievance and which denied that the agency materially breached the settlement agreement so as to render the agreement unenforceable.

In the previously settled grievance, grievant complained that the IBB had violated its Manual of Operations requirements concerning the transfer of grievant to a post in {Blank} from his then post in {Blank}. The settlement agreement, signed by both his AFSA legal representative and him, provided generally for:

- The cancellation of his assignment to {Blank},
- An assignment to the {Region} Transmitting Station for the duration of his employment with IBB,
- A voluntary and irrevocable agreement to retire no later than August 31, 2003,
- Home leave after 18 months of service at {Region},
- A waiver of any and all grievance, appeal and other review rights for actions connected with the agreement.

In the present case, grievant (1) challenged the validity of the settlement agreement on grounds of coercion, and (2) claimed otherwise that the IBB breached the settlement agreement by refusing to grant him a period of home leave, thereby voiding the agreement.

Earlier on, in the processing of this case, grievant filed a motion to compel certain discovery. The Board denied the motion on the grounds that the information sought related to the validity of the agreement and that he was barred from challenging the validity of the agreement by the two-year limitation period for the filing of a grievance. The Board, in denying the motion to compel, directed that the claim of the invalidity of the settlement agreement be dismissed as an issue in the present case.

Grievant's theory of the case was that the agency breached a critical provision of a settlement agreement so as to relieve him of his obligations under the agreement. The

[1] The International Broadcasting Bureau (IBB) is part of the Broadcasting Board of Governors (BBG) that is identified in 22 U.S.C. 4131. References to the IBB are used in this Decision in order to conform to the term most frequently used by the parties.

breached provision, he claimed, was an agency promise to allow him to take home leave after 18 months of service.

The Board held that settlement agreements are enforced and interpreted in accordance with contract law. Under principles of contract law, a party may be discharged from an obligation where a material breach has occurred. A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract. In this case, the Board found that the settlement provision relating to the exercise of home leave was not a matter of vital importance, nor did it go to the essence of the agreement. The Board found further that the agency did not breach the home leave provision, and therefore, did not materially breach the settlement agreement. In these circumstances, the Board held that grievant was bound to adhere to the terms of the settlement agreement.

The Board found further judicial authority that would preclude the granting of the grievance appeal. That authority is found in a judicial holding that an appellant is estopped to attack a settlement that resulted in the retirement of a federal employee where the appellant has accepted the very valuable benefits of the settlement.

DECISION

I. THE GRIEVANCE

{Grievant}, a Technical Foreign Service Officer with the International Broadcasting Bureau, Broadcasting Board of Governors (IBB) at the time of the filing of this grievance, seeks the reversal of an IBB decision which upheld the validity of a settlement agreement of a prior grievance (FSGB Case No. 2000-077), and which denied that the agency materially breached the settlement agreement so as to render the agreement unenforceable.

{Grievant} filed the present grievance with the IBB on July 29, 2003, by a letter of July 27, 2003. The IBB responded by a letter decision of August 29. The appeal to this Board followed on September 3, 2003.

II. BACKGROUND

In the previously settled grievance, by a memorandum of July 4, 2000 grievant complained that the IBB had violated Manual of Operations (MOA) requirements concerning his transfer to a post in {Blank} from his then post in {Blank}. The agency did not render a decision within 90 days of the filing of the grievance and grievant filed an appeal with this Board on November 10, 2000. The Board acknowledged receipt of the appeal by a memorandum of November 21, 2000 in which the case number FSGB No. 2000-077 was assigned to the appeal.

Thereafter, on January 21, 2001, {Grievant}'s representative, the American Foreign Service Association (AFSA), filed a facsimile message advising of a settlement of the grievance in the following terms:

> Re: FSGB No. 2000-077, Request for Withdrawal
>
> The parties have reached a settlement in the above grievance. Grievant hereby requests that the appeal be withdrawn and the case closed. Thank you for your consideration.

By a memorandum of January 31, 2001, the Board dismissed the appeal in the following terms:

> {Grievant} has notified the Board, via a fax message with AFSA, that the parties have reached a settlement, and thereby, he is withdrawing his appeal to the Board. The Board, therefore, dismisses this appeal with prejudice.

The settlement agreement was not filed with the Board at the time.

In the present case, grievant (1) challenges the validity of the settlement agreement on grounds of coercion, and (2) claims that the IBB breached the settlement agreement by refusing to grant him a period of home leave, thereby voiding the agreement.

A copy of the settlement agreement, as now presented in the record as a part of the present grievance, shows {Grievant}'s signature along with the signature of AFSA legal representative, Ms. Zlatana Badrich.

In the settlement agreement, the parties agreed, as follows:

- The agency agreed not to effect the employee's assignment to the {Blank} Transmitting Station.
- The agency agreed that, for the duration of his employment with the agency, he would be assigned to the {Region} Transmitting Station as the Transmitter Plant Supervisor.
- After 18 months of the employee's service at the {Region Transmitting Station, the agency agreed to approve 30 days of home leave for the employee, to begin July 1, 2002.
- The employee voluntarily and irrevocably agreed to retire from the agency effective no later than August 31, 2003.

- The employee and the union waived any and all grievance, appeal, and other review rights for actions connected with the agreement.

- The employee withdrew and agreed not to refile his grievance of July 4, 2000.

- In the event that the employee did not resign or voluntarily retire on or before August 11, 2003, the agreement would constitute his irrevocable resignation from the agency, effective August 31, 2003.

Earlier in the processing of this case, grievant filed a motion to compel certain discovery. That motion was denied on the grounds that the information sought related to the validity of the agreement and that he was barred from challenging the validity of the agreement by the two-year limitation period for the filing of a grievance. The Board, in denying the motion to compel, directed that the claim of the invalidity of the settlement agreement of January 12, 2001 be dismissed as an issue in this case.

The dismissal action leaves only the issue as to whether the IBB breached the settlement agreement by refusing to grant him a period of home leave, thereby voiding the agreement.

III. POSITIONS OF THE PARTIES

The Grievant

Grievant avers strongly that the agreement was breached by the agency, and, therefore, it is no longer valid. In his own words, he argues:

> Specifically, I am grieving the agency's failure to abide by its settlement agreement, dated 1-12-01. In particular, the Agency's failure to allow me to take Home Leave, as specified in paragraph 3 of the agreement, constitutes a breach of the agreement.
>
> The agreement states that I will receive thirty days of Home Leave during the period between July 1, 2002 and August 15, 2002. However, I was not granted any Home Leave during this period. When I asked for home leave I was told that MOA V-B 413 says that I am not eligible for Home Leave

> because the {Blank} is a two year tour not a three year tour. Since the promise of Home Leave is a critical part of this agreement, and they refused to give Home Leave when I requested it, the entire agreement should be declared void and invalid.
>
> Therefore, paragraphs 4, 5, 6, and 7 of the agreement no longer pertain, and I am free to raise the issues that led to the agreement. Furthermore, since the agreement is invalid, I will not be required to resign on or before August 31, 2003 (para 4) nor does it constitute my irrevocable agreement to resign (para 6).

The Agency

The agency states that, as part of the settlement agreement, it agreed to approve 30 days of home leave after {Grievant} served 18 months at the {Region} Transmitting Station. The leave was to begin July 1, 2002, with a return to duty at PTS by August 15, 2002. As it turned out, grievant was not initially eligible for home leave until August 7, 2002, because he did not arrive at {Blank} until February 7, 2001.

Further, on October 16, 2001, {Grievant} went on R&R travel, returning to {Blank} on November 17. Sometime thereafter, grievant submitted a request for home leave to {Name}, Acting {Region} Station Manager. {Name} was not aware of the settlement agreement and he responded to the request based on his knowledge of agency tour policy. {Name} informed grievant, by e-mail of November 7, 2001, that because he had taken R&R he would not be eligible for home leave until grievant had been back at post for 18 months following the R&R. Therefore, grievant would not have been eligible for home leave until April 2003. {Name} also sent, by e-mail, a message from the {Region} administrative staff explaining home leave eligibility and the reasons why {Grievant} was not eligible for home leave at the time of grievant's request. {Name}'s November 7, 2001 e-mail constituted the Station's determination of grievant's eligibility for home leave. Given the facts of this case, the agency contends that it was grievant's

failure to follow {Name}'s clear recommendation to contact Washington or take other reasonable steps to obtain approval for home leave that resulted in the leave not being approved. By this failure, grievant effectively elected not to take the home leave.

IV. DISCUSSION AND FINDINGS

Grievant's theory of the case is that the agency breached a critical provision of a settlement agreement so as to relieve him of his obligations under the agreement. The breached provision, {Grievant} claims, was an agency promise to allow him to take home leave during the period of time between July 1,2002, and August 15, 2002. As a consequence of the alleged breach, grievant argues that he is freed of his obligations to: (1) retire from the agency no later than August 31, 2003, (2) waive any and all grievance and other review rights for actions connected with the agreement, (3) accept the agreement as an irrevocable resignation if he does not retire on or before August 31, 2003, and (4) freely and voluntarily agree to the settlement conditions.

Settlement agreements are enforced and interpreted in accordance with contract law. *See Greco v. Department of the Army,* 852 F.d 558 (Fed.Cir. 1988) (Settlement agreements brought before the Board [Merit Systems Protection Board] for enforcement are to be enforced and interpreted in accordance with contract law.); *Hicks v. U.S. Postal Service,* 52 MSPR 561 (1992). Under principles of contract law, a party may be discharged from an obligation where a material breach has occurred. The burden of proving that a settlement agreement has been breached lies with the party asserting the breach. (*See Gallegos v. Department of the Interior,* 63 MSPR 223 (1994)). In this regard, grievant faces a formidable task to show that there was a material breach of the

settlement agreement by the agency. *See e.g., Betterl v. Dept. of Veterans Affairs, 47 MSPR 63 (1991)*

We address, first, the question as to whether the agency materially breached the settlement agreement. A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract. *See Littlejohn v. Department of the Air Force,* 69 MSPR 59 (1995) citing 5 Arthur L. Corbin, Corbin on Contracts, Section 1104 (1964). In this case, we find that the settlement provision relating to the exercise of home leave was not a matter of vital importance, nor did it go to the essence of the agreement. We find further that the agency did not breach the home leave provision. We explain, as follows.

Grievant's earlier grievance, FSGB Case No. 2000-077, related to alleged violations of assignment procedures. Grievant complained that the IBB violated MOA requirements concerning a transfer of grievant to a post in {Blank}from his then post in {Blank}. The relatively short record in the earlier grievance shows that there {Grievant} expressed strong preference to remain at a post in {Region} rather than transferring to a {different Region} post. He argued strenuously that he should be assigned to a {Region} post, including, for family reasons, i.e., a {nationality} wife and son who would best be schooled in a {Region} school. There was no mention of, nor reference to, the taking of home leave in FSGB 2000-077. In the settlement agreement, grievant achieved his sought after goal, i.e., a {Region} post assignment at the {Region} Transmitting Station.

The assignment to the {Region} Transmitting Station was the matter of vital importance, and of the essence of, the settlement agreement. The matter of home leave, however, did not go to the essence of the settlement agreement. Grievant was entitled to

home leave, as well as other normal benefits and allowances, by virtue of his continued overseas service with the IBB. There was no need to specify an entitlement to home leave in the settlement agreement since grievant would be entitled to home leave in accordance with the governing regulations, after eighteen months of continuous service abroad.

With respect to the issue as to whether the agency failed to abide by its agreement to grant home leave to {Grievant}, we conclude, for the reasons set forth below, that grievant was in breach of an implied agreement to fulfill his obligations in good faith.

Grievant achieved the 18 month threshold for home leave on August 7, 2002 (having arrived at {Region} on February 7, 2001), but did not request approval for home leave until early November, 2002. After receiving the station director's determination of non-eligibility for home leave, grievant did not take the matter up with Washington personnel officials, as suggested by the terms of MOA V-B 414. 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 Kuykendall v. Department of Veterans Affairs*, 68 MSPR 314 (1995). Grievant should have taken up the question of home leave with the Washington personnel officers with whom he negotiated the settlement agreement who were in a position to determine eligibility. Further, grievant did not advise the station chief of the agreement on home leave, which would have enabled him to acquire a ruling from Washington.

On the other hand, the {Region} station director erred in measuring the 18-month continuous service abroad requirement from the date of grievant's return to {Region} from R&R on November 17, 2001. The {Region} should have measured the 18-month

requirement from February 7, 2001. That error occurred in the director's reading of and citing of 3 FAM 3431.2, relating to 18 months continuous service abroad, as measuring from the date of grievant's return to {Region} following R&R travel rather than from the date of arrival at {Region}. 3 FAH-1 H-3431.2-1 provides that fulfillment of the 18-month continuous service abroad requirement is delayed by:

> (1) Any time spent in the United States or in a U.S. Commonwealth or possession in annual leave status (e.g., rest and recuperation . . .

Hence, grievant's 18-month period would be delayed after August 7, 2002 by the amount of time spent on R&R, rather than counting the 18-month period as beginning on the date of return to {Region} from R&R travel. However, {Grievant}, in withholding information concerning the settlement agreement provision for home leave, and in not seeking a ruling from Washington headquarters, precluded an eligibility ruling on granting him home leave in November, 2002.

In these circumstances, we hold that the IBB did not materially breach the settlement agreement and that grievant is bound by the terms of the settlement agreement.

While we analyze grievant's claims on a factual basis, there is further judicial authority which would preclude the granting of his grievance appeal. This authority is expressed in the case of *Hatcher v. Office of the Comptroller of the Currency, et al.* 631 F.2d 985 (D.C. Cir. 1980), MacKinnon, Circuit Judge: (concurring):

> I join in the forgoing disposition of the case but would also hold that appellant is estopped to attack the settlement that resulted in his retirement since he has accepted the very valuable benefits of the settlement. The receipt of the benefits of the settlement agreement which were acquired by inducing the government to change its position on discharging Hatcher creates an equitable estoppel, an estoppel *in pais,* which denies him the right to plead or prove that his retirement was improper. *28 Am. Jur. 2d, Estoppel and Waiver, Sections 26, 27, 33.* Estoppel may rest upon conduct and does not need an express written agreement. The

> Government gave up its right to discharge appellant for cause and allowed him to continue as an employee until he qualified for enhanced retirement benefits. This was in return for appellant's dismissal of his original cause of action. In my view his acquisition of these enhanced retirement benefits and his refusal to surrender them estops him from attacking the settlement. He cannot keep the benefits he bargained for and at the same time attack the agreement that gave them to him. It would be grossly inequitable now to permit Hatcher to attack the contract that he is using to obtain regular retirement benefits.

Applying Judge MacKinnon's concurring decision to the instant appeal, we find a similar fact pattern. Grievant achieved valuable benefits in return for his agreement to retire no later than August 31, 2003. Those valuable benefits were the cancellation of his assignment to the {Blank} Transmitting Station and his assignment to the {Region} Transmitting Station as the Transmitter Plant Supervisor. Those benefits cannot be returned. The acceptance and fulfillment of those benefits created an estoppel which denied grievant the right to challenge the terms of the settlement agreement. In the language of the *Hatcher* case, it would be inequitable now to permit grievant to attack the contract that he used to obtain a continued assignment to a {Region} post.

V. DECISION

The grievance appeal is denied.