BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF	*	
	*	
[redacted],	*	
	*	
APPELLANT,	*	
	*	
AND	*	**CASE NO. 20-08**
	*	
MONTGOMERY COUNTY GOVERNMENT,	*	
	*	
	*	
EMPLOYER	*	
	*	

= =

DECISION CONCERNING ENFORCEMENT OF SETTLEMENT AGREEMENT

On October 16, 2019, [redacted] (Appellant) filed a Complaint with the Merit System Protection Board (Board or MSPB) seeking to enforce the terms of a settlement agreement (Appellant's Enforcement Request). Appellant alleged that the County had failed to comply with the September 25, 2015, settlement agreement filed with the Board by the parties in MSPB Case No. 15-24. Pursuant to Montgomery County Personnel Regulations (MCPR), § 35-15, the Board had issued an Order accepting the settlement agreement into the record and retaining jurisdiction over any disputes concerning interpretation or enforcement. MSPB Case No. 15-24 (September 30, 2015).

Appellant now alleges that the County breached the settlement agreement by failing to remove certain documents from her personnel file, including those concerning the settlement and original discipline against her, and by failing to provide her with the proper salary and benefits. In addition to the Complaint filed on October 16, 2019, on November 22, 2019, Appellant filed an Amended Complaint and exhibits.[1] On December 19, 2019, the County filed its response, which

[1] The following exhibits filed with the Amended Complaint will be designated as Appellant Exhibits (AX).
A. Settlement Agreement, September 25, 2015.
B. Email from [redacted] to Appellant, March 22, 2016.
C. Email from [redacted] to Appellant, October 4, 2017.
D. Email from [redacted] to Appellant, October 14, 2015.

it titled "Employer's Opposition to Appellant's Complaint of Breach of Contract" (County Opposition).[2]

On January 13, 2020, Appellant's attorney filed a Notice of Withdrawal from this matter. The next day Appellant's current attorney filed a Notice of Appearance and a motion for extension of time to file Appellant's response to the County's Opposition. The Board granted the extension, and on February 3, 2020, Appellant filed "Appellant's Response to County's Opposition to Appellant's Complaint for Breach of Contract" (Appellant Response).[3]

The Board has reviewed the record and considered the arguments of the parties.

FINDINGS OF FACT

Appellant was employed by the Montgomery County Police Department in the Management and Budget Division as a Manager 3 at the M-3 salary level.[4] For reasons not pertinent to this enforcement action the Police Department dismissed Appellant from County employment. Appellant appealed her dismissal and the Board held an evidentiary hearing. Before a decision was rendered Appellant and the County agreed to a settlement. The Board accepted the Settlement Agreement and retained jurisdiction over any disputes concerning the interpretation or enforcement of the Settlement Agreement. MSPB Case No. 15-24.

The Settlement Agreement provides, in part:

> A. [redacted] will be placed in a Grade 25 position within the Department of Finance as a Program Manager II with a redline freeze in her former M-3 salary and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years, from October 19, 2015 to October 19, 2019. The COLA for FY16 is to be implemented as though [redacted] had been continuously employed during the period of her separation. The parties intend that the Settlement Agreement results in no break in service for [redacted]. Moreover, the parties agree that the "redline freeze" acts as a floor for salary and benefits, but [redacted] is entitled to any additional COLA, raises or benefits that she, or all county employees, become entitled to.

---

[2] The following exhibits filed with the County Opposition will be designated as County Exhibits (CX).
- A. Settlement Agreement, September 25, 2015.
- B. Order Accepting Settlement Agreement, September 30, 2015.
- C. Position Description, Grade 25 Program Manager II, Division of the Controller.
- D. Letter from Appellant's attorney to County, September 16, 2019.
- E. Letter from County Attorney to Appellant's attorney, September 20, 2019.
- F. Affidavit of Custodian of Records, OHR, undated.
- G. Decision Concerning Enforcement of Settlement Agreement, December 17, 2015.
- H. Affidavit of MCtime Program Manager with Appellant leave records, undated.

[3] The following exhibits filed with Appellant's Response will be designated as Appellant Exhibits (AX).
1. Settlement Agreement, September 25, 2015.
2. Affidavit of Appellant, February 2, 2020.
3. Letter from Appellant's attorney to County, April 21, 2016.
4. Letter from County Attorney to Appellant's attorney, May 27, 2016.

[4] Parts of these findings of fact are derived from the findings of fact contained in our decision of December 17, 2015, in MSPB Case No. 16-06 (2015).

B. After four (4) years on October 19, 2019, [redacted]'s salary shall be the top of grade for the position she occupies if the position she occupies is below an M-3. However, at the conclusion of 4 years, on October 19, 2019, if [redacted] occupies an M-3 position, her salary shall not be less than her former M-3 salary on October 19, 2019.

C. The Employer agrees to pay [redacted] back pay from February 26, 2015 through October 19, 2015. [redacted] will receive the FY 16 COLA effective July 12, 2015. The employer will deduct all applicable payroll deductions (including local, state and federal taxes), Retirement contributions and Health benefits coverage at the time of her separation. The Employer will make the employers retirement contributions, as well as investment earnings on the employee and employer contributions retroactively to February 26, 2015. The Employer will perform under this subsection within two weeks of the final signature on the Settlement Agreement.

D. [redacted] will provide documentation to the Employer of the date of commencement of her COBRA health benefits and the exact monthly premium that she has paid since her termination on February 26, 2015. The Employer agrees to reimburse [redacted] the entire amount [redacted] paid for COBRA.

E. The Employer agrees to issue a written reprimand for unsatisfactory performance. Said written reprimand will remain in her personnel file until February 26, 2016. On February 26, 2016 the written reprimand will be removed from [redacted]'s personnel file. The employee is entitled to file a written rebuttal which shall also remain in the personnel file until February 26, 2016.

F. The Employer agrees to pay attorney's fees in the amount of $12,130.00. No further action will be sought for reimbursement of any additional attorney's fees related to this matter. . . .

J. The Office of the County Attorney shall maintain in a secure and confidential file the original of this Settlement Agreement and Release for a period of 5 years from the date of execution.

Pursuant to the Settlement Agreement Appellant was reinstated to County employment on October 19, 2015. Appellant was placed in a Grade 25 Program Manager II position with the County Department of Finance with a work location in the Executive Office Building (EOB). Appellant also received backpay and attorney's fees.

On November 4, 2015, Appellant filed a motion with the Board to enforce the settlement agreement, claiming that the County had breached the agreement by not giving her assigned parking in the EOB. The Board ruled on December 17, 2015, that there was no breach of the settlement agreement. MSPB Case No. 16-06 (2015).

After Appellant was reinstated on October 19, 2015, "the County rescinded 64.57 hours of PTO." Affidavit of Appellant, AX 2, ¶ 4. Appellant submitted a document that explains the reason the PTO hours were rescinded. AX 4. PTO is credited to MLS employees on January 1 and July 1 of each year. Appellant's Response, pp. 6-7. When Appellant was reinstated pursuant to the

Settlement Agreement, she was credited with the full 140 hours of PTO she would have earned on July 1, 2015, had she not been dismissed. Payslips reflecting Appellant's salary and the treatment of her leave were issued in October before Appellant filed MSPB Case No. 16-06 on November 5, 2015. AX 3 (April 21, 2016, letter to the County from her then attorney and copies of payslips). Those payslips show the restoration of Appellant's backpay and leave. The November 13, 2015, payslip clearly shows that her PTO balance was, in the words of Appellant's then attorney, "reduced and replaced with annual leave and sick leave as Grade 25 benefits." AX 3. The amount of PTO that was rescinded reflected the portion of time after the Settlement Agreement was signed on September 25, 2015, for which the County believed she was not entitled to PTO as she was no longer an MLS employee under the agreement. AX 4, p. 2.

Appellant also raised questions concerning the calculation of her salary and benefits in a March 21, 2016, email to the Director of the Department of Finance. Amended Complaint, Exhibit B. In response, the Director advised Appellant that she was eligible for the Cost of Living Adjustment (COLA) given to a Grade 25 employee. The Director specifically addressed the Settlement Agreement, noting that under the terms of the agreement her salary was to be "frozen at the *former* M3 salary and benefits." (emphasis in original). He went on to say he was "not sure what" Appellant meant by referencing her compensation and benefits as an M3.

Subsequently, on October 4, 2017, Appellant received confirmation by email that her COLA was being "calculated using the Grade 25 maximum salary rather than" at an MLS III salary. Amended Complaint, p. 4, ¶20; AX C.

The Settlement Agreement, ¶E, specifically addressed the written reprimand that was to be placed in Appellant's personnel file:

> The Employer agrees to issue a written reprimand for unsatisfactory performance. Said written reprimand will remain in her personnel file until February 26, 2016. On February 26, 2016 the written reprimand will be removed from [redacted]'s personnel file. The employee is entitled to file a written rebuttal which shall also remain in the personnel file until February 26, 2016.

The term "personnel file" was not used anywhere else in the Settlement Agreement. However, in the only other provision of the agreement addressing the content of a file ¶J provided that: "The Office of the County Attorney shall maintain in a secure and confidential file the original of this Settlement Agreement and Release for a period of 5 years from the date of execution."

On May 28 and August 26, 2019, Appellant reviewed her personnel file. CX F, ¶11. Appellant found that it contained the Settlement Agreement, Notice of Disciplinary Action for her dismissal, and Appellant's Appeal to the Maryland State Unemployment Insurance agency. Amended Complaint, ¶12, pp. 2-3.

Appellant asserts that her inability to successfully compete for a promotion is the result of the Settlement Agreement being seen by various hiring authorities. Appellant's view is speculative as she has not provided any evidence to support her theory and the affidavit of the custodian of records indicates that Appellant is the only person who has reviewed her personnel file. CX F, ¶14. The custodian also avers that Appellant's personnel file does not contain the written reprimand. CX F, ¶13. *See* Complaint, ¶15.

Appellant suggests that it was improper for certain County employees to have had access to copies of the Settlement Agreement as the original was to be kept by the Office of the County Attorney in a confidential file under ¶J of the agreement. Appellant specifically names the following individuals as improperly having access to the Settlement Agreement: [redacted] (JB), [redacted] (LM), [redacted] (SS), and [redacted] (MD), referencing a March 22, 2016, email from JB. Amended Complaint, ¶14 and AX B. The copy of the email filed with the Board as AX B consists of only one page and omits the text of the email Appellant sent on March 21, 2016, at 12:49 pm to LM. The text of the March 22 reply from JB states that LM "referred your question to me."

The April 21, 2016, letter from Appellant's attorney states that Appellant "has attempted to clarify benefits due and owing to her under the Settlement Agreement with her immediate supervisor, [LM], Controller. She has also attempted to clarify benefits due and owing to her with the Director of the Department of Finance, [JB]." AX 3.

Thus, it appears clear that the involvement of JB and LM in reviewing the Settlement Agreement was necessary for the proper implementation of the agreement and, at least in part, necessitated by inquiries made to them by Appellant herself.

Finally, we note that as the Director of OHR, SS, was a signatory to the agreement and that MD is a high level manager in OHR, an agency with responsibility for addressing personnel issues.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Merit System Law, Section 33-14. Hearing Authority of Board, which states in applicable part,

> (c) **Decisions**. . . .The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:
>
> (8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale;
>
> * * *
>
> (10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

Montgomery County Personnel Regulations (MCPR), 2001 (As amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010, February 8, 2011, and June 30, 2015), 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.

§ 35-16. MSPB decisions.

(a) The MSPB may decide an appeal in any manner deemed necessary and appropriate, under County Code Section 33-14(c), *Hearing Authority of MSPB.* The MSPB may order appropriate relief, which includes but is not limited to the following:

(2) change in position status, grade, work schedule, working conditions, and benefits;

* * *

(8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale;

(9) reimbursement or payment by the County of all or part of an employee's reasonable attorney's fees.

ISSUE

Has the County acted in compliance with the Settlement 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 it by statute and 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).

Montgomery County regulations specifically provide that the MSPB may interpret and enforce a settlement agreement. MCPR §35-15(a). Further, the Settlement Agreement specifically recognized the Board's authority to retain jurisdiction over County compliance with all aspects of the settlement agreement. Settlement Agreement, ¶ M.

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 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, Cmty. Coll. of Baltimore Cty. 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 Serv.*, 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); APA, §2A-10(b).

Appellant's Claims that are Barred by Res Judicata

Certain claims raised in this enforcement action are barred under the doctrine of *res judicata*, which precludes a second action involving the same parties and based on claims that were, or could have been, raised in the prior proceeding.[5]

The elements of *res judicata* are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and (3) that there was a final judgment on the merits. *Colandrea v. Wilde Lake Community Association, Inc*., 361 Md. 371, 392 (2000). These principles apply in administrative proceedings, such as those conducted by the Board. *Batson v. Shiflett*, 325 Md. 684, 702 (1992) ("agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court.").

In both MSPB Case No. 16-06 and this matter Appellant challenged the propriety of her parking assignment in a garage other than the one in the EOB. Appellant may not now relitigate in this case the same claims she raised in 2015. Because the claim regarding parking in the EOB presented in this case is identical to that determined in Case No. 16-06, the parties are the same, and there was a final decision by the Board, the elements of *res judicata* are satisfied.

Appellant's claim that she should have received PTO instead of annual and sick leave was not asserted in the 2015 enforcement action. If Appellant could have raised that claim in 2015 it too may be barred by *res judicata*. MSPB Case No. 14-38 (2014); *Colandrea*, 361 Md. at 392.

---

[5] Although it does not appear that the County raised the issue of *res judicata*, we do so *sua sponte*. *Sabersky v. Dep't of Justice*, 91 M.S.P.R. 210, 2002 WL 522300 (2002), *aff'd*, 61 F. App'x 676 (Fed. Cir. 2003) (issue of *res judicata* may be raised *sua sponte*).

In an affidavit filed in this enforcement action Appellant acknowledges that when she was reinstated pursuant to the Settlement Agreement in October 2015, "the County rescinded 64.57 hours of PTO." AX 3, ¶ 4. Appellant also submitted a document that explains the reason the PTO hours were rescinded. AX 4. PTO is credited to MLS employees on January 1 and July 1 of each year. Appellant's Response, pp. 6-7. When Appellant was reinstated pursuant to the Settlement Agreement, she was credited with the full 140 hours of PTO she would have earned on July 1, 2015, had she not been dismissed prior to that date. The amount of PTO that was rescinded reflected the portion of time after the Settlement Agreement was signed on September 25, 2015, for which the County believed she was not entitled to PTO.[6]

Payslips reflecting Appellant's salary and the treatment of her leave were issued in October before she filed MSPB Case No. 16-06 on November 5, 2015. AX 3 (April 21, 2016, letter to the County from her then attorney and copies of payslips). The November 13, 2015, payslip clearly shows that her PTO balance was, in the words of Appellant's then attorney, "reduced and replaced with annual leave and sick leave as Grade 25 benefits." AX 3. Appellant received that payslip while her settlement agreement enforcement action was still pending. However, Appellant made no effort to advise the Board that she believed the County had violated the settlement agreement with regard to leave benefits at any time during the month before the Board decided MSPB Case No. 16-06 on December 17, 2015. As we noted in our December 17, 2015, decision: "Other than the failure to provide her with parking in the EOB garage, Appellant makes no allegation that the County failed to fulfill any of its obligations under the Settlement Agreement or that any other provision of the Settlement Agreement was breached by the County."

Under County law and Board procedures Appellant had the opportunity to seek to amend her Motion to Interpret and Enforce the Terms of a Settlement Agreement to include the leave benefits claim. Montgomery County Code, Administrative Procedures Act (APA), § 2A-7(c) ("Any motion seeking determination by the hearing authority of any preliminary matter including, but not limited to, . . . motions to amend . . . submissions to the hearing authority. . . shall be made promptly"); APA § 2A-7(h)(7) & (10); MCPR § 35-10(f)(4) & (10); MCPR § 35-11(a)(4). *Cf.* Md. Rule 2-341(c) ("An amendment may seek to . . . (1) change the nature of the action or defense. . . (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended . . . Amendments shall be freely allowed when justice so permits.").

Thus, because Appellant had a reasonable opportunity to raise the leave benefits issue with the Board as part of her 2015 enforcement action, that claim is barred by the doctrine of *res judicata*. MSPB Case No. 14-38 (2014). This is true even if the claim arose after she filed the enforcement action but well before the decision was issued.

Maryland courts have approved the principles enunciated in *Restatement (Second) of Judgments*, § 24 (1982). *Kent County Board of Education v. Bilbrough*, 309 Md. 487, 499 (1987). Comment (a) to *Restatement* § 24 explains that the term "claim" includes "all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected

[6] There are 26 weeks from July 1 and December 31. The 12 weeks from September 25 to December 31 constitute 46.15% of the full 26 weeks. Pro rating 46.15% of the 140 hours of PTO is 64.61hours. The minor discrepancy from Appellant's admission that 64.57 hours of PTO that were actually rescinded is presumably due to a difference in the precise method the County used for the calculation.

transactions)," and further states that because litigants have "considerable freedom of amendment" the "law of *res judicata* now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so."

Consistent with this principle courts have concluded that a party has a responsibility to amend or supplement claims even after the action has been filed, and that even the denial of leave to amend may result in a claim being barred by *res judicata* in a subsequent case. *Gonsalves v. Bingel*, 194 Md. App. 695, 716-21 (2009).[7] *See Buck v. Thomas M. Cooley Law Sch*., 597 F.3d 812, 817 (6th Cir. 2010) ("plaintiff has a duty to supplement her complaint with related factual allegations that develop 'during the pendency of' her state suit or have them barred by *res judicata*"); *Havercombe v. Dep't of Education*, 250 F.3d 1, 8-9 (1st Cir. 2001) ("given that the general rule in the federal courts is to liberally permit amendments where justice so requires, his failure to . . . amend has foreclosed him from bringing . . . [the claims] at all. . . he has only himself to blame for not . . . amending his complaint . . ."); *Monterey Plaza Hotel Ltd. P'ship v. Local 483*, 215 F.3d 923, 928 (9th Cir. 2000) ("the doctrine of *res judicata* bars the relitigation of all events which occurred prior to entry of judgment, and not just those acts that happened before the complaint was filed. . .").

We find that Appellant, a thirty year County employee with competent counsel, knew or should have known shortly after her reinstatement, and while her prior settlement enforcement action was pending with the Board, that her PTO hours were rescinded because the County had determined that she was no longer entitled to the MLS leave benefits. Because Appellant had a reasonable opportunity to litigate her leave benefits claim in the 2015 enforcement action she is barred by *res judicata* from pursuing it now. MSPB Case No. 14-38 (2014).

Appellant Claims that are Untimely

Although a settlement enforcement action does not have a strict statutory time period within which it must be filed, an action alleging breach of a settlement agreement must be filed within a reasonable time after the party seeking enforcement becomes aware of the breach, and the reasonableness of the time period depends on the circumstances of each case. *Kasarsky v. Merit Systems Protection Board*, 296 F.3d 1331, 1335 (Fed. Cir. 2002) (*citing Adamcik v. U.S. Postal Service*, 48 M.S.P.R. 493, 496 (1991); *Eagleheart v. United States Postal Service*, 110 M.S.P.R. 642 (2009).[8]

---

[7]The obligation to amend a complaint to include additional claims is also consistent with longstanding Maryland law requiring breach of contract actions to include all possible claims under the entire contract. *Gonsalves v. Bingel*, 194 Md. App. 695, 715 (2010); *Dugan v. Anderson*, 36 Md. 567, 584-85 (1872) ("It is an ancient and familiar rule of law that only one action can be maintained for the breach of an entire contract, and the judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding.").

[8] Were this not a settlement enforcement action, Appellant's disputes with the County over salary and leave benefits may have been appropriate for the grievance procedure. The County grievance procedure is designed to promote dispute resolution under "specific and reasonable time limits for each level or step". MCPR §34-3(a). Step one of the grievance procedure provides that an employee shall initially file a grievance with the employee's immediate supervisor within 30 days after the employee "knew or should have known of the occurrence or action on which the grievance is based." MCPR § 34-9(a)(1)(A). Thus, under County law, 30 days is considered a "reasonable time limit" within which to challenge an employment action. *See* MSPB Case No. 11-08 (2011) (grievance filed 5 years after employee knew of pay inequity was untimely).

This "reasonable time" standard is also compelled by the doctrine of laches. *See Poett v. Merit System Protection Board*, 360 F.3d 1377, 1384 (Fed. Cir. 2004) ("The 'reasonable time' requirement for filing a petition for enforcement of a settlement agreement is conceptually similar to the defense of laches."); *United States EEOC v. Lockheed Martin Global Telecommunications, Inc*., 514 F. Supp. 2d 797, 801 (D. Md. 2007) ("In a laches determination, a lack of diligence exists where the plaintiff delayed inexcusably or unreasonably in filing suit.").

Appellant received biweekly payslips in October and November 2015, four years before filing this enforcement action. A reasonably prudent employee would have reviewed the payslips to confirm that they correctly reflected the salary and benefits required under the Settlement Agreement. The November 13, 2015, payslip leaves no doubt that per the agreement Appellant had been demoted to "Grade 25," that her PTO leave balance had changed, and that she was now earning annual and sick leave. AX 3.

Indeed, Appellant raised the issue with the County in a letter from her attorney dated April 21, 2016 and received a reply from the County in a letter dated May 27, 2016. Appellant's Response, p. 7; AX 3 & 4. In that letter her attorney acknowledged that the November 13, 2015, payslip shows that her PTO balance was, in his words, "reduced and replaced with annual leave and sick leave as Grade 25 benefits." AX 3. Appellant thus knew or should have known on November 13, 2015, that the County was treating her as a Grade 25 non-MLS employee for leave purposes. *Brown v. MSPB*, 86 F. App'x 421, 422 (Fed. Cir. 2004) (leave and earnings statements provide sufficient notice of alleged breach of a settlement agreement).

However, Appellant apparently did nothing further to contest her leave status until filing this enforcement action. For over three years she used the PTO leave balance and annual and sick leave benefits credited to her by the County without further complaint. AX 2, ¶5; CX H.

This enforcement action was filed October 16, 2019, over 3 ½ years after Appellant raised the leave issue in her April 21, 2016 letter and four years after receiving payslips reflecting the leave treatment. AX 3. The letter from Appellant's attorney demonstrates that 3 ½ years before filing this enforcement action Appellant was aware of the pay and leave issues she now raises in this matter. Under the facts of this case a delay of that length certainly cannot be considered "reasonable." In our view, having done nothing to enforce the agreement as she understood its terms for almost four years, Appellant's claim is untimely.

Appellant also alleges that the County used an incorrect COLA calculation for salary adjustments. The Settlement Agreement, ¶A, provides that Appellant "will be placed in a Grade 25 position . . . with a redline freeze in her former M-3 salary and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years . . . the parties agree that the "redline freeze" acts as a floor for salary and benefits, but [redacted] is entitled to any additional COLA, raises or benefits that she, or all county employees, become entitled to."

Appellant raised questions concerning the calculation of her salary and benefits in a March 21, 2016, email to the Director of the Department of Finance. Amended Complaint, Exhibit B. In response, the Director advised Appellant that she was eligible for the COLAs given to a Grade 25 employee. The Director specifically addressed the Settlement Agreement, noting that under the

terms of the agreement her salary was to be "frozen at the *former* M3 salary and benefits." (emphasis in original). He went on to say he was "not sure what you mean" by Appellant's reference to her compensation and benefits as an M3.

October 4, 2017, Appellant received confirmation by email that her COLA was being "calculated using the Grade 25 maximum salary rather than" at an MLS III salary. Amended Complaint, p. 4, ¶20; AX C. As the COLA issue was raised for the first time in the Amended Complaint, it appears that Appellant waited over two years after being told how the COLA was calculated to seek enforcement of the agreement. We conclude that a two-year delay is not reasonable and Appellant's COLA claim is therefore untimely.

Appellant Has Failed to Demonstrate a Breach of the Settlement Agreement

Appellant contends that a proper interpretation of the Settlement Agreement required the County to purge Appellant's personnel file of documents related to the settlement, the disciplinary dismissal, and, because it indicates that she was dismissed, her unemployment insurance appeal. Accordingly, Appellant demands that the County remove from Appellant's personnel file all copies of the Settlement Agreement, NODA, and unemployment insurance claim records. In its opposition brief the County argues that there is no provision in the Settlement Agreement requiring that documents concerning the dismissal matter and settlement may not be in her personnel file.

The only provisions in the Settlement Agreement addressing files say that: (1) the Office of the County Attorney was to maintain a secure and confidential file with the Settlement Agreement until September, 2020; and (2) the written reprimand would be (and apparently was) removed from Appellant's personnel file February 26, 2016.

We see no reason the Settlement Agreement should remain in Appellant's personnel file now that over four years have elapsed since its execution. Paragraph A of the Settlement Agreement provided that the "redline freeze" on Appellant's salary level would expire on October 19, 2019. Paragraph B provided that on October 19, 2019, Appellant's salary would be at the top of her pay grade if she was below the M-3 level.[9] These conditions are no longer in effect and we can see no other contractual language that would necessitate maintenance of the agreement in her personnel file.

It is also our view that the dismissal NODA should not have been maintained in the personnel file after the County agreed to demote Appellant, substitute a written reprimand for unsatisfactory performance, reinstate Appellant with backpay, and pay attorney's fees. Furthermore, once the dismissal was rescinded and Appellant reinstated with backpay the unemployment insurance case information was not appropriate for the personnel file.[10]

Although Appellant and the County agreed to a demotion from M-3 (MLS III) to a Grade 25 position, reinstatement with backpay, a written reprimand, and attorney's fees the Settlement Agreement does not expressly say that the dismissal NODA was rescinded or that references and

[9] Paragraph B also required that if Appellant was in an M-3 position her salary would not be less than her former M-3 salary on October 19, 2019. Since Appellant remains at a Grade 25 this provision was not triggered.
[10] We do not address what records may be maintained by the Office of the County Attorney.

documents concerning the NODA must be expunged. For those reasons, we do not find that there has been a material breach of the Settlement Agreement.

While we find it unusual that the Settlement Agreement did not include an express expungement requirement or even a neutral reference provision, for the reasons discussed above we strongly urge the County to promptly remove copies of the Settlement Agreement, dismissal NODA, and unemployment insurance case information from both the electronic and paper versions of Appellant's personnel file.

Appellant argues that it "would have been nonsensical for the parties to agree that the original Agreement be kept confidential, yet allow for copies to be liberally distributed within the County and kept in Appellant's personnel file." Appellant's Response, at p. 13. We do not find that the County "liberally distributed" the Settlement Agreement.

From the evidence in the record it appears more likely that the County employees who had access to copies of the Settlement Agreement were engaged in carrying out their job duties. JB and LM were involved in the proper implementation of the agreement and in responding to inquiries made to them by Appellant. The April 21, 2016, letter from Appellant's attorney admits that Appellant "has attempted to clarify benefits due and owing to her under the Settlement Agreement with her immediate supervisor, [LM], Controller. She has also attempted to clarify benefits due and owing to her with the Director of the Department of Finance, [JB]." AX 3. Moreover, we see nothing inappropriate with the Director of OHR, a signatory to the agreement, and one of her high level personnel managers having knowledge of the terms of the agreement.

It is true that personnel files are confidential, MD Code Ann., General Provisions Article, § 4-311. However, even to the extent the Settlement Agreement itself is considered a personnel record, that does not prevent the sharing of personnel records with employees who are charged with personnel administration responsibilities to the extent necessary for those employees to carry out their legitimate responsibilities. *See* 86 *Opinions of the Attorney General* 94 (2001).

Appellant also assumes that she was passed over for other positions because hiring managers somehow found out about the original charges against her and the settlement. However, Appellant has not provided any evidence supporting her theory, and the County provided a sworn affidavit averring and a document showing that Appellant was the only person to have looked at her personnel file.

Finally, although we have already determined that Appellant's COLA claim is time barred we wish to briefly discuss the merits of Appellant's allegation that the County used an incorrect COLA calculation because it was based on that used for a General Salary Scale employee at Grade 25. The Settlement Agreement, ¶A, provides that Appellant "will be *placed in a Grade 25 position* . . . with a redline freeze in her *former M-3 salary* and benefits (determined at the rate of pay and benefits at the time of her reinstatement on October 19, 2015) for four (4) years . . . the parties agree that the "redline freeze" acts as a floor for salary and benefits, but [redacted] is entitled to any additional COLA, raises or benefits that she, or all county employees, become entitled to." (emphasis added).

Appellant's response acknowledges that under the agreement Appellant was demoted from MLS III to a Grade 25 Program Manager position but notes that her salary and benefits would be

frozen at her MLS III level (and act as a floor) for 4 years. We see nothing in the language of the Settlement Agreement suggesting that the "redline freeze" would somehow entitle Appellant to receive a COLA as an MLS employee when she had been "placed in a Grade 25 position" and her "former M-3 salary" was to be frozen. Rather, it is clear that the redline freeze of her former M-3 salary served "as a floor for salary and benefits," not an entitlement to future COLAs.

Having failed to carry her burden of proving that the County breached the Settlement Agreement, Appellant's complaint seeking enforcement must be denied.

ORDER

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the Board hereby **ORDERS** that Appellant's complaint seeking to enforce the Settlement Agreement be, and in its entirety is, hereby **DENIED.**

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board
June 8, 2020

[redacted]
Harriet E. Davidson
Chair