

MEMORANDUM

November 3, 1997

To: T. Jeremy Gunn
Executive Director and
General Counsel

Cc: Thomas Samoluk
Deputy Director

From: Ronald G. Haron
Associate General Counsel

Subject: Agreement with ARRB Employee

You have asked for my legal opinion regarding a proposed agreement with an ARRB employee that would govern the conditions relating to the employee's leaving the ARRB. Among the pertinent provisions of the proposed agreement are: (1) an agreement by the employee not to sue the ARRB, or individual ARRB officials, with a reciprocal agreement by the ARRB not to sue the employee and (2) an agreement by the ARRB not to place certain memos regarding the employee's performance in the employee's official personnel file and to retain only one copy of these memos in the unofficial personnel file.

Based on my review of the agreement executed today, my prior discussion with the General Counsel's Office for the General Services Administration ("GSA") (attorney Lesley P. Wilson), my review of a similar agreement approved for use by GSA Counsel, and my review of the JFK Act, I have concluded that this agreement is legally valid and enforceable. Set forth are my analyses regarding key specific issues raised by the agreement:

1. Legal Validity. An agreement of this type, in which the employee agrees not to sue the agency and the agency agrees not to release negative evaluations of the employee's performance, is legally valid and enforceable. I have based this on advice from GSA counsel, as well as reviewing the draft agreement that they approved in another matter. See Draft GSA Agreement approved for use by GSA Counsel (Attachment A hereto).

In addition, I had suggested making explicit the your authority under the JFK Act to enter into such an agreement relating to a personnel matter. Section 8 (b) (1) of the JFK Act provides that "[t]he Review Board, without regard to the civil service laws, may appoint and terminate additional

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personnel as are necessary to enable the the Review Board and its Executive Director to perform the duties of the Review Board.” Furthermore, I would interpret this authority as being delegated to the Executive Director under Sections 8 (a)(4)(B) & (C), which state that the Executive Director shall “be responsible for the administration and coordination of the Review Board’s review of records” and shall “be responsible for the administration of all official activities conducted by the Review Board.”

2. Handling of Documents in Personnel File. Based on my discussion with GSA counsel and a review of their draft agreement (Attachment A hereto), I understand that there is no legal bar to agreeing not to place certain pre-existing memoranda in an employee’s official personnel file. In fact, the GSA agreement provides for the removal of memoranda from an official personnel file. Accordingly, it is appropriate to place in the agreement a provision that the ARRB will not send certain memoranda to the employee’s official personnel file.

However, as the ARRB agreement notes, certain memoranda are in the employee’s unofficial personnel file in the custody of the ARRB. While the GSA agreement suggests that it is permissible to purge such documents, the requirements of the JFK Act, in my opinion, preclude us from doing so pending a determination as to whether these records (as well as personnel records generally) are required to be transmitted to the JFK Collection at the National Archives and Records Administration (“NARA”). The JFK Act states that the JFK Collection at NARA “shall include . . . all Review Board records as required by this Act.” 44 U.S.C. § 2107 (4) (a) (2) (C). Pending a determination by the Review Board as to whether or not these personnel records constitute the type of record encompassed by this provision of the Act, we must, in my opinion, preserve these documents.

3. Handling of the Agreement. As provided in the ARRB agreement, we have pledged to use our best efforts to keep the agreement confidential. The agreement will be retained by _____ for the Review Board.

In sum, I have reviewed the ARRB agreement with the employee and conclude that it is legally appropriate and enforceable.