UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 134

Docket No. AT-0752-06-0968-I-1

Mitchell G. Johnson,

Appellant,

v.

United States Postal Service,

Agency.

May 9, 2007

Albert Lum, Esquire, Maspeth, New York, for the appellant.

Edward M. Gilgor, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has timely filed a petition for review of an initial decision dismissing his appeal of his demotion for lack of jurisdiction. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 On December 8, 2003, the appellant and the agency entered into a settlement agreement whereby the agency agreed to change the appellant's proposed reduction in grade and pay to "a letter of warning in lieu of a 30-day suspension." Initial Appeal File (IAF), Tab 4, Ex. 1 at 1-3. In exchange, the

appellant agreed not to engage in conduct including, but not limited to, "inappropriate remarks of a sexual, offensive[,] or other improper nature and/or inappropriate physical contact with customers or postal employees." *Id*. at 2. The appellant also agreed that "any further similar incidents of improper conduct . . . [would] result in [his] immediate reduction in grade and pay to a Level 05/O PTF clerk position, without avenue of appeal." *Id*.

¶3 On May 25, 2006, the agency proposed to reduce the appellant from Supervisor, Customer Services, EAS-17, to Part Time Flexible Sales and Service/Distribution Associate, level 5/O. IAF, Tab 4, Ex. 2 at 1-3. The agency's proposed reduction in grade and pay was based on a single charge of "improper conduct – violation of resolution of proposed adverse action." *Id*. at 1 (capitalization omitted). The charge brought against the appellant was based on the allegations of Rural Carrier Shirley Hallman. *Id*. at 1-2. The charge specified that on or about December 5, 2005, Ms. Hallman contacted the North Florida District Equal Employment Opportunity Office and alleged that, in the past, the appellant subjected her to inappropriate comments and unwelcome touching. *Id*. Ms. Hallman also alleged that she was the victim of third-party sexual harassment based on the appellant's conduct toward Rural Carrier Associate Julia White. *Id*. After an investigation of Ms. Hallman's allegations, the agency decided to demote the appellant. IAF, Tab 4, Ex. 3 at 1-2.

¶4 The appellant appealed his demotion to the Board's Atlanta Regional Office and requested a hearing. IAF, Tab 1 at 4. The agency filed a motion to dismiss the appeal for lack of jurisdiction arguing that the appellant waived his right to appeal in the December 2003 settlement agreement. IAF, Tab 4 at 1. The administrative judge issued an Order to Show Cause directing the appellant to show why his appeal should not be dismissed for lack of jurisdiction. IAF, Tab 5 at 1-2. The appellant argued, inter alia, that he did not violate the settlement agreement and that his waiver of appeal rights in the settlement agreement was no

longer effective at the time of the alleged misconduct.[*] IAF, Tab 6 at 1-2, Tab 7 at 1-3. The agency argued that the settlement agreement was still in effect when it proposed his demotion and that the appellant's "blanket" denial of the allegation in the notice of proposed action did not constitute a nonfrivolous allegation of jurisdiction. IAF, Tab 8 at 4-6, 8-9. The administrative judge issued an initial decision that dismissed the appeal for lack of jurisdiction finding that, under the settlement agreement, the appellant waived his right to appeal the demotion if he violated the settlement agreement within three years of its execution. IAF, Tab 9, Initial Decision (ID) at 2-3.

¶5 The appellant has filed a timely petition for review of the initial decision. Petition for Review File (PFRF), Tab 1. The agency has filed a timely response opposing the appellant's petition for review. PFRF, Tab 3.

ANALYSIS

¶6 The appellant bears the burden of proving that his appeal is within the Board's jurisdiction. *See* 5 C.F.R. § 1201.56(a)(2)(i); *Hamiter v. U.S. Postal Service*, 96 M.S.P.R. 511, ¶ 8 (2004). To establish that a waiver of appeal rights in a settlement agreement should not be enforced, an appellant must show one of the following: He complied with the agreement; the agency materially breached the agreement; he did not voluntarily enter into the agreement; or the agreement was the result of fraud or mutual mistake. *See Zordel v. Department of Defense*, 99 M.S.P.R. 554, ¶ 13 (2005); *Hamiter*, 96 M.S.P.R. 511, ¶ 8. Where an appellant raises a nonfrivolous factual issue of compliance with a settlement

---

[*] The appellant also argued that the agency's motion to dismiss for lack of jurisdiction was untimely. IAF, Tab 6 at 1-2, Tab 7 at 2-3. He has raised this argument again on review. Petition for Review File, Tab 1 at 6. The administrative judge correctly considered the agency's arguments regarding jurisdiction as the issue of jurisdiction is always before the Board. IAF, Tab 9 at 1-3; *see, e.g.*, *Muyco v. Office of Personnel Management*, 104 M.S.P.R. 557, ¶ 9 (2007) (the issue of Board jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time during the proceeding).

agreement, the Board must resolve that issue before addressing the scope and applicability of a waiver of appeal rights in the agreement. *Zordel*, 99 M.S.P.R. 554, ¶ 13. Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Id.*; *see Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc) (nonfrivolous claims are "claims that, if proven, establish the Board's jurisdiction").

¶7 The settlement agreement provides that the appellant will be demoted upon any "failure to adhere" to the terms of the agreement. IAF, Tab 4, Ex. 1 at 1-2. The appellant argued before the administrative judge that the agency could not demote him under the terms of the settlement agreement because he had not breached it. IAF, Tab 7 at 2. The agency's determination that the appellant had breached the settlement agreement was based on the allegations of Ms. Hallman and a follow-up investigation. IAF, Tab 4, Ex. 2 at 1-3. The agency's notice of proposed adverse action repeated Ms. Hallman's allegations that the appellant rubbed her back and told her that he "would love her forever if she carried an end [sic]." *Id*. at 1. Ms. Hallman further alleged that she requested time off for a doctor's appointment and the appellant responded "that she didn't need to see a doctor, that she just needed to drink some Jack Daniels." *Id*.

¶8 The notice of proposed adverse action also noted as follows:

> Ms. Hallman allege[d] that she has been a victim of third party sexual harassment in that [the appellant has] engaged in inappropriate behavior with Rural Carrier Associate [Ms.] White. Ms. Hallman allege[d] that [the appellant has] made numerous comments and jokes of a sexual nature to Ms. White, that [the appellant has] hugged Ms. White and rubbed her back and that [he has brought] coffee to Ms. White on a daily basis. Further, Ms. Hallman allege[d] that Ms. White has received preferential treatment from [the appellant], such as being provided with assistance on a route on which she was previously denied assistance, being provided with a postal vehicle, and, being given Saturdays off.

Id. at 1-2. The agency claimed that its investigation confirmed Ms. Hallman's allegations, as agency employees reported that the appellant engaged in the following activities: (1) brought coffee to Ms. White on a regular basis; (2) hugged Ms. White and other female employees and patted them on their backs; (3) made inappropriate and suggestive comments to Ms. White and other employees; (4) called Ms. White and other female employees honey and/or baby; and (5) "ogled" Ms. White. *Id*. at 2. The agency also indicated in the notice of proposed adverse action that the "[e]mployees perceived that Ms. White received favoritism in work assignments, scheduling and in the way she [was] allowed to dress." *Id*.

¶9 Certainly, some of the foregoing activities might violate the settlement agreement's requirement that the appellant not engage in "inappropriate remarks of a sexual, offensive[,] or other improper nature and/or inappropriate physical contact with customers or postal employees." IAF, Tab 4, Ex. 1 at 2. However, in responding to the agency's motion to dismiss and the show-cause order below, the appellant generally denied that he violated the settlement agreement. IAF, Tab 6 at 1, Tab 7 at 2. More specifically, he denied that "he committed the infractions cited in the notice of proposed action [and] disput[ed] the veracity of the allegations by [Ms. Hallman]." IAF, Tab 7 at 2. The appellant further asserted that numerous employees interviewed during the investigation stated that the allegations brought against him were misleading and untrue. *Id*. Included with the appellant's response to the agency's motion to dismiss are alleged summaries of the interviews of the appellant and five other agency employees undertaken as part of the investigation. *Id*., Exs. A-F. The accuracy of those summaries is unclear; however, they do uniformly state that those five other employees were unaware of any inappropriate conduct by the appellant. *Id*. According to the summary of Ms. White's interview, she admits that the appellant has brought her coffee and that the two have hugged. *Id*., Ex. C. The summary fails to describe the context of her interaction with the appellant, however, stating

only that she did not believe that the appellant "has ever crossed the line with any actions or comments to her." *Id*.

¶10 The appellant, at this stage of his appeal, is not required to prove the jurisdictional threshold issue of compliance with the settlement agreement, but need only nonfrivolously allege it. *See Stewart v. U.S. Postal Service*, 926 F.2d 1146, 1148-49 (Fed. Cir. 1991); *Hamiter*, 96 M.S.P.R. 511, ¶ 12. The appellant's general denial of the agency's allegations, along with the interview summaries, constitute a nonfrivolous allegation that he did not violate the settlement agreement. Thus, he is entitled to a hearing to determine whether he, in fact, complied with the settlement agreement. *See Stewart*, 926 F.2d at 1148-49; *Hamiter*, 96 M.S.P.R. 511, ¶ 12.

¶11 If the appellant fails to show compliance with the settlement agreement, the Board must determine the scope and applicability of the agreement's wavier provision. *See Hamiter*, 96 M.S.P.R. 511, ¶ 13.

¶12 On review, the appellant argues, as he did below, that the settlement agreement was only valid for two years after it was signed and, therefore, expired on December 2, 2005. PFRF, Tab 1 at 3-6; IAF, Tab 7 at 1. The appellant relies on a provision appearing on the signature page of the settlement agreement that reads as follows:

> I, Mitchell Johnson, have read and understand the conditions and restrictions set forth in the above agreement. I am mentally and physically fit so as to be able to understand this agreement in its entirety. I know and understand that I may have appeal rights to the Merit Systems Protection Board, the 650 appeals procedure, NLRB, and EEO with respect to any removal action [sic] taken against me. I know and understand that I have waived my appeal rights through any and all forums and avenues including, but not limited to, the Merit Systems Protection Board, the 650 appeals procedures, and EEO, for any reduction in grade and pay initiated against me for violation of this settlement agreement *during this two-year period*. I freely sign this agreement without reservation, duress, or coercion on the part of anyone. I agree to abide by the terms of this agreement.

IAF, Tab 4, Ex. 1 at 3 (emphasis added). The agency argues that the reference to a two-year period in that provision is erroneous. PFRF, Tab 3, Agency's Response to the Petition for Review at 5-8. The agency claims that the parties intended that the appellant's waiver of appeal rights would be effective for three years, as a three-year period was used in other provisions of the agreement, including a passage that reads as follows:

> All parties agree with this resolution and waive further appeal of this action and any other action caused by violation of any of the above for a period *not to exceed three years*. The wavier of appeal rights includes, but is not limited to, those under the Merit Systems Protection Board (MSPB); the 650 appeals procedures; the National Labor Relations Board (NLRB); and EEO Forums; Federal and Civil Courts.

Id.; IAF, Tab 4, Ex. 1 at 2 (emphasis added). As the agreement is reasonably susceptible to more than one interpretation, we find it appropriate to examine extrinsic evidence of the parties' intent on this issue. *See Wells v. U.S. Postal Service*, 52 M.S.P.R. 497, 500-01 (1992) (where the terms of a settlement agreement are reasonably susceptible of more than one interpretation, extrinsic evidence will be considered); *see also Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988) (in interpreting a settlement agreement, the court will determine the intent of the parties at the time they contracted as reflected in the contract terms and, if there is any ambiguity in the contract language, with recourse to other evidence of the parties' intent). Thus, the administrative judge should allow the parties to further develop the record on this issue on remand, including hearing testimony if necessary.

ORDER

¶13 Accordingly, we remand this appeal to the Atlanta Regional Office for further development of the record, a hearing, and the issuance of a new initial decision consistent with this Opinion and Order.

FOR THE BOARD:

_____
Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.