

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 121

Docket No. AT-0752-09-0156-I-1

Hugh E. Lee, Jr.,

Appellant,

v.

United States Postal Service,

Agency.

June 26, 2009

Billy C. Padgett, Pensacola, Florida, for the appellant.

Jennifer S. Nichols, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the January 30, 2009 initial decision (ID) that dismissed his appeal for lack of jurisdiction. The agency has moved to dismiss the appeal as settled. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, GRANT the agency's motion, VACATE the ID, and DISMISS the appeal as settled.

BACKGROUND

¶2 On December 4, 2008, the appellant filed an appeal in which he alleged that the agency constructively suspended him from the position of Electronic Technician¹ for more than 14 days in November 2008. IAF, Tab 1 at 1, 3, 5; *see also* Tab 11 at 4. The administrative judge (AJ) noted that a preference-eligible Postal Service employee with 1 year of current, continuous service may appeal an adverse action to the Board; that adverse actions include suspensions of more than 14 days; and that the appellant could establish Board jurisdiction by showing that he was involuntarily placed on leave for more than 14 days. ID at 4. The AJ found that the appellant is a preference eligible with more than 1 year of current, continuous service. *Id.* at 5. The AJ further found, though, that the appellant failed to establish that he was involuntarily placed on leave for more than 14 days. *Id.* at 5-7. The AJ thus found that the appellant failed to establish Board jurisdiction over his appeal as a constructive suspension. *Id.* at 7. The AJ also found that, absent an otherwise appealable action, the appellant's discrimination allegation was insufficient to establish Board jurisdiction. *Id.* at 7. He therefore dismissed the appeal for lack of jurisdiction without holding the appellant's requested hearing. *Id.* at 1, 7.

¶3 The appellant has filed a PFR of the ID dismissing his appeal. PFR File, Tab 6. The agency has moved to deny the PFR, or to dismiss the appeal as settled, based on a "Settlement Agreement and Release" reached during the processing of the appellant's Equal Employment Opportunity (EEO) complaint. *Id.*, Tabs 4, 5, 8. The appellant has contested the agency's motion. *Id.*, Tabs 3, 7, 9.

¹ Electronic Technician is the appellant's permanent assignment, although he has been on a limited duty assignment as a Mail Handler. Initial Appeal File (IAF), Tab 5, subtabs 4C, 4Q.

ANALYSIS

¶4 Before considering the appellant's PFR, the Board will consider the agency's submission of the parties' agreement settling the appellant's EEO complaint as a motion to vacate the ID, reopen the record, and dismiss the Board appeal as settled. *See Swidecki v. U.S. Postal Service*, [101 M.S.P.R. 110](#), ¶¶ 1, 7 (2006). The Board will consider the settlement agreement, even though it was reached outside of a Board proceeding, to determine its effect on the Board appeal and any waiver of Board appeal rights. *Id.*, ¶ 7; *Sullivan v. Department of Veterans Affairs*, [79 M.S.P.R. 81](#), 84 (1998); *Laity v. Department of Veterans Affairs*, [61 M.S.P.R. 256](#), 261 (1994). The appellant may challenge the validity of the settlement agreement if he believes that the agreement was unlawful, involuntary, or resulted from fraud or mutual mistake.² *Swidecki*, [101 M.S.P.R. 110](#), ¶ 13. He may also challenge the enforceability of any waiver of Board appeal rights. Such a waiver is enforceable if its terms are comprehensive, freely made, and fair, and execution of the waiver did not result from agency duress or bad faith. *Id.*, ¶ 17.

¶5 The agency asserts that, in the settlement agreement, the appellant released the agency from "all claims of any nature" that occurred before the March 2009 execution of the settlement agreement, and, thus, that the release "patently included" the appellant's December 2008 Board appeal. PFR File, Tab 5 at 2. The appellant does not argue that the settlement agreement of his EEO complaint was unlawful, involuntary, or resulted from fraud or mutual mistake. Rather, he contends that it "has nothing to do with [his] MSPB appeal." *Id.*, Tab 3 at 1. He asserts that his Board appeal concerns events in "October 2008,"³ whereas the

² The Board has no authority to enforce or invalidate a settlement agreement reached in another forum. *See, e.g., Johnson v. U.S. Postal Service*, [108 M.S.P.R. 502](#), ¶ 8 n.5 (2008), *aff'd*, 315 F. App'x 274 (Fed. Cir. 2009).

³ The appellant apparently refers to October instead of November because he submitted his sick leave request and went home on October 31, 2008. IAF, Tab 5, subtab 4M.

settlement concerns events in “March and June of 2008,” noting that “[n]o where in the EEO settlement is anything addressed about the events that took place in Oct 2008.” *Id.* at 1-2; *see also* PFR File, Tab 7 at 3. He further asserts that, if the agency believed that the subject matter of his Board appeal was related to that of his EEO complaint, the agency should have addressed it in the settlement agreement. *Id.*, Tab 7 at 3. He contends that he did not give up his right to file a Board appeal in the EEO settlement agreement. *Id.*

¶6 A settlement agreement is a contract, the interpretation of which is a matter of law. *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). The words of the agreement are of paramount importance in determining the parties’ intent when they contracted, and parol evidence will be considered only if the agreement is ambiguous. *See id.*; *Johnson*, [108 M.S.P.R. 502](#), ¶ 8; *Dunn v. Department of the Army*, [100 M.S.P.R. 89](#), ¶ 9 (2005). Ambiguity exists if the settlement agreement’s terms are reasonably susceptible to more than one interpretation. *Johnson*, [108 M.S.P.R. 502](#), ¶ 8; *Romano v. U.S. Postal Service*, [49 M.S.P.R. 319](#), 323 (1991). When the parties’ intended meaning is not apparent from the face of the agreement, it is appropriate to examine extrinsic evidence of intent. *Johnson*, [108 M.S.P.R. 502](#), ¶ 8; *Brown v. Department of the Interior*, [86 M.S.P.R. 546](#), ¶ 17 (2000).

¶7 We agree with the agency that the settlement agreement encompassed the matters raised in the appellant’s Board appeal and find that the appellant waived his Board appeal rights in the settlement agreement. Admittedly, the settlement agreement did not explicitly refer to the Board appeal. Nonetheless, its explicit terms stated, *inter alia*, as follows:

Mr. Lee further agrees to generally release John E. Potter, the Postal Service, and their employees and agents *from all claims of any nature ever arising from his employment with the Postal Service up to and including the date of full execution of this agreement.*

PFR File, Tab 5, Ex. 1 at 1-2 (emphasis added). The appellant’s constructive suspension appeal was a claim that arose from his employment with the agency

before the settlement agreement was executed. Therefore, we find that the plain meaning of the settlement agreement's terms included the appellant's Board appeal. *See, e.g., Swidecki*, [101 M.S.P.R. 110](#), ¶¶ 10-12. Further, by agreeing "to generally release" the agency from "all claims of any nature ever arising from his employment" before the March 2009 execution of the settlement agreement, the appellant waived his right to appeal his alleged November 2008 constructive suspension to the Board. *Id.*, ¶¶ 14-16. That the appellant and/or his representative may have made a unilateral mistake as to the scope of the settlement agreement does not provide a basis for not applying it in this case. *See, e.g., Washington v. Department of the Navy*, [101 M.S.P.R. 258](#), ¶ 18 (2006). Accordingly, it is unnecessary to consider parol evidence, such as the e-mails and related argument submitted by the agency on review, and the appellant's response to that submission. PFR File, Tabs 8, 9.

¶8 We further find that the waiver of Board appeal rights is enforceable. The settlement agreement stated:

Mr. Lee confirms that he has read this Settlement Agreement and Release and that he fully understands its terms and conditions. Mr. Lee also confirms that he has conferred with the representative of his choice and has been afforded a reasonable period of time in which to consider the terms of this Settlement Agreement and Release. He voluntarily accepts the Agreement for the purpose of fully and finally settling and releasing John E. Potter, the Postal Service, and its agents and employees from all claims arising out of or connected to the subject matter of this complaint and otherwise generally released by Hugh Lee.

IAF, Tab 5, Ex. 1 at 5.

¶9 The appellant has failed to show that the settlement agreement was not freely made, was unfair, or resulted from agency duress or bad faith. The settlement agreement was signed by both the appellant and his representative in his EEO complaint, a factor that is quite significant in determining the validity of an appeal rights waiver. PFR File, Tab 5, Ex. 1; *see, e.g., Swidecki*, [101 M.S.P.R. 110](#), ¶ 18. Further, the appellant has not asserted that he was mentally impaired

or unable to understand the agreement or to assist his representative. Thus, he has not shown that he involuntarily entered into the agreement. *See, e.g., Swidecki*, [101 M.S.P.R. 110](#), ¶¶ 17-19. Again, that he and/or his representative may have made a unilateral mistake as to the scope of the settlement agreement does not provide a basis for finding the waiver unenforceable. *See, e.g., Washington*, [101 M.S.P.R. 258](#), ¶ 18. Moreover, the agency provided consideration to the appellant in exchange for the waiver by allowing him to proceed through the agency's "DRAC"⁴ process, and, depending on the results of that proceeding, to potentially pay him \$1,400 in back pay. PFR File, Tab 5, Ex. 1; *see, e.g., Swidecki*, [101 M.S.P.R. 110](#), ¶ 23.

¶10 In sum, we find that the settlement agreement reached in the EEO proceeding encompassed the matters raised in the appellant's Board appeal, that the appellant knowingly and voluntarily signed the settlement agreement, that the appellant waived his Board appeal rights concerning his alleged constructive suspension in the settlement agreement, and that the waiver is enforceable. Accordingly we dismiss this appeal as settled. Because this appeal has been settled, we need not reach the other issues raised by the appellant on PFR. *See Swidecki*, [101 M.S.P.R. 110](#), ¶ 26.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

⁴ A DRAC is an agency District Reasonable Accommodation Committee. *See, e.g., Mills v. U.S. Postal Service*, [106 M.S.P.R. 441](#), ¶ 2 (2007).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.