UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 219

Docket No. NY-3443-08-0345-I-1
NY-3330-08-0346-I-1
NY-4324-08-0348-I-1

Jose W. Linares-Rosado,

Appellant,

v.

United States Postal Service,

Agency.

October 29, 2009

Jose W. Linares-Rosado, Luguillo, Puerto Rico, pro se.

Anne M. Gallaudet, Esquire, New York, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed an apparently untimely petition for review (PFR) of the initial decisions (IDs) dismissing his appeals as settled.[1] For the reasons set

[1] The Board joins these three cases for consideration, pursuant to 5 C.F.R. § 1201.36, because doing so will expedite processing. *See Roesel v. Peace Corps*, 111 M.S.P.R. 366, ¶ 6 (2009). The cases originally derived from a single appeal challenging the agency's failure to hire the appellant for a carrier position, which the regional office docketed as three appeals: (1) MSPB Docket No. NY-3443-08-0345-I-1 (challenging the agency's conclusion that the appellant was medically unsuitable for the position), which will be cited as IAF-345; MSPB Docket No. NY-3330-08-0346-I-1 (challenging the agency's determination under the Veterans Employment Opportunities Act (VEOA)), which will be cited as IAF-346; and (3) MSPB Docket No. NY-4324-08-

forth below, we find that the appellant has established good cause for his delay in filing his PFR, GRANT the PFR under 5 C.F.R. § 1201.115(d), VACATE the IDs, and REMAND the appeals for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The agency made a tentative determination that the appellant was not qualified for the position of City Carrier because of a medical or physical condition. IAF-345, Tab 1, Attachment 1.[2] Pursuant to 5 U.S.C. § 3312(b), the Office of Personnel Management (OPM) reviewed the documentation submitted by the parties regarding the tentative determination. *Id*. After reviewing the medical documentation and related materials, OPM rendered a final determination finding that the appellant's medical condition presents an unacceptable safety and health risk and is likely to adversely affect his ability to perform the full range of duties required for the position. *Id*. The appellant, a preference-eligible veteran, appealed, challenging the agency's failure to employ him and its supposed negative suitability determination. IAF-345, Tab 1. Subsequently, on September 23, 2008, the agency filed an Equal Employment Opportunity (EEO) pre-complaint settlement agreement, dated September 19, 2008, that the agency represented resolved the appellant's appeal. IAF-345, Tab 4; IAF-346, Tab 5. The settlement contained four handwritten provisions: (1) the appellant was referred to the agency's reasonable accommodation committee; (2) the appellant would be required to provide medical evidence to support his claim that he was physically and mentally fit for a career position with the agency; (3) if the appellant was found to be fit for a career position, he would be awarded back pay from May 12, 2008, to the effective date of the career appointment; and (4) the

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0348-I-1 (challenging the agency's action under the Uniformed Services Employment and Reemployment Rights Act (USERRA)), which will be cited as IAF-348.

[2] The records of the three initial appeal files are essentially identical. Therefore, we will cite only to the record in IAF-345, except where otherwise noted.

settlement resolved "the pending MSPB appeal." *Id*. On September 29, 2008, the administrative judge (AJ) issued IDs summarily dismissing the appeals as withdrawn based upon the settlement agreement. IAF-345, Tab 5; IAF-346, Tab 6.

¶3 On September 22, 2008, prior to the issuance of the IDs, the appellant began disputing various aspects of the settlement with the agency and filing copies of this correspondence (and other pleadings) with the AJ.[3] Petition for Review File-345 (PFRF-345), Tab 3; PFRF-346, Tab 3; PFRF-348, Tab 3.[4] On February 24, 2009, the AJ issued an order stating that the "submission"[5] received after the record closed was rejected because the appellant had failed to establish good cause for the late filing. PFRF-345, Tab 3, Annex 16. On June 2, 2009, after receiving additional materials from the appellant, including a motion to reinstate his appeal, the AJ issued an order stating that the "submission" received on June 1, 2009[6] was being returned, and the appellant should file a PFR if he was dissatisfied with the ID. *Id*., Annex 20. On June 11, 2009, the parties agreed to revoke the settlement agreement, consider it void in its entirety, and recommence the EEO process previously terminated by the settlement agreement. *Id*., Annexes 8, 9.

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[3] The initial appeal files do not contain the appellant's post-ID filings. Thus, the only source of this information is the appellant's representations and copies of his purported filings. The agency has not controverted the appellant's representations in this regard.

[4] Because the three PFR files are identical, we will subsequently cite only to PFRF-345, with the understanding that the same materials can be found in the other records at the same location.

[5] Presumably copies of the correspondence chronicling the ongoing dispute about the settlement agreement.

[6] The AJ may be referring to correspondence related to the appellant's motion to reinstate his appeal; the appellant's certified mailing receipt suggests that this motion was originally received by the AJ on March 6, 2009. PFRF-345, Tab 3, Annexes 17-19; PFRF-346, Tab 3, Annexes 17-19; PFRF-348, Tab 3, Annexes 17-19.

¶4 On June 24, 2009, the appellant filed an apparently untimely PFR of the IDs. PFRF-345, Tab 1. The Clerk of the Board notified the appellant that the PFR appeared untimely and directed him to respond on the issue of timeliness. PFRF-345, Tab 2. The appellant did so. PFRF-345, Tab 3. The agency did not respond to the PFR.

ANALYSIS

¶5 In his PFR, the pro se appellant argues the cases never actually settled,[7] his appeals should not have been dismissed as settled, and his delay in filing a PFR is justified by his ongoing communications with the agency and the AJ's failure to respond to his various motions. PFRF-345, Tab 1. He also argues that his appeals should be reinstated. *Id*.

¶6 An attack on the validity of a settlement agreement must be in the form of a PFR of the ID dismissing the appeal as settled. *Armstrong v. Department of the Treasury*, 110 M.S.P.R. 533, ¶ 10 (2009). A PFR must be filed within 35 days after the date the ID was issued, or, if the appellant received the ID more than 5 days after it was issued, within 30 days after the date that he received the ID. 5 C.F.R. § 1201.114(d). Given that the IDs were issued on September 29, 2008, but the appellant's PFR was not filed until June 24, 2009, the PFR is untimely by over 7 months.

Timeliness and Validity of the Settlement Agreement

¶7 To establish good cause for a late PFR, the appellant must show that he exercised due diligence or ordinary prudence under the circumstances of his case. *See Stempihar v. U.S. Postal Service*, 106 M.S.P.R. 115, ¶ 4 (2007). In assessing good cause for a late filing, the Board considers the length of the delay, the reasonableness of the excuse, the showing of due diligence, whether the appellant is pro se, and whether the appellant has shown circumstances beyond his control

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[7] Essentially, the appellant is arguing that there was no contract because there was no meeting of the minds. *See Brown v. Department of the Army*, 108 M.S.P.R. 90, ¶ 5 (2008).

or an unavoidable causality that impaired his ability to timely file his petition. *See Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table). If an ID dismisses an appeal as settled, newly discovered evidence that shows the settlement agreement is invalid can establish good cause for an untimely PFR. *Graves v. Department of Veterans Affairs*, 82 M.S.P.R. 38, ¶ 11 (1999).

¶8 Thus, in cases such as this, the question of good cause and the underlying issue of the validity of the settlement agreement largely overlap. *See Armstrong*, 110 M.S.P.R. 533, ¶ 11. A settlement agreement is a contract between the parties, and may only be voided in limited circumstances, such as fraud, coercion, or mutual mistake. *Johnson v. Department of Agriculture*, 98 M.S.P.R. 691, ¶ 7 (2005). In addition, events occurring after the purported settlement of an appeal can cast doubt on the settlement's validity. *See Hazelton v. Department of Veterans Affairs*, 112 M.S.P.R. 357, ¶ 11 (2009); *DeLoach v. Department of the Air Force*, 108 M.S.P.R. 485, ¶ 11 (2008). Further, a settlement agreement, as a contract, may be modified by the parties after it is executed. *Rothwell v. U.S. Postal Service*, 64 M.S.P.R. 473, 477 (1994). Here, the appellant has presented sufficient new evidence regarding whether a settlement agreement was ever reached to both excuse his late filing and support a request to reopen and reinstate his appeals.

¶9 The appellant has presented evidence of a letter that he sent to the agency disputing provisions of the purported settlement agreement on September 22, 2008, the day before the agency filed the agreement with the AJ. *See* PFRF-345, Tab 3, Annex 4. This contemporaneous document contradicting the contents of the purported settlement casts doubt on the existence of a settlement agreement because it suggests that there was no meeting of the minds. *See Gill v. Department of Veterans Affairs*, 85 M.S.P.R. 541, ¶ 4 (2000). Thereafter, the appellant and the agency disputed the purported settlement's content and the handling of the appellant's medical information. PFRF-345, Tab 3. Here, in the course of their ongoing negotiations, the agency offered the appellant the option

of voiding the settlement in its entirety, and he accepted that option. PFRF-345, Tab 3, Annexes 8, 9. On June 11, 2009, the agency and the appellant agreed that the settlement agreement was void in its entirety, and that the appellant's EEO counseling would begin again. *Id.*, Annexes 8, 9.

¶10 The parties' subsequent agreement to deem the settlement "void" constitutes new evidence regarding whether a settlement ever existed and good cause for the delay in filing the PFR. *See Panther v. Department of Agriculture*, 52 M.S.P.R. 419, 422 (1992) (a showing of circumstances casting doubt on the existence of a valid settlement agreement may form the basis for reopening a closed appeal without regard to time limits for filing a PFR); *cf. Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 99 (2001), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002) (the appellant cannot reassert previously settled claims because he has not established that the settlement is invalid or no longer in existence). The parties' agreement also resolves the question of whether a valid settlement agreement exists. *See generally Brown*, 108 M.S.P.R. 90, ¶ 9 (even if the invalidity of the settlement is not apparent at the time of settlement, it must be set aside if it is subsequently shown to be tainted with invalidity); *see also DeLoach*, 108 M.S.P.R. 485, ¶ 11 (events occurring after the purported settlement can be probative of its validity); *Rothwell*, 64 M.S.P.R. at 477 (parties may agree to modify a settlement after it is executed).

¶11 In other circumstances in which an appellant has cast doubt on whether a settlement agreement ever existed or revoked a settlement agreement, the Board has reopened or remanded the appeal. *See Brown*, 108 M.S.P.R. 90, ¶ 10 (remand was appropriate based upon the appellant's unrebutted allegations that the settlement was a forgery or otherwise invalid because there was no meeting of the minds); *Jarosz v. Department of Air Force*, 107 M.S.P.R. 281, ¶ 6 (2007) (it was appropriate to reopen and reinstate the appellant's appeal after he revoked the settlement agreement under the agreement's revocation provision); *Lee v. Office of Personnel Management*, 83 M.S.P.R. 236, ¶ 4 (1999) (remand was appropriate given there was insufficient evidence that a settlement had ever been reached);

Reinert v. Department of Agriculture, 74 M.S.P.R. 60, 64-65 (1997) (the Board reopened a prior appeal as the parties' contractually agreed remedy for the agency's breach); *see also Cruz v. Department of Veterans Affairs*, 99 M.S.P.R. 450, ¶ 4 (2005) (the Board reopened the action to allow the parties to enter an agreed upon modification to their settlement into the record); *Walker v. Department of the Navy*, 40 M.S.P.R. 600, 601 (1989) (agency agreed to reopen the appeal and the parties entered into a new settlement agreement). Thus, the proper course is to reopen and reinstate the appellant's appeals.

The AJ's Handling of Settlement

¶12 Generally, it is error for an AJ to dismiss an appeal as settled without documenting for the record whether the parties have actually reached a settlement agreement, whether they understand the agreement's terms, and whether they have agreed that the settlement will be enforceable by the Board. *See Gerdts v. Department of Labor*, 111 M.S.P.R. 412, ¶ 14 (2009). Furthermore, before accepting a settlement agreement into the record for enforcement purposes, the Board must determine whether the agreement is lawful on its face, whether the parties freely entered into it, and whether the subject matter of the appeal is within the Board's jurisdiction. *Gillespie v. Department of Veterans Affairs*, 111 M.S.P.R. 363, ¶ 4 (2009).

¶13 Here, the AJ accepted the agency's representation that the settlement resolved the appellant's appeal without confirming that the case had actually settled, that the parties understood the agreement's terms, or that the parties had agreed that the settlement would be enforceable by the Board. IAF-345, Tabs 4, 5; IAF-346, Tabs 5, 6. This was particularly consequential here because the record reflects potential questions regarding whether a settlement was reached even before the ID was issued. Notably, the settlement contains an ambiguity — it refers to the pending MSPB appeal (singular), but as of the date of the settlement, the appellant's appeal had been docketed as three separate appeals. IAF-345, Tab 4; IAF-346, Tab 5. Furthermore, there was the appellant's letter to

the agency of September 22, 2008, which cast doubt on the question of whether the parties had actually reached an agreement, PFRF-345, Tab 3, Annex 4, and which the appellant represents that he also sent to the AJ, thus potentially putting the AJ on notice of the dispute before the ID was issued, PFRF-345, Tab 3 at 3. *See generally Gill*, 85 M.S.P.R. 541, ¶¶ 5-6. All these issues likely would have come to light if the AJ had confirmed the parties' intentions regarding the settlement before dismissing the appeals. *See generally Gerdts*, 111 M.S.P.R. 412, ¶ 15.

¶14 Moreover, the AJ never assessed the facial legality of the agreement, whether the parties had entered into it voluntarily, or whether the appeal was within the Board's jurisdiction. This is particularly significant given there is some question regarding the Board's jurisdiction in two of the appeals. The agency moved to dismiss for lack of jurisdiction in one of the appeals based on its argument that the simple non-selection of the appellant was not a matter appealable to the Board and that the appellant failed to exhaust his remedy with the Department of Labor (DOL) for purposes of the VEOA appeal.[8] IAF-346, Tab 4. As to the appeal of the negative suitability determination (IAF-345), U.S. Postal Service positions are excepted service positions, and excepted service employees have no right to appeal negative suitability determinations to the Board. *See McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 414 (1998); *Dixon v. U.S. Postal Service*, 69 M.S.P.R. 171, 174 (1995). As to the appeal of the VEOA claim (IAF-346), the AJ never determined whether the appellant had exhausted his remedy with the DOL.

Subsequent Pleadings

¶15 An AJ lacks authority to reopen or reinstate appeals in which there has been a final Board decision; only the Board has such authority. 5 U.S.C. § 7701(e)(1)(B); *Nahoney v. U.S. Postal Service*, 112 M.S.P.R. 93, ¶ 9 (2009).

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[8] But the motion contained arguments relevant to both IAF-345 and IAF-346. *See* IAF-346, Tab 4.

When a post-ID pleading can be construed as a PFR seeking to reopen and reinstate an appeal, the proper course is to forward the pleading to the Board. *See, e.g.*, *Carlson v. General Services Administration*, 101 M.S.P.R. 70, ¶ 5 (2006) (the AJ correctly forwarded a case challenging the validity of a settlement agreement to the Board); *Beyer v. U.S. Postal Service*, 37 M.S.P.R. 672, 675 (1988) (the appellant's letter was a PFR that should have been forwarded by the AJ to the Board).

¶16 The appellant has represented that his post-ID filings included a motion to reinstate or reopen his appeal and other pleadings that could also fairly be construed as PFRs. Thus, the AJ's post-ID orders addressing these filings are problematic because the orders were issued after the IDs became final and therefore may have exceeded the AJ's authority. *See* PFRF-345, Tab 3, Annexes 16, 20. It appears that the AJ should have forwarded these pleadings to the Board.

ORDER

¶17 We therefore VACATE the IDs and REMAND these appeals for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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