UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 237

Docket No. AT-0752-05-0990-X-2
AT-0752-05-0990-C-2

Carolyn A. Miller,

Appellant,

v.

Department of the Army,

Agency.

December 29, 2009

Carolyn A. Miller, McDonough, Georgia, pro se.

Stephen S. Malley, Esquire, Ft. McPherson, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is before the Board pursuant to the administrative judge's recommendation that denied in part and granted in part the appellant's petition for enforcement. In addition, the appellant petitions for review of the initial decision that dismissed her prior petition for enforcement as settled. For the reasons discussed below, we DISMISS her petition for review as untimely filed without good cause shown to waive the time limits, and we FIND the agency in

compliance with the settlement agreement and therefore DISMISS the petition for enforcement.

BACKGROUND

¶2 On July 21, 2006, the Board ordered the agency to cancel the appellant's removal and substitute in its place a 60-day suspension and to restore the appellant effective September 3, 2005. *Miller v. Department of the Army*, 102 M.S.P.R. 621, 622 (2006). Three separate enforcement proceedings followed. In her first petition for enforcement, the appellant alleged, among other things, that the agency did not reinstate her into her prior position of Inspector General Investigative Specialist, but instead placed her in the position of Support Specialist, GS grade 7, target 9. *See Miller v. Department of the Army*, 109 M.S.P.R. 41, ¶ 6 (2008). The Board granted the appellant's petition in part and directed the agency to reinstate the appellant to her prior position or reassign her to a position that is substantially similar to her prior position. *Id.*, ¶ 20.

¶3 The agency then reassigned the appellant to the position of Inspection Specialist within the Inspector General's Office. X-1 File, Tab 26. The appellant did not dispute that the Inspection Specialist position was substantially similar to the position of Investigative Specialist, but instead stated that she wished to decline the reassignment and stay in the Support Specialist position. *Id.*, Tab 27. In an order issued on June 18, 2008, the Board found the agency in compliance and dismissed the appellant's petition for enforcement as moot. *Miller v. Department of the Army*, MSPB Docket No. AT-0752-05-0990-X-1 (Order, June 18, 2008).

¶4 Subsequently, the appellant filed a second petition for enforcement in which she alleged that the Board's June 18, 2008 order entitled her to stay in her Support Specialist position and that the agency violated that order by requiring her to apply for the position. C-2 File, Tab 1. In a settlement agreement executed on January 20, 2009, the parties agreed that the appellant would be

reassigned from the Inspection Specialist position to the Support Specialist position. *Id*., Tab 27 at 1. The agreement also provided, inter alia, that the agency would provide training concerning prevention of retaliation, prohibited personnel practices, and hostile work environment to managers and employees who have a close working relationship with the appellant. *Id*. at 2. The agency agreed to assist the appellant in setting up automatic notification from USA Jobs, the Office of Personnel Management (OPM) website listing government-wide vacancies, "so that [the appellant] can submit her application, resume, and any required certifications, credentials or documentation as early as possible within the selection process." *Id*. The agency also promised to credit the appellant with 16 hours of annual leave and substitute 16 hours of administrative leave for the annual leave that she used in the course of the enforcement proceedings before the Board. *Id*.

¶5 The administrative judge found that the agreement was understood by the parties, entered into freely, and that it was lawful on its face. *Miller v. Department of the Army*, MSPB Docket No. AT-0752-05-0990-C-2 (Initial Decision, Jan. 22, 2009); C-2 File, Tab 28. Accordingly, he entered the agreement into the record for enforcement purposes and dismissed the petition for enforcement pursuant to the agreement. *Id*. at 2. The initial decision became final on February 26, 2009, when neither party timely filed a petition for review with the full Board. *Id*.

¶6 On March 14, 2009, the appellant filed a petition for enforcement alleging that the agency had not complied with various provisions of the January 20, 2009 settlement agreement. C-3 File, Tab 1. She stated that the SF-50 memorializing her reassignment to the Support Specialist position erroneously stated that the action was a promotion. *Id*. at 2-3. She alleged that the agency had not provided her with the promised 16 hours of administrative leave. *Id*. at 6-9, 11. She also questioned whether the agency had conducted the training referred to in the

settlement agreement. *Id*. at 9. Finally, she alleged that the agency violated the agreement by not assisting her in locating a position at Fort Benning. *Id*. at 9-11.

¶7 In a recommendation issued on June 19, 2009, the administrative judge found the agency in partial non-compliance with the settlement agreement. *Miller v. Department of the Army*, MSPB Docket No. AT-0752-05-0990-C-3 (Recommendation, June 19, 2009); C-3 File, Tab 9. Specifically, the administrative judge recommended that the Board order the agency to credit the appellant with 16 hours of annual leave and substitute 16 hours of administrative leave for the annual leave previously taken, and to assist her in setting up email notification of job vacancies. *Id*. at 7.

¶8 The case was then forwarded to the full Board for enforcement purposes. The agency submitted evidence that it had taken the actions recommended by the administrative judge. Specifically, the agency stated that it had credited the appellant with 16 hours of leave and attempted to assist her in setting up email notification through the USA Jobs website. X-2 File, Tab 3. The appellant responded by contesting the agency's compliance with the agreement and, in addition, alleging that the parties' settlement agreement is invalid because of fraud and/or misrepresentation, because it was executed under duress and coercion, and because the appellant was "impeded by medical conditions" when she signed the agreement. X-2 File, Tab 6 at 1.

¶9 Based on the appellant's allegations that the agreement was invalid, the Clerk of the Board, in an acknowledgment letter dated September 15, 2009, noted that it appeared that she was challenging the January 23, 2009 initial decision in docket number AT-0752-05-0990-C-2. C-2 Petition For Review File (PFRF), Tab 2. The Clerk notified the appellant that it would treat her pleading as a petition for review of that initial decision, and informed her that the petition was untimely filed because it was not postmarked or received by February 27, 2009, the 35th day following the issuance of the initial decision. *Id*. at 1. In response, the

appellant asserts that the time limits should be waived. PFRF, Tab 3. The agency has responded in opposition to the petition for review. *Id.*, Tabs 4-6.

ANALYSIS

The appellant has not shown good cause for waiving the time limits for her untimely filed petition for review.

¶10 When an administrative judge dismisses an appeal or an enforcement matter as settled, a party who believes that the agreement is invalid because it was obtained by fraud or coercion, or because it was based on mutual mistake, may file a petition for review of the initial decision and seek to have the settlement agreement set aside. *See McKinney v. Department of Agriculture*, 70 M.S.P.R. 165, 166 (1996). A petition for review must be filed with the Board within 35 days of the issuance of an initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. 5 C.F.R. § 1201.114(d) (2009).

¶11 Here, the administrative judge dismissed the appellant's petition for enforcement as settled on January 22, 2009. C-2 File, Tab 28. The initial decision informed the appellant that the deadline for filing a petition for review was February 26, 2009. *Id.* at 2. The appellant filed her petition for review on July 16, 2009, nearly five months after the deadline. PFRF, Tab 1 (postmark date).

¶12 We note that, where an appellant's petition for enforcement "unmistakably" challenges the validity of the agreement, the Board will treat it as a petition for review. *See Armstrong v. Department of the Treasury*, 110 M.S.P.R. 533 ¶ 10 (2009). On March 14, 2009, the appellant filed a pleading titled "noncompliance issues" with the regional office. C-3 File, Tab 1. The appellant alleged that the agency had not complied with various terms of the agreement and the administrative judge properly treated the submission as a petition for

enforcement. The appellant did not explicitly argue that the agreement was invalid, although she alleged that "[u]nder duress, [she] did a quick review of the document and realize[d] our document that we had discussed in [the] past had been revised." *Id*. at 11. She further stated that her attorney had "overlooked the Agency's revisions." *Id*. These allegations, however, are not sufficient for us to find that the appellant was "unmistakably" challenging the validity of the agreement in her petition for enforcement. At most, they allege a unilateral mistake by the appellant and her attorney in accepting the agency's revisions to the draft agreement. In any event, even if we were to find that the appellant's petition for enforcement challenged the validity of the agreement and therefore should be characterized as a petition for review of the January 22, 2009 initial decision, it would nevertheless be untimely filed by 16 days.

¶13 The Board will waive the time limits where an appellant has shown good cause for an untimely filing. 5 C.F.R. § 1201.114(f). The burden is on the appellant to demonstrate excusable delay. *Mendoza v. Merit Systems Protection Board*, 966 F.2d 650, 653 (Fed. Cir. 1992) (en banc). In determining whether an appellant has shown good cause, the Board considers the length of the delay, the reasonableness of appellant's excuse and any showing of due diligence, whether the appellant is proceeding *pro se*, and whether the appellant has presented evidence of the existence of circumstances beyond his control that affected the appellant's ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to the appellant's inability to timely file. *See Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1582 (Fed. Cir. 1994).

¶14 The appellant alleges that she was delayed in filing her petition for review due to health issues, including depression, anxiety, stress, "decreased mental ability," lack of focus, back pain, and "impaired decisiveness and judgment." PFRF, Tab 3 at 3. To establish that an untimely filing was the result of an illness, the party must: (1) identify the time period during which he suffered from the

illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness prevented him from timely filing his appeal or a request for an extension of time. *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437 (1998). The appellant was notified of these criteria in the Board's letter acknowledging her petition for review. PFRF, Tab 2.

¶15 The appellant has not provided any evidence that she was prevented by illness from timely filing a petition for review or seeking an extension of time. The appellant's evidence does not explain why she was unable to file a petition for review during the relevant period of time, i.e., between January 22, 2009, and February 26, 2009. She has included a certification that she was examined at the hospital on March 2, 2009, and that four days of bed rest were recommended. PFRF, Tab 3, Ex. D. The certification includes the comment "out of work 17 Feb. - 20 Feb. 09." *Id*. While this document indicates that the appellant apparently suffered an illness and missed work in late February, it does not state what the illness was or discuss how the illness would have prevented her from filing a timely petition for review with the Board. Much of the rest of the appellant's submissions related to her health are from 2006 and do not discuss her health during the relevant time period. We find that the appellant has not shown that circumstances beyond her control prevented her from timely filing a petition for review, and that she has not shown good cause for waiving the applicable time limits.

¶16 The appellant further requests that we reopen the case in order to consider her challenge to the validity of the settlement agreement. PFRF, Tab 1 at 2. However, we generally will not reopen a case to cure the untimeliness of a party's petition for review. *Santos v. Office of Personnel Management*, 58 M.S.P.R. 408, 409 (1993), *aff'd*, 26 F.3d 137 (Fed. Cir. 1994) (Table). This case does not present any reason for the Board to depart from its general rule.

The Agency Is In Compliance With The Settlement Agreement.

¶17 The Board has the authority to enforce a settlement agreement which has been entered into the record in the same manner as any final Board decision or order. *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981). Because a settlement agreement is a contract, the Board will adjudicate an enforcement proceeding relevant to a settlement agreement in accordance with contract law. *See Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). Under settled contract law, the party alleging breach of a settlement agreement has the burden of proving such breach. *Kramer v. Department of the Navy*, 46 M.S.P.R. 187, 190 (1990).

¶18 The administrative judge's recommendation found that, to be in compliance with the settlement agreement, the agency must credit the appellant with 16 hours of annual leave and substitute 16 hours of administrative leave for the annual leave previously taken by the appellant. CF-3, Tab 9 at 7. In response to the recommendation, the agency submitted an affidavit from an agency official and the appellant's amended time cards indicating that 16 hours of administrative leave had been substituted for the 16 hours of annual leave previously entered for the days of May 29 and June 1, 2009. X-2 File, Tab 3 at 7-10. The appellant objects that the timecards show only "handwritten corrections" and therefore "[i]t is questionable as to how this transaction was performed." X-2 File, Tab 6 at 11. However, the agency official's affidavit explains that the changes were made electronically and that these changes are noted on the attached timecards where "LA" is the code for annual leave and "LN" is the code for administrative leave. X-2 File, Tab 3 at 7; Tab 7 at 5-6, 10-16. The handwritten notes explain and highlight the timecard changes. *Id*. In the absence of any evidence to the contrary, we find that the agency has complied with the settlement agreement by restoring 16 hours of annual leave to the appellant.

¶19 In addition, the administrative judge directed the agency to assist the appellant in setting up an automatic email notification from OPM's USA Jobs

website, which lists government-wide job vacancies. CF-3, Tab 9 at 7. The agency has submitted affidavits describing its efforts to assist the appellant in setting up such notification and the appellant's lack of cooperation with those efforts. X-2, Tab 3 at 11-12; Tab 4 at 4-5. The emails provided by the appellant corroborate the agency's account. X-2, Tab 6 at 38-44. While the appellant states that she was only interested in jobs at Fort Benning, it is not clear why she believes that job vacancies at that location would not be listed on USA Jobs. *Id*. at 8, 13. Regardless, the agency has shown that it was willing to fulfill its obligations under the agreement. C-2, Tab 27 at 2. Under these circumstances, we find that the agency has complied with the terms of the agreement relating to assisting the appellant with email notifications concerning job vacancies.

¶20 The appellant disputes the administrative judge's finding that the agency correctly characterized her reassignment as a promotion on a Standard Form (SF) 50. X-2 File, Tab 6 at 11-12. In response to the appellant's concern that it would appear that she was recently promoted to GS-9 and therefore might not satisfy time-in-grade requirements for further promotion, the agency amended the SF-50 with a comment documenting that the appellant had served in the GS-9 position from March 18, 2007, to the present. CF-3 File, Tab 9 at 3. The administrative judge found that this comment met her concern and that, in any event, her reassignment was, in fact, a "promotion" as defined by 5 C.F.R. § 210.102(11) ("Promotion" means a change of an employee, while serving continuously within the same agency to a position with a higher rate of pay when the old and new positions are in different pay method categories). *Id*. We find no error in the administrative judge's analysis.

¶21 The appellant further asserts that the agency has not complied with its promise to provide training on prevention of retaliation. X-2 File, Tab 6 at 8, 12. The administrative judge found that the agency complied with this provision by providing training to 15 managers and employees on January 29, 2009. C-3 File, Tab 9 at 4. The appellant concedes that the training occurred, but argues that it

should have been performed by someone outside the organization instead of agency counsel. X-2 File, Tab 6 at 12. While such arrangement may have been preferable, the settlement agreement does not specify who will lead the training program. Instead, the agreement states only that the "agency will ensure those personnel (both managers and co-workers who are identified as having a close working relationship with [the appellant]) will receive the training as early as possible." C-2 File, Tab 27 at 2. Given this language, we agree with the administrative judge that the agency has met its training obligations.

ORDER

¶22 Accordingly, we DISMISS the appellant's petition for review as untimely filed and we DISMISS her petition for enforcement. The initial decision dismissing the appellant's second petition for enforcement as settled remains the Board's final decision as to that matter, and this is the Board's final order regarding the merits of her third petition for enforcement. Title 5 of the Code of Federal Regulations, section 1201.183(b)(3) (5 C.F.R. § 1201.183(b)(3)).

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:

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