UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 7

Docket No. DE-3443-09-0083-I-1

Susan J. Spidel,

Appellant,

v.

Department of Agriculture,

Agency.

January 11, 2010

Albert Loew, Esquire, Merrick, New York, for the appellant.

Brian E. Guy, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed her appeal as settled, but that did not incorporate the settlement agreement into the record for purposes of enforcing its terms. For the reasons set forth below, we GRANT the appellant's petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal with the Board challenging her removal from her excepted service position as Mathematical Statistician for medical inability to

perform the functions of the position. Initial Appeal File (IAF), Tab 1 at 2; *id.*, Tab 15, Subtab 4a at 1. The administrative judge thereafter issued an acknowledgment order noting that the appellant had been employed in the excepted service and informing her that a question existed regarding whether the Board had jurisdiction over the appeal. IAF, Tab 2 at 2. The appellant, in her subsequent response, asserted that her appeal was within the Board's jurisdiction because at the time of her removal, she had completed more than 2 years of current continuous service in the same or similar positions. IAF, Tab 17 at 2.

¶3 The agency did not respond to the appellant's jurisdictional argument. Its representative later submitted to the administrative judge, however, a written settlement agreement in which the parties agreed, inter alia, that the appellant would withdraw the appeal, and in which they stated that they would request that the Board accept the agreement into the record so that it would retain jurisdiction to enforce its terms. IAF, Tab 25 (Settlement Agreement at 3, 5). The agreement also provided that it was binding on the parties regardless of whether the administrative judge accepted it into the record. *Id.* at 5.

¶4 In an initial decision, the administrative judge dismissed the appeal as settled. IAF, Tab 26, Initial Decision (ID) at 3. Noting that "[t]here is an outstanding question of Board appellate jurisdiction," however, the administrative judge accepted the agreement into the record "only as proof that the appellant is voluntarily withdrawing her appeal pursuant to the off-the-record agreement," and stated that "[t]he Board will not retain jurisdiction to enforce the terms of the settlement agreement because a finding of jurisdiction over the underlying matter has not been made . . . ." ID at 1-2.

¶5 The appellant has timely filed a petition for review of the initial decision, arguing that the administrative judge erred in refusing to enter the settlement agreement into the record for enforcement by the Board on the basis that the issue of jurisdiction was unresolved. *See* Petition for Review File, Tab 4 at 1-2. The agency has not responded to the appellant's petition.

ANALYSIS

¶6 The Board will incorporate a settlement agreement into the record and enforce its terms if the following requirements are met: (1) The parties intended that the agreement be enforced by the Board; (2) the Board has jurisdiction over the appeal; and (3) the agreement is lawful on its face and was freely reached and understood by the parties. *See Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 148-49 (1988); *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981), *as modified by Shaw v. Department of the Navy*, 39 M.S.P.R. 586 (1989), *overruled on other grounds by Joyce v. Department of the Air Force*, 74 M.S.P.R. 112 (1997). Before dismissing an appeal as settled, the administrative judge must determine whether the settlement agreement is enforceable by the Board under the above criteria. *See Clark v. Department of the Treasury*, 48 M.S.P.R. 330, 333 (1991); *Alvarez v. Department of the Air Force*, 48 M.S.P.R. 309, 311 (1991); *Outterbridge v. U.S. Postal Service*, 47 M.S.P.R. 353, 354 (1991). The Board's regulation at 5 C.F.R. § 1201.41 further provides that "[i]f the parties offer the [settlement] agreement for inclusion in the record, and if the judge approves the agreement, it will be made a part of the record, and the Board will retain jurisdiction to ensure compliance with the agreement." 5 C.F.R. § 1201.41(c)(2)(i).

¶7 We find no error in the administrative judge's determination that the parties reached a settlement agreement in this case, that it was freely reached, that the parties understood its terms, and that those terms are lawful. *See* ID at 2; IAF, Tab 25 at 8-9. Further, the agreement expressly provides that the parties "ask that the Board accept the Agreement into the record so that it will retain jurisdiction to enforce the terms of the agreement." IAF, Tab 25 at 5. Thus, the parties have demonstrated their intent to have the Board retain jurisdiction for purposes of enforcement. *See Stewart v. U.S. Postal Service*, 73 M.S.P.R. 104, 107 (1997). The administrative judge therefore should have determined whether the agreement could be enforced by the Board, according to the parties' intent, by

determining whether the Board has jurisdiction over the appeal. *See Bays v. Department of the Army*, 54 M.S.P.R. 469, 471 (1992). Instead, the administrative judge simply found that the agreement could not be enforced by the Board because the issue of jurisdiction had not been resolved. This was error under the circumstances. *See id.*[1]

¶8 We note further that the record in this case is developed on the issue of jurisdiction, and that it demonstrates that the Board has jurisdiction over this appeal. Paragraph (ii) of 5 U.S.C. § 7511(a)(1)(C) grants the Board jurisdiction over removal appeals of certain individuals in the excepted service who, like the appellant, are not preference eligibles. *See* IAF, Tab 15, Subtab 4a at 1 (form documenting the appellant's removal, indicating that she was not a preference eligible). Specifically, it provides that an individual who has "completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less" may appeal her removal to the Board. Here, the record establishes that the appellant was converted from a part-time student trainee position to a full-time excepted-service appointment as a Mathematical Statistician on January 6, 2003, and that she remained in that position until the effective date of her removal on May 14,

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[1] This appeal is distinguishable from *Pelatti v. Department of the Navy*, 45 M.S.P.R. 33, 35-36 (1990), in which the Board upheld the administrative judge's finding that the parties' settlement agreement could not be entered into the record for enforcement because the issue of jurisdiction had not been resolved. Unlike the circumstances in the present appeal, the appellant did not respond to the administrative judge's order to provide evidence and argument on the jurisdictional issue, and the parties did not object when advised by the administrative judge that their agreement could not be enforced by the Board because the issue of jurisdiction had not been resolved. *See id.* at 34, 36. Here, the appellant offered evidence and argument below in support of her position that the Board has jurisdiction over the instant appeal, and there is no indication in the record that the administrative judge advised the parties that their agreement could not be enforced by the Board because the jurisdictional issue had not been resolved. Further, for the reasons stated below, the record provides a sufficient basis on which to resolve the jurisdictional issue in the appellant's favor.

2005. *See* IAF, Tab 15, Subtab 4a at 1-2.[2] Although the Standard Form 50 documenting the appointment states that it is conditional and "intended to continue thru completion of education & study related work requirements," there is no indication that the appointment was a temporary one limited to 2 years or less. Because the appellant has completed more than 2 years of current continuous service in that position, she is an "employee" under section 7511(a)(1)(C)(ii) and the Board therefore has jurisdiction to adjudicate her removal appeal.

¶9 Because the agreement is a full and complete settlement of all issues in that appeal, no matter remains before the Board for adjudication.

ORDER

¶10 Accordingly, we AFFIRM the initial decision insofar as it dismisses this appeal as settled, and we accept the settlement agreement into the record for enforcement purposes. This is the final decision of the Merit Systems Protection

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[2] The appellant was absent from work beginning on or about February 19, 2004, and continuing until her removal in May 2005. *See* IAF, Tab 15, Subtab 1 at 2; *id.*, Tab 17 at 2. The change in her service computation date (SCD) between her November 2001 appointment and her removal suggests that she was in a nonpay status during much of her absence. *Compare* IAF, Tab 15, Subtab 4a at 1 (showing an SCD, for leave-accrual purposes, of February 17, 2002) *with id.* at 3 (showing an SCD of November 19, 2001); *see* 5 U.S.C. § 6303(a) (an employee is entitled to credit, for leave-accrual purposes, for service that is creditable under 5 U.S.C. § 8332); 5 U.S.C. § 8332(f) (credit generally "may not be allowed for so much of . . . leaves of absence without pay as exceeds 6 months in the aggregate in a calendar year"). The Board has held, however, that time in a nonpay status while on the employee rolls is counted in calculating current continuous service under 5 U.S.C. § 7511(a)(1). *See Campbell v. U.S. Postal Service*, 88 M.S.P.R. 546, ¶¶ 7-8 (2001) (the appellant had completed 1 year of current continuous service by the time of her removal, for purposes of 5 U.S.C. § 7511(a)(1), even though she was in a nonpay status beginning less than a year after her assignment to her position and continuing until about the time of her removal); *cf. Jackson v. U.S. Postal Service*, 73 M.S.P.R. 512, 514 n.2 (1997) (the Board exercised jurisdiction over the appellant's adverse actions despite the fact that the appellant had been suspended approximately 9 months after he had been appointed and therefore completed his year of current continuous service while in a nonpay status), *rev'd in part on other grounds on reopening*, 79 M.S.P.R. 46 (1998).

Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE PARTIES OF THEIR ENFORCEMENT RIGHTS

If the agency or the appellant has not fully carried out the terms of the agreement, either party may ask the Board to enforce the settlement agreement by promptly filing a petition for enforcement with the office that issued the initial decision on this appeal. The petition should contain specific reasons why the petitioning party believes that the terms of the settlement agreement have not been fully carried out, and should include the dates and results of any communications between the parties. 5 C.F.R. § 1201.182(a).

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.