UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 53

Docket No. DC-0752-81-1049-M-1

Deborah Katz Pueschel,

Appellant,

v.

Department of Transportation,

Agency.

March 18, 2010

George M. Chuzi, Esquire, Washington, D.C., for the appellant.

Mary M. McCarthy, Esquire, Jamaica, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the August 5, 2009 remand initial decision dismissing her petition for enforcement as barred by the doctrine of laches. For the following reasons, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the matter for further adjudication.

BACKGROUND

¶2 After the Board reversed the appellant's September 14, 1981 removal from her air traffic controller position with the agency's Federal Aviation

Administration (FAA), *Katz v. Department of Transportation*, 17 M.S.P.R. 303 (1983), the parties entered into a January 1984 settlement agreement that, among other things, required the agency to "award [the] Appellant backpay[,] net of deductions and contributions, as required by statute and regulation," Remand File (RF), Tab 10, Exhibit (Ex.) A at 2. In March 1984, the agency notified the appellant that it had completed its computation of the back pay it owed the appellant, enclosing a "recap" that showed the appellant was due a net amount of $67,479.95, covering the period from September 15, 1981, through January 21, 1984. *Id.*, Ex. D.[1] In April 1992, pursuant to the appellant's October 1982 request, the Office of Workers' Compensation Programs (OWCP) accepted her claim for disability status retroactive to March 12, 1990, and on October 15, 1993, OWCP orally extended the retroactivity date for the appellant's disability status to January 1, 1980. *Pueschel v. United States*, 297 F.3d 1371, 1373 (Fed. Cir. 2002). The appellant subsequently submitted a Form CA-7 to OWCP, seeking disability compensation benefits for the period from January 1, 1980, to April 27, 1993. *Id.*

¶3 In 1999, the appellant filed suit in the United States Court of Federal Claims seeking reimbursement of monies deducted from her back pay award because she contended "that the deductions were improper on the grounds that she was entitled to an award of disability benefits not subject to offset." *Pueschel v. United States*, 49 Fed. Cl. 309, 309-10 (2001). That court dismissed

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[1] The copy of this letter that the agency attached to its response file below omitted the page that recapitulated its computation of the appellant's back pay. *See* RF, Tab 10, Ex. D. However, the appellant attached a copy of the same letter, including the page containing the agency's computation of her back pay, which amounted to $67,479.95 after deductions for taxes and other items, with her brief on the timeliness of her petition for enforcement. *See Katz-Pueschel v. Department of Transportation*, MSPB Docket No. DC-0752-81-1049-C-1 (C-1 File), Tab 8, Ex. 1 at 2. The appellant indicated in her petition for enforcement that the agency paid her the $67,479.95, but that it subsequently demanded that she repay $15,544.44 that it asserted she was overpaid. C-1 File, Tab 1 at 2, Ex. 1.

the appellant's suit because it lacked subject matter jurisdiction to review the Department of Labor's final decision regarding the appellant's disability compensation. *Id.* at 310-12. The appellant appealed that decision to the United States Court of Appeals for the Federal Circuit, which affirmed the Court of Federal Claims's decision that it lacked subject matter jurisdiction over the appellant's claim and noted that, even if the appellant's claim could be characterized as a claim for recalculation of the appellant's FAA back pay award, "[t]o the extent that [she was] seeking an increased recovery under the 1984 award she received based on the MSPB's decision that she was improperly removed from her position, her claim would necessarily be for enforcement of the MSPB's order reversing her removal and awarding back pay, a matter that is within the exclusive jurisdiction of the MSPB." *Pueschel*, 297 F.3d. at 1374, 1377-78.

¶4 However, the appellant pursued other remedies after the Federal Circuit issued its 2002 decision, and did not file a petition for enforcement of the Board's reinstatement order until January 25, 2008. C-1 File, Tab 1, Petition for Enforcement (PFE). The administrative judge's initial decision dismissed the petition for enforcement as untimely and barred by laches, *id.*, Tab 9, and the Board denied the appellant's petition for review of that initial decision by final order, *Katz-Pueschel v. Department of Transportation*, 109 M.S.P.R. 698 (2008) (Table). The appellant appealed to the United States Court of Appeals for the Federal Circuit, which, at the Board's request, vacated the Board's decision and remanded the case to correct errors in the determination that the appellant's petition for enforcement was untimely filed and barred by laches. *See* RF, Tab 1.

¶5 On remand from the Board, the administrative judge again dismissed the petition for enforcement and found that "the agency ha[d] proven that the [appellant's] delay in filing the enforcement petition was unreasonable and inexcusable and that it was materially prejudiced by the delay." *Id.*, Tab 12, Remand Initial Decision (RID) at 4-8. In her petition for review, the appellant

argues that the agency failed to make the required showing that it was prejudiced by her delay in filing the petition for enforcement. Remand Petition for Review File (RPFRF), Tab 1, Petition for Review (PFR) at 9-18. The agency responds in opposition to the appellant's petition for review.[2] RPFRF, Tab 3.

ANALYSIS

¶6 At the time that the Board issued its decision reversing the appellant's removal, the Board's regulations did not contain a time limit for filing a petition for enforcement. 5 C.F.R. § 1201.181(a) (1983). To determine the timeliness of a petition for enforcement under that regulation, the Board applied the doctrine of laches. *See, e.g., Wooten v. U.S. Government Printing Office*, 21 M.S.P.R. 425, 426 (1984). The equitable defense of laches bars an action when an unreasonable delay in bringing the action has prejudiced the party against whom the action is taken. *See, e.g., Social Security Administration v. Carr*, 78 M.S.P.R. 313, 330 (1998), *aff'd*, 185 F.3d 1318 (Fed. Cir. 1999). The party asserting laches must prove both unreasonable delay and prejudice. *Id.; see Nuss v. Office of Personnel Management*, 974 F.2d 1316, 1318 (Fed. Cir. 1992); *Hoover v. Department of the*

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[2] The agency filed its response on October 8, 2009, four days after the October 4, 2009 close of the record on review. *See* RPFRF, Tab 3; *id.*, Tab 2 at 1. The Board informed the agency that any late-filed response to a petition for review must be accompanied by a motion for waiver of the time limit, including an affidavit or statement, signed under penalty of perjury, stating why there is good cause for the late filing. *Id.*, Tab 4 at 1; *see* 5 C.F.R. § 1201.114(f). With its motion for waiver, the agency submits the sworn declaration of agency representative Mary McCarthy, who asserts that the appellant's attorney served her with a copy of the petition for review by facsimile on September 9, 2009, and that "[i]n the mistaken belief that the reply was due thirty days from the date of filing, [she] calculated that the reply brief was due on October 9, 2009." RPFRF, Tab 5 at 5-6. The agency's response was due within 25 days of the date that the appellant served her petition. *See* 5 C.F.R. § 1201.114(d). Because the agency failed to establish good cause for its untimely response, we have not considered it in reaching our decision. *See, e.g., Jones v. U.S. Postal Service*, 110 M.S.P.R. 674, ¶ 5 n.2 (2009) (miscalculation of a filing deadline does not establish good cause for an untimely response).

Navy, 957 F.2d 861, 863 (Fed. Cir. 1992); *Pepper v. United States*, 794 F.2d 1571, 1573 (Fed. Cir. 1986).

¶7 As noted above, the appellant argues that the administrative judge erred in finding that the agency demonstrated that it was prejudiced by the appellant's delay in filing her petition for enforcement. PFR at 9-18. Based on the sworn declarations of agency employees, three of whom had specific involvement in the settlement matter, the administrative judge found that "the current employees who had some involvement in the settlement agreement and back pay calculation no longer have specific recollections of the matter, and there is no evidence that other witnesses are available." RID at 6. Ms. McCarthy, who has been the agency's representative in matters involving the appellant since approximately 1994, declared that, of the two payroll personnel who were involved in implementing the appellant's restoration to duty, Zelda Cook had retired and Linda Krause could not be found. RF, Tab 10, Ex. H at 1-2. Ms. McCarthy further declared that Diane Liff, who was a signatory to the settlement agreement and still works for the agency, had not returned her telephone message, but Ms. McCarthy opined that "it would be unlikely that Ms. Liff would [have been] involved in implementation of the Board's order or the settlement agreement." *Id.* at 3. James Whitlow, who was involved in negotiating the settlement agreement on behalf of the agency, declared that he had "no specific recollection of the details of the negotiations" and that he "would not have been involved in [the] implementation" of the agreement. *Id.*, Ex. I. Aaron Rappaport, who, in his capacity as a Supervisory Personnel Management Specialist "dealt with some issues regarding implementation of the settlement agreement," declared that he had "no specific recollection of any events and issues connected to the implementation of the agreement," that he "[did] not recall the names of anyone else involved in this matter," and, that he "was unable to refresh [his] recollection of any issues relating to the implementation of the settlement agreement and would not be able to articulate the Agency's position or reasoning with respect to

those issues." *Id.*, Ex. L. Lastly, Margaret Gilligan, who, as a staff attorney, "dealt with some issues regarding implementation of the settlement agreement," declared that she had a "vague recollection that there were issues with respect to the implementation of the settlement agreement" but that she now has "no specific recollection of those issues, and would not be able to articulate the Agency's position with respect to those issues." *Id.*, Ex. M.

¶8 With regard to Ms. Cook, her alleged retirement does not establish her unavailability, and the record does not reflect that the agency made any attempt to find her. *See Nuss*, 974 F.2d at 1319 (a claim that a witness has retired does not establish that the witness is unavailable); *Hoover*, 957 F.2d at 864 ("It is the availability and memory of witnesses, not their employment status, that is relevant."). With regard to Ms. Krause, who, in her capacity as the Manager of the Payroll Branch signed the March 1984 letter that transmitted the back pay computations to the appellant, *see* RF, Tab 10, Ex. D; C-1 File, Tab 8, Ex. 1 at 2, the record does not reflect that, after the agency's current Payroll Liaison Staff Point of Contact told Ms. McCarthy that she had never heard of Ms. Krause, Ms. McCarthy made any further attempt to find the witness, RF, Tab 10, Ex. H at 2. With regard to Ms. Ziff, who is still employed by the agency, Ms. McCarthy merely left a voice mail message which was not returned. *Id.* at 3. Ms. McCarthy's declaration does not reflect any significant effort to locate these three witnesses and is therefore insufficient to establish their unavailability.

¶9 Although Mr. Whitlow asserted that his memory has faded, he was not involved in implementing the settlement agreement; thus, the agency has not shown how his inability to recall any issues regarding its implementation prejudiced the agency. *See* RF, Tab 10, Ex. I. Mr. Rappaport and Ms. Gilligan were involved in implementing the settlement agreement, but they both asserted that they had "no specific recollection" regarding its implementation and "would not be able to articulate the Agency's position" with respect to any issues involved in its implementation. *Id.*, Exs. L-M. Nevertheless, even if the agency

established that those witnesses' unavailability or lack of memory prejudiced its ability to defend against the appellant's claim, the unavailability of some witnesses does not show prejudice if other witnesses are available. *See Nuss*, 974 F.2d at 1318. The appellant's sworn declaration below asserted that three other individuals involved in the matter, Patricia Healey, Pat Carey, and Heather Biblow, are still employed by the agency and presumably are available to testify. RF, Tab 11, Ex. 1. Further, the appellant asserts that Ms. Healey, "a Human Resource Specialist in the [FAA's] Eastern Region – was involved in the processing of [her] time and attendance information for [her] OWCP claims," and Ms. Carey, also a Human Resource Specialist "was responsible for calculating [her] OWCP leave." *Id.* at 1. Ms. Healey and Ms. Carey would therefore appear to be able to provide important testimony on the appellant's claim, that OWCP's acceptance of her injury claim had effectively transformed the back pay into non-taxable compensation. C-1 File, Tab 1, PFE at 3. The agency, which bears the burden of establishing prejudice, failed to rebut the appellant's assertions regarding the availability of Ms. Healey and Ms. Carey. *See Hoover*, 957 F.2d at 864.

¶10 The appellant also claims that the agency's missing witnesses are irrelevant and immaterial to her petition for enforcement, because "the legal question of whether all or part of the [appellant's] back pay should be classified as OWCP compensation rather than back pay . . . does not require witness testimony by [the] employees involved in the original calculations . . . ." PFR at 7. The appellant asserts that those witnesses' testimony is not needed because "neither the accuracy of the calculations nor the reasoning behind the calculations is being challenged." *Id.* The appellant explains that, instead, "the issue is whether the Agency should be required to reclassify the amounts paid to Appellant (e.g., the restoration of federal income taxes, which are not paid on OWCP compensation)" including amounts that were withheld from her back pay award. *Id.* at 7-8. Thus, the appellant asserts, "the testimony of the employees who made the original

calculations will shed no light on the issue in this Petition" and "the fact that current Agency employees can no longer recall the specifics of the 1983 settlement agreement . . . is also irrelevant." *Id.* at 9. The administrative judge disagreed, stating that "[i]f the 'legal question' is answered in the affirmative, then it would be very important to know how the appellant's back pay was calculated in order to determine what portion of it, if any, should be OWCP compensation." RID at 7. The administrative judge also commented that "it would be inappropriate at this early stage of the adjudication to presuppose that the agency could adequately defend against the enforcement petition without witnesses." *Id.* However, as noted above, the appellant asserted without rebuttal that other witnesses are available, and that two of those available witnesses, Ms. Healey and Ms. Carey, may have specific knowledge of the appellant's OWCP claim. *See* RF, Tab 11, Ex. 1. Further, the agency bears the burden of establishing prejudice, *see, e.g.*, *Hoover*, 957 F.2d at 864, and the administrative judge's comment about the inappropriateness of presupposing that the agency could defend itself without witnesses indicates that she may have improperly placed the burden on the appellant to show that she could prove her claim on the available documents rather than placing the burden on the agency to establish prejudice.

¶11 The administrative judge's discussion of the documents already in the record also indicates that she may have improperly placed the burden on the appellant to show that she could prove her claim on those documents alone rather than requiring the agency to establish that the inadequacy of the available documents prejudiced its ability to respond. *See* RID at 7 ("After reviewing these documents identified by the appellant as 'available evidence' of her back pay calculation, I find that they create more confusion than they resolve and they convince me of the necessity for more reliable evidence."). Further, the administrative judge gave short shrift to the appellant's sworn declaration that the payroll and leave records necessary to adjudicate her petition for enforcement are

still available from the Department of the Interior, which processes payroll for the FAA. *See* RF, Tab 11, Ex. 1 at 2; PFR at 10-11. As noted above, the agency's specific back pay calculations are a part of the record, including the amount of base pay at issue and the amount of taxes that were taken out.[3] *See* C-1 File, Tab 8, Ex. 1 at 2.

¶12 Nevertheless, the administrative judge's discussion focused on the availability of documents from the agency's litigation files, not on the payment, payroll, and leave records described above, records that appear to be more relevant to the issue presented, which is the proper classification of the appellant's back pay award. RID at 7-8. Regarding the litigation files, the administrative judge found, based on the declaration of agency Legal Technician Maryann Migone, that the litigation files regarding this matter had been held for two years by the agency, transferred to the Federal Records Center, retained for the required period, and then destroyed. *Id.*; *see* RF, Tab 10, Ex. B at 1-2. Based on Ms. Migone's declaration, the administrative judge found that, "[b]ecause the litigation files were destroyed pursuant to a disposal schedule . . . their

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[3] The administrative judge observed that "[b]ecause the appellant's back pay appears to have been calculated pursuant to the settlement agreement and not the Board['s] decision, it is unclear how the Board could address the back pay calculation in an enforcement petition." RID at 5 n.2. However, our reviewing court has recognized that a settlement agreement, like the one in this matter, which the parties intended to be a full and complete settlement of a case, including all other issues pertaining to that case, does not foreclose a subsequent claim based on a separate substantive right, even if both claims arise out of the same set of facts. *Cf. Mays v. U.S. Postal Service*, 995 F.2d 1056, 1060 (Fed. Cir. 1993) ("claims based on different laws giving rise to separate substantive rights were not mutually foreclosed by settlement of one of them, notwithstanding their common factual bases"). The appellant's right to appeal her removal under 5 U.S.C. chapter 75 and her right to file a petition for enforcement of a final Board order under 5 C.F.R. § 1201.182(a) appear to be such separate substantive rights. Importantly, nothing in the settlement agreement explicitly waives the appellant's right to file a petition for enforcement or appears to represent the sort of knowing and voluntary waiver that the Board requires in order for a settlement agreement to waive an appellant's rights. *See generally McCall v. U.S. Postal Service*, 839 F.2d 664, 666-67 (Fed. Cir. 1988) (a knowing and voluntary waiver of appeal rights in a settlement agreement is not void as a matter of public policy); RF, Tab 10, Ex. A.

destruction was the result of the filing delay." RID at 8. However, the record is devoid of any information as to when those documents were actually destroyed, and the destruction of documents pursuant to a disposal schedule is insufficient to establish that the destruction was the result of the appellant's delay. *See Nuss*, 974 F.2d at 1319 (the loss of relevant documents pursuant to the destruction of the appellant's personnel file shortly after his retirement was not deemed to be due to the appellant's delay in bringing his claim for enhanced retirement benefits). Further, even if the litigation files were destroyed as a direct result of the appellant's delay in bringing her petition for enforcement, the administrative judge failed to satisfactorily explain how the unavailability of the litigation files prejudiced the agency. *See* RID at 7-8.

¶13 Accordingly, we find that the agency failed to establish that the unavailability of witnesses or documents prejudiced its ability to defend against the appellant's petition for enforcement. Because the agency did not meet its burden of showing prejudice, we need not reach the issue of the reasonableness of the appellant's delay in bringing her petition for enforcement. *See, e.g.*, *Hoover*, 957 F.2d at 864.

ORDER

¶14 The initial decision is VACATED and the matter REMANDED to the regional office for adjudication of the merits of the petition for enforcemnt.

FOR THE BOARD:

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