

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

2010 MSPB 91

Docket No. SF-0752-09-0799-I-1

**Brian Smith,
Appellant,**

v.

**Department of the Interior,
Agency.**

May 18, 2010

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Kevin D. Mack, Esquire, Sacramento, California, 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 (PFR) of the initial decision (ID) that dismissed his removal appeal for lack of jurisdiction based upon findings that the agency properly removed him for violating the terms of a last chance agreement (LCA) that included a waiver of his right to appeal to the Board. We GRANT the PFR under [5 C.F.R. § 1201.115](#)(d)(2), REVERSE the initial decision, and DO NOT SUSTAIN the removal action.

BACKGROUND

¶2 In February 2007, the agency proposed to remove the appellant from his Senior Law Enforcement Ranger position with the Bureau of Land Management for misuse of a government-owned vehicle and for conduct prejudicial to the government in violation of [5 C.F.R. § 735.203](#). Initial Appeal File (IAF), Tab 8, subtab 40. In April 2007, the parties executed an LCA under which the proposed removal action was reduced to a 60-day suspension. IAF, Tab 3, Ex. A. The parties also agreed that “[the agency] will remove the [appellant] if [the agency] determines, after a thorough investigation and at least a 7-day advance notice to the [appellant] giving the [appellant] an opportunity to respond, that the [appellant] has committed **any offense requiring discipline,**” and that the appellant waived his right to appeal to the Board any such removal within 3 years from the effective date of the LCA.¹ *Id.* at 2, 4 (emphasis added). The LCA also provided that any offense requiring discipline includes any form of disobedience or insubordinate behavior, and willfully misusing a Government vehicle. *Id.* at 2. The agreement became effective on April 26, 2007. *See id.* at 4.

¶3 On April 22, 2009, the agency proposed to remove the appellant pursuant to the LCA. IAF, Tab 3, Ex. B. It alleged that the appellant failed to use proper safety equipment, i.e., failing to wear his seat belt during his pursuit of a suspect, resulting in his ejection from a send rail vehicle, in violation of agency policy and procedures. Deeming this lapse to be an offense requiring discipline, the agency invoked the LCA. IAF, Tab 3, Ex. B. After considering the appellant’s written and oral responses, the agency removed the appellant effective June 16, 2009. IAF, Tab 3, Ex. D, Tab 8, subtabs 4(a)-4(d).

¹ It is undisputed that the agency drafted the LCA. IAF, Tab 3 at 7; *see* IAF, Tabs 8, 14, 21.

¶4 The appellant appealed the removal action, alleging that the LCA is inapplicable in this matter.² IAF, Tab 1 at 3-4, Tab 3 at 4-7. In particular, he contended that he had not committed an “offense requiring discipline.” IAF, Tab 3. He designated a representative and requested a hearing. IAF, Tab 1 at 3, 8. The agency responded. IAF, Tabs 7-8. The administrative judge found that the appellant nonfrivolously alleged jurisdiction over his removal appeal and was entitled to a jurisdictional hearing. IAF, Tab 16 at 1. However, the appellant subsequently withdrew his request for a hearing. IAF, Tabs 17-18.

¶5 Based on the written record, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, finding that: (1) the terms of the LCA are unambiguous and fair on their face; (2) failure to use proper safety equipment is an offense requiring discipline; (3) the appellant’s failure to use proper safety equipment violated the LCA, and therefore the agency properly removed him pursuant to the LCA; and (4) the waiver provision in the LCA applies and deprives the Board of jurisdiction over this removal appeal.³ ID at 2-7. The appellant has filed a PFR of this decision. PFR File, Tab 1. The agency has responded in opposition. PFR File, Tab 3.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit*

² Whether the appellant wore his seat belt during the underlying incident is not at issue. See PFR File, Tab 1 at 8; IAF, Tab 3 at 4, 8, Tab 8, subtab 1 at 1.

³ Although the administrative judge correctly stated that it is the appellant’s burden to prove by preponderant evidence that the Board has jurisdiction over this removal appeal, she erroneously referred to the agency’s establishment by preponderant evidence that the appellant breached the LCA. ID at 3. However, this error is non-prejudicial as the administrative judge decided the jurisdictional issue based upon whether the appellant proved by preponderant evidence that the LCA waiver provision is unenforceable because he complied with the LCA. See ID at 3, 5-7; *Meza v. U.S. Postal Service*, [75 M.S.P.R. 238](#), 240 (1997).

Systems Protection Board, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The Board lacks jurisdiction over an action taken pursuant to an LCA in which the appellant waives his Board appeal rights. See *Link v. Department of the Treasury*, [51 F.3d 1577](#), 1581 (Fed. Cir. 1995); *Willis v. Department of Defense*, [105 M.S.P.R. 466](#), ¶ 17 (2007). To establish that the waiver of appeal rights in an LCA is unenforceable, the appellant must show that: (1) he complied with the LCA; (2) the agency materially breached the LCA or acted in bad faith; (3) he did not voluntarily enter into the LCA; or (4) the LCA resulted from fraud or mutual mistake. *Willis*, [105 M.S.P.R. 466](#), ¶ 17.

¶7 The appellant alleges that the administrative judge erred in dismissing his removal appeal for lack of jurisdiction, arguing that he complied with the LCA, and that the LCA therefore does not apply in this matter.⁴ See PFR File, Tab 1; IAF, Tab 1, Tab 3 at 4-7, Tab 13 at 3-7, Tab 20 at 2-8. Where an appellant nonfrivolously alleges that he complied with the LCA, the Board must resolve that issue before addressing the scope and applicability of a waiver of appeal rights in the LCA. *Gibbons v. Department of Agriculture*, [74 M.S.P.R. 33](#), 36 (1997) (citing *Stewart v. U.S. Postal Service*, [926 F.2d 1146](#), 1148 (Fed. Cir. 1991)). Here, the administrative judge determined that the appellant nonfrivolously alleged jurisdiction over the appeal. IAF, Tab 16 at 1. We discern no error in this finding. Thus, the threshold issue is whether the appellant proved that the underlying charged misconduct is not an offense requiring discipline, and therefore the LCA is inapplicable in this matter.

¶8 A settlement agreement is a contract, the interpretation of which is a question of law. See *Birdsong v. Department of the Navy*, [75 M.S.P.R. 524](#), 528 (1997) (citing *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir.

⁴ The appellant does not dispute the validity of the LCA, or ask that the Board set aside the LCA on the grounds of fraud or mutual mistake. PFR File, Tab 1 at 5; IAF, Tab 3 at 5.

1988)). In construing the terms of a settlement agreement, the Board looks to the words of the agreement itself, which are of paramount importance, and assigns them their ordinary meaning unless the parties intended otherwise. *Greco*, 852 F.2d at 560; *Jackson v. Department of the Army*, [69 M.S.P.R. 268](#), 271, *enforcement dismissed*, [70 M.S.P.R. 250](#) (1996) (Table). The plain meaning of a settlement agreement’s terms control. *Birdsong*, 75 M.S.P.R. at 528. Ambiguity exists if the terms of the agreement are reasonably susceptible of more than one interpretation. *Id.*

¶9 Here, the LCA expressly provides that the agency will remove the appellant for commission of “any offense requiring discipline.” IAF, Tab 3, Ex. A at 2. We discern no ambiguity in the term “requiring,” which is a participial form of the verb “require,” the ordinary meaning of which is to “direct or instruct” and to “[o]rder, command, demand, compel, coerce, . . . make mandatory.” *West’s Legal Thesaurus/Dictionary* 654 (1985). *See also Webster’s Third New International Dictionary* 1929 (Merriam-Webster 1993) (“require” means “to ask for authoritatively or imperatively: . . . insist upon, usu. with certainty or urgency”); *Mississippi River Fuel Corporation v. Slayton*, [359 F.2d 106](#), 119 (8th Cir. 1966) (the word “required” implies something mandatory). Thus, the agency could only remove the appellant under the LCA if the appellant committed an offense for which discipline is mandatory.

¶10 We agree with the appellant that failure to use proper safety equipment is not an offense requiring discipline. *See* PFR, Tab 1 at 3-8, Tab 3 at 3-8. Although agency policy and Executive Order 12566 require seat belt use by operators of government owned vehicles, neither⁵ mandates disciplinary action for violations. IAF, Tab 3, Ex. C at 4-5, Tab 8, subtab 4(h) at 1-2, 4, 6-7, 12, 14, 16-17. Rather, the policy provides that an employee’s failure to wear a seat belt

⁵ Executive Order 12566 is silent with regard to disciplinary action. IAF, Tab 8, subtab 4(h) at 2-3.

“may result in disciplinary action,” IAF, Tab 8, subtab 4(h) at 17, which plainly suggests that discipline is discretionary, not mandatory. Further, the charged misconduct does not violate a statute that mandates discipline, such as misuse of a government vehicle or engaging in prohibited partisan political activity. See IAF, Tab 21 at 8 and Ex. 4 at 29; [5 U.S.C. § 7326](#), [31 U.S.C. § 1349](#). Although the Table of Penalties in the Department of Interior Departmental Manual *suggests* penalties for failure to use proper safety equipment, ranging from a written reprimand to removal, it does not compel discipline for this offense.⁶ See IAF, Tab 21, Ex. 4 at 1, 19, 24. Thus, the AJ erred in finding that failure to use proper safety equipment is an offense requiring discipline. See ID at 5-7.

¶11 To the extent that the administrative judge found that the appellant disobeyed agency policy and Executive Order 12566, and that disobedience is an offense requiring discipline, these findings are erroneous and deny the appellant the required notice under [5 U.S.C. § 7513](#). See PFR File, Tab 1 at 8; ID at 6; IAF, Tab 3 at 8 and Ex. A at 2, Tab 8, subtab 4(n) at 2. The agency did not charge the appellant with disobedience. See IAF, Tab 3, Exs. B, D; see [5 U.S.C. § 7513\(b\)\(1\)](#); *Brown v. U.S. Postal Service*, [47 M.S.P.R. 50](#), 57 (1991) (the appellant must know of the claims with which he is being charged so that he may adequately prepare and present a defense before the agency); *Gottlieb v. Veterans Administration*, [39 M.S.P.R. 606](#), 609 (1989) (the Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency; the Board may not substitute what it considers to be a more adequate or proper basis). Thus, the administrative judge erred in considering the alleged charge of disobedience in this appeal. In any event, the Board has treated disobedience and insubordination offenses as involving willful and intentional

⁶ The Table of Penalties lists several offenses that violate statutes mandating discipline, e.g., misuse of a government vehicle in violation of [31 U.S.C. § 1349](#). IAF, Tab 21, Ex. 4 at 29.

conduct. *See Redfearn v. Department of Labor*, [58 M.S.P.R. 307](#), 312-13 (1993). Here, the agency has not shown that the appellant's failure to use proper safety equipment was willful and intentional. In fact, the agency indicated in its proposal and decision notices that the offense was "inadvertent" and not intentional. IAF, Tab 8, subtabs 4(b) at 2, 4(g) at 2.

¶12 Based on the foregoing, the administrative judge erred in finding the appellant committed an offense requiring discipline, that the agency properly invoked the LCA, and that the waiver provision deprives the Board of jurisdiction over this removal appeal. *See ID* at 3-7. We therefore REVERSE the initial decision. We find that the appellant established his compliance with the LCA insofar as he did not commit an offense requiring discipline. As the alleged violation of the LCA was the sole basis for the agency's action terminating the appellant's employment and, absent the waiver of appeal rights associated with the LCA, this removal action was clearly within the Board's adverse action jurisdiction, we find that the Board has jurisdiction over his removal appeal, and that the agency improperly removed him pursuant to the LCA.

ORDER

¶13 Accordingly, we ORDER the agency to cancel the appellant's removal action and to reinstate him to his former Senior Law Enforcement Ranger position effective June 16, 2009. The agency must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest

due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶15 We further ORDER the agency to promptly notify the appellant in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not so notified, should ask the agency about its progress. *See* [5 C.F.R. 1201.181\(b\)](#).

¶16 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶17 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶18 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\(c\)](#)).

**NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The

regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.ca9.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.