UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 162

Docket No. AT-0752-09-0918-I-1

Shaun Morris,

Appellant,

v.

Department of Veterans Affairs,

Agency.

August 10, 2010

NOTE: THIS FINAL ORDER IS NON-PRECEDENTIAL

Muriel Newman, Gainesville, Florida, for the appellant.

James A. Mantia, Esquire, Orlando, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner issues a separate dissenting opinion.

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

On May 1, 2009, the agency issued a notice of proposed removal to the appellant based upon absence without leave (AWOL), lack of candor with a supervisor, and leaving an assigned job during working hours without permission. Initial Appeal File (IAF), Tab 4, Subtab 4c at 1. On July 13, 2009, the appellant signed a last-chance agreement (LCA) in order to prevent the agency from effecting his removal; the LCA provided that the proposed charges "were supported by competent evidence," and the record reflects a decision to remove the appellant from employment had been "made and rendered" on July 10, 2009. IAF, Tab 4, Subtab 4b at 1, 4c at 1. The LCA contained the following requirements:

> 2.b. *You agree*, that from the date you sign this agreement, and continuing for the full two (2) years of the agreement, *that you are placed on leave certification that requires you to provide acceptable medical documentation for any period of sick leave that you request or that you use during the period of this agreement*. You will also be required to provide proof, acceptable to the NF/SGVHS Management, of any: (a) emergency leave that you request and/or (b) for any other documentation, proof of emergency, or proof offered for any other leave such as care and bereavement, or leave to care for a family member. *Any medical documentation*…[or] proof of emergency … *will be provided to your supervisor by close of business on the third day you return to work from the absence*. Self certification or certification provided by a family member or other family relative will be unacceptable and grounds for breach of this agreement.
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> …
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> 2.d. In further consideration for the abeyance of the removal for the above-specified period, *you agree to refrain from engaging in any conduct which, in the sole discretion of VA Management, would justify a charge or charges of misconduct against you*. You agree to abide by all VA and federal government rules, regulations, manual provisions, policies and laws, regarding the conduct of federal employees for the entire two (2) year period of the Agreement.

IAF, Tab 4, Subtab 4c at 1-2 (emphasis added). The LCA further provided that if the appellant failed to comply with any term of the agreement "on even one occasion," the agency "may effect [his] removal without prior notice" and he

waives his right to appeal such a removal to the Board. *Id.*, Subtab 4c at 2-3. The appellant's first-line supervisor during the relevant time period was Bobbie Morrisett, Nurse Manager. IAF, Tab 5, Exhibit 1 (Morrisett declaration). Supervisor Morrisett issued explicit call-in procedures to the appellant in a July 1 email, and the record reflects the appellant opened and read these procedures on July 14, 2009, the day after signing the LCA on July 13. IAF, Tab 3, Subtab C.

By letter dated July 31, 2009, the agency terminated the appellant's employment for violating the terms of the LCA. IAF, Tab 4, Subtab 4b. The Board lacks jurisdiction over an action taken pursuant to a LCA in which an appellant waives his right to appeal to the Board. To establish that a waiver of appeal rights in a LCA should not be enforced, an appellant must show one of the following: (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 agreement; or (4) the LCA resulted from fraud or mutual mistake. *Rhett v. U.S. Postal Service*, 113 M.S.P.R. 178, ¶ 13 (2010). An appellant is entitled to a jurisdictional hearing if he raises a nonfrivolous factual issue of compliance with the LCA. Nonfrivolous allegations are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). The dissent disagrees with the Board's decision to dismiss the appeal for lack of jurisdiction, asserting that the appellant made a nonfrivolous allegation of Board jurisdiction in his pleadings. We find, though, that the undisputed evidence establishes the appellant breached the LCA in several different ways. He is therefore not entitled to a hearing and his appeal is dismissed for lack of jurisdiction.

The undisputed record establishes that supervisor Morrisett issued strict call-in requirements to the appellant, and the appellant was aware of those requirements. Morrisett had instructed the appellant to make "direct contact" with her to request leave, directing him to call her office phone, then her cell phone, and then page her, in that order. IAF, Tab 3, Subtab C. She expressly

informed the appellant that a "voicemail [was] not an acceptable method of requesting leave." *Id*. Only if he had followed her instructions, and she failed to timely return his page, was an alternative procedure allowed through notification to the "nursing supervisor." The appellant failed to comply with the required call-in procedures when on July 22, however, he merely left a voice mail at 5:15 a.m. and did not speak to Morrisett until 3:00 p.m. The appellant does not dispute these facts, but only contends Morrisett's call-in requirements violated hospital policy and the applicable union agreement. He has thus failed to make a nonfrivolous allegation that he did not breach the LCA. Even if his allegations are true, his failure to comply with the leave procedures ordered by Morrisett would justify a charge of misconduct for failure to follow leave procedures and/or failure to follow his supervisor's instructions.[1]

Credible record evidence also shows, and the appellant does not dispute, that he left work at approximately 11:55 a.m. on July 20 contrary to supervisor Morrisett's instructions to remain at work. The appellant's representative alleges the appellant left work because he had "pink eye" and that the hospital's infection control policy stated that he could not remain on the ward. The appellant has not produced any documentation of such a hospital policy, and the doctor's slip dated

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[1] The Board has held that an employee does not have the unfettered right to disregard an order merely because there is a substantial reason to believe that the order is not proper; rather, he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation, or when complying with the order would cause him irreparable harm. *E.g.*, *Bowen v. Department of the Navy*, 112 M.S.P.R. 607, ¶ 15 (2009); *Pedeleose v. Department of Defense*, 110 M.S.P.R. 508, ¶¶ 16-18, *aff'd*, 343 F. App'x 605 (Fed. Cir. 2009); *Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table). The appellant's allegations that Morrisett's leave procedures violate hospital policy or the collective bargaining agreement do not fall within the limited circumstances that would allow him to refuse to comply with Morrisett's instructions regarding leave-requesting procedures.

July 20 identifies only an "eye infection," not conjunctivitis.[2] Nor has he alleged that the hospital policy would not have allowed him to work in another capacity in the hospital. In any event, even if true and viewed in the light most favorable to the appellant, his allegations do not provide a basis for failing to comply with his supervisor's instruction to remain at work, as he has made no allegation that compliance would have subjected him to a clearly dangerous situation or irreparable harm.[3]

The undisputed record further reflects that the appellant called in to personally talk to supervisor Morrisett on July 20, 2009, when he spoke to her at approximately 9:10 a.m. to request sick leave from 8:00 a.m.-10:00 a.m. Although Morrisett granted the appellant sick leave from 8:00 a.m. to 10:00 a.m. on July 20, she charged him AWOL from 10:00 a.m. to 11:15 a.m. The LCA required that he provide medical documentation to Morrisett regarding any absence "by close of business on the third day [he] returned to work from the absence." The appellant returned to work on the same day as his morning absence on July 20, so the first day he returned to work after his morning absence would also be July 20. Because the record also contains undisputed evidence the appellant worked regular days on July 23 and 24, 2009, on its face the LCA required the appellant to provide medical documentation for his morning absence of July 20 by close of business on July 24. He provided the "doctor's slip" only in response to the administrative judge's jurisdictional order, and he has not alleged or submitted any evidence showing that he provided the medical

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[2] IAF, Tab 3, Subtab C. The record reflects the appellant worked full days on July 23 and 24, even though the doctor's slip purports to make him incapacitated for duty from July 20 through July 23 with a follow-up required on July 24, and the appellant alleges he was infectious during this time period.

[3] *See* note 1, *supra.*

documentation within the time required by the LCA.[4] If the appellant indeed had the doctor's slip on July 20, there is no apparent, logical reason for the appellant to fail to provide the doctor's slip to his supervisor by close of business on July 24, given the prior removal action, the requirements of the LCA and his documented history of attendance problems.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

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

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[4] In response to the administrative judge's jurisdictional order below, the appellant's representative alleges only that "[the appellant] has complied with the ter[m]s of this contract and informed [his supervisor] that he had a Doctor's excuse and would be absent until July 23, 2009 …." IAF, Tab 3 at 3. On petition for review, the appellant's representative does not dispute the agency's assertions in Morrisett's declaration that the appellant did not timely provide the required medical documentation.

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.

DISSENTING OPINION OF ANNE M. WAGNER

in

Shaun Morris v. Department of Veterans Affairs

MSPB Docket No. AT-0752-09-0918-I-1

I disagree with the Board's decision to deny the appellant's petition for review of the initial decision. The agency terminated the appellant from his GS-05 Nursing Assistant position for breach of a Last Chance Agreement (LCA) for failure to follow leave requesting procedures, leaving work without permission, and absence without leave (AWOL). Initial Appeal File (IAF), Tab 4, Subtab 4b. The appellant appealed this action alleging that he had complied with the LCA's provisions placing him on leave restriction and requiring him to refrain from misconduct because he provided acceptable medical documentation to the agency that he had conjunctivitis (pink eye) and back pain that incapacitated him from duty between July 20-23, 2009, and because his supervisor had imposed upon him unreasonable procedures for requesting sick leave that were contrary to the hospital's policy and the master agreement with his union. IAF, Tabs 1, 3. The appellant further explained on review that he could not remain in the workplace on July 20, 2009, because he had viral pink eye and, as a result, he could not remain on the ward and give direct patient care under the hospital's infection control policy. Petition for Review File, Tab 3 at 4. Under the circumstances, I believe that the appellant made a non-frivolous allegation of Board jurisdiction in his pleadings below and, therefore, was entitled to a jurisdictional hearing. Accordingly, I dissent from the Board's decision to affirm the initial decision.

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Anne M. Wagner
Vice Chairman