UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 13

Docket No. AT-0752-09-0926-I-1

James M. Black,

Appellant,

v.

Department of Transportation,

Agency.

February 2, 2011

Sean Lafferty, Esquire, Burlington, Massachusetts, for the appellant.

Rashawn Rich-George, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a petition for review of the initial decision dismissing his removal appeal for lack of jurisdiction based upon his waiver of his Board appeal rights in a last chance agreement (LCA). For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND this appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On January 8, 2009, the Federal Aviation Administration (FAA) proposed to remove the appellant from his Air Traffic Control Specialist position based

upon his positive alcohol test in violation of the Department of Transportation (DOT) policy.[1] Initial Appeal File (IAF), Tab 5, subtab 4g. In proposing to remove him, the FAA considered factors contained in DOT Order 3910.1C, and the FAA's Personnel Management System, Human Resources Policy Manual, and Human Resources Operating Instructions (HROI). *Id.* at 1. The appellant responded to the proposal notice, requesting that the FAA permit him to retain his position and noting his "exuberant willingness and participation in an [Employee Assistance Program (EAP)] rehabilitation program" and his completion of an EAP evaluation. *Id.*, subtab 4f. On January 26, 2009, the FAA EAP offered the appellant a Treatment/Rehabilitation Plan (TRP), which he accepted on February 3, 2009. *Id.*, subtab 4e.

¶3 On January 29, 2009, the deciding official issued a decision notice that sustained the proposed removal action and found that the appellant's violation of DOT/FAA policy constituted a serious breach of his responsibility as an FAA employee and warranted his removal. IAF, Tab 5, subtab 4d at 1. However, he offered the appellant an LCA, warning the appellant:

> If you fail to return [the attached LCA and Accept/Decline Form], I will consider that you have declined my offer of a LCA including the one-time opportunity to enter into an FAA EAP approved and monitored TRP. Should you choose to decline or fail to return the attached documents, your removal will become effective **February 28, 2009**.

Id. at 1-2 (emphasis in original).

¶4 The appellant accepted the LCA on February 25, 2009, after he began rehabilitation under the TRP. IAF, Tab 5, subtab 4d at 6-7. In the LCA, the FAA agreed to hold the removal action in abeyance in exchange for the appellant's

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[1] The proposal notice specified that the appellant occupied a testing designated position subject to DOT Order 3910.1C, Drug and Alcohol-Free Departmental Workplace, which prohibited him from having an alcohol concentration of 0.02 or greater on a confirmation test. Initial Appeal File (IAF), Tab 5, subtab 4g at 1. The appellant does not dispute these facts. *See* IAF, Tabs 1, 16.

promises: (1) to successfully complete and strictly adhere to all terms and conditions of the LCA and TRP; (2) to completely abstain from both on- and off-duty illegal drug use for the duration of his FAA employment; (3) if he has a medical diagnosis of alcohol abuse/dependence or a diagnosis where alcohol could trigger a relapse, to abstain from alcohol for the remainder of his FAA career while employed in a testing designated position; and (4) to waive all rights to challenge a removal action taken for his non-compliance with the TRP or LCA, including his right to file a Board appeal. *Id.*, subtab 4d at 4-7. If the appellant failed to comply with any term of the LCA or was declared non-compliant with his TRP, the FAA would terminate the abeyance status and implement his removal. *Id.* at 5, 7. The appellant averred that he freely and voluntarily entered the LCA "without any duress, and with full understanding of and agreement with its valid and binding terms and conditions . . . ." *Id.* at 4.

¶5 On July 9, 2009, the appellant allegedly tested positive for marijuana metabolite, and a laboratory scientist confirmed the test results. IAF, Tab 5, subtab 4b at 3-4, subtab 4c. Based upon the appellant's alleged violation of the LCA, the FAA terminated the abeyance status of the removal action and removed him effective August 11, 2009. *See id.*, subtab 4a, subtab 4b at 1.

¶6 The appellant filed a Board appeal challenging the validity of the LCA. IAF, Tab 1. He alleged that he did not breach the LCA, that he had no choice but to execute the LCA and completely waive his appeal rights in order to continue rehabilitation under his TRP, and that there was no consideration for his waiver of his appeal rights. *Id.* at 1, Tab 16 at 13-14. He asserted that the FAA lacked the authority to implement the HROI, a "desk guide" that conditions an employee's right to rehabilitation upon his waiver of his appeal rights, and that the HROI amends and conflicts with DOT Order 3910.1C, which provides employees with an absolute right to rehabilitation. IAF, Tab 16 at 2-13. The FAA moved to dismiss the appeal for lack of jurisdiction based upon the

appellant's allegedly enforceable, valid waiver of his appeal rights in the LCA. IAF, Tab 14.

¶7 Based on the written record, the administrative judge issued an initial decision dismissing the removal appeal for lack of jurisdiction. Initial Decision (ID) at 1, 5. The administrative judge determined that: (1) the appellant could have enforced his right to continued treatment under agency policy without signing the LCA and risking removal; instead, the appellant chose to sign the LCA so the agency would hold the removal action in abeyance, which meant waiving his Board appeal rights, ID at 4-5; (2) the FAA has the authority to condition treatment upon the appellant's execution of an LCA based on its right to promulgate and implement its treatment policy, *id.*; (3) the appellant voluntarily entered into the LCA and breached it when he tested positive for marijuana, *id.*; (4) there was no evidence of impropriety, bad faith, fraud, or coercion by the FAA, ID at 1-2, 5; and (5) the FAA removed the appellant pursuant to the LCA, and the appellant's valid and enforceable waiver deprives the Board of jurisdiction over the appeal, ID at 4-5.

¶8 The appellant filed a petition for review of this decision, asking the Board to set aside the LCA. Petition for Review (PFR) File, Tab 5. He contends that the administrative judge erred in finding that the FAA has the authority to implement the HROI, as only the Secretary of Transportation may develop and implement policies for achieving a drug and alcohol-free workplace. He further claims that the HROI unilaterally amends and conflicts with DOT Order 3910.1C, which governs the FAA's alcohol and drug policy and procedures and guarantees an employee's unconditional right to rehabilitation. *Id.* at 2-14, 17-19. The appellant also alleges that the administrative judge erred in finding that the LCA was voluntary, contending that: (1) he had an absolute right to rehabilitation under DOT Order 3910.1C; (2) there was no consideration for his waiver of appeal rights; and (3) the FAA gave him no alternative but to sign the LCA and completely waive his appeal rights if he wished to continue his rehabilitation

under the TRP.[2] *Id.* at 13-16, 18-19. The appellant additionally contends that the collective bargaining agreement requires the FAA to follow DOT Order 3910.1C in its alcohol and drug testing program, and the FAA cannot unilaterally implement any regulation that conflicts with a collective bargaining agreement provision. *Id.* at 12.

¶9 In its response to the appellant's petition for review, the FAA contends that it possesses the authority to develop policies concerning the implementation of DOT Order 3910.1C, as the Secretary of Transportation delegated authority to the FAA Administrator "over and with respect to any personnel within its organization, and Congress[] mandate[d] . . . the FAA to create a Personnel Management System to address the 'unique demands on the agency's workforce.'"[3] *See* PFR File, Tab 8 at 5-6, 13. It points to the introductory paragraph of the HROI, *id.* at 6, which provides as follows:

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[2] The appellant also asserts that the administrative judge erred in finding that he did not allege fraud, mutual mistake, or that he did not violate the LCA. *See* PFR File, Tab 5 at 15-16. To the contrary, the administrative judge found that "[t]he appellant *does* contend, however, that the LCA is the result of fraud or mutual mistake" but "[he] did not set forth a non-frivolous allegation that he did not breach the agreement, . . . or that the LCA resulted from fraud or mutual mistake. . . ." ID at 4-5 (emphasis added). A finding that the appellant failed to make a nonfrivolous allegation does not mean that he did not make the allegation; it means that he did not make an allegation of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *See Hurston v. Department of the Army*, 113 M.S.P.R. 34, ¶ 5 (2010). The administrative judge found that it was undisputed that the appellant breached the LCA because he tested positive for marijuana and failed to nonfrivolously allege that he did not breach the agreement. ID at 4-5.

[3] The FAA filed its response to the petition for review on March 9, 2010, accompanied by a Motion to Accept Agency Response to Petition for Review Out of Time, alleging that the Board should waive the filing deadline for good cause shown for the one-day filing delay. PFR File, Tab 6. The appellant opposed the FAA's motion. PFR File, Tab 7. Oddly, neither party recalled that on February 4, 2010, the Office of the Clerk of the Board issued an Order that extended the deadlines for filing a petition for review and a response to the petition for review. PFR File, Tab 2. The Order expressly states that the FAA may file its response on or before April 6, 2010. *Id.* at 2. Consequently, the FAA's March 9, 2010 response to the petition for review was timely filed.

> 1. **Background:** . . . The FAA takes its responsibility for aviation safety and security seriously and is especially concerned when an employee's use of drugs or alcohol, on- or off-duty, could affect the safety or security of the flying public. The maintenance of a safe and effective transportation system demands, in particular, that those employees whose jobs involve significant responsibilities affecting public safety and national security remain totally drug-free and alcohol-free in the workplace.

IAF, Tab 16, Ex. G at 1. The FAA contends that the HROI is consistent with DOT Order 3910.1C and that pursuant to the HROI and DOT Order 3910.1C, it properly conditioned the appellant's opportunity for rehabilitation upon his execution of the LCA and his waiver of appeal rights. PFR File, Tab 8 at 6-10. It further alleges that it properly reinstated the removal action based upon the appellant's violation of the LCA, and that the administrative judge correctly found that the LCA is valid and that the appellant's enforceable waiver of his appeal rights deprives the Board of jurisdiction over this removal appeal taken pursuant to an LCA. *Id.* at 10-13, 15.

ANALYSIS

The HROI conflicts with DOT Order 3910.1C.

¶10 The HROI expressly provides that the FAA shall initiate a removal action for a positive alcohol test against an employee in a testing designated position, and that:

> The proposed removal notice informs [the testing designated position] employee of an opportunity to enter into a LCA, which includes a one-time opportunity for a TRP. A decision notice is issued informing the employee of the disciplinary/adverse action to be imposed. If the employee accepts the offer of the TRP and LCA, the decision notice informs the employee that the implementation of the disciplinary/adverse action is held in abeyance pending successful completion of the TRP and LCA. If the employee declines the offer of a rehabilitation program and a LCA, then the disciplinary/adverse action shall be implemented.

IAF, Tab 16, Ex. G at 4. In other words, the HROI conditions the opportunity for rehabilitation on acceptance of the LCA. *Id.* at 7-8. If the employee rejects the

LCA, then the FAA will remove him, regardless of whether he wishes to participate in a rehabilitation program.

¶11 DOT Order 3910.1C, however, sets forth different terms. In Chapter VII, it provides in pertinent part as follows:

> 2. OPPORTUNITY FOR REHABILITATION. When it has been determined, for the first time, that an employee has violated a prohibition of off-duty illegal drug use or off-duty alcohol misuse covered by this Order, it is the responsibility of management to direct the employee to the EAP. Following initial counseling, the employee must be given an opportunity to enter an agency recommended substance abuse rehabilitation program by the EAP manager or coordinator . . . .
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> . . . .
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> b. Successful completion. **An employee shall not be subject to disciplinary action for a first determination of an off-duty drug use or off-duty alcohol misuse if he or she successfully completes a rehabilitation program**. If an employee refuses to enter a rehabilitation program or fails to successfully complete a rehabilitation program, the provisions of Chapter IX (Disciplinary Action) shall be used for guidance.

IAF, Tab 16, Ex. A at 50-51 (emphasis added). Chapter IX, Section 1(e) provides that:

> The agency shall initiate action to remove a covered employee from Federal service in the case of off-duty misuse of alcohol as measured by an alcohol concentration of 0.04 or greater on a confirmation test . . . On the first determination of this violation, the removal action shall be held in abeyance while the employee is offered a conditional opportunity for rehabilitation . . . .

Id. at 56. We read these provisions of DOT Order 3910.1C to mean that where there is a first determination of off-duty alcohol misuse, as indicated by a positive alcohol confirmation test showing an alcohol concentration of 0.04 or more, and the employee accepts the opportunity to participate in a TRP, the FAA must hold the removal action in abeyance. Only if the employee refuses the opportunity for rehabilitation or fails to successfully complete the rehabilitation program, may the FAA effect his removal.

¶12 Based on the foregoing, we find that the HROI implemented by the FAA conflicts with DOT Order 3910.1C. The HROI authorizes the FAA to effect an employee's removal for declining the LCA, even if the employee wishes to participate in a rehabilitation program. Consequently, the HROI permits the FAA to renege on its offer of rehabilitation once the employee has begun treatment, simply because the employee rejects its subsequent offer of an LCA. This is impermissible under DOT Order 3910.1C, which only provides for the removal of an employee for a first determination of alcohol misuse if the employee refuses or fails to successfully complete a rehabilitation program.

A question exists concerning the FAA's authority to promulgate a policy that amends or conflicts with DOT Order 3910.1C.

¶13 On review, the FAA contends that it had the authority to establish procedures for implementing DOT Order 3910.1C, and points to section 347 of the DOT Appropriations Act of 1996, Pub. L. No. 104-50, 109 Stat. 436, 460 and to 49 C.F.R. § 1.45(a). *See* PFR File, Tab 8 at 5-6. We note that section 347 has been repealed,[4] but has been replaced by a comparable provision, codified at 49 U.S.C. § 40122(g), that authorizes the FAA Administrator to "develop and implement . . . a personnel management system for the [FAA] that addresses the unique demands on the agency's workforce." Section 1.45(a)(1) of Title 49 of the Code of Federal Regulations provides that each Administrator within DOT is authorized to "[e]xercise the authority of the Secretary [of Transportation] over and with respect to any personnel within their respective organizations," except as prescribed by the Secretary of Transportation.

¶14 Based on the current record, it is unclear whether the FAA's authority to implement a personnel management system that addresses the "unique demands"

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[4] Pub. L. No. 104-50, § 347 was repealed by Pub. L. No. 106-181, § 307(d), 114 Stat. 61, 126 (2000). Section 307(a) of Pub. L. No. 106-181 added subsection (g) to 49 U.S.C. § 40122.

of its workforce includes the power to implement policies that amend or conflict with DOT Order 3910.1C. This is at least in part because the FAA has asserted that its HROI is fully consistent with DOT Order 3910.1C. PFR File, Tab 8 at 6-10. The HROI itself evinces no intent to amend or override DOT Order 3910.1C. To the contrary, the very first sentence states its purpose as follows: "This HROI is established to supplement DOT Order 3910.1 (series) (PDF) to provide for specific procedures pertinent to the FAA." IAF, Tab 16, Ex. G at 1. As set forth above, we find that the HROI conflicts with DOT Order 3910.1C. However, this conflict does not warrant a different outcome than that of the initial decision if the FAA has the authority to promulgate a conflicting policy. The record is insufficient to decide this issue. Thus, it is necessary to remand this appeal to the Atlanta Regional Office for further adjudication.

¶15 On remand, the administrative judge shall provide the parties with a reasonable opportunity to present evidence and argument regarding whether the FAA has the authority to promulgate a conflicting policy. The administrative judge shall specifically order the FAA to identify who issued the HROI, to address whether the individual issuing the HROI had the authority to do so, and to provide documentation as to the authority under which the FAA promulgated the HROI. If the administrative judge finds that the FAA failed to prove that it possesses this authority, then DOT Order 3910.1C controls over the conflicting HROI, and the administrative judge shall make findings consistent with this Opinion and Order.

<u>If DOT Order 3910.1C controls, then the LCA is invalid.</u>

¶16 An LCA is a settlement agreement, which is a contract. *Bahrke v. U.S. Postal Service*, 98 M.S.P.R. 513, ¶ 11 (2005). A party challenging the validity of a settlement agreement bears a heavy burden of showing a basis for invalidation. *Id.* A party may challenge the validity of a settlement agreement if the party believes that the agreement is unlawful, involuntary, or the result of fraud or mutual mistake. *Id.* To establish that a settlement agreement was fraudulent as a

result of coercion or duress, a party must prove that he involuntarily accepted the other party's terms, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts. *Id.*, ¶ 12.

¶17 To have an enforceable contract, there must be consideration, i.e., a performance or a return promise that must be bargained for and does not involve performance of a pre-existing duty. *See Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1574 (Fed. Cir. 1991); *Thompson v. Department of the Treasury*, 100 M.S.P.R. 545, ¶ 9 (2005); Restatement (Second) of Contracts § 71 (1981). "In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration." Restatement (Second) of Contracts, § 71.

¶18 The Board has upheld LCAs executed by the parties where they are freely made, fair, the subject of mutual consideration, and are the result of the appellant's knowing and intentional waiver of his right to appeal the agency's action to the Board. *See Gonzales v. Department of the Air Force*, 38 M.S.P.R. 162, 165 (1988). However, the Board has found waivers of appeal rights in similar situations unenforceable when there was no consideration for the employee's waiver. *See Thompson*, 100 M.S.P.R. 545, ¶ 9 (there was no consideration for Thompson's waiver where she already occupied a position with the agency when she signed the "Notice of Probationary Period Document," and there was no evidence that she knew prior to starting her position that she was waiving her appeal rights); *see also Hughes v. Social Security Administration*, 99 M.S.P.R. 67, ¶ 7 (2005) (the appellant did not waive her Board appeal rights by signing a probationary agreement two months after starting a position with a new agency because she received no consideration from the agency in exchange for the waiver of those rights).

¶19 Here, the FAA agreed to offer the appellant an opportunity for rehabilitation and to hold the removal action in abeyance in exchange for the

appellant's execution of the LCA, which contained a complete waiver of the appellant's appeal rights. IAF, Tab 5, subtab 4d at 1-2, 4-5; *see* IAF, Tab 16, Ex. G at 7-8. However, under DOT Order 3910.1C, the FAA had a "pre-existing duty" to offer the appellant a rehabilitation plan and to hold the removal action in abeyance if he accepted the TRP. *See Baker v. Department of Transportation*, 418 F.3d 1369, 1371-72 (Fed. Cir. 2005) (the FAA was required to offer Baker, an Air Traffic Control Specialist, the opportunity for rehabilitation/treatment under DOT Order 3910.1C and to hold in abeyance the removal action since this was his first instance of off-duty drug use); IAF, Tab 16, Ex. A at 50-51, 56. If DOT Order 3910.1C controls, based upon this "pre-existing duty" and without some other promise from the FAA, there was no consideration for the appellant's execution of the LCA and waiver of appeal rights.

¶20 As the decision notice expressly provided that, if the appellant declined the LCA or failed to return the LCA acceptance/declination form, "[the appellant's] removal [would have] become effective **February 28, 2009**," the appellant could not have enforced his right to continue rehabilitation under the TRP without signing the LCA. *See* IAF, Tab 5, subtab 4d at 1-2 (emphasis in original). Consequently, the appellant had no alternative but to sign the LCA and waive all of his appeal rights in order to continue treatment under the TRP. Thus, if the FAA did not have the authority to promulgate the conflicting HROI provisions, the LCA would be unenforceable and would have to be set aside. *See Aviation Contractor Employees, Inc.*, 945 F.2d at 1574; *Bahrke*, 98 M.S.P.R. 513, ¶¶ 11-12. Under such circumstances, the appellant's waiver of his Board appeal rights would be unenforceable and would not deprive the Board of jurisdiction over the reinstated removal action, which the FAA effected based upon the appellant's alleged positive alcohol test in violation of FAA/DOT policy. *See* IAF, Tab 5, subtabs 4a-4b, 4d, 4g.

ORDER

¶21 Accordingly, we VACATE the initial decision and REMAND the appeal to the Atlanta Regional Office for further adjudication.[5] On remand, the administrative judge shall afford the parties a reasonable opportunity to submit evidence and argument concerning the FAA's alleged authority to promulgate a policy that conflicts with DOT Order 3910.1C. If the FAA establishes that it has the authority to implement a policy that conflicts with DOT Order 3910.1C, the administrative judge shall find that the LCA is valid, and that the appellant's waiver of his Board appeal rights deprives the Board of jurisdiction over this appeal.[6] The administrative judge shall issue a new initial decision that addresses these findings and incorporates by reference his findings in the January 6, 2010 initial decision.

¶22 If, however, the FAA fails to prove that it possesses this authority, the administrative judge shall find that the HROI impermissibly conflicts with DOT Order 3910.1C, that DOT Order 3910.1C controls over the conflicting HROI, and that the LCA is invalid for the reasons set forth in this Opinion and Order. The administrative judge shall issue a new initial decision that makes these findings. Upon finding that the Board has jurisdiction over the reinstated removal action, the administrative judge shall apprise the parties of their burdens of proof and afford them a reasonable opportunity to submit evidence and argument on whether the original removal action, which was effected based upon the appellant's allegedly positive alcohol test, is supported by preponderant evidence.

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[5] We note that the FAA is not precluded from bringing a separate action against the appellant under 5 U.S.C. chapter 75 based upon the appellant's alleged positive drug test. *See* IAF, Tab 5, subtabs 4b-4c.

[6] If the administrative judge finds that the FAA had the authority to promulgate the conflicting HROI provisions, a finding would also be necessary as to whether the conflicting HROI provisions were proper under the collective bargaining agreement. *See* PFR File, Tab 5 at 12.

After holding a hearing, the administrative judge shall issue a new initial decision determining whether the FAA proved that the removal action is supported by preponderant evidence.

FOR THE BOARD:

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