

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

2012 MSPB 57

Docket No. AT-0752-11-0986-I-1

**Juarene W. Cason,
Appellant,**

v.

**Department of the Army,
Agency.**

April 17, 2012

Juarene W. Cason, Columbus, Georgia, pro se.

Anne M. Norfolk, Fort Benning, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review from the initial decision that dismissed her appeal as withdrawn. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 On September 23, 2011, the appellant appealed the agency's action removing her from the position of Licensed Practical Nurse, GS-5, effective September 21, 2011. Initial Appeal File (IAF), Tab 1 at 5. The agency removed the appellant based on the charge of use of a controlled substance. *Id.* It appears

that on September 28, 2011, the appellant also filed a grievance over the removal action. IAF, Tab 5. On October 7, 2011, the agency moved to dismiss the appeal based on a settlement agreement signed on September 30, 2011. The agency indicated that at the time it entered into the agreement it was aware of the appellant's grievance but unaware of the appellant's Board appeal. IAF, Tab 5 at 4-5. The terms of the agreement provided that the agency would allow the appellant to retire on October 3, 2011, in lieu of removal, and the agency would carry the appellant in a leave without pay status from September 22 through October 3, 2011. *Id.* Paragraph 4 of the agreement stated that:

If Employee fails to comply in any respect with the requirements listed above, the removal action will be reinstated and Employee will be removed from Federal service. Employee waives any right to appeal said removal to the Merit Systems Protection Board or to pursue any grievance or arbitration regarding any aspect of this agreement. Such removal will be accomplished by written notice.

Id. at 4-5.

¶3 The administrative judge issued an initial decision on October 17, 2011, which dismissed the appeal as withdrawn by the appellant. IAF, Tab 6. The administrative judge found that, under paragraph 4 of the settlement agreement submitted by the agency, the appellant had waived her right to appeal her removal to the Board. *Id.* at 1. The administrative judge found further that, because “the appellant has withdrawn her appeal, there is no pending case or controversy over which the Board has jurisdiction,” and he dismissed the appeal. *Id.* at 2.

¶4 The appellant has filed a petition for review in which she claims that she signed the settlement agreement under duress and she appears to challenge the merits of the removal action. Petition for Review (PFR) File, Tab 1. The agency has filed a response in which it asserts that the agency filed a motion to dismiss the appeal as settled and that the administrative judge granted its motion. PFR File, Tab 3 at 3. The agency asserts further that neither the agency nor the appellant's union representative were aware that the appellant had filed an appeal

with the Board at the time that the parties settled the grievance, and that the agency settled the matter in good faith. *Id.* The agency contends that, if the appellant is permitted to proceed with her appeal, the agency will cancel the appellant's retirement and remove her from federal service. The agency states that, under the terms of the settlement agreement, the appellant has waived her Board appeal rights over the removal action. *Id.*

ANALYSIS

¶5 Ordinarily, an appellant's withdrawal of an appeal is an act of finality, and in the absence of unusual circumstances such as misinformation or new and material evidence, the Board will not reinstate* an appeal once it has been withdrawn merely because the appellant wishes to proceed before the Board or to cure an untimely petition for review. *Potter v. Department of Veterans Affairs*, [116 M.S.P.R. 256](#) ¶ 7 (2011); *Small v. Department of Homeland Security*, [112 M.S.P.R. 191](#), ¶ 4 (2009). However, a relinquishment of one's right to appeal to the Board must be by clear, unequivocal, and decisive action. *Potter*, [116 M.S.P.R. 256](#), ¶ 7; *Tozier v. Department of the Interior*, [41 M.S.P.R. 167](#), 169 (1989) (the appellant's letter to the administrative judge plainly and unequivocally stated that he wished to withdraw his appeal).

* In *Potter v. Department of Veterans Affairs*, [116 M.S.P.R. 256](#), ¶ 7 (2011), the Board noted that where an appellant petitions for review of an initial decision dismissing an appeal as withdrawn, the Board will treat the petition as a request to reopen the appeal. *Id.* (citing *Lincoln v. U.S. Postal Service*, [113 M.S.P.R. 486](#), ¶¶ 10-13 (2010)). Since issuing *Potter* and *Lincoln*, however, the Board has discontinued use of the term "reopening an appeal" in referring to its appellate authority over a timely filed petition for review because, under such circumstances, the appeal has never, in fact, closed. The more appropriate characterization of the Board's review in that context is simply that it is exercising appellate jurisdiction over a petition for review. In any event, the standard for determining whether the Board will allow the appellant to reinstate an appeal after withdrawing it remains the same.

¶6 Here, although the administrative judge dismissed this appeal as withdrawn by the appellant, there is no evidence in the record that the appellant ever withdrew her appeal. Notably, the agency, not the appellant, filed the motion to dismiss the appeal based on the settlement agreement. The agency concedes that it was unaware of the appellant's Board appeal at the time it entered into the agreement. IAF, Tab 5 at 3; PFR File, Tab 3 at 3. In addition, there is also no evidence in the record that the administrative judge made any attempt to contact the appellant to determine whether she was withdrawing her appeal based on the settlement agreement. Rather, after receiving the signed settlement agreement from the agency, the administrative judge simply dismissed the appeal as withdrawn by the appellant. IAF, Tab 6. In particular, he found that the appellant waived her right to appeal her removal in paragraph 4 of the agreement. However, that paragraph contained a waiver of appeal rights in the event that the appellant failed to comply with the requirements of the agreement, which the agency has not alleged. IAF, Tab 5 at 4-5. Based on our review of the record below, we find that the appellant did not make a clear, unequivocal, and decisive waiver of her Board appeal right. Accordingly, we find that the administrative judge erred in dismissing the appellant's appeal as withdrawn. *Hopkins v. Office of Personnel Management*, [67 M.S.P.R. 289](#), 291 (1995).

¶7 Furthermore, we find that, even if the administrative judge inadvertently dismissed this appeal as "withdrawn by the appellant" instead of "as settled," the administrative judge failed to properly document the record below. IAF, Tab 6. Before dismissing an appeal as settled, an administrative judge must document for the record that the parties reached a settlement agreement, understood its terms, and agreed whether or not it was to be enforceable by the Board. *Futrell-Rawls v. Department of Veterans Affairs*, [115 M.S.P.R. 322](#), ¶ 8 (2010); *Mahoney v. U.S. Postal Service*, [37 M.S.P.R. 146](#), 148-49 (1988). If the administrative judge finds that the parties intended that the agreement be enforced by the Board, the administrative judge must make additional findings before entering the

agreement into the record for enforcement purposes and dismissing the appeal. Specifically, the administrative judge must determine that the Board has jurisdiction over the appeal and that the agreement is lawful on its face and was freely reached and understood by the parties. *See Spidel v. Department of Agriculture*, [113 M.S.P.R. 67](#), ¶ 6 (2010); [5 C.F.R. § 1201.41\(c\)\(2\)](#). The administrative judge did not make these findings before dismissing this appeal. IAF, Tab 6.

¶8 We are remanding this appeal for proper findings by the administrative judge on whether the criteria for dismissing as settled have been met. The agency has represented that it lacked knowledge of the Board appeal at the time it entered into the agreement, the agreement does not contain an explicit reference to any pending Board appeal, and the appellant has asserted that she signed the agreement under duress. On remand, the administrative judge should provide the parties the opportunity to submit evidence and argument on these issues and any other issues relevant to whether this appeal should be dismissed as settled.

ORDER

¶9 Accordingly, we VACATE the initial decision and REMAND this case to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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