UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Roy C. Gonzales, Appellant,

v.

Department of the Air Force, Agency.

Docket Number DA07528710344

Date: August 15, 1988

R.C. Rodriguez, American Federation of Government Employees, Local 1617, San Antonio, Texas, for the appellant.

Edward F. Yarbrough, Kelly Air Force Base, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant has filed a petition for review of the initial decision dismissing his appeal of the agency's removal action. For the reasons discussed in this Opinion and Order, the petition is DENIED because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED in this Opinion and Order.

BACKGROUND

The agency initially proposed to remove the appellant on April 28, 1986, based on a charge of absence without leave (AWOL) and leaving the job site without permission. On June 18, 1986, after the agency decided to remove the appellant but before the removal was effected, the parties entered into a “last

chance" agreement.[1] In consideration of the agency's agreement to hold the removal action in abeyance for one year (June 20, 1986 through June 19, 1987), the appellant agreed that the removal action would be effected if any other offense or performance problem of any kind occurred during the one-year period. He also agreed to waive all rights to grieve or appeal both a charge of further misconduct during the abeyance period and the delayed removal action. *See* Appeal File, Tab 5-5.

On March 5, 1987, three months before the expiration of the agreement, the agency charged the appellant with one hour of AWOL and failure to request leave. The agency notified the appellant that it intended to invoke the agreement and remove him based on the previous and current incidents of AWOL. The agency effected the appellant's removal on March 17, 1987, and he filed the instant appeal with the Board's Dallas Regional Office.

In her initial decision issued on July 28, 1987, the administrative judge found that the appellant had requested the last chance agreement, had been represented when he signed the agreement, and had signed a separate letter confirming his understanding and acceptance of its terms. She found no evidence that the appellant was coerced into signing the agreement or that he did not understand the terms of the agreement. Relying on *Ferby v. United States Postal Service,* 26 M.S.P.R. 451 (1985), the administrative judge found that the appellant had waived his appeal right to the Board and dismissed the appeal.

ANALYSIS

1. The last chance agreement does not constitute an abuse of discretion or violate fundamental fairness or public policy.

In his petition for review, the appellant argues that the administrative judge erred in relying on the Board's decision in *Ferby* because the facts of his case are

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[1] The last chance agreement specifically states: "In consideration for not being removed from Federal employment on 20 June 1986, I voluntarily and willingly agree to the following conditions: (a) If not removed, effective 20 June 86, I agree the removal action will be held in abeyance for a period of one year beginning 20 June 1986; (b) I understand and agree that the removal action will be effected if and when any other offense or performance problem of any kind occurs during the period 20 June 1986 through 19 June 1987, inclusive; (c) I agree that if a removal action is effected for any offense, I waive any and all rights to grieve, appeal, complain, or litigate both a management charge of my commission of a further offense during the abeyance period and the delayed removal action itself." Appeal File, Tab 5-5. The agreement was signed by the appellant, the appellant's representative, and the agency's branch chief, Mr. Pete Longoria.

distinguishable from the facts presented in *Ferby.* In *Ferby,* the Board found that it had the authority to enforce two last chance agreements, executed by the appellants after the effective dates of their removals, which provided for the employees' waiver of their appeal rights to the Board in return for the agency's suspension of the removal actions for one year.[2] The Board specifically stated that its holding in *Ferby* was limited to the particular facts and circumstances of the two appeals before it and noted that its decision did not address the question of whether a last chance settlement agreement, based upon a less than fully effected removal action, may constitute agency abuse of discretion or otherwise violate fundamental fairness or public policy. *Id.* at 456 n. 3. Such a factual situation is presented in the instant case, since the appellant's removal action was not yet fully effected at the time the last chance agreement was executed. Thus, the administrative judge erred in failing to address the effect of the factual difference between the appellant's case and the two cases in *Ferby.* We find, however, that this error is not prejudicial, in light of our finding that the administrative judge properly determined that the last chance agreement executed by the parties in this case was freely made, fair, the subject of mutual consideration, and the result of the appellant's knowing and intentional waiver of his right to appeal the agency's action to the Board.

We first note that, in the present case, the appellant was represented when he negotiated the agreement. Second, the appellant signed a separate letter indicating that he accepted the agreement. *See* Appeal File, Tab 5-6. Third, as the administrative judge found, there was no evidence in the record that the execution of the agreement was in any way the result of duress or bad faith negotiation on the agency's part. We also note that the appellant did not present any evidence of duress or bad faith with his petition for review. Moreover, the fact that the appellant was faced with an unpleasant choice does not of itself

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[2] In *Ferby,* a consolidation of two appeals, the employees were removed based on charges of excessive absenteeism. After the effective dates of their removals, the employees negotiated and executed last chance agreements. Under the terms of the agreements, the agency suspended their removal actions for one year; in return, the employees agreed to waive their appeal rights to the Board during the probationary one-year period. During the one-year periods, the agency charged each employee with new instances of misconduct and reinstated the removal actions. When the employees appealed to the Board, the administrative judge granted the agency's motions to dismiss the appeals. The Board affirmed. In holding that the last chance agreements were enforceable, the Board found that the terms of the agreements were comprehensive, freely made, and fair, and that there was no evidence that the agreements were made in bad faith or the result of duress on the part of the agency. Additionally, the Board noted that the employees were represented and that the agreements were fully negotiated by the parties and were the subject of mutual consideration. *Id.* at 456.

negate the presumed voluntariness of his decision to execute the agreement.[3] *See, Christie v. United States,* 518 F.2d 584, 587-88 (Ct. Cl. 1975). Thus, we find no error in the administrative judge's finding that the appellant knowingly and intentionally waived his appeal rights when he executed the agreement.

Fourth, we find that the terms of the agreement were based on mutual consideration. As we found in *Ferby,* having ascertained that the agreement is fair, freely made, the subject of mutual consideration, and in no way the result of duress or bad faith on the part of the agency, we have the authority to uphold such an agreement and will do so. *Ferby,* 26 M.S.P.R. at 456; *see generally Richardson v. Environmental Protection Agency,* 5 MSPB 248, 5 M.S.P.R. 248, 250 (1981) (public policy favors settlement agreements in Board actions, as in civil actions, which serve to avoid unnecessary litigation and to encourage fair and speedy resolution of issues).

2. The agency's action removing the appellant under the terms of the agreement was not an abuse of discretion.

The appellant argues that the agreement is not fair because it does not specifically delineate what constitutes an offense triggering the reinstatement of the removal action and because it was invoked totally at the discretion of his supervisor. He also argues that the agency's action in removing him for only a few hours of AWOL constitutes an abuse of discretion and is unduly harsh.

We note that the agency proposed the first removal action based on charges of AWOL and leaving the job site without permission. The parties then executed the last chance agreement, which states that the removal action would be effected "*if and when any other offense or performance problem of any kind occurs during* " the one-year period. *See* Appeal File, Tab 5-5 (emphasis added).

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[3] In his petition for review, the appellant argues that he signed the agreement because he had a family to support and his only concern was to keep his job. He argues that the fact that he entered into the agreement five days after receiving the agency's letter of its final decision to remove him and before the removal was actually effected suggests that he was not fully conscious of the position in which he placed himself by entering into the agreement. He also argues that he did not intend to give up his rights to due process prior to the agency's invoking of the agreement and the reinstatement of the removal action. We again note that the appellant was represented when he executed the last chance agreement. *See Sofio v. Internal Revenue Service,* 7 M.S.P.R. 667, 670 (1981) (having chosen his representative, the appellant is bound by that representative's actions or inactions).

The agency subsequently reinstated the removal action under the terms of the agreement based on a charge of AWOL and failure to request leave.[4] We find that the appellant's subsequent misconduct was the type of prohibited behavior contemplated by the parties in negotiating the agreement and was properly considered by the agency to violate the agreement. The term of the agreement stating that the appellant would be removed for any other offense is unambiguous. The appellant agreed to the terms of the agreement, which then functioned exactly as it was intended to function, as a "last chance" agreement. *See Tootsie Roll Industries v. Local Union No. 1, Bakery, Confectionery and Tobacco Workers' International Union,* 832 F.2d 81, 83 (7th Cir. 1987) (even though the term of the last chance agreement which states that the employee would be discharged if she was absent for any reason whatsoever is very harsh and perhaps may be viewed as unreasonable, the parties agreed to it and the contract is exactly what it purports to be-a last chance agreement); *cf. Roberson v. Veterans Administration,* 32 M.S.P.R. 173, 176 (1987) (where the last chance agreement uses the term "disciplinary action," but the agency invoked the agreement based on its denial of the appellant's within-grade salary increase, the appeal was remanded for a determination of whether the agreement met the *Ferby* criteria for a waiver of appeal rights).

Moreover, we reject the appellant's argument that removal is an abuse of the agency's discretion or too harsh a penalty for the charged AWOL of one hour. The subsequent misconduct was merely the event which triggered reinstatement of the suspended removal action, which the agency had already found warranted based on his previous misconduct. In addition, the agreement by its very language supports the finding that the appellant waived his right to appeal to the Board, not only the original removal action, but also the subsequent disciplinary action taken against him by the agency during the agreed-upon one-year probationary period. Accordingly, we find that the appellant has not shown that the agency's invoking of the agreement was arbitrary, capricious, or an abuse of its discretion.[5] *See Ferby,* 26 M.S.P.R. at 457.

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[4] The appellant does not deny the agency's charges that he was AWOL and failed to request leave on March 5, 1987, but argues that the agency could have excused his absence and granted him approved leave.

[5] The appellant also argues that there is no provision in the agreement precluding the agency from adhering to the due process rights provided by 5 U.S.C. § 7513. As we have found, however, under the very terms of the agreement, the appellant waived his right to appeal the agency's action to the Board, including Board review of any alleged violation of § 7513.

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.