UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 10

Docket No. PH-0752-06-0546-M-1

Peter J. Lizzio,

Appellant,

v.

Department of the Army,

Agency.

February 10, 2009

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

Michael C. Denny, Esquire, Fort Belvoir, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The United States Court of Appeals for the Federal Circuit vacated the Board's final decision of March 26, 2007, in this appeal, and remanded the appeal for further proceedings consistent with its opinion. For the reasons explained below, we REVERSE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The agency removed the appellant from his position as a Special Agent, GS-1811-13, with the U.S. Army Criminal Investigation Command (CID), Major Procurement Fraud Unit ("MPFU"), on the grounds that he violated a last-chance

agreement (LCA). Initial Appeal File (AF), Tab 5, Subtab 4C. The LCA had held in abeyance the appellant's removal for insubordination and conduct unbecoming a federal employee. *Id.*, Subtab 4E. The appellant's obligations under the LCA included an agreement to "[a]void any misconduct." *Id.* at 1. The LCA also contained a waiver of Board appeal rights if the appellant were removed for breach of the agreement. *Id.* at 2. The MPFU Director, Wesley Kilgore, notified the appellant that he had determined the appellant engaged in misconduct based on the results of an investigation by the CID's Standards of Conduct Office (SOCO). AF, Tab 5, Subtab 4C. The SOCO inquiry arose after the security manager at a General Electric (GE) facility complained that the appellant had attempted to gain access without authorization and acted in an unprofessional manner when he came to the facility to interview a witness in a procurement investigation. *See id.*, Subtab 4D at 2. The Director's notice to the appellant stated that SOCO concluded he had failed "to maintain the standards of personal conduct and professionalism required by AR [Army Regulation] 195-3 and CIDR [CID Regulation] 195-1." *Id.*, Subtab 4C. AR 195-3 provides in relevant part that CID personnel must "maintain the highest standards of personal conduct and professionalism to . . . [a]void embarrassment to the Army and the Government." *Id.*, Subtab 4D at 4. CIDR 195-1 states in pertinent part that "any agent who is considered substandard in performance or conduct . . . can be eliminated." *Id.*

¶3 The appellant appealed his removal to the Board, asserting that his conduct was acceptable, that he did not breach the LCA, and that the agency's removal of him was therefore in bad faith. AF, Tabs 1, 17. The administrative judge (AJ) to whom the appeal was assigned found, after a hearing, that the appellant had engaged in conduct that was "rude and obnoxious." MSPB Docket No. PH-0752-06-0546-I-1 (Initial Decision, Oct. 18, 2006) (ID) at 12. The AJ held, however, that the sole basis for the agency's notice of breach was conduct embarrassing to the government under AR 195-3 and that the appellant's actions were not in fact

an embarrassment. ID at 9, 12. The AJ therefore found that the appellant did not breach the LCA, the agency was not entitled to invoke the waiver of Board appeal rights in the agreement, and the appellant's removal must be reversed. *Id.* at 14. She ordered the agency to provide interim relief in accord with 5 U.S.C. § 7701(b)(2)(A). *Id.* at 15.

¶4 The Board granted the agency's petition for review (PFR) and reversed the ID. *Lizzio v. Department of the Army*, 105 M.S.P.R. 322 (2007), *vacated*, 534 F.3d 1376 (Fed. Cir. 2008); Petition for Review File (RF), Tab 4. The Board concluded that any misconduct by the appellant would violate the LCA and that the AJ erred in limiting her inquiry to whether the appellant engaged in embarrassing conduct referenced in the agency's notice to the appellant that he had breached the LCA. *Lizzio*, 105 M.S.P.R. 322, ¶¶ 11-14. Without deciding whether the appellant engaged in conduct embarrassing to the agency, the Board held that he nevertheless committed misconduct in breach of the LCA, based on the AJ's finding that he had been rude and obnoxious, and so dismissed his appeal for lack of jurisdiction. *Id.*, ¶ 17.

¶5 The Court of Appeals vacated the Board's decision and remanded for further proceedings. *Lizzio*, 534 F.3d at 1386. It held that the Board erred in relying on a basis for finding a breach of the LCA different from the one found by the AJ to have been asserted by the agency in the notice of breach. *Id.* It also noted that the Board had declined to review the AJ's findings regarding the alleged breach, and it remanded the case for consideration of arguments made in the agency's PFR that were previously unaddressed by the Board. 534 F.3d at 1386-87. Those arguments, as articulated in the Board's prior decision, were whether:

> (a) the administrative judge improperly limited the issue of the appellant's compliance with the LCA to the specific misconduct cited in the SOCO report; (b) the administrative judge misapplied AR 195-3 by inquiring as to whether the appellant's action caused embarrassment, instead of whether the appellant

failed to "maintain the highest standards of personal conduct and professionalism";
(c) the administrative judge erred in concluding that the appellant's conduct, which she found to be "rude and obnoxious," was insufficient to establish embarrassment to the agency and the government;
(d) the administrative judge failed to apply the principle that law enforcement officers are held to a higher standard than ordinary employees;
(e) the administrative judge erred in her credibility determination by relying upon selected witnesses; and
(f) the agency acted in good faith in accordance with the provisions of the LCA.

Lizzio, 534 F.3d at 1387 n.8 (citing 105 M.S.P.R. 322, ¶ 8). In addition, the court directed the Board to consider first on remand any challenges to the AJ's determination that the agency found the appellant breached the LCA by engaging in conduct embarrassing to the government and any challenges to her finding that the conduct was not in fact embarrassing. *Lizzio*, 534 F.3d at 1387 n.8.

¶6 On remand, the Board ordered the parties to brief the PFR arguments described above. MSPB Docket No. PH-0752-06-0546-M-1 ("M-1 File"), Tab 2. Each party made a submission and responded to the submission of the other. M-1 File, Tabs 3-6.[1]

ANALYSIS

¶7 The Board does not have jurisdiction over a personnel action taken pursuant to an LCA in which an appellant waives his right to appeal to the Board. *Willis v. Department of Defense*, 105 M.S.P.R. 466, ¶ 17 (2007); *Rosell v.*

[1] In response to our order, the appellant moves for the PFR to be dismissed based on the agency's failure to provide interim relief, as ordered in the ID, after the court's remand. M-1 File, Tab 3 at 2-3. He did not allege failure to provide interim relief while the case was pending before us previously, however, and the court has not instructed us to review the matter. The interim relief issue therefore is outside the scope of our review. *Cf. Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

Department of Defense, 100 M.S.P.R. 594, ¶ 7 (2005), *aff'd*, 191 F. App'x. 954 (Fed. Cir. 2006). The appellant bears the burden of proving that his appeal is within the Board's jurisdiction. *Rosell*, 100 M.S.P.R. 594, ¶ 7. To establish that a waiver of appeal rights in an 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 LCA; or (4) the LCA resulted from fraud or mutual mistake. *Willis*, 105 M.S.P.R. 466, ¶ 17. Here, the appellant claims that he did not breach the LCA and that the agency's removal was therefore in bad faith. For the reasons discussed herein, we find that the AJ erred in finding the appellant complied with the agreement and therefore reverse the ID. Accordingly, the waiver in the LCA is effective, and the Board lacks jurisdiction over the appeal.

The AJ erred in finding that the agency's sole ground for asserting breach of the LCA was conduct embarrassing to the agency under AR 195-3.

¶8 We address first the challenge by the agency in its PFR to the AJ's determinations, previously undisturbed by the Board, that (1) the agency's basis for finding the appellant breached the LCA was that he engaged in conduct embarrassing to the government and (2) the conduct was not in fact embarrassing. As noted by the court, the AJ found that the agency relied solely on AR 195-3 in concluding that the appellant had engaged in misconduct that breached the LCA despite the citation in the agency's notice of breach to *both* AR 195-3 and CIDR 195-1. 534 F.3d at 1380. In so holding, the AJ relied on Director Kilgore's testimony that embarrassment to MPFU was material to his finding of misconduct by the appellant and on the fact that the only conduct standard cited in the notice of breach that referred to embarrassment was AR 195-3. ID at 6-8. She therefore held that this was the standard utilized by the agency to invoke the LCA and that she was required to determine if the appellant violated it. *Id*. at 9. We find that the AJ erred in finding that the agency relied only on AR 195-3.

¶9 "The general rule is that the Board is free to substitute its judgment for that of one of its administrative judges," with the exception of overturning a demeanor-based credibility determination. *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304 (Fed. Cir. 2008). The Board may make determinations of fact different from those of the AJ where it "can articulate a sound reason, based on the record, for a contrary evaluation of the evidence." *Dogar v. Department of Defense*, 95 M.S.P.R. 527, ¶ 4 (2004), *aff'd*, 128 F. App'x 156 (Fed. Cir. 2005) (citing *Haebe v. Department of Justice*, 288 F.3d 1288, 1300 (Fed. Cir. 2002)). Where, as in this case, "the record is sufficiently developed and we do not rely upon witness demeanor, we may address such findings without remand." *Dogar*, 95 M.S.P.R. 527, ¶ 4.

¶10 We find that the AJ erred in concluding that the agency relied only on AR 195-3 because, as the court noted, *Lizzio*, 534 F.3d at 1383, the agency explicitly referenced both that regulation and CIDR 195-1 in its notice to the appellant that he was in breach of the LCA. The Board therefore must determine whether the appellant in this case has shown that he did not breach the LCA by failing "to maintain the standards of personal conduct and professionalism required by AR 195-3 *and* CIDR 195-1" as cited in the notice. AF, Tab 5, Subtab 4C (emphasis added). The AJ accordingly erred in determining that the agency did not rely on CIDR 195-1 and in not addressing the appellant's conduct under that standard.

¶11 The agency's argument on PFR that the notice of breach did not limit the misconduct to the violations referenced in the SOCO report (i.e., argument (a) above) is without merit. It is contrary to a plain reading of the notice. Moreover, the court held that the notice informed the appellant that he had breached the LCA by failing to maintain the standards of personal conduct and professionalism required by AR 195-3 and CIDR 195-1, which reflected the SOCO findings. *Lizzio*, 534 F.3d at 1383.

The appellant breached the LCA by engaging in conduct that violated AR-195-3 and CIDR 195-1.

¶12 After consideration of the record and for the reasons explained below, we find that the appellant has not shown that his conduct was acceptable and that the record shows instead that he violated the cited standards. Therefore, the appellant has not shown that he complied with the LCA or that the agency's removal of him was in bad faith.

¶13 As a threshold matter, we reject the agency's argument on PFR (argument (b) above) that the AJ misapplied AR 195-3 by inquiring whether the appellant's action caused embarrassment instead of simply whether he failed to maintain the highest standards of personal conduct and professionalism. As quoted in the SOCO report, which was the basis for the agency's finding of misconduct, AR 195-3 states in pertinent part that CID personnel must maintain the highest standards of conduct and professionalism in order to "avoid embarrassment to the Army and the Government." AF, Tab 5, Subtab 4D at 4. Moreover, as the AJ noted, ID at 7, MPFU Director Kilgore testified that embarrassment to the agency and the government was material to his conclusion that the appellant engaged in misconduct in violation of the LCA. Therefore, application of AR 195-3 requires consideration of whether the appellant's conduct caused embarrassment.[2]

¶14 Turning to whether the appellant's conduct was in fact embarrassing to the agency and the government under the standards of AR 195-3, we find that the AJ erred in her determination that it was not. Thus, we agree with the agency's argument on PFR, identified as (c) above. The AJ assessed the appellant's conduct based on the testimony of several witnesses to his behavior when he

[2] We also reject the agency's argument, identified as (d) above, that the AJ erred in failing to apply the principle that law enforcement officers are held to a higher standard of conduct than other employees. This principle, while relevant to the penalty in a Chapter 75 removal, has no applicability here. The issue in this case is whether the appellant engaged in misconduct as defined in the notice of breach, i.e., whether he violated the standards of AR 195-3 and CIDR 195-1.

attempted to enter the GE facility as well as the testimony of the appellant himself. ID at 9-13. The witnesses included two GE security guards, a GE manager the appellant spoke with by telephone when denied entry at the security gate, an agent of the Defense Criminal Investigative Service (DCIS) who accompanied the appellant, and a local police officer also present at the gate. *Id.* The AJ based her findings in part on the demeanor of the witnesses (except the GE manager and DCIS agent, who gave sworn statements to SOCO), and we do not disturb her credibility determinations. The appellant described himself as "insistent" and "persistent." ID at 11. The GE witnesses described him variously as rude, condescending, bullying, unprofessional, and a jerk. *Id.* The local police officer who testified on the appellant's behalf also described his behavior as rude, and said he appeared heated and aggravated. ID at 13. As noted above, the AJ concluded that the appellant was "rude and obnoxious." ID at 12. This determination is supported by the record.

¶15 The DCIS agent, who observed the appellant's conduct from a parked car and did not hear most of his interactions with GE personnel, nevertheless stated that his conduct embarrassed her. *Id.*; AF, Tab 5, Subtab 4D at 57. She stated that his gestures were exaggerated and that, based on his body language, she concurred with the GE officials' description of him as irate, agitated, bullying, and unprofessional. AF, Tab 5, Subtab 4D at 57. She also stated that she believed the appellant's behavior was what prevented the agents from getting access to the GE facility to conduct the witness interview. *Id.* MPFU Director Kilgore, who found the appellant in breach of the LCA, testified that he considered the appellant's conduct at the GE facility rude and discourteous and that such behavior "is embarrassing to the U.S. Army." HT, Side 2. He also stated that his judgment that the behavior was rude and discourteous was based on his 30 years of experience at CID, during which he had learned how agents are expected to act. *Id.*

¶16 In finding that the appellant's conduct was not an embarrassment, the AJ cited testimony that the appellant did not engage in shouting, cursing, or a physical altercation. ID at 11, 13. She also relied on testimony from GE security guards that they did not respect the agency less because of the appellant's behavior or believe that he represented all federal employees. *Id.* at 12. The AJ's reliance on those officials' testimony appears to be the subject of argument (e) above. In light of this testimony, the AJ concluded that while the appellant made a colleague and GE officials feel ill at ease, this did not equate to conduct that was an embarrassment under AR 195-3. *Id.* However, whether the appellant's conduct was an embarrassment to the agency and the government logically depends on how it was perceived by the officials of those entities, not by third parties. Thus, we agree with the agency that the GE officials' testimony about the effect of the appellant's conduct on their opinions of the agency and of federal employees generally is not dispositive of whether the appellant's conduct was embarrassing *to the agency and the government*. The issue before us is whether the appellant's conduct was embarrassing in the view of representatives of the agency and the government. The testimony of the MPFU Director and the DCIS agent establishes that it was.

¶17 Moreover, their assessment is reasonable. The appellant need not have gone so far as to shout, curse, or physically accost a GE official to engage in conduct that was an embarrassment. That rude and obnoxious behavior toward private citizens by the appellant, a federal agent, in the course of carrying out his investigative responsibilities was an embarrassment to his agency and the government is obvious and does not require further detailed explanation. *Cf. Brook v. Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993) (electrician's conviction for possession of cocaine with intent to distribute created a potential embarrassment for the agency); *Blank v. Department of the Army*, 85 M.S.P.R. 443, ¶ 10 (2000) (program specialist's failure to meet commitments to external organizations caused embarrassment to the agency), *aff'd*, 247 F.3d 1225 (Fed.

Cir. 2001). It is also clear, as stated by the MPFU Director, that rude and discourteous behavior is not what is expected of a CID agent and that the appellant's conduct was thus "substandard," as stated in CIDR 195-1.

¶*18* We therefore find that the appellant did not maintain the standards of personal conduct or professionalism required by AR 195-3 and CIDR 195-1, as stated in the agency's notice to the appellant that he had breached the LCA. Accordingly, we find that the appellant failed to prove that he did not engage in misconduct in violation of the LCA, as he asserted on appeal. Further, the agency acted in accord with the LCA and thus its removal of the appellant was not in bad faith. *See Posey v. Department of Defense*, 106 M.S.P.R. 472, ¶ 8 (2007).[3] Thus, the appellant has not borne his burden of proving that his appeal of his removal is within the Board's jurisdiction. *See Willis*, 105 M.S.P.R. 466, ¶ 17; *Rosell*, 100 M.S.P.R. 594, ¶ 7.

¶19 The appeal is therefore DISMISSED.

ORDER

¶20 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 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

[3] This finding comports with the agency's argument (f) on PFR. RF, Tab 1 at 7-8.

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.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:

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