

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

2009 MSPB 116

Docket No. DA-0752-08-0426-I-1

**Steven G. Coker,
Appellant,**

v.

**Department of Commerce,
Agency.**

June 23, 2009

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Aimee R. Fox, Esquire, Washington, D.C., and John Wornell, Esquire,
Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision that reversed its action reducing the appellant's pay. For the reasons set forth below, we GRANT the agency's petition for review under [5 C.F.R. § 1201.115](#), VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction

BACKGROUND

¶2 Effective March 2, 2007, the agency removed the appellant from his Supervisory Criminal Investigator position based on alleged misconduct related to his time and attendance. Initial Appeal File (IAF), Tab 5, Exhibits 3, 4. The

appellant appealed the removal to the Board and, while the appeal was pending, the parties reached a written settlement. *Id.*, Exhibit 6. The parties agreed, inter alia, that the agency would cancel the removal action, return the appellant to the rolls in a sick leave status effective March 2, 2007, and remove him for failure to meet the medical standards of his position, whereas the appellant agreed to withdraw his appeal and apply for disability retirement.¹ *Id.* The administrative judge found that the Board has jurisdiction over the appeal, entered the settlement agreement into the record for enforcement purposes, and dismissed the appeal as settled in an initial decision that became the final decision of the Board on August 3, 2007, when neither party petitioned for review. IAF, Tab 5, Exhibit 7.

¶3 Thereafter, the appellant filed a petition for enforcement in which he contended that the agency breached the settlement agreement by failing to afford him Law Enforcement Availability Pay (LEAP) when it placed him in a sick leave status. *Id.*, Exhibits 8, 9. The administrative judge found that the agreement did not entitle the appellant to LEAP and, therefore, the appellant did not show that the agency breached the agreement. *Coker v. Department of Commerce*, MSPB Docket No. DA-0752-07-0282-C-1, slip op. at 5 (Compliance Initial Decision, Dec. 28, 2007); see IAF, Tab 5, Exhibit 2. The compliance initial decision became the final decision of the Board on May 16, 2008, when the Board denied the appellant's petition for review of the compliance initial decision.² *Coker v. Department of Commerce*, [109 M.S.P.R. 156](#) (2008) (Table); see IAF, Tab 5, Exhibit 1.

¶4 Subsequently, the appellant filed this appeal in which he contended that the agency improperly reduced his pay without affording him due process when it

¹ The Office of Personnel Management later approved the appellant's application for disability retirement. IAF, Tab 10 at 2.

² The appellant sought review of the Board's final decision in the United States Court of Appeals for the Federal Circuit, and the court affirmed the Board's final decision. *Coker v. Department of Commerce*, No. 2008-3296 (Fed. Cir. May 11, 2009) (NP).

suspended his LEAP during the time period he was placed on sick leave pursuant to the settlement agreement. IAF, Tab 1. He requested a hearing in his appeal. *Id.* The agency moved to dismiss the appeal on the basis of *res judicata*, arguing that the issue of the appellant's entitlement to LEAP had already been decided by the Board in a final decision in the appellant's petition for enforcement. IAF, Tab 5. The administrative judge denied the agency's motion and ruled, based on undisputed facts, that the agency's cancellation of the appellant's LEAP certification was an appealable adverse action. IAF, Tab 16 at 3. She further found that, because the agency canceled the appellant's LEAP certification without affording him advance notice or an opportunity to respond, the agency's action deprived the appellant of minimum due process. *Id.*

¶5 After affording the parties the opportunity to submit additional evidence and argument concerning the appellant's affirmative defenses, the administrative judge issued an initial decision on the written record, because the appellant withdrew his request for a hearing. IAF, Tabs 26, 27, 30, 32, 41. The administrative judge found that the agency's cancellation of the appellant's LEAP certification was an appealable adverse action, and she reversed it on the basis that the agency failed to afford the appellant minimum due process. Initial Decision (I.D.) at 1-7. The administrative judge further found that the appellant failed to prove his affirmative defenses of retaliation for prior equal employment opportunity activity and whistleblower reprisal. I.D. at 7-15. The administrative judge did not order interim relief.

¶6 The agency petitions for review of the initial decision. Petition for Review (PFR) File, Tab 1. The appellant responds in opposition to the petition for review. PFR File, Tab 5.

ANALYSIS

¶7 The agency asserts on review that the appellant's appeal is precluded by the earlier settlement agreement, which set forth the appellant's entitlement to

compensation arising from the cancellation of the first removal and during the interim period while his disability retirement application was pending, and in which he waived his right to seek any further compensation. PFR File, Tab 1 at 11-13; IAF, Tab 15 at 10-11. We agree.

¶8 A settlement agreement is a contract, the interpretation of which is a matter of law. *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). Settlement agreements are to be interpreted as a whole; thus, to interpret a provision in an agreement, the Board must read it in conjunction with the entire agreement. *See Saunders v. U.S. Postal Service*, [75 M.S.P.R. 225](#), 232 (1997). Reading the settlement agreement as a whole, it is clear that the agreement was designed to accomplish three primary tasks: (1) To resolve the original removal for misconduct and the litigation resulting from it; (2) to provide for the appellant's separation from the agency; and (3) to govern the circumstances of his employment in the interim period between the effective date of the agreement and the effective date of his separation. *See* IAF, Tab 5, Exhibit 6. The agreement accomplished these three major objectives via very specific terms, which included a broad waiver clause, under which the appellant agreed to:

Waive, release, and forever discharge the Agency, its officers, agents, employees, and representatives (in their official and/or personal capacities) from any claims, demands, or causes of action, which Appellant has or may have, arising from his MSPB appeal or from his employment with the Agency. This release includes but is not limited to a release of any right to administrative, judicial, or congressional relief, or any other type of relief, or of any claim to back pay, attorney's fees and costs, or other type of compensation, except what is specifically set forth in paragraph 3, below.

IAF, Tab 5, Exhibit 6 at 1, ¶ 2b. Thus, under the terms of the agreement, the appellant's entitlement to relief, including monetary relief, was governed by the terms of paragraph 3. That paragraph provided for the following: Cancellation of the original removal for alleged misconduct, and expunction of the appellant's Official Personnel Folder; issuance of a new notice of proposed removal based on the appellant's failure to meet the medical standards for his position; correction

of the appellant's sick leave and annual leave balances; the placement of the appellant on sick leave from March 2, 2007, through the effective date of his removal for failure to meet the medical standards for his position; cooperation with the processing of the appellant's application for disability retirement, to include completion of the agency's portion of the application within thirty days of its receipt of the appellant's application; a provision for future employment references; and a contingency, not applicable here, in the event that the appellant's application for disability retirement was not approved. *Id.* at 3-5, ¶¶ 3a-3j. The agreement made no provision for back pay, attorney fees and costs, or any other form of monetary compensation. *Id.* As we found previously in a final decision, the agreement made no provision for the payment of LEAP while the appellant was on sick leave during the interim period between the effective date of the settlement agreement and the effective date of separation for failure to meet the medical standards for his position. *Coker v. Department of Commerce*, MSPB Docket No. DA-0752-07-0282-C-1, slip op. at 5 (Compliance Initial Decision, Dec. 28, 2007), *review denied*, [109 M.S.P.R. 156](#) (2008) (Table), *aff'd*, No. 2008-3296 (Fed. Cir. May 11, 2009) (NP); *see* IAF, Tab 5, Exhibits 1, 2.

¶9 The appellant, who was represented by counsel during the negotiation of the settlement agreement and throughout this process, could have bargained for the payment of LEAP, but he did not do so. Further, the settlement agreement itself provided for the specific circumstances under which he would be retained on the agency rolls between the settlement agreement and the separation; those circumstances did not include the payment of LEAP, as we previously determined in the enforcement proceeding when we found that the agency's failure to pay LEAP was not a breach of the settlement agreement. Also, the appellant waived his right to pursue any claims against the agency arising from his employment with the agency, which necessarily included his right to raise a claim for LEAP. *See Johnson v. U.S. Postal Service*, [108 M.S.P.R. 502](#), ¶ 16 (2008) (a settlement agreement providing that the settlement was "a final and complete settlement of

the subject grievance,” and “constitutes a full and final settlement of the subject grievance and resolves all issues pertaining thereto” constituted a waiver of the appellant’s right to challenge a subsequent removal to the Board), *aff’d*, 315 F. App’x 274 (Fed. Cir. 2009). We conclude, therefore, that the appellant’s attempt to separately appeal the agency’s failure to pay LEAP amounts to a prohibited collateral attack on the settlement agreement. *See Johnson*, [108 M.S.P.R. 502](#), ¶ 8 n.5 (the Board generally will not entertain an appeal that amounts to a collateral attack on a settlement agreement). Consequently, the appeal must be dismissed for lack of jurisdiction. *See Johnson*, [108 M.S.P.R. 502](#), ¶ 16; *see also Nease v. Department of the Army*, [68 M.S.P.R. 365](#), 367 (1995) (because the appellant agreed to retire in a settlement agreement, she could not collaterally attack the validity of the settlement agreement by filing a new appeal claiming that the retirement was involuntary); *Mahoney v. Department of Labor*, [56 M.S.P.R. 69](#), 72 (1992) (because the appellant entered into a settlement agreement that provided for his retirement, he could not collaterally attack the validity of the settlement agreement by filing a new appeal claiming that the retirement was involuntary).

¶10 Accordingly, we dismiss this appeal for lack of jurisdiction.

ORDER

¶11 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

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.