UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 133

Docket No. CH-752S-09-0328-I-1

James E. Swink, Jr.,

Appellant,

v.

United States Postal Service,

Agency.

July 16, 2009

James E. Swink, Jr., Kansas City, Missouri, pro se.

Kimberly Cates Wiseman, Esquire, Denver, Colorado, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the following reasons, we DENY the petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115(d), REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still DISMISSING this appeal for lack of jurisdiction.

BACKGROUND

¶2 In a December 5, 2007 letter, the agency notified the appellant, a City Carrier, that he was being placed in an off-duty status without pay effective

December 4, 2007, because there was reason to believe that he might injure himself or others given that on December 4, 2007, he "ran toward [a supervisor] in a threatening manner." Initial Appeal File (IAF), Tab 7, Subtab 4E. The letter informed the appellant that a decision would be made as to whether discipline would be issued for the alleged misconduct. *Id.* On December 27, 2007, the agency proposed the appellant's removal based on unacceptable conduct arising from the December 4, 2007 incident. *Id.*, Subtab 4D. The appellant filed a grievance and, on January 15, 2008, the agency and the appellant's union entered into a settlement agreement under which the December 5, 2007 "Emergency Placement" and the December 27, 2007 notice of proposed removal would be reduced to a letter of warning for 6 months from the date of the incident, the appellant would report to his normal bid assignment on his next scheduled workday, and there would be "no recourse to back-pay." *Id.*, Subtab 4B.

¶3 The appellant, a preference eligible, filed a February 2, 2009 Board appeal asserting that he was appealing a January 23, 2009 failure to restore, reemploy, or reinstate him, and that the agency discriminated against him and created a hostile work environment. IAF, Tab 1 at 1, 3. The appellant submitted a copy of the January 15, 2008 settlement agreement, as well as a January 9, 2009 "Grievant's Detailed Statement of Undisputed Facts" indicating that he had been subjected to harassment since "bidding to Westport [Station, Kansas City, Missouri]" in September 2007, and asserting that the collective bargaining agreement did not permit the agency to withhold two weeks of pay associated with the letter of warning. *Id.* at 8-9. The appellant also submitted a January 23, 2009 settlement of another grievance that provided, among other things, that the union "will withdraw the part about the 2-week back pay for the incident back in 2007." *Id.* at 10. The appellant requested a hearing. *Id.* at 2-3.

¶4 The administrative judge (AJ) informed the appellant that although he had alleged that the agency suspended him for 14 days in September 2007, only suspensions exceeding 14 days are appealable to the Board. IAF, Tab 2 at 2. The

AJ ordered the appellant to file evidence and argument proving Board jurisdiction over the appeal, and informed the appellant that the appeal would be dismissed without a hearing if he did not assert a nonfrivolous claim of jurisdiction. *Id.* The AJ subsequently informed the appellant that it appeared that the filing period in this case began on September 3, 2007, and that his appeal was therefore filed 488 days late. IAF, Tab 3 at 2. The AJ ordered the appellant to file evidence and argument showing that he timely filed his appeal or that good cause existed for the delay. *Id.* at 3. The agency moved to dismiss the appeal, arguing that the appeal was untimely filed and that none of the actions raised by the appellant were within the Board's jurisdiction. IAF, Tab 6.

¶5 Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction. IAF, Tab 13, Initial Decision (ID) at 1-2. The AJ found that although the appellant's time records showed a total of 84.48 hours of leave without pay (LWOP) between pay periods 25 and 26 of 2007, the record evidence also showed that this absence consisted of two "separate consecutive periods" of LWOP, from part of the day on December 4, 2007, to part of the day on December 14, 2007, and from part of the day on December 14, 2007, to December 17, 2007, neither of which exceeded 14 days. ID at 3.[*] From December 18, 2007, until his return to work, the appellant either was not scheduled to work or received "Other Paid Leave" or Holiday Pay. IAF, Tab 12 at 1-2, 6-10. Thus, the AJ found that the Board lacked jurisdiction over the appeal because the appellant did not establish that his LWOP exceeded 14 days. ID at 4. The AJ further found that the Board had no authority to address the appellant's discrimination claims in the absence of an otherwise appealable matter, and that she did not need to address the timeliness of the appeal. ID at 4.

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[*] An agency time and attendance report shows that on December 14, 2007, the appellant had 1.1 hours of work time, 6.9 hours of part-day LWOP, and 1.1 hours of steward's duty time. IAF, Tab 12 at 1-2, 5.

¶6 The appellant asserts in his petition for review of the initial decision that he is entitled to a hearing because his filing of a grievance does not preclude him from pursuing a Board appeal. Petition for Review File, Tab 1 at 1. The appellant also claims that the AJ relied on misinformation provided by the agency, that record evidence shows that he did not work 1.1 hours on December 14, 2007, and that he was suspended for 15 calendar days, from December 4, 2007, through December 18, 2007, which was a nonscheduled workday. *Id*. at 2-5. The appellant also contends that a coworker was treated differently in 2005-06 when he was placed on an emergency off-duty suspension. *Id*. at 8-9.

ANALYSIS

¶7 We deny the appellant's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115(d). The appellant has not submitted new and material evidence that, despite due diligence, was not available when the record closed below, nor has he shown that the initial decision is based on an erroneous interpretation of statute or regulation. Nevertheless, we reopen the appeal on our own motion and affirm the initial decision as modified.

¶8 Preference-eligible employees in the U.S. Postal Service are entitled to pursue simultaneously both a grievance and a Board appeal. *Mays v. U.S. Postal Service*, 995 F.2d 1056, 1058 (Fed. Cir. 1993). An agency's placement of an employee on enforced leave for more than 14 days, pending its inquiry into whether his retention in a duty status might be detrimental to the government's interests, or be injurious to himself, his fellow workers, or the public, constitutes a constructive suspension appealable to the Board. *Perry v. U.S. Postal Service*, 78 M.S.P.R. 272, 276 (1997). For purposes of determining whether the employee has been suspended for more than 14 days, the Board may, under some circumstances, combine multiple suspensions of 14 days or less. *See Miller v. Department of Transportation*, 109 M.S.P.R. 463, ¶ 11 (2008). Here, we need not determine whether the appellant received multiple suspensions totaling more than

14 days or whether, if he did, his suspensions should be combined for jurisdictional purposes. We also need not remand this case for the provision of notice to the parties of the jurisdictional test set forth in *Miller*, assuming it should be applied in this case. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). We find that the Board lacks jurisdiction over this case for a different reason.

¶9 When an employee chooses to file and settle a grievance by agreeing to lesser discipline, that course of action is presumptively voluntary and therefore divests the Board of jurisdiction over the underlying matter. *Perry*, 78 M.S.P.R. at 276; *see Johnson v. U.S. Postal Service*, 108 M.S.P.R. 502, ¶ 15 (2008) (a presumption exists that Board appeal rights are waived when settlement of a grievance concerning an action appealable to the Board does not specifically reserve the right to file a Board appeal), *aff'd*, 315 F. App'x 274 (Fed. Cir. 2009). However, the Board will review the terms of a settlement agreement and the surrounding circumstances to determine if it retains jurisdiction over an appeal of an action that was settled in another procedural avenue. *Perry*, 78 M.S.P.R. at 276.

¶10 A settlement agreement such as the one here, that is not made a part of the Board's record and is reached free of Board intervention, is treated as a contract. *Id*. The interpretation of the settlement agreement is therefore a matter of law based on the words in the agreement itself. *Id*. The settlement agreement, which is entitled "Formal A Settlement" and which identifies the appellant as the "[g]rievant" and the agency and union grievance numbers, provides that

> [t]he parties agree that the Emergency Placement dated December 5, 2007 and the Notice of Proposed Removal dated December 27, 2007 will be reduced to a Letter of Warning for six (6) months from the date of incident. The Grievant will report to his normal bid assignment on his next scheduled work day. There is no recourse to back-pay.

IAF, Tab 7, Subtab 4B. These provisions suggest that the parties limited the settlement agreement solely to the grievance procedure and did not intend to foreclose the appellant from pursuing other procedural avenues. *See Perry*, 78 M.S.P.R. at 276; *Castro v. U.S. Postal Service*, 51 M.S.P.R. 530, 531-34 (1991) (the grievance settlement's inclusion of the terms "the subject case has been resolved" and "full and complete settlement of the subject case" indicated that the agreement was limited to a resolution of the grievance and therefore did not bar a Board appeal); *cf. Mays*, 955 F.2d at 1059 (the phrase "full and final settlement to this matter" evidenced an intent that the appellant waived all rights to appeal the matter in any other forum; the phrase did not show that the parties intended the agreement to be limited to settlement of the grievance procedure); *Laity v. Department of Veterans Affairs*, 61 M.S.P.R. 256, 263 (1994) (provision stating that the agreement "fully resolves any and all" matters and issues leading to the suspension was broad enough to support a finding that the appellant waived the whistleblower reprisal claim stemming from that action).

¶11 Nevertheless, even though the settlement agreement may not bar a Board appeal, the appellant still must have expressly reserved the right to seek Board review in order for the Board to retain jurisdiction. *See Perry*, 78 M.S.P.R. at 277 (it is the appellant's burden to reserve the additional review to which he is entitled). Moreover, it is immaterial whether the appellant knew of, and intentionally did not reserve, a Board appeal right when he entered into the settlement agreement, or whether the agency's failure to inform the appellant of a Board appeal right when it placed him in an off-duty status caused him to be unaware of such a right when he entered into the agreement, assuming he did not know of a Board appeal right at that time. *Id*. at 278. As set forth above, the agreement does not reserve the right to seek Board review. The appellant has not alleged that he involuntarily entered into the settlement agreement, was unaware of the union's activity on his behalf, did not designate the union to act as his representative, or did not ratify the union's actions by reporting to his normal bid

assignment on his next scheduled work day, and he has not claimed that the union was representing its own interests and not those of the appellant. *See Hanna v. U.S. Postal Service*, 101 M.S.P.R. 461, ¶ 10 (2006). Thus, this appeal is dismissed for lack of jurisdiction. *See Johnson*, 108 M.S.P.R. 502, ¶ 16; *Perry*, 78 M.S.P.R. at 280.

ORDER

¶12 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:

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