

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

2010 MSPB 93

Docket No. DC-0752-09-0612-I-1

**Rodney B. Schwartz,
Appellant,**

v.

**Department of Education,
Agency.**

May 21, 2010

Rodney B. Schwartz, University Park, Maryland, pro se.

Pamela Gault, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his removal appeal as settled. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under [5 C.F.R. § 1201.115\(d\)](#), REOPEN the appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision to the extent that it dismissed the appellant's age discrimination claim as settled, AFFIRM the initial decision to the extent that it dismissed the remainder of the appellant's claims as settled, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant. Initial Appeal File (IAF), Tab 6, Subtabs 4b, 4c. The appellant filed a Board appeal of his removal, alleging among other things that the agency discriminated against him based on age. IAF, Tab 1 at 2, Tab 17 at 3. It appears that the parties discussed settlement options throughout the course of the appeal. IAF, Tab 3, Tab 9 at 2, Tab 11, Tab 17 at 1.

¶3 On September 22, 2009, the parties reached an oral settlement agreement and read it into the record. IAF, Tab 20, Hearing Tape (HT). Among other things, the parties agreed that the appellant's removal would be rescinded, any documents related to the removal would be expunged from his Official Personnel File, the appellant would be placed in a paid administrative leave status from the date of his rescinded removal until his retirement eligibility date, and the appellant would separate from service by retirement effective that date. HT. The parties agreed that the terms of the agreement would be enforceable by the Board and entered into the record for enforcement purposes. HT.

¶4 The administrative judge issued an initial decision dismissing the appeal as settled. IAF, Tab 21, Initial Decision (ID) at 1-2. She found that the agreement was lawful on its face, that it had been freely entered into by the parties, and that the subject matter of the appeal was within the Board's jurisdiction. *Id.* The administrative judge entered the agreement into the record for enforcement purposes and gave the parties leave to enter a signed, written agreement consistent with the terms of the oral agreement. *Id.*

¶5 The appellant has filed a petition for review, alleging that the agency representative sent him a written version of the settlement agreement that was inconsistent with the oral agreement. Petition for Review File (PFR File), Tab 1 at 1. He further alleges that the agency misinformed him about his potential retirement benefits if he were to retire on a different date. *Id.* The agency has filed a response, addressing the appellant's allegations on review and arguing that the petition should be denied for failure to meet the Board's review criteria. PFR

File, Tab 3 at 1-6. About 2 weeks after the record on review closed, the appellant filed a reply to the agency's response. PFR File, Tabs 2, 4.

ANALYSIS

Written version of the settlement agreement

¶6 The appellant alleges on review that the agency representative sent him a written version of the settlement agreement that is inconsistent with the oral agreement. PFR File, Tab 1 at 1, Tab 3, Attachment 1; HT. The appellant describes the alleged inconsistencies. PFR File, Tab 1 at 2.

¶7 The appellant's argument provides no basis to disturb the initial decision because it does not concern the validity of the oral settlement agreement. Generally, an oral settlement agreement is valid and binding on the parties even though the appellant has subsequently declined to sign a written document memorializing the terms of the agreement.¹ Even if there is language suggesting that the oral agreement will be subsequently reduced to writing, the agreement is still binding absent a showing that the parties did not intend to be bound until a written agreement was signed. *Tiburzi v. Department of Justice*, [269 F.3d 1346](#), 1351-54 (Fed. Cir. 2001); *Martin v. Department of the Air Force*, [91 M.S.P.R. 36](#), ¶ 7 (2002). In this case, the administrative judge dismissed the appeal based on the oral settlement agreement, ID at 1-2, and the tape recording of that agreement makes clear that the parties intended it to be binding, HT; see *Scott v. Department of Veterans Affairs*, [89 M.S.P.R. 650](#), ¶ 7 (2001), review dismissed, 33 F. App'x 502 (Fed. Cir. 2002). The recording contains no statement that only a written and signed agreement would be binding on the parties. HT; see *Martin*, [91 M.S.P.R. 36](#), ¶ 8; cf. *Mahboob v. Department of the Navy*, [928 F.2d 1126](#), 1128-30 (Fed. Cir. 1991) (the oral agreement was not binding because, among other things, the transcript of the tape made clear that the agreement would not be binding until it was reduced to writing and signed by the parties). Because the oral settlement

¹ But see the discussion below regarding oral waivers of age discrimination claims.

agreement was the operative agreement in this case, the appellant's dispute about the accuracy of the agency's written memorialization of the agreement, even if true, is immaterial. Should the agency's alleged misconstruction of the oral settlement agreement result in a breach of the agreement, the appellant's remedy lies with a petition for enforcement. See [5 U.S.C. § 1204\(a\)\(2\)](#); 5 C.F.R. part 1201, subpart F.

Misinformation

¶8 A party may challenge the validity of a settlement agreement if the party believes that the agreement is unlawful, involuntary, or the result of fraud or mutual mistake. *E.g.*, *Sargent v. Department of Health & Human Services*, [229 F.3d 1088](#), 1091 (Fed. Cir. 2000); *Wade v. Department of Veterans Affairs*, [61 M.S.P.R. 580](#), 583 (1994). The party challenging the validity of the settlement agreement bears a "heavy burden." *Asberry v. U.S. Postal Service*, [692 F.2d 1378](#), 1380 (Fed. Cir. 1982).

¶9 The appellant alleges on review that the agency misinformed him about his retirement benefits. PFR File, Tab 1 at 1. Specifically, he states that the agency misinformed him regarding the effect that having 20 years of service would have on his retirement, that he was "just a few months short of 20 years of service," and that "[h]ad the agency told [him] the truth about this it certainly would have affected [his] thinking about any settlement." *Id.*

¶10 The appellant's argument provides no basis to set aside the settlement agreement because his ambiguous assertion that accurate retirement information would have "affected [his] thinking about any settlement" does not constitute an allegation that accurate retirement information would have caused him not to settle. PFR File, Tab 1 at 1. Furthermore, there is nothing in the record to show that the appellant made inquiries on this matter prior to settlement or that it was the subject of any negotiation between the parties. In addition, the appellant has not identified who at the agency allegedly misinformed him or when the communication occurred, and he has failed to relate the alleged communication

with specificity sufficient for the Board to determine whether he was actually misinformed. *See Farrero v. National Aeronautics & Space Administration*, [83 M.S.P.R. 487](#), ¶ 7 (1999), *aff'd*, 232 F.3d 916 (Fed. Cir. 2000) (Table). For these reasons, and because the settlement agreement was reached after long negotiation, IAF, Tab 3 at 3, Tab 9 at 2, Tab 11, Tab 17 at 1, we find that the petition for review fails to satisfy the appellant's heavy burden of establishing that the settlement agreement is invalid,² *see Moran v. Veterans Administration*, [43 M.S.P.R. 547](#), 552 (the settlement agreement was the product of careful negotiations between the appellant and the agency), *aff'd*, 923 F.2d 869 (Fed. Cir. 1990) (Table); *see also Tiburzi*, 269 F.3d at 1355 (the appellant's unsubstantiated allegations were insufficient to meet his burden of establishing that the settlement agreement was improperly obtained).

Age discrimination claim

¶11 Before accepting a settlement agreement in an appeal where age discrimination has been alleged, the Board must first verify that the agency has complied with the provisions of the Older Workers Benefit Protection Act of 1990 (OWBPA). *Lange v. Department of the Interior*, [94 M.S.P.R. 371](#), ¶¶ 5-7 (2003), *review dismissed*, 87 F. App'x 172 (Fed. Cir. 2004). Under the OWBPA, a settlement agreement in such an appeal must meet the requirements of [29 U.S.C. § 626\(f\)\(1\)\(A\)-\(E\)](#), and the appellant must be given a reasonable period of time within which to consider the agreement. [29 U.S.C. § 626\(f\)\(2\)](#); *Lange*, [94 M.S.P.R. 371](#), ¶ 7. Section 626(f)(1)(A)-(E) provides as follows:

(f) Waiver

² We also find that the appellant's reply to the agency's response to his petition for review provides no basis to disturb the initial decision. PFR File, Tab 4. Not only is this filing untimely and unauthorized under the Board's regulations, *see 5 C.F.R. § 1201.114(i)*, it is essentially a more detailed version of the arguments in the petition for review and contains no additional allegations of fact that would support a finding that the settlement agreement is invalid.

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum -

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; [and]

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement[.]

¶12

In this case, the appellant raised allegations of age discrimination. IAF, Tab 17 at 3. The OWBPA applies to the appellant's age discrimination claim because it was made under "this chapter," i.e. under 29 U.S.C. chapter 14, the Age Discrimination in Employment Act (ADEA) as amended. *See* [29 U.S.C. § 626\(f\)\(1\)](#); *see also* [29 U.S.C. § 633a\(a\)](#) (making the ADEA applicable to executive branch agencies). Nevertheless, the administrative judge made no finding that the settlement agreement complied with the OWBPA.³ Our review of the settlement agreement shows that it fails to meet several of the requirements of the OWBPA. Specifically, the agreement does not explicitly refer to waiver of claims arising under the ADEA, and there is no indication that the agency ever advised the appellant in writing to consult with an attorney prior to entering into the agreement. HT; *see* [29 U.S.C. § 626\(f\)\(1\)\(B\)](#), (E); *Harris v. Department of*

³ The administrative judge acknowledged that the OWBPA had been implicated, and she afforded the appellant a 7-day revocation period before issuing the initial decision. HT; ID at 1; *see* [29 U.S.C. § 626\(f\)\(1\)\(G\)](#). Such a revocation period, however, is not required in settlement of a Board appeal. *See Lange*, [94 M.S.P.R. 371](#), ¶¶ 7-8, 11.

the Air Force, [98 M.S.P.R. 261](#), ¶ 7 (2005). In addition, we find that this oral settlement agreement fails to comply with the OWBPA because the OWBPA requires that waiver of an ADEA claim be in writing. See [29 U.S.C. § 626\(f\)\(1\)\(A\)](#). Courts have issued conflicting decisions on the OWBPA's writing requirement. Compare *Williams v. Cigna Financial Advisors, Inc.*, [56 F.3d 656](#), 660 (5th Cir. 1995) (the OWBPA requires that the waiver of a claim be in writing), with *Powell v. Omnicom*, [497 F.3d 124](#), 128-32 (2d Cir. 2007) (upholding an oral waiver of an ADEA claim under the OWBPA). However, the Equal Employment Opportunity Commission has interpreted the OWBPA as requiring that "[t]he entire waiver agreement must be in writing," [29 C.F.R. § 1625.22\(b\)\(2\)](#), and the Board will defer to this interpretation because it is purely a matter of substantive discrimination law, see *Evans v. Department of Homeland Security*, [107 M.S.P.R. 484](#), ¶ 9 (2007); *Campo v. U.S. Postal Service*, [93 M.S.P.R. 419](#), ¶¶ 4-5 (2003). Because the appellant's waiver of his ADEA claim was not "knowing and voluntary" within the meaning of the OWBPA, the administrative judge erred in finding that the settlement agreement "was freely reached by the parties, and that the parties understand the terms of the agreement" with respect to that claim. ID at 2; see 29 U.S.C. § 626(f)(2).

¶13 Nevertheless, the agency's failure to comply with the OWBPA affects only the appellant's waiver of his age discrimination claim; the appellant's waiver of his other claims remains in effect. See *Harris*, [98 M.S.P.R. 261](#), ¶ 8 (despite its noncompliance with the OWBPA, the settlement agreement remained in effect with respect to the appellant's waiver of all non-age discrimination claims; therefore, the merits of the removal action were not at issue on remand except to the extent that the administrative judge needed to consider them in deciding whether the removal was based on age discrimination); *Lange*, [94 M.S.P.R. 371](#), ¶ 13 (same); *Campo*, [93 M.S.P.R. 419](#), ¶¶ 12-13 (same). Therefore, if the appellant still wishes to pursue his age discrimination claim on remand, further adjudication will be limited to that issue. If the appellant wishes to ratify the

waiver, his ratification must comply with the provisions of the OWBPA set forth above.⁴ See *Oubre v. Entergy Operations, Inc.*, [522 U.S. 422](#), 427-28 (1998) (waiver of an ADEA claim, or ratification of a voidable waiver, is of no effect unless it complies with the OWBPA).

ORDER

¶14 We REMAND the appeal to the Washington Regional Office for further adjudication consistent with the Opinion and Order. On remand, the administrative judge shall afford the appellant the opportunity to choose between (1) renewing his age discrimination claim and (2) ratifying the waiver of that claim in compliance with the OWBPA's requirements for a knowing and voluntary waiver of an ADEA claim.

FOR THE BOARD:

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

⁴ Although we find that the appellant may continue to pursue his age discrimination claim if he wishes, the appellant has not indicated on review that he wishes to do so. Therefore, we do not remand for further adjudication of the age discrimination claim, but rather for the administrative judge first to discern whether the appellant wishes to pursue that claim. Cf. *Harris*, [98 M.S.P.R. 261](#), ¶¶ 5, 9 (where the appellant's petition for review specifically raised the settlement agreement's noncompliance with the OWBPA, the Board remanded the appeal for adjudication of his age discrimination claim); *Lange*, [94 M.S.P.R. 371](#), ¶¶ 4, 14 (same).