UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 181

Docket No. DC-4324-09-0812-I-2

Clifton McCarter,

Appellant,

v.

Department of the Navy,

Agency.

September 1, 2010

Clifton McCarter, Jacksonville, North Carolina, pro se.

Major Nicole Hudspeth, Camp Lejeune, North Carolina, 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 January 21, 2010 initial decision that dismissed his appeal as settled. For the reasons set forth below we DENY the petition for review, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency charged him military leave on unspecified nonwork days, which caused him to use an unspecified amount of annual leave, sick leave, or leave without pay in order to perform his military duty in violation of *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003) (federal employees are required to take military leave days for reserve military training only for those days on which they would otherwise be required to work). *McCarter v. Department of the Navy*, MSPB Docket No. DC-4324-09-0812-I-1 (I-1 File), Tab 1. His attorney subsequently filed a sworn declaration asserting that as a result of the agency improperly charging the appellant military leave on intervening non-workdays, the appellant was forced to use an alternative form of leave on September 22-23, 1988, and August 20-24, 1990. I-1 File, Tab 6 at 2. Then, on November 4, 2009, the appellant's attorney requested that the administrative judge dismiss the appeal without prejudice because he was unable to locate the appellant in order to convey a settlement offer from the agency. I-1 File, Tab 10 at 2. The administrative judge granted the request. I-1 File, Tab 11 at 1-2.

¶3 Although the administrative judge dismissed the case without prejudice to its refiling, the appellant filed a timely pro se petition for review of that decision. *Id.*; *McCarter v. Department of the Navy*, MSPB Docket No. DC-4324-09-0812-I-2 (I-2 File), Tab 1 at 10. The Clerk of the Board forwarded the appellant's petition for review to the regional office, which treated the document as a refiled appeal. I-2 File, Tab 1 at 1, Tab 2 at 1. Based on the appellant's pro se filing, the appellant's counsel formally withdrew from the matter. I-2 File, Tab 4 at 2. In his submission, the appellant argued the merits of his appeal. I-2 File, Tab 1 at 10-11. He also argued that he had been denied the right to a hearing and to submit evidence. *Id.* at 10. The appellant contended that, contrary to his counsel's assertion in requesting that the appeal be dismissed without prejudice, he had been in contact with his counsel. *Id.* at 11. Further, the appellant asserted

that he had refused the proposed settlement because his counsel had neglected to pursue factual information from the Defense Finance and Accounting Service (DFAS) and his workplace at Camp Lejeune for the period in question. *Id.*

¶4 On January 20, 2010, the date scheduled for both the prehearing conference and the hearing on the merits, the administrative judge dismissed the appeal as settled. I-2 File, Tab 8; Tab 10, Initial Decision (ID) at 1. In her initial decision dismissing the appeal, the administrative judge asserted that the settlement agreement was recorded and a copy of the recording was entered into the record. ID at 1. She wrote that she had reviewed the agreement and was satisfied that it was lawful on its face, that it was freely reached by the parties, and that the parties understood its terms. ID at 1-2. The administrative judge concluded that the agreement was therefore enforceable by the Board. ID at 2.

¶5 The appellant has filed a timely petition for review asserting that the initial decision was wrongly decided based on evidence submitted by his former counsel and that, "based on the submission and content of the evidence in the **unilateral 'Negotiated Settlement Agreement'** [he] was denied due process." Petition For Review (PFR) File, Tab 1 at 9 (emphasis in original). The agency responds that "[t]he appellant voluntarily orally agreed to the entire settlement agreement on the record." PFR File, Tab 3 at 3. In addition, the agency provides proof that it paid the appellant $552.24, which it claims represents "a full accord and satisfaction of the agreement between [the] parties." *Id.* at 3-4.

ANALYSIS

¶6 As a matter of policy, the Board favors the settlement of actions between an agency and its employees. *See Social Security Administration v. Givens*, 27 M.S.P.R. 360, 362 (1985). Settlement of disputes serves to avoid unnecessary litigation and to encourage fair and speedy resolution of issues. *See Roberson v. Department of the Air Force*, 27 M.S.P.R. 11 (1985). Before dismissing an appeal based on a settlement agreement, an administrative judge must document

for the record that the parties reached a settlement agreement, understood its terms, and agreed whether or not it was to be enforceable by the Board. *Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 148-49 (1988). The fact that a settlement agreement is oral does not detract from its validity or enforceability. *Brown v. Department of the Navy*, 60 M.S.P.R. 461, 462-63 (1994). The record in this matter, however, does not reflect that the appellant understood the terms of the agreement or whether the parties agreed to enter the settlement agreement into the record for enforcement purposes. Therefore, we are remanding this matter for further adjudication.

The record does not show that the appellant understood the terms of the agreement.

¶7 As noted above, the administrative judge found that the appellant understood the terms of the agreement. ID at 1-2. She asserted that "[t]he agreement was recorded and a copy of the recording was entered into the record." ID at 1. However, the recording of the January 20, 2010 telephonic hearing, which is less than 3 minutes long, only reflects that the appellant knew how much he was getting paid, and does not specifically address any other term of the three page unexecuted written settlement agreement referenced in the recording. I-2 File, Tab 9, Hearing CD[1]; *see id.* at 4-6.

¶8 In the recording, the administrative judge asserted that the appellant had a written copy of the settlement agreement before him.[2] Hearing CD. The administrative judge asked the appellant to repeat the amount he is to be paid under the agreement, and after he did so, she asked him: "Do you agree to settle this case for that amount under the terms of that agreement?" *Id.* The appellant

[1] The record contains a CD and a tape of the hearing. I-2 File, Tab 9. The CD and the tape are identical. *Id.*

[2] The agency representative asserts that the appellant's copy differed from the copy in the record in that the attorneys' fees provision and the signature line for the appellant's former counsel was excised from the copy in the record. Hearing CD.

responded: "Yes ma'am." *Id.* After that exchange, the administrative judge asked the parties if they had anything else they would like to add to the tape and the appellant stated that he understood that he was accepting the amount and that, because of a lack of evidence, "the case cannot proceed." *Id.* The administrative judge advised the parties that, if they wanted to sign the agreement, she would put it in the record, but they did not have to do so because she was "going to dismiss the case as settled based on the tape recorded terms that we recorded this morning." *Id.*

¶9 The unexecuted written copy of the agreement is three pages long, and in addition to providing that the appellant will be paid $552.24, it waives his right to "institute any other actions, . . . in any forum, against the Department of the Navy or any of its employees, with respect to any matter related to Appellant's employment with the Department of the Navy occurring prior to the effective date of this Settlement Agreement." I-2 File, Tab 9 at 4-6. The agreement also "irrevocably and unconditionally releases the Department of the Navy, its employees, and all persons connected with the Department of the Navy . . . from any and all charges, complaints, liabilities, damages, suits, costs, debts, and expenses which Appellant had in the past, has now currently, or will have in the future including attorney fees and costs actually incurred related to this appeal." *Id.* at 5. Without explanation, the agreement provides that in the event that the appellant breaches it, the agency may "cancel the Agreement and reinstate Appellant's removal through summary termination of Appellant's employment, and the Appellant waives any appeal, complaint, or other protest or claim as to that termination." *Id.* However, the record does not reflect that the appellant was removed from his position.[3]

---

[3] After deciding to proceed with his appeal pro se, the appellant asserted in a prehearing submission that he was forced out of work on medical retirement, and was denied regular promotion and other benefits due to exercising his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C.

¶10 The appellant's affirmative response to the administrative judge's question whether he agreed to "settle this case for payment of that amount under the terms of that agreement" is insufficient to show that he understood the terms of the agreement. Except for the amount to be paid, none of the other terms of the agreement were discussed on the record. Hearing CD. Further, the appellant's assertion that he understood that "the case cannot proceed" because of a lack of evidence does not show that he understood that the pending dismissal was with prejudice or that such a dismissal was the end of his claim. Indeed, it is possible that the appellant believed that, if he obtained further evidence from DFAS or his agency, his appeal could then "proceed." Moreover, absolutely nothing in the record indicates that the appellant understood the breadth of the waivers contained in the agreement regarding this, or any other claims he had or may have had against the agency. Before dismissing an appeal as settled based on an oral agreement, as is the case with any settlement agreement, an administrative judge must sufficiently document for the record that the parties understood and agreed with the terms of the agreement settling the appeal. *See Burton v. Department of Health & Human Services*, 45 M.S.P.R. 37, 39-40 (1990) (because the record did not document the terms of the parties' agreement, it failed to support the administrative judge's finding that the parties understood the agreement). Because the record does not adequately reflect the terms of the parties' agreement, or that the parties understood those terms, the administrative judge erred in dismissing the appeal as settled. *See id.*

---

§§ 4301-4333) (USERRA). I-2 File, Tab 6 at 2. However, the administrative judge had already given the appellant notice of the requirements for establishing Board jurisdiction over a USERRA discrimination appeal, and the appellant made no further assertions related to removal or reprisal. *See* I-1 File, Tab 2 at 1-2.

The record does not reflect whether the parties agreed to enter the settlement agreement into the record for enforcement purposes.

¶11 In her initial decision, the administrative judge appears to indicate that because she was satisfied that the agreement was lawful on its face, that it was freely reached by the parties, and that the parties understood its terms, the agreement was then enforceable by the Board. ID at 1-2. However, the parties must agree to enter a settlement agreement into the Board's records for enforcement purposes and it is an error for an administrative judge to dismiss an appeal as settled before documenting this issue for the record. *See, e.g., Parks v. U.S. Postal Service*, 113 M.S.P.R. 60, ¶ 11 (2010). Here, the record does not indicate that the parties reached such an agreement. Hearing CD. The issue was not addressed either in the Hearing CD or in the unexecuted written settlement agreement included in the record. *Id.*; I-2 File, Tab 9 at 4-6. The Board has the authority to enforce an oral settlement agreement if it has jurisdiction over the appeal, the agreement is lawful on its face, the parties understand its terms, the parties freely entered into it, and the parties agree to enter the agreement into the record for enforcement purposes. *Brown*, 60 M.S.P.R. at 462-63. In the instant case, the administrative judge correctly found that the appellant established jurisdiction over his appeal. *See* ID at 1. However, neither the Hearing CD, nor the unexecuted written agreement, indicates whether the parties agreed that their agreement would be entered into the record for enforcement purposes.

¶12 Based on the foregoing, the record does not indicate that the appellant understood the terms of the agreement, or that the parties agreed whether the agreement would be entered into the record for enforcement purposes. Accordingly, the administrative judge erred in dismissing this case as settled. *E.g., Jimenez v. Department of Health & Human Services*, 70 M.S.P.R. 24, 26-27 (1996) (the administrative judge had an insufficient basis upon which to dismiss the appeal as settled, in part because she failed to document whether the parties agreed their agreement was to be enforceable by the Board); *Boucher v.*

Department of the Treasury, 68 M.S.P.R. 40, 44 (1995) (same). Accordingly, remand is necessary. *E.g.*, *Jimenez*, 70 M.S.P.R. at 27.

ORDER

¶13 The initial decision is VACATED and the appeal is REMANDED to the regional office for further adjudication in accordance with this Opinion and Order. On remand, the administrative judge shall afford the parties an opportunity to present evidence and argument showing whether they have entered into a settlement agreement, understood its terms, and if so, whether they agree that the Board shall retain jurisdiction to enforce the agreement. If an agreement has not been reached, the administrative judge shall adjudicate the appeal on the merits.

FOR THE BOARD:

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