UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 23

Docket No. NY-0752-11-0003-I-1

Alexander L. Cooper,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 1, 2012

James Brown, Montrose, New York, for the appellant.

Arlene B. Rosen, Esquire, Brooklyn, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed his appeal as settled. For the reasons set forth below, we DENY the petition and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from the WG-8 position of Pipe Fitter effective September 3, 2010, for misconduct. Initial Appeal File (IAF), Tab 5, Subtabs 4a, 4b, 4d. The appellant appealed the agency's action and, during proceedings, the parties entered into a last chance settlement agreement that

provided in relevant part that the agency would hold the removal action in abeyance for 24 months, issue a 60-day suspension for the sustained charges, and subject the appellant to random urine and/or breath analyzer testing for alcohol. IAF, Tab 10. The agreement provided further that, if testing revealed that the appellant was under the influence of alcohol during the 24 months following the date of the agreement, the removal action would be effected based on the sustained charges and the appellant waived his right to appeal the removal action to the Board. IAF, Tab 10. The administrative judge dismissed the appeal as settled. IAF, Tab 11.

¶3 The appellant has petitioned for review. Petition for Review File (PFR File), Tab 4. The agency has responded in opposition to the petition. PFR File, Tab 7.

ANALYSIS

¶4 The initial decision in this case was issued on December 22, 2010, and informed the parties that a petition for review must be filed by January 26, 2011. IAF, Tab 11; 5 C.F.R. § 1201.114(d) (a petition for review must be filed within 35 days after the issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision). The appellant filed his petition for review on May 26, 2011. PFR File, Tab 1. The Clerk of the Board notified the appellant that his petition was untimely filed and afforded him the opportunity to file a Motion to Accept Filing as Timely or to Waive Time Limit. PFR File, Tab 2. However, we do not reach the timeliness issue because, as explained below, the appellant failed to meet the criteria for review.

¶5 The appellant argues that the settlement agreement is invalid because it allows for a 60-day suspension and a removal based on the same misconduct. Outside of the context of a settlement agreement, the Board has long held that an

agency cannot impose a disciplinary or adverse action more than once for the same misconduct. *See Gartner v. Department of the Army*, 104 M.S.P.R. 463, ¶ 5 (2007); *Anderson v. U.S. Postal Service*, 24 M.S.P.R. 488, 490 (1984), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985) (Table); *Adamek v. U.S. Postal Service*, 13 M.S.P.R. 224, 226 (1982). The Board has analogized the rule to the prohibition against double punishment for the same crime in the criminal context, i.e., the prohibition against double jeopardy. The Board has stated that, although the constitutional prohibition against double jeopardy applies only to defendants in criminal cases, and not to petitioners in administrative proceedings before the Board, an agency cannot impose a disciplinary or adverse action more than once for the same misconduct. *Wigen v. U.S. Postal Service*, 58 M.S.P.R. 381, 383 (1993). It appears, however, that the Board has not addressed whether the prohibition against imposing discipline more than once for the same misconduct may be waived in the context of a last chance settlement agreement.

¶6 It is settled that an employee can waive significant statutory rights in a settlement agreement, including the right to appeal the adverse action that is at issue in the agreement. *Ferby v. U.S. Postal Service*, 26 M.S.P.R. 451 (1985), was the first case in which the full Board addressed the question of whether the statutory right to appeal may be waived. The employees in *Ferby* had executed "last chance" settlement agreements waiving their right to appeal the adverse actions and the Board enforced the agreements. The Board first noted that both the right to a hearing before the Board and the right to counsel in a criminal proceeding were susceptible to waiver if the waiver was the informed, intentional abandonment of a known right, free of any coercion or duress. *Ferby*, 26 M.S.P.R. at 455. The Board then held that appellants could also knowingly and intentionally waive their right to appeal to the Board in a last chance settlement agreement if the terms of the waiver appear comprehensive, freely made, and fair, and there is no evidence that the execution of the agreement was in any way the result of duress or bad faith negotiation on the agency's part. *Id*. at 456.

¶7 Further, in *McCall v. U.S. Postal Service*, 839 F.2d 664, 665, 668-69 (Fed. Cir. 1988), our reviewing court found that the Board properly may enforce an employee's waiver of his right to appeal a disciplinary action in a last chance settlement agreement. In *McCall*, 839 F.2d at 666-67, the court relied on the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). The issue in *Rumery* was whether a court properly may enforce an agreement in which a criminal defendant releases his right to file a 42 U.S.C. § 1983 action, i.e., an action alleging that town officers violated a defendant's constitutional rights by arresting him, defaming him, and imprisoning him falsely, in return for a prosecutor's dismissal of pending criminal charges. *Rumery*, 380 U.S. at 386. The agreement at issue in *Rumery* purported to waive a substantive right to sue conferred by a federal statute. The Court stated that the most important underlying question was whether the policies underlying that statute may in some circumstances render a waiver of the rights that it conferred unenforceable. *Id.* at 386, 392. The Court resolved this question by reference to the traditional common law principle that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 392. After weighing, among other things, whether the waiver was inherently coercive because of unequal bargaining positions, the Court held that the mere possibility of intimidation cannot justify invalidating all such agreements, noting that parties are often forced to make difficult choices which effectively waive statutory or even constitutional rights. *Id*. at 393-94. An important consideration for the Court was that one entering into an agreement waiving an important right may be judging that the certain benefits of escaping a harsh alternative exceed other speculative benefits. *Id.*

¶8 We find that last chance settlement agreements that waive both the right to appeal and the right not to be disciplined twice for the same offense are susceptible to the same analysis as the waiver of Board appeal rights discussed in *Ferby* and *McCall*, and the considerations of the Court in *Rumery*. The appellant

may be judging that the certain benefit of escaping removal and accepting a lesser penalty exceeds the speculative benefit that he might prevail in the removal appeal. Further, the incorporation of some discipline into the last chance settlement agreement makes it more likely that the agency will consider entering into the agreement because the employee will not escape all punishment for the charged offense. Thus, such settlement agreements advance the Board's policy that, in Board actions, as in civil actions, public policy favors settlement agreements, which serve to avoid unnecessary litigation and to encourage fair and speedy resolution of issues. *Futrell-Rawls v. Department of Veterans Affairs*, 115 M.S.P.R. 322, ¶ 8 (2010); *Lee v. Office of Personnel Management*, 83 M.S.P.R. 236, ¶ 3 (1999).

¶9 In sum, we find valid a last chance settlement agreement in which the appellant agreed to the following: discipline for the charged misconduct prior to being reinstated; removal for the same misconduct based on breach of the agreement; and waiver of his Board appeal rights if he is removed based on breach of the agreement. The Board can enforce such an agreement if it is lawful on its face, was freely entered into by the parties, and the subject matter of the appeal is within the Board's jurisdiction. *Stewart v. U.S. Postal Service*, 73 M.S.P.R. 104, 107 (1997). Additionally, the waivers within the agreement must be clear, unequivocal, and decisive, comprehensive, freely made, fair, and the execution of the agreement must not be the result of duress or bad faith on the part of the agency. *Lawrence v. Office of Personnel Management*, 108 M.S.P.R. 325, ¶ 6, *aff'd*, 318 F. App'x 895 (Fed. Cir. 2008); *Lockridge v. U.S. Postal Service*, 72 M.S.P.R. 613, 620 (1996), *aff'd*, 121 F.3d 727 (Fed. Cir. 1997) (Table). We find that the administrative judge properly found that the last chance settlement agreement entered into by the parties to this appeal met these criteria, and we therefore reject the appellant's argument that the administrative judge improperly accepted an invalid agreement into the record for enforcement by the Board.

ORDER

¶10 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.