UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 39

Docket No. SF-0752-12-0393-I-1

Marilyn L. Weldon,

Appellant,

v.

Department of Veterans Affairs,

Agency.

May 24, 2013

Phillip T. Haynes, Loma Linda, California, for the appellant.

Maureen Ney, Esquire, Los Angeles, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision issued by the administrative judge in this case, which dismissed her removal appeal as settled.[1] For the reasons discussed below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal to the Western Regional Office for further adjudication.

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 The appellant, a Food Service Worker, filed a Board appeal in which she challenged her removal based on charges of Violence in the Workplace and Disrespectful Conduct, which stemmed from a physical altercation that she had with a coworker. Initial Appeal File (IAF), Tab 1 at 6, 8, 10; *id.*, Tab 7 at 18, 20-23, 25-26. The parties thereafter entered into a settlement agreement. IAF, Tab 15. Under the terms of the agreement, the agency agreed to cancel the appellant's removal and replace it with a resignation, and the appellant agreed to withdraw her Board appeal and waive her right to contest the removal. *Id.* at 2.

¶3 The administrative judge reviewed the agreement and found that it was freely entered into and lawful on its face, that the parties understood its terms, and that the parties wanted the agreement entered into the record for enforcement purposes. IAF, Tab 16, Initial Decision (ID) at 2. She therefore entered the agreement into the record for enforcement purposes and dismissed the appeal as settled. ID at 2-3.

¶4 On review, the appellant alleges that the settlement agreement is invalid because it was the result of an agency misrepresentation. Petition for Review (PFR) File, Tab 2 at 3. Specifically, the appellant alleges that she was misled when she was told that neither party involved in the underlying physical altercation would be retained as an employee. *Id.* The appellant further states that she signed the settlement agreement based on this representation, but that she learned after signing the settlement agreement that the other employee involved in the altercation was reinstated to her previous position. *Id.* The appellant also alleges that, during the course of her appeal, she was not given an opportunity to present witnesses on her behalf. *Id.* The agency has not filed a response to the appellant's petition for review.

ANALYSIS

¶5 An attack on the validity of a settlement agreement must be made in the form of a petition for review of the initial decision dismissing the case as settled. *Hazelton v. Department of Veterans Affairs*, 112 M.S.P.R. 357, ¶ 8 (2009). Even if invalidity is not apparent at the time of settlement, the settlement agreement must be set aside if it is subsequently shown, by new evidence, that the agreement is tainted with invalidity by fraud or misrepresentation. *Henson v. Department of the Treasury*, 86 M.S.P.R. 221, ¶ 7 (2000). A showing that a reasonable person would have been misled by the agency's statements is sufficient to show misrepresentation. *See Hazelton*, 112 M.S.P.R. 357, ¶ 11.

¶6 This case, involving an alleged agency misrepresentation regarding the way that the agency treated another employee, is factually distinguishable from *Hazelton* and *Henson*, which involved alleged agency misrepresentations about Mr. Hazelton's eligibility for retirement benefits and the availability of other GS-13 positions to which Mr. Henson could have been reassigned. *See Hazelton*, 112 M.S.P.R. 357, ¶ 4; *Henson*, 86 M.S.P.R. 221, ¶ 6. We are not aware of, and the appellant has not identified, any Board or Federal Circuit decision involving an agency misrepresentation regarding another employee. Nevertheless, we find it appropriate to rely on *Hazelton* and *Henson* because they are consistent with a body of precedent involving waivers of Board appeal rights and withdrawals of Board appeals through, or as a result of, settlement agreements, all of which are grounded in the basic principle that an appellant's actions must be knowing and voluntary. *See, e.g.*, *Wyatt v. U.S. Postal Service*, 101 M.S.P.R. 28, ¶ 18 (2006) ("[A] waiver of appeal rights in a settlement agreement is enforceable and not against public policy if the terms of the waiver are comprehensive, freely made, and fair, and the execution of the waiver was not the result of duress or bad faith on the part of the agency."); *Wade v. Department of Veterans Affairs*, 61 M.S.P.R. 580, 583 (1994) ("The essence of a settlement agreement is that it must be a voluntary action."); *Doyle v. U.S. Postal Service*, 51 M.S.P.R. 566, 568

(1991) (remanding the appeal because "the appellant's allegations raise[d] substantial factual questions as to the voluntariness of the withdrawal of the appeal," after the parties had reached a settlement). Indeed, the Board has held that an employee's decision to enter into a settlement agreement "is considered involuntary if it resulted from the employee's reasonable reliance on the agency's misleading statements, or from the agency's failure to provide the employee with adequate information on which to make an informed choice." *Pawlowski v. Department of Veterans Affairs*, 96 M.S.P.R. 353, ¶¶ 9-10 (2004) (quoting *Smitka v. U.S. Postal Service*, 66 M.S.P.R. 680, 689 (1995), *aff'd*, 78 F.3d 605 (Fed. Cir. 1996) (Table)).

¶7 Because these principles have broad applicability, it is appropriate to extend the reasoning of *Hazelton* and *Henson* to the appellant's claim of agency misrepresentation involving another employee. Accordingly, we find that the appellant's allegation, made under penalty of perjury on petition for review, if proven, would constitute new evidence. *See Henson*, 86 M.S.P.R. 221, ¶ 7. Indeed, if the agency representative knew that the agency intended to reinstate or had reinstated the other party to the altercation and stated otherwise to the appellant, this would be material evidence because it could warrant a finding of agency misrepresentation in the settlement process. *See id.* We further find that the appellant made a nonfrivolous allegation of facts which, if proven, could establish that she was misled into signing the settlement agreement and could warrant setting aside the settlement agreement. *See, e.g.*, *Hazelton*, 112 M.S.P.R. 357, ¶ 12; *Henson*, 86 M.S.P.R. 221, ¶ 8. We therefore remand the appeal to the Western Regional Office to afford the appellant an opportunity to prove her allegation of agency misrepresentation.[2] *See Hazelton*, 112 M.S.P.R. 357, ¶ 13; *Henson*, 86 M.S.P.R. 221, ¶ 16.

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[2] In light of our decision to remand this matter, we do not address the appellant's argument that she was not given an opportunity to present witnesses, below. If, on remand, the administrative judge determines that the settlement agreement is invalid

¶8 On remand, the administrative judge shall allow the parties to submit evidence and argument regarding whether the settlement agreement should be set aside as invalid. If necessary to resolve disputed issues of material fact, the administrative judge shall also conduct a hearing so that the parties may present testimonial evidence in support of their positions. If the administrative judge determines that the settlement agreement is valid, she shall issue a new initial decision dismissing the appeal as settled. If the administrative judge determines that the settlement agreement should be set aside as invalid, she shall continue to adjudicate the merits of the appeal. *See Hazelton*, 112 M.S.P.R. 357, ¶ 13; *Brown v. Department of the Army*, 108 M.S.P.R. 90, ¶ 11 (2008).

ORDER

¶9 We VACATE the initial decision and REMAND this case to the Western Regional Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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

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and sets it aside, the appellant will have an opportunity to present evidence and argument, which may include presentation of witnesses, to contest the removal action. If, however, the administrative judge determines that the settlement agreement is valid, then pursuant to the terms of the agreement, the appellant waived her right to further litigate the removal action. *See* IAF, Tab 15 at 2; *see also Burks v. Department of the Interior*, 84 M.S.P.R. 423, ¶ 4 (1999) ("The appellant does challenge the merits of the removal action, but, in choosing to settle his appeal, he waived his right to have the Board review the facts underlying, and the legal validity of, the removal action."), *aff'd*, 243 F.3d 566 (Fed. Cir. 2000) (Table).