UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 214

Docket No. AT-0752-08-0292-I-1

Patrick D. Easterling,

Appellant,

v.

United States Postal Service,

Agency.

September 19, 2008

John R. Macon, Memphis, Tennessee, for the appellant.

Gillian Steinhauer, Esquire, Memphis, Tennessee, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that dismissed his removal appeal, which was based on the appellant's alleged violation of a Last Chance Settlement Agreement (LCA), for lack of a nonfrivolous allegation of jurisdiction. For the reasons discussed below, we GRANT the PFR under 5 C.F.R. § 1201.115, VACATE the ID, and REMAND the case to the Atlanta Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a preference eligible veteran, was employed by the agency as a Mail Handler in Memphis, Tennessee. Initial Appeal File (IAF), Tab 5, Subtab 4U. On March 15, 2007, the agency proposed the appellant's removal for failure to be regular in attendance and absence without leave. *Id.*, Subtab 4AT. After sustaining the charge, but prior to effecting the appellant's removal, the deciding official, Carl Iannazzo, the appellant, and the appellant's union representative entered into an LCA, which was dated April 17, 2007. *Id.*, Subtab 4AQ. In the LCA, the appellant agreed, inter alia, to maintain satisfactory attendance by not having more than three unscheduled absences during any 6-month period. *Id.* at 1. "Unscheduled absence" is defined in the agreement as "any absence not requested and approved in advance," and "[a]ny unscheduled absence(s) that meet the criteria under the Family Medical Leave Act (FMLA) and are properly documented will not be considered under this [a]greement." *Id.* The LCA was to last for 1 year, and the appellant agreed to waive his Board appeal rights if he was later removed for violating its terms. *Id.* at 1-2.

¶3 On July 13, 2007, Mr. Iannazzo issued a notice to the appellant that he had violated the terms of the LCA by incurring 12 days or portions of days of unscheduled absences between May 9, 2007 and June 16, 2007. IAF, Tab 5, Subtab 4AD. Based on the appellant's alleged breach of the agreement, Mr. Iannazzo reinstated the removal with an effective date of July 16, 2007.[1] *Id.* at 2.

¶4 The appellant responded to the removal by filing a formal complaint of discrimination. IAF, Tab 5, Subtab 4T. In the complaint, the appellant asserted that he had not violated the LCA and that the agency discriminated against him by removing him based on his race (African American), and his disability (total

[1] By this time, the appellant's position had changed from Mail Handler to Custodian. IAF, Tab 5, Subtab 4AD.

reconstruction of his right knee, migraines, asthma, and spinal misalignment). *Id.*, Subtab 4C at 5, Subtab 4T at 1. The appellant also alleged that the agency retaliated against him based on prior equal employment opportunity (EEO) activity, and that he was treated disparately to other non-disabled employees who the agency had not removed after they had unscheduled and FMLA absences similar to his. *Id.*, Subtab 4C at 2-7. The agency issued a final agency decision finding that the agency had not discriminated against the appellant when it removed him for violating the LCA. IAF, Tab 1 at 7-27.

¶5 With the assistance of his union representative, the appellant filed an appeal of the final agency decision to the Board. IAF, Tab 1. In his appeal, the appellant alleged that the agency removed him based on his disability, in retaliation for prior EEO activity, and based on his sex because "female employees are no[t] removed for attendance." *Id.* at 3. He requested a hearing. IAF, Tab 1 at 2, Tab 4.

¶6 The administrative judge (AJ) issued a standard acknowledgment order that discussed the Board's procedures, the rights of the parties, the discovery process, and settlement. IAF, Tab 2. The agency responded to the appeal and filed a motion to dismiss the appeal for lack of jurisdiction. IAF, Tab 5, Subtab 1. In its motion, the agency asserted that the Board does not have jurisdiction over the appeal because the appellant waived his Board appeal rights in the LCA. *Id.* The appellant did not respond to the agency's motion to dismiss.

¶7 Without holding the appellant's requested hearing, the AJ issued an ID that dismissed the appeal for lack of a nonfrivolous allegation of Board jurisdiction. IAF, Tab 6 (ID). The AJ found that the appellant failed to make a nonfrivolous allegation that he had not violated the LCA, that the agency acted in bad faith, or that he had not voluntarily entered into the LCA. ID at 1-4.

¶8 The appellant has filed a PFR. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition to the appellant's PFR.[2] PFRF, Tab 3.

ANALYSIS

The Board need not consider the appellant's new argument on review or the documents he submitted after the record closed.

¶9 On review, the appellant claims for the first time that the agency's proposed removal of him was procedurally defective because it incorrectly cited certain prior discipline of the appellant, IAF, Tab 5, Subtab 4AT at 2, which he now claims was purged. PFRF, Tab 1 at 2-3. The Board need not consider the appellant's argument that he raises for the first time in his PFR without any showing that it is based on new and material evidence not available prior to the close of the record despite his due diligence. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

¶10 The Board also need not consider the appellant's untimely submissions on review,[3] as it does not accept additional evidence or argument after the close of the record unless the party submitting it shows that the evidence was not readily available before the record closed. PFRF, Tabs 4-5; *see, e.g., Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 11 (2005); 5 C.F.R. § 1201.114(i). In this case the Clerk's office properly notified the appellant that the record would close on May 25, 2008, PFRF, Tab 2, yet the appellant filed submissions on June 17, 2008 and June 20, 2008. PFRF, Tabs 4-5. Further, the appellant has not shown that the evidence in either submission is new and material or that the

---

[2] Before the agency submitted its response, the Office of the Clerk of the Board issued a notice to the appellant and the agency indicating that the record would close on May 25, 2008. PFRF, Tab 2. The appellant later submitted two additional sets of documents after the record closed. PFRF, Tabs 4-5.

[3] These submissions consist largely of the appellant's updated petition for review, which is almost identical to his original petition for review, as well as the appellant's attendance records and a number of other documents, such as statements and other evidence found in his EEO file. PFRF, Tabs 1, 4-5.

documents were not available prior to the close of the record despite his due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Additionally, the Board will not grant a PFR based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the ID. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). The documents the appellant's submits for the first time on review provide no such evidence, as all of the documents predate the close of the record on review.[4] PFRF, Tabs 4-5. Finally, between his two submissions, the appellant has resubmitted a number of the documents that can already be found in the record below, *id.*, which the Board need not consider because evidence that is already part of the record is not new. *See Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980).

The AJ failed to provide the appellant with proper jurisdictional notice and an opportunity to respond.

¶11 The appellant has the burden of proof on the issue of jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i). Where an appellant makes a nonfrivolous allegation of Board jurisdiction over an appeal, he is entitled to a hearing on the jurisdictional question. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc). Nonfrivolous allegations of Board jurisdiction are allegations of facts which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). However, an AJ's failure to provide an appellant with proper *Burgess* notice can be cured if

[4] To the extent any of these submissions may be relevant to the jurisdictional issue or the merits of the appeal (if the AJ reaches the merits), the appellant may resubmit the documents on remand to the AJ for consideration of their relevance.

the agency's pleadings contain the notice that was lacking in the acknowledgment order or the ID puts the appellant on notice of what he must do to establish jurisdiction, thus affording him the opportunity to meet his jurisdictional burden in the PFR. *Scott v. Department of Justice*, 105 M.S.P.R. 482, ¶ 6 (2007).

¶12 The Board lacks jurisdiction over an action taken pursuant to an LCA in which an appellant waives his right to appeal to the Board. *Willis v. Department of Defense*, 105 M.S.P.R. 466, ¶ 17 (2007). To establish that a waiver of appeal rights in the LCA should not be enforced, an appellant must show one of the following: (1) He complied with the LCA; (2) the agency materially breached the LCA or acted in bad faith; (3) he did not voluntarily enter into the LCA; or (4) the LCA resulted from fraud or mutual mistake. *Id.*

¶13 Although not raised by the appellant on review, the AJ did not provide *Burgess* notice to the appellant of his burden to prove jurisdiction prior to issuing the ID, PFRF, Tab 1; ID at 2, so we look to the agency's motion and the ID to determine whether the appellant ever received notice of his jurisdictional burden. *See Scott*, 105 M.S.P.R. 482, ¶ 6. In its motion to dismiss, the agency cited *Buchanan v. Department of Energy*, 247 F.3d 1333, 1338 (Fed. Cir. 2001), where the court held that to overcome a waiver of the right to appeal in a LCA, an employee must prove compliance with the LCA, that the agency breached the agreement, or that the employee did not knowingly and voluntarily enter into the agreement. IAF, Tab 5, Subtab 1 at 4. Similarly, in the ID, the AJ also cited *Buchanan* and notified the appellant that he could only prove Board jurisdiction if he makes a nonfrivolous allegation that "he did not violate the agreement, that the agency acted in bad faith, or that he did not voluntarily and freely enter into the agreement." ID at 2. Neither the AJ, nor the agency included the fourth criterion found in recent Board cases where the appellant could prove jurisdiction by alleging that the LCA resulted from fraud or mutual mistake. *See, e.g., Johnson v. U.S. Postal Service*, 105 M.S.P.R. 648, ¶ 6 (2007); *Willis*, 105 M.S.P.R. 466, ¶ 17. We find this omission to be error under *Burgess* because neither the

agency's, nor the AJ's, notice provided the appellant with explicit and complete information on what he needed to do to prove jurisdiction. IAF, Tab 5, Subtab 1 at 4; *see Burgess*, 758 F.2d at 643-44; ID at 2.

The AJ improperly denied the appellant a jurisdictional hearing.

¶14 On review, the appellant argues that the AJ erred by not allowing him a hearing, and although he concedes that he did not respond to the agency's motion to dismiss, the appellant also points to specific places in the record below where he claims he made nonfrivolous allegations that he did not breach the LCA. PFRF, Tab 1 at 3-8.

¶15 We agree with the appellant that he made a nonfrivolous allegation of jurisdiction, and that the AJ erred when he found that "[t]he appellant [did] not contest that he was absent on the dates in question or that the absences were unscheduled." ID at 3. On review, the appellant points to IAF, Tab 5, Subtabs 4G and 4T in the agency's file, which are places in the record below where the appellant claimed he had not violated the LCA. PFRF, Tab 1 at 4. Additionally, the appellant asserted that his absences were not unscheduled and that the FMLA applied to and excused some of his absences.[5] *Id.* at 6-10; 13. We have reviewed the record and conclude that the appellant has made a nonfrivolous allegation that he did not violate the LCA because it appears that at least some of his absences may not have been "unscheduled" under the agency's definition in the LCA. IAF, Tab 5, Subtab 4AQ.

¶16 In the agency's notice to the appellant that it was removing him based on his violation of the LCA, the agency asserted that the appellant had 12 occasions

---

[5] The appellant also argues that he was not absent on April 9, 2007, through April 11, 2007, and cites to what appears to be a draft removal notice where the agency claimed the appellant breached his LCA. IAF, Tab 5, Subtab 4AC; PFRF, Tab 2. The Board need not consider this claim because this version of the letter appears to be only a draft notice to the appellant, and the actual notice appears in Tab 5, Subtab 4AD, which is signed by the deciding official. The signed notice does not include the dates in April, 2007, so those dates are not at issue in this appeal. IAF, Tab 5, Subtab 4AD.

of unscheduled absences on May 9, 2007, May 10-11, 2007, May 16, 2007, May 17-19, 2007, May 29, 2007, June 1-2, 2007, and June 15-16, 2007, and the agency specified the number of hours the appellant was allegedly absent for each time period. IAF, Tab 5, Subtab 4AD. The only definition the LCA provides for an "unexcused absence" is "any absence not requested and approved in advance." *Id.*, Subtab 4AD, Subtab 4AQ. The agency's policy documents provide no further guidance, as § 511.41 also simply states that "unscheduled absences are any absences from work that are not requested and approved in advance." *Id.*, Subtab 4AU at 2. Nothing in the record further defines the term "in advance" or dictates how far in advance the leave must be requested and approved for the agency to consider it scheduled leave. The agency also does not define in the LCA what constitutes an "occasion." *Id.*, Subtab 4AQ.

¶17 "To meet its burden to prove the charge of unscheduled absence, the agency must show that on each 'occasion' the approved leave was not requested and approved in advance of its use." *Williams v. U.S. Postal Service*, 68 M.S.P.R. 150, 156 (1995). The Board has held that the agency has not met its burden to prove absences were unscheduled where leave was requested in advance and the agency did not show the date or the time the supervisor approved the appellant's leave request. *Id.*

¶18 In the appellant's case, the leave requests show that all of his requested leave was approved, even though the agency considered them unscheduled absences.[6] IAF, Tab 5, Subtab 4AI. Also, the appellant made all of his leave requests, except two, prior to the start of his shift (although they were made very

---

[6] Additionally, despite the appellant's claims on review that his absences were covered by the FMLA, PFRF, Tab 1 at 6-10, it does not appear that the appellant had the requisite number of hours to be eligible for FMLA at the time he requested it. IAF, Tab 5, Subtab 4AL. To confer FMLA eligibility, the appellant had to have worked 1,250 hours at the time of his request. 29 U.S.C. § 2611(2)(A)(ii). During the time period the appellant was requesting FMLA, the agency denied his FMLA requests because he had only worked a little over 1,000 hours. *Id.*, Subtab 4AI, Subtab 4AL.

close in time to the start of his shift).[7] *Id.* The appellant's supervisor approved all of the requests and indicated that they were unscheduled, but he did not indicate the date or the time he approved each of the requests, so it is impossible to determine from this record whether or not he approved the appellant's leave in advance of the beginning of the appellant's shifts. *Id.*; *see Williams,* 68 M.S.P.R. at 156. If the appellant's supervisor did approve the absences in advance, the appellant's absences were not unscheduled. *See Williams,* 68 M.S.P.R. at 156.

¶19 The appellant alleged in the record below that he did not violate the LCA, and it appears from his leave requests that all but two of them, at least arguably, may have been made and approved in advance. IAF, Tab 5, Subtabs 4G, 4T, 4AI. Since the appellant had to have more than three unscheduled absences in order to violate his LCA, *id.,* Subtab 4AQ, we find that he has made a nonfrivolous allegation that he has not violated it. Under these circumstances, the lack of explicit *Burgess* notice in the acknowledgment order leads us to find that the appellant was not provided an adequate opportunity to address the jurisdictional issues. *See Willis,* 105 M.S.P.R. 466, ¶ 21.

ORDER

¶20 Accordingly, we REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order, including a jurisdictional hearing. Prior to the hearing, the appellant should be given an opportunity to supplement his pleadings with evidence and argument geared to the fourth criterion mentioned in ¶ 13 above, since the appellant is first being put on notice of that criterion by this decision; if the appellant makes a non-frivolous allegation of jurisdiction under that criterion, the AJ should include that matter within the scope of the hearing. If the AJ finds that the Board has jurisdiction

---

[7] The appellant made his leave requests for May 15-16, 2007, and May 16-19, 2007, on May 18, 2007. IAF, Tab 5, Subtab 4AI at 4-5.

over this appeal, he shall adjudicate the issue of whether the agency properly removed the appellant after he allegedly violated his LCA.

FOR THE BOARD:

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