BARBARA J. TAYLOR-CARTER v. U.S. General Accounting Office

Docket No. 96-03

Date of Decision: December 18, 1996

Cite as: Taylor-Carter v. GAO, Docket No. 96-03 (12/18/96)

Before: Elliott Bunce, Administrative Judge

Headnotes:

Dismissals

Effect of Merit Systems Protection Board Decisions

Jurisdiction

Motion to Dismiss

Settlement Agreements

ORDER

PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

Barbara J. Taylor-Carter, Petitioner v. United States General Accounting Office, Respondent	Docket No. 96-03

ORDER

The undersigned was appointed as administrative judge in this proceeding pursuant to a Notice dated November 22, 1996. The prior administrative judge recused herself by notice dated October 29, 1996. Several matters are pending in this proceeding: (1) the Petition for Review, dated June 10, 1996, which was amended on August 26, 1996; (2) Respondent's motion to dismiss the original Petition, filed June 28, 1996; (3) Respondent's motion to dismiss the amended Petition, filed September 5, 1996, which was accompanied by an Answer to the amended Petition; and (4) Petitioner's motion to dismiss her Petition for Review, dated September 20, 1996, to which Respondent did not object.

Background

Petitioner was hired by Respondent, United States General Accounting Office (GAO), on January 7, 1986, and continued that employment until she was separated by a reduction in force,

effective June 8, 1996. In her original Petition for Review, Petitioner, who represented herself, charged that her separation was a discriminatory action.[1] In her amended Petition for Review, Petitioner, now represented by the General Counsel of the Personnel Appeals Board (PAB/OGC), charged that Respondent had failed to take a number of actions with respect to her separation. Among these was Respondent's alleged failure to file, on Petitioner's behalf, an application for disability retirement and to defer her separation pending the resolution of that application. Petitioner further alleged that Respondent knew, or should have known, that Petitioner suffered from a mental impairment and that, therefore, disability retirement, rather than separation by reduction in force, was appropriate. In the amended petition, Petitioner did not renew her charge of discrimination.

In its motions to dismiss the original and amended petitions, Respondent argued that Petitioner failed to state a claim upon which relief could be granted.

In her motion to dismiss her Petition,[2] Petitioner states that she and Respondent "have reached an agreement settling all matters

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[1] Petitioner did not specify the nature of the alleged discrimination, except to state with respect to one issue that "racism played a major role." Petitioner also implied that "whistleblowing" may have been a factor in her separation.

[2] The motion does not refer specifically to the amended Petition for Review; rather, it seeks an order "dismissing the Petition For Review in the above-referenced matter." The text of the motion and the discussion at the second status conference, discussed below, indicate that the motion embraces both the original and amended Petitions, and the motion will be so interpreted for the purposes of the instant order.

at issue in this case" and that as part of that agreement Petitioner has agreed to withdraw her Petition for Review. The motion notes that "[i]n fulfillment of the Agreement, the Agency [GAO] has agreed and is currently providing assistance to the employee [Petitioner] in the preparation of an application for disability retirement."

Two status conferences have been held in this proceeding, the first on July 3, 1996, and the second on September 25, 1996, after the filing of Petitioner's motion to dismiss. At the second conference, Petitioner, her counsel, and counsel for GAO discussed the settlement agreement with the administrative judge. Counsel for GAO at first resisted calling the agreement with Petitioner a "settlement agreement" but then conceded the term was appropriate (Conference transcript, at 4). He noted that most of the terms of the settlement had been carried out by GAO but that it had not been reduced to writing. Instead, a letter of understanding had been executed (Id., at 5).

At the conference, Petitioner stated that she understood the agreement to be that GAO would assist her in securing disability retirement (Id., at 5-6). Petitioner stated further that she understood that dismissal would eliminate the claims stated in her original and amended Petitions; her counsel noted that he would continue to monitor the agreement to be certain it would be carried out (Id., at 6-7). The administrative judge pointed out to Petitioner that the agreement would not be filed with the Personnel

Appeals Board and that her counsel would be responsible for monitoring compliance (Id., at 9).

The administrative judge stated that the motion to dismiss would be granted (Id., at 10). However, her recusal occurred before an order of dismissal was issued.

Analysis

The regulations governing this Board are silent as to settlement agreements, with one exception. Section 28.21(d), 4 C.F.R., states that in cases in which Petitioner is represented by the Office of the General Counsel of the Board and in which the General Counsel "transmits a settlement which has been agreed to by the parties, the settlement shall be the final disposition of the case." Although the regulation does not specifically say so, it would appear to require that the agreement be transmitted to the Board, i.e., filed with the Board, before it becomes the final disposition of the case.

Settlement agreements are treated specifically in the regulations of the Merit Systems Protection Board (MSPB), 5 C.F.R. §1201.41(c)(2), which provide that an agreement "is the final and binding resolution of the appeal, and the judge will dismiss the appeal with prejudice." The regulation provides that if the agreement is offered by the parties for inclusion in the record and is approved by the judge it will be entered in the record, and the MSPB will retain jurisdiction to assure compliance. If the agreement is not entered into the record, the MSPB will not retain jurisdiction.

The cases decided by this Board, like its regulations, say little about settlement agreements. In Davis v. GAO, 1 PAB 677, 680 (1988), the Board held:

> It is well settled that a party may waive his cause of action under Title VII as part of a voluntary settlement. Alexander v. Gardner-Denver, 415 U.S. 36, 52 n.7 (1974). In a case where waiver and settlement are issues, the responsibility of this Board is to determine whether the employee's consent to the settlement was express, knowing, and voluntary. Id.

By contrast, the MSPB has developed a substantial body of case law dealing with settlement agreements. The United States Court of Appeals for the District of Columbia Circuit has noted that although Congress, in creating this Board, did not command it to adopt the decisions of the MSPB, it nonetheless encouraged this Board, "at a minimum, to consider MSPB decisions and other executive agency precedent before deciding questions already settled in the executive personnel system." General Accounting Office v. GAO Personnel Appeals Board, 698 F.2d 516, 535 (D.C. Cir. 1983).[3] This Board often turns to MSPB decisions for guidance in interpreting principles applied by the MSPB to executive branch agencies, (see, e.g., Cosella v. GAO, 2 PAB 383, 390 (1994)), and here I will look to the guidelines for settlement agreements drawn by the MSPB.

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[3] The Personnel Appeals Board was created by the General Accounting Office Personnel Act of 1980, P.L. No. 96-191, 94 Stat. 27 (1980), codified at 31 U.S.C. §731 et seq. When enacted, the Act placed judicial review of Board decisions with the United States Court of Appeals for the District of Columbia Circuit or with the court of appeals of the United States for the circuit in which the petitioner resides. 31 U.S.C. §755. The section was amended in 1988 by substituting the Federal Circuit for the D.C. Circuit or the person's home circuit.

"The Board favors settlement agreements provided that they are consistent with law, equity, and public policy." Clark v. Dept. of Treasury, 48 M.S.P.R. 330, 332 (1991). As to agreements which are not recorded with the reviewing authority, the MSPB has held:

> Where one or both parties to a settlement agreement initially make clear that they do not desire to have an agreement entered into the record for enforcement purposes, an administrative judge need not determine whether the Board has jurisdiction over the appeal; and it may be properly dismissed pursuant to the agreement. . . . It is error for the administrative judge, however, to dismiss an appeal without documenting for the record whether the parties agreed that the agreement was enforceable by the Board.

Sitas v. Veterans Admin., 41 M.S.P.R. 214, 216 (1989). In a similar vein, the MSPB held:

> We find that it was error for the administrative judge to dismiss this appeal without documenting for the record whether the parties had reached a settlement agreement, understood the agreement's terms, and agreed whether or not the settlement agreement was to be enforceable by the Board.

Mahoney v. U.S. Postal Serv., 37 M.S.P.R. 146, 149 (1988). Even unrecorded agreements may be revisited by the reviewing authority if equitable principles so require:

> While the Board does not have the authority to enforce a settlement agreement not entered into the record for enforcement purposes, see Diamond v. U.S. Postal Service, 51 M.S.P.R. 448, 450 (1991), aff'd, 972 F.2d 1353 (Fed. Cir. 1992) (Table), that principle does not preclude us from ensuring the validity and integrity of the appellate process. The essence of a settlement agreement is that it must be a voluntary action. An agreement that is reached by virtue of fraud or mutual mistake is, by definition, involuntary. Similarly, we do not countenance an agreement that is unlawful on its face or otherwise. Thus, we find that a party may challenge the validity of a settlement agreement resulting in the withdrawal of an appeal, even when that agreement is not entered into the Board's record for purposes of enforcement, if the party believes that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. See King v. U.S. Postal Service, 52 M.S.P.R. 60, 64-65 (1991).

Wade v. Dept. of Veterans Affairs, 61 M.S.P.R. 580, 583 (1994).

In determining whether an employee has the mental capacity to enter into a settlement agreement, the MSPB asks two principal questions. First, was the employee capable of making a rational decision; stated differently, was the mental disability so extreme that the employee could not form the necessary intent? Second, was the employee represented by counsel when deciding to accept the agreement? See, Moran v. Veterans Admin., 43 M.S.P.R. 547, 552-53 (1990); Ray v. Dept. of Health and Human Services, 57 M.S.P.R. 16, 20 (1993).

I turn now to the question of whether the Petitions for Review in this proceeding should be dismissed. Here, the parties have entered into some form of settlement agreement. That its precise terms have not been documented or even specifically approved by the parties is not an impediment to dismissal of this action, if it is clear that the parties do not wish this Board to retain jurisdiction for the purpose of enforcement. Robertson v. U.S. Postal Serv., 37 M.S.P.R. 512, 515 n.2 (1982). The record suggests that the parties have elected not to file the agreement with the Board, and thus the General Counsel of the Board does not appear to intend to transmit the agreement to the Board. Therefore, this case is not automatically disposed of pursuant to 4 CFR §28.21(d). It should be noted also that although the parties have not indicated on the record that they will not file the agreement with the Board, it has not been explicitly stated that they wish the Board to have no further enforcement duties.

Davis, supra, requires that Petitioner's consent to the agreement be express, knowing, and voluntary. The question of whether Petitioner understands the terms of the agreement must be addressed with care in this proceeding, because she has raised the issue of her mental impairment in her amended Petition for Review. Also, it must be noted that Petitioner made a profound shift in issues from her original Petition for Review, which was based on discrimination and whistleblowing, to her amended Petition, which abandoned these claims and focused on retirement based on her mental impairment. At the second status conference, Petitioner stated that she understood the terms of the agreement but then indicated a certain lack of understanding (Conference transcript, at 9). However, there is nothing in the record to indicate that Petitioner was not capable of making a rational decision to enter into the agreement or that she could not form the intent to so decide. Petitioner was represented by counsel during her negotiations with GAO about the agreement, and her counsel intends to monitor the agreement's execution.

Although the criteria established by this Board in Davis and by the decisions of the MSPB in cases addressing the acceptance of settlement agreements as the basis for dismissal, including those cases in which the employee's mental capacity is in issue, have been largely met in this proceeding, I am going to require a further step to assure that the record has the necessary clarity before an order dismissing the Petitions for Review is issued. The parties, through counsel, are ordered to submit to the Board in

writing, no later than two weeks from the date of this order, answers to the following questions:

1. Do the parties wish the settlement agreement entered into the record of this proceeding?

2. Do the parties wish any additional information about the settlement agreement entered into the record of this proceeding? If so, what is the additional information?

3. Do the parties wish the Board to retain jurisdiction over the agreement in any respect? If so, in what respect?

In addition, Petitioner, through counsel, is ordered to answer in writing, by the same date, the following questions:

1. Does Petitioner understand fully the terms of the settlement agreement? If not, what terms does Petitioner not understand?

2. Does Petitioner contend that her mental impairment affects her capacity to enter into the settlement agreement? If so, how does it affect her capacity?

SO ORDERED.

Date: 12-18-96

/S/
Elliott Bunce
Administrative Judge