



## Birdsong v. Department of Navy

168 F.3d 1320 (1998) | Cited 0 times | Federal Circuit | August 12, 1998

NOTE: Pursuant to Fed. Cir. R. 47.6, this Disposition is not citable as precedent. It is a public record. The Disposition will appear in tables published periodically.

### Decision

Alfred Birdsong (appellant) appeals from a final decision of the Merit Systems Protection Board (Board) that dismissed his appeal for lack of jurisdiction upon finding that appellant breached his last-chance settlement agreement. We affirm.

### Discussion

Appellant was terminated from his federal service employment as a sheet metal mechanic after allegedly breaching his last-chance settlement agreement on August 26, 1996, by using alcohol, being absent without leave, not requesting leave within thirty minutes after the start of his shift, and misrepresenting his status by requesting sick leave. On August 25, 1996, appellant was arrested for driving under the influence of alcohol (DUI) and remained detained when his next work shift began on the morning of August 26. Appellant's wife called forty-five minutes after this shift was to begin to request that he be placed on annual leave. Appellant's wife also called his work location to request that appellant be placed on sick leave for the day. The agency approved Birdsong's sick leave. The agency later learned, however, that appellant was not ill, but detained by the police on a DUI charge. The agency subsequently disapproved the sick leave request and changed his record from sick leave to absent without leave.

In an initial decision, the Administrative Judge dismissed appellant's appeal from his dismissal for lack of jurisdiction because appellant had not made a non-frivolous argument that he had not breached his last-chance settlement agreement. The Administrative Judge found that appellant's arrest for DUI and request for sick leave because of his subsequent detention violated the agreement prohibiting "[a]ny further alcohol-related misconduct or performance problems, or alcohol use as herein described." On appeal, the full Merit Systems Protection Board vacated and remanded the case to the Atlanta Regional Office because the term "alcohol-related misconduct" was ambiguous and could mean all alcohol-related conduct or only that which occurs while the appellant is on-duty.

On remand, the Administrative Judge explored what the parties contemplated in the last-chance agreement concerning appellant's off-duty consumption of alcohol. The Administrative Judge again determined that he did not have jurisdiction to hear the appeal. In looking at the agreement itself,



## Birdsong v. Department of Navy

168 F.3d 1320 (1998) | Cited 0 times | Federal Circuit | August 12, 1998

the Administrative Judge concluded that "[t]he agreement, on its face, proscribed the appellant's ability to drink alcohol off-duty because it prohibited his reporting to work with alcohol in his system and testing positive for alcohol." *Birdsong v. Department of the Navy*, Docket No. AT-0752-97-0047-B-1, slip op. at 5 (MSPB October 31, 1997). In reviewing the appellant's testimony, the Administrative Judge concluded:

Thus, the appellant admitted that the language of the agreement was very broad, covered off-duty misconduct, and covered more than he wanted it to cover. It appears that the appellant's real difficulty with the last-chance agreement concerned the fact that he signed it with the language as broad as it was. Indeed, his testimony at the hearing made it rather clear that he knew exactly what the agency intended for the agreement to cover, but that he believed that the agency had no right to tell him what he could and could not do in his private life. The appellant's belief was unjustified, however. For, the last-chance agreement included a provision that the appellant would be removed if he tested positive for alcohol.

Since the appellant voluntarily waived his appeal rights to the Board when he entered into the agreement, and because he did not make a showing that would bring the appeal within the Board's jurisdiction, his appeal is dismissed for lack of jurisdiction.

*Id.* at 10.

We review the final decision of the Board to determine whether substantial evidence existed to support the determination that appellant breached his last-chance settlement agreement. See 5 U.S.C. § 7703(c) (1994); *Stewart v. United States Postal Serv.*, 926 F.2d 1146, 1148 (Fed. Cir. 1991). Although the interpretation of the last-chance settlement agreement is a question of law, the Administrative Judge considered parole evidence to resolve the ambiguity in the agreement's language. See *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). We agree with the full Board that an ambiguity in the language of the agreement existed allowing the Administrative Judge to consider parole evidence.

In resolving the ambiguity, however, the Administrative Judge assessed the credibility of the witnesses and determined that the agreement encompassed appellant's alcohol use off-duty, which effected him during work. We will not disturb the Administrative Judge's assessment of credibility unless the testimony is inherently improbable or discredited by undisputed evidence or physical fact. Appellant, who has the burden of proof in establishing the Board's jurisdiction, has not shown such inherent improbability of the credibility determinations. See *Manning v. Merit Sys. Protection Bd.*, 742 F.2d 1424, 1427 (Fed. Cir. 1984) (appellant bears burden on jurisdictional issue). Conclusion

For the reasons set forth in this opinion, we affirm the final decision of the Board's dismissal of appellant's appeal for lack of jurisdiction.

