

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

CHRISTOPHER R. CHIN-YOUNG,
Appellant,

DOCKET NUMBER
DC-0752-11-0394-C-3

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: September 29, 2016

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Christopher R. Chin-Young, Alpharetta, Georgia, pro se.

Kyle C. Barrentine, Esquire, Redstone Arsenal, Alabama, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which denied corrective action in his third petition for enforcement of a settlement agreement. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

BACKGROUND

¶2 The agency removed the appellant effective January 18, 2011, based on alleged misconduct. Initial Appeal File (IAF), Tab 6 at 8-12 of 129. He appealed, and, while the appeal was pending, the parties reached a settlement agreement. IAF, Tab 21. Thereafter, the appellant filed a petition for enforcement, which the parties resolved by executing a written modification to the earlier settlement agreement to address certain matters that were not covered in the original agreement. *Chin-Young v. Department of the Army*, MSPB Docket No. DC-0752-11-0394-C-1, Compliance File (CF), Tabs 1, 10. Both agreements have been entered into the record for enforcement purposes. IAF, Tab 22; CF, Tab 11.

¶3 The appellant then filed a second petition for enforcement in which he asserted that the settlement agreement was invalid and that the agency had breached several of its provisions. *Chin-Young v. Department of the Army*, MSPB Docket No. DC-0752-11-0394-C-2, Compliance File (C-2 CF), Tab 1. After the administrative judge denied the petition for enforcement, the appellant petitioned for review. In a final order dated November 13, 2013, the Board found

that the appellant failed to establish that the agreement was invalid. *Chin-Young v. Department of the Army*, MSPB Docket Nos. DC-0752-11-0394-C-1, DC-0752-11-0394-C-2, Final Order (FO) (Nov. 14, 2013). The Board also affirmed the administrative judge's findings that the appellant failed to establish breach.

¶4 Meanwhile, another component of the agency hired the appellant after a competitive selection process. Things did not work out in the new position, and, after a series of progressively severe disciplinary and adverse actions, the agency removed him from the new position effective July 31, 2015, while his second petition for enforcement was pending before the administrative judge and well before the Board issued its final order. The appellant filed an appeal of the new removal action, which is being adjudicated separately and is not at issue in this case.

¶5 While his second removal appeal was pending, the appellant filed a third petition for enforcement in which he again asserted that the settlement agreement was invalid and that the agency breached it in a number of respects. *Chin-Young v. Department of the Army*, MSPB Docket No. DC-0752-11-0394-C-3, Compliance File (C-3 CF), Tab 1. The administrative judge denied the petition for enforcement in its entirety. C-3 CF, Tab 25, Compliance Initial Decision (CID) at 10-18.

¶6 The appellant petitions for review of the compliance initial decision. *Chin-Young v. Department of the Army*, MSPB Docket No. DC-0752-11-0394-C-3, Petition for Review (PFR) File, Tab 1. The agency responds in opposition to the petition for review, and the appellant replies to the agency's response. PFR File, Tabs 3-4.

ANALYSIS

The original appeal was within the Board's jurisdiction.

¶7 The appellant reiterates on review his argument below that the settlement agreement cannot be enforced because the underlying appeal was outside the Board's jurisdiction. PFR File, Tab 1 at 12-13. The issue of Board jurisdiction may be raised at any time during a proceeding. *Morgan v. Department of the Navy*, [28 M.S.P.R. 477](#), 478 (1985). Here, however, the appellant's argument is without merit.

¶8 He appears to concede that his original appeal was an adverse action appealable to the Board under 5 U.S.C. chapter 75. He states, however, that he raised whistleblower reprisal as an affirmative defense to the removal. He alleges that "the AJ decisively moved away from hearing the underlying personnel action that was otherwise appealable, [and] his actions triggered the requirement to exhaust OSC [Office of Special Counsel] remedies." PFR File, Tab 1 at 12-13. Because, when he filed his appeal, 120 days purportedly had not yet passed since he filed a complaint with OSC, he asserts that the exhaustion requirement was not met. Thus, in the appellant's view, the administrative judge, by committing acts that the appellant does not describe, somehow converted the appellant's chapter 75 appeal to an individual right of action (IRA) appeal under [5 U.S.C. § 1221](#) over which the Board lacked jurisdiction. However, it is the appellant, not the administrative judge, who controls whether an otherwise appealable action, such as a removal, is heard as a chapter 75 appeal or an IRA appeal, by making a binding election under [5 U.S.C. § 7121\(g\)](#) to pursue one avenue of redress or the other. The appellant here elected to file a chapter 75 appeal, and, therefore, jurisdictional standards for an IRA appeal do not apply. *Grubb v. Department of the Interior*, [96 M.S.P.R. 377](#), ¶ 14 (2004).

The appellant's challenges to the validity of the settlement agreement are barred by res judicata.

¶9 The appellant reiterates on review his allegations below that the settlement agreement is invalid because it was procured by “fraud in the inducement” and improperly imposed legal obligations on third parties, the Defense Finance and Accounting Services (DFAS) and the Department of Defense. PFR File, Tab 1 at 13-14. He also asserts that the settlement agreement was “not ratified in contract” and that he intended for his signature on the agreement to be conditioned on the agency’s compliance with all of the terms contained therein. *Id.* Further, he avers that the settlement agreement is invalid because it was the product of administrative judge coercion. *Id.* at 5. The actions that the appellant describes are, at worst, aggressive efforts to settle the appeal and a frank assessment of the appellant’s likelihood of prevailing should he not settle. The Board has found that similar statements and actions do not constitute coercion. *Delacruz v. U.S. Postal Service*, [48 M.S.P.R. 424](#), 428 (1991); *Cranfield v. Tennessee Valley Authority*, [44 M.S.P.R. 384](#), 387-88 (1990).

¶10 Moreover, the Board already has considered and rejected the appellant’s assertion that the settlement agreement is invalid. FO at 6-9. Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Encarnado v. Office of Personnel Management*, [116 M.S.P.R. 301](#), ¶ 10 (2011); *Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Encarnado*, [116 M.S.P.R. 301](#), ¶ 10; *Peartree*, 66 M.S.P.R. at 337.

¶11 The Board has explicitly addressed the appellant's arguments concerning fraudulent inducement, the imposition of legal obligations on third parties, and general assertions of bad faith, fraud, and misrepresentation. FO at 6-9. To the extent that any particular allegations of fraud and/or misrepresentation previously have not been before the Board, they are all based on facts that were known to the appellant at the time of his earlier claim of invalidity. Similarly, all of the purported facts surrounding the appellant's coercion claim have been known to him for some years. Thus, even if the appellant has not specifically raised these claims before, he could have and should have raised them along with his other claims that the settlement agreement was invalid. Therefore, these claims are barred by the doctrine of res judicata. *Encarnado*, [116 M.S.P.R. 301](#), ¶¶ 11-12.

The appellant's arguments concerning the Older Workers Benefit Protection Act do not warrant a finding that the settlement agreement is invalid.

¶12 The appellant reiterates on review his argument below that the settlement agreement is unenforceable because it did not contain a proper waiver of his age discrimination claim under the Older Workers Benefit Protection Act of 1990 (OWBPA). PFR File, Tab 1 at 14-15. He alleges that he raised an age discrimination claim by checking the appropriate box on the appeal form he filed with his original appeal. *Id.* at 14. The appellant checked a box indicating that he was raising a claim under [5 U.S.C. § 2302\(b\)\(1\)](#), which covers all forms of discrimination, including race, color, religion, sex, national origin, disability and age. IAF, Tab 1 at 10. There is nothing on the appeal form reflecting that the appellant specifically raised an age discrimination claim as opposed to a claim of discrimination based on any other protected category. Moreover, in the continuation sheet that his attorney submitted with the appeal, the appellant raised claims of race, national origin, and color discrimination, retaliation for prior equal employment opportunity (EEO) activity, and reprisal for whistleblowing, but not age discrimination. *Id.* at 13. The appellant did not raise age discrimination in his prehearing submission, and he did not raise age

discrimination when the administrative judge's memorandum of prehearing conference did not include age discrimination as an issue for the hearing. IAF, Tabs 15, 17. Under the circumstances, we agree with the administrative judge that the appellant did not raise an age discrimination claim and that the OWBPA was not triggered. CID at 8 & n.2. Even if the appellant had properly raised a claim of age discrimination, the fact that the settlement agreement does not contain language required by the OWBPA is not a basis to set aside the entire agreement. Rather, noncompliance with the OWBPA only invalidates the waiver of the age discrimination claim. *Blanding v. U.S. Postal Service*, [121 M.S.P.R. 248](#), ¶ 9 (2014); *Hinton v. Department of Veterans Affairs*, [119 M.S.P.R. 129](#), ¶ 9 (2013). In either case, the appellant's OWBPA claim is without merit.

The appellant has not shown that actions not addressed in the scope of the agreement constituted a breach of the agreement.

¶13 The appellant argues at some length on review that the removal action underlying his original appeal was procedurally flawed and imposed without affording him constitutional due process. PFR File, Tab 1 at 10-12. He also asserts that the administrative judge erred by denying a motion for sanctions in the original appeal. *Id.* at 13. The appellant waived his right to pursue these matters when he settled his appeal. Because the Board has found that the settlement agreement is valid and binding, the appellant's arguments concerning the merits of his underlying appeal and any alleged adjudicatory errors by the administrative judge are no longer cognizable. *Burks v. Department of the Interior*, [84 M.S.P.R. 423](#), ¶ 4 (1999), *aff'd*, 243 F.3d 566 (Fed. Cir. 2000) (Table).

¶14 The appellant also argues that the agency breached the settlement agreement by taking various disciplinary and adverse actions against him beginning in January 2014. PFR File, Tab 1 at 18. However, nothing in the settlement agreement precludes the agency from taking a new adverse action based on new

alleged misconduct. *Moody v. U.S. Postal Service*, [91 M.S.P.R. 319](#), ¶¶ 10-11 (2002); CID at 10.

¶15 The appellant again contends that the agency breached the clean record and nondisclosure provisions of the settlement agreement by retaining documents in its security files and disclosing information in his subsequent EEO cases. PFR File, Tab 1 at 15-16. The Board considered and rejected the agency's alleged retention of documents in its security files in the final order. FO at 11. That issue, therefore, is *res judicata*. Although the Board does not appear to have addressed explicitly the agency's alleged disclosures to the EEO office, the reasoning it employed in the final order regarding the disclosures to the security office are on point. The Board found that the plain language of the settlement agreement required the agency to expunge the appellant's Official Personnel File, but not other agency files. FO at 11. The Board further found that the settlement agreement placed restrictions on the information the agency could provide to prospective employers but did not preclude disclosures to the agency's security office. FO at 10-11. Similarly, the agreement does not prohibit disclosures to the agency's EEO office. IAF, Tab 21 at 3-4, ¶¶ 8-9, 11. Therefore, any retention of documents in the appellant's EEO files or disclosures to the EEO office are beyond the scope of the agreement and do not constitute a breach of the agreement. The same is true of the other entities to which the agency allegedly made improper disclosures to the extent that those disclosures concern the discipline that was resolved by the settlement agreement. PFR File, Tab 1 at 17-22. To the extent that these alleged improper disclosures concern new acts of misconduct occurring after the settlement agreement was executed, there is nothing in the agreement that waives either party's rights as to any potential future misconduct.

The appellant's claims for Permanent Change of Station (PCS) benefits and for waiver of a debt owed to DFAS are without merit.

¶16 In paragraph 20 of the modification to the settlement agreement, the agency promised, to the extent permissible by law, regulation, and agency policy, to request that DFAS waive the indebtedness resulting from the appellant's separation and reinstatement. CF, Tab 10 at 2. The appellant argues on review that the agency has breached the agreement because it has not provided proof that it made any such request of DFAS. PFR File, Tab 1 at 17. In a sworn statement filed in response to the appellant's second petition for enforcement, the agency's representative responded to each allegation of noncompliance, and, as to the DFAS claim, he stated under oath, "The Agency has requested on numerous occasions that DFAS waive financial recoupment wherever possible. DFAS is not within the control of the Agency." C-3 CF, Tab 17 at 16, 19; C-2 CF, Tab 5 at 3, 6. The administrative judge acknowledged that it should have been a simple matter for the agency to submit documentation to corroborate its representative's sworn statement, but he nevertheless found the sworn statement highly credible and ruled that the appellant did not show that the agency failed to request that DFAS waive his indebtedness. *Chin-Young v. Department of the Army*, MSPB Docket No. DC-0752-11-0394-C-2, Initial Decision at 7-8 (June 20, 2012). The appellant previously argued before the Board that the agency representative's sworn statement was insufficient proof that any request was made to DFAS. *Chin-Young v. Department of the Army*, MSPB Docket No. DC-0752-11-0394-C-2, Petition for Review File, Tab 11 at 16-17. The Board rejected the appellant's claim that the administrative judge relied on the agency representative's sworn statement alone, but found that, even if the administrative judge had, a sworn statement from an agency's representative is sufficient to show compliance. FO at 12-13. Therefore, the appellant's claim of noncompliance as to DFAS is res judicata.

¶17 The appellant contends that the agency breached the settlement agreement by failing to pay him PCS benefits relating to his relocation from Georgia to Virginia in 2010. PFR File, Tab 1 16-17; IAF, Tab 21 at 4-5, ¶ 12. The administrative judge found that the agency had in fact paid the appellant some \$40,000 in PCS benefits according to a sworn statement and supporting documents from the agency that itemized the reimbursable amounts. CID at 13; C-3 CF, Tab 17 at 7-13. The appellant's rebuttal, on the other hand, consisted of a list of dollar amounts with no explanation as to what they meant and no documentation to show that they were actually incurred or were incurred for reimbursable expenses. C-3 CF, Tab 4 at 21. The appellant disputes the administrative judge's conclusion, but he does not identify any evidence of record that contradicts her findings and we see no reason to disturb them.

¶18 Accordingly, we find that the administrative judge correctly found that the appellant failed to prove that the agency breached the settlement agreement and she correctly denied corrective action.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS²

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* title 5 of the U.S. Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

² The administrative judge failed to inform the appellant of his mixed-case right to appeal to the Equal Employment Opportunity Commission and/or the United States District Court. This was error, but it does not constitute reversible error, because we notify the appellant of his mixed-case appeal rights in this Final Order. *See* [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#) (as rev. eff. Dec. 27, 2012); *see also* *Caros v. Department of Homeland Security*, [122 M.S.P.R. 231](#), ¶ 25 (2015).

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate U.S. district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

FOR THE BOARD:

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.