

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

KENNETH G. BAYS,  
Appellant,

v.

DEPARTMENT OF THE ARMY,  
Agency.

DOCKET NUMBER  
DC0752920225-I-1

DATE: JUL - 7 1992

Peter B. Broida, Esquire, Cohen, Broida & Associates,  
Arlington, Virginia, for the appellant.

Captain Clay E. Donnigan, Esquire, Washington, D.C., for  
the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision that dismissed his appeal as settled. For the reasons set forth below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

On January 27, 1992, the appellant filed an appeal with the Board's Washington, D.C., Regional Office, asserting that the agency, after effecting his promotion to a WL-10 Heavy Mobile Equipment Leader position on November 10, 1991, improperly cancelled the promotion. See Initial Appeal File (IAF), Tab 1. On March 10, 1992, the appellant's attorney submitted to the administrative judge a written settlement agreement in which the parties agreed, inter alia, that: (1) The appellant would withdraw the appeal; (2) the agency would rescind the cancellation of the promotion and would restore the appellant to the WL-10 position retroactive to November 10, 1991; and (3) the appellant would submit the settlement agreement to the administrative judge "to be entered into the record of this case for continuing jurisdiction of MSPB [the Board] ...." See IAF, Tab 5.

In a March 12, 1992 initial decision, the administrative judge dismissed the appeal pursuant to the settlement agreement. See Initial Decision (ID), IAF, Tab 6. The administrative judge did not enter the agreement into the record for enforcement by the Board, finding that, "[b]ecause the jurisdictional question in this case was never resolved, jurisdiction has not been established." ID at 1-2.

The appellant has timely filed a petition for review of the initial decision, arguing that the administrative judge erred in refusing to enter the settlement agreement into the record for enforcement by the Board on the basis that the

issue of jurisdiction was unresolved. See Petition for Review File, Tab 1. The agency has not responded to the appellant's petition.

#### ANALYSIS

The Board will incorporate a settlement agreement into the record and enforce its terms if the following requirements are met: (1) The parties intended that the agreement be enforced by the Board; (2) the Board has jurisdiction over the appeal; and (3) the agreement is lawful on its face and was freely reached and understood by the parties. See *Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 148-49 (1988); *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981), as modified by *Shaw v. Department of the Navy*, 39 M.S.P.R. 586 (1989). Before dismissing an appeal as settled, the administrative judge must determine whether the settlement agreement is enforceable by the Board under the above criteria. See *Clark v. Department of the Treasury*, 48 M.S.P.R. 330, 333 (1991); *Alvarez v. Department of the Air Force*, 48 M.S.P.R. 309, 311 (1991); *Outterbridge v. U.S. Postal Service*, 47 M.S.P.R. 353, 354 (1991).

Here, the parties expressed their intent, in their settlement agreement, that the agreement be entered into the record and enforced by the Board. The administrative judge therefore should have determined whether the agreement could be enforced by the Board, according to the parties intent, by determining whether the Board has jurisdiction over the appeal and, if so, whether the agreement is lawful on its face and

was freely reached and understood by the parties. Instead, the administrative judge simply found that the agreement could not be enforced by the Board because the issue of jurisdiction had not been resolved. This was error under the circumstances.\* See *Alvarez*, 48 M.S.P.R. at 311-12; *Doebele v. Department of the Treasury*, 46 M.S.P.R. 31, 33-34 (1990).

ORDER

Accordingly, we REMAND this appeal to the regional office. After affording the parties an opportunity to submit relevant evidence and argument, the administrative judge shall determine, under the criteria outlined above, whether the settlement agreement should be incorporated into the record for enforcement by the Board.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.

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This appeal is distinguishable from *Felatti v. Department of the Navy*, 45 M.S.P.R. 33, 35-36 (1990), in which the Board upheld the administrative judge's finding that the parties' settlement agreement could not be entered into the record for enforcement by the Board because the issue of jurisdiction had not been resolved. Unlike the circumstances in the present appeal, the issue of jurisdiction was specifically raised by the administrative judge in *Felatti* before the parties reached the settlement agreement, and they did not object when advised by the administrative judge that their agreement could not be enforced by the Board because the issue of jurisdiction had not been resolved. See *id.* at 35-36.