UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 187

Docket No. AT-0752-08-0669-I-1

Clayton Hazelton,

Appellant,

v.

Department of Veterans Affairs,

Agency.

September 15, 2009

Rebecca Manning, Atlanta, Georgia, for the appellant.

Neil S. Deol, Esquire, Decatur, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued January 14, 2009, that dismissed the appeal as settled. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant's appeal of his removal from his Mail Clerk position culminated in a settlement agreement. Appeal File, Tab 19. The terms of the agreement required the agency, among other things, to change the appellant's removal to a resignation effective May 27, 2008, and also stated that the appellant

agreed that his resignation was knowing, voluntary, and irrevocable. *Id*. The agreement further provided that both parties understood the settlement, that the three-page settlement constituted the entire agreement, that there were no other provisions either express or implied, and that the parties wanted the settlement to be entered into the Board's record for enforcement purposes. *Id*.

¶3 The administrative judge found that the agreement was lawful, and that the parties understood it and entered into it voluntarily. Appeal File, Tab 20. She then accepted the settlement agreement into the record for enforcement purposes and dismissed the appeal as settled. *Id*. The administrative judge also informed the parties that the initial decision dismissing the appeal would become final on January 18, 2009, unless a party filed a petition for review. *Id*.

¶4 On March 11, 2009, the appellant complained to the regional office that the agency misled him about his eligibility for retirement, and that he based his decision to enter into the settlement on the term "retirement." Petition for Review File, Tab 1. The regional office docketed the letter as a petition for enforcement, and the administrative judge ordered the agency to show that it had complied with the terms of the settlement, and provided the appellant with an opportunity to respond to the agency's submission. *Id*. In response, the agency asserted that the settlement did not encompass the appellant's attempt to retire. *Id*. It also submitted evidence regarding its compliance with the settlement. *Id*.

¶5 The appellant, however, asserted that, during settlement negotiations, several agency officials, including Vivian Deloach, a Human Resource Liaison, assured him that he would be able to retire, and that these assurances induced him into entering into the settlement. The appellant further asserted that when he subsequently attempted to retire, he learned that he was not eligible for retirement and reiterated that he would have not entered into the settlement had he known that he was ineligible for retirement. *Id*. The administrative judge, however, did not issue a decision on this matter, and instead forwarded these filings to the

Office of the Clerk of the Board with a notation stating "[p]er Appellant this is not an enforcement it is a PFR." *Id*.

¶6 The appellant then submitted a motion to waive the time limit for filing a petition for review. Petition for Review File, Tab 3. The appellant again asserted that, before signing the settlement, Ms. Deloach told him that he could retire, and that he did not learn that he was ineligible for retirement until March 2009, after the time for filing a petition for review of the initial decision dismissing his appeal as settled had passed. *Id*. The appellant then stated that he filed a complaint with the regional office as soon as he learned that he could not retire, that Ms. Deloach misled him into believing he could retire to induce a settlement, and that he would have not agreed to the settlement had he known that he was ineligible for retirement. *Id*.

¶7 In its response, the agency asserts that the appellant's petition is untimely and that it fails to meet the criteria for granting review, in any event. Petition for Review File, Tab 5. The agency argues that the settlement is silent regarding the appellant's eligibility for retirement, and that the appellant's mere allegation that the agency improperly induced him into entering the settlement does meet the heavy burden required to invalidate a settlement. *Id*.

ANALYSIS

¶8 An attack on the validity of a settlement agreement must be made in the form of a petition for review of the initial decision dismissing the case as settled. *See Armstrong v. Department of the Treasury*, 110 M.S.P.R. 533, ¶ 10 (2009). Generally, a petition for review must be filed within 35 days after the issuance of the initial decision, or, if the petitioner shows that he received the initial decision more than 5 days after the date of issuance, within 30 days after the date he received the initial decision. 5 C.F.R. § 1201.114(d); *Armstrong*, 110 M.S.P.R. 533, ¶ 10.

¶9 Here, the initial decision dismissing the appeal as settled was issued on January 14, 2009, and the appellant was required to have filed his petition for review by February 18, 2009.[1] Appeal File, Tab 20; Petition for Review File, Tab 2. The appellant filed his complaint regarding the settlement with the regional office on March 11, 2009, and the regional office received it on March 17, 2009. Petition for Review File, Tab 1. Because this complaint unmistakably challenged the validity of the settlement, it is proper to consider it as a petition for review of the initial decision dismissing the appeal as settled and it is deemed to have been filed on the date it was received in the regional office. *Armstrong*, 110 M.S.P.R. 533, ¶ 10; *Hawley v. Social Security Administration*, 108 M.S.P.R. 587, ¶ 4 (2008). The petition is, therefore, untimely by 27 days.

¶10 The Board will waive the time limit for the filing of a petition for review only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the untimely filing of a petition for review, the appellant must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See Armstrong*, 110 M.S.P.R. 533, ¶ 11. Here, the appellant has shown that he acted with due diligence once he learned that he was ineligible for retirement and, therefore, believed that the settlement was invalid. Specifically, the appellant claims that he learned that he was ineligible for retirement in early March 2009, and has submitted evidence showing that he filed his challenge to the settlement's validity on March 11, 2009. Petition for Review File, Tab 1, Tab 3.

¶11 As discussed above, the appellant asserts that the agency misled him regarding his eligibility for retirement to induce him into entering into the settlement agreement, and that he did not discover this misrepresentation until he attempted to retire after entering into the settlement. Petition for Review File,

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[1] The initial decision incorrectly stated that it would become final on January 18, 2009, unless a party filed a petition for review. Appeal File, Tab 20 at 2.

Tab 1. Events transpiring after a purported settlement agreement can cast doubt on its validity. *See DeLoach v. Department of the Air Force*, 108 M.S.P.R. 485, ¶ 11 (2008). Further, a settlement agreement may be invalid if a party to the agreement subsequently shows that the agreement was based on fraud or misrepresentation by the agency. *See Armstrong* 110 M.S.P.R. 533, ¶ 12; *Hamilton v. Department of Veterans Affairs*, 92 M.S.P.R. 467, ¶ 19 (2002). A showing that a reasonable person would have been misled by the agency's statements is sufficient to show misrepresentation. *Armstrong*, 110 M.S.P.R. 533, ¶ 12; *Hamilton*, 92 M.S.P.R. 467, ¶ 19.

¶12 We find that the appellant's petition constitutes a nonfrivolous allegation of facts that, if proven, could establish that the agency misrepresented his eligibility for retirement, thereby misleading him into entering the settlement. Specifically, the appellant has alleged that he discussed the issue of his retirement eligibility with an agency human resource specialist and with the agency representative, that they told him that he was eligible to retire before he entered into the settlement, that he entered into the settlement based upon that understanding, and that he was later denied the retirement he sought. Petition for Review File, Tab 1. These claims are more than bare allegations that would be insufficient to set aside a settlement. *See Lasker v. Department of Justice*, 74 M.S.P.R. 189, 191 (1997); *Jardine v. U.S. Postal Service*, 68 M.S.P.R. 544, 547 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table). We also note that the agency has not disputed the appellant's account of the discussions at issue, and argues only that the terms of the settlement do not address the appellant's retirement and that it carried out its obligations under the settlement. Petition for Review File, Tab 5. We find that these circumstances warrant findings that good cause exists for waiving the petition for review filing time limit, and that further adjudication is required to determine whether the settlement is invalid and should

be set aside.[2] *See Brown v. Department of the Army*, 108 M.S.P.R. 90, ¶¶ 9-11 (2008); *Hamilton*, 92 M.S.P.R. 467, ¶¶ 21-22.

ORDER

¶13 We, therefore, REMAND this appeal for further adjudication consistent with this Opinion and Order, including a hearing if necessary, to determine whether the settlement agreement should be set aside as invalid. See Brown, 108 M.S.P.R. 90, ¶ 11.

FOR THE BOARD:

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

[2] To the extent that *Armstrong*, 110 M.S.P.R. 533, ¶ 11, suggests that, to establish good cause for the untimely filing of a petition for review of an initial decision dismissing an appeal as settled, the appellant must provide actual proof that the settlement agreement is invalid, we hereby clarify our holding in that case and find that an appellant may establish good cause for the untimely filing of a petition for review of an initial decision dismissing an appeal as settled by raising a nonfrivolous allegation that the settlement agreement is invalid.