

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

2010 MSPB 250

Docket No. DA-0752-02-0325-I-1

**Misty L. Wofford,
Appellant,**

v.

**Department of Justice,¹
Agency.**

December 23, 2010

Misty L. Wofford, Norfolk, Virginia, pro se.

William J. Flynn, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her removal appeal pursuant to the parties' execution of a June 18,

¹ The appellant was employed by the Department of Justice (DOJ), Immigration and Naturalization Service (INS). Initial Appeal File (IAF), Tab 1. Congress abolished the INS, and in 2003, the Department of Homeland Security (DHS) took over the functions and responsibilities of the INS concerning immigration enforcement. *See Doe v. Department of Justice*, [95 M.S.P.R. 198](#) n.2 (2003). It is the Board's practice not to recaption a case such as this to list DHS as the responding agency; the term "agency" in this Opinion and Order refers to the INS, both as it existed prior to the transfer and as it exists today as a component of DHS. *Id.*

2002 settlement agreement. For the reasons set forth below, we DENY the petition, finding that the appellant has failed to establish any basis for setting aside the settlement agreement as invalid.

BACKGROUND

¶2 The appellant filed a Board appeal challenging her removal from her Immigration Enforcement Agent position and alleging disability discrimination. IAF, Tab 1 at 1, 4-5 and Exs. A-B, Tab 4, subtab 4A. On June 18, 2002, the parties executed a settlement agreement and submitted a copy to the Board for enforcement purposes. IAF, Tab 15. In pertinent part, the appellant agreed to resign and to dismiss all claims she may have had against the agency arising from her employment in exchange for the agency's agreement to purge any and all negative information from files it maintained concerning the appellant

Including, but not limited to any and all discipline matters (actual and proposed), all documents, notations, exhibits, statements, findings of fact, memoranda and files concerning any and all investigations, management inquiries and other examinations of [the appellant's] conduct (including the investigation conducted by . . . the Office of Internal Audit).

Id. at 1-3.

¶3 On June 21, 2002, the administrative judge issued an initial decision dismissing the appeal. Initial Decision (ID) at 2. She found that: (1) the Board has jurisdiction over the removal appeal; (2) the parties freely entered into a settlement agreement that appeared lawful on its face and reflected the parties' understanding of the terms; and (3) based upon the parties' submission of the agreement for enforcement purposes, the Board retained enforcement authority over the agreement. ID at 1-2.

¶4 On September 25, 2009, the appellant filed a petition for enforcement, MSPB Docket No. DA-0752-02-0325-C-1 (Compliance File), Tab 1, alleging that the agency breached the settlement agreement by failing to purge negative information about her from the litigation database and the Internal Audit case

report.² She alleged that she discovered this breach when she received certain documents, apparently in conjunction with a United States District Court case. Compliance File, Tab 1 at 1-2 and Ex. 1; *see* Petition for Review (PFR) File, Tab 7, Ex. 3.

¶5 On February 26, 2010, the appellant filed a petition for review of the 2002 initial decision.³ PFR File, Tab 1. She contended that the agency's January 2010 pre-hearing submission and accompanying motion to dismiss in the compliance matter⁴ demonstrate that the agency did not purge negative information about her from its litigation database or from the Internal Audit case report in its Office of Investigations file, and that this shows that, at the time the agency entered the settlement agreement, the agency did not intend to perform its obligations under the agreement. *Id.* at 4-12. The agency responded in opposition. PFR File, Tabs 6-7.

ANALYSIS

¶6 A settlement agreement is a contract between the parties and its terms are to be interpreted as a question of contract law. *LaMontagne v. U.S. Postal Service*, [91 M.S.P.R. 304](#), ¶ 6 (2002). An appellant may challenge the validity of

² The appellant's compliance matter will be adjudicated in a separate decision.

³ We note that the appellant filed her petition for review more than 7 years after the July 26, 2002 filing deadline. *See* PFR File, Tab 1; ID at 2; [5 C.F.R. § 1201.114\(d\)](#). She argues that pursuant to *Armstrong v. Department of the Treasury*, [591 F.3d 1358](#) (Fed. Cir. 2010), the Board should waive the filing deadline for good cause shown based upon her discovery of new evidence that the settlement agreement resulted from fraud. PFR File, Tabs 1, 3. Because we deny the petition for review on the merits, the Board does not reach the timeliness issue.

⁴ We note that the appellant has not submitted copies of the agency's motion to dismiss and pre-hearing submissions from the compliance matter because the documents are already part of the record in the compliance case. PFR File, Tab 1 at 12. The Board may take official notice of matters that can be verified, including documents or actions in other Board appeals. *Moore v. Department of Justice*, [112 M.S.P.R. 382](#), ¶ 20 n.6 (2009); *see* [5 C.F.R. § 1201.64](#).

a settlement agreement if she believes it was unlawful, involuntary, or the result of fraud or mutual mistake. *Bahrke v. U.S. Postal Service*, [98 M.S.P.R. 513](#), ¶ 11 (2005). Even if invalidity was not apparent at the time of settlement, the agreement must be set aside if it is subsequently shown by new evidence that the agreement was tainted with invalidity by fraud or misrepresentation. *Henson v. Department of the Treasury*, [86 M.S.P.R. 221](#), ¶ 7 (2000). However, the party challenging the validity of a settlement agreement bears a heavy burden of showing a basis for invalidation. *Bahrke*, [98 M.S.P.R. 513](#), ¶ 11.

¶7 “Fraud in the inducement” is defined as “occurring when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved; an intentional misrepresentation of a material risk or duty reasonably relied on, thereby injuring the other party without vitiating the contract itself.” Black’s Law Dictionary 671 (7th Ed. 1999). To establish that a settlement agreement resulted from fraud in the inducement, the appellant must show that the agency knowingly concealed a material fact or intentionally misled her. *See Armstrong v. Department of Transportation*, [115 M.S.P.R. 1](#), ¶ 7 (2010).

¶8 Here, the appellant contends that the agency’s pre-hearing submission and the accompanying motion to dismiss in the compliance matter demonstrate that the agency did not purge negative information about her from its files, which thereby shows that

the agency did, knowingly, as well as intentionally, conceal and/or misrepresent the material fact that its actual intention . . . at the time of the negotiations, as well as at the time when the agreement was executed, was to retain and/or preserve these same referenced documents and/or records on a long term basis in the agency’s files which are described and/or identified by the agency as being a litigation database, as well as an Office of Investigation[s] file. . . . [T]he agency intentionally deceived the appellant by using all of the elements of fraud. . . . It is clearly established, therefore, that any reasonable person would have been misled given the fact that the agency falsely indicated that a meeting of the minds existed between

the parties when the agency did, on June 18, 2002, execute the parties['] MSPB settlement agreement. . . . Further, the agency did fraudulently induce appellant to enter into this same referenced MSPB settlement agreement as a result of the agency's deceitful and misleading conduct in the negotiations, as well as in the execution of the parties['] MSPB settlement agreement dated June 18, 2002.

PFR File, Tab 1 at 4-6. However, the mere fact that the agency did not purge negative information about the appellant from its files and, thus, may have breached the settlement agreement,⁵ is insufficient on its own to establish that the agency never intended to purge the files and that it knowingly concealed a material fact or intentionally misled her. *See id.* at 5, 7-10; *Armstrong*, [115 M.S.P.R. 1](#), ¶ 7. There is no evidence to support the appellant's bare assertions that the agreement resulted from fraud or that any other basis exists for invalidating the agreement. *See* PFR File, Tab 1; Compliance File, Tab 1 at 2 and Ex. 1, Tab 18; *Lasker v. Department of Justice*, [74 M.S.P.R. 189](#), 191 (1997); *Hoffman v. Department of the Navy*, [71 M.S.P.R. 484](#), 486 (1996). Thus, the appellant has failed to establish that the settlement agreement is invalid and we DENY her petition for review.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

⁵ Here, we do not make findings on whether the agency in fact violated the terms of the settlement agreement, and if so, whether such breach was material. Those issues will be addressed in the appellant's compliance matter, MSPB Docket No. DA-0752-02-0325-C-1.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 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 court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991). If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se

Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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