

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

THOMAS A. FALLON,
Appellant,

DOCKET NUMBER
PH-0752-12-0011-I-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: September 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL *

James G. Noucas, Jr., Esquire, Portsmouth, New Hampshire, for the
appellant.

Penny C. Colomb, Portsmouth, New Hampshire, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge that dismissed his appeal of a removal action taken pursuant to a last-chance agreement (LCA)

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

for lack of jurisdiction. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

An LCA is a settlement agreement, which is a contract. *Black v. Department of Transportation*, [116 M.S.P.R. 87](#), ¶ 16 (2011). A party challenging the validity of a settlement agreement bears a heavy burden of showing a basis for invalidation. *Id.* An appellant may prove that an LCA, including its waiver of appeal rights provision, is invalid and thereby establish Board jurisdiction over his appeal by showing that the agreement is unlawful, involuntary, or the result of fraud or mutual mistake. *Id.*

In his petition for review, the appellant argues, as he did below, that the LCA is invalid because: (1) the agency did not fully inform him of his disability retirement rights or his rights under the Family Medical Leave Act (FMLA) when it issued its April 25, 2011 decision to separate, Petition for Review (PFR) File, at 7-8; (2) the April 25, 2011 decision to separate was defective and void, *id.* at 8; (3) the performance appraisal process upon which the agency based the April 25, 2011 decision to separate was defective and void, *id.* at 8-9; (4) the performance standards in place when the agency issued its April 25, 2011 decision to separate were invalid, *id.* at 9; and (5) the agency discriminated against him based on disability when it failed to accommodate him prior to the separation proceedings, *id.* at 9-10. All of these arguments, however, relate to the merits of the April 25, 2011 decision to separate, rather than the validity of the LCA. By freely signing the waiver of all appeal rights contained in the LCA, including his right to appeal to the Board, Initial Appeal File (IAF), Tab 7 at 26, the appellant waived his right to appeal any aspect of the underlying agency action, including his right to assert any affirmative defenses, *see Martin v. Department of Defense*, [70 M.S.P.R. 653, 657](#) (1996).

To the extent that the appellant argues that he did not enter into the LCA voluntarily because he was not fully informed of his disability retirement rights and his rights under the FMLA at the time he signed the LCA, we find that his argument is without merit. To establish that a settlement agreement was fraudulent as a result of coercion or duress, a party must prove that he involuntarily accepted the other party's terms, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts. *Bahrke v. U.S. Postal Service*, [98 M.S.P.R. 513](#), ¶ 12 (2005). In determining whether an appellant voluntarily entered into a settlement agreement, the Board will also consider such factors as whether the appellant was represented, mentally impaired, or otherwise unable to understand the nature of the settlement agreement. *Swidecki v. U.S. Postal Service*, [101 M.S.P.R. 110](#), ¶ 17, *review dismissed*, 182 F. App'x 992 (Fed. Cir. 2006). The fact that an appellant must choose between two unpleasant alternatives, such as signing the settlement agreement or facing immediate removal, does not render his choice involuntary. *Bahrke*, [98 M.S.P.R. 513](#), ¶ 12.

Here, the appellant has not set forth any facts that would support a finding that his entering into the LCA was anything other than a voluntary act. First, with respect to the appellant's argument regarding his disability retirement rights, when the appellant signed the LCA, he faced the same fundamental choice between being removed for poor performance or having another opportunity to perform satisfactorily in a different position, regardless of whether he knew he could apply for disability retirement. Contrary to the appellant's assertion below, *see* IAF, Tab 6 at 7, disability retirement was not an alternative to removal. Even assuming that the agency was required to notify the appellant of his right to apply for disability benefits as he alleged, the agency still would have effected his removal had he not entered into the LCA. *Id.* at 37. The appellant then would have had up to 1 year to apply for disability retirement. [5 C.F.R. § 831.1203](#)(a)(5). Second, with respect to his claim regarding his rights under the

FMLA, the appellant's removal was based on performance, not leave, IAF, Tab 6 at 34, and he has failed to allege how proper notice of those rights would have altered his decision to enter into the LCA. Therefore, the alleged lack of notice of his disability retirement and FMLA rights does not in any way negate the appellant's voluntary choice to sign the LCA rather than be removed. *See Bahrke*, [98 M.S.P.R. 513](#), ¶ 12.

Moreover, as noted by the administrative judge, the agency asserted, and the appellant does not dispute, that the appellant was advised by his exclusive representative, his union, over a 6-week period during the course of negotiating the LCA. IAF, Tab 10, Initial Decision at 4; IAF, Tab 7 at 1-2. During these negotiations, the appellant and his representative made comments, suggestions, and recommendations to the proposed draft of the LCA. IAF, Tab 7 at 1-2. Therefore, the appellant cannot show, nor does he argue, that he did not understand the nature of the LCA. In addition, to the extent that the appellant argues that his union representative should have prevented him from signing the agreement because of the alleged deficiencies of the April 25, 2011 decision to separate, the Board has consistently held that the appellant is responsible for the errors of his chosen representative. *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981).

Therefore, because the appellant failed to make a nonfrivolous allegation that that the agreement is unlawful, involuntary, or the result of fraud or mutual mistake, the administrative judge correctly determined that the appellant has no right to a jurisdictional hearing. *See Pawlowski v. Department of Veterans Affairs*, [96 M.S.P.R. 353](#), ¶ 18 (2004).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is the Board's final decision.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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.