

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

KENNETH RAY KENT,
Appellant,

DOCKET NUMBER
AT-0752-10-0652-B-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: September 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Kenneth Ray Kent, Atlanta, Georgia, pro se.

Major Robert E. Beyler and Scott A. Van Schoyck, Dobbins Air Reserve
Base, Georgia, 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. We grant petitions such as this one only when significant new evidence is presented to us

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

The administrative judge issued the initial decision on January 11, 2012, dismissing this appeal as settled, and informed the appellant that a petition for review must be filed by February 15, 2012. Remand Appeal File, Tab 15. The appellant filed his petition for review in an envelope postmarked February 16, 2012. Remand Petition for Review (RPFR) File, Tab 1. The Clerk informed the appellant that a petition must be filed within 35 days of the date of the initial decision or within 30 days of receipt of the petition and afforded the appellant the opportunity to file a motion to accept the filing as timely, and/or to waive the time limit for good cause. RPFR File, Tab 2. The appellant responded, stating in a sworn affidavit that he received the initial decision on January 17, 2012, and thus his petition, filed on February 16, 2012, was filed within 30 days of receipt of the initial decision and was thus timely. RPFR File, Tab 3.

Nothing in the record indicates that the appellant registered as an e-filer. Thus, there is no basis to examine whether the initial decision was deemed received by electronic filing. See [5 C.F.R. § 1201.14\(m\)\(2\)](#); *Terrell v. U.S. Postal Service*, [114 M.S.P.R. 38](#) (2010) (MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission). The affidavit that the appellant submitted in response to the Clerk's show-cause order establishes that the appellant did not receive the administrative judge's initial decision until January 17, 2012. Also, January 16, 2012, the 5th day after the initial decision was mailed was the Martin Luther King, Jr. holiday. Thus, the affidavit and the fact that the 5th day after the mailing date of the initial decision was a holiday, taken together and in the absence of any rebuttal from the agency,

establish that the appellant timely filed his petition. *See McDaniel v. U.S. Postal Service*, [43 M.S.P.R. 583](#) (1990).

In his petition, the appellant states that he entered the settlement agreement under duress because he did not have an attorney to review the agreement and he had no income for more than a year. RPF File, Tab 1. He also asserts that during settlement negotiations, he asked to be separated by reduction in force (RIF), but the agency denied that any RIF was taking place. *Id.* He states that he learned on the day after he signed the agreement that the agency was undergoing a RIF and was offering “reduction packages” of \$25,000. *Id.* Finally, he asserts that the administrative judge would not let him have time to consult with anyone regarding the settlement. *Id.*

The appellant’s assertion that he did not have an attorney and that he had no income for a year suggests that he entered into the settlement agreement because of financial hardship. However, financial hardship is an insufficient reason to set aside a settlement agreement. *Asberry v. United States Postal Service*, [692 F.2d 1378](#) (Fed. Cir. 1982). As the court stated in *Asberry*, “every loss of employment entails financial hardship. If that alone were sufficient to establish economic duress, no settlement involving it would ever be free from attack.” *Id.*

The appellant’s assertion that he learned that the agency was conducting a RIF after he signed the agreement appears to be an argument that the agency engaged in fraud in inducing the settlement without telling him about the RIF. 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 him. *See Armstrong v. Department of the Treasury*, [115 M.S.P.R. 1](#), ¶ 7 (2010), *aff’d*, 438 F. App’x 903 (Fed. Cir. 2011).

In its response to the petition for review, the agency indicates that there was no RIF action in the area of the agency where the appellant worked on the effective date of his removal, April 16, 2010, which preceded the

January 10, 2012 settlement agreement by about 21 months, or up to the date of the response and that the agency did not have the authority to change the appellant's SF-50 to indicate that he was removed or resigned due to a RIF. RPF File, Tab 4. The appellant has not shown that any RIF action was occurring in his area of the agency as of the date of his removal. That date would have remained the appellant's separation date under the settlement agreement. Further, the appellant has not established that whether the agency was conducting a RIF was a material fact. He has not shown that, if the agency had revealed facts regarding the alleged RIF, he would not have entered into the settlement, which the agency states coincidentally provided the appellant with the same cash amount as the appellant alleges was being awarded in the RIF.

The appellant also appears to assert that actions by the administrative judge coerced the settlement agreement. To establish that a settlement was fraudulent as a result of coercion by the administrative judge, a party must prove that he involuntarily accepted the terms, that circumstances permitted no alternative, and that such circumstances were the result of the administrative judge's coercive acts. *Thomas v. U.S. Postal Service*, [87 M.S.P.R. 512](#), ¶ 6 (2001). Even considering the appellant's allegation that the administrative judge encouraged the settlement, the appellant remained free to refuse to sign the settlement agreement and insist on a ruling by the administrative judge concerning whether the agency's removal action violated his due process rights. Furthermore, other than the appellant's unsworn and uncorroborated allegations regarding the administrative judge's involvement in the settlement process, the appellant did not present evidence to show that the administrative judge engaged in coercive acts. *See Anderson v. Environmental Protection Agency*, [81 M.S.P.R. 618](#), 619 (1999) (to prove an allegation that she was coerced by the administrative judge, the appellant must present evidence that she involuntarily accepted the other party's terms, that circumstances permitted no other alternative, and that the circumstances resulted from the administrative judge's coercive acts).

In sum, the appellant has not established that the settlement agreement was the result of fraud committed by the agency or coercion exerted by the administrative judge.

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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

**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.