UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANK KENYATTA NELSON, Appellant,	DOCKET NUMBER AT-0752-11-0923-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: December 4, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Chungsoo J. Lee, Feasterville, Pennsylvania, for the appellant.

Randle Smith, Esquire, Atlanta, 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case asking us to reconsider the initial decision issued by the administrative judge, which dismissed the appeal as withdrawn. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).[2] After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. 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).

The agency removed the appellant on a charge of Unacceptable Conduct because he allegedly engaged in a physical altercation with a coworker in the workplace. Initial Appeal File (IAF), Tab 4, Subtab 4A. The appellant filed an appeal of the removal. *Id.*, Tab 1. The record reflects that the appellant subsequently requested to withdraw his appeal during a scheduled telephonic close of record conference so that he could go forward with arbitration on an existing grievance regarding the removal. *Id.*, Tab 14. The administrative judge granted the appellant's request and dismissed the appeal as withdrawn. *Id.*, Tab 15.

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[2] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

In his petition for review,[3] the appellant now contends that he withdrew his appeal because of erroneous and misleading statements made by the administrative judge during an improper ex parte communication prior to the close of record conference. Petition for Review (PFR) File, Tab 2 at 7-8. Specifically, the appellant alleges that the administrative judge instilled fear in him that the Board would rule in favor of the agency and sustain the removal action, thus jeopardizing the pending grievance procedure and forever barring him from any future federal employment. *Id.*

An appellant's withdrawal of an appeal is an act of finality, and, absent unusual circumstances, such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn. *Lincoln v. U.S. Postal Service*, 113 M.S.P.R. 486, ¶¶ 7-8 (2010). A voluntary withdrawal must be clear, decisive, and unequivocal, and where the appellant raises a genuine question of fact as to whether he made a clear, decisive, or unequivocal act to relinquish his right to appeal, the Board, in the interest of justice, may vacate an initial decision dismissing an appeal as withdrawn and remand it for adjudication. *Rosso v. Department of Homeland Security*, 113 M.S.P.R. 271, ¶ 9 (2010). Thus, in some circumstances, the Board may relieve an appellant of the consequence of his decision to withdraw an appeal by finding that the withdrawal was involuntary because it was based on misinformation. *Mueller v. Office of Personnel Management*, 77 M.S.P.R. 639, 640-41 (1998).

Here, the record reflects that the appellant unequivocally expressed his intent to withdraw during a status conference on November 21, 2011, in order to pursue his grievance to arbitration. IAF, Tab 14. The appellant has not shown on

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[3] Although the appellant's January 9, 2012 petition for review appeared to be untimely filed, we find his representative's declaration under penalty of perjury that he timely mailed the submission to the Board and to the agency on December 27, 2011, combined with the agency's receipt of the submission on January 3, 2012, sufficient to establish its timely filing. *See Fisher v. Department of Defense*, 59 M.S.P.R. 165, 169 (1993).

review that this decision was involuntary due to misinformation. In particular, the record shows that the administrative judge correctly advised the appellant that that he would lose his grievance-arbitration rights if he received a decision from the Board on the merits of his appeal. *See Hall v. U.S. Postal Service*, 26 M.S.P.R. 233, 236 (1985) (although the right of preference eligible employees to appeal to the Board cannot be limited by a collective bargaining agreement, it may provide that once an appeal to the Board is initiated, the right to elect the grievance procedure under the agreement is waived); PFR, Tab 2, Exhibit (Ex.) P, ¶¶ 5, 11. The initial decision and the recording of the status conference establish that the appellant voluntarily requested to withdraw his appeal for a valid reason, i.e., to avoid waiving his right to go to arbitration on his union grievance. IAF, Tabs 14, 15. Thus, the record evidence contradicts the appellant's factual assertions on review that his withdrawal was based on misinformation from the administrative judge that he was likely to lose his appeal, and not his desire to preserve his right to go to arbitration.

In addition, the appellant has not created a genuine issue that his withdrawal should be deemed involuntary because the administrative judge misinformed him that he would most likely lose his appeal on the merits. PFR, Tab 2, Ex. P, ¶¶ 4-5. The appellant primarily argues that the administrative judge's statements indicated that he had made up his mind prematurely and without considering all of the evidence. *Id.*, ¶ 14. However, the record only shows that the administrative judge provided the appellant with a frank assessment of the case during ex parte settlement discussions. Indeed, the appellant's affidavit specifically states that the administrative judge "explained during the ex-parte communication with me on Nov. 22, 2011 that based on the available evidence and the submitted statements he had, I was more likely than not to be found guilty of improper conduct . . . ." *Id.*, ¶ 4. The Board does not find that such measured statements on the merits of an appeal made during ex parte settlement communications constitutes evidence of improper bias or

prejudgment by an administrative judge. *See Pfefferkorn v. Department Justice*, 57 M.S.P.R. 658, 660 (1993) (an administrative judge may make an honest appraisal of a party's likelihood of success if the party elects to pursue adjudication). Therefore, the appellant has not shown that his withdrawal was involuntary because the administrative judge gave him an honest appraisal of his likelihood of success on appeal.

Accordingly, we find that the administrative judge did not err in dismissing the appeal as withdrawn. Furthermore, the appellant's allegation on review that his ex parte communications with the administrative judge were improper does not provide a basis for relief. Parties may agree to waive the prohibitions against ex parte communications during settlement discussions.[4] 5 C.F.R. § 1201.41(c)(1). In the absence of such a waiver, settlement discussions between an appellant and the administrative judge, without the presence of the agency's representative, constitute impermissible ex parte communications, which we analyze as an adjudicatory error. *See Young v. Department of Veterans Affairs*, 83 M.S.P.R. 187, ¶¶ 8-9 (1999). However, an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Here, even if we assume that the agency did not waive objection to the appellant's ex parte settlement discussions with the administrative judge, the appellant has failed to prove that his substantive rights were adversely affected by the exclusion of the agency's representative from the settlement negotiations.

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[4] We note that the ex parte settlement discussion occurred at the time of the scheduled close of record conference, while the agency's representative was temporarily unavailable. PFR File, Tab 3, Ex. P. In addition, the record shows that the administrative judge had informed the parties of his intent to discuss settlement with them and had previously discussed settlement during an earlier status conference. IAF, Tabs 8, 12. Shortly after the ex parte communications, the administrative judge conducted the close of record conference with the parties in which the appellant withdrew his appeal. *Id.*, Tabs 14, 15.

Indeed, the appellant asserts in his affidavit that during an earlier status conference, in which the agency's representative participated, he felt that he "was doomed from the outset and would be found guilty as charged" based upon the administrative judge's statements regarding the status of the evidence. PFR File, Tab 3, Ex. P, ¶¶ 7-8. Therefore, the appellant has not shown that this adjudicatory error was harmful.

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:

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William D. Spencer
Clerk of the Board

Washington, D.C.