

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

MICHAEL J. STARANOWICZ,  
Appellant,

DOCKET NUMBER  
PH-1221-12-0039-W-1

v.

DEPARTMENT OF THE TREASURY,  
Agency.

DATE: January 30, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Michael J. Staranowicz, Philadelphia, Pennsylvania, pro se.

Parker E. Thoeni, Esquire, Washington, D.C., 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. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).<sup>2</sup> 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. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

In the proceeding below, the appellant claimed that the agency took certain personnel actions against him because of his whistleblowing.<sup>3</sup> In his initial decision, the administrative judge first found that, to the extent the appellant was appealing his removal in his individual right of action (IRA) appeal, it was barred by *res judicata*. Initial Decision (ID) at 3-4. The Board has held that an individual who appeals his removal directly to the Board is barred by *res judicata*

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<sup>2</sup> 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.

<sup>3</sup> In a previous settlement agreement reached between the appellant and his former employer, the Internal Revenue Service's Small Business/Self-Employed (SB/SE) Division, during the Board appeal of the appellant's removal, the appellant agreed to settle his equal employment opportunity (EEO) complaint, the Board appeal, and "any and all other pending complaints, charges, grievances, and appeals of any kind pending by the Appellant against the Agency in any other forum, with the sole exception of the Appellant's pending complaint with the Office of Special Counsel (OSC) against the Treasury Inspector General for Tax Administration (TIGTA)." The appellant agreed to release "the Agency" from any claims or liability relating to the appellant's employment up to and including the execution of the agreement. After OSC issued its closure letter, the appellant filed the instant appeal.

from bringing, after exhausting his administrative remedies, a second whistleblower appeal challenging the same removal action. *See Sabersky v. Department of Justice*, [91 M.S.P.R. 210](#), ¶¶ 2-3, 7-8 (2002), *aff'd*, 61 F. App'x 676 (Fed. Cir. 2003). This is true even when the first appeal is resolved by settlement. *Ford-Clifton v. Department of Veterans Affairs*, [661 F.3d 655](#), 660-61 (Fed. Cir. 2011). However, res judicata is a basis to dismiss an appeal over which the Board has jurisdiction, *Roesel v. Peace Corps*, [111 M.S.P.R. 366](#), ¶ 13 (2009), and the administrative judge in this case made no finding that the Board had jurisdiction over this IRA appeal.

We need not address, however, whether the appellant's IRA appeal against the SB/SE Division is barred by res judicata because the terms of the settlement agreement preclude such an appeal. *See Ford-Clifton*, 661 F.3d at 661 (holding that a dismissal of a second appeal following a settlement of a prior appeal could, in addition to res judicata, be characterized in terms of a waiver under a settlement agreement). In construing the terms of a settlement agreement, the words of the agreement are of paramount importance. *E.g., Flores v. U.S. Postal Service*, [115 M.S.P.R. 189](#), ¶ 10 (2010). Here, the agreement indicates that the term "agency" refers to the "Department of the Treasury (Internal Revenue Service, Small-Business/Self-Employed Division, Philadelphia, PA)." Initial Appeal File (IAF), Tab 6, Subtab 2 at 1. The appellant and the "agency" agreed to settle the Board appeal and "any and all other pending complaints, charges, grievances, and appeals of any kind pending by the Appellant against *the Agency* in any other forum . . . ." *Id.* (emphasis added). The agreement also provided that the appellant released "the Agency" from any claims or liability relating to his employment up to and including the execution of the agreement. *Id.* at 2. By contrast, the parties agreed that the only matter not settled was the appellant's pending complaint with OSC "against the Treasury Inspector General for Tax Administration (TIGTA)." *Id.* at 1. Because the appellant's OSC complaint was pending at the time of the agreement against the SB/SE Division, the agreement

provided that that complaint was settled and the “agency” was released from liability relating to that complaint. Giving effect to the parties’ intent in using different words in the settlement agreement, i.e., “agency” as opposed to “TIGTA,” we find that any claims in the IRA appeal against the “agency,” including the appellant’s removal and suspension, are barred by the settlement agreement.

Even if these provisions of the agreement were found to be ambiguous, the Board has held that, when there is a latent ambiguity, which is an ambiguity that is not glaring, substantial, or patently obvious, the ambiguous term is construed against the drafter of the contract if the nondrafter’s interpretation is reasonable. *See Bables v. Department of the Army*, [86 M.S.P.R. 171](#), ¶ 14 (2000).

Here, the applicable settlement language was drafted and included by the appellant’s representative. IAF, Tab 5 at 80, 82, 84-85, 91-92. The appellant’s representative wrote to the appellant and notified him that “¶ 2.D of the Agreement (page 2) refers to TIGTA,” that “[t]he language, as written, would require you to drop your pending OSC complaint against TIGTA,” and that “[t]hat was not part of the agreement we made during the telephone mediation conference . . . .” *Id.* at 80. The agency’s draft of the settlement agreement had provided that “[t]his release covers all components of the Agency, including [TIGTA].” *Id.* at 82. The appellant’s attorney wrote to the agency that

during the mediation conference on May 10, 2011, the Agency and [the] mediator . . . were informed that [the appellant] had filed a separate non-EEO complaint against TIGTA with the Office of Special Counsel (OSC). Mr. Staranowicz informed the Agency that he had no intention of dropping that complaint. The settlement discussions proceeded on that basis. We agreed that [the] . . . mediation efforts concerned only the EEO complaint which was pending, and concerned no other matters. Thus the opening paragraph of the Settlement Agreement must make clear what was agreed upon on May 10, e.g., that Mr. Staranowicz has no obligation under this agreement to withdraw his OSC complaint against TIGTA.

*Id.* at 84. In that same letter, the appellant’s attorney wrote:

We were surprised to see the reference to TIGTA in the Agency's proposed Settlement Agreement in view of the above-referenced discussion at the May 10, 2011 mediation conference. As you know, your office lacks jurisdiction to mediate matters other than the EEO complaints pursuant to which the mediation conferences are convened. On May 10, we mediated only the Complainant's EEO complaint. I don't know whether, under the OSC's regulation, Mr. Staranowicz can unilaterally close an OSC investigation of government wrongdoing merely by withdrawing an OSC complaint. I believe that matter must now be addressed by OSC. Accordingly, I deleted the reference to TIGTA which appears in the agency's draft, and inserted a reference to the preservation of the OSC matter. If the Agency wants to limit the reference in ¶ 1D to TIGTA by inserting language that the Complainant is dropping any *EEO claims or complaints* against TIGTA, we will consider that modification.

*Id.* at 85. The agency's counsel sent an e-mail to the appellant's attorney indicating that he had "deleted old Paragraph 6 in its entirety" and "did not change your language re: TIGTA/OSC matter." *Id.* at 92. The appellant's attorney subsequently wrote to the appellant informing him that "I'm surprised that the Agency agreed to everything we requested in terms of revisions" and that "[i]mportantly, you are free to continue with the OSC matter." *Id.* at 91.

In addition, parol evidence suggests that the appellant's OSC complaint was directed at TIGTA. *See Flores*, [115 M.S.P.R. 189](#), ¶ 10 (the Board will consider parol evidence only if the agreement is ambiguous). In an apparent draft response to a July 15, 2011 set of questions posed by OSC, the appellant's attorney wrote that the instant OSC complaint

involves TIGTA's destruction of audio tape recordings confiscated by TIGTA from Mr. Staranowicz during its investigation of Mr. Staranowicz's workplace activities and complaints. Mr. Staranowicz's position is that the audio tapes were legally recorded, and contained evidence relevant to certain EEO complaints he initiated. Thus the underlying bases for Mr. Staranowicz's OSC complaint are that TIGTA engaged in sanctionable (a) violations of records/evidence retention provisions contained in the applicable EEO regulations, and (b) spoliation of evidence.

IAF, Tab 9 at 92.

Thus, to the extent that the settlement agreement is ambiguous, we find that the appellant's attorney drafted the provisions in question, and the nondrafter "agency's" interpretation, that this language precludes the current IRA appeal against the IRS's Small Business/Self-Employed Division, is reasonable.

Regarding the IRA appeal filed against TIGTA, we agree with the administrative judge that the appellant did not nonfrivolously allege that TIGTA took, threatened to take, or failed to take a personnel action against him. ID at 5-6. The only apparent allegation the appellant made regarding TIGTA was that it improperly destroyed evidence he had provided, which does not meet the definition of a "personnel action." See [5 U.S.C. § 2302\(a\)\(2\)\(A\)](#). Although the OSC complaint referenced the appellant's suspension and removal, those actions were taken by the "agency" and are precluded under the settlement agreement. Thus, the IRA against TIGTA must be dismissed for lack of jurisdiction.

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

The initial decision, as supplemented by this Final Order, constitutes 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.

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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 want to request review of the Board's decision concerning your claims of prohibited personnel practices under [5 U.S.C. § 2302\(b\)\(8\)](#), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you

may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://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. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through [http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.