

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

STEVEN A. MCNEILL,
Appellant,

DOCKET NUMBER
SF-0752-12-0177-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: February 7, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Shane K. McNeill, Thompson's Station, Tennessee, for the appellant.

Asmaa Abdul-Haqq, Fort Wainwright, Alaska, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 from the position of nurse, and he appealed the action. Initial Appeal File (IAF), Tab 1. The parties participated in the Board's Mediation Appeals Program (MAP) and submitted a signed agreement to the administrative judge that settled the appellant's Board appeal and his age discrimination equal employment opportunity complaint. IAF, Tab 10. The administrative judge found that the Board has jurisdiction over the removal action and entered the agreement into the record for enforcement purposes. IAF, Tab 12.

In his petition, the appellant asserts that the document reached during the MAP process was not a settlement agreement, but a Memorandum of Understanding and that a fully executed settlement agreement was to follow. The document that the administrative judge entered into the record is titled

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.

“Memorandum of Understanding for Negotiated Settlement Agreement.” IAF, Tab 10. Regardless of the phrase “Memorandum of Understanding” in the title, the document is cast as a settlement agreement. *See Kelley v. Department of the Air Force*, [50 M.S.P.R. 635](#), 641-42 (1991) (in construing the terms of a settlement agreement, the Board examines the four corners of the agreement to determine the parties' intent; the parties are bound by the terms of their settlement).

The appellant also asserts that the settlement agreement is not effective because neither he nor the agency's representative signed it. The settlement agreement is signed by the appellant's representative, Shane McNeill, and by an agency official, LTC John McNally, Deputy Commander for Administration. IAF, Tab 10. The absence of an appellant's signature will not, standing alone, invalidate a settlement agreement where the appellant's representative has authority to enter into a settlement agreement on the appellant's behalf. *See Howell v. U.S. Postal Service*, [86 M.S.P.R. 249](#), ¶ 5 (2000); *Walker v. Department of the Navy*, [40 M.S.P.R. 600](#), 603 n.2 (1989). While a representative may not settle his client's case without express authority for this action, a representative of record is presumed to have this authority, absent evidence to the contrary. *Howell*, [86 M.S.P.R. 249](#), ¶ 4; *Franklin v. U.S. Postal Service*, [81 M.S.P.R. 294](#), ¶ 5 (1999). Here, there is no evidence that the appellant's representative lacked the authority to enter into the settlement agreement on the appellant's behalf. Additionally, the appellant has presented no evidence to support his assertion that LTC McNally lacked the authority to enter into a settlement agreement on behalf of the agency.

The appellant also alleges that the agreement must be overturned because the provisions of the Older Workers Benefits Protection Act (OWBPA), specifically, [29 U.S.C. § 626\(f\)\(1\)\(F\)-\(G\)](#), were not met. However, the Board is not bound by these provisions of the OWBPA. *See Lange v. Department of the Interior*, [94 M.S.P.R. 371](#), ¶¶ 7, 11 (2003). Rather, we have previously found

that settlements of Board cases are covered by [29 U.S.C. §626\(f\)\(2\)](#), which requires compliance only with the criteria set forth in [29 U.S.C. § 626\(f\)\(1\)\(A\)-\(E\)](#). *Lange*, [94 M.S.P.R. 371](#), ¶7. Thus, before accepting a settlement agreement in an appeal where age discrimination has been alleged, the Board must first verify that the agency has complied with the requirements of [29 U.S.C. § 626\(f\)\(1\)\(A\)-\(E\)](#), and the appellant must be given a reasonable period of time within which to consider the agreement. *Lange*, [94 M.S.P.R. 371](#), ¶¶ 5-7.

Review of the settlement agreement at issue here shows that it meets the applicable requirements of the OWBPA. Specifically, it is written in a manner that can be understood by the average individual, explicitly refers to waiver of claims arising under the Age Discrimination in Employment Act, does not waive rights or claims that may arise after the date the waiver is executed, affords the appellant consideration (a clean record, a neutral job reference, and a lump sum payment of \$25,000.00), and provides that the agency advised the appellant in writing to consult with an attorney prior to entering into the agreement. IAF, Tab 10. Furthermore, the appellant was represented during the MAP settlement process. *See Harris v. Department of the Air Force*, [98 M.S.P.R. 261](#), ¶ 7 (2005). There is no indication that the MAP process failed to afford the appellant and his representative a reasonable time to consider the agreement. Also, given that the initial decision dismissing this appeal as settled issued 7 days after the agreement was signed, the appellant had a reasonable period of time within which to reconsider the agreement.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the

United States Code, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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 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 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 is available at the court's website, www.ca9c.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.