UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANNE WHITEMAN,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DA-1221-09-0106-W-2

DATE: April 28, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL

Peter E. Mina, Esquire, Washington, D.C., for the appellant.

Alexandra R. Randazzo, Esquire, and Brett Daee, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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 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).

On November 16, 2008, the appellant filed an individual right of action (IRA) appeal with the Board, alleging that the agency took several personnel actions against her in retaliation for her whistleblowing activity. *Whiteman v. Department of Transportation*, MSPB Docket No. DA-1221-09-0106-W-1, Initial Appeal File (IAF 1), Tab 1. Specifically, the appellant claimed that the agency failed to promote her, failed to consider her for promotional opportunities, exerted improper duress and coercion in inducing her to sign a settlement agreement, improperly denied her leave, and substantially changed her job duties by prohibiting her access to the "radar room." *Id.* at 11-12. In a subsequent filing, the appellant cited three additional alleged personnel actions, claiming that: (1) on February 2, 2006, she received a written memo threatening disciplinary action and accusing her of not reporting and incompletely investigating an operational deviation; (2) on February 22, 2006, she received a "documented performance counseling"; and (3) on May 23, 2006, she was threatened with disciplinary action when she received a memo accusing her of violating two FAA orders. *Whiteman v. Department of Transportation*, MSPB Docket No. DA-1221-09-0106-W-2, Initial Appeal File (IAF 2), Tab 11 at 12.

Without holding a hearing, the administrative judge issued an initial decision that dismissed the appeal for lack of jurisdiction, finding that all of the personnel actions identified by the appellant were either waived by a February 5, 2003 settlement agreement, barred by the doctrine of collateral estoppel, or untimely filed. IAF 2, Tab 21, Initial Decision (ID).

On review, the appellant argues that the administrative judge erred in finding that the 2006 personnel actions she raised were untimely. Petition for Review (PFR) File, Tab 3 at 13. Specifically, the contends that she first raised these actions in her March 13, 2009 response to the agency's March 3, 2009 motion to dismiss the appeal, not in her February 12, 2010 response to the

administrative judge's July 20, 2009 jurisdictional order, as the administrative judge found. *Id.* at 14; ID at 4. In addition, she claims that, even though she raised these personnel actions 87 days following the date of the notice of her MSPB appeal rights, i.e, 22 days after the deadline for filing an IRA appeal, *see* 5 C.F.R. § 1209.5(a)(1), good cause exists for the delay. PFR File, Tab 3 at 14.

This argument is unavailing. The Board has no authority to waive the statutory time limit for filing an IRA appeal for good cause. *See MacDonald v. Department of Justice*, 105 M.S.P.R. 83, ¶ 11 (2007) (citing *Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 592 (1992)) (the Whistleblower Protection Act does not make any provision for late filings or grant the Board the authority to waive the time limit for good cause shown). Therefore, regardless of whether the appellant first raised the 2006 personnel actions before the Board in her February 12, 2010 response to the administrative judge's July 20, 2009 jurisdictional order, as the administrative judge found, or in her March 13, 2009 response to the agency's March 3, 2009 motion to dismiss the appeal, as she claims, the portion of the appellant's IRA appeal related to the 2006 personnel actions is untimely because it was not filed within the statutory deadline.

On review, the appellant also reiterates her argument that the agency coerced her into signing the February 2003 settlement agreement and, therefore, the agreement is invalid. PFR File, Tab 3 at 14-26; IAF 2, Tab 11 at 15-21. Specifically, she contends that, at the time she signed the settlement agreement, she had been subjected to intolerable working conditions for years, including harassment and threats of "serious physical harm" by her co-workers. PFR File, Tab 3 at 17-21; IAF 2, Tab 11 at 7. The appellant alleges that the agency was aware of her complaints of harassment and threats, yet took no steps to investigate or otherwise address these circumstances, aside from having her "locked in an office to be 'monitored' by her supervisor, with no work and . . . only permitted to leave to use the bathroom." PFR File, Tab 3 at 18-19. The appellant argues that, because of these intolerable working conditions, and the

knowledge that the years of harassment and threats were not going to be investigated, let alone remedied by the agency, she had no choice but to accept the agency's settlement agreement against her will. *Id.* at 23.

We find this argument unpersuasive. The Board has consistently held that, to establish that a settlement agreement is invalid due to agency coercion, the party challenging the validity of the agreement must prove that she 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. *See Potter v. Department of Veterans Affairs*, 111 M.S.P.R. 374, ¶ 5 (2009). The administrative judge properly applied this standard here, finding that the appellant's execution of the settlement agreement was a considered choice among undesirable options. ID at 8. While the appellant's options may have been unpleasant, she nonetheless had options. For example, instead of electing to accept a settlement offer that included attorneys' fees, priority consideration for promotion to a supervisory position, and leave restoration, the appellant could have chosen to proceed with litigation. Therefore, the appellant failed to establish that she was coerced into signing the settlement agreement.

In her petition for review, the appellant also challenges the administrative judge's finding that the only personnel action she identified that occurred after she entered into the February 2003 settlement agreement with the agency is the agency's alleged failure to select her for a supervisory promotion in October 2003. PFR File, Tab 3 at 11-13; ID at 7. The appellant argues that her allegations that she was improperly denied leave and subjected to a significant change in duties and working conditions were not limited to events that occurred prior to February 5, 2003. PFR File, Tab 3 at 11-13. With respect to the alleged improper denial of leave, she asserts that her March 2009 response to the agency's dismissal motion includes documentation from the Office of Special Counsel (OSC) indicating that she had informed OSC of denials of leave occurring in 2007. *Id.* at 12. As for the allegation that the agency subjected her

to a significant change in duties and working conditions, the appellant contends that one such change, denying her access to the radar room, continued well after February 5, 2003. PFR File, Tab 3 at 13. She further asserts that she submitted documentation showing that, following the settlement agreement, agency officials took other actions that altered her working conditions, including denying her work assignments, failing to assign her subordinates despite her supervisory status, verbally reprimanding her, and denying her requests for training and overtime. *Id.*

In his July 20, 2009 order, the administrative judge explicitly directed the appellant to list each personnel action that she claimed was taken in retaliation for each protected disclosure. IAF 1, Tab 24. Thus, if the appellant wished to claim that the agency improperly denied her leave after February 5, 2003, it was incumbent upon her to identify the denial of leave after February 5, 2003, as a personnel action in her response to administrative judge's July 20, 2009 order. None of the personnel actions that the appellant identified in her February 12, 2010 response to the order related to the denial of leave after February 5, 2003, however. IAF 2, Tab 11 at 8-10. Therefore, the administrative judge properly found that the appellant's improper denial of leave claim was barred by the February 5, 2003 settlement agreement.

We also find unpersuasive the appellant's contention on review that the settlement agreement does not bar her claim that the agency denied her access to the radar room as a controller because the denial of access continued after February 5, 2003. *See* PFR File, Tab 3 at 8. The settlement agreement resolved all of the appellant's claims against the agency as of the date of the agreement. IAF 1, Tab 8, Subtab 4P at 3. Because the appellant was denied access to the radar room as a controller before the settlement agreement, *see* IAF 1, Tab 10, Attachment B at 10**,** the administrative judge properly found that appellant waived her claim relating to the denial of access to the radar room as a controller in the settlement agreement. ID at 7.

Moreover, under 5 C.F.R. § 1209.6(a)(1) and 5 C.F.R. § 1201.24(a)(1)-(a)(9), an appellant in an IRA appeal is required to identify the action in dispute and the date of the action. While the appellant claims that her submissions during the proceedings below documented the agency's continual efforts to alter her job duties and her working conditions, PFR File, Tab 3 at 13, other than the 2006 personnel actions and the agency's failure to select her for a promotion in October 2003, the appellant failed to identify with specificity any retaliatory actions that occurred after February 5, 2003. Therefore, the administrative judge properly found that the appellant's claim that the agency altered her working conditions and job duties was barred by the settlement agreement.

In her petition for review, the appellant also challenges the administrative judge's finding that she is collaterally estopped from raising her non-selection for promotion in October 2003 as a personnel action in this appeal because the issue of whether the agency breached the parties' February 2003 settlement agreement, resulting in the appellant's non-selection for a promotion in October 2003, and a consequential loss of pay due to the delay in this promotion until April 2004, was addressed and resolved in the negative by the District Court in its 2005 decision dismissing the appellant's complaint alleging that the agency had breached the settlement agreement. PFR File, Tab 3 at 26-27; ID at 11.

The appellant contends that she is not barred by collateral estoppel from raising her non-selection for promotion in October 2003 as a personnel action in this appeal because the issue of her non-selection was not addressed by the District Court, as that issue was beyond the scope of the settlement agreement. PFR File, Tab 3 at 26-27. Specifically, she contends that the issue before the District Court was whether she received priority consideration for a supervisory position at the Dallas/Fort Worth International Airport Tower in October 2003 pursuant to the settlement agreement. *Id.* at 27. She asserts that, because the District Court did not reach the merits of whether the agency canceled the vacancy announcement and delayed her promotion in retaliation for her protected

activity, she should not be barred from raising her non-selection as a personnel action in this appeal. *Id.*

We find the appellant's argument unpersuasive. In both this appeal and the District Court action, the appellant raised the issue of whether the agency breached the settlement agreement in October 2003, thereby resulting in her non-selection for a promotion until April 2004 and a consequential loss of pay. IAF 1, Tab 1 at 11; Tab 8, Subtab 4K at 2-3. The administrative judge properly found that this issue was already decided by the District Court. ID at 12. Moreover, because the appellant claimed that the agency's breach of the agreement delayed her promotion, an analysis of that issue was necessary to the finding that the agency did not breach the settlement agreement. Therefore, the administrative judge correctly found that the appellant is collaterally estopped from raising as personnel actions in this appeal the agency's failure to select her for a promotion in October 2003 and a consequential loss of pay owing to the delay in this promotion until April 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. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

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.