

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

ROBERT E. YOTT,
Appellant,

DOCKET NUMBER
NY-0752-07-0127-C-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: April 18, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Robert E. Yott, Bath, New York, pro se.

Georgette Gonzales-Snyder, Esquire, Syracuse, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the compliance initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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](#)).

The appellant asserts that the administrative judge erred in denying his petition for enforcement of an April 4, 2007 settlement agreement providing, among other things, that the agreement “shall be kept confidential and the terms herein shall not be disclosed by either party except that disclosure may be made to authorized MSPB officials or to other officials responsible for implementing the Agreement or as required by law.” Compliance File (CF), Tab 3, Subtab 4n at 3, paragraph 9. In order to prevail, the appellant bears the ultimate burden of showing material noncompliance by the agency with the terms of the settlement agreement. *Flores v. U.S. Postal Service*, [115 M.S.P.R. 189](#), ¶ 9 (2010); *see Lutz v. U.S. Postal Service*, [485 F.3d 1377](#), 1381 (Fed. Cir. 2007). A breach is material when it relates to a matter of vital importance, or goes to the essence of the contract. *Flores*, [115 M.S.P.R. 189](#), ¶ 9; *see Lutz*, 485 F.3d at 1381. A party may establish a breach of an agreement by proving that the other party failed to comply with a provision of the contract in a way that was material, regardless of the party’s motive. *See Link v. Department of the Treasury*, 51 F.3d 1577, 1582 (Fed. Cir. 1995).

The administrative judge found that the agency committed a material breach of the settlement agreement when it disclosed to third parties on September 30, 2009, that the appellant had been fired from the agency. CF, Tab 17, Compliance Initial Decision (CID) at 4, 7. However, the administrative judge denied the appellant’s petition for enforcement based on her findings that the appellant had disclosed the fact that he was terminated in a September 28-29, 2009 e-mail to a U.S. Congressman’s Chief of Staff, and that he had disclosed

that he was forced to resign in his January 2009 posting to his public website.² *Id.* at 4-5, 7; *see* CF, Tab 3, Subtab 4a at 7-8, Subtab 4g at 1-2. Thus, the administrative judge found that the appellant was not entitled to any relief given that he had breached the agreement prior to the agency's breach, *see Thomas v. Department of Housing and Urban Development*, [124 F.3d 1439](#), 1442 (Fed. Cir. 1997); *Caston v. Department of the Interior*, [108 M.S.P.R. 190](#), ¶ 20 (2008), and, further, because the appellant had breached the agreement prior to learning of the agency's breach, he had come before the Board with "unclean hands," *see Wofford v. Department of Justice*, [115 M.S.P.R. 367](#), ¶¶ 15-16 (2010). CID at 4, 6-7.

The appellant's only relevant assertion on review is that he was informed by several agency employees in "April of 2007" that an agency manager had informed her employees that the appellant had been fired and that they were to inform her anytime the appellant was in the agency's facility. Petition for Review File, Tab 1 at 2. The appellant did not raise this assertion in any of his pleadings below and he has not established that the assertion is based on new and material evidence that was unavailable prior to the close of the record below. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

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).

² As a result of a potential threat in one of the appellant's communications with the Congressman's Chief of Staff, the Chief of Staff contacted the agency facility. *See* CF, Tab 3, Subtab 1, Subtab 4a. As a result, the agency stopped vehicles entering its facility and it is in that context that the appellant's employment status was disclosed. *Id.*, Subtab 1.

Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

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

This is 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. 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.ca9.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.