

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HERMAN P. R. ORTEGA,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
DE07528710103

DATE: SEP 29 1987

LaFollette Butler, Phoenix, Arizona, for the appellant.

Ray G. Meadows, Phoenix, Arizona, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision dated March 10, 1987, that dismissed the appellant's appeal of his removal from his position as a Land Operations Officer based on a settlement agreement approved by the administrative judge. After consideration, the Board DENIES the appellant's petition for review of the initial decision because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, and for the reasons discussed below, REMANDS the file to the

regional office for consideration of the appellant's arguments that relate to the enforcement of the settlement agreement.

BACKGROUND

On February 24, 1987, the parties executed a settlement agreement that provided, among other things, for the withdrawal of the appellant's appeal of the agency's removal action from the Board's Denver Regional Office; that the appellant would neither seek nor accept employment with the agency's Bureau of Indian Affairs (BIA); that he would submit his voluntary resignation from the BIA effective December 6, 1986; that the agency would cancel its December 6, 1986, removal action and accept his resignation in lieu thereof; and that the agency would expunge from the appellant's Official Personnel Folder (OPF) all references to the removal action and his OPF would reflect that the appellant resigned effective December 6, 1986, for whatever personal reasons he wished to state. See Initial Appeal File (IAF), Tab 10.

The administrative judge issued an initial decision on March 10, 1987, in which he found that the parties had freely entered into the settlement; that the settlement appeared to be lawful on its face; that the appellant had withdrawn his appeal; that the Board no longer had jurisdiction to decide the merits of the case; that the settlement represented a final disposition of the appeal, and that, under *Richardson v. Environmental Protection*

Agency, 5 M.S.P.R. 248 (1981), the Board retained power to enforce the terms of the settlement agreement. See Initial Decision at 2.

Thereafter, on March 31, 1987, the appellant filed a petition for review in which he alleges that the agency breached the agreement because it failed to cancel his removal, to record his voluntary resignation, to purge references in his OPF to misconduct, and to have his resignation reflected in his OPF. He states that, as a result, he has been unable to apply for employment with other agencies and that enforcement of the agreement "at this late date" cannot cure the harm he has suffered.

In addition, the appellant argues that he did not enter into the agreement freely because he signed the agreement while under stress due to the prehearing telephone conference, uncertainty as to whether the administrative judge would permit him to present his case and call witnesses he felt were necessary, and his family's concern for his future. He also claims that during settlement discussions the agency's representative stated that the agency did not want him as an employee and that, should he return to his job, it would take action against him for other misconduct. Although he states that the agency's Acting Superintendent disavowed the representative's claim that the agency had other charges pending against the appellant, he claims that, whether true or not, the statement served its purpose because he agreed to the

settlement to spare himself and his family further stress from fighting the additional charges and the associated unpleasantness on the job. He asks that the settlement agreement be set aside and that he be given a hearing and decision on the merits.

In a letter dated April 29, 1987, the appellant asserts as new and material evidence that he learned from an official with the Department of Agriculture that the department contacted the agency about the end of March 1987 relative to an employment application filed by the appellant and was told that the appellant had been removed for cause. At the appellant's request, the Department of Agriculture official wrote to the Board stating that the appellant telephoned him about the latter part of April 1987 inquiring about the status of a job application he had filed with the department. The official states that he told the appellant that he had heard that someone from the Department of Agriculture had checked with the BIA regarding the appellant's status and allegedly was told that the appellant had been removed and that an appeal was pending. However, after checking with the two employees who might have contacted the BIA, he learned that no contact had been made with the BIA and that the information on the appellant's removal had come from the appellant himself.

ANALYSIS

A party who attacks a settlement agreement has the burden of proving that the agreement was tainted with

invalidity either by fraud practiced upon him by the other party or by the mutual mistake of both parties. See *Hazlett v. Department of Justice*, 25 M.S.P.R. 623, 625 (1985). In *Hazlett*, the Board found that the appellant failed to meet his burden of proving that he did not knowingly and voluntarily enter into the agreement because the record showed that the appellant was accompanied by his representatives at a prehearing conference with the administrative judge during which the terms of the agreement were stated and entered into the record, and the appellant, when asked if he agreed to the terms of the agreement, responded that he did, provided that his privacy would be protected. A provision covering privacy was then added to the agreement.

In the present case, apart from the appellant's bare unsupported allegations, he has presented no evidence to show that he agreed to the settlement because of any agency fraud or that both parties had entered into the agreement through mutual mistake. Therefore, we find no merit to the appellant's claim that the administrative judge erred in finding that the agreement was freely entered into by the parties. See *id.* and *Bohan v. United States Postal Service*, 31 M.S.P.R. 601, 603 (1986) (a settlement agreement was enforceable despite the appellant's claim that he did not fully understand the implications of its terms when his attorney explained them to him).

The appellant's other contentions, that the agency violated the terms of the settlement because it failed to cancel his removal, record his voluntary resignation, purge his OPF of references to misconduct, and have his resignation reflected in his OPF, and that he has been harmed thereby, relate to issues of compliance, rather than errors of the administrative judge under 5 C.F.R. § 1201.115. Therefore, we are remanding the file in this matter to the regional office for consideration of the appellant's arguments that relate to the enforcement of the settlement agreement. See *Nunez v. Department of the Interior*, 33 M.S.P.R. 424, 426 (1987) (although finding that the appellant's contention in his petition for review that he involuntarily agreed to a settlement did not meet the criteria for review under 5 C.F.R. § 1201.115, the Board forwarded the case file to the regional office for consideration of the appellant's other arguments relating to the enforcement of the settlement agreement).

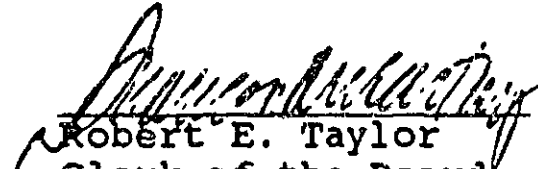
This is the Board's final order in this appeal, except as to the compliance issues discussed above. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington,

D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.