

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EARL C. HARRIS,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
PH0752900529-C-1

DATE: 001 2 1 1993

William T. Cannon, Esquire, Philadelphia, Pennsylvania,
for the appellant.

Theresa Hensel, Trenton, New Jersey, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant seeks enforcement of the agreement under which he and the agency settled the underlying appeal. For the reasons set forth below, we FORWARD the appellant's submission to the Philadelphia regional office for adjudication as a petition for enforcement.

BACKGROUND

The agency removed the appellant, a preference-eligible Mailhandler at its facility in Trenton, New Jersey, for assaulting a supervisor. Initial Appeal File (IAF),

No. PH0752900338-I-1, Tab 5, Subtab 3b. He contested the removal via a Board appeal that was later dismissed without prejudice pending the outcome of related criminal proceedings. *Id.*, Tabs 1 & 14. The appellant reinstated his appeal at the conclusion of the criminal matter. IAF, No. PH0752900529-I-1, Tab 1. Ultimately, the parties entered into a settlement agreement that provided, *inter alia*, that: The appellant would withdraw his Board appeal and resign immediately; all "official files" would indicate that he resigned for personal reasons; after two years, the appellant could apply for "reinstatement to any Post Office or Postal Facility," provided that during such time he did not commit any assault; if the appellant did apply for reinstatement, there would be no negative information about him "conveyed to the office to which he is applying for reinstatement"; and either party could seek enforcement of the agreement before the Board. *Id.*, Tab 13. The administrative judge incorporated the agreement into the record and dismissed the appeal. *Id.*, Tab 14.

Over two years later, the appellant sought reinstatement at the agency's Philadelphia facility. See Compliance File (CF), Tab 1. Officials there advised him that they had no openings. *Id.* The appellant then filed a petition for enforcement of the settlement agreement. *Id.* The administrative judge denied the petition, holding that, although the agency had agreed that the appellant could seek

reinstatement after two assault-free years, it had not guaranteed him a position. CF, Tab 10.

The appellant then filed the instant submission, which he has styled a "Petition for Review Based on New and Material Evidence Unavailable to Appellant Before the Record Closed." Petition for Review File (PRF), Tab 1. He states that the petition "is not premised on any error" in the compliance initial decision, and concedes that the administrative judge correctly concluded, based on the record before him, that the agency had not violated the settlement agreement. *Id.* at 4. He alleges, however, that during the pendency of his petition for enforcement, he sought reinstatement at the agency's Trenton facility. He further alleges that after the record closed below, the agency refused to hire him "based on a disclosure of [his] past behavior by Postal Service Management to Mr. [Steve] Roman[,] ... the new hiring supervisor" *Id.* at 6. According to the appellant, this alleged disclosure violated the settlement agreement. *Id.*

The agency, in its response to the appellant's submission, alleges that Roman denied the reinstatement request after he learned of the assault incident from the Postal Inspection Service. PRF, Tab 6 at 2. It also contends that the appellant's submission should be treated as a petition for enforcement, and that as such, it is untimely. *Id.* at 1.

ANALYSIS

The appellant's submission is in the nature of a petition for enforcement, not a petition for review. As mentioned above, the appellant does not challenge the holding of the compliance initial decision. Instead, he claims that agency actions unrelated to those raised in his original petition for enforcement, and occurring after the record closed on that petition, constituted a breach of the settlement agreement.

Allegations that a party has failed to comply with a settlement agreement are to be raised in the first instance before the regional office that accepted the agreement into the record. See *Sharkey v. Department of Transportation*, 56 M.S.P.R. 156, 158 (1992); *Davis v. Department of the Navy*, 55 M.S.P.R. 109, 112 (1992). Where allegations of noncompliance are raised for the first time before the full Board, the Board will forward the submission to the appropriate regional office for adjudication as a petition for enforcement. *Sharkey*, 56 M.S.P.R. at 158; *Davis*, 55 M.S.P.R. at 112.

We note that the appellant filed his "Petition for Review Based on New and Material Evidence Unavailable to Appellant Before the Record Closed" within 35 days of the compliance initial decision. CF, Tab 10; PRF, Tab 1. If the submission were actually a petition for review, it would have been timely. 5 C.F.R. § 1201.114(d). This fact, however, is not dispositive of the issue of whether the pleading, which is properly characterized as a petition for enforcement, was timely. See *Maddox v. General Services Administration*, 53

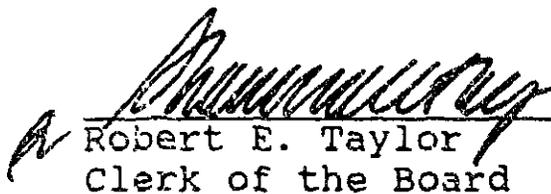
M.S.P.R. 288, 291 (1992) (a petition for enforcement of a settlement agreement must be filed within a reasonable time of the alleged breach, "taking into consideration the date of the petitioning party's knowledge of the alleged breach") (citation omitted). The administrative judge should therefore consider, as a threshold matter, whether the appellant's second petition for enforcement was timely.

ORDER

Accordingly, we FORWARD the appellant's submission to the Philadelphia regional office for adjudication as a petition for enforcement.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board