UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 25

Docket No. DC-0752-08-0188-C-1
DC-0752-08-0188-I-1

William H. Armstrong,

Appellant,

v.

Department of the Treasury,

Agency.

March 6, 2009

Kevin E. Byrnes, Esquire, Falls Church, Virginia, for the appellant.

Lori L. Creswell, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the February 19, 2008 initial decision that dismissed his removal appeal pursuant to a settlement agreement between the parties and the July 14, 2008 compliance initial decision that denied his petition for enforcement of that agreement. For the reasons set forth below, we DISMISS the appellant's petition for review of the February 19, 2008 initial decision as untimely filed without good cause shown for the delay, and DENY the appellant's petition for review of the July 14, 2008 compliance initial decision for failure to meet the Board's criteria for review under 5 C.F.R. § 1201.115(d).

BACKGROUND

¶2 The appellant served as a GS-14 Criminal Investigator for the agency's Inspector General for Tax Administration (TIGTA). Initial Appeal File (I-1 File), Tab 1 at 2. Through an August 20, 2007 letter to the appellant, the Department of Agriculture (USDA) confirmed its offer of a GS-14 Criminal Investigator position to the appellant and gave him a September 2, 2007 effective date for his transfer to the USDA. *Id.*, Ex. 3. Soon after, the USDA received six anonymous letters that the appellant alleged were written by TIGTA employees, accusing the appellant of serious misconduct. Compliance File (C-1 File), Tab 1 at 3, Ex. 1 at 17-28. The appellant alleged that the USDA subsequently placed an immediate hold on his job offer. C-1 File, Tab 1 at 3. On September 4, 2007, the agency proposed the appellant's removal. I-1 File, Tab 4, Subtab 4i. On October 30, 2007, the appellant filed a lawsuit in the U.S. District Court for the District of Columbia, alleging that the agency violated the Privacy Act and that individual TIGTA officials had defamed him. C-1 File, Tab 1 at 3, Ex. 1. On December 4, 2007, the agency issued its decision to remove the appellant, effective December 11, 2007. I-1 File, Tab 4, Subtab 4b.

¶3 The appellant filed a Board appeal concerning his removal and, on February 7, 2008, the parties executed an agreement settling the appeal and substituting a 30-day suspension for the appellant's removal. I-1 File, Tab 11, Settlement Agreement at 1. The agency agreed to generate a new SF-50 that would document the 30-day suspension and state the specific charges supporting the suspension, but also agreed to remove from the appellant's record documentation concerning the rescinded removal. *Id.*, Settlement Agreement at 1-2. The settlement agreement generally prohibited the agency from providing the USDA with any information regarding the rescinded penalty, required any employment inquiries regarding the appellant to be routed through a particular human capital office, and limited the agency's response to any such inquiries to the appellant's dates of employment with TIGTA, along with his grades, salary

levels, and classification series. *Id.*, Settlement Agreement at 2-3. However, the agreement did not preclude the agency from responding "fully and truthfully" to inquiries in suitability or security clearance background investigations consistent with federal law. *Id.* The parties also negotiated the text of the agency's response to the USDA's January 2, 2008 request, which remained unanswered at the time, for information regarding the disposition of the appellant's disciplinary matter. *Id.*, Ex. A. The letter negotiated by the parties explained that the appellant "was suspended from duty and pay for thirty days and remain[ed] on the rolls in the position of Assistant Special Agent in Charge." *Id.* Satisfied that the settlement agreement was lawful on its face, that it was freely reached by the parties, and that the parties understood the terms of the agreement, the administrative judge (AJ) accepted the agreement into the record for enforcement purposes and issued a February 19, 2008 initial decision dismissing the appeal as settled. I-1 File, Tab 12.

¶4 On May 28, 2008, the appellant filed a pleading with the Board's Washington Regional Office captioned "Motion to Set Aside Settlement Agreement; or, in the Alternative, Petition for Enforcement of Settlement Agreement; Motion for Sanctions." C-1 File, Tab 1. The appellant argued that the agency violated the terms of the settlement agreement when, on March 18, 2008, it filed its initial disclosures in the appellant's Privacy Act suit, because those disclosures made assertions regarding potential witnesses' testimony about the reasons for the appellant's removal from his position at TIGTA. *Id.* at 8. The appellant claimed that he successfully moved the district court to strike those disclosures and that, over the agency's objection, the district court judge ordered the agency to "surrender the reports of Agency 'investigators' who had acted on [the agency counsel's] behalf and direction." *Id.* at 9. The appellant claimed that those reports revealed that agency investigators had a series of contacts with Kathy Horsley, the hiring official for the position the appellant sought at the USDA, around the time of the appellant's application for employment in August

2007. *Id.* at 9-10. The appellant further asserted that he subsequently learned that the agency had contact with the USDA at least twice in December 2007 and once in January 2008. *Id.* at 10.

¶5 Based on the investigative reports produced in his district court suit, the appellant argued that the agency committed fraud and deception "as to the extent of its contacts with the [USDA] and with Ms. Horsley" in securing the appellant's assent to the settlement agreement, such that "the bargained for promise of confidentiality and agreed upon set of facts [the agreement represented] was a ruse." *Id.* at 10-13. The agency denied that it had breached the settlement agreement and claimed that the appellant was attempting to hold it responsible for terms and conditions not contained in the agreement, i.e. the "agreed upon set of facts" that the appellant contended he bargained for through the agreement. C-1 File, Tab 3, Response at 2. The agency also asserted that, even if the Board were to treat the appellant's allegations of fraud with regard to the settlement agreement as a petition for review of the February 19, 2008 initial decision dismissing the appeal as settled, the appellant's fraud allegations were untimely raised. *Id.*

¶6 In a July 14, 2008 compliance initial decision, the AJ denied the appellant's petition for enforcement, finding that the appellant failed to establish that the agency was not in compliance with the settlement agreement. C-1 File, Tab 5, Compliance Initial Decision. The AJ determined that the appellant had failed to show that the agency violated the agreement through its initial disclosures in district court, or through contacts with the USDA that occurred before the February 7, 2008 execution of the settlement agreement. *Id.* at 5-6. Regarding the appellant's allegations that he relied on agency misinformation when he signed the settlement agreement, the AJ noted that any such arguments must be set forth in a petition for review of the initial decision dismissing the appeal as settled. *Id.* at 6-7.

¶7 The appellant filed a petition for review on August 12, 2008, bearing the docket number from his settled removal appeal (MSPB Docket No. DC-0752-08-0188-I-1), not his subsequent petition for enforcement (MSPB Docket No. DC-0752-08-0188-C-1). Petition for Review File (PFRF), Tab 1 at 1. He argues that the settlement agreement between the parties "was a product of fraud and misrepresentation" that "vitiated the entire premise and benefit on which [the appellant] agreed to enter a settlement with the Agency." *Id.* The appellant claims that the agency fraudulently induced him to sign the settlement agreement by misleading him as to the nature and extent of its prior contacts with the USDA concerning him, and asks the Board to reinstate his removal appeal. *Id.* at 9-14. Although the Clerk of the Board informed the appellant that the Board would consider his petition as seeking review of both the initial decision dismissing his removal appeal as settled and the compliance initial decision denying his petition for enforcement, PFRF, Tab 2, the appellant failed to submit specific argument regarding the compliance initial decision.

¶8 The Clerk further informed the appellant that his petition for review of the February 19, 2008 initial decision dismissing his appeal as settled appeared to be untimely and that, under the Board's regulations, the appellant must file a motion to accept the filing as timely or to waive the time limit for good cause, accompanied by a sworn statement or affidavit in support. *Id.*; *see* 5 C.F.R. § 1201.114(f). In response, the appellant filed a motion contending that he learned for the first time on May 20, 2008, when the agency produced its investigative reports, that the agency "had engaged in continuous contacts with the [USDA] that disclosed unproven allegations of misconduct against [him] and which were specifically designed to lead the [USDA] to withdraw, rescind or hold in perpetual abatement its offer of employment." PFRF, Tab 3 at 2, *see* C-1 File,

Tab 4, Ex. 3.[1] The appellant argues that the agency hid those contacts from him, affirmatively misleading him into believing that its only contact with the USDA was to state that it had no comment on any matters pertaining to the appellant's TIGTA employment. PFRF, Tab 3 at 2. The appellant contends that those undisclosed contacts were sufficient to deny him any realistic possibility of employment with the USDA and negated his "principal relief in this case . . . [, i.e.] an agreed upon set of facts which could be set forth in writing to the [USDA] to maximize the opportunity for [him] to commence employment with the [USDA]." *Id.* at 2-3. Thus, the appellant asserts, there was no "meeting of the minds" between the parties and the settlement agreement should therefore be set aside and the appellant's removal appeal reopened for a hearing on the merits. *Id.* at 3.

¶9 The agency argues that the appellant has abandoned his compliance arguments, denies that the agency breached the settlement agreement, and contends that the "agreed upon set of facts" the appellant claims as the principal relief he received in the agreement "were neither negotiated nor contained in the settlement agreement." PFRF, Tab 4 at 1. The agency further argues that the appellant's petition for review of his removal appeal is untimely filed without good cause shown, but that, "even if the Board were to waive the timeliness requirement, the Agency did not engage in fraud in connection with discussions prior to the execution of the settlement agreement." *Id.* at 2.[2]

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[1] The appellant asserted below that he received the investigative reports reflecting the agency's contacts with the USDA on May 12, 2008. C-1 File, Tab 4 at 9. The difference between him receiving the documents on May 12, as opposed to May 20, is immaterial to our analysis of the timeliness of the appellant's petition for review.

[2] We have not considered the appellant's reply to the agency's response, which he filed after the record closed on September 22, 2008, because the appellant has not shown that the evidence was not readily available prior to the close of the record on petition for review. PFRF, Tabs 2, 5-7; *see, e.g., Welby v. Department of Agriculture*, 101 M.S.P.R. 17, ¶ 11 (2006); 5 C.F.R. § 1201.114(i). Accordingly, we GRANT the agency's motion to strike the appellant's reply.

ANALYSIS

The appellant has failed to establish good cause for the untimely filing of his petition for review because the new evidence he proffered is insufficient to invalidate the settlement agreement.

¶10 An attack on the validity of a settlement agreement must be made in the form of a petition for review of the initial decision dismissing the case as settled. *See, e.g., Nichols v. Department of the Air Force*, 102 M.S.P.R. 551, ¶ 7 (2006), *review dismissed*, 253 F. App'x 961 (Fed. Cir. 2007); *Washington v. Department of the Navy*, 101 M.S.P.R. 258, ¶ 11 (2006). Generally, a petition for review must be filed within 35 days after the issuance of the initial decision, or, if the petitioner shows that he received the initial decision more than 5 days after the date of issuance, within 30 days after the date he received the initial decision. 5 C.F.R. § 1201.114(d). The record reflects that the AJ dismissed the appellant's initial appeal as settled on February 19, 2008, and that initial decision became the Board's final decision when neither party filed a petition for review by March 25, 2008. I-1 File, Tab 12; *see* 5 C.F.R. § 1201.113. The appellant filed his petition for enforcement on May 28, 2008. C-1 File, Tab 1. Because that petition unmistakably challenged the validity of the settlement agreement, we will consider it as a petition for review of the February 19, 2008 initial decision, making the appellant's petition for review just over 2 months late. *Id.*; *see, e.g., Hawley v. Social Security Administration*, 108 M.S.P.R. 587, ¶ 4 (2008) (the Board considered a petition for enforcement that questioned the validity of the parties' settlement agreement as a petition for review of the initial decision dismissing the appeal as settled, and deemed it to have been filed on the date it was received in the field office, not the date on which it was received by the Clerk of the Board); *Simpson v. U.S. Postal Service*, 83 M.S.P.R. 253, ¶ 6 (1999) (date of pleading in enforcement action accepted as filing date for petition for review of the initial decision dismissing appeal as settled because the pleading indicated the appellant's intent to petition for review of the initial decision).

¶11 The Board will waive the time limit for the filing of a petition for review only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the untimely filing of a petition for review, the appellant must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See, e.g., Jones v. Department of Transportation*, 69 M.S.P.R. 21, 26 (1995), *aff'd*, 111 F.3d 144 (Fed. Cir. 1997) (Table). The appellant here acted with due diligence once he became aware of the evidence which he claims establishes a valid reason to set aside the settlement agreement. However, the discovery of such new evidence may establish good cause for the untimely filing of a petition for review only if the evidence was not readily available before the close of the record below, and is of sufficient weight to warrant a different outcome from that of the initial decision. *Id.* Thus, where the initial decision dismissed an appeal as settled, newly-discovered evidence would only warrant a different outcome, thus establishing good cause for an untimely petition for review, if the evidence shows that the settlement agreement was invalid. *Id.*

¶12 The appellant claims that the agency fraudulently induced him into signing the settlement agreement by misrepresenting the nature and extent of contacts between agency personnel and Ms. Horsley. PFRF, Tab 1 at 9-14. A settlement agreement may be invalid if a party to the agreement subsequently shows that the agreement was based on fraud or misrepresentation by the agency. *See, e.g., Hamilton v. Department of Veterans Affairs*, 92 M.S.P.R. 467, ¶ 19 (2002). One who attacks a settlement agreement bears the heavy burden of showing that the contract is tainted, and thus invalidated, by fraud practiced upon him. *See Hazlett v. Department of Justice*, 25 M.S.P.R. 623, 625 (1985) (citing *Asberry v. U.S. Postal Service*, 692 F.2d 1378, 1380 (Fed. Cir. 1982)). On the issue of misrepresentation, it is sufficient to show that a reasonable person would have been misled by the agency's statements. *Hamilton*, 92 M.S.P.R. 467, ¶ 19.

The appellant has not established that the agency misrepresented the nature and extent of its contacts with the USDA.

¶13 The essence of the appellant's claim is that, in signing the settlement agreement, he relied on agency counsel's representation in a February 5, 2008 e-mail exchange concerning the extent of the agency's contact with USDA, and newly discovered evidence demonstrates that the agency had more extensive contact with USDA than was revealed in that e-mail exchange. PFRF, Tab 1 at 6, 9-14. The appellant claims that his attorney "pointedly asked the Agency whether any communications had occurred between the Agency and [USDA] before entering the Agreement." *Id.* at 6. As an initial matter, we note that the agency's representations in the February 5, 2008 e-mail exchange are more limited than the appellant contends. *See id.*; C-1 File, Tab 1, Ex. 3. Specifically, in response to the assertion of the appellant's counsel that "[a]s an officer of the court, I accept your representations that there were no further communications with USDA other than the letter responding to their inquiry,"[3] the agency's counsel pointedly replied that, "I have not, as an officer of the court, so indicated in your e-mail." *Id.* at 1-2. The agency's counsel then clarified that she had "stated that the only information that was conveyed to USDA by Agency management/officials concerning the proposal or decision memorandum and any disciplinary action is 'no comment,' 'the matter is still pending,' and no further information can be provided." *Id.* at 1. In reply, the appellant's counsel posed the following specific question limited to a particular time frame: "Have you or

[3] At the time of this e-mail exchange, February 5, 2008, Ms. Horsley had made two written requests to the agency for information regarding the appellant's status. *See* C-1 File, Tab 4, Ex. 3 at 12-13. Neither request is in the record. The "letter" to which the appellant's attorney referred in the February 5, 2008 e-mail exchange is apparently the response to Ms. Horsley's January 2, 2008 inquiry, which the parties negotiated as part of the settlement agreement, PFRF, Tab 1 at 6, and which was apparently not sent until February 13, 2008, PFRF, Tab 4, Ex. 17. No other letter responding to an inquiry from USDA is in the record.

any member of the Agency been in contact with USDA to discuss [the appellant], his claims or his employment other than through the response to the letter since December of last year[,]" to which the agency counsel replied that, "subsequent to December 2007, [the agency was] unaware of any individual employed by TIGTA who has spoken with or corresponded with Director Horsley." *Id.*

The August and September 2007 contacts between the agency and USDA do not contradict the agency's assertions to the appellant regarding its contacts with USDA.

¶14 The appellant maintains that the investigative reports the agency produced in his Privacy Act suit "establish that the Agency misled [him] as to the extent of its contacts with the [USDA] and with Ms. Horsley, . . . and as to the nature and extent of information concerning [the appellant]" that agency officials disclosed in those contacts, PFRF, Tab 1 at 9, specifically regarding contacts that occurred around the time of the appellant's application for employment with the USDA, *id.* at 8. In that regard, the appellant claims that the "statements of Rodney Davis, Michael Delgado and Lori Creswell show that the Agency had additional contacts with Ms. Horsley," *id.* at 10, and that agency counsel "hid that fact from [the appellant] and his counsel while negotiating [the] Settlement Agreement," *id.* at 11. First and foremost, the statements that the appellant cites indicate that the contacts in question occurred in August or September 2007, around the time of the appellant's application for employment with the USDA. *See* C-1 File, Tab 4, Ex. 3 at 12-18, 45-46. Thus, because the contacts the appellant cites all happened before the end of December 2007, a reasonable person would not have been misled by the agency's assertion in the February 5, 2008 e-mail exchange that it was unaware of any contacts between the agency and the USDA subsequent to December 2007. *See Hamilton*, 92 M.S.P.R. 467, ¶ 19.

¶15 Further, the agency correctly points out that Ms. Horsley initiated these contacts with Mr. Delgado and Mr. Davis, not agency personnel, and that the documentation of those contacts indicates that neither Delgado nor Davis

"provided any information concerning the proposal or decision memorandum (neither of which had been finalized nor issued by August 2007) or the administrative action to Director Horsley." PFRF, Tab 4, Response at 11; *see* C-1 File, Tab 4, Ex. 3 at 12-18, 21, 45-48. Mr. Delgado asserted that Ms. Horsley contacted him around the beginning of September 2007 because the appellant provided his name to her in order "to confirm that an internal investigation would result in a clearance letter being issued." C-1 File, Tab 4, Ex. 3 at 46. However, Delgado's statement to agency investigators does not indicate that he provided any information to Ms. Horsley concerning the agency's proposal to remove the appellant, any decision on that proposal, or the appellant's disciplinary status. *See id.* at 45-46. Similarly, Mr. Davis claimed that Ms. Horsley contacted him as a reference for the appellant on August 28, 2007, and that he told Ms. Horsley he was unable to comment whether the agency was investigating the appellant and referred her to TIGTA's Director of Human Services for a response. C-1 File, Tab 4, Ex. 3 at 15. Although Mr. Davis conceded that he told Ms. Horsley his opinion that the appellant's performance was average and that he would not re-hire him, *id.*, his statement also does not indicate that he commented on the agency's proposal to remove or the status of any pending discipline, *see id.* at 14-18. Thus, the record is consistent with the agency's assertion in the February 5, 2008 e-mail exchange between the parties that "the only information that was conveyed to USDA by Agency management/officials concerning the proposal or decision memorandum and any disciplinary action is 'no comment,' 'the matter is still pending,' and no further information can be provided." C-1 File, Tab 1, Ex. 3 at 1. Therefore, the appellant has failed to establish that the agency misled him regarding its contacts with the USDA in August or September 2007.

The December 2007 contacts between the agency and USDA also do not contradict the agency's assertions to the appellant regarding its contacts with USDA.

¶16 The appellant's petition for enforcement claimed that the agency misled him regarding two December 2007 contacts that agency special agents made with Ms. Horsley. C-1 File, Tab 1 at 10. However, other than to claim that the investigatory statements of Mr. Davis, Mr. Delgado, and Ms. Creswell revealed the agency's additional contacts with Ms. Horsley, the appellant did not specify which contacts, the date that the particular contacts occurred, or exactly what the named agency officials said to Ms. Horsley in those interviews that violated the agency's assurances that it was unaware of any post-December 2007 contacts between it and the USDA. *Id.* at 11; *see* C-1 File, Tab 1, Ex. 3. Nonetheless, a review of the investigative statements that the appellant cites, C-1 File, Tab 4, Ex. 3 at 12-18, 21, 45-48, reveals only one December 2007 contact, Ms. Horsley's December 12, 2007 interview with agency investigators, who were investigating his Privacy Act lawsuit, *id.*, at 47-48.

¶17 According to the investigators' report of that interview, Ms. Horsley stated that the appellant told her at the time of his job interview that he was under investigation and that he subsequently asserted that the matter was "all cleared up." *Id.* at 48. However, after USDA received the anonymous letters, the appellant recanted his initial statement and explained to Ms. Horsley that he had "meant to imply that the investigation was completed, but that the matter had not been adjudicated." *Id.* Ms. Horsley, with the concurrence of USDA counsel Michael Jones, who was present during the December 12, 2007 interview, stated that if the USDA had known that the matter was not yet adjudicated, it would not have offered the appellant a job, and that she had advised the appellant "that the employment offer was postponed pending the completion of the TIGTA investigation." *Id.* Just as with the August and September 2007 contacts reviewed above, nothing in the statements that the appellant cites contradicts the

assurances set forth in the February 5, 2008 e-mail exchange between the parties. Thus, the record is consistent with the agency's assertion in the February 5, 2008 e-mail exchange that "the only information that was conveyed to USDA by Agency management/officials concerning the proposal or decision memorandum and any disciplinary action is 'no comment,' 'the matter is still pending,' and no further information can be provided." *See* C-1 File, Tab 1, Ex. 3 at 1. Therefore, the appellant fails to establish that the agency misled him regarding its contacts with the USDA in December 2007. However, one contact between the agency and the USDA did violate the assurances that agency counsel provided to the appellant in the February 5, 2008 e-mail exchange that no contact between the agency and the USDA occurred after December 2007.

The appellant has failed to establish that the agency fraudulently induced him to enter into the settlement agreement through its failure to disclose a January 2008 contact between the agency and USDA.

¶18 On April 21, 2008, the agency disclosed to the appellant that one of its investigators interviewed Ms. Horsley on January 10, 2008, in connection with the appellant's Privacy Act lawsuit and asserted that the agency failed to report the contact to the appellant because agency counsel "was inadvertently not made aware of this conversation until today."[4] PFRF, Tab 4, Subtab 8; *see* C-1 File, Tab 4, Ex. 3 at 21. Ms. Creswell's deposition testimony explains that she was not involved in the investigation of the appellant's claims in his Privacy Act lawsuit and was therefore unaware of the contact because the agency tried to keep the two legal proceedings separate. PFRF, Tab 1, Ex. A at 153. She further testified that

[4]The agency contends that the appellant's petition for review, as it relates to this allegation, is untimely filed without good cause shown for the delay because, even considering the appellant's May 28, 2008 filing in the regional office as a petition for review, that pleading was filed more than 35 days after the agency notified the appellant of the January 10, 2008 contact. PFRF, Tab 4, Response at 24-25; *see* 5 C.F.R. § 1201.114(d). Because we determine that, for the reasons set forth *infra*, the appellant's allegation is insufficient to invalidate the settlement agreement, we need not address the agency's contentions in this regard.

despite her good-faith efforts to respond to the appellant's inquiries prior to entering the settlement agreement, she only became aware of the January 10, 2008 agency contact with Ms. Horsley while responding to the appellant's subsequent allegation that the agency had breached the settlement agreement. *Id.* at 153-55. Although the January 10, 2008 contact contradicts the assurances the agency gave the appellant in the February 5, 2008 e-mail exchange between the parties' counsel regarding whether such contacts had occurred subsequent to December 2007, the appellant has failed to establish that the agency "knowingly concealed a material fact or intentionally misled him" when it failed to notify him of the contact in response to his counsel's February 5, 2008 inquiry. *See Harris v. Department of Veterans Affairs*, 142 F.3d 1463, 1468 (Fed. Cir. 1998) (the appellant's "heavy burden of showing fraud" requires him to demonstrate that the agency knowingly concealed a material fact or that he was intentionally misled). The appellant has failed to establish, and nothing in the record indicates, that the agency intentionally concealed the January 10, 2008 contact with Ms. Horsley. Further, the appellant has failed to establish that the January 10, 2008 contact is a material fact.

¶19 Although the appellant asserts that he would not have entered into the settlement agreement had he known of the agency's contacts with USDA, PFRF, Tab 3 at 3, the record does not support his claim. Paragraphs 6 and 10 of the settlement agreement indicate that the appellant's concerns in entering the agreement were that the agency not share information about the rescinded removal penalty or express an opinion about his ability or inability to testify as a law enforcement officer, *see* I-1 File, Tab 11, Settlement Agreement at 2-4. None of the investigatory statements gathered in any of the contacts the appellant cites on review, including the one recounting the January 10, 2008 contact, indicate that agency investigators conveyed information in their interviews regarding the rescinded penalty of removal or the appellant's ability to testify as a law enforcement officer. C-1 File, Tab 4, Ex. 3 at 12-18, 21, 45-48. The appellant

claims on review that the investigative reports show that the agency's contacts with the USDA "were specifically designed to lead the [USDA] to withdraw, rescind or hold in perpetual abatement its offer of employment." PFRF, Tab 3 at 2. However, the reports fail to back up the appellant's assertion and the appellant has not provided evidence that would show that the investigative reports he cites are either inaccurate or incomplete regarding the scope or the substance of the agency's contacts with the USDA. The reports instead reveal that, before the parties executed the settlement agreement, Ms. Horsley told the appellant that the USDA put the appellant's employment offer on hold pending completion of TIGTA's adjudication of his disciplinary matter because the appellant had contradicted his initial statement to her that his disciplinary problems were resolved, conceding that the agency had only investigated and not yet adjudicated the matter. C-1 File, Tab 4, Ex. 3 at 48. Thus, the record reflects that the USDA placed the appellant's employment offer on hold due to information that the appellant himself conveyed directly to Ms. Horsley, circumstances well known by the appellant at the time he entered into the settlement agreement, and not due to information conveyed by the agency in the contacts he cites on review.

¶20 Therefore, the appellant's alleged new evidence is of insufficient weight to invalidate the settlement agreement and fails to provide good cause for the untimely filing of the appellant's petition for review. *Jones*, 69 M.S.P.R. at 26. Accordingly, we DISMISS the appellant's petition for review of the February 19, 2008 initial decision as untimely filed without good cause shown for the delay.

The appellant's petition for review abandons his compliance action.

¶21 Other than to note the AJ's instruction that a challenge to the settlement agreement must be pursued through a petition for review before the full Board and to disagree with the AJ's determination that the agency did not violate the settlement agreement with its initial disclosures in the appellant's Privacy Act suit, the appellant's petition for review fails to address the compliance initial decision. PFRF, Tab 1 at 7, 9. The appellant offers no authority for his assertion

that the settlement agreement somehow precluded the agency's disclosures in his Privacy Act suit, and he failed to establish that the agency's disclosures actually violated the settlement agreement. *Id.* at 7-8. Mere disagreement with the AJ's findings and credibility determinations does not warrant full review of the record by the Board. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Accordingly, with respect to the July 14, 2008 compliance initial decision, we DENY the appellant's petition for review because it fails to meet the Board's criteria for review. *See* 5 C.F.R. § 1201.115(a), (d).

ORDER

¶22 This is the final decision of the Merit Systems Protection Board on the timeliness of the appellant's petition for review of the February 19, 2008 initial decision that dismissed his appeal pursuant to the parties' settlement agreement. The February 19, 2008 initial decision will remain the final decision of the Board regarding the dismissal of the appeal docketed as MSPB Docket No. DC-0752-08-0188-I-1 as settled. The July 14, 2008 initial decision in the appellant's compliance matter docketed as MSPB Docket No. DC-0752-08-0188-C-1 is final. 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:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.