

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

2010 MSPB 179

Docket No. DC-0752-08-0188-M-1

**William H. Armstrong,
Appellant,**

v.

**Department of the Treasury,
Agency.**

September 1, 2010

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

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

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on remand from the United States Court of Appeals for the Federal Circuit, which vacated in part, affirmed in part and remanded the Board's March 6, 2009 decision in this matter for further proceedings. For the following reasons, we FIND that the appellant has established good cause for the untimely filing of his petition for review of the February 19, 2008 initial decision dismissing his appeal as settled, and we DENY the petition on the merits.

BACKGROUND

¶2 The facts and procedural history underlying this appeal, briefly summarized below, are fully set forth in the Board’s Opinion and Order in *Armstrong v. Department of the Treasury*, 110 M.S.P.R. 533, ¶¶ 2-9 (2009). The appellant settled his removal appeal and subsequently filed a petition for enforcement of the parties’ settlement agreement, which included an allegation that he relied on agency misinformation when he signed the agreement. *Id.*, ¶¶ 3-4, 6. The administrative judge denied the petition for enforcement, finding that the appellant failed to establish the agency’s noncompliance with the settlement agreement. *Id.*, ¶ 6. She noted that the appellant’s allegations concerning agency misinformation must be addressed in a petition for review of the initial decision that dismissed the removal appeal as settled. *Id.* Because the appellant’s subsequent petition for review argued that the agency fraudulently induced him to sign the settlement agreement, the Board considered it a petition for review of the initial decision that dismissed his appeal as settled. *Id.*, ¶ 7. However, the Board dismissed the petition for review as untimely filed without good cause shown for the delay because the appellant’s evidence was insufficient to invalidate the settlement agreement. *Id.*, ¶¶ 10-20. The Board also found that, to the extent that the appellant was petitioning for review of the initial decision in the enforcement matter, he had failed to meet the Board’s review criteria. *Id.*, ¶ 21.

¶3 The appellant appealed the Board’s decision to the Federal Circuit, which found that the Board had improperly conflated the issue of timeliness with the merits of the appellant’s fraudulent inducement claim. *Armstrong v. Department of the Treasury*, 591 F.3d 1358, 1359 (Fed. Cir. 2010). The court vacated the Board’s decision in part and remanded the appeal “for further proceedings to determine whether the Board should waive its timeliness requirement to permit

the appeal to be decided on the merits.” *Id.* The court affirmed the part of the Board’s decision regarding the compliance action.* *Id.*

ANALYSIS

The appellant established good cause for his untimely petition for review.

¶4 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. *Armstrong*, 110 M.S.P.R. 533, ¶ 10; 5 C.F.R. § 1201.114(d). The record reflects that the administrative judge 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. Initial Appeal File, Tab 12; *see* 5 C.F.R. § 1201.113. The appellant filed his petition for enforcement on May 28, 2008. Compliance File, Tab 1. Because that petition unmistakably challenged the validity of the settlement agreement, as noted above, we 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, ¶¶ 3-4 (2008) (the Board considered a petition for enforcement that was filed with the Board’s field office and that questioned the validity of the parties’ settlement agreement as a misfiled 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) (the Board accepted the date of a pleading filed in an enforcement action in a regional office as the filing date for the petition for

* We therefore readopt our finding that the appellant failed to meet the Board’s review criteria regarding the compliance matter. *Armstrong*, 110 M.S.P.R. 533, ¶ 21.

review of the initial decision dismissing the appeal as settled because the pleading indicated the appellant's intent to petition for review of that initial decision).

¶5 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. *Hawley*, 108 M.S.P.R. 587, ¶ 4 (citing *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980)). As we found in our previous decision on this matter, 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. *Armstrong*, 110 M.S.P.R. 533, ¶ 11. The record reflects that the appellant filed his petition for enforcement with the regional office on May 28, 2008, less than 3 weeks after the date that the agency produced the evidence in question. *See Armstrong*, 591 F.3d at 1362-63. We find that the appellant's "prompt reaction to evidence tending to show that the settlement agreement may have been procured through fraud," as described by our reviewing court, was diligent. *See id.* Thus, the appellant has established good cause to waive the time limit for filing his petition for review.

The appellant failed to establish that he was fraudulently induced to sign the settlement agreement.

¶6 Our previous decision examined the merits of the appellant's assertions in detail and, for the reasons previously articulated, we find that the appellant has failed to establish that the agency fraudulently induced him into signing the settlement agreement. *See Armstrong*, 110 M.S.P.R. 533, ¶¶ 13-19. The appellant had alleged that, while the parties were negotiating the agreement that settled his appeal, the agency misrepresented the scope and substance of its contacts with the Department of Agriculture concerning him. *Id.*, ¶ 7. He further alleged that those contacts disclosed unproven allegations against him and were

specifically designed to interfere with a job offer that the Department of Agriculture had extended to him, but subsequently placed on hold. *Id.*, ¶ 8. Ultimately, the appellant alleged that he would not have signed the agreement had he known of the undisclosed contacts. *Id.*, ¶¶ 8, 19.

¶7 We found that the agency did not misrepresent its contacts in any material fashion, and that the appellant failed to establish that the agency had knowingly concealed a material fact or intentionally misled him. *Id.*, ¶¶ 14-18. Further, the record reflected that, contrary to the appellant's claim, the Department of Agriculture did not place his job offer on hold due to any of the agency's contacts with it, or due to any information provided to it by the agency. *Id.*, ¶ 19. Instead, the record showed that the Department of Agriculture had placed the appellant's job offer on hold because the appellant had contradicted his initial statement to the hiring officer that his disciplinary problems had been resolved, when he later conceded that the agency had only investigated the matter but had not yet adjudicated it. *Id.* Thus, we found that the Department of Agriculture had placed the appellant's job offer on hold due to information conveyed directly to it by the appellant, and not due to information conveyed by the agency in the contacts he cited on review. *Id.* We further found that the appellant was well aware of these circumstances when he chose to sign the agreement settling his removal appeal. *Id.*

¶8 Accordingly, the appellant has failed to establish that the settlement agreement is invalid due to fraud or misrepresentation and we DENY his petition for review.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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.