

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

**2010 MSPB 249**

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Docket No. DA-0752-02-0325-C-1

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**Misty L. Wofford,  
Appellant,**

**v.**

**Department of Justice,  
Agency.**

December 23, 2010

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Misty L. Wofford, Norfolk, Virginia, pro se.

B. Don Perritt, Jr., Houston, Texas, for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the compliance initial decision dismissing her petition for enforcement of the parties' settlement agreement. We DENY the petition for review for failure to meet the review criteria under [5 C.F.R. § 1201.115](#)(d). For the reasons set forth below, we REOPEN the appeal on the Board's own motion pursuant to 5 C.F.R. § 1201.118, and AFFIRM the compliance initial decision as modified herein.

## BACKGROUND

¶2 In the underlying appeal, the appellant challenged her removal from her Immigration Enforcement Agent position.<sup>1</sup> Petition for Enforcement (PFE) File, Tab 1, Ex. 1B at 33-38. On June 18, 2002, the appellant and the agency executed a settlement agreement. PFE File, Tab 1 at 5-8. In exchange for the appellant's resignation and dismissal of any and all claims she may have had against the agency arising from her employment, *id.* at 5, 7, the agency agreed, among other things, to:

within fourteen (14) days of the date of this agreement, purge any and all files it maintains on [the appellant] of any and all negative information, including, but not limited to any and all discipline matters (actual and proposed), all documents . . . memoranda and files concerning any and all investigations, management inquiries and other examinations of [the appellant's] conduct (including the investigations conducted by Susan Friesenhahn and the Office of Internal Audit);

*Id.* at 6. In executing the agreement, the parties settled all known and unknown claims that the parties might have had against each other arising from the appellant's employment. *Id.* at 5, 8. Pursuant to this settlement agreement, the administrative judge issued an initial decision dismissing the appeal as settled, and retaining jurisdiction to enforce the terms of the agreement.<sup>2</sup> *Id.* at 3-4.

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<sup>1</sup> The appellant was employed by the Department of Justice (DOJ), Immigration and Naturalization Service (INS). Petition for Enforcement (PFE) File, Tab 1, Ex. 1B at 33-38. Congress abolished the INS, and in 2003, the Department of Homeland Security (DHS) took over the functions and responsibilities of the INS concerning immigration enforcement. PFE File, Tab 2 at 1 n.\*, Tab 6 at 2; *see Doe v. Department of Justice*, [95 M.S.P.R. 198](#) n.2 (2003). It is the Board's practice not to re-caption a case such as this to list DHS as the responding agency; the term "agency" in this Opinion and Order refers to the INS, both as it existed prior to the transfer and as it exists today as a component of DHS. *Doe*, [95 M.S.P.R. 198](#) n.2.

<sup>2</sup> In a 2010 petition for review of the 2002 initial decision, MSPB Docket No. DA-0752-02-0325-I-1, the appellant asks the Board to set aside the settlement agreement on the ground that it was procured by fraud or misrepresentation. That request will be addressed in a separate decision.

¶3 In 2008, the appellant filed a discrimination appeal with the Equal Employment Opportunity Commission (EEOC), alleging that the agency subjected her to disability discrimination, which ultimately resulted in her removal. PFE File, Tab 6, Ex. 1 at 1. In February 2009, she filed a lawsuit against the agency in the U.S. District Court for the Eastern District of Virginia, captioned, *Misty L. Wofford v. Janet Napolitano, Secretary, U.S. Department of Homeland Security*, Case No. 2:09-cv-38 (U.S. District Court case), alleging claims of discrimination, hostile work environment, and disparate treatment under Title VII of the Civil Rights Act of 1964. *Id.*, Exs. 2-3.

¶4 On September 25, 2009, the appellant filed a petition for enforcement with the Board, alleging that, apparently during the U.S. District Court case, she discovered that the agency had not purged negative information about her from the litigation database and the Internal Audit case report. PFE File, Tab 1 at 1-2 and Ex. 1. The agency responded that the appellant untimely filed her petition for enforcement and that only in response to the appellant's filing the U.S. District Court case did it seek to locate information concerning the settlement agreement. PFE File, Tab 6 at 1-4. The administrative judge informed the parties in a status conference that the record evidence showed that the agency materially breached the agreement. PFE File, Tab 13 at 1. She scheduled a hearing regarding the appellant's petition for enforcement. PFE File, Tabs 12-14.

¶5 The agency moved to dismiss the petition for enforcement based upon the Board's findings in *Caston v. Department of the Interior*, [108 M.S.P.R. 190](#) (2008). PFE File, Tab 18. Caston's removal appeal was resolved in a written settlement agreement in which the agency agreed to limitations on its ability to disclose information about the adverse action in exchange for the appellant's agreement not to file additional administrative or judicial actions concerning the subject matter of the appeal. *Id.*, ¶¶ 2-4. Caston later filed an equal employment opportunity (EEO) complaint concerning matters covered by the settlement agreement, and the agency's response included a chronology of the appellant's

removal and its subsequent rescission per the settlement agreement. *Id.*, ¶¶ 6, 12. The Board held that Caston materially breached the settlement agreement when he filed the EEO action and that this breach discharged the agency from its obligation to perform. *Id.*, ¶ 21.

¶6 Although the appellant did not initially respond to the agency's motion, she stated during a pre-hearing conference that she had read the *Caston* case. PFE File, Tab 20 at 1. The administrative judge cancelled the hearing and apprised the parties that she would deny the petition for enforcement based upon the Board's ruling in *Caston*. However, she granted the appellant's request for additional time to respond to the agency's motion to dismiss. *Id.* at 1-2. The appellant submitted her response. PFE File, Tab 21.

¶7 Based upon the written record, the administrative judge issued a compliance initial decision dismissing the petition for enforcement. Compliance Initial Decision (CID) at 1, 7. She found that the undisputed record shows that the agency materially breached the 2002 settlement agreement by failing to purge the Internal Audit case report of information concerning the 2002 removal action. CID at 3-4. However, the administrative judge also determined that the appellant materially breached the settlement agreement by filing complaints with the EEOC and in U.S. District Court. CID at 4-6. Applying the Board's rationale in the *Caston* case, the administrative judge determined that the appellant materially breached the agreement before she became aware of the agency's breach and that, because the appellant came to the Board with "unclean hands," she cannot now complain of the agency's breach. CID at 5-6.

¶8 The appellant has filed a petition for review of this compliance initial decision. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition. PFR File, Tab 3.

## ANALYSIS

The appellant's petition for review fails to establish any error in the compliance initial decision.

¶9 On review, the appellant contends that the 2002 settlement agreement is invalid because it resulted from fraud and misrepresentation. PFR File, Tab 1 at 2-11, 14-16; *see* PFE File, Tabs 11, 21. As a general rule, an attack on the validity of a settlement agreement should be raised in a petition for review of the initial decision that dismissed the appeal pursuant to the settlement. *See Gareis v. Department of the Interior*, [90 M.S.P.R. 107](#), ¶ 5 (2001). Consequently, the Board will address the appellant's contention that the settlement agreement is invalid because it was procured by fraud and misrepresentation in MSPB Docket No. DA-0752-02-0325-I-1, in connection with the appellant's petition for review of the 2002 initial decision.

¶10 The appellant also alleges that the administrative judge abused her discretion in considering the agency's "untimely" motion to dismiss the petition for enforcement. PFR File, Tab 1 at 19-23; *see* PFE, Tab 21. As an administrative judge has broad discretion in controlling proceedings before her, and the administrative judge gave the appellant an opportunity to respond to the motion to dismiss, we discern no abuse of discretion by the administrative judge. *See Key v. General Services Administration*, [60 M.S.P.R. 66](#), 68 (1993); *see* [5 C.F.R. § 1201.41\(b\)\(8\)](#); PFE File, Tabs 20-21; CID at 4-6.

¶11 The appellant appears to argue that she did not breach the settlement agreement in filing a lawsuit against the agency in U.S. District Court. *See* PFR File, Tab 1 at 18. She alleges that the case was dismissed for want of prosecution on March 9, 2010, and thereby "relieved [the agency] of the burden of having to defend this referenced litigation." *See id.* at 18, 40. The appellant's alleged decision not to prosecute her case in U.S. District Court does not erase the fact that she filed the lawsuit. *See Bables v. Department of the Army*, [86 M.S.P.R.](#)

[171](#), ¶ 19 (2000) (the mere fact that the agency cured the breach does not mean that there was not one).

¶12 In sum, the appellant has not put forth any argument establishing error by the administrative judge or presented any new and material evidence that affects the outcome of this appeal. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980); [5 C.F.R. § 1201.115\(d\)](#). We therefore deny the petition for review for failure to meet the review criteria. We reopen the appeal on the Board’s own motion to affirm the compliance initial decision, as modified herein. The petition for enforcement should be denied.

¶13 We discern no error with the administrative judge’s conclusion that the appellant breached the agreement based on the appellant’s 2008 EEOC complaint and her 2009 U.S. District Court case. The administrative judge found that the agency materially breached the settlement agreement by maintaining the Internal Audit case report.<sup>3</sup> The agency did not file a petition for review of the administrative judge’s decision in this regard, and we see no basis to disturb this finding.

¶14 However, the administrative judge’s reliance on *Caston* in the compliance initial decision is problematic. First, this matter is factually distinguishable from *Caston*. The Board found that *Caston* materially breached the settlement agreement when he filed an EEO action, and that this breach discharged the agency of its obligation not to disclose information covered by the confidentiality provisions during the EEO proceedings. *Caston*, [108 M.S.P.R. 190](#), ¶¶ 9, 19-21. *Caston*’s breach in filing an EEO action preceded the agency’s “breach” in

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<sup>3</sup> In light of this finding, we need not address whether the agency’s decision to maintain information about the appellant in a litigation database violates the settlement agreement. *See e.g., Baig v. Department of the Navy*, [66 M.S.P.R. 269](#), 275 (“[A]n agency may retain a separate file containing documents related to the disciplinary action as long as the agency observes appropriate safeguards against unauthorized disclosures.”) (internal citations omitted), *aff’d*, 64 F.3d 677 (Fed. Cir. 1995) (Table).

disclosing information that was required to be kept confidential. However, in this matter, the agency's breach preceded the appellant's breach. The agency breached the agreement in 2002 when it failed to purge the Internal Audit case report within fourteen days of the June 18, 2002 agreement, *see* PFE File, Tab 1 at 6 and Ex. 1, and then several years later, the appellant breached the agreement by filing complaints against the agency with the EEOC in 2008, and in U.S. District Court in 2009, *see id.*, Ex. 1; PFE File, Tab 6, Ex. 1 at 1, Exs. 2-3. Consequently, where the agency was the first party to breach the agreement, the *Caston* holding that the appellant's breach discharged the agency's obligation to honor its obligations does not apply.

¶15 Second, the compliance initial decision leaves the impression that the Board applied the doctrine of “unclean hands” in *Caston*; however, this term of art was not used in *Caston*.<sup>4</sup> CID at 5-6. The clean hands doctrine “closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.” *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, [324 U.S. 806](#), 814 (1945); *Special Counsel v. Filiberti*, [27 M.S.P.R. 37](#), 39 (the clean hands doctrine holds that “the person who seeks equity must do equity”), *modified on other grounds*, [27 M.S.P.R. 577](#) (1985).

¶16 We believe that application of the “unclean hands” doctrine is appropriate in this matter. The administrative judge correctly observed that the appellant breached the agreement before she became aware of the agency's breach, and the

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<sup>4</sup> “[I]t would be inequitable to require the agency to remain silent concerning the removal in order to adhere to the agreement's confidentiality provision when the appellant has also violated that provision as well as his obligation . . . not to bring further actions concerning the subject matter of his MSPB appeal.” *Caston*, [108 M.S.P.R. 190](#), ¶ 21. Consequently, the Board held that “the appellant's breach of the agreement was a material one that discharged the agency from its obligation to perform.” *Id.*

appellant's breach in filing claims against the agency with the EEOC and in U.S. District Court was clearly a material one. *See* PFE File, Tab 1 at 5-8. Under these circumstances, we conclude that the appellant's actions were "tainted with inequitableness or bad faith relative to the matter in which [she] seeks relief, however improper may have been the behavior of the [agency]." *Precision Instrument Manufacturing Co.*, 324 U.S. at 814. For these reasons, we affirm the compliance initial decision as modified herein.

¶17 We note that the administrative judge erroneously "dismissed" the petition for enforcement, when the proper disposition was to deny it. Therefore, we DENY the petition for enforcement.

#### ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this compliance matter. 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](http://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:

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