

STATE OF NEW JERSEY
BEFORE THE MERIT SYSTEM BOARD
AND
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

STATE OF NEW JERSEY,
DEPARTMENT OF COMMUNITY AFFAIRS,

JOINT DECISION AND ORDER

Respondent,

DOP Docket Nos.
2001-3359 & 2002-622

-and-

MAXIMO A. NINAL, JR.

OAL Docket Nos.
CSV 913-01 & CSV 9344-01

Appellant.

STATE OF NEW JERSEY
(DEPARTMENT OF COMMUNITY AFFAIRS),

Respondent,

-and-

PERC Docket No. CI-H-2002-15

MAXIMO A. NINAL, JR.,

Charging Party.

SYNOPSIS

In a joint order, the Public Employment Relations Commission and the Department of Personnel adopt an Administrative Law Judge's recommendation and make enforceable the terms and conditions of a settlement agreement entered into between Maximo A. Ninal, Jr. and the State of New Jersey (Department of Community Affairs). Ninal's appeal filed with the Merit System Board and his unfair practice charge filed with the Commission had been consolidated for hearing before an ALJ. At the hearing, the parties entered into a settlement agreement which was subsequently reduced to writing. Ninal refused to sign the written agreement and sought to have the hearings continued. The ALJ found that the parties entered into the settlement agreement voluntarily and freely with the advice of counsel and without any fraud.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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MAXIMO A. NINAL, JR.,

Charging Party.

Appearances:

For the Respondent, Peter C. Harvey, Attorney General
(Julie Cavanagh, Deputy Attorney General)

For the Charging Party, Maximo A. Ninal, Jr., pro se

JOINT DECISION

Maximo A. Ninal, Jr. ("Appellant") filed appeals with the Merit System Board regarding a ten-day suspension and his removal from employment by the State of New Jersey, Department of Community Affairs. Appellant also filed an unfair practice

charge with the Public Employment Relations Commission. The appeals were transmitted to the Office of Administrative Law and a Complaint on the unfair practice charge was issued. The matters were consolidated before an Administrative Law Judge.

P.E.R.C. No. 2003-45, 29 NJPER 401 (¶130 2003).

At an October 16, 2003 hearing, extensive settlement negotiations took place and the parties settled the matter. The terms of the settlement were placed on the record. The pertinent terms called for Appellant's withdrawal of the appeals and the unfair practice charge in exchange for a lump sum payment of \$35,000 and a resignation in good standing.

The ALJ questioned Appellant about the terms of the settlement and Appellant indicated that he understood that the matter was being settled that day. The parties agreed that the terms of the agreement would also be reduced to a written agreement that would reflect the terms as stated on the record.

No written agreement was forwarded to the ALJ. The attorney for Respondent informed the ALJ that Appellant refused to sign a written agreement memorializing the settlement. On December 31, 2003, Respondent filed a motion to enforce the settlement.

The case was re-listed for March 24, 2004 to give Appellant an opportunity to explain why he refused to sign the agreement. Although Appellant was represented by counsel, he personally indicated that he did not want to honor the settlement agreement,

and that he wanted to continue the hearing. He indicated that he had not understood the terms of the agreement that had been placed on the record on October 16, 2003. Appellant stated that he was under the impression that the agreement reached was only an offer, and that a signed agreement had to be executed. The ALJ conducted a lengthy review of the record, including the transcript of the prior proceedings.

On March 29, 2004, the ALJ issued an Initial Decision finding that the parties entered into the settlement agreement voluntarily and freely with the advice of counsel and without any fraud. He also found that the agreement was fair and just under the circumstances and consistent with law, and that approval of the settlement agreement would serve the interests of justice. The ALJ approved the terms of the settlement agreement as reflected in the transcript of the October 16, 2003 proceeding. The ALJ ordered the parties to comply with the settlement terms, subject to final approval by the Commission and the Merit System Board.

On May 4, 2004, Appellant filed exceptions.^{1/} He asserts that enforcing the Initial Decision may violate his constitutional and civil rights. He further asserts that he did not understand or review the terms of the settlement and that he

^{1/} The Initial Decision was mailed to Appellant on April 19, 2004.

felt coerced. Appellant indicates that he would sign the Settlement Agreement if he could have an additional \$5,000.

On May 11, 2004, Respondent filed a response urging adoption of the ALJ's Initial Decision. On May 26, Appellant filed a supplemental submission.

New Jersey has a "strong public policy favoring the settlement of litigation." Zuccarelli v. Dept. of Environmental Protection, 326 N.J. Super. 372, 380 (App. Div. 1999), certif. den. 163 N.J. 394 (2000) (citing Nolan v. Le Ho, 120 N.J. 465, 472 (1990)). A voluntary settlement agreement is binding upon the parties, whether or not made in the presence of the court or in writing. Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983); In the matter of Edgar Medina (MSB, decided May 23, 2000) (MSB acknowledged settlement placed on the record even though appellant did not sign written memorialization of agreement). The question in this case is whether the agreement was voluntarily entered into. The ALJ ruled that it was. We agree.

N.J.A.C. 1:1-19.1 provides that where the parties orally disclose the full settlement terms, and the ALJ determines that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy, the ALJ shall issue an initial decision incorporating the full terms and approving the settlement. The ALJ has done exactly that.

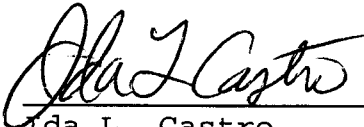
Appellant was represented by counsel. The terms of the settlement agreement were placed on the record at the October 16, 2003 hearing. Appellant asked and answered questions about the settlement that indicated his understanding of its terms and did not suggest any confusion or coercion. That the parties engaged in subsequent negotiations in an attempt to conclude the matter does not undermine the fact that on October 16, the consolidated matter was settled upon mutually agreeable terms. We know of no constitutional or civil rights that would be contravened by enforcing this settlement agreement. Finally, the agreement is not in contravention of any Merit System law or rule.

Having independently evaluated the record and considered the ALJ's Initial Decision, the Board, at its meeting on June 9, 2004 and the Public Employment Relations Commission, at its meeting on May 27, 2004, adopt the ALJ's recommendation and make the terms and conditions of the settlement agreement enforceable.

JOINT ORDER

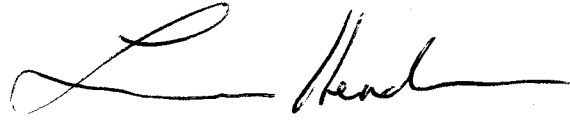
The terms and conditions of the October 16, 2003 settlement agreement as recited in the Initial Decision are acknowledged and enforceable.

DECISION RENDERED BY THE
MERIT SYSTEM BOARD ON
JUNE 9, 2004



Ida L. Castro
Commissioner
Department of Personnel

DECISION RENDERED BY THE
PUBLIC EMPLOYMENT RELATIONS
COMMISSION ON MAY 27, 2004



Lawrence Henderson
Chairman
Public Employment Relations
Commission

Chairman Henderson,
Commissioners Buchanan,
DiNardo, Mastriani and Sandman
voted in favor of this
decision. None opposed.
Commissioner Katz was not
present.

COPY



COPY

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 0913-01
AGENCY REF. NO. 2001-3359
OAL DKT. NO. CSV 9344-01
AGENCY REF. NO. 2002-622

MAXIMO NINAL,

Appellant,

v.

STATE OF NEW JERSEY

DEPARTMENT OF COMMUNITY AFFAIRS,

Respondent.

PERC DKT. NO. CI-H-2002-15

MAXIMO NINAL

Charging Party,

v.

STATE OF NEW JERSEY

DEPARTMENT OF COMMUNITY AFFAIRS

Respondent.

Robert H. Jaffe, Esq., for appellant (Robert H. Jaffe and Associates, attorneys)

Julie Cavanagh, Deputy Attorney General, for respondent (Peter C. Harvey,
Attorney General of New Jersey, attorney)

Record Closed: March 24, 2004

Decided: March 29, 2004

BEFORE ROBERT J. GIORDANO, ALJ:

On March 19, 2001, an appeal from a ten-day suspension by appellant, Maximo Ninal, was transmitted to the Office of Administrative Law (OAL) for determination as a

contested case pursuant to *N.J.S.A. 52:14B-1 to -15* and *N.J.S.A. 52:14F1 to -13*. The matter was assigned OAL Dkt. CSV 0913-01. On October 25, 2001, an appeal from a removal by appellant was transmitted to the OAL for determination as a contested case. The matters were consolidated for hearing and a prehearing conference was held on May 2, 2002. A Prehearing Order was entered on March 3, 2002. The hearing was scheduled to commence on October 28, 2002.

Prior to the hearing, the respondent, Department of Community Affairs, filed a motion for consolidation and for determination of predominant interest on October 1, 2002. In addition to the two appeals from the disciplinary actions filed with the Merit Systems Practices and Labor Relations, Department of Personnel (MSB), there had been an unfair labor practice charge filed on behalf of appellant herein with the New Jersey Public Employee Relations Commission (PERC). The hearing in the matters was adjourned pending the entry of an order on the motion. An order on the motion was entered on November 27, 2002. Thereafter, the final order from the agencies modified the initial order to require that, after making the recommended finding of fact and conclusions of law, the matters would be submitted to both agencies.

The matters were scheduled for hearing on May 29, 2003, but were subsequently adjourned to October 16, 2003. At the hearing, extensive settlement negotiations took place and the matter was settled between the parties. The terms of the settlement agreement were placed on the record at that time. The parties agreed that the terms of the agreement would also be reduced to a written agreement that would reflect the terms as stated on the record.

The terms of the agreement as placed on the record are as follows:

1. The appellant will withdraw the appeals from the two disciplinary actions as well as the unfair labor practice charge filed with PERC, under Docket No. CI-H-2002-15.

2. The respondent will withdraw the disciplinary charges against appellant.
3. The personnel file for the appellant will be changed to remove any references to the disciplinary action resulting in the ten-day suspension, as well as any references to the disciplinary action resulting in the removal from employment.
4. The personnel file for appellant will reflect a resignation in good standing from the respondent, Department of Community Affairs, effective April 19, 2001.
5. The respondent shall forward the record as modified to the Department of Personnel.
6. The respondent shall issue a "To whom it may concern" letter stating that the appellant resigned from employment in good standing.
7. The respondent shall pay the appellant the lump sum amount of \$35,000.
8. The appellant waives any claim for back pay, vacation pay, or any other emolument of employment.
9. There shall be no other payments for costs, or fees, including, but not limited to attorney fees or costs of suit.
10. The appellant shall release the respondent from any and all claims that may arise out of the within incidents, including but not limited to civil rights claims, wrongful termination claims, LAD claims, or other similar claims, except for any claims the appellant may have pursuant to the Workers' Compensation laws of the State of New Jersey.
11. The appellant agrees not seek employment in the future with the Department of Community Affairs. He may apply for a position with any other agency of the State of New Jersey.

12. By entering into this agreement, neither party is admitting liability, or wrongdoing, nor shall this agreement be precedent for any other claims in the future.
13. The parties shall not modify the terms and conditions of this agreement except upon mutual agreement, and except as otherwise prohibited by law.

Thereafter, no written agreement was forwarded to the undersigned. The Deputy Attorney General, attorney for respondent, advised the undersigned that the appellant refused to sign a written agreement memorializing the agreement. On December 31, 2003, the respondent filed a motion to enforce the settlement. The appellant was to submit opposition, if any, by January 16, 2004.

After several requests for extension of time to file opposition, counsel for the appellant advised the undersigned that the appellant wanted to be heard regarding his refusal to sign the agreement. As such, the matter was re-listed for March 24, 2004. Appearing for appellant at that time was Robert H. Jaffe, Esq. Appearing for the respondent was Deputy Attorney General Julie Cavanagh. Appellant himself indicated that he did not want to honor the settlement agreement, and that he wanted to continue the hearing. He indicated that he did not understand the terms of the agreement that had been placed on the record on October 16, 2003. Counsel for respondent indicated that respondent wanted to enforce the settlement agreement. The parties were permitted to place their respective positions on the record.

Appellant was questioned on the record about his current understanding of the agreement of October 16, 2003. Appellant stated that he did not understand the terms of the agreement. He stated that he was under the impression that the agreement reached was only an offer, and that a signed agreement had to be executed. The undersigned conducted a lengthy review of the prior proceedings, and the *voir dire* of the appellant at the time. The appellant asked questions at the time, relevant to the settlement, and evidencing his full understanding of the issues at hand. He responded to my questions in

an unequivocal manner, further evidencing to the undersigned his full understanding of the proceedings. He indicated he understood that the matter was being settled that day.

Counsel for the appellant acknowledged that after the date the settlement was placed on the record, the parties engaged in additional negotiations to effect changes to the agreement. In fact, the respondent agreed to many of the recommended changes. However, the respondent refused to agree to increase the lump sum payment to \$40,000. At the conclusion of the examination of appellant and oral arguments of counsel, the record was closed.

Generally, New Jersey has a "strong public policy favoring the settlement of litigation." *Zuccarelli v. Dept. of Env'tl. Protection*, 326 N.J. Super. 372, 380 (App. Div. 1999), *certif. denied*, 163 N.J. 394 (2000) (citing *Nolan v. Le Ho*, 120 N.J. 465, 472 (1990)). Settlement agreements between parties to a lawsuit are enforceable contracts, and "absent a demonstration of fraud or other compelling circumstances", courts "should honor and enforce" settlement agreements as they do other contracts. *Ibid.* (citing *Pascarella v. Bruck*, 190 N.J. Super. 118, 124-25 (App. Div. 1983)).

Like other contracts, when a settlement is obtained by fraud, the injured party may seek rescission. When there is a breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement. *Stamato & Co v. Borough of Lodi*, 4 N.J. 14, 17 A.2d 336 (1950). Where a party is not seeking damages, the party need establish only equitable fraud, not legal fraud. In order to prove equitable fraud, a party must demonstrate a material misrepresentation made with intent that it be relied on, coupled with actual detrimental reliance. *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 625, 432 A.2d 521 (1981).

Considering the circumstances of this matter, I **FIND** there was no fraud or other compelling circumstances here. I further **FIND** that the parties entered into the agreement freely and voluntarily on October 16, 2003, and with the advise of counsel. I further **FIND** that the terms of the settlement agreement are fair and just under the

circumstances of the matter and are consistent with law, and the approval of the settlement agreement will serve the interests of justice. The reasons posited by appellant in support of his request to set aside the agreement do not rise to the level and are not sufficient to set aside the agreement. I will approve of the terms of the settlement between the parties, the terms of which have been placed on the record on October 16, 2003, as reflected in the transcript of the proceeding, which is incorporated by reference herein.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C. 1:1-19.1* and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. The terms and conditions of this agreement shall be enforceable as to the parties upon final approval of the Merit System Board and the Public Employee Relation Commission.


I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for their consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**, which by law are authorized to make a final decision regarding approval of the settlement. If the **MERIT SYSTEM BOARD** and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** do not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, DEPARTMENT OF PERSONNEL, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, and the **CHAIR OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION**,

495 West State Street, PO Box 429, Trenton, New Jersey 08625-0429, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/29/04
DATE


ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

DATE

MERIT SYSTEM BOARD

Receipt Acknowledged:

DATE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mailed to Parties:

DATE
md

OFFICE OF ADMINISTRATIVE LAW