

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

**2007 MSPB 304**

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Docket No. DA-0752-07-0206-I-1

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**Jerry O. Jones,  
Appellant,**

**v.**

**Department of the Treasury,  
Agency.**

December 13, 2007

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Jerry O. Jones, Allen, Texas, pro se.

Michael L. Salyards, Esquire, Dallas, Texas, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision which dismissed the appeal of his allegedly involuntary retirement for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

**BACKGROUND**

¶2 From November 14, 2004, to July 24, 2005, the appellant worked as Program Manager/Senior Manager of Operations for Reporting Compliance in the Internal Revenue Service Small Business/Self Employed Division (SBSE) in

Dallas, Texas. Initial Appeal File (IAF), Tab 4, Subtab 4b-18 at 8, 10. The agency asserted that the appellant was experiencing performance problems in that position. IAF, Tab 4, Subtabs 4b5-4b7.

¶3 According to the appellant, on July 19, 2005, he received a telephone call from his second-line supervisor, Robert Hunt. Hunt told the appellant that he was unhappy with the appellant's performance and would be reassigning the appellant immediately. This prompted the appellant to arrange a meeting with Hunt on July 21, 2005, to discuss the matter. IAF, Tab 15 at 4. The appellant alleged that, at the meeting, Hunt informed the appellant that he had "lost confidence" in him and was therefore assigning the appellant to a new post as an Automation Project Manager, which would require the appellant to report for duty in New Carrollton, Maryland. When the appellant indicated that he did not wish to move from Dallas to New Carrollton, Hunt told the appellant that, if he did not accept the reassignment, then he must either retire or face removal within 90 days. *Id.* at 5-6.

¶4 Hunt also told the appellant that, if the appellant were to retire by August 3, 2005, Hunt could offer him a Voluntary Separation Incentive Payment (VSIP). Because the Office of Personnel Management (OPM), had not given the agency VSIP authority for either the Senior Manager of Operations position or the Automation Project Manager position, the agency had to reassign the appellant to a position as a Supervisory Public Affairs Specialist in the Communications, Liaison & Disclosure section (CLD) in order to qualify him for a VSIP. IAF, Tab 4, Subtab 4b-5 at 1-2, Subtab 4b-14 at 2; Tab 15 at 5-6. The appellant alleges that on July 24, 2005, while he was contemplating retirement, the agency transferred him to CLD without his knowledge. IAF, Tab 4, Subtab 4b-18 at 8; Tab 15 at 6. On July 28, 2007, the appellant applied for immediate retirement and a VSIP. IAF Tab 8; Tab 15 at 6-7. Both applications were approved, and the

appellant retired from the CLD position, effective August 3, 2005, with a VSIP of \$25,000.<sup>1</sup> Tab 4, Subtab 4b-18 at 3-6.

¶5 On September 12, 2005, the appellant contacted an equal employment opportunity (EEO) counselor to file a complaint alleging that his retirement was involuntary. IAF, Tab 4, Subtab 4b-2. After the agency conducted an investigation and issued a final decision on the appellant's EEO complaint, the appellant filed an initial appeal contesting his allegedly involuntary retirement. He requested a hearing. IAF, Tab 1.

¶6 The administrative judge (AJ) issued an acknowledgment order which advised the appellant he would be granted a hearing only if he alleged that his retirement was involuntary due to agency duress, coercion, or misrepresentation. IAF, Tab 2. During a status conference, the AJ provided the appellant additional information regarding the standards the Board applies when considering claims that an agency coerced an employee to resign or retire by directing his reassignment. IAF, Tab 7.

¶7 In his attempt to prove jurisdiction, the appellant alleged that the agency coerced his retirement by making his job unreasonably difficult and unpleasant, IAF, Tab 15, at 2-3, 7, that the agency had no legitimate reason to reassign him to the Project Manager position in New Carrollton, *id.* at 7-8, and that the agency used the VSIP to pressure him into retirement, *id.* at 6-7.

¶8 After considering the parties' submissions, the AJ found that the appellant failed to raise a non-frivolous allegation that the Board has jurisdiction over the appeal. Accordingly, she dismissed the appeal without a hearing. IAF, Tab 17, Initial Decision (ID) at 1, 10. Specifically, the AJ found that: (1) The appellant failed to allege facts that could show that the agency's actions rendered the

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<sup>1</sup> Although the appellant was in the position from which he retired for less than 1 year, the parties do not dispute that the appellant has adverse action appeal rights on the basis that he had over 36 total years of service with the agency prior to his assignment to the CLD. IAF, Tab 6.

workplace so pervasively unpleasant and difficult as to deprive him of any other choice but to separate from service; (2) the appellant failed to allege facts that could show that his retirement was obtained through duress or coercion, or that he was misled by the agency, i.e., the appellant was not deprived of his freedom of choice when he decided to retire; (3) Hunt had not yet officially reassigned the appellant, and the appellant could have chosen to challenge the agency's reassignment instead of retiring; and (4) the appellant's allegedly poor job performance supplied a legitimate agency reason for his reassignment. ID at 8-10. In sum, the AJ found that there was a legitimate basis to reassign the appellant to New Carrollton and that the appellant did not retire for lack of options.

¶9 In his petition for review, the appellant contends that the AJ did not fully consider his arguments and that he should have been afforded a hearing to present his jurisdictional evidence. Petition for Review File, Tab 1 at 4-6.

#### ANALYSIS

¶10 A decision to resign or retire is presumed to be voluntary, and an employee who voluntarily retires has no right to appeal to the Board. *Staats v. U.S. Postal Service*, 99 F.3d 1120, 1123-1124 (Fed. Cir. 1996). There are, however, limited situations in which an appellant may overcome the presumption of voluntariness and prove Board jurisdiction over an involuntary retirement appeal. For example, in cases where an agency threatens a removal action knowing that the removal cannot be substantiated, an employee's resignation in the face of such a removal is the product of coercion and is deemed involuntary. *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136-37 (Fed. Cir. 1987). When considering whether a retirement was involuntary, the Board will consider the totality of the circumstances surrounding the retirement in order determine whether those circumstances would have compelled a reasonable person to retire. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1329 (Fed. Cir. 2006) (en banc); *Shoaf v. Department of*

*Agriculture*, 260 F.3d 1336, 1341-42 (Fed. Cir. 2001). Factors that the Board will consider include undue time pressure on the retirement decision and agency bad faith in encouraging the retirement, *Bravman v. Department of the Navy*, 26 M.S.P.R. 169, 171 (1985), as well as unreasonably difficult working conditions caused by the agency, *Bates v. Department of Justice*, 70 M.S.P.R. 659, 663 (1996).

¶11 An appellant who alleges that a presumptively voluntary action was involuntary bears the burden of proving Board jurisdiction by a preponderance of the evidence. *Garcia*, 437 F.3d at 1329; *Staats*, 99 F.3d at 1123-24; 5 C.F.R. § 1201.56(a)(2). An appellant is only entitled to a jurisdictional hearing if he makes a non-frivolous allegation of Board jurisdiction. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 642-43 (Fed. Cir. 1985). Non-frivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter in issue. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). In determining whether the appellant has made a non-frivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Id.*

¶12 In this case, the appellant alleged that he retired when faced with a threatened removal for refusing to accept a directed reassignment. In order to remove an employee for failure to accept a reassignment, the agency's decision to reassign the employee must be bona fide and based upon legitimate management considerations in the interest of the service. *Umshler v. Department of the Interior*, 44 M.S.P.R. 628, 630 (1990); *Ketterer v. Department of Agriculture*, 2 M.S.P.R. 294, 299 (1980). An unjustifiable reassignment cannot serve as the

basis for a removal action. Therefore, if the appellant can show that the agency knew or should have known that its reasons for reassigning him to the Project Manager position in New Carrollton were not bona fide and based upon legitimate management considerations in the interest of the service, then he can show that the agency knew or should have known that it could not substantiate Hunt's threat to remove the appellant for declining the reassignment and that the threatened removal was coercive.

¶13 The agency alleges that it had legitimate management reasons for reassigning the appellant, i.e., the agency was going through a reorganization,<sup>2</sup> the appellant was suffering from performance problems as Senior Manager of Operations, and the agency determined that the appellant's talents could best be utilized as an Automation Project Manager at the New Carrollton post of duty. IAF, Tab 4, Subtab 4b-5 at 2-3; Tab 9. The appellant alleges, however, that he was not experiencing any performance problems as Senior Manager of Operations. The appellant also alleges that, even as Automation Project Manager, there was no legitimate reason for the agency to require him to move to New Carrollton, as no one else working on the project, including the other Automation Project Manager, had been required to move to New Carrollton. The other employees on the automation project were permitted to work from their respective posts of duty throughout the United States. IAF, Tab 15 at 8-9.

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<sup>2</sup> The agency has failed to provide a reasonable explanation as to why its reorganization played any role in its decision to reassign the appellant. The agency alleges only that the duties of the Senior Manager of Operations have "changed dramatically" and are now "vastly different" than what they were when the appellant held the position. IAF, Tab 4, Subtab 4b-5 at 2. Because the agency did not have the authority to offer the appellant a VSIP in his Senior Manager of Operations position, it does not appear that the incumbent of the position would have been directly affected by the reorganization. *See Cook v. Department of Defense*, 63 M.S.P.R. 270, 274 (1994) (the purpose of the VSIP program is to avoid or minimize the need for involuntary separations due to a RIF, base closure, reorganization, or other similar actions).

¶14 The AJ found that the agency's decision to reassign the appellant was justified because the appellant's supervisors contended that the appellant's performance was lacking. ID at 9 n.6. However, the fact that the agency alleged that it had a justifiable reason for directing the reassignment was insufficient to divest the Board of jurisdiction over the appellant's claim. "Although the appellant bears the burden of establishing that his retirement was involuntary, the agency must refute his allegation that the transfer was intended to coerce his retirement by showing that the transfer was based on a legitimate management reason. The appellant must then be allowed an opportunity to rebut that averred reason," and must ultimately "demonstrate that the transfer had 'no solid or substantial basis in personnel practice or principle.'" *Rayfield v. Department of Agriculture*, 26 M.S.P.R. 244, 246 (1985) (quoting *Roskos v. United States*, 549 F.2d 1386, 1389 (Ct.Cl. 1979)). Thus, the AJ erred in crediting the agency's explanation for the reassignment over the appellant's explanation because the appellant stated an adequate prima facie case of jurisdiction and, in the absence of an evidentiary hearing, the AJ may not accept the agency's assertions as dispositive. *See Ferdon*, 60 M.S.P.R. at 329.

¶15 Although the Board will not review the management considerations which underlie the exercise of agency discretion if it is established that the reassignment was properly ordered due to legitimate and bona fide management reasons, *Rayfield*, 26 M.S.P.R. at 247 n.1, in the face of a non-frivolous allegation to the contrary, the propriety of the reassignment cannot be determined without a hearing.<sup>3</sup> Because the appellant has alleged facts which, if proven, would show

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<sup>3</sup> Generally, the Board's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined. In most cases, if an appellant establishes that his resignation was involuntary, he not only establishes Board jurisdiction, but the appellant also wins on the merits. *Schultz*, 810 F.2d at 1136; *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 895 (Fed. Cir. 1986). Thus, the jurisdictional question and the merits of the appeal may rise and fall together.

that the agency knew or should have known that it could not substantiate its threatened removal based on the appellant's declination of the directed reassignment, the appellant has non-frivolously alleged that the threatened removal was purely coercive. *See Schultz*, 810 F.2d at 1136.

¶16 In addition to the threatened removal, the appellant has alleged that the agency showed bad faith in encouraging the appellant's retirement by qualifying him for a VSIP for which he was not otherwise eligible, and which exerted additional time pressure on his decision to retire. Specifically, the appellant alleges that the agency gave him an extra incentive to retire by making him VSIP eligible through reassignment to the CLD section while simultaneously presenting him with the prospect of choosing between termination and working in New Carrollton. IAF, Tab 15, Exhibit A. In fact, both parties admit that there was no legitimate purpose for the agency to reassign the appellant to CLD and that the sole purpose of that reassignment was to qualify the appellant for a VSIP. Additionally, the appellant alleges that the VSIP put him under "tremendous pressure" to choose between retirement, relocation, or removal because he had only a few days within which to submit his retirement paperwork in order to qualify for the VSIP, and only a small window of time after that within which to withdraw it.<sup>4</sup> IAF, Tab 15 at 6-7. Thus, the appellant has made a non-frivolous allegation that the agency offered him the VSIP to coerce his retirement.

¶17 In conclusion, the appellant has made a non-frivolous allegation that his retirement was involuntary. A coercive threat of removal coupled with a VSIP offered in bad faith to encourage retirement and to apply time pressure to the

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<sup>4</sup> As the ID points out, this time pressure was associated not with the appellant's retirement per se, but with the VSIP. ID at 9; *see Patrick v. Department of Agriculture*, 72 M.S.P.R. 509, 522-23 (1996), *aff'd*, 173 F.3d 434 (Fed. Cir. 1998) (Table). However, this is not a reason to ignore the time pressure factor when considering whether the appellant's retirement was involuntary. Rather, the AJ should give this factor its appropriate weight when considering the totality of the circumstances.

retirement decision may constitute circumstances which would make a reasonable person feel compelled to retire.<sup>5</sup> If proven, the appellant's allegations would show that the agency coerced his involuntary retirement and would establish Board jurisdiction over the appeal.

ORDER

¶18 Accordingly, we REMAND this appeal to the regional office for further adjudication consistent with this Opinion and Order, including a jurisdictional hearing.

FOR THE BOARD:

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

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<sup>5</sup> We also note that the appellant alleges his retirement was coerced due to unreasonably difficult working conditions and discrimination on the basis of age, sex, and race. IAF, Tab 15 at 2-3, 7; Tab 1. On remand, the AJ should consider these allegations among the other allegations regarding the circumstances surrounding the appellant's retirement. *See Markon v. Department of State*, 71 M.S.P.R. 574, 578 (1996) (when an appellant raises allegations of discrimination and reprisal in connection with an involuntariness claim, evidence of discrimination may be considered only in terms of the standard for voluntariness in a particular situation – not whether such evidence meets the test for proof of discrimination or reprisal established under Title VII).