

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

2008 MSPB 169

Docket No. CH-0752-08-0238-I-1

**Bryan D. Baldwin,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

July 30, 2008

Dale L. Ingram, Esquire, Kansas City, Missouri, for the appellant.

Michael E. Anfang, Esquire, Kansas City, Missouri, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed his alleged involuntary resignation appeal for lack of a nonfrivolous allegation of jurisdiction. For the reasons discussed below, we DENY the PFR under 5 C.F.R. § 1201.115, REOPEN this appeal on our own motion pursuant to 5 C.F.R. § 1201.118, VACATE the ID, and REMAND the appeal to the Central Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was a WG-11 Maintenance Mechanic (Boiler Plant Operator) with the agency's Medical Center (KCMC) in Kansas City, Missouri. Initial Appeal File (IAF), Tab 8, Exhibit 4. On November 27, 2007, the agency issued a decision notice informing the appellant that he would be removed from his position effective December 3, 2007, for two instances of inappropriate conduct, one instance of lack of candor in responding to questions by Special Agents from the agency's Office of Inspector General (OIG), and 57 instances of misuse of government property and time, namely using a government computer for non-work related reasons. *Id.*, Exhibits 1, 2. The appellant separated from government service on December 3, 2007, and the agency processed his separation as a resignation in lieu of involuntary action. *Id.*, Exhibits 3, 4.

¶3 The appellant, through counsel, filed an appeal with the Board, alleging that he retired and that his retirement was involuntary. IAF, Tab 1 at 19-20. He requested a hearing. *Id.* at 2.

¶4 The administrative judge (AJ) issued an order informing the appellant that a retirement is presumed to be voluntary and that, unless he alleged that his retirement was the result of duress, coercion, or misrepresentation by the agency, his appeal would be dismissed. IAF, Tab 2 at 2. The AJ also informed the appellant that he would be granted a hearing only if he alleged duress, coercion, or misrepresentation supported by facts which, if proven, would establish that his retirement was involuntary. *Id.* The AJ ordered the appellant to submit evidence and argument proving that the Board has jurisdiction over his appeal. *Id.* The appellant responded to the AJ's order, IAF, Tab 6, and the agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 8.

¶5 The AJ then held a status conference during which the parties discussed the agency's submission on jurisdiction. IAF, Tab 9 at 1. In her written status conference summary and order, the AJ advised the parties that the Board has jurisdiction over the removal appeal of an employee who retires when faced with

a removal decision notice, regardless of whether the employee retires on or before the effective date of removal; and she ordered the agency to “show [that] the appellant did not retire but rather resigned from employment.” *Id.* Conversely, the AJ ordered the appellant to “show he retired and that his appeal is a removal within the Board’s jurisdiction.” *Id.* Both parties filed responses to this order. IAF, Tabs 10, 11.

¶6 Without holding the requested hearing, the AJ issued an ID dismissing the appeal for lack of Board jurisdiction. IAF, Tab 12 (ID). The AJ found that the Board lacks jurisdiction to review the appellant’s resignation because the appellant failed to make a nonfrivolous allegation that his resignation was the result of agency coercion. ID at 3-4. The AJ further found that the Board lacks jurisdiction to review this appeal as an involuntary retirement. ID at 4.

¶7 The appellant has filed a PFR in which he generally reiterates his arguments from below and alleges that the AJ applied an incorrect standard in determining that he was not entitled to a jurisdictional hearing on the issue of whether the agency coerced his resignation. Petition for Review File (PFRF), Tab 3. In addition, for the first time on review, the appellant alleges that his resignation was the result of misrepresentation by the agency, *id.* at 13-15, and submits an excerpt from the November 30, 2006 telephonic affidavit of KCMC Plant Operator David Bennett regarding the appellant’s assignment to clean the basement of the boiler plant. *Id.*, Exhibit 1. The appellant has not shown that this document was unavailable before the record closed below despite his due diligence and, therefore, we have not considered it. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The agency has filed a response in opposition to the PFR. PFRF, Tab 4.

ANALYSIS

The Board lacks jurisdiction over this appeal as an involuntary retirement.

¶8 On PFR, the appellant reiterates his argument below that he did not resign but, rather, retired effective December 3, 2007. Thus, he reasserts that the Board has jurisdiction to review his appeal under *Mays v. Department of Transportation*, 27 F.3d 1577 (Fed. Cir. 1994), which held that, under 5 U.S.C. § 7701(j), the Board has jurisdiction over the removal appeal of an employee who retires when faced with a removal decision notice, regardless of whether the employee retires on or before the effective date of the removal. PFRF, Tab 3 at 1-2, 4-5; IAF, Tab 11 at 1, 4-7.

¶9 The appellant's argument is without merit. While 5 U.S.C. § 7701(j) allows an employee who is eligible to retire but who the agency wants to remove to take his retirement annuity and still challenge the adverse action before the Board, *Mays*, 27 F.3d at 1580-81, the Board does not have jurisdiction over such an appeal under *Mays* if the appellant was not eligible to retire at the time of his separation from service. Here, it is undisputed that, at the time of his separation from service, the appellant, who is covered by the Federal Employees' Retirement System (FERS), had not yet reached age sixty, nor had he completed 30 years of service. IAF, Tab 6 at 1, Tab 8, Exhibits 3, 4. Consequently, he was not entitled to a FERS immediate retirement annuity under 5 U.S.C. § 8412. Therefore, the AJ correctly found that the Board lacks jurisdiction to review this appeal as an involuntary retirement. ID at 4.

The appellant failed to make a nonfrivolous allegation of an involuntary resignation based on coercion.

¶10 An employee-initiated action, such as a retirement or resignation, is presumed to be voluntary, and thus outside the Board's jurisdiction, unless the employee presents sufficient evidence to establish that the retirement or resignation was obtained through duress or coercion or shows that a reasonable person would have been misled by the agency. *Staats v. U.S. Postal Service*, 99

F.3d 1120, 1123-24 (Fed. Cir. 1996); *Huyler v. Department of the Army*, 101 M.S.P.R. 570, ¶ 5 (2006); ID at 2. When considering whether a resignation or retirement was involuntary, the Board will consider the totality of the circumstances surrounding the action in order determine whether those circumstances would have compelled a reasonable person to resign or 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 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; 5 C.F.R. § 1201.56(a)(2). An appellant is only entitled to a jurisdictional hearing if he makes a nonfrivolous allegation of Board jurisdiction. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 642-43 (Fed. Cir. 1985). Nonfrivolous 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 nonfrivolous allegation of jurisdiction entitling him to a hearing, the AJ 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 AJ may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Id.*

¶12 It is well established that the fact that an employee is faced with the unpleasant choice of either resigning or opposing a potential adverse action does not rebut the presumed voluntariness of his ultimate choice of resignation. *Schultz v. Department of the Navy*, 810 F.2d 1133, 1136-37 (Fed. Cir. 1987).

However, if an appellant shows that an agency knew that it would not prevail on a proposed adverse action, the proposed action is coercive and the resulting resignation is involuntary. *Barthel v. Department of the Army*, 38 M.S.P.R. 245, 250-51 (1988).

¶13 On PFR, the appellant essentially reiterates his argument below that “[t]he [a]gency knows, or should know, that it cannot terminate [the] [a]ppellant for the reasons it stated,” IAF, Tab 6 at 5, contending that the “charges [against him] were, in fact, not offenses subject to discipline.” PFRF, Tab 3 at 16. Specifically, with respect to his alleged misuse of an agency computer, the appellant argues that personal use of the Internet is widespread among agency employees and the manner in which he allegedly used the computer does not constitute an actionable offense. IAF, Tab 6 at 5, Tab 8, Exhibit 1 at 2-16 (Reasons 4-60); PFRF, Tab 3 at 16. As for the remaining charges, the appellant contended that one of the instances of alleged inappropriate conduct and the lack of candor charge are stale charges and, therefore, cannot be used to remove him because they pertain to a statement that he allegedly made more than ten years before his proposed removal concerning how easy it would be to sabotage KCMC’s boiler-plant operations. IAF, Tab 6 at 4-5, Tab 8, Exhibit 1 at 1 (Reasons 1-2).¹

¶14 These arguments are unavailing. The Board has held that discipline, including removal, is warranted for the misuse of government equipment and time arising from an appellant’s personal use of a government computer during business hours, particularly when, as here, the appellant allegedly used the agency’s computer to view material of a sexually explicit nature. *See, e.g.,*

¹ The appellant did not address the second charge of inappropriate conduct, which alleged that he told two of his co-workers that he did not intend to bother with monitoring certain water levels and/or pump equipment in the boiler-plant during his tour of duty as he felt that this responsibility was not within his purview. IAF, Tab 8, Exhibit 1 at 2 (Reason 3).

Martin v. Department of Transportation, 103 M.S.P.R. 153, ¶ 13 (2006) (demotion was a reasonable penalty for an employee's use of a government computer to view sexually explicit images), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007); *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 23 (the penalty of removal was reasonable for an employee's use of a government computer to send and receive sexually explicit images via e-mail), *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006); IAF, Tab 8, Exhibit 1 at 16.

¶15 Further, that the appellant allegedly made the comment regarding sabotage more than ten years before the agency proposed his removal does not mean that the resulting charge of inappropriate conduct is improper. The Board has recognized that a charge may be dismissed if an agency's delay in proposing the adverse action is unreasonable and prejudicial to the appellant. *Mauro v. Department of the Navy*, 35 M.S.P.R. 86, 94 (1987). Even assuming that the delay in this case was unreasonable, the appellant has not nonfrivolously asserted that he was unable to defend himself against the charge because of the amount of time that elapsed since the alleged incident. *See id.*; *Deatrick v. Department of the Treasury*, 10 M.S.P.R. 262, 267 (1982), *aff'd* 707 F.2d 517 (9th Cir. 1983) (Table).

¶16 The appellant's claim that the lack of candor charge is stale is also without merit. While the questions that the OIG Special Agents asked the appellant during his September 18, 2007 interview pertained to a comment that the appellant allegedly made several years before his proposed removal, the alleged misconduct that was the basis for this charge – the appellant's lack of candor in answering those questions – occurred on September 18, 2007, less than three weeks before the agency issued its October 5, 2007 notice of proposed removal and less than three months prior to the agency's November 27, 2007 notice informing the appellant of its decision to remove him. IAF, Tab 8, Exhibits 1-2.

¶17 Therefore, the AJ properly found that the appellant failed to make a nonfrivolous allegation that the agency knew that it would not prevail on its

removal action or that no arguable basis existed for the removal action. ID at 3-4.

¶18 Although not addressed by the AJ in the ID, the appellant also argued below that the agency made working conditions so “onerous and demeaning” that his separation from service was involuntary. IAF, Tab 11 at 7-12. In cases where intolerable working conditions are alleged, the Board will find an action involuntary only if the employee demonstrates that the employer or agency engaged in a course of action that made working conditions so difficult or unpleasant that a reasonable person in that employee’s position would have felt compelled to resign or retire. *Markon v. Department of State*, 71 M.S.P.R. 574, 577 (1996).

¶19 On PFR, the appellant reiterates the “allegations of coercive activity by the [a]gency” that he made below, contending, inter alia, that the agency: assigned him to clean areas of the boiler plant that had not been cleaned in 16 years and told other employees not to help him, even though difficult tasks were generally tackled by all operators; unjustifiably threatened him with discipline; conducted unwarranted investigations targeted at him; and required him to be accompanied by agency police while on the premises of KCMC, even though there was no evidence that he was a threat to the agency or its property. PFRF, Tab 3 at 6-7, 12-13; IAF, Tab 11 at 7-12.

¶20 Applying the standard set forth in *Markon*, we find that the appellant failed to nonfrivolously assert that his daily working conditions were so intolerable that a reasonable person in his position would have felt compelled to resign. *See, e.g., Miller v. Department of Defense*, 85 M.S.P.R. 310, ¶ 32 (2000) (dissatisfaction with work assignments, a feeling of being unfairly criticized or difficult or unpleasant working conditions are generally not so intolerable as to compel a reasonable person to resign). Therefore, he did not make a nonfrivolous allegation that he was coerced to resign as result of intolerable working conditions.

The AJ applied the proper standard in determining whether the appellant was entitled to a jurisdictional hearing.

¶21 The appellant further asserts on review that the AJ applied an incorrect standard in deciding that he was not entitled to a jurisdictional hearing. PFRF, Tab 7-11. He alleges that, although he is only required to make a nonfrivolous allegation of duress, coercion, or misinformation at this stage of his appeal, the AJ improperly required him to *prove* that he resigned due to coercion, duress, or misinformation provided by the agency and then dismissed his appeal because he did not prove that his resignation was obtained by agency coercion. *Id.*

¶22 In the ID, the AJ mistakenly stated that, in her acknowledgment order, she ordered the appellant to amend his appeal to “show” that his resignation was the result of duress, coercion, or misrepresentation by the agency, and explained that she would dismiss his appeal if he did not do so. ID at 3. In fact, however, the acknowledgment order correctly informed the appellant that his appeal would be dismissed unless he amended it to “allege” that his retirement was the result of duress, coercion, or misrepresentation by the agency, and that he would be granted a hearing only if he “made allegations of duress, coercion, or misrepresentation supported by facts which, if proven, would establish that [his] retirement was involuntary.” IAF, Tab 2 at 2.

¶23 Further, not only did the AJ’s acknowledgment order correctly inform the appellant of the standard for obtaining a jurisdictional hearing in this appeal, the AJ also applied the correct standard in the ID. Contrary to the appellant’s assertion, the AJ did not dismiss the appeal for lack of jurisdiction because the appellant failed to *prove* that his resignation was the result of duress, coercion or misrepresentation by the agency. PFRF, Tab 3 at 10-11. Rather, she dismissed the appeal for lack of jurisdiction without holding the requested hearing based on her finding that the appellant failed to make a nonfrivolous *allegation* of Board jurisdiction. ID at 3-4. Therefore, the AJ’s misstatement in the ID as to the jurisdictional notice she provided the appellant in her acknowledgment order does

not provide a reason for disturbing the ID. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an ID).

The appellant has made a nonfrivolous allegation of an involuntary resignation based on agency-supplied misinformation.

¶24 For the first time on review, the appellant argues that the agency misled him concerning his choices regarding resignation/retirement and his appeal rights. PFRF, Tab 3 at 14-15, 17. The Board will not consider an argument raised for the first time in a PFR absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant has made no such showing.

¶25 We deny the appellant's PFR because it does not demonstrate error in the ID and it does not contain new and material evidence that, despite due diligence, was not available when the record closed. *See* 5 C.F.R. § 1201.115. We reopen this appeal on our own motion, however, because the record shows that the appellant has made a nonfrivolous allegation that his resignation was the product of agency misinformation. *See* 5 C.F.R. § 1201.118.

¶26 One means by which an appellant may rebut the presumption of voluntariness is by presenting sufficient evidence to show that his resignation was based on agency-supplied misinformation. In particular, a resignation is involuntary if the agency made misleading statements upon which the employee reasonably relied to his detriment. *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983); *Barthel*, 38 M.S.P.R. at 253. The appellant, however, need not show that the agency intentionally misled him. *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984); *Barthel*, 38 M.S.P.R. at 253. That is, the agency could have provided the misleading information negligently or even innocently; if the appellant materially

relied on the misinformation to his detriment, his resignation is considered involuntary. *Covington*, 750 F.2d at 942; *Barthel*, 38 M.S.P.R. at 253.

¶27 Here, the appellant's submissions below suggest that his resignation was involuntary. According to the appellant's argument and affidavit that he submitted below, on Friday, November 30, 2007, after receiving notice of the agency's decision to remove him effective December 3, 2007, he went to KCMC's personnel office and notified Ms. Valarie McDowell of his intent to retire. IAF, Tab 11 at 4, Exhibit A at 1. Ms. McDowell generated a Standard Form 52 (SF-52) (Request for Personnel Action) and typed the word "Retirement" in the box titled "Nature of Action." *Id.*, Exhibits A, B.² The appellant then wrote "Constructive discharge" in the box titled "Reasons for Resignation/Retirement" and signed the form, which identified the effective date of the action as December 3, 2007. *Id.*, Exhibit B.

¶28 The agency admits that Supervisory Human Resources Specialist Valarie McDowell generated the SF-52 submitted by the appellant but disputes his version of events, asserting that the appellant elected to resign after Ms. McDowell informed him on November 30, 2007, that, if he resigned before his removal became effective, "he could still obtain a full retirement annuity, provided that he later complete the relevant annuity application paperwork," and that he would become eligible to receive his retirement annuity on February 13, 2008, his sixtieth birthday. IAF, Tab 10 at 1-2, Attachment 1 at 1-2. Taking the appellant's allegations as true, however, they present a nonfrivolous allegation that his resignation was involuntary based upon agency-supplied misinformation. By typing the word "Retirement" on the SF-52 and processing it for the appellant's signature, the agency's Supervisory Human Resources Specialist may

² The appellant submitted a more legible version of the SF-52 with his Board appeal. IAF, Tab 1 (SF-52).

have unintentionally misled the appellant into reasonably believing that his separation was a retirement rather than a resignation.

¶29 Further, other than the agency's disputed version of events, there is no indication in the record that the appellant became aware that his separation was, in fact, a resignation rather than a retirement until after the resignation became effective on December 3, 2007. In this regard, we note that, while the agency revised the SF-52 to indicate that the nature of the appellant's separation was a resignation, rather than a retirement, the record indicates that this document was not approved by agency officials until December 7, 2007, four days after the appellant's separation became effective. IAF, Tab 10, Exhibit 1.

¶30 In addition, we note that even the revised SF-52 indicates that agency personnel may have been confused as to the nature of the action and, therefore, may have inadvertently misled the appellant into believing that he was retiring. While the word "Retirement" in the box titled "Nature of Action" has been crossed out and replaced with the word "Resignation" in handwriting, the "Remarks for SF-50" section of the revised SF-52 states that the appellant "*retired* after receiving written notice" of the agency's decision to remove him. IAF, Tab 8, Exhibit 1 (emphasis supplied).

¶31 Finally, we note that if, as the agency claims, Ms. McDowell notified the appellant that if he resigned before his removal became effective, he would become eligible to receive his retirement annuity on his sixtieth birthday, this information was incorrect. Under 5 U.S.C. § 8413(a), the appellant would not have been eligible to receive a FERS deferred retirement annuity until he reached 62 years of age.

¶32 Therefore, we find that the circumstances alleged by the appellant, combined with the undisputed record evidence, are sufficient to raise a nonfrivolous allegation of jurisdiction over his involuntary resignation claim on the basis of agency-supplied misinformation.

ORDER

¶33 Accordingly, we REMAND this appeal to the Central Regional Office for further adjudication consistent with this Opinion and Order, including a jurisdictional hearing.

FOR THE BOARD:

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