

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

**2009 MSPB 126**

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

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**Bryan D. Baldwin,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

July 9, 2009

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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 the remand initial decision (RID) that dismissed his alleged involuntary resignation appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the PFR under [5 C.F.R. § 1201.115](#), REVERSE the RID, and ORDER the agency to reinstate the appellant to his former position.

**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, and fifty-seven instances of misuse of government property and time, namely using a government computer for non-work related reasons. *Id.*, Exhibits 1, 2.

¶3 After receiving the decision notice, the appellant met with Supervisory Human Resources Specialist Valarie McDowell at her office on November 30, 2007, to notify her that he wished to retire from the agency and to discuss the retirement options available to him. Remand Appeal File (RAF), Tab 17 at 1-2. Human Resources Assistant Janice Fieldcamp attended the meeting intermittently. Hearing Transcript (HT) at 67.

¶4 During the meeting, Ms. McDowell presented the appellant with two retirement options under the Federal Employees' Retirement System: (1) an immediate retirement annuity, which would be reduced five percent for each year the appellant was under sixty-two; or (2) an unreduced postponed retirement annuity, which the appellant would be eligible to receive when he reached age sixty in February 2008. HT at 30-32, 67-69, 87. The appellant chose the second option. RAF, Tab 10 at 1-2.

¶5 At the meeting, 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." IAF, Tab 1 at 18-19. 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.* at 19. The agency subsequently revised the SF-52 to indicate that the nature of the action was a "Resignation" rather than a retirement, and this document was approved by agency officials on December 7, 2007, four days after the appellant's separation became effective. IAF, Tab 8, Exhibit 3. The agency

processed the appellant's separation as a resignation in lieu of involuntary action effective December 3, 2007. *Id.*, Exhibit 4.

¶6 On December 12, 2007, the appellant filed an appeal of the agency's removal action with the Board and requested a hearing. IAF, Tab 1 at 2-3. Treating the appeal as an alleged involuntary retirement appeal, 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 appellant filed a response to the order, IAF Tab 6, and the agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 8.

¶7 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, and she ordered the agency to "show the appellant did not retire, but rather resigned from employment." *Id.* The AJ ordered the appellant to "show he retired and that his appeal is a removal within the Board's jurisdiction." *Id.*

¶8 Both parties filed responses to this order. IAF, Tabs 10, 11. In his response, the appellant reasserted his claim that he retired. IAF, Tab 11 at 4-7. In the alternative, he claimed that "the [a]gency made working conditions so onerous and demeaning that, even accepting the [a]gency's position that [the] [a]ppellant resigned, his resignation was involuntary." *Id.* at 7. In its response to the AJ's order, the agency alleged 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, Declaration of Valarie McDowell at 1-2.

¶9 Without holding the appellant's requested hearing, the AJ issued an initial decision (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 he 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.

¶10 The appellant filed a PFR, in which he generally reiterated his arguments from below and alleged, for the first time, that his resignation was the result of misrepresentation by the agency. Petition for Review File, Tab 3.

¶11 The Board denied the appellant's PFR but reopened the appeal on its own motion, finding that the appellant made a nonfrivolous allegation that his resignation was the product of agency misinformation. *Baldwin v. Department of Veterans Affairs*, [109 M.S.P.R. 392](#), ¶ 25 (2008). The Board found that "[b]y typing the word 'Retirement' on the SF-52 and processing it for the appellant's signature, [Ms. McDowell] may have unintentionally misled the appellant into reasonably believing that his separation was a retirement rather than a resignation." *Id.*, ¶ 28. The Board also found that "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." *Id.*, ¶ 29. Accordingly the Board remanded the appeal to the Central Regional Office for a jurisdictional hearing on the issue of whether the appellant's resignation was the result of agency-supplied misinformation. *Id.*, ¶ 33.

¶12 On remand, the appellant alleged that, during his November 30, 2007 meeting with Ms. McDowell and Ms. Fieldcamp, the agency misled him into believing that, if he elected a postponed retirement annuity, his separation would

be recorded as a retirement and he would be eligible for Federal Employees' Health Benefits (FEHB) coverage. RAF, Tab 8 at 1-3. He claimed that, prior to the effective date of his separation he was never informed that the agency was changing the action from a retirement to a resignation. *Id.* at 3. The agency alleged that the appellant chose to resign after Ms. McDowell informed him that he would have to resign in order to be eligible for a deferred annuity. RAF, Tab 9 at 3.

¶13 Following a hearing, the AJ issued an RID dismissing the appeal for lack of jurisdiction. RAF, Tab 19 (RID). The AJ found that, even though Ms. McDowell did not use the word "resignation" in her discussion with the appellant on November 30, 2007, she did not mislead the appellant into resigning. RID at 5-10. In particular, the AJ found that the evidence did not show that either Ms. Fieldcamp or Ms. McDowell told the appellant that he would be entitled to health benefits if he elected a deferred retirement annuity and that, to the extent that the appellant showed that he mistakenly believed that he would be entitled to such benefits if he elected to postpone applying for an annuity, that belief was "unreasonable" and "developed spontaneously." RID at 8-9. The AJ further found that "because the appellant did not show that the agency was, or should have been, aware of his mistaken belief, he did not show the agency acted negligently in failing to extinguish it." RID at 9-10. The AJ also found that the appellant did not show that Ms. Fieldcamp or Ms. McDowell misled him as to when he would become eligible for an unreduced annuity. RID at 9. The AJ therefore concluded that the appellant did not show that his resignation was involuntary due to misinformation. RID at 10.

¶14 The appellant has filed a PFR of the RID in which he argues that the RID fails to support the AJ's conclusions with explained findings of fact and analysis and does not adequately address the issue of whether he had sufficient information to make an informed decision about whether to resign. Remand

Petition for Review File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

### ANALYSIS

¶15 A decision to resign is presumed to be a voluntary act outside the Board’s jurisdiction, and the appellant bears the burden of showing by a preponderance of the evidence that his resignation was involuntary and therefore tantamount to a forced removal. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1329-30 (Fed. Cir. 2006). One means by which an appellant may overcome the presumption of involuntariness is by showing that the resignation was obtained by agency misinformation or deception. *Covington v. Department of Health & Human Services*, [750 F.2d 937](#), 942 (Fed. Cir. 1984); *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983).

¶16 The touchstone of the analysis of whether a retirement or resignation is voluntary is whether the employee made an informed choice. *Covington*, 750 F.2d at 941-42. A decision made “with blinders on,” based upon misinformation or lack of information cannot be binding as a matter of fundamental fairness and due process. *Id.* at 943; *Aldridge v. Department of Agriculture*, [110 M.S.P.R. 21](#), ¶ 11 (2008). The Board has stated that the principles set forth in *Scharf* and *Covington* “require an agency to provide information that is not only correct in nature but adequate in scope to allow an employee to make an informed decision. This includes an obligation to correct any erroneous information that it has reason to know an employee is relying on.” *Kolstad v. Department of Agriculture*, [30 M.S.P.R. 143](#), 145 (1986), *rev’d and vacated on other grounds*, 809 F.2d 790 (Fed. Cir. 1986) (Table); *see Johnson v. U.S. Postal Service*, [66 M.S.P.R. 620](#), 627-28 (1995).

The AJ did not adequately address the issue of whether the agency communicated to the appellant that he would have to resign in order to receive a postponed retirement annuity.

¶17 An ID must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ’s conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *See Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980); [5 C.F.R. § 1201.111\(b\)](#). In the RID, the AJ correctly stated, “I must first determine whether the agency communicated to the appellant his separation would be processed as a resignation if he waited to apply for an annuity.” RID at 5. The AJ then summarized the testimony of the appellant, Ms. Fieldcamp, and Ms. McDowell relevant to this issue, noted that Ms. McDowell “was upset and mumbled at the hearing, claiming she was tired and could not remember some of what had happened,” and found that: (1) Ms. McDowell did not “explicitly” inform the appellant that his separation would be processed as a resignation or “explicitly” use the word “resignation” during her discussion with the appellant on November 30, 2007; and (2) the appellant credibly testified that he did not hear the word “resignation” during his conference with Ms. McDowell. RID at 5-7.

¶18 After making these findings, however, the AJ did not further address the issue of whether the agency informed the appellant that if he elected a postponed retirement annuity, his separation would be processed as a resignation. Specifically, the AJ did not determine whether, notwithstanding Ms. McDowell’s omission of the word “resignation” during her November 30, 2007 meeting with the appellant, she nonetheless communicated to the appellant that he would have to resign in order to receive a deferred retirement annuity so that, before his separation became effective, the appellant was aware that his separation would be effected as a resignation rather than a retirement.

¶19 Instead of fully addressing the issue of whether the agency informed the appellant that he would have to resign if he elected to receive a postponed retirement annuity, the AJ turned to the appellant's allegation that he believed that he would be eligible for FEHB coverage if he elected a postponed retirement annuity, found that the appellant's mistaken belief was unreasonable, and that he did not show that the agency acted negligently in failing to disabuse him of that belief, and dismissed the appeal for lack of jurisdiction. RID at 9-10. Thus, the AJ essentially avoided deciding whether the agency communicated to the appellant that he would have to resign if he elected a postponed retirement annuity by focusing on the issue of whether it was reasonable for the appellant to believe that he would be eligible for FEHB coverage if he elected a postponed retirement annuity.

¶20 Those two issues are intertwined, however. As the AJ pointed out, had the appellant retired without a break in service, he would have been eligible for FEHB coverage under [5 U.S.C. § 8905](#)(b)(1)(A), which provides for FEHB coverage for annuitants who were enrolled in a health benefits plan at the time they became annuitants and have "5 years of service immediately before retirement." RID at 7. It follows that, if the agency misled the appellant into believing that he was retiring without a break in service effective December 3, 2007, by generating and providing him an SF-52 with incorrect information that the appellant reasonably relied on, and by failing to correct that misinformation by communicating to the appellant that he would have to resign in order to receive a postponed retirement annuity, his mistaken belief that he would be eligible for FEHB coverage upon his separation was not unreasonable, nor did it develop spontaneously, as the AJ found. RID at 9. Instead, under those circumstances, the appellant's mistaken belief that he would separate effective December 3, 2007, with retiree status, including FEHB coverage, would be attributable to the agency's failure to communicate to him that he would have to resign in order to receive a postponed retirement annuity.

¶21 Thus, whether the appellant's belief that he was entitled to FEHB coverage was reasonable depends on whether the agency misled him into believing that he was retiring by failing to communicate to the appellant that he would have to resign to receive a postponed retirement annuity. Therefore, the AJ erred by dismissing this case for lack of jurisdiction without adequately addressing the seminal issue of whether the agency communicated to the appellant that he would have to resign to receive a postponed retirement annuity.

¶22 We further note that, in support of her finding that the appellant's alleged belief that he would be eligible for health benefits was unreasonable and developed spontaneously, the AJ concluded that the evidence and the appellant's testimony – which she found unpersuasive and “self-serving” – were insufficient to support a finding that Ms. Fieldcamp or Ms. McDowell told the appellant that he would be eligible for FEHB coverage. RID at 8. In addition, the AJ found that the appellant: “came to the [November 30, 2007] meeting at issue allegedly convinced he was entitled to health benefits even if he elected to separate without applying for an annuity”; “does not claim to have asked any specific questions about FEHB coverage at the meeting”; and “does not appear to have taken reasonable steps to learn that he would be ineligible for FEHB coverage.” RID at 7-8.

¶23 To the extent that the AJ found that the appellant's testimony was not credible because it was “self-serving,” RID at 8, this was error. While witness bias is a factor in resolving credibility issues, the Board does not discount testimony merely because it is self-serving or the witness has an interest in the outcome. *See Bennett v. Department of the Air Force*, [84 M.S.P.R. 132](#), ¶¶ 10-11 (1999). Instead, self-serving testimony and documentary evidence is entitled to weight and must be evaluated for credibility in the same manner as all other testimony presented by the parties. *See Special Counsel v. Doyle*, [42 M.S.P.R. 376](#), 380 (1989), *recons. denied*, [45 M.S.P.R. 43](#) (1990); *McKoy v. Department of Defense*, [33 M.S.P.R. 195](#), 199 (1987). Thus, the appellant's testimony that Ms.

Fieldcamp told him that he would be entitled to FEHB coverage, although self-serving, cannot be given minimal weight simply on that basis. *See McKoy*, 33 M.S.P.R. at 199.

¶24 In addition, the hearing testimony of the appellant indicates that he was aware that he would be able to maintain his FEHB coverage if he retired prior to his removal. HT at 45. Consequently, if the appellant believed that his separation would be processed as a retirement, he would have also believed that, as a retiree, he would maintain his FEHB coverage and he thus would have had no reason to inquire about FEHB coverage. Similarly, under those circumstances, it would have been reasonable for the appellant to believe that he had FEHB coverage regardless of whether Ms. Fieldcamp or Ms. McDowell ever told him that he would be entitled to FEHB coverage.

¶25 Further, we find that the AJ erred to the extent that she apparently discredited the appellant's testimony that he believed that he was retiring and would thus be entitled to FEHB coverage based on his failure to contact the agency after he received the revised SF-52 or ask the Office of Personnel Management to waive the eligibility requirements for FEHB coverage. RID at 3, 8. As the appellant testified, it would have been fruitless to contact the agency when he received the SF-52 because his resignation had already been effected at that time. HT at 56. In addition, the focus in an alleged involuntary resignation is on the circumstances immediately preceding the appellant's action. *Filliben v. Department of the Navy*, [34 M.S.P.R. 31](#), 34 (1987).

¶26 The Board could remand this case with instructions for the AJ to reconsider the evidence and argument on whether the agency communicated to the appellant that he would have to resign if he elected a delayed retirement annuity. However, the AJ did not base her finding that the appellant failed to show that he resigned due to agency-supplied misinformation on the demeanor of the witnesses. Because the AJ's findings in that regard are not based on demeanor and the parties have had a full opportunity to argue this issue, remand is not necessary,

and we can adjudicate the appeal at the Board level. *See, e.g., Gregory v. Federal Communications Commission*, [84 M.S.P.R. 22](#), ¶ 6 (1999), *aff'd*, 232 F.3d 912 (Fed. Cir. 2000) (Table). Such a resolution, in our view, better serves the interest of efficiency and justice than would a remand for a new ID. *Negron v Department of Justice*, [95 M.S.P.R. 561](#), ¶ 9 (2004).

The appellant has shown by preponderant evidence that his resignation was involuntary due to agency misinformation.

¶27 Based on our review of the entire record, including the hearing testimony concerning what transpired during the November 30, 2007 meeting, we find no evidence to support the finding that the agency communicated to the appellant that his separation would be processed as a resignation if he elected a postponed retirement annuity. Indeed, there is no indication in the record that the appellant became aware that his separation was, in fact, a resignation rather than a retirement before the resignation became effective on December 3, 2007.

¶28 The record shows that, at the time of the November 30, 2007 meeting, Ms. McDowell and Ms. Fieldcamp were aware that the agency had notified the appellant of its intention to remove him and that he intended to retire in lieu of removal. The appellant testified that, during the November 30, 2007 meeting, he told Ms. Fieldcamp and Ms. McDowell that he wanted to retire before being removed to keep his termination off his record. HT at 42. The appellant also testified that when Ms. McDowell filled out the SF-52, she stated that she would date it for December 3, 2007, so that it would be effective prior to his termination. *Id.*

¶29 While Ms. McDowell testified at the hearing that, when the appellant called her to schedule a meeting to discuss his retirement options, he did not tell her that he had received his removal decision notice and he did not mention the removal notice at their November 30, 2007 meeting, HT at 94-95, we find this testimony not credible. Ms. McDowell's hearing testimony is inconsistent with her January 29, 2008 declaration, in which she stated that she recalled the

appellant contacting her office “generally stating that he did not want his separation from the [agency] to be recorded as a removal,” and that when he met with Ms. McDowell on November 30, 2007, she “informed him that if he resigned before his removal became effective” he could still obtain a retirement annuity. IAF, Tab 10, Declaration of Valarie McDowell at 1; *see Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987) (one of the relevant factors in resolving credibility issues is the contradiction of the witness's version of events by other evidence or its consistency with other evidence). In her January 29, 2008, declaration, Ms. McDowell also stated, “[t]here is no particular reason that I typed December 3, 2007 as the effective resignation date, other than to ensure that the resignation was effected rather than the removal.” IAF, Tab 10, Declaration of Valarie McDowell at 2; *see* HT at 94. Further, Ms. McDowell’s testimony is inconsistent with Ms. Fieldcamp’s hearing testimony, which indicates that Ms. Fieldcamp and Ms. McDowell were aware of the appellant’s impending removal at the time of the November 30, 2007 meeting. Specifically, Ms. Fieldcamp testified that the appellant made it clear during that meeting that he faced the prospect of his employment being terminated as of December 3, 2007, and “demonstrated a great concern in getting something finalized or set in place before he was to be removed.” Hearing Tape 2, Side A; HT at 70.<sup>1</sup>

¶30 As noted above, during the hearing, the appellant, Ms. Fieldcamp, and Ms. McDowell provided testimony regarding whether the agency informed the appellant during the November 30, 2007 meeting that he would have to resign if he elected to take a postponed retirement annuity. The appellant testified that Ms. McDowell explained that, under that option, he would retire that day, November 30, 2007, and “take a delayed annuity within a couple of months

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<sup>1</sup> We have included citations to the hearing tapes in this Opinion and Order where it is necessary to correct minor discrepancies between the testimony reported in the hearing transcript and the actual testimony on the hearing tapes.

[when he reached age sixty].” HT at 30-32, 51, 58. The appellant further testified that neither Ms. Fieldcamp nor Ms. McDowell ever said at any point during the November 30, 2007 meeting that he was going to have to resign to get the postponed annuity, and that the word “resignation” was never spoken the entire time he was in Ms. McDowell’s office. HT at 31, 61. In addition, the appellant claimed that, when he left the meeting, he believed that he was retiring that day and that his separation from the agency would be recorded as a retirement effective December 3, 2007. HT at 32, 51, 55.

¶31 By contrast, Ms. McDowell testified that the appellant “was informed when he was there at the meeting that he would have to resign and later apply for the retirement.” HT at 102. When asked at the hearing how she communicated to the appellant during the November 30, 2007 meeting that he would have to resign first in order to receive a postponed annuity when he reached age sixty, Ms. McDowell responded as follows: “We told him that it would be a resignation and that he would have to apply for the, for the retirement.” Hearing Tape 2, Side A; HT at 89. She was then asked whether the resignation discussion was raised during the course of the November 30, 2007 meeting and responded that she was “sure it was raised.” *Id.*

¶32 Ms. Fieldcamp also testified at the hearing about whether the appellant was informed during the November 30, 2007 meeting that he would have to resign if he elected a postponed retirement annuity. The AJ did not make any credibility determinations regarding Ms. Fieldcamp’s testimony, which she summarized as follows:

Ms. Fieldcamp further testified Ms. McDowell told the appellant he would have to resign in order to apply for the deferred annuity. *See Hr’g Tr.* at 79. She did not testify she overheard those particular words, and does not remember whether she said them herself, but rather testified she was very confident that when the appellant left the meeting, he knew he was resigning from his position without health insurance. *See Hr’g Tr.* at 72, 79-80.

RID at 6.

¶33 Our review of the record indicates that the foregoing summary misstates and mischaracterizes Ms. Fieldcamp's testimony. For example, the AJ's conclusion that Ms. Fieldcamp testified that Ms. McDowell told the appellant he would have to resign in order to apply for the deferred annuity is based on the following exchange between the appellant's counsel and Ms. Fieldcamp during the hearing:

Q: Did you tell [the appellant] or who told him that he was going to have to resign [to receive the full annuity at age sixty], you or Ms. McDowell?

A: That would have been Valarie McDowell.

HT at 79.

¶34 Considering the context in which this statement was made, however, a more accurate description of Ms. Fieldcamp's testimony than that set forth in the RID is that Ms. Fieldcamp testified that Ms. McDowell, not she, would have been the one responsible for informing the appellant that he would have to resign in order to receive an unreduced annuity at age sixty. *See id.*

¶35 In addition, we have reviewed Ms. Fieldcamp's hearing testimony and, contrary to the AJ's finding, Ms. Fieldcamp did not testify that "she does not remember whether she told the appellant that he would have to resign in order to apply for the deferred annuity." RID at 6.

¶36 The AJ's statement that Ms. Fieldcamp testified that "she was very confident that when the appellant left the meeting, he knew he was resigning from his position," RID at 6, while technically correct, overstates Ms. Fieldcamp's level of certainty that the appellant had been informed that he would have to resign in order to receive a postponed retirement annuity. The AJ based this statement on the following exchange between Ms. Fieldcamp and agency counsel during the hearing:

Q: How confident are you that Ms. McDowell during the November 30<sup>th</sup>, 2007 meeting communicated to [the appellant] that if he wanted a deferred retirement annuity benefit that he would first have to resign his position at the [agency]?

A: I'm very confident.

HT at 72.

¶37 Ms. Fieldcamp displayed considerably less certainty that the appellant was provided with this information when she was asked essentially the same question in a less leading manner at the hearing. Specifically, when questioned as to whether it was communicated to the appellant that his separation would be recorded as a resignation, Ms. Fieldcamp responded, "As far as I know, yes, that was communicated to him." HT at 69. She was then asked for her recollection as to how it was communicated to the appellant that he was going to have to resign if he decided to receive a postponed retirement annuity, and Ms. Fieldcamp responded, "I believe that was communicated to him by [Valarie McDowell]." HT at 70. Further, Ms. Fieldcamp was not present for the whole meeting, nor did she hear Ms. McDowell tell the appellant that he would have to resign his position if he wanted the postponed retirement annuity during the portions of the meeting she attended. HT at 67.

¶38 Therefore, it appears that Ms. Fieldcamp's "confidence" that the appellant knew on November 30, 2007, that he would have to resign to receive a postponed retirement annuity is nothing more than an inference that, during Ms. Fieldcamp's absence from the meeting, Ms. McDowell must have told the appellant that he would have to resign if he elected a postponed retirement annuity because Ms. McDowell was responsible for conveying this information to the appellant. Given these circumstances, Ms. Fieldcamp's testimony does not support a finding that the agency communicated to the appellant on November 30, 2007, that he would have to resign in order to receive a postponed retirement annuity.

¶39 The RID also states that Ms. Fieldcamp testified that "she communicated to the appellant he would not be eligible for FEHB coverage if he postponed his annuity," but he still selected the postponed annuity to avoid a penalty, which would have been five percent for each year he was under age sixty-two. RID at

6; HT at 68, 71, 79. Arguably, that information might have alerted the appellant to the fact that his separation would not be processed as a retirement if he elected a postponed retirement annuity. We find, however, that this characterization of Ms. Fieldcamp's testimony is also misleading. While Ms. Fieldcamp initially testified that she believed the subject of health insurance benefits came up during the meeting and that she believed she communicated to the appellant during the meeting that he would not be eligible for health benefits if he took a deferred annuity, on cross-examination Ms. Fieldcamp testified that she did not remember whether she told the appellant that he would no longer have health insurance after the effective date of his separation. HT at 71, 79-80. Given Ms. Fieldcamp's uncertainty as to whether she communicated to the appellant that he would not be eligible for FEHB coverage if he elected a postponed retirement annuity, her testimony in that regard is insufficient to support a finding that the agency communicated to the appellant that he would have to resign if he elected such an annuity.

¶40 The appellant's actions following the November 30, 2007 meeting also indicate that, contrary to the agency's assertion, the appellant did not know that he was resigning from the agency without health insurance when he left the November 30, 2007 meeting. During the hearing, the appellant's spouse testified that when the appellant returned home after his meeting with Ms. McDowell and Ms. Fieldcamp on November 30, 2007, he showed her the SF-52 indicating that he had retired and told her that she "didn't have to worry [because] he was retired now[.]" although his annuity had been deferred and he would not start receiving his annuity check until later. Hearing Tape 1, Side A; HT at 9, 14-15. When questioned as to what was the consensus in the appellant's house on November 30, 2007, after the appellant returned from KCMC, the appellant's spouse testified that "it was fine[.] [H]is check, of course, was going to be smaller [than it would have been if he had retired at age sixty-three as she and the appellant had originally planned]. But at least he has health insurance." HT at 12. Although

ignored by the AJ, this undisputed testimony corroborates the appellant's claim that he left the November 30, 2007 meeting believing that he was retiring from the agency effective December 3, 2007. HT at 32.

¶41 Further, consistent with the appellant's alleged belief that he retired, he filed an appeal of the removal action nine days after the effective date of his separation. While the Board has jurisdiction over the removal appeal of an employee who retires when faced with a removal decision notice, *see* [5 U.S.C. § 7701\(j\)](#); *Mays v. Department of Transportation*, [27 F.3d 1577](#), 1579-81 (Fed. Cir. 1994), the same principle does not apply to resignations effected in the face of a removal decision. In that case, the Board does not have jurisdiction over the appeal unless the appellant demonstrates that his resignation was involuntary due to coercion, duress or circumstances which may constitute intolerable working conditions. *E.g.*, *Baldwin*, [109 M.S.P.R. 392](#), ¶ 10; *Glenn v. U.S. Soldiers' & Airmen's Home*, [76 M.S.P.R. 572](#), 580 (1997). Thus, by filing a removal appeal, the appellant clearly indicated that he believed his separation was by retirement.<sup>2</sup>

¶42 The record shows that the right to appeal his removal was important to the appellant and that he deliberately waited to receive the removal decision notice in order to preserve that right. HT at 43. During the hearing, the appellant testified that he waited to retire until after he received the decision notice so that he would preserve his right to appeal the agency's decision to remove him. Specifically, in explaining that he did not telephone Ms. McDowell to discuss his retirement options until after he received the decision notice on November 30, 2007, the appellant testified as follows:

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<sup>2</sup> While the RID indicates that the appellant filed the removal appeal after Ms. Fieldcamp telephoned his spouse in mid-December to notify her that the appellant no longer had health benefits, RID at 3, the hearing testimony indicates that the appellant filed his removal appeal before that telephone call which, in turn, took place before the appellant received the revised version of the SF-52 with the word "Retirement" crossed out and replaced by "Resignation." HT at 33, 36, 55.

I did not call anybody about this until the 30<sup>th</sup>, when I received my notification. I had no reason to. There's no reason in the world, **I would have never resigned and gave (sic) up my appeal rights**, and I made up my mind and I knew what I was doing. And when I received my notice [I knew] that I would have time to go in and retire, they always have to give you that lead time between when it becomes effective so you have time to take an action, I went in to retire and I told her on the 30<sup>th</sup>, not on the 29<sup>th</sup> because I didn't even have the documents on the 29<sup>th</sup>. They were mailed on the 29<sup>th</sup>. I received them on the 30<sup>th</sup>. I called her immediately and told her that I had just received my termination notice and that I wanted to come in and retire before it became effective.

HT at 43-44 (emphasis added).

¶43 Thus, the evidence shows that: (1) the appellant went to KCMC on November 30, 2007, to discuss his retirement options; (2) in apprising the appellant of those options, Ms. McDowell never used the word “resignation”; and (3) during the November 30, 2007 meeting, Ms. McDowell generated and provided the appellant with an SF-52 that incorrectly reflected that the nature of the appellant's separation was a retirement.<sup>3</sup> This was incorrect information that the appellant reasonably relied on and we find that the agency should have known that the appellant was acting under the erroneous impression that he would be separating from the agency with retiree status. For this reason, and because of the obviously important effect that resignation would have on the appellant's right to appeal the decided removal action, we find that the agency had an obligation to inform the appellant that he would have to resign in order to obtain a postponed retirement annuity.

¶44 Based on our review of the record, we conclude that the agency did not provide the appellant with this information. It is undisputed that the appellant

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<sup>3</sup> In the RID, the AJ found that Ms. McDowell “likely she [sic] wrote retirement on the [SF-52] at least in part because the appellant told her to do so.” RID at 7. However, as discussed above, the record does support that conclusion.

had the agency generated SF-52 with the incorrect information as to the nature of his separation in his possession when he left the November 30, 2007 meeting. Further, after the meeting, the appellant acted in accordance with the belief that he had retired, both in the representations he made to his spouse, and in timely filing a removal appeal following his separation. Finally, it is also undisputed that the appellant did not receive the revised SF-52 indicating that his separation had been processed as a resignation until after the effective date of his separation and there is no evidence to indicate that he learned that his separation had been processed as a resignation until he received the revised SF-52.

¶45 Thus, we find that, to the extent that the appellant “decided” to resign by electing a postponed retirement annuity, which required that the appellant’s separation be recorded as a resignation, that decision was involuntary because it was made “with blinders on,” that is, without adequate information that the agency should have given him. *See Covington*, 750 F.2d at 943; *Johnson*, 66 M.S.P.R. at 626; *see also Scharf*, 710 F.2d at 1574-75 (the appellant’s retirement was involuntary because, even though the agency did not actually intend to deceive him, it failed to apprise him adequately of the implications of his retirement). Accordingly, we find that the appellant has shown by a preponderance of the evidence that his resignation was involuntary due to agency misinformation.

¶46 When the Board concludes that the appellant’s resignation was involuntary, the Board not only has jurisdiction, but the appellant wins on the merits and is entitled to reinstatement. *Schultz v. U.S. Navy*, [810 F.2d 1133](#), 1136 (Fed. Cir. 1986) (the Board’s jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined). When an appellant prevails in an adverse action appeal, we would normally issue a final order directing the agency to cancel the appellant’s separation and reinstate him to the status quo ante; i.e., to restore the appellant to his former position of record and provide him with back pay and benefits retroactive to the date of his separation. *E.g., Sink v.*

*Department of Energy*, [110 M.S.P.R. 153](#), ¶ 18 (2008). However, we find that further consideration of the status quo ante is warranted under the unusual circumstances of this case. *See id.*

¶47 The status quo ante in this case includes that the agency issued a decision to remove the appellant effective December 3, 2007, and the appellant involuntarily resigned effective December 3, 2007, because he had been misled by the agency into believing that his separation would be processed as a retirement. Thus, even in the absence of the misinformation from the agency, the appellant likely would have been separated by the agency's decided removal action effective December 3, 2007. In restoring the appellant to the status quo ante, he is subject to those same circumstances. The Board's relief order in this case must take into account the appellant's decided removal; otherwise, the appellant would be placed in a better position than he would have enjoyed if he had not resigned on December 3, 2007. *See Sink*, [110 M.S.P.R. 153](#), ¶ 19; *Washington v. Tennessee Valley Authority*, [22 M.S.P.R. 377](#), 379 (1984), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985) (Table).

#### ORDER

¶48 We ORDER the agency to cancel the appellant's resignation and restore him retroactive to December 3, 2007. We further ORDER the agency to take such action as is necessary to ensure that the appellant's retirement annuity is adjusted in accordance with whatever retirement annuity he elects, if any. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶49 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to

provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶50 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶51 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶52 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶53 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 RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. § § 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.



## **DFAS CHECKLIST**

### **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT  
CASES

### **CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:**

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

### **ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:**

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
  - a. Outside earnings with copies of W2's or statement from employer.
  - b. Statement that employee was ready, willing and able to work during the period.
  - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



## **NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES**

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
  - a. Employee name and social security number.
  - b. Detailed explanation of request.
  - c. Valid agency accounting.
  - d. Authorized signature (Table 63)
  - e. If interest is to be included.
  - f. Check mailing address.
  - g. Indicate if case is prior to conversion. Computations must be attached.
  - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

### **Attachments to AD-343**

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.