

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

**2009 MSPB 142**

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Docket No. PH-0752-08-0549-I-2

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**Samuel Green, Jr.,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

July 27, 2009

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Samuel Green, Jr., Kearneysville, West Virginia, pro se.

Xan DeMarinis, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant petitions for review of an initial decision dismissing his involuntary resignation appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for review, REOPEN the appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

**BACKGROUND**

¶2 The agency proposed to remove the appellant, a Medical Support Assistant, based on the following charges: (1) leaving a job to which he was assigned without proper permission; (2) disrespectful conduct, use of insulting, abusive, or

obscene language; and (3) reporting to or being on duty while under the influence of alcohol. Refiled Appeal File (RAF), Tab 4, Subtabs 4a at 1, 4d. In an August 3, 2007 letter, the agency informed the appellant that it had sustained the charges against him and his removal would be effective August 17, 2007. *Id.*, Subtab 4c. The appellant resigned “[f]or health reasons” effective August 17, 2007. *Id.*, Subtab 4b.

¶3 On September 14, 2007, the appellant filed a formal equal employment opportunity complaint of discrimination. *Id.*, Subtab 3c, Tab A6 at 1. On June 18, 2008, the agency issued a decision finding that the appellant was not a qualified individual with a disability, that the agency articulated a legitimate, nondiscriminatory reason for his removal, and that the appellant failed to show that he was constructively discharged under Title VII. *Id.*, Subtab 3b at 22, 24, 26. The appellant filed an appeal with the Board. Initial Appeal File (IAF), Tab 1. In response, the agency asserted that the appellant resigned from his position on the effective date of the removal, that his resignation was voluntary, and thus that the Board lacked jurisdiction over the appeal. RAF, Tab 5 at 6-7. In response to a jurisdictional show cause order, the appellant asserted that his resignation was involuntary as a result of coercion, duress, and misrepresentation by the union representative who told him that he might be able to get his job back if he resigned. RAF, Tab 12 at 5-6; *id.*, Tab 13 at 9-17.

¶4 Without holding the hearing requested by the appellant, the administrative judge dismissed the appeal for lack of Board jurisdiction. *See* RAF, Tab 16, Initial Decision (ID) at 2, 8. She found that the appellant had two weeks between the time he received the removal letter and the time he resigned and thus he had adequate time and information to make an informed decision. *Id.* at 6. She further found that the appellant “failed to provide preponderant evidence of coercion or coercive activity such that a reasonable person in his position would have felt compelled to resign.” *Id.* Moreover, she found that the appellant presented no evidence that the agency misled him and that the appellant did not

show “by preponderant evidence that he was forced to resign because of misrepresentation, coercion, or any other actions by the agency.” *Id.* at 7. Rather, she found that his union representative advised him to resign, and that he was bound by the actions of his representative. *Id.* Lastly, the administrative judge found that, while the appellant alleged that he was mentally confused, he failed to submit evidence demonstrating that he was mentally incompetent or unable to make a rational decision at the time of his resignation. *Id.* at 7-8.

¶5 The appellant filed a petition for review, Petition for Review File (PFRF), Tabs 1, 3, and the agency filed a response in opposition, *id.*, Tab 5.

#### ANALYSIS

¶6 The appellant asserts on review that the administrative judge improperly denied his hearing request because the testimony he would have presented at the hearing would have established that his resignation was involuntary. PFRF, Tab 1 at 17. An appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an alleged involuntary resignation or retirement only if he makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643 (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 at issue. *Deines v. Department of Energy*, [98 M.S.P.R. 389](#), ¶ 11 (2005). In determining whether the appellant has made a nonfrivolous 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. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994).

¶7 The administrative judge provided the appellant with the proper jurisdictional notice in a December 1, 2008 order, advising that he must make a “non-frivolous allegation that [his] resignation was involuntary and is within the Board’s jurisdiction” in order to be afforded a jurisdictional hearing. *See* RAF, Tab 8 at 3. In the initial decision, the administrative judge opened by summarizing the appeal and finding that the “appellant failed to raise a nonfrivolous allegation that his resignation was involuntary.” ID at 1-2. As fully discussed below, we do not disagree with this initial finding. The administrative judge erred, however, in apparently applying a preponderant evidence standard in analyzing the appellant’s assertions and evidence in the remainder of the initial decision. *See id.* at 6-8. She found that the appellant “failed to provide preponderant evidence of coercion or coercive activity such that a reasonable person in his position would have felt compelled to resign,” did “not show[] by preponderant evidence that he was forced to resign because of misrepresentation, coercion, or any other actions by the agency,” and did “not show[] that there were factors that deprived him of freedom of choice.” *Id.* Such findings were inappropriate in light of her denial of the appellant’s request for a hearing. *See Burgess*, 758 F.2d at 643; *Deines*, [98 M.S.P.R. 389](#), ¶ 11; ID at 2.

¶8 An employee-initiated action, such as a retirement, is presumed to be voluntary, and thus outside the Board’s jurisdiction, unless the employee presents sufficient evidence to establish that the action 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); *Neice v. Department of Homeland Security*, [105 M.S.P.R. 211](#), ¶ 7 (2007); ID at 3. The touchstone of the “voluntariness” analysis is whether, considering the totality of the circumstances, factors operated on the employee’s decision-making process that deprived him of freedom of choice. *Coufal v. Department of Justice*, [98 M.S.P.R. 31](#), ¶ 22 (2004); *Heining v. General Services Administration*, [68 M.S.P.R. 513](#), 519-20 (1995). 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. United States Navy*, [810 F.2d 1133](#), 1136-37 (Fed. Cir. 1987).

¶9 The appellant asserted that he resigned after his union representative told him to do so because he might later get his job back or be rehired. *See* RAF, Tab 13 at 9-10, 14-17; *see also* PFRF, Tab 1 at 18, 20 (referring to the union president’s “promise of being able to get my job back if I did in fact resign”). The appellant’s assertions suggest that if he was misled it was by his union representative rather than by the agency. *See* RAF, Tab 13 at 15, 17. He claims that he “was compelled to not fight by the union” and that the union representative advised him that it “will be in your best int[e]rest . . . to resign, and maybe you will get your job back and return to work.” *Id.* While the appellant may feel that he was misled by the union representative, the union representative is not a representative of the agency and her acts cannot be imputed to the agency. The only allegation of coercion that can be attributed to the agency is an assertion that the proposing official, Robert Manness, notified the appellant on the effective date of the removal that he needed to choose between resigning and being removed on that date. *See id.* at 14; *see also* RAF, Tab 4, Subtab 4d at 4. The appellant does not dispute that he was informed of the agency’s decision to remove him on August 3, 2007, two weeks before the effective date of the removal, and the appellant states that he discussed his options with his union representative before he chose to resign. *See* RAF, Tab 4, Subtab 4c; *id.*, Tab 13 at 15-17. Therefore, the fact that Mr. Manness indicated to the appellant that he must choose between resigning and being removed on the effective date does not suggest that his resignation was involuntary. *See Schultz*, 810 F.2d at 1136-37. Accordingly, the appellant failed to make a nonfrivolous allegation that his resignation was involuntary as a result of coercion or misrepresentation by the agency.

¶10 The appellant also asserted that he was mistreated by coworkers and that this too contributed to his involuntary resignation. *See, e.g.*, RAF, Tab 6 at 3-4; *id.*, Tab 7 at 48-49; *see also* PFRF, Tab 1 at 18. He stated that he “had a no win situation working around 6 to 12 nurses a day, yelling and screaming all at the same time in demanding tones. . . . Laughter, scheming and plotting against me were present in some cases.” RAF, Tab 6 at 14; *see also* PFRF, Tab 1 at 18. He also asserted that a nurse had spread rumors about his personal life. *See* RAF, Tab 7 at 48-49; *id.*, Tab 6 at 3-4, 14. In support of his assertion that he was mistreated by nurses, the appellant submitted a letter from a patient who apparently witnessed a nurse “upset” and “laugh at” the appellant. *See* RAF, Tab 7 at 61.

¶11 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). 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). While the appellant identified a single nurse who allegedly continued to spread rumors about him, the appellant’s statement regarding such complaints is dated June 19, 2006, more than a year before his resignation. *See* RAF, Tab 7 at 52. Moreover, the appellant’s assertions amount to vague and general claims that nurses “spread[] rumors” and were “trying to get back at [him] for some reason.” RAF, Tab 6 at 3, 5.

Therefore, the appellant failed to make a nonfrivolous allegation that he was forced to resign as a result of intolerable working conditions.

¶12 The appellant also asserted that he resigned under duress as a result of post traumatic stress disorder. See RAF, Tab 13 at 2, 5, 7, 16; PFRF, Tab 1 at 18. To overcome the presumption that a resignation is voluntary on the grounds of mental incapacity, an employee must show that, at the time of the resignation, he was incapable of making a rational decision to resign. *Lewis v. U.S. Postal Service*, [39 M.S.P.R. 236](#), 238-39 (1988). The appellant submitted nearly 30 pages of medical documentation that describe his status and progress at an inpatient counseling program from September 11, 2008, through October 11, 2008. See RAF, Tab 6 at 53-81. He also submitted documentation showing that in August 2008, the agency modified his pension benefit, effective April 16, 2008, for tendonitis that is service-connected and for post traumatic stress disorder that is not service-connected. See RAF, Tab 13 at 3, 5-8. The foregoing medical evidence relates only to the appellant's mental status from April 2008 to October 2008. See RAF, Tab 6 at 53-81; *id.*, Tab 13 at 5-8. The appellant failed to provide any evidence whatsoever of his mental status at the time of his resignation in August 2007, or at any time prior to April 2008, eight months after his resignation. Thus, the appellant failed to make a nonfrivolous allegation that, at the time of his resignation, he was incapable of making a rational decision to resign. See *Lewis v. U.S. Postal Service*, [35 M.S.P.R. 77](#), 80 (1987).

¶13 Accordingly, because the appellant did not make a nonfrivolous allegation casting doubt on the presumption that his resignation was voluntary, the administrative judge properly denied his request for a hearing and properly dismissed his appeal for lack of Board jurisdiction. The petition for review is therefore DENIED.

ORDER

¶14 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 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.