UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 156

Docket No. DA-0752-09-0131-I-1

John M. Taber,

Appellant,

v.

Department of the Air Force,

Agency.

August 7, 2009

John M. Taber, Norman, Oklahoma, pro se.

Rebecca A. Burbridge, Esquire, Tinker AFB, Oklahoma, for the agency.

Rick W. Tague, Esquire, Tinker AFB, Oklahoma, 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 sustaining his removal. We DENY the appellant's petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. For the following reasons, however, we REOPEN the appeal on our own motion, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant retired after the agency notified him of its decision to remove him for inability to perform the essential functions of his position as a Sheet Metal Mechanic (Aircraft). Initial Appeal File (IAF), Tab 4, Subtabs 4c-4d. The inability arose from an on-the-job injury that resulted in permanent medical restrictions on the appellant's lifting, reaching, kneeling, pulling, and use of two of his fingers. IAF, Tab 4, Subtabs 4i, 4hh; *see also id.*, Subtabs 4k, 4s, 4z, 4bb. The decision to remove the appellant followed his placement in a limited-duty Tool and Parts Attendant position in March 2001,[1] and subsequent unsuccessful attempts to place him in a job within his medical restrictions. *Id.*, Subtabs 4e, 4h 4j at 2, 4l, 4n-4q, 4t-4y, 4cc-4dd; *id.*, Tab 12, Exhibit C at 1 (Declaration of David Gower, Chief, Miscellaneous Bomber Sheet Metal Section). The appellant was scheduled to be removed effective October 29, 2008. IAF, Tab 4, Subtab 4d at 1. The effective date of his retirement is November 3, 2008. *Id.*, Subtab 4c.

¶3 On November 24, 2008, the appellant filed an appeal alleging that his resignation was involuntary, and that the decision to remove him from his position was based on his disabling condition and age. IAF, Tab 1 at 3, 5-6. On the same day that the appellant filed the instant appeal, the agency mailed a notice to the appellant informing him that "[i]nasmuch as [he had] been approved for Voluntary Retirement, [the agency had] determined that the Notice of Decision to Separate . . . [would] be cancelled effective this date." IAF, Tab 1 at 1; *id.*, Tab 4, Subtab 4b at 1-2. While the appeal was pending below, the agency repeatedly referred to its cancellation of the decision to remove the appellant, it denied that the appellant's retirement was coerced or otherwise involuntary, and it argued that the appeal should be dismissed for lack of

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[1] The initial decision erroneously states that the appellant was placed in the Tool and Parts Attendant position in March 2003. *Compare* IAF, Tab 18 at 2-3 *with* IAF, Tab 4, Subtab 4i.

jurisdiction. IAF, Tab 4, Subtab 1 at 1-2; *id.*, Tab 12; *id.*, Tab 15, Motion to Dismiss for Lack of Jurisdiction.

¶4 The administrative judge construed the appeal as an appeal of the agency's decision to remove him and, based on the written record,[2] sustained the charge, found that the appellant had not substantiated his discrimination claims, and sustained the removal. IAF, Tab 18, Initial Decision (ID). She found that the agency's cancellation of the removal decision did not affect the Board's jurisdiction because "the record contains no evidence that the action was actually rescinded before the appellant filed his appeal with the Board." ID at 4 n.2. She did not reach the issue of whether the appellant's retirement was involuntary.

¶5 In his timely petition for review, the appellant challenges only the administrative judge's determination that he did not establish his disability discrimination claim. Petition for Review File, (PFRF), Tab 1.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Moreover, the Board must satisfy itself that it has authority to adjudicate the matter before it, and may raise the question of its own jurisdiction sua sponte at any time. *See Martin v. U.S. Postal Service*, 101 M.S.P.R. 634, ¶ 4 (2006).

¶7 The administrative judge did not expressly address the fact that the appellant retired after receiving the agency's notice of decision to remove him. We note, however, that, under 5 U.S.C. § 7701(j), "an individual's status under any retirement system established by or under Federal statute . . . may [not] be taken into account" in "determining the appealability" of a removal. The Board and its reviewing court have interpreted this section as providing that, even when

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[2] The appellant withdrew his request for a hearing. *See* IAF, Tab 9, Subtab 1 at 3.

an employee retires on the scheduled effective date of his removal, the Board retains jurisdiction over the employee's removal appeal. *See Mays v. Department of Transportation*, 27 F.3d 1577, 1579-81 (Fed. Cir. 1994); *Black v. Department of the Air Force*, 76 M.S.P.R. 559, 561-63 (1997); *Scalese v. Department of the Air Force*, 68 M.S.P.R. 247, 249 (1995). In this case, the appellant's retirement was not effective until after the scheduled effective date of his removal. Clearly, the appellant's retirement after receiving a notice of decision to remove him does not deprive the Board of jurisdiction to adjudicate an appeal of his removal.

¶8 As noted above, however, the agency canceled its decision to remove the appellant. If an agency cancels or rescinds an action before the employee files an appeal of that action, or if the agency modifies the action to one that is not appealable prior to the filing of an appeal, the Board lacks jurisdiction over the appeal of that action. *Martin*, 101 M.S.P.R. 634, ¶ 5; *Shelton v. U.S. Soldiers' & Airmen's Home*, 82 M.S.P.R. 695, ¶ 9 (1999); *Siman v. Department of the Air Force*, 80 M.S.P.R. 306, 310 n.2 (1998); *see also Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981) (it is the nature of the agency's action at the time the appeal is filed that determines the Board's jurisdiction).

¶9 The agency asserted below that it had cancelled its decision to remove the appellant and argued that the Board lacked jurisdiction over the appeal in light of the cancellation and the allegedly voluntary nature of the appellant's retirement. IAF, Tab 15 at 2-4. The administrative judge, finding that the "record contained no evidence that the action was actually rescinded before the appellant filed his appeal," determined that the cancellation did not affect the Board's jurisdiction over the appeal. ID at 4 n.2. This was error. The agency claimed that "[t]he Decision to Separate . . . , effective 29 October 2008, was cancelled due to the employee's voluntary retirement, effective 03 November 2008 . . ." and further, that the appellant "was not removed from his position because he voluntarily retired." *See* IAF, Tab 4, Subtab 1 at 1. There is nothing in the record that contradicts these statements. In the absence of any evidence or claim that the

agency ever effected the removal, cancellation of the removal decision was the only action the agency needed to take in order to cancel the action. We find further that the agency cancelled its decision to remove the appellant before the appellant filed his appeal. Although the cancellation notice contains only the date November 24, 2008, and not a time of day, *see* IAF, Tab 4, Subtab 4b at 2, the record shows that it was signed during business hours. That is, it shows that the notice not only was signed on November 24, but was subsequently mailed on the same day. *See id.*, Subtab 4a; *id.*, Subtab 4b at 1. The appellant's electronically filed appeal indicates that it was not filed until 10:29:08 p.m., Central Daylight Time, on November 24. *See* IAF, Tab 1 at 1.[3] Thus, the record establishes that the decision to remove the appellant had been cancelled by the time the appellant filed his appeal, and that the Board therefore lacks jurisdiction to consider this case as an appeal from the agency's decision to remove the appellant. *See Martin*, 101 M.S.P.R. 634, ¶ 5; *Shelton*, 82 M.S.P.R. 695, ¶ 9.

¶10 We note, however, that the appellant, when he filed this appeal, characterized it as an appeal from a constructive removal. That is, he alleged that the agency improperly forced him to retire. IAF, Tab 1 at 3.[4] While the agency's cancellation of its decision to remove the appellant precludes a finding of jurisdiction over the appellant's appeal of the agency's decision to remove him, it does not preclude a finding of jurisdiction over the appellant's constructive removal appeal. *See Siman*, 80 M.S.P.R. 306, ¶¶ 8-11 & 9 n.2 (the Board lacked jurisdiction to adjudicate the appellant's appeal as a removal appeal, since the

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[3]Although the appeal indicates that it was electronically filed at 11:29:08 p.m., Eastern Daylight Time, the appellant's address of record is located in the Central time zone. *See* IAF, Tab 1 at 1.

[4] Although the appellant indicated on his appeal form that he was challenging an involuntary resignation rather than an involuntary retirement, *see* IAF, Tab 1 at 3, there is no dispute that the appellant was approved for voluntary retirement, and his subsequent pleadings challenged his retirement as involuntary, *see* IAF, Tab 4, Subtabs 4b-4c; *id.*; Tab 14 at 1.

agency had withdrawn that decision without effecting the removal, but it remanded for further consideration the appellant's claim that his retirement, which was precipitated by the removal decision, was involuntary); *cf. Cooper v. Department of the Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997) (although cancellation of a removal after the employee retired rendered the employee's removal appeal moot, the employee could still argue that his retirement was involuntary). Accordingly, this case should have been considered as an appeal of an alleged involuntary retirement.

¶11 A decision to retire 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 retirement was involuntary and therefore tantamount to a forced removal. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1329-30 (Fed. Cir. 2006). When an appellant raises allegations of discrimination in connection with an involuntariness claim, evidence of discrimination may be considered only in terms of the standard for voluntariness. *Markon v. Department of State*, 71 M.S.P.R. 574, 578 (1996). Thus, in an involuntary retirement or resignation appeal, evidence of discrimination goes to the ultimate question of coercion, i.e., whether under all of the circumstances working conditions were made so difficult by the agency, that a reasonable person in the employee's position would have felt compelled to resign or retire. *Id.*

¶12 Nonetheless, where, as here, the appellant's involuntariness claim is based solely on his objections to the agency's finding that he was unable to perform the duties of his job, to its decision to remove him for that reason, and to its failure to accommodate his medical conditions, "if the agency is able to show that it properly decided to remove the appellant based on physical inability to perform, then he could not establish that his retirement was involuntary." *See Scalese*, 68 M.S.P.R. at 249. Because, as discussed below, we find no error in the administrative judge's determination that the agency properly decided to remove the appellant based on physical inability to perform, the appellant cannot

establish that his retirement was involuntary, and the Board therefore lacks jurisdiction over his constructive removal appeal.

¶13 The appellant has not alleged error in the administrative judge's finding that his serious medical conditions preclude him from performing the essential functions of the position of Sheet Metal Mechanic, ID at 5, and we see none. Indeed, the appellant stated below that "[t]here is of course no denying that I was unable to perform the job of a Sheet Metal Mechanic . . . ." IAF, Tab 16, Exhibit 1 at 1. Rather, the appellant argues, as he did below, that he can perform the duties of a Tool and Parts Attendant as those duties were modified to accommodate his medical restrictions, and that the agency was required to continue to assign him to perform those duties. PFRF, Tab 1 at 2-3.

¶14 The undisputed documentary evidence, however, establishes that the Tool and Parts Attendant position was not a vacant, funded position the agency recruited to fill on a full-time, permanent basis; rather, the appellant was detailed to the position on a temporary basis only. *See* IAF, Tab 12, Exhibit C at 1 (Gower Declaration). Although the appellant might be able to perform the Tool and Parts Attendant duties he had previously been assigned, the agency was not required to assign him to limited duties that do not comprise a complete and separate position. *See Green v. U.S. Postal Service*, 47 M.S.P.R. 661, 668 (1991). Further, the fact that an agency may have permitted an individual not to perform an essential function of his position for a period of time, as in this case, does not mean that it is required by law to do so. This would effectively entail creation of a new position for the appellant, which an agency is not required to do to accommodate an employee's medical restrictions. *See Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶ 13 (2005). Finally, as the administrative judge noted, the appellant identified no other positions for which he was qualified and to which he might be assigned. ID at 7; *see Collins*, 100 M.S.P.R. 332, ¶ 13 (the employee has the burden of showing that he can perform the essential functions of a vacant position).

¶15 Thus, the administrative judge correctly found that the agency properly decided to remove the appellant based on physical inability to perform the essential functions of the position of Sheet Metal Mechanic. The appellant cannot establish that his retirement was involuntary, therefore, and the Board lacks jurisdiction over his appeal. *See Garcia* 437 F.3d at 1329-30; *Scalese*, 68 M.S.P.R. at 249.

¶16 Accordingly, we DISMISS this appeal for lack of jurisdiction.

ORDER

¶17 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. 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.