UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 31

Docket No. CH-0752-09-0698-I-1

Dawn Rosso,

Appellant,

v.

Department of Homeland Security,

Agency.

February 16, 2010

Dawn Rosso, Kansas City, Missouri, pro se.

Haywood McDuffie, Esquire, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review (PFR) of the initial decision (ID) that dismissed her appeal as withdrawn. For the reasons set forth below, we GRANT the PFR, VACATE the ID, and REMAND the appeal to the Central Regional Office for adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On June 12, 2009, the appellant, a GS-1895-11 Customs and Border Protection (CBP) Officer, filed an appeal in which she identified the personnel action or decision that she was contesting as "Involuntary Resignation" and

"Improper use of CFR/other illegalities" and the date of the action as June 9, 2009. Initial Appeal File (IAF), Tab 1 at 1, 3. She apparently asserted that the agency improperly conducted a fitness-for-duty examination, found her unfit for duty, and told her that it would remove her unless she accepted an Entry Specialist (ES) position. *Id.* at 5, 8-10. She asserted that she was forced under extreme duress to accept the ES position, tried to rescind her acceptance, and was not allowed to do so. *Id.* at 5. She stated that she had not yet signed "the final acceptance letter" for the position, had not yet worked in the position, and would be forced to sign a document accepting the position and enter on duty in the position on June 15, 2009. *Id.* at 5. She further claimed harmful procedural error; prohibited discrimination; the action was not in accordance with law; prohibited personnel practices; retaliation for winning a 2005 Board appeal; and retaliation for filing complaints with the Equal Employment Opportunity Commission (EEOC), the Office of Inspector General, Internal Affairs/Office of Professional Responsibility, and her congressional office.[*] *Id.* at 4, 5, 7-8, 11-13. She asserted that she was also filing a complaint with the Office of Special Counsel (OSC). *Id.* at 5, 12.

¶3 On June 17, 2009, the administrative judge (AJ) notified the appellant of the standard for proving Board jurisdiction over an alleged involuntary resignation, ordered her to prove jurisdiction, and informed her that her appeal would be dismissed without her requested hearing if she failed to make a non-frivolous allegation of jurisdiction. IAF, Tab 3. On the same day, the AJ received a copy of what he referred to as "the appellant's Equal Employment Opportunity Commission complaint and additional evidence." *Id.*, Tabs 4, 5. The submission appeared to be documents that the appellant had annotated with

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[*] Although the appellant indicated that she had filed a formal discrimination complaint on May 7, 2008, concerning the action she was appealing, and that a decision had not been issued, *id.* at 11, any such complaint obviously did not involve her action in June 2009.

comments to the AJ, *id.*, Tab 5, Vol. 1 at 1-45, followed by the 718-page Equal Employment Opportunity Investigative File, *id.*, Vols. 1-3. It included, inter alia, the following documents: 1. An April 3, 2009 letter from St. Louis Area Port Director Joseph A. Lanzante notifying the appellant that she had been determined to be unfit for her CBP Officer position; offering her an ES position at the same grade and pay level; and notifying her that, if she did not accept the position, the agency would initiate action to remove her, *id.*, Vol. 1 at 14-15; 2. her April 17, 2009 acceptance of the ES position, *id.* at 16; 3. her June 4, 2009 letter to ES Supervisor Lenora Damper stating that she had accepted the ES position under duress of firing and that she was rescinding her acceptance, *id.* at 2; and 4. Damper's June 8, 2009 e-mail to her stating that she accepted the ES position on April 17, 2009; she was reassigned to the position effective May 10, 2009; she could not unilaterally decide that she wanted to undo a reassignment by stating that she was rescinding her acceptance, and, therefore, she was an ES; and her refusal to update her position title, send Human Resources a signed and dated copy of her ES Acceptance Agreement form, and get started with on-the-job training for the ES duties could result in disciplinary action, *id.* at 9.

¶4 On June 25, 2009, the agency moved to defer submission of its file "until jurisdiction is determined and/or until it is determined that the Appellant will proceed." IAF, Tab 6 at 1. The agency stated, inter alia, that the appellant "has today indicated to the undersigned counsel that she contacted the assigned Administrative Judge and indicated that she might decide to dismiss her MSPB appeal altogether." *Id.*, Mot. at 2. On July 6, 2009, the appellant faxed a document to the AJ and the agency stating that she had "to drop this appeal with prejudice" because she had no attorney and no funds to hire one to remedy the situation and no legal education to remedy the situation herself. She further stated: "Thank you for the advice to keep seeking resolution with the EEOC and the OSC- and your advice about seeking some form of official capacity within the union." IAF, Tab 7 at 1.

¶5 On August 7, 2009, the AJ issued his ID dismissing the appeal as withdrawn. ID at 1-2. He found that the appellant had filed an appeal "claiming that her June 9, 2009 resignation from her position as an CRP [sic] Officer with the Agency in Kansas City, Missouri was involuntary." *Id.* at 1. He found that she withdrew her appeal on July 6, 2009, "in order to pursue remedies before the EEOC." *Id.* at 2. He noted that, at her request, he delayed issuing the ID for 4 weeks. *Id.* at 2 n.2. He found that her withdrawal was an act of finality that removed the appeal from the Board's jurisdiction, and, thus, that the appeal must be dismissed. *Id.* at 2. He found that, because the appellant had withdrawn her appeal, he did not need to reach the issues of timeliness or jurisdiction. *Id.* at 1 n.1.

¶6 On September 10, 2009, the appellant filed her PFR of the ID. PFR File, Tab 1. The agency filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

¶7 The appellant asserts that she did not wish to withdraw her appeal. She contends that the AJ told her that the Board lacks jurisdiction because her decision to accept another position rather than be terminated was not an involuntary resignation that she was forced to take under duress. She contends that her resignation from the CBP Officer position was involuntary and that she had to take the other position to retain her health insurance because she requires life-sustaining medications for her thyroid condition. She further asserts that the AJ told her that she should have let the agency terminate her and then file a Board appeal. She also asserts that the AJ told her that it was unwise to proceed before the Board without an attorney. She states that she cannot afford an attorney. PFR at 1-2. In addition, she contends that the AJ stated that she had a "better chance of taking this matter through the EEOC and through the Office of Special Council [sic] in a Whistleblower Complaint." *Id.* at 2.

¶8 The appellant further argues that her former CBP Officer position and the ES position to which she was reassigned are not comparable. She contends that the CBP Officer position requires only 20 years of service for retirement eligibility whereas the ES position requires 30 years; that "there is some talk" that the CBP Officer position is going to be a GS-12 position; and that, apparently, she could earn up to $30,000 per year in overtime in the CBP Officer position whereas there is no overtime in the ES position. PFR at 2.

¶9 An appellant's withdrawal of her appeal is an act of finality, and, absent unusual circumstances, such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn. But an appellant's relinquishment of her right to appeal to the Board must be by clear, unequivocal, and decisive action. Where the appellant has raised a genuine question of fact as to whether she made a clear, unequivocal, and decisive act to relinquish her right to appeal to the Board, in the interest of justice, the Board has vacated the ID dismissing the appeal as withdrawn and remanded the case. It is appropriate to reopen an appeal in the interest of justice, "particularly where the evidence is of such weight as to warrant a different outcome," and the appellant has exercised due diligence in seeking reopening. *E.g.*, *Simon v. Department of Justice*, 112 M.S.P.R. 169, ¶¶ 6-8 (2009).

¶10 We find that the appellant exercised due diligence in seeking reopening because she timely filed her PFR. *See, e.g.*, *Simon*, 112 M.S.P.R. 169, ¶ 9; *Edwards v. Department of Veterans Affairs*, 111 M.S.P.R. 297, ¶ 5 (2009). Although her PFR is unsworn, her statements that she discussed the matter with the AJ are consistent with both the agency's representations below and her letter withdrawing her appeal. IAF, Tab 6, Mot. at 2, Tab 7 at 1. Admittedly, the AJ did not misinform her to the extent that he told her that the Board lacks jurisdiction over her alleged involuntary resignation claim because she did not resign. In that regard, the appellant has not contested the evidence that she was reassigned to the ES position on May 10, 2009. IAF, Tab 5, Vol. 1 at 9.

¶11 The AJ did not provide the appellant with notice of what she must show to establish Board jurisdiction over her allegation that her reassignment from the CBP Officer position to the ES position, as opposed to any resignation from the CBP Officer position, was involuntary. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985); *Wilson v. U.S. Postal Service*, 109 M.S.P.R. 60, ¶ 6 (2008); *see also McAlexander v. Department of Defense*, 105 M.S.P.R. 384, ¶ 4 (2007) (noting that, because it appeared that the appellant was reassigned, not removed, the Board issued a show-cause order informing the parties that the Board might lack jurisdiction and directing the parties to address whether the appellant's reassignment was voluntary and whether it resulted in an appealable reduction in grade or pay). In addition, the appellant's reference to her inability to proceed without legal representation, IAF, Tab 7, raises the question of whether the withdrawal of her appeal was clear, decisive, and unequivocal, and whether she should have been advised that she could seek to dismiss the appeal without prejudice to refiling. *See, e.g., Soto v. Department of Justice*, 95 M.S.P.R. 552, ¶¶ 8-9 (2004). The record does not reveal whether the AJ did so in this case. In addition, it is unclear whether the appellant has raised this matter before OSC, which could affect the Board's jurisdiction. *See Krape v. Department of Defense*, 87 M.S.P.R. 126, ¶¶ 7-8 (2000) (if an appellant elects to seek corrective action from OSC, the Board's jurisdiction does not vest until the OSC process is exhausted). It is also unclear whether the appellant has filed an EEO complaint with the agency or has attempted to proceed before the EEOC. If the appellant filed an EEO complaint with the agency before filing this appeal, then she must exhaust that process before appealing to the Board. 5 C.F.R. § 1201.154(b); *see Gomez-Burgos v. Department of Defense*, 79 M.S.P.R. 245, ¶ 8 (1998) (an appellant who was subjected to an appealable action may file a timely formal EEO complaint with the agency or file a Board appeal, but not both at the same

time). However, we note that the appellant's entitlement to an evidentiary hearing is only before the Board. *See Brooks v. Department of the Army*, 67 M.S.P.R. 551, 553-54 (1995) (reinstating a withdrawn appeal where the appellant withdrew based on the mistaken belief that she could take her mixed-case discrimination claims to an evidentiary hearing before EEOC); *Davis v. Department of the Navy*, 37 M.S.P.R. 120, 123 (1988) (EEOC's jurisdiction over mixed cases extends only to those discrimination issues properly presented to the Board in the first instance). Thus, under the circumstances of this case, we find it appropriate to remand the case to the regional office for further processing.

ORDER

¶12 Accordingly, we VACATE the ID and REMAND this appeal to the Central Regional Office for adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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