

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

ALITA MCCOLLUM,
Appellant,

DOCKET NUMBER
AT-0752-11-0455-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: August 2, 2012

THIS ORDER IS NONPRECEDENTIAL¹

William F. Smith, III, Esquire, Atlanta, Georgia, for the appellant.

Robert Peter Duffy, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant began a lengthy absence from work for a variety of health reasons beginning January 14, 2008. Initial Appeal File (IAF), Tab 6 at 5. She exhausted her leave and continued her absence in a leave without pay status. *Id.* at 14. On April 8, 2008, the agency suspended the appellant's security clearance, citing her health conditions. *Id.* at 26-27. On October 15, 2008, the appellant applied for Federal Employees' Retirement System (FERS) disability retirement. *Id.* at 18-23. On April 1, 2009, the Office of Personnel Management (OPM) informed the agency that it had approved the appellant's disability retirement application, and it requested additional information in order to help it process the annuity. *Id.* at 32-33. The appellant was separated from service by disability retirement effective May 23, 2009. *Id.* at 34.

On February 22, 2011, the appellant filed a Board appeal alleging that her disability retirement was involuntary, and she requested a hearing. IAF, Tab 1 at 2, 5. The administrative judge notified the appellant of her jurisdictional burden and ordered her to file evidence and argument to show that her disability retirement was involuntary. IAF, Tab 3 at 1-2. After the close of the written record, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing on the basis that the appellant failed to make a nonfrivolous allegation that her disability retirement was involuntary. IAF, Tab 16, Initial Decision (ID). The appellant has filed a petition for review, arguing that the administrative judge applied the wrong standard in finding that

she failed to make a nonfrivolous allegation that her retirement was involuntary. Petition for Review (PFR) File, Tab 1 at 6.

The administrative judge properly found that the appellant has not articulated any reasonable accommodations available during the relevant time period that would have allowed her to keep working. ID at 3-4. Therefore, the appellant has not made a nonfrivolous allegation that her disability retirement was involuntary under the standard set forth in *SanSoucie v. Department of Agriculture*, [116 M.S.P.R. 149](#), ¶ 15 (2011). Further, the appellant has not made a nonfrivolous allegation that her disability retirement was involuntary under the theories articulated in the cases that she cites on petition for review. Specifically, she has not made a nonfrivolous allegation that the agency caused the disabling conditions, *see Vaughan v. Department of Agriculture*, [116 M.S.P.R. 493](#), ¶ 14 (2011), or that her retirement decision was based on misinformation, *see Hosford v. Office of Personnel Management*, [107 M.S.P.R. 418](#), ¶¶ 8-9 (2007).

However, the appellant has made a nonfrivolous allegation that her disability retirement was involuntary under another theory. An employee has a right to withdraw a resignation or a retirement at any time before its effective date unless the agency has a valid reason for refusing to permit the withdrawal. *Levy v. Department of Homeland Security*, [109 M.S.P.R. 444](#), ¶ 18 (2008); *Almon v. National Aeronautics & Space Administration*, [16 M.S.P.R. 124](#), 126-27 (1983); [5 C.F.R. § 715.202\(b\)](#); *see also* [5 C.F.R. § 841.203\(a\)](#) (an applicant for benefits under the FERS may withdraw her application at any time until a payment based on that application is authorized). Therefore, an employee's separation may be deemed involuntary if the agency improperly denied her request to withdraw her disability retirement application before its effective date. *Greene v. Department of Health & Human Services*, [48 M.S.P.R. 161](#), 165-66 (1991); *see Douglas v. Department of Defense*, [108 M.S.P.R. 244](#), ¶ 9 (2008); *see also Berg v. U.S. Postal Service*, [78 M.S.P.R. 250](#), 253 (1998).

In this case, the appellant alleged that, on May 21, 2009 — two days prior to the effective date of her separation — she informed Retha Fulmore, an agency personnel official, that she wished to revoke her disability retirement application, but that the agency effected her separation from service regardless. IAF, Tab 11 at 60-61. This constitutes a nonfrivolous allegation that the agency improperly refused to allow the appellant to withdraw her disability retirement application and that her disability retirement was therefore involuntary. *See Greene*, [48 M.S.P.R. 161](#), 165-66 (the appellant's disability retirement was involuntary because she attempted to withdraw her disability retirement application prior to the effective date of her separation and the agency unjustifiably refused to allow the withdrawal). Contrary to the agency's suggestion on review, there is no legal requirement that a request to withdraw be in writing.

The hallmark of all constructive appeals is that the agency deprived the appellant of her freedom of choice in the matter. *See Heining v. General Services Administration*, [68 M.S.P.R. 513](#), 519 (1995). It may very well be that the agency has a solid basis to remove the appellant under 5 U.S.C. chapter 75 for attendance reasons, for failure to maintain a condition of employment, i.e., her security clearance, or for physical inability to perform. However, the decision between retiring and facing removal belongs to the appellant. *See Schultz v. U.S. Navy*, [810 F.2d 1133](#), 1136-37 (Fed. Cir. 1987) (the choice between resigning and facing removal is presumed to be voluntary). The agency cannot avoid taking an adverse action against an appellant by simply “retiring” her even if OPM ultimately determines that she meets the statutory disability retirement criteria. *See 5 C.F.R. § 844.202* (an agency may file a disability retirement application on behalf of an appellant only after it has issued a decision to remove her); *see also Sunderland v. Veterans Administration*, [13 M.S.P.R. 618](#), 620 n.2 (1982) (avoidance of adverse action proceedings is not a valid reason under 5 C.F.R. § 715.202(b) for an agency to disallow the withdrawal of a resignation).

On remand, the administrative judge should afford the appellant her requested hearing and decide whether she did, in fact, communicate to the agency her desire to withdraw her disability retirement application prior to its effective date, *cf. Glenn v. U.S. Soldier's & Airmen's Home*, [76 M.S.P.R. 572](#), 576-77 (1997) (an employee does not have a right to withdraw a resignation after its effective date), and if so, whether the agency had an acceptable reason for refusing to permit the withdrawal.² As the administrative judge noted, there is a question as to the timeliness of the instant appeal. However, there is no indication in the record that the agency notified the appellant of her Board appeal rights and the applicable filing deadline under [5 C.F.R. § 1201.21](#). To the extent the jurisdictional and timeliness issues are inextricably intertwined, as is normally the case in constructive removal appeals, the administrative judge should adjudicate the jurisdictional issue before proceeding to the timeliness issue.³ *See Brown v. U.S. Postal Service*, [115 M.S.P.R. 609](#), ¶ 5, *aff'd*, 469 F. App'x 852 (Fed. Cir. 2011).

² To the extent the appellant wishes to raise a claim of reprisal for whistleblowing activity, she may file an individual right of action appeal with the regional office. *See Morales v. Department of Justice*, [77 M.S.P.R. 482](#), 485 (1998) (individual right of action appeals must first be heard at the Board's regional office level). To the extent the appellant is requesting additional relief in connection with a whistleblower claim related to her involuntary retirement claim, evidence and argument on this matter is not relevant to the jurisdictional issue but may be presented during addendum proceedings if she prevails on the merits.

³ While the agency has addressed the timeliness issue, its arguments pertain to matters surrounding the appellant's equal employment opportunity (EEO) complaint. The record shows that the agency did not process the EEO complaint as a mixed case or inform the appellant that she had the right to appeal the final agency decision to the Board. The EEO complaint has nothing to do with the timeliness issues before the Board, and the agency's theory of untimeliness lacks a factual basis.

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.