

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

DAWN ROSSO,
Appellant,

DOCKET NUMBER
CH-0752-09-0698-B-2

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: September 25, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Ray E. Sousley, Esquire, Kansas City, Missouri, for the appellant.

Haywood McDuffie, Chicago, Illinois, for the agency.

BEFORE

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

FINAL 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

that was not available for consideration earlier or when the administrative judge 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](#)).

In 2002, the appellant was hired as an Immigration Inspector with the Department of Justice's former Immigration and Naturalization Service (INS). RRAAF, Tab 15 at 1. As a result of the terrorist attacks of September 11, 2001, INS was subsequently merged into the Department of Homeland Security, U.S. Customs and Border Protection (CBP), in March 2003, and the appellant was assigned to the position of CBP Officer. *Id.* The position description and classification for the CBP Officer position became effective on October 31, 2003, with a journeyman grade level of GS/GG-11.² RRAAF, Tab 5, Exhibit (Ex.) 11.

In 2008, the agency began to look at whether an upgrade in the journeymen grade level of the CBP Officer position was warranted as a result of the changes in the CBP Officers' work environment since September 11, 2001, and because of the high attrition rate of CBP Officers leaving for other agencies' positions that had a journeymen grade level higher than GS-11. RRAAF, Tab 15 at 6. In March 2009, the Office of Personnel Management issued new classification standards for the CBP Officer position. *Id.* at 7 n.6. In May 2009, the appellant was reassigned to the position of Entry Specialist at her existing GS-11 grade and pay. *Id.* at 3. On August 29, 2010, the agency effected the upgrade of the CBP Officer position journeymen grade level from GS-11 to GS-12. *Id.* at 4.

The appellant initially filed an appeal alleging an involuntary resignation; she subsequently withdrew the appeal with prejudice; and her appeal was

² See *Manlogon v. Environmental Protection Agency*, [87 M.S.P.R. 653](#), ¶ 11 (2001) (a position classification action becomes effective when a person with properly delegated authority signs the cover sheet of the position description, certifying that the position has been properly classified); [5 C.F.R. § 511.701\(a\)\(1\)\(i\)](#).

dismissed on that basis. Initial Appeal File, Tabs 1, 7, 8. On petition for review, the Board found that the appellant had raised a genuine question of fact as to whether she had made a clear, unequivocal, and decisive act to relinquish her right to appeal to the Board. *Rosso v. Department of Homeland Security*, [113 M.S.P.R. 271](#), ¶ 9 (2010). The Board also found that the appellant had asserted that her reassignment to her new position was involuntary and that the record failed to reflect that the administrative judge had informed the appellant of what she had to allege to establish the Board's jurisdiction over a claim of an involuntary reassignment that resulted in a reduction in grade or pay. *Id.*, ¶ 11. The Board vacated the initial decision and remanded the appeal for further adjudication in accordance with the opinion and order. *Id.*, ¶ 12.

On remand, the administrative judge issued jurisdictional orders to show cause that, in pertinent part, informed the appellant of what she was required to allege in order to establish the Board's jurisdiction over her appeal as a constructive demotion appeal. Remand Appeal File (RAF), Tab 2; RRAF, Tab 2. The appellant's response asserted that she was forced to accept her new Entry Specialist position and that her former CBP Officer position had subsequently been reclassified, without a change in the duties of the position, from GS-11 to GS-12 due to a classification error in 2003. RRAF, Tab 11 at 4-6. The appellant asserted that the documentation she submitted in support of her claim of a constructive demotion satisfied the jurisdictional requirements set forth in *Russell v. Department of the Navy*, [6 M.S.P.R. 698](#) (1981). *Id.* at 6-7. The agency's jurisdictional response asserted that the Board does not have jurisdiction over the appellant's claim of a constructive demotion because the CBP Officer position was not upgraded from GS-11 to GS-12 as a result of a newly established classification standard or the correction of a classification error; rather, the position was upgraded as a result of a planned management action. RRAF, Tab 15 at 4-7. The agency also asserted that, because the appellant was found unfit to perform the full range of her duties as a CBP Officer during a 2008 fitness for

duty examination, the appellant could not show that she meets the legal and qualification requirements for promotion to the upgraded GS-12 journeymen level of the CBP Officer position. *Id.* at 2-3 n.2. The appellant filed a reply in which, in part, she disputed the agency's assertion that she is unfit for duty, and she asserted that she meets the requirements for the upgraded CBP Officer position. RRAF, Tab 18 at 6-7.

In the remand initial decision based on the record evidence, the administrative judge reviewed the parties' respective evidence and found that the appellant had failed to raise nonfrivolous allegations that the CBP Officer position was not classified at the GS-12 level in 2003 in conformance with published classification standards or that some other classification error had occurred and, thus, that she had not shown that the position upgrade was the result of the correction of a classification error or a new classification standard, as required to prove a constructive demotion claim. RRAF, Tab 19 at 3-8. Rather, the administrative judge found that the evidence established that the position upgrade occurred as a result of a planned management action following the events of September 11, 2001, and not as a result of a classification error or new classification standards. *Id.* at 7-8. Accordingly, the administrative judge dismissed the appeal for lack of jurisdiction. *Id.* at 2, 9.

The appellant has filed a petition for review of the remand initial decision in which she asserts that the administrative judge erred in finding that the August 29, 2010 upgrade of the journeymen level of her former CBP Officer position from GS-11 to GS-12 was the result of a planned management action and was not the result of the correction of a classification error that occurred when the position was initially classified in 2003.³ Remand Petition for Review (RPFR)

³ The appellant also filed a May 3, 2012 sur-reply to the agency's reply to the appellant's response to the order to show cause. RPFR File, Tab 20. The agency has filed a motion to strike the appellant's sur-reply. *Id.*, Tab 21. We find that the appellant's sur-reply is not authorized under our regulations, and it is not based on new

File, Tab 1 at 4. However, even assuming that the administrative judge's finding was in error, we still find that the Board lacks jurisdiction over the instant appeal because the appellant has not made a nonfrivolous allegation that her reassignment was involuntary.

The Board's reviewing court has held that an essential element of a constructive demotion is that the employee's transfer must have been involuntary. *Elmore v. Department of Transportation*, [421 F.3d 1339](#), 1343 (Fed. Cir. 2005). If an employee voluntarily transfers out of a position that is subsequently upgraded, the employee cannot properly complain that the transfer constituted a demotion. *Id.* An appellant may establish that her reassignment decision was involuntary if she could show that she was placed under unreasonable time constraints, that she relied on agency misinformation in reaching her decision, or that the agency could not substantiate a threatened removal or other adverse action. *See Soler-Minardo v. Department of Defense*, [92 M.S.P.R. 100](#), ¶ 9 (2002).

The administrative judge did not address, as instructed in the Board's remand decision, RAF, Tab 1 at 6, the issue of the voluntariness of the appellant's transfer to her current Entry Specialist position. Therefore, we issued an order to show cause that informed the appellant of her burden to assert nonfrivolous allegations that, if proven, could show that her reassignment from her former CBP Officer position to her current Entry Specialist position was involuntary, and we afforded her the opportunity to assert such nonfrivolous allegations. RPF File, Tab 10. In the appellant's response, she asserts that she was coerced into accepting the reassignment to the Entry Specialist position,

and material evidence; rather, it is merely an attempt to rebut the agency's arguments in the agency's reply. Therefore, we have not considered the appellant's May 3, 2012 sur-reply. *See* [5 C.F.R. § 1201.114\(a\)-\(i\)](#); *see also Parikh v. Department of Veterans Affairs*, [116 M.S.P.R. 197](#), ¶ 5 n.1 (2011); *Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 6 n.1 (2010).

which the agency offered her in lieu of removing her from her former CBP position due to the agency's determination that she could not be permitted to carry a firearm in the course of her CBP Officer duties as a result of her 2004 and 2008 psychotic episodes and subsequent failure of a psychiatric fitness for duty examination. RPFRR File, Tab 15 at 6-11, 30-31; RRAF, Tab 15, Exs. 5-7. In order to establish a claim of duress or coercion, an appellant must allege facts that if proven could show that: (1) one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *Soler-Minardo*, [92 M.S.P.R. 100](#), ¶ 6. Coercion is present if there is evidence that the appellant was threatened with discharge, the appellant can establish that she accepted a reassignment to avoid the threatened discharge, and if she can further show that the agency knew or should have known that the threatened removal from her former CBP Officer position could not be substantiated. *Id.*

In support of her assertion of coercion, the appellant appears to assert that the agency knew or should have known that it could not have taken the threatened removal action because the agency allegedly withheld medical information, showing that the appellant's psychotic episodes were the result of a thyroid condition for which she was initially prescribed a medication that did not work for her, when she was examined by the two psychiatrists who found her to be unsuitable for her CBP Officer position. RPFRR, Tab 16 at 5, 7-9. We find that the record demonstrates that her assertion is frivolous. The record shows that Dr. Colin MacKenzie, M.D., was aware of the appellant's mild hyperthyroidism when he examined the appellant in July 2008, and that Dr. Kenneth Gaarder, M.D., conducted a second review of all the appellant's medical records, to include the evidence of her hyperthyroidism and the adjustment of her thyroid medication. RPFRR, Tab 17, Exs. D, E. Both of those psychiatrists found the appellant unsuitable to remain in the CBP Officer position in which she would be required to carry a firearm. *Id.* We also find the appellant's assertion that she has never

been diagnosed as having a mental condition to be frivolous. Dr. MacKenzie diagnosed the appellant as having “Cognitive Disorder Not Otherwise Specified”; “History of Psychosis due to a General Medical Condition”; and “Paranoid Personality Disorder.” RPF, Tab 17, Ex. D at 4. Dr. Gaarder concurred in the credibility of Dr. MacKenzie’s findings that the appellant has a paranoid personality disorder and that her thyroid-induced psychosis is not the primary cause of the appellant’s work difficulties. *Id.*, Ex. E. Dr. Gaarder reviewed the appellant’s medical records a second time after she had her own psychiatric evaluations performed, and he again concluded that the appellant was not fit to fully perform the duties of the CBP Officer position, including the carrying of firearms. RRAF, Tab 19, Ex. H. We therefore find that the appellant failed to assert nonfrivolous allegations that the agency knew or should have known that the threatened discharge could not be sustained. *See Soler-Minardo*, [92 M.S.P.R. 100](#), ¶ 6.

For the same reasons noted above, we find the appellant’s apparent assertion that she involuntarily accepted the reassignment based on agency misinformation declaring her to be unfit for duty to be frivolous. RPF File, Tab 15 at 10-11. In making such an assertion, the appellant must allege facts that, if proven, could show that: (1) the agency made misleading statements; and (2) the appellant reasonably relied on the misinformation to her detriment. *Salazar v. Department of the Army*, [115 M.S.P.R. 296](#), ¶ 9 (2010). The appellant has not shown that the agency provided her with misinformation because, as noted above, the two psychiatrists’ reports show that they were, in fact, aware of the appellant’s hyperthyroid condition and adjustments to her thyroid medication. Further, the appellant has not alleged that she accepted the reassignment in reliance on the allegedly erroneous finding that she is unfit for the CBP Officer position; rather, the appellant has maintained that she is not unfit for the CBP Officer position. RRAF, Tab 18 at 6-7; RPF File, Tab 15 at 9-11. Thus, the

appellant has not raised nonfrivolous allegations of either of the misinformation criteria. *See Salazar*, [115 M.S.P.R. 296](#), ¶ 9.

The appellant also appears to assert that she only accepted the reassignment as a result of agency duress, in that the agency allegedly refused to allow her to leave until she accepted or rejected the offered reassignment at the time the agency presented the offer to her. RPF, Tab 15 at 10. The record reflects that the agency first informed the appellant of the option of accepting the offered Entry Specialist position in lieu of being removed in a letter dated March 13, 2009, that the agency informed the appellant that she qualified for the Entry Specialist position at her current pay grade and step level in an April 3, 2009 letter, and that, on April 14, 2009, the appellant signed an “Offer Of Position” in which she acknowledged that, after having had reasonable time to seek legal counsel and to consider her options, she voluntarily accepted the offered Entry Specialist position. RRAF, Tab 15, Exs. 5-7. Thus, we find the appellant’s assertion of duress to be frivolous.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#). Therefore, we DENY the petition for review and AFFIRM the remand initial decision AS MODIFIED by this Final Order.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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:

William D. Spencer
Clerk of the Board

Washington, D.C.