UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RALPH G. BAUER, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER PH-0752-12-0069-I-1 DATE: September 27, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Ralph G. Bauer, Cherry Hill, New Jersey, pro se.

John A. Skarbek, Esquire, Philadelphia, Pennsylvania, 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 that was not available for consideration earlier or when the administrative judge

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

The appellant completed an application for Immediate Retirement on May 14, 1997, Initial Appeal File (IAF), Tab 12, Subtab a, and he filed an appeal on November 10, 2011, alleging that his retirement was involuntary, IAF, Tab 1. The administrative judge found that the appellant failed to establish by preponderant evidence that his decision to retire was involuntary. Initial Decision at 7. On review, the appellant's arguments consist of a single paragraph in which he challenges the merits of a proposed 5-day suspension, which he claims resulted in his coerced retirement.[2] Petition for Review (PFR) File, Tab 1. Specifically, the appellant contends that he "did not shout" at Greg Lee during the meeting as alleged in the notice of proposed suspension. PFR File, Tab 1.

An employee-initiated action, such as a transfer between agencies, resignation, or retirement, is presumed to be voluntary unless the appellant 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. *Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991). The test for determining whether a resignation was the result of coercion is whether: (1) The appellant involuntarily accepted the agency's terms; (2) the circumstances permitted no other alternative; and (3) the circumstances were the result of the agency's coercive acts. *Edgerton v. Merit Systems Protection Board*, 768 F.2d 1314, 1316-17 (Fed. Cir. 1985); *Barnett v. U.S. Postal Service*, 59 M.S.P.R. 125, 127-28 (1993). This is true even if the appellant retired in order to avoid an adverse agency action, as long as the threatened agency action could

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[2] We note that the appellant does not challenge the administrative judge's determination that he failed to show by preponderant evidence that Ms. Ware told him he could not withdraw his retirement application prior to the effective date. Accordingly, we have not addressed this issue on review.

have been properly taken. *See Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) ("[W]here an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act."). However, "inherent in that proposition is that the agency has reasonable grounds for threatening to take an adverse action. If an employee can show that the agency knew that the reason for the threatened removal could not be substantiated, the threatened action . . . is purely coercive." *Id*.

Here, there is no evidence that the agency imposed the terms of the appellant's retirement. Further, even though the appellant appears to assert that the agency coerced him into retiring by proposing a 5-day suspension, the administrative judge correctly found that the appellant has made no attempt to show that the agency knew that the allegations against him could not be substantiated. The fact that the appellant was faced with the unpleasant choice of either retiring or opposing a potential 5-day suspension action does not rebut the presumed voluntariness of his ultimate choice of retiring. Therefore, even though the appellant may regret his decision now, the appellant's choice to retire does not equate to coercion.

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 initial decision issued by the administrative judge, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

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: _____
William D. Spencer
Clerk of the Board

Washington, D.C.