

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

JOHN YERESSIAN,
Appellant,

DOCKET NUMBER
SF-0752-10-0972-I-2

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: January 29, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

John Yeressian, Pasadena, California, pro se.

Larry F. Estrada, Esquire, Los Angeles, California, 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

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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](#)²). For the reasons discussed below, we GRANT the appellant's petition for review and AFFIRM the initial decision AS MODIFIED. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

Effective October 17, 2008, the agency terminated the appellant from his Student Trainee (Realty) position in the Student Career Experience Program (SCEP) for unsatisfactory performance, he filed a Board appeal, and the administrative judge determined that the Board lacked jurisdiction over the appeal. *Yeressian v. Department of the Army*, [112 M.S.P.R. 21](#), ¶¶ 3-4, 6 (2009). On review, the Board found that the agency "failed to inform the appellant that he would lose the appeal rights he had acquired in his former SCEP position prior to his acceptance of the SCEP position from which he was terminated," and it vacated the initial decision and remanded the appeal for the administrative judge to determine whether the appellant would have accepted the Student Trainee (Realty) appointment if he had known that he would lose his appeal rights by accepting that position. *Id.*, ¶¶ 13-14. On remand, the administrative judge determined that the appellant would not have accepted the appointment, and he reversed the agency's action. *See Yeressian v. Department of the Army*, MSPB Docket No. SF-0752-09-0049-B-2, Remand Initial Decision (Jan. 21, 2010). Neither party filed a petition for review of the remand initial decision.

On May 13, 2010, the agency informed the appellant that, pursuant to the administrative judge's order, he was being restored to his position, and it directed him to report for duty on June 7, 2010. *Yeressian v. Department of the Army*,

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

MSPB Docket No. SF-0752-10-0972-I-2, Initial Appeal File-2 (IAF-2), Tab 85 at 14 of 56. The appellant did not return to work. Instead, on July 31, 2010, the appellant sent a signed, but undated letter, stating that he would resign, effective June 7, 2010, and stating that the letter served as his two-week notice.³ See *Yeressian v. Department of the Army*, MSPB Docket No. SF-0752-09-0049-C-1 (Compliance File), Tab 80 (involuntary resignation package). On August 2, 2010, the appellant filed a subsequent submission, in which he stated that he has “withdrawn/rescinded” his resignation. See Compliance File, Tab 81.

The appellant filed an appeal and claimed that his resignation was involuntary. See *Yeressian v. Department of the Army*, MSPB Docket No. SF-0752-10-0972-I-1, Initial Appeal File (IAF), Tab 1. The administrative judge issued an initial decision, which dismissed the appeal for lack of jurisdiction. See IAF-2, Tab 100, Initial Decision (ID). In particular, the administrative judge noted that the agency did not submit a copy of a Standard Form 50 (SF-50) reflecting “the fact, and effective date, of the appellant’s resignation.” *Id.* He also noted that, in an April 2, 2012 telephone message, the agency representative “confirmed that the agency never issued an SF-50 effecting the appellant’s resignation, reportedly because the appellant was, and continues to be, on the rolls of another Federal agency”; thus, because the appellant had not been separated from the agency, either voluntarily or otherwise, the administrative judge determined that the Board lacked jurisdiction over the involuntary resignation appeal.⁴ ID at 6.

On petition for review, the appellant complains, among other things, that the administrative judge erred when he: (1) failed to inform him of the agency’s

³ We do not know why this letter was apparently sent almost 2 months after its purported effective date.

⁴ Although the administrative judge joined the instant matter and the appellant’s compliance matter, IAF-2, Tab 47, the initial decisions were separately issued and did not reference the other matter. To minimize any further confusion, we have decided to issue our decisions in these matters separately as well.

telephone message and the information contained therein and did not give him an opportunity to respond; (2) relied upon the absence of an Standard Form 50 (SF-50) to find that the agency did not effect his resignation request and to conclude that the Board lacks jurisdiction over the appeal; (3) failed to give him notice of his jurisdictional burden; and (4) prohibited him from filing any submissions. The appellant also claims that the administrative judge was biased.⁵

With respect to the appellant's contention regarding the administrative judge's failure to inform him of the telephone message and give him an opportunity to respond, we note that the administrative judge *did* document the substance of the telephone message in the initial decision, the appellant was given an opportunity to respond to the information contained therein in his petition for review, and we have considered his arguments in this regard. We disagree, however, with the administrative judge's decision to rely on the agency counsel's telephone message and the absence of a resignation SF-50 to conclude that the Board lacks jurisdiction over this appeal. *See Hendricks v. Department of the Navy*, [69 M.S.P.R. 163](#), 168 (1995) (the statements of a party's representative in a pleading do not constitute evidence); *see also Grigsby v. Department of Commerce*, [729 F.2d 772](#), 776 (Fed. Cir. 1984) (“[T]he SF-50 is not a legally operative document controlling on its face an employee's status and rights.”). Accordingly, we vacate the portion of the initial decision that discusses the telephone message and relies upon the absence of a resignation SF-50 to conclude that the appellant did not meet his burden to show that his resignation was involuntary.

We have considered the appellant's other arguments on review and we find that these arguments are without merit. With respect to the appellant's contention that he was not given proper notice of his jurisdictional burden in an involuntary

⁵ The appellant also makes arguments relating to his attorney fees and compliance matters. As both of these matters were separately before the Board on petition for review, we do not address these arguments herein.

resignation appeal, this claim is without merit because he was given proper notice in the Acknowledgment Order. *See* IAF, Tab 2 (Acknowledgment Order).

We are not persuaded by the appellant's assertion that the administrative judge prohibited him from filing any submissions. In this regard, we note that the administrative judge stated, in response to the appellant's similar assertions, below: "I did not state or imply that there was any limit on the number of filings a party may submit in an appeal, and I unequivocally did NOT instruct [the appellant] not to file any further submissions in this or any other appeal." IAF-2, Tab 49 at 2 (emphasis in original). The administrative judge also stated that "the appellant's apparent misreading of [his] Order may not serve as a defense or excuse for any future missed deadlines. . . ." *Id.* Based on the clear language in this Order, the appellant's contention is without merit.

We are also not persuaded by the appellant's claim of administrative judge bias. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)). The record contains no such evidence.

Finally, we recognize that this appeal presents an unusual situation: The appellant was ordered reinstated, the agency directed him to return to work, he failed to report for duty, he apparently tendered a resignation letter effective the same date that he was originally directed to return to work, he subsequently withdrew that resignation, and he then filed an involuntary resignation appeal claiming intolerable working conditions. In his "Resignation in Protest" letter, *see* Compliance File, Tab 80 at 4, the appellant alleged that there was an

“extremely hostile” and “toxic” working environment, and he cited the agency’s “retaliatory/improper actions” and “coercive pressure” to leave his employment, but he offered few, if any, factual details to support these contentions. As an example of his allegations, he stated below that he did not resign from the agency, and he was never allowed into the building. IAF-2, Tab 95 at 1. Obviously, the appellant *did* tender his resignation; thus, the first statement is untrue.⁶ With respect to the second statement, even if true, this allegation does not constitute a nonfrivolous allegation of an involuntary resignation. Accordingly, under the unusual circumstances of this appeal, we find that the appellant did not nonfrivolously allege that his resignation was involuntary.⁷

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

⁶ The regulation at [5 C.F.R. § 715.202](#)(b) states that an employee has a right to withdraw a resignation at any time before it is effective, 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). We note that the appellant’s withdrawal letter was submitted almost 2 months *after* the effective date of the resignation; thus, the appellant had no *right* to withdraw his resignation and the agency was not required to “accept any attempt to rescind the resignation after that date.” *Axson v. Department of Veterans Affairs*, [110 M.S.P.R. 605](#), ¶ 19 (2009).

⁷ The appellant and the agency each requested that the Board issue sanctions against the other party. We deny the appellant’s numerous requests for sanctions against the agency. Although we are extremely concerned about the multiple serious allegations made against the appellant, in light of our disposition, we deny the agency’s requests for sanctions against him without prejudice. We also deny the agency’s January 24, 2013 motion for leave to file an additional pleading.

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.