

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

SHARON LYNETTE BLOUNT,
Appellant,

DOCKET NUMBER
DC-0752-13-0755-I-1

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DATE: May 16, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Sharon Lynette Blount, Fort Washington, Maryland, pro se.

James E. Simpson, Washington, D.C., 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 of the initial decision, which dismissed her involuntary resignation appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

On May 29, 2013, the agency issued a decision notice informing the appellant that she would be removed from her GS-12 Consumer Safety Officer (CSO) position, effective June 30, 2013, based on her ongoing failure to comply with attendance requirements and leave restrictions, including numerous instances of absence without leave between February 2013 and March 2013. Initial Appeal File (IAF), Tab 1 at 32-39. On June 22, 2013, the appellant submitted a resignation letter to the agency. *Id.* at 41-42. The agency thereafter issued an SF-50 documenting the appellant's resignation, effective June 22, 2013. IAF, Tab 4 at 13-14.

The appellant filed an appeal with the Board regarding her purported removal and requested a hearing. IAF, Tab 1. The agency moved to dismiss the appeal because the appellant was not removed, but rather, resigned from her position. IAF, Tab 4 at 4. The administrative judge notified the appellant of her burden to establish Board jurisdiction, correctly advised her of the limited circumstances under which the Board has jurisdiction over a resignation, and ordered her to file evidence and/or argument constituting a nonfrivolous allegation of Board jurisdiction. IAF, Tab 5. The appellant failed to respond to

the administrative judge's jurisdictional order. See IAF, Tab 9, Initial Decision (ID) at 6. The administrative judge then issued an initial decision dismissing the appellant's appeal for lack of jurisdiction, without holding a hearing, finding that the appellant did not nonfrivolously allege that her resignation was involuntary. ID.

The appellant thereafter filed a petition for review of the initial decision, which the agency opposes. Petition for Review (PFR) File, Tab 1, Tab 3. She attaches documents that were already in the record, including the agency's proposal and decision notices, and 2 copies of a step 1 union grievance regarding her placement on leave restriction, which she claims demonstrate that she "had no other choice but to resign" because "a pattern of retaliation" led to her "being forced out of" the agency. PFR File, Tab 1 at 1-2, 13-34.

The appellant failed to non-frivolously allege that her resignation was involuntary.

An employee-initiated action, such as a resignation, is presumed to be voluntary, and thus outside the Board's jurisdiction, unless the employee 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. *Green v. Department of Veterans Affairs*, [112 M.S.P.R. 59](#), ¶ 8 (2009). For the reasons set forth below, we find that the appellant has not nonfrivolously alleged that her resignation was involuntary.

As an initial matter, when she filed her appeal the appellant did not allege that her resignation was involuntary. Rather, she filed an appeal regarding the merits of the agency's sustained removal action and the administrative judge raised the issue of whether the appellant's resignation was involuntary, in response to the agency's motion to dismiss. IAF, Tab 1, Tab 5. The appellant

filed a hearing request,² stating that she was “forced to resign,” and attaching: (1) her resignation letter; (2) an e-mail informing the agency that she intended to make oral and written replies to the proposed removal action; (3) the agency’s decision notice; and (4) her step 1 union grievance. IAF, Tab 6. However, she provided no explanation as to how the attached documents related to her bare assertion that she was forced to resign.

The appellant’s resignation letter indicated that, “[a]fter careful review and consideration” of the agency’s decision notice, she “decided that it would be to [her] best interest to resign.” IAF, Tab 1 at 41. She further stated that her “decision to resign [was] based solely on the necessity to uphold [her] reputation.” *Id.* It is well-settled that the fact that an employee is faced with the unpleasant choice of either resigning or opposing a potential removal action does not rebut the presumed voluntariness of her ultimate choice of resignation. *Adams v. U.S. Postal Service*, [108 M.S.P.R. 250](#), ¶ 15 (2008), *aff’d*, 309 F. App’x 413 (Fed. Cir. 2009). That the appellant decided, after careful reflection, that she would rather resign to protect her reputation than be removed, indicates that her resignation was voluntary.

The Board may consider allegations of discrimination in connection with an involuntariness claim in terms of the standard for voluntariness, i.e., whether under all of the circumstances working conditions were made so difficult by the agency, that a reasonable person in the employee’s position would have felt compelled to resign or retire. *Taber v. Department of the Air*

² The administrative judge received the appellant’s hearing request one day after issuing his jurisdictional order. IAF, Tab 5, Tab 6. It is not clear to us whether the submission was made in response to the jurisdictional order; however, it appears unlikely given that the jurisdictional order was sent to the appellant by U.S. mail. IAF, Tab 5 at 5. To the extent that the submission was a response to the jurisdictional order, which the administrative judge failed to consider, we discern no harm because we have considered it and find that it does not affect the outcome in this appeal. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party’s substantive rights provides no basis for reversal of an initial decision).

Force, [112 M.S.P.R. 124](#), ¶ 11 (2009). We therefore note the appellant's statement, in her resignation letter, that she believed the agency's decision to remove her was motivated by "retaliation and discrimination" based on her filing of discrimination complaints and a grievance against the agency regarding "abuse, mistreatment . . . [a] hostile work environment, [and] unfair and unequal pay." IAF, Tab 1 at 42. Further, in her grievance, the appellant alleged that the agency subjected her to disparate treatment based on race and sex because it: (1) failed to assign her duties to someone else while she was on maternity leave in 2009, which led to her having an overwhelming workload upon her return; (2) should have hired a second CSO to assist her with her duties, which were too much for her to do on her own; (3) "retaliated" against her when she circumvented her supervisor and spoke to the office director regarding hiring an additional CSO; (4) placed her on leave restriction in February 2012, despite knowing that the reason for her low leave balance was that she used advanced leave, and therefore accrued a negative leave balance, when she gave birth in 2009;³ (5) took away her scientific duties, leaving her with only administrative duties; and (6) failed to renew her reasonable accommodation.⁴ IAF, Tab 1 at 17-21; *see id.* at 9-12. Although the appellant alleged in her resignation letter that the agency's decision to remove her was discriminatory, and enumerated in her grievance various agency actions which she perceived to be discriminatory, she

³ The appellant contends that because of her membership in a protected class (female), the agency was required to give her "time to build her leave up" after returning from maternity leave. IAF, Tab 1 at 19.

⁴ An agency's failure to provide an employee with a reasonable accommodation may establish that such an employee's resignation was involuntary. *See Hosozawa v. Department of Veterans Affairs*, [113 M.S.P.R. 110](#), ¶ 7 (2010) (the appellant's allegation that the agency refused to provide her with a reasonable accommodation for her disability, which her doctor stated would enable her to continue working, and which the agency did not allege was infeasible, constituted a nonfrivolous allegation that her resignation was involuntary). In this appeal, the appellant has not alleged that she felt compelled to resign due to the agency's alleged refusal to renew the reasonable accommodation she was purportedly granted.

has not alleged that she resigned because of discrimination that made her work environment intolerable. Thus, her allegations of discrimination do not indicate that her resignation was involuntary and we do not consider them further.

We decline to consider the appellant's reply and we deny her motion to file additional evidence.

The agency timely filed its response to the appellant's petition for review on October 28, 2013,⁵ and sent a copy of its response to the appellant via U.S. mail. PFR File, Tab 3. The deadline for the appellant to file her reply was November 12, 2013. See [5 C.F.R. § 1201.23](#) (5 days are added to a party's deadline for responding to a document served by mail on the party), § 1201.114(e) (Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review.). The appellant did not file her reply until November 22, 2013. PFR File, Tab 4 at 6. We also note that the record on review closed on November 12, 2013, upon the expiration of the appellant's time period for filing a reply. [5 C.F.R. § 1201.114\(k\)](#). Once the record on review closes, the Board will not accept any additional evidence or argument unless it is new and material and the party submitting it shows that the evidence or argument was not readily available before the record closed. Further, the appellant's reply repeated previous arguments and set forth new arguments, rather than addressing issues raised in the agency's response. PFR File, Tab 4. Under [5 C.F.R. § 1201.114\(a\)\(4\)](#), a reply is limited to the factual and legal issues raised by another party in the response to the petition for review and may not raise new allegations of error. Based on the foregoing, we have not considered the appellant's reply.

⁵ The agency's response was initially due on or before October 12, 2013, PFR File, Tab 2, but the filing deadline was extended due to the government shutdown from October 1 through October 16.

The appellant also moved to file additional “evidence that demonstrates a pattern of retaliation that ultimately led to [her] wrongful termination,” including: (1) various communications she had with agency management requesting the hire of a second CSO to help alleviate her workload; (2) an organizational chart demonstrating that she was the only CSO in her division, although the organizational structure contemplated two CSOs based on her division’s workload demands; (3) performance appraisals and awards she received; (4) disciplinary records and memos regarding her leave usage; and (5) memos showing that the agency removed her from her “2-day medical flexiplace schedule,” which was previously approved. PFR File, Tab 6 at 2-4.

Although the filing date of the appellant’s motion is unclear, it is dated December 12, 2013, and we therefore conclude that it was filed after the record closed on review.⁶ *Id.* at 2. The appellant has proffered no explanation for her failure to submit the evidence below, or even before the record closed on review. Moreover, all of the evidence the appellant identifies appears to relate to incidents that occurred while the appellant was still employed with the agency and, thus, the appellant has not shown that it is new. *See Roush v. Department of the Interior*, [59 M.S.P.R. 113](#), 118 (1993) (finding that documents that appear[ed] to concern matters that occurred while the appellant was still employed by the agency did not constitute new evidence). Under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party’s due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980); *see* [5 C.F.R. § 1201.114\(k\)](#). Therefore, the appellant’s motion to file additional evidence is DENIED.

⁶ It appears that the appellant may have initially submitted her additional evidence with her reply, and thereafter filed a motion for the Board to consider it after the Clerk of the Board returned the evidence to her. *See* PFR File, Tab 5 at 1. Even if this were the case, the evidence would still have been untimely submitted because the appellant’s reply was also filed after the record closed on review.

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

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 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.