

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH GARCIA,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
NY0752930099-I-1

DATE: AUG 26 1993

William Rios, Bronx, New York, for the appellant.

Robert Molyneaux, New York, New York, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision that dismissed his appeal of his alleged involuntary resignation for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

The appellant filed a December 8, 1992 petition for appeal, alleging, inter alia, that he involuntarily resigned from the position of WG-9 Food Service Foreman on November 9, 1992, because the agency coerced and willfully misled him to resign. See Initial Appeal File (IAF), Tabs 1, 3. The appellant submitted with his petition an August 17, 1992 "Memorandum of Understanding" between the appellant and the agency that provided he would resign from his position no later than November 30, 1992, and a Standard Form 52, Request for Personnel Action (SF-52), that the appellant completed to effect his resignation on November 9, 1992. *Id.*, Tab 1 at 19-21. He requested a hearing in his appeal. *Id.* at 4.

In an acknowledgment order, the administrative judge ordered the appellant to submit evidence and argument proving that his alleged involuntary resignation appeal was within the Board's jurisdiction, and to show that his appeal was timely filed or that good cause existed for its delayed filing. See IAF, Tab 2 at 2-3. The appellant responded to the acknowledgment order. *Id.*, Tab 3. The agency responded in opposition to his petition for appeal. *Id.*, Tab 5.

In the initial decision, the administrative judge found that the appellant failed to raise a nonfrivolous allegation that his resignation was involuntary, and thus the appellant was not entitled to a jurisdictional hearing and a determination on the issue of timeliness was unnecessary. See Initial Decision at 8. Therefore, the administrative judge

dismissed the appeal for lack of jurisdiction.* *Id.* at 1, 8. In so finding, the administrative judge considered the agency's assertions concerning the voluntariness of the appellant's resignation and its reasons for entering into the August 17, 1992 "Memorandum of Understanding" with the appellant. *Id.* at 3-4. The administrative judge also considered the agency's evidentiary submissions of the August 17, 1992 "Memorandum of Understanding" between the parties and the November 9, 1992 SF-52 completed by the appellant to document his resignation. *Id.* at 6-7.

The appellant has timely petitioned for review of the initial decision. See Petition for Review File (PRF), Tab 1. He argues on review that he raised a nonfrivolous allegation below that his resignation was obtained through duress and was therefore involuntary, and that the administrative judge erred in failing to grant him a jurisdictional hearing. *Id.* at 1. The agency has not responded to his petition.

* The administrative judge found that the agency, in its response to the petition for appeal, had moved to dismiss the appeal for lack of jurisdiction, and he granted the agency's motion in the initial decision. See Initial Decision at 4, 8. However, we note that the agency argued in its response below that the Board lacked jurisdiction over this appeal, but the agency did not move for dismissal of the appeal. See IAF, Tab 5. In light of our finding in this Opinion and Order that the appellant's evidence supports the administrative judge's determination that the Board lacks jurisdiction over this appeal, aside from any consideration of the agency's evidence below, we find that the administrative judge's error did not prejudice the appellant's substantive rights and provides no basis to reverse the initial decision. See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

ANALYSIS

Generally, resignations are presumed to be voluntary actions and therefore not appealable to the Board. See *Collins v. Defense Logistics Agency*, 55 M.S.P.R. 185, 188 (1992). An appellant who alleges that his resignation was involuntary, and thus tantamount to a removal, is entitled to a hearing on the issue of Board jurisdiction only if he makes a nonfrivolous allegation that his resignation was obtained through duress, coercion, or misrepresentation. See *Mahoney v. Department of Labor*, 56 M.S.P.R. 69, 72 (1992); *Collins*, 55 M.S.P.R. at 188. Because an appellant need only make a nonfrivolous allegation of fact to establish a prima facie case that the Board has jurisdiction over his involuntary resignation, the administrative judge's jurisdictional determination must be made independent of any evidence submitted by the agency. See *Dumas v. Department of Veterans Affairs*, 789 F.2d 892, 894 (Fed. Cir. 1986); *Collins*, 55 M.S.P.R. at 189. Such allegations by an appellant may be disposed of summarily on a documentary record in appropriate cases. *Dumas*, 789 F.2d at 894; *Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984).

We find that the administrative judge here erred because he considered the agency's evidence opposing the appellant's arguments concerning the Board's jurisdiction over this appeal. See Initial Decision at 3-4, 6-7. However, we also find that, in determining that the appellant failed to cast sufficient doubt on the voluntariness of his resignation to

entitle him to a jurisdictional hearing, the administrative judge did not rely upon the agency's arguments concerning jurisdiction but cited the weakness of the appellant's jurisdictional arguments as the basis for his finding. *Id.* at 7-8. Further, while the administrative judge improperly cited to the agency's response to the petition for appeal as the source of the November 9, 1992 SF-52 and the August 17, 1992 "Memorandum of Understanding" in finding that the appellant's resignation was voluntary, the appellant had submitted the identical evidence into the record with his petition for appeal. See IAF, Tab 1 at 19-21.

Therefore, we find that the administrative judge's determinations in the initial decision are supported by the appellant's pleadings and evidence, and that the administrative judge would have made the same jurisdictional determination if he had properly limited his consideration to the appellant's evidence and argument. Thus, the administrative judge's error in considering the evidence submitted below by the agency did not prejudice the appellant's substantive rights and provides no basis for reversal of the initial decision in this appeal. *Collins*, 55 M.S.P.R. at 188-90; see *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Accordingly, the administrative judge properly dismissed the appeal for lack of jurisdiction without affording the appellant a jurisdictional hearing.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. § 1201.113(c).

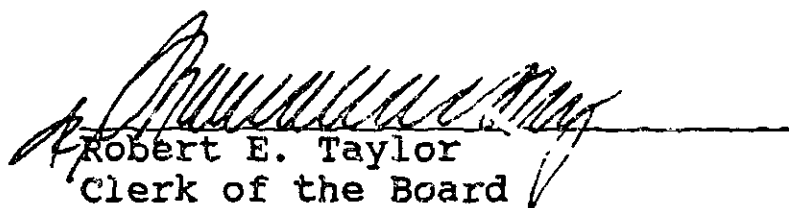
NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.