UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 195

Docket No. AT-0752-10-0010-I-1

Carl L. Gibeault,
Appellant,
v.
Department of the Treasury,
Agency.

September 23, 2010

James R. Becker, Jr., Esquire, Memphis, Tennessee, for the appellant.

Elizabeth P. Evans, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his alleged involuntary resignation appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 On September 2, 2009, the appellant, a GS-11 Investigative Analyst, resigned from his position effective that date. Initial Appeal File (IAF), Tab 3, Exhibits 1 and 2. On September 30, 2009, he filed a pro se appeal in which he

alleged that his resignation was involuntary. *Id.*, Tab 1. He stated that he was told that, if he did not resign, the agency was going to terminate his employment. *Id.* at 5. He stated that he believed that any request for reconsideration would be denied and that any future employment opportunities would be overshadowed by having an adverse action recorded in his personnel file. *Id.* He admitted that he had failed to perform certain job tasks, but argued that termination was excessive. *Id.* He requested a hearing. *Id.* at 2. In acknowledging the appeal, the administrative judge stated that resignations are presumed to be voluntary and therefore not appealable to the Board, and that the appellant's appeal would be dismissed unless he amended it to allege that his resignation was the result of duress, coercion, or misrepresentation by the agency. *Id.*, Tab 2 at 2. The appellant's response was due within 15 days of the date of the October 2, 2009 Order, or by October 19, 2009.[1] *Id.*

¶3 On November 3, 2009, the appellant's newly-designated counsel filed a response to the administrative judge's Order, asking that it be considered in that he had just been retained. *Id.*, Tab 4. With the response, he included the appellant's sworn affidavit describing the circumstances surrounding his decision to resign. *Id.*, Exhibit A. Therein, he stated that, at a meeting with his supervisor to which he was summoned on September 2, 2009, he was told "without preamble" that: 1) his employment was going to be terminated based on the agency's recent discovery that he had failed to complete certain work; 2) if he fought the termination, he would be ineligible for any future employment with the government, but that, if he immediately resigned, he would be able to later apply for government jobs; and 3) if he decided to resign, he had to do so within 24 hours. *Id.* at 1-2. He further stated that he was not told that he had a right to any type of "pretermination hearing," that the agency was only proposing his

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[1] The response would have been due on October 17, 2009, but because that was a Saturday, it was actually due on Monday, October 19, 2009.

removal, or that he had the right to appeal his removal to the Board, if it came to that. *Id.* The agency argued that the appellant's response was untimely and that it should not be considered, and that, in any event, his resignation was voluntary. *Id.*, Tab 5.

¶4 The administrative judge issued an initial decision based on the written record, having determined that the appellant was not entitled to a hearing because he had failed to make a nonfrivolous allegation that his retirement[2] was involuntary based on duress, coercion, or misrepresentation. Initial Decision (ID) at 1-2. The administrative judge acknowledged that, if an employee shows that the agency knew it would not prevail on a proposed adverse action, the action is deemed coercive and the resulting resignation involuntary. ID at 3. The administrative judge found, however, that, while the agency told the appellant he would be facing an adverse action, no proposal was issued and therefore he could not argue that the agency knew it would not prevail on such an action. *Id.* The administrative judge further found that, "arguably," the advice the agency gave the appellant regarding future employment opportunities within the Federal government was correct, and not coercive or misleading. *Id.* The administrative judge dismissed the appeal for lack of jurisdiction. *Id.* at 1, 4.

¶5 In his petition for review, the appellant challenges the administrative judge's finding that he was not entitled to a hearing because he did not make a nonfrivolous allegation that his resignation was involuntary. Petition for Review (PFR) File, Tab 1 at 3, 6. The appellant argues that the administrative judge based his finding on "pure speculation" that a resignation would make it easier for the appellant to find subsequent employment, *id.* at 3, and that the administrative judge erred in failing to consider that, during the meeting which culminated in the appellant's resignation, the agency provided him misleading

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[2] The record reflects that the appellant resigned from his position, IAF, Tab 3, Exhibits 1 and 2. There is no indication that he retired.

information upon which he relied, to his detriment, and failed to provide him with accurate information regarding his recourse if the removal occurred, *id.* at 4-6. The agency has responded in opposition the appellant's petition. PFR File, Tab 3.

ANALYSIS

¶6 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. *Searcy v. Department of Commerce*, 114 M.S.P.R. 281, ¶ 12 (2010). An appellant is entitled to a hearing on the issue of Board jurisdiction over an alleged involuntary resignation only if he makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue.[3] *Deines v. Department of Energy*, 98 M.S.P.R. 389, ¶ 11 (2005). In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie evidence

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[3] In acknowledging the appellant's appeal, the administrative judge advised him that, if he was requesting a hearing, he would be granted one only if he made allegations of duress, coercion, or misrepresentation supported by facts which, if proven, would establish that his resignation was involuntary. IAF, Tab 2. To the extent that, in order to be granted a hearing, the administrative judge required the appellant to allege facts that, if proven, definitely would establish that his resignation was involuntary, the administrative judge erred. *Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶ 23 (2004). In fact, the appellant was only required to allege facts that, if proven, could establish such a claim. *Id.*

of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶7 In determining that the appellant failed to make a nonfrivolous allegation of jurisdiction, the administrative judge properly considered only the appellant's evidence.[4] ID at 2-3. In fact, the agency submitted no evidence on the issue of voluntariness.

¶8 An employee-initiated action is considered involuntary if it resulted from the employee's reasonable reliance on the agency's misleading statements, or from the agency's failure to provide the employee with adequate information on which to make an informed choice. *Smitka v. U.S. Postal Service*, 66 M.S.P.R. 680, 689 (1995), *aff'd*, 78 F.3d 605 (Fed. Cir. 1996) (Table). As noted, the appellant in this case submitted an affidavit in which he set forth statements that the agency made upon which he allegedly relied in determining to resign and which he asserts were misleading. IAF, Tab 4, Exhibit A. Specifically, he stated that he was told that he was going to be terminated and that, if he fought the action, he would not be eligible for future employment with the government. *Id.* While an individual who has been removed may not be viewed as favorably as other candidates, he is not per se ineligible for future employment with the government. Moreover, the statement in question does not allow for the possibility that the individual might successfully challenge the adverse action. In fact, according to the appellant's affidavit, he was not told that he had a right to have an impartial third party, that is, the Board, review the action. *Id.* Similarly, the appellant stated that he was told that, if he resigned immediately, he would be

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[4] It appears that the administrative judge considered the appellant's affidavit, ID at 2-3, even though it was not timely filed. The agency acknowledges that the administrative judge considered the affidavit, but has not argued against such consideration on petition for review. We find that the administrative judge did not abuse his discretion in considering this evidence. 5 C.F.R. § 1201.41(b)(3).

eligible for future employment. *Id.* The administrative judge found that, under such circumstances, the appellant would have a "clean" record, whereas if he waited until after the agency issued a proposal notice, the record would reflect that he resigned pending an adverse action, and that such a notation would severely hamper the appellant's efforts to secure employment with the Federal government. ID at 3. Even if the agency placed such a notation in the appellant's record, it is not a certainty that his efforts to be reemployed would necessarily be thwarted. As part of its hiring process, a new agency might deem it appropriate to inquire as to the circumstances surrounding his resignation and to consider the information he provided by way of explanation. Moreover, the appellant stated that he was not told that the agency was, at that time, only contemplating a proposal to remove him, nor that, if such a proposal was issued, he would have a right to respond to it. IAF, Tab 4, Exhibit A. As stated previously, the agency offered nothing to contest the appellant's statements.

¶9 On review, we find that the appellant has alleged that, by these statements, the agency provided him with, if not incorrect, then at least misleading or incomplete, information as to his options. That is so regardless of whether the agency was aware that its statements were misleading. *See Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984). We further find that the appellant alleged that, as a long-time employee who had never been disciplined, IAF, Tab 4, Exhibit A, he reasonably relied upon those statements in concluding that he had no real choice but to immediately resign, which he did. In light of these allegations, supported by the appellant's affidavit, we find that he raised a nonfrivolous allegation that his resignation was involuntary based on misleading statements, and that he is therefore entitled to a hearing.

ORDER

¶10 We remand this appeal for further adjudication, including a jurisdictional hearing.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.