

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANCIS R. MAHONEY,
Appellant,

v.

DEPARTMENT OF LABOR,
Agency.

DOCKET NUMBERS
BN0752920187I1

DATE: DEC 10 1992

William J. Lafferty, Esquire, Lafferty & Lafferty,
Boston, Massachusetts, for the appellant.

Dennis K. Kade, Esquire, New York, New York, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued June 29, 1992, which dismissed the appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for failure to meet the criteria set forth at 5 C.F.R. § 1201.115. We REOPEN the 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.

BACKGROUND

Effective September 8, 1991, the appellant was demoted from his position as a Supervisory Workers' Compensation Claims Examiner, GM-13, to the position of Workers' Compensation Claims Examiner, GS-11. Initial Appeal File (IAF), tab 3, subtab 4b (MSPB Docket No. BN0752910305I1). The appellant's subsequent appeal was dismissed pursuant to the parties' settlement agreement. *Mahoney v. Department of Labor*, MSPB Initial Decision No. BN0752910305I1 (December 20, 1991). See IAF, tab 21 (MSPB Docket No. BN0752910305I1). The administrative judge found that the parties voluntarily entered into the agreement and understood its terms, and thus approved it and accepted it into the record for enforcement purposes. The agreement provided that: the appellant would resign from his position in lieu of a discharge for inefficient performance; he would withdraw his appeal; and, he would not initiate any complaints, appeals, grievances or other causes of action against the agency for events relating to his employment which occurred prior to the execution of the agreement. IAF, tab 20, para. 1, 2, 5 (MSPB Docket No. BN0752910305I1). The appellant did not petition for review of the initial decision and it thus became the final decision of the Board on January 24, 1992.

On April 16, 1992, the appellant filed the instant appeal, alleging that his retirement had been involuntary. IAF, tab 1 (MSPB Docket No. BN0752920187I1). The administrative judge advised the appellant that the Board may

lack jurisdiction because of the Board's decision finding the settlement agreement to have been voluntary. The appellant was ordered to file argument and evidence showing that the Board had jurisdiction. IAF, tab 2 (MSPB Docket No. BN0752920187I1). In response, the appellant alleged that he had agreed to settle the demotion appeal and to resign only because the agency had threatened to cancel the demotion and to substitute a removal for cause. The appellant asserted that he feared losing retirement benefits if he were removed for cause, and that the agency's alleged threat to remove him therefore amounted to coercing him into resigning. IAF, tab 3 (MSPB Docket No. BN0752920187I1). He also requested reinstatement of the demotion appeal. *Id.* The agency moved to dismiss the appeal for lack of jurisdiction, or in the alternative, to enforce the provision in the settlement agreement barring the appellant from challenging any events relating to his employment which occurred prior to the execution of the agreement. IAF, tab 4 (MSPB Docket No. BN0752920187I1).

The administrative judge dismissed the appeal for lack of jurisdiction, holding that he was without authority to address the appellant's argument that his retirement had been coerced. IAF, tab 6. Noting that in the demotion appeal he had found that the settlement agreement had been freely entered into, the administrative judge held that the issue of whether the appellant had voluntarily accepted the terms of the settlement agreement -- and thus, whether the appellant's retirement was

voluntary -- was *res judicata* because the initial decision in the demotion appeal had become final on January 24, 1992.

The appellant filed a timely petition for review, alleging two errors by the administrative judge. Petition for Review File (PRF), tab 1. First, the appellant argues that the administrative judge should have treated the appeal as one alleging an involuntary retirement, rather than as an attempt to reopen the demotion appeal, and should have considered the appellant's allegations that his retirement was induced through coercion. Second, the appellant argues that since the administrative judge chose to treat the appeal as an attempt to reopen the demotion appeal, he should have forwarded the appeal to the Board's headquarters for consideration as a belated petition for review of the initial decision rendered in the demotion appeal. The agency has not responded to the petition for review.

ANALYSIS

The administrative judge correctly determined that he was without authority to adjudicate the appellant's alleged involuntary retirement appeal.

An employee-initiated action, such as resignation or retirement, is presumed to be voluntary. *West v. U.S. Postal Service*, 44 M.S.P.R. 551, 561 (1990). Where an employee alleges that a resignation or retirement was involuntary, and was thus tantamount to a removal, he or she must rebut the presumption of voluntariness by showing that the action was obtained through duress, coercion, or misrepresentation. *Id.*

Under such circumstances, an appellant is entitled to a hearing on the issue of Board jurisdiction only if he or she 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).

According to the appellant, his resignation was exacted by a baseless threat of removal. Whether or not he could have substantiated his allegations, though, the fact remains that the appellant agreed to retire in the course of settling his demotion appeal. The settlement agreement was found to have been voluntarily entered into, it was accepted into the record, and the demotion appeal was dismissed. The appellant did not file a petition for review of the initial decision dismissing the appeal, and the decision became final on January 24, 1992. Simply put, the appellant cannot prevail in an involuntary retirement appeal without convincing the Board that the initial decision and the settlement agreement in the demotion appeal should be set aside.

The appellant points out that in *Lamb v. U.S. Postal Service*, 46 M.S.P.R. 470, 474 (1990), we held that an employee's agreement to resign was not an absolute bar to an involuntary resignation appeal, but was simply evidence bearing on whether the resignation had been coerced. The agreement in *Lamb*, however, was unrelated to any Board proceeding, so allowing the involuntary resignation appeal to go forward did not raise the potential for inconsistent Board adjudications. Here, because the appellant agreed to retire

in the course of settling the demotion appeal, he may not collaterally attack the validity of the agreement in a new action at the regional office level alleging involuntary retirement. Instead, any attack on the validity of the agreement must be made directly, through a petition for review of the initial decision in the demotion appeal. See *Strange v. U.S. Postal Service*, 48 M.S.P.R. 674, 676 (1991) (if an appellant believes that an agreement executed in settlement of an appeal before the Board is invalid, the appellant may file a petition for review of the initial decision dismissing the appeal; if the agreement is invalidated, the appropriate remedy is reinstatement of the appeal).¹ Therefore, the administrative judge correctly concluded that he did not have

¹ Should the appellant choose to now petition the Board for review of the December 20, 1991 initial decision, his petition should be accompanied by an affidavit explaining the circumstances surrounding the belated filing. See 5 C.F.R. § 1201.114(d) (petition for review must be filed within 35 days after initial decision is issued); 5 C.F.R. § 1201.114(f) (Board may waive filing deadline only for good cause shown, and such a showing can be made only through an affidavit or sworn statement). In this connection, we reject the appellant's argument that the administrative judge erred in not forwarding the appeal to the Board's headquarters for consideration as a belated petition for review in the demotion appeal. The administrative judge cannot be expected to have divined that the appellant's response to the acknowledgment order in the alleged involuntary retirement appeal was actually intended as a petition for review of the initial decision in the demotion appeal. Moreover, throughout these proceedings the appellant has been ably represented by an attorney-at-law with full knowledge of the Board's regulations.

the authority to adjudicate a new appeal alleging involuntary retirement.²

ORDER

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

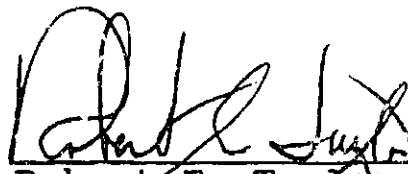
NOTICE TO APPELLANT

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.

² Once an initial decision is issued, an administrative judge's jurisdiction over an appeal is limited to those purposes specified in 5 C.F.R. § 1201.112. *Lannen v. Department of the Navy*, 41 M.S.P.R. 662, 664 (1989). While an administrative judge has the authority to enforce the terms of a settlement agreement under 5 C.F.R. § 1201.112, the regulation does not confer the authority to reopen a settlement agreement once an initial decision is issued.