UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS E. NICOLETTI, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	DOCKET NUMBER NY0752910359-B-2 DATE: DEC 30 1993

Vincent J. D'Elia, Esquire, Englewood, New Jersey, for the appellant.

Jeffrey B. Killeen, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

The agency has petitioned for review of an initial decision which reversed its involuntary demotion of the appellant. For the reasons set forth below, we GRANT the agency's petition under 5 U.S.C. § 7701(e) and AFFIRM the initial decision AS MODIFIED by the Opinion and Order, still REVERSING the appellant's involuntary demotion.

BACKGROUND

The appellant filed a petition for appeal alleging that he had been involuntarily demoted from the position of Supervisory Special Agent, GM-14, to the position of Special Agent, GS-13. *See* Initial Appeal File 1 (IAF 1), Tab 1. The administrative judge dismissed the appeal without prejudice to refiling, and the appellant timely refiled his appeal. *See* Initial Decision 1 (I.D. 1) at 2; Initial Appeal File 2 (IAF 2), Tab 1. After a hearing, the administrative judge reversed the appellant's demotion. *See* Initial Decision 2 (I.D. 2) at 2-13. She found that good cause existed for the untimeliness of the appeal, and she concluded that the appellant's demotion was involuntary and constituted an adverse action taken without affording him required procedural rights. *See* I.D. 2 at 1 n.1, 11-13.

The agency petitioned for review of the initial decision, see Petition for Review File (PFRF), Tab 1, and the Board found that the appellant had failed to show good cause for the untimely filing of his appeal, dismissing it on that basis. *See Nicoletti v. Department of Justice*, 53 M.S.P.R. 610, 613-17 (1992). The appellant petitioned the U.S. Court of Appeals for the Federal Circuit to review the Board's decision; the Board, however, requested the court to remand the case to it for further consideration, and the court granted the motion for remand.

The Board held on remand that the appellant had not had sufficient notice of his appeal rights to file a timely appeal

with the Board. *See Nicoletti v. Department of Justice*, 55 M.S.P.R. 557, 560 (1992). It concluded, however, that the question of whether the agency had a duty to notify the appellant of his appeal rights raised the issues of whether or not the demotion was facially voluntary and whether or not the appellant had put the agency on notice that he viewed the demotion as involuntary. *See id.* at 560-61. It found that the administrative judge had not made credibility findings concerning those issues, and it directed her to make such findings on remand. *See id.* It also ordered her to determine whether notice to the appellant's new supervisor (Mr. McShane) after the demotion constituted notice to the agency that the appellant viewed his demotion as involuntary. *See id.* at 561.

Based on new credibility findings, the administrative judge found that the appellant had informed the agency that he would accept a temporary change in his duties but that he did not want to be demoted from his supervisory position. *See* I.D. 4 at 10-11.[1] She also found that his statements to Mr. McShane that he had been forced to step down from his position also constituted notice to the agency that he considered his demotion involuntary. *See id.* at 10. She further determined that the agency had coerced him by repeatedly asking him to accept a demotion under circumstances

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[1] Before issuing the remand initial decision, the administrative judge dismissed the appeal without prejudice to refiling, and the appellant timely refiled his appeal. *See* Initial Appeal File 3 (IAF 3), Tab 14; Initial Decision 3 (I.D. 3) at 1-2; Initial Appeal File 4 (IAF 4), Tab 1.

in which it allowed him only one day to make a decision and when it believed that he was suffering from significant emotional problems. *See id.* at 10-11. She therefore found that the appellant's demotion was involuntary and that he had triggered a duty on the agency's part to notify him of his appeal rights to the Board. *See id.* And, because the agency had not afforded him the procedural rights required by constitutional due process, she concluded that the demotion could not be sustained. *See* I.D. 4 at 12.

On petition for review, the agency argues that the administrative judge erred by not applying the correct legal standard for evaluating the voluntariness of appellant's demotion. *See* Petition for Review File 2 (PFRF 2), Tab 1 at 11-16. It also contends that she improperly allowed the appellant to introduce new and material evidence into the record while not allowing the agency to rebut that evidence and to introduce its own new and material evidence into the record. *See* PFRF 2, Tab 1 at 17-22. And, it asserts that the administrative judge's credibility findings regarding the voluntariness of the appellant's demotion are not supported by the record. *See id.* at 22-29. It further argues that she erred in finding that notice to Mr. McShane constituted notice to the agency that the appellant viewed his demotion as involuntary, because the record on that issue is not sufficiently developed. *See id.* at 29. Finally, it contends that, because the demotion was voluntary, the administrative judge erred in finding that the appellant had a constitutional

right to minimum due process. *See id.* at 30-31. The appellant has responded in opposition to the petition and has moved to impose sanctions on the agency for its alleged delaying tactics and misleading statements during the processing of the appeal. *See* PFRF 2, Tab 3. The agency has moved to strike portions of the response and to impose sanctions on the appellant. *See id.*, Tab 4.

ANALYSIS

In our decision remanding this appeal to the regional office, we found that the appellant had not been given sufficient notice of his appeal rights to file a timely appeal with the Board. *See Nicoletti*, 55 M.S.P.R. at 560. We also found, however, that in order to determine whether the agency had a duty to notify the appellant of his appeal rights, the administrative judge would have to make credibility findings regarding two issues: (1) Was the appellant's demotion voluntary on its face? and (2) Did the appellant put the agency on notice that he viewed his demotion as involuntary? *See id.* at 560-61. The administrative judge apparently concluded that these questions involved the jurisdictional issue of whether the appellant's demotion was voluntary. *See* I.D. [illegible]. In fact, whether the demotion was voluntary on its face and whether the appellant put the agency on notice that he viewed it as involuntary implicate the issu of timeliness and not jurisdiction. *See Schrum v. Department of the Treasury*, 42 M.S.P.R. 103, 104-07 (1989); *Ricci v.*

Veterans Administration, 40 M.S.P.R. 113, 116 (1989).[2] We find below, however, that the credibility findings made by the administrative judge are sufficient to resolve both the issue of timeliness and the issue of jurisdiction; her error here thus does not warrant reversal of the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

We directed the administrative judge in our remand order to make credibility findings resolving the following conflict in hearing testimony: The appellant stated that he met with an agency official (Mr. Esposito) on July 9, 1990, and July 10, 1990. He asserted that his discussion with Mr. Esposito on July 9, 1990, was heated and angry and that Mr. Esposito told him that he wanted the appellant out of his supervisory position. He reported that Mr. Esposito scheduled another meeting with him for the following day and that, on that occasion, Mr. Esposito dictated a memorandum to him effecting his "voluntary" demotion from the GM-14 position. He declared that he did not sign or otherwise endorse the memorandum and that he told Mr. Esposito that he did not want to be demoted. He testified that he gave the paper bearing the words Mr. Esposito had dictated to a secretary (Ms. MacGowan), telling her that he was not "on the desk" any

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[2] The agency makes essentially the same point in its petition for review when it argues that the issue of whether it should have notified the appellant of his appeal rights involves the issue of timeliness and not jurisdiction. *See* PFRF 2, Tab 1 at 11.

more and that Mr. Esposito had told him to give her the paper. Finally, he reported that when Ms. MacGowan had finished typing the memorandum, another agency official (Mr. Casperson) delivered it to Mr. Esposito. *See* Hearing Transcript Day Three (H.T. 3) at 642-58, Testimony of Thomas Nicoletti. Mr. Esposito testified that, after they discussed the appellant's work-related problems on July 9, 1990, the appellant returned the next day and told him that he wanted to step down from the GM-14 position. Mr. Esposito asserted that he told the appellant that, to effect this request, the appellant would have to prepare a memorandum stating that he would voluntarily withdraw from the GM-14 position. Mr. Esposito testified that he arranged for Ms. MacGowan to type the memorandum and that he directed the appellant to pick up the memorandum from her. He reported that the appellant brought the memorandum to him later that same day. *See* Hearing Transcript Day One (H.T. 1) at 256-72, Testimony of James Esposito. The memorandum at issue effects the appellant's "voluntary" demotion from the GM-14 position and bears his type-written name, but it has neither been signed nor initialed by him. *See* IAF 2, Tab 20, Exhibit C. Ms. MacGowan testified that the appellant gave her the memorandum in rough-draft form to be typed and that, after she had finished typing it, he picked it up himself and left her area. *See* Hearing Transcript Day Two (H.T. 2) at 468-69, Testimony of Kathleen MacGowan.

The administrative judge credited the appellant's account over the accounts of Mr. Esposito and Ms. MacGowan, basing this finding on her evaluation of the demeanor of those two witnesses during their testimony and on her conclusion that Mr. Esposito's account was not plausible. *See* I.D. 4 at 10-11. Specifically, regarding demeanor, she found that Mr. Esposito's testimony was often "evasive" and that Ms. MacGowan revealed in her testimony bias and anger against the appellant stemming from a prior confrontation with him. *See id.* In addition, she concluded that the hurried preparation of the memorandum by Mr. Esposito's office belied his claim that he wanted the appellant to reach a deliberate, well-considered decision. *See id.* As noted above, she also found that Mr. Esposito had effected the appellant's demotion on July 10, 1990, despite the appellant's assertions that he did not want to be demoted and where Mr. Esposito had reason to believe that the appellant was experiencing significant emotional problems. *See id.* at 11. The agency claims that this finding is error, because the administrative judge did not recognize that the appellant's testimony was biased and self-serving and that much of it was contradicted by the testimony of agency witnesses. *See* PFRF 2, Tab 1 at 22-26. It also contends that it is improbable that the appellant could have been coerced into accepting a demotion. *See id.* at 26-27.

It is well settled that an appellant's testimony should not be discredited as self-serving because most testimony that

he is likely to give, other than admissions, can be characterized as self-serving. *See Gamble v. U.S. Postal Service*, 6 M.S.P.R. 578, 580-81 (1981). And, as noted above, the administrative judge resolved the contradictions between the testimony of the appellant and Mr. Esposito and Ms. MacGowan by making credibility findings that were based to a great extent on her observation of the demeanor of the latter two witnesses. The Board must give due deference to the credibility findings of an administrative judge, especially where those findings are based on the demeanor of the witnesses. *See McClellan v. Department of Defense*, 53 M.S.P.R. 139, 147 (1992). The agency also asserts that it is implausible that a criminal investigator with the appellant's background could be coerced into accepting a demotion that he did not want. *See* PFRF 2, Tab 1 at 26-27. This evaluation of the appellant is at odds with the opinion given by Mr. Esposito at the hearing, where he stated that his concerns about the appellant's emotional stability had led him to order the appellant to submit to a fitness-for-duty examination; he also reported that during their meeting together on July 9, 1990, the appellant was teary-eyed and upset. *See* H.T. 1 at 258, H.T. 2 at 313-14, 352-53, Testimony of James Esposito. Given this background, then, it appears that the administrative judge's credibility findings are detailed and supported by the record, and we therefore discern no basis for disturbing them. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

Based on these credibility findings, we conclude that the appellant told Mr. Esposito that he did not want to be demoted and that he would not accept such an action voluntarily. The appellant thus triggered a duty on the agency's part to notify him of his Board appeal rights, and its failure to do so constitutes good cause for the untimely filing of his petition for appeal. *See Schrum*, 42 M.S.P.R. at 104-07; *Ricci*, 40 M.S.P.R. at 116.[3]

Regarding jurisdiction, it is well settled that an action initiated by the appellant is presumed to be voluntary unless he 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. *See Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991). The administrative judge's credibility findings, however, see I.D. 4 at 10-11, make clear that the appellant's demotion was initiated not by him but by Mr. Esposito, and that he told Mr. Esposito that he did not want to be demoted. Because this action was not initiated by the appellant, the presumption of voluntariness does not apply to the demotion,

[3] As noted above, we also remanded this appeal to determine whether the appellant had put the agency on notice by informing Mr. McShane that he viewed his demotion as involuntary. The administrative judge found that he had done so, but she made this finding, as the agency points out, without any explanation. *See* I.D. 4 at 10; PFRF 2, Tab 1 at 29. This finding thus is unsupported and cannot be sustained. However, given our finding above that the appellant put Mr. Esposito himself on notice that he viewed his demotion as involuntary, this error does not affect the ultimate result on the timeliness issue. *See Panter*, 22 M.S.P.R. at 282.

see Talley, 50 M.S.P.R. at 263, and we can only conclude that the agency effected an adverse action against the appellant. And, because the record does not show that the agency afforded the appellant the required due process rights of notice and an opportunity to respond in connection with that action, it cannot be sustained. *See Drummonds v. Department of Veterans Affairs*, 58 M.S.P.R. 579, 585 (1993) (an involuntary adverse action must be reversed where the agency denies the appellant minimum due process).

The agency claims that the administrative judge improperly allowed new and material evidence from the appellant into the record while not allowing the agency to rebut that evidence and to submit additional testimony into the record. *See* PFRF 2, Tab 1 at 17-22. The evidence of record shows that the administrative judge initially scheduled a hearing after the appeal was remanded to the regional office. *See* IAF 3, Tab 5. It also shows that the appellant submitted additional evidence on remand concerning whether notice to Mr. McShane represented notice to the agency that he considered his demotion involuntary. *See* IAF 4, Tab 1. The agency requested the administrative judge to allow several witnesses to rebut that evidence at the hearing and to testify regarding the appellant's general character and credibility as a witness. *See* IAF 3, Tabs 8, 12; IAF 4, Tabs 3, 8. The administrative judge ultimately decided to resolve the appeal based on the existing record. *See* IAF 4, Tabs 5, 10.

The agency's proffered testimony regarding the appellant's credibility addressed matters falling outside the scope of our remand order. We remanded the appeal in order to resolve specific conflicts in testimony and not in order to examine the general nature of the appellant's "character." *See* PFRF 2, Tab 1 at 19; *Nicastri*, 55 M.S.P.R. at 560-61. The administrative judge thus properly exercised her discretion as presiding official to exclude testimony that was not relevant or material to the issues outlined in our remand order. *See Umshler v. Department of the Interior*, 55 M.S.P.R. 593, 597 (1992), *aff'd*, No. 93-[illegible] Fed. Cir. Sept. 21, 1993) (Table). We note, too, that the administrative judge allowed the agency after remand to submit whatever documentary evidence it wished on this issue, as well as extensive argument. *See* IAF 3, Tabs 8, 12; IAF 4, Tabs 3, 8. Moreover, even assuming *arguendo* that the administrative judge erred by not allowing the agency to rebut or supplement the appellant's new evidence concerning his communications with Mr. McShane, we note that she did not rely at all on that evidence in her initial decision. *See* I.D. 4 at 1-12. Her alleged error in not allowing testimony by agency witnesses on this issue thus did not affect the outcome of this appeal. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).[4]

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[4] Based on the record before us, we cannot confirm the allegations made by the appellant that the agency has acted in bad faith, and sanctions are therefore not appropriate here to serve the ends of justice. *See Seltzer v. Office of Personnel Management*, 47 M.S.P.R. 694, 697 (1991). Similarly, we find

ORDER

We ORDER the agency to cancel the appellant's demotion and to restore the appellant effective July 10, 1990. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement

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that granting the agency's motions would not be necessary or appropriate to serve the ends of justice. *See id.*

with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

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.