

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARTER B. PIERCE

v.

DEPARTMENT OF THE AIR FORCE

) DOCKET NUMBERS

) SF07528110978

) SF07528110979

OPINION AND ORDER

Carter B. Pierce (appellant) filed two appeals with the Board's San Francisco Regional Office alleging in one appeal that he had been suspended from his position of Electronics Worker, WG-8, at McClellan Air Force Base, California (agency), and in the second appeal that his separation was the result of an involuntary resignation. The presiding official, in separate initial decisions, both issued November 17, 1981, found that the appeal of the alleged suspension was untimely (Docket No. SF07528110978), but that appellant's resignation was involuntary (Docket No. SF07528110979).

Appellant incurred a back injury while on duty on August 5, 1980. After treatment on the following two days he was sent home from work by the agency's physician on August 7, 1980. Appellant was off-duty for an extended period as a result of this injury. During his absence, appellant applied for disability retirement. The Office of Personnel Management (OPM) denied his application in a letter appellant received December 9, 1980. Appellant also made several telephone calls to his supervisor during his absence regarding the availability of light duty assignments. Appellant returned to a light duty clerical position on December 22, 1980. He also requested reconsideration of his disability retirement application by OPM. While the OPM reconsideration was pending, the agency proposed

appellant's demotion from Electronics Worker, WG-8, to Clerk, GS-2. The agency's reason for the demotion was appellant's physical disability. The action was to be effective June 27, 1981. Appellant has since received a disability retirement from OPM.

By letter dated May 13, 1981, the Department of Labor denied appellant's compensation claim. On May 24, 1981, appellant filed an agency grievance seeking assistance in pursuing the compensation claim with the Department of Labor. That grievance was denied on June 26, 1981.

Appellant had discussed the effect the demotion would have on his retirement claim with an agency employment relations specialist. Appellant testified at the hearing that he believed he would lose his right to disability retirement if he allowed the demotion to become effective. Appellant decided to resign, effective June 26, 1981, although his second level supervisor advised him not to. Hearing Transcript (H.T.) at 24.

In separate appeals, appellant alleged that his resignation was involuntary, and that the agency suspended him for the period August 8, 1980, through December 22, 1980. In separate initial decisions, the presiding official concluded that appellant's resignation was involuntary, but dismissed the appeal of the alleged suspension as untimely filed.

The agency has now filed a petition for review of the initial decision finding the resignation involuntary. The appellant filed a petition for review^{*}/ of the initial decision dismissing his appeal as untimely filed. We shall consider each of these in turn under 5 U.S.C. § 7701(f) in this consolidated opinion and order.

^{*}/ Appellant's petition for review appeared to be untimely filed and an order to show cause why the petition should not be dismissed as untimely filed was issued. Appellant did not respond to this order. In light of appellant's statement in the petition to the effect that he had moved, however, and only received the initial decision shortly before he filed his petition, we find that he established good cause for the delay.

RESIGNATION

As noted by the presiding official, the presumed validity of a resignation may be rebutted if appellant shows: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. Hijar v. Department of the Army, 6 MSPB 121 (1981).

The presiding official then applied the balancing test enunciated by the Board in Douglas v. Veterans Administration, 5 MSPB 313 (1981), that the agency must take reasonable account of the factors relevant to promotion of the efficiency of the service, and must strike a responsible balance within tolerable limits of reasonableness, and resolved that since there were reasonable alternatives for the agency other than demotion, the demotion action was coercive and appellant's resignation involuntary. We find this in error. The test enunciated in Douglas is applied to determine the reasonableness of a penalty imposed in an adverse action; the tripartite test enunciated in Hijar is to be applied, in light of the facts, to determine whether the appellant rebutted the presumption of a valid resignation. The analysis should not examine whether the agency's acts were reasonable, but whether the appellant involuntarily resigned.

Applying the tripartite test, we find that appellant's resignation was not involuntary. There is nothing to suggest that his resignation was the result of coercive acts. The appellant chose to resign because he was faced with unpleasant alternatives. This is not a basis for finding coercive acts. Hijar at 123. Furthermore, there is no indication that the agency initiated the demotion action to coerce the appellant into resigning. One agency official indicated to appellant that he might consider resigning in order to avoid the adverse effects on his disability retirement application, but appellant's second level supervisor advised him not to resign. H.T. at 24-27. Since we find appellant did not involuntarily resign from his position, the Board lacks jurisdiction over that appeal.

SUSPENSION

With regard to the alleged suspension, appellant apparently believed the agency placed him on leave with pay during the period August 8, 1980, to December 22, 1980, or that he would receive pay and recredit of any leave he had used for this period, should the Department of Labor grant his compensation claim. Appellant also believed that the agency's failure to return him to light duty during the period August 8, 1980, to December 22, 1980, constituted a suspension. The presiding official reasoned that, at the very latest, when appellant received the May 13, 1981, letter denying his compensation claim and knew he would not receive pay and leave recredit, he should have filed the appeal from what turned out to be a non-duty, non-pay status from August 8, 1980, to December 22, 1980. Instead, appellant waited until the unsuccessful completion of an agency grievance before he filed his appeal. Since this was beyond the time limit set for filing an appeal, see 5 C.F.R. § 1201.22, the presiding official dismissed the appeal as untimely.

In his petition, appellant contends that his non-duty status during the period of absence did not become a suspension until the grievance was denied, and since he filed his appeal within 20 days of this event, he timely filed. With regard to the timeliness issue, we see no error. As pointed out by the presiding official, under the Board's decision in Alonzo v. Department of the Air Force, 4 MSPB 262, 265 (1980), an employee must give a reasonable excuse for the delay and must show that diligence or ordinary prudence has been exercised. As found by the presiding official, while appellant was off-duty he did not consider that period as being a suspension. Since appellant knew at the time that the agency would not return him to duty he should have, at that point, pursued any appeal.

Furthermore, although not addressed by the presiding official, we find that the agency action did not constitute a suspension. A "suspension" is defined at 5 U.S.C. §§ 7501(2) and 7511(a)(2) as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." The Board has interpreted the statutory definition of "suspension" in the context of an enforced leave appeal as consisting of the following three essential elements:

- (1) the action must be involuntary;
- (2) the employee must, in fact, be ready, willing, and able to work during the period in question; and
- (3) the action must be disciplinary.

Mosely v. Department of the Navy, 4 MSPB 220, 221 (1980).

The action in this case cannot be considered a suspension for the simple reason that it was not disciplinary. Since the action did not constitute a suspension, the Board did not have jurisdiction over the appeal.

Accordingly, having fully considered appellant's petition for review, and finding that it does not meet the criteria for review as set forth in 5 C.F.R. § 1201.115, the Board hereby DENIES the petition. Additionally, the agency's petition is hereby GRANTED under the authority of 5 U.S.C. § 7701, the initial decision holding appellant's resignation involuntary is hereby REVERSED, and his appeal is DISMISSED for lack of jurisdiction.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision with regard to appellant's alleged suspension shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b). This opinion and order represents the Board's final decision with regard to the appellant's involuntary resignation claim. 5 C.F.R. § 1201.113(c).

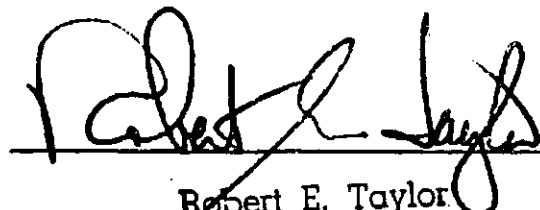
The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

MAR 1 1984

(Date)

Washington, D.C.



Robert E. Taylor
Secretary