

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

ELIZABETH L. ROBERTS,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DC-3443-98-0666-I-1

DATE: APR 26 1999

Richard H. Burwell, Metal Trades Council, Norfolk, Virginia, for the appellant.

Thomas E. Rinehart, Portsmouth, Virginia, for the agency and Tom Berhan, Fort Bragg, North Carolina, for the Department of the Army.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board upon the appellant's timely petition for review of the September 11, 1998 initial decision which dismissed her appeal as withdrawn. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 In January 1998 the appellant, a Pipefitter Helper, WG-4204-05, at the Navy Public Works Center, Norfolk, Virginia, was notified of her separation by reduction in force effective June 5, 1998. Appeal File (AF), Tab 4, Subtabs 4c, 4h. The appellant registered for the Department of Defense's priority placement program (PPP), and through the PPP was offered a position by the Department of the Army (Army) as a Food Service Worker, WG-7408-02, with retained grade and pay, at Fort Bragg, North Carolina, effective June 7, 1998. AF, Tab 4, Subtab 1 at 6, Subtab 4b. After accepting the position, the appellant discovered upon arrival at Fort Bragg that she had been misinformed concerning her ability to choose morning shifts, and stated she could not work the required hours. AF, Tab 4, Subtab 1 at 6. The appellant was given the choice to either decline the position and return to her former status (separated by RIF and registered in the PPP in the Tidewater area), or to continue employment at Fort Bragg, with retained grade and pay, and remain registered in the PPP program in the Fort Bragg area. *Id.* Under these conditions, the appellant chose to accept the position at Fort Bragg for a second time. *Id.*

¶3 The appellant filed a timely appeal regarding her apparently involuntary acceptance of the Food Service Worker position, and requested that she be considered for all positions in and outside of the Tidewater commuting area for which she was qualified, including those offered to others from May 28, 1998, to June 5, 1998, with no loss of retention of pay or grade. AF, Tab 1. After the parties submitted evidence and argument requested by the administrative judge concerning Board jurisdiction over the appeal, the appellant submitted a letter through her representative withdrawing her appeal. AF, Tabs 2, 3, 5, 7. The AJ subsequently dismissed the appeal as withdrawn. Initial Decision (ID) at 1-2.

¶4 The appellant has timely filed a petition for review, asserting that in settlement of her appeal she was offered a position by the Army at Fort Bragg as a

Messenger (Motor Vehicle Operator), GS-302-02, with retained pay, and when she withdrew her appeal the offer of retained pay was also withdrawn. Petition for Review (PFR) File, Tab 1. The appellant's petition requests that the Board enforce the term of retained pay in the alleged settlement agreement. *Id.* The agency has transferred the petition for review to the Army Staff Judge Advocate at Fort Bragg, who has not responded to the petition. PFR File, Tabs 3, 4.

ANALYSIS

¶5 An appellant's withdrawal of an appeal is an act of finality, and, in the absence of unusual circumstances such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn. *Mueller v. Office of Personnel Management*, 77 M.S.P.R. 639, 640 (1998); *Scarboro v. Department of the Navy*, 55 M.S.P.R. 494, 496 (1992). The Board, however, may relieve the appellant of the consequences of her decision to withdraw the appeal based on incorrect or misleading information. *Mueller*, 77 M.S.P.R. at 640; *Scarboro*, 55 M.S.P.R. at 497.

¶6 Here, the appellant asserts on review that the Army, whom the agency had moved to join as a respondent party below prior to the appellant's withdrawal of her appeal, *see* AF, Tab 6, offered her a position with retained pay in settlement of her appeal and then retracted the retained pay portion of the agreement after the appellant withdrew the appeal, PFR File, Tab 1. Although not explicitly stating that she withdrew her appeal in reliance on the Army's alleged settlement offer, the appellant at least appears to be claiming in her petition that she was given misleading or incorrect information by the Army as to the consequences of withdrawing her appeal. *Id.* The appellant's withdrawal letter, while ambiguous, does not contradict the interpretation that the appellant, at least in part, withdrew her appeal based on the alleged settlement offer. *See* AF, Tab 7. We find under these circumstances that the parties (including the Army) should be afforded the opportunity to address the issue of any misleading or incorrect information

provided by the Army to the appellant concerning the alleged settlement offer and its asserted terms.

¶7 We note that the appellant, citing the alleged settlement offer, requests as relief that the Board enforce the terms of the purported settlement. PFR File, Tab 1 at 7. Even if the appellant's assertions regarding the settlement offer are true, however, the Board does not have authority to act on the appellant's request because any agreement reached between the parties was not entered into the record for enforcement purposes. *See, e.g., Lopez v. U.S. Postal Service*, 71 M.S.P.R. 461, 463 (1996); *Boucher v. Department of the Treasury*, 68 M.S.P.R. 40, 43 (1995). However, that principle does not preclude the Board from ensuring the validity and integrity of the appellate process. *See Boucher*, 68 M.S.P.R. at 43; *Wade v. Department of Veterans Affairs*, 61 M.S.P.R. 580, 583 (1994). If it is determined on remand that the appellant based her decision to withdraw her appeal on misleading or incorrect information provided by the Army, she may proceed with her reinstated appeal if she so wishes. *See Mueller*, 77 M.S.P.R. at 641.

ORDER

¶8 Accordingly, we remand this appeal to the regional office for joinder of all relevant parties and further development of the record to determine whether the appellant's decision to withdraw her appeal was based on misinformation. If the administrative judge determines that the appellant relied on misinformation in choosing to withdraw her appeal, he shall adjudicate the appeal if the appellant chooses to proceed with her appeal.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.