

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

76 M.S.P.R. 172

Docket Number AT-0752-96-0829-I-1

RALPH W. TIMBERLAKE, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: Aug 8, 1997

Ralph W. Timberlake, Huntsville, Alabama, pro se.

E.O. Harper, Jr., Huntsville, Alabama, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

The appellant petitions for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and REMAND the appeal to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

Prior to August 17, 1996, the appellant encumbered the PS-5 position of Mail Processor. See Initial Appeal File (IAF), Tabs 1 and 3, and Tab 5, Subtab 4A. On July 26, 1996, he submitted a PS Form 1717, Bid for Preferred Assignment. IAF, Tab 5, Subtab 4B. Effective August 17, 1996, the agency awarded the appellant the PS-4 position of Mail Processor. See IAF, Tab 5, Subtab 4A. The appellant petitioned for appeal, contending that he had not bid on the PS-4 position, and that the agency's award was an involuntary demotion. See IAF, Tabs 1 and 3. He also claimed that the agency retaliated against him because he filed a Board appeal and discriminated against him because he is a black veteran. See IAF, Tab 1. He requested a hearing. *Id.*

The agency moved to dismiss the appeal for lack of jurisdiction, arguing that the demotion was voluntary because it awarded the lower-graded position to the appellant

based on his submission of a bid for the position. Specifically, the agency alleged that the appellant completed PS Form 1717 with the position number of the PS-4 position.¹ See IAF, Tab 5, Subtab 4A. The agency accompanied its motion with a copy of a Vacancy Posting Notice, opening July 23, 1996, and closing August 2, 1996. It showed the position number for the PS-4 Mail Processor position as 6863642, the same position number as the one on the PS Form 1717 submitted by the appellant. *Id.*

In a jurisdictional order dated December 12, 1996, the administrative judge informed the appellant that the Board may lack jurisdiction over his appeal from his acceptance of a lower-graded position which he had bid for and directed him to file evidence and argument by December 24, 1996, to prove that his appeal is within the Board's jurisdiction. The administrative judge also informed the appellant that he would be granted a hearing only if he made a nonfrivolous allegation of jurisdiction. See IAF, Tab 6. The appellant did not respond to the jurisdictional order. The administrative judge dismissed the appeal for lack of jurisdiction without holding the hearing the appellant had requested. He found that the appellant's submissions did not rebut the presumption that his demotion was voluntary. See IAF, Tab 8. He did not address the appellant's claims that the agency retaliated against him for filing a Board appeal and that the agency had discriminated against him because he is a black veteran. *Id.* The appellant has now petitioned for review. See Petition for Review File (PfRF), Tab 1.² The agency has responded in opposition to the petition. See PfRF, Tab 3.

ANALYSIS

The appellant alleges, for the first time on petition for review, that he filled out the PS Form 1717 with the position description of the PS-5 Window Clerk job, but that he did not fill in a position number. He contends that some unknown person with access to his PS Form 1717 filled in the position number of the PS-4 position. The appellant also contends that, in the past, the agency has awarded jobs to bidders based on the job description alone, without the position number. See PfRF, Tab 1 (Petition for Review at 1).

Generally, the Board will not consider arguments raised for the first time in a petition for review absent a showing that they are based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant has made no such showing here. Further, the appellant was afforded an opportunity to raise these assertions below in

¹ Under the collective bargaining agreement applicable to the appellant, positions available for bid by covered employees are posted. The posting, which is numbered, includes both a description of the position and a position number. See IAF, Tab 5, Subtabs 4A and 4D.

² In its reply to the appellant's petition, the agency made a submission that it alternatively referred to as a response to the petition and a cross petition for review. See PfRF, Tab 3. The agency's submission does not challenge the findings on which the administrative judge's initial decision is based. Therefore, it is not a cross petition for review, but only a response to the petition, and we have treated it as such. See *Nixon v. Department of the Navy*, 51 M.S.P.R. 624, 626 (1991), *aff'd*, 972 F.2d 1354 (Fed. Cir. 1992) (Table).

response to the administrative judge's jurisdictional order, but he did not do so. See IAF, Tab 6. Thus, we have not considered these arguments on petition for review. We reopen this appeal, however, for further consideration of the issue of jurisdiction based on the evidence of record submitted below.

The Appellant's Involuntary Demotion Claim

An employee initiated action, such as retirement, resignation, or demotion, is presumed to be voluntary, and the Board does not have jurisdiction, unless the employee establishes that the action was obtained through duress or coercion, or shows that a reasonable person would have been misled by the agency's misrepresentation. See *Wise v. Department of the Navy*, 73 M.S.P.R. 95, 98 (1997). An employee action is considered to be involuntary if it results from the agency's failure to correct erroneous information that it has reason to know that the employee is relying on. See *Lawson v. U.S. Postal Service*, 68 M.S.P.R. 345, 349 (1995); *Drummonds v. Department of Veterans Affairs*, 58 M.S.P.R. 579, 583-84 (1993).

Here, the evidence of record shows that the appellant's PS Form 1717 is completed as follows: In the space provided for "Posting" number is entered "6863642"; in the space provided for "Job No., Route No., or Position Title" is entered "Window Clerk"; and in the space provided for "Location" is entered "Downtown". The job posting from which this information was taken shows that the "Posting" number is CL 1096. This number, however, does not appear on the appellant's PS Form 1717. The number entered in the "Posting" number space is the position number for a PS-4 Mail Processor position located at Main Distribution. See IAF, Tab 5, Subtab 4C. The job posting also shows that the position titled "Window Clerk" and located "Downtown" is a PS-5 position. *Id.* Thus, on its face, the PS Form 1717 submitted by the appellant contained conflicting information, the position number of a PS-4 job, and the position title and location of a PS-5 job. Thus, either the position number or the position title and location listed on the appellant's PS Form 1717 was erroneous. And, notwithstanding, the agency acted on the form to effect the appellant's demotion.

Based on the information on the face of the appellant's PS Form 1717, the agency knew or should have known that the appellant was relying on erroneous information to make his bid. *Id.* However, there is no evidence in the record tending to show that the agency attempted to correct the erroneous information the appellant was apparently relying on. Thus, the appellant's assertion that his demotion is involuntary is sufficiently supported to become more than a bald allegation. See *Briscoe v. Department of Veterans Affairs*, 55 F.3d 1571, 1573 (Fed. Cir. 1995). Accordingly, we find that the appellant has made a nonfrivolous allegation that the agency's action constituted an involuntary demotion over which the Board has jurisdiction.

The agency has submitted documents stating that it awards position bids based on the position number, and that it awarded the appellant the lower-graded position because the number of that position was on the PS Form 1717 that he submitted. See IAF, Tab 5, Subtab 4. The agency, however, did not show that it could rely solely on the position number to award a bid based upon agency regulations, a negotiated labor management agreement, or other legal provision. The agency's assertions, therefore, are mere factual contradictions of the appellant's otherwise adequate prima facie

showing of jurisdiction. Resolution of the disputed issue, whether the agency may properly rely on the position number alone in awarding a bid position when the PS Form 1717 contains obvious erroneous information, requires weighing the evidence and resolving conflicting factual assertions. See *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 330 (1994). Thus, we find that the administrative judge erred by dismissing this appeal without affording the appellant the jurisdictional hearing that he requested. See *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985); *Clark v. Department of the Interior*, 68 M.S.P.R. 453, 456 (1995).

The Board will resolve conflicts in the evidence and decide issues of credibility without remanding where the record is sufficiently well-developed to address these issues and the Board's findings are not based on the demeanor of witnesses. See *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 556 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995), *cert. denied*, 116 S.Ct. 728 (1996). However, where credibility issues are present, and since deciding issues of credibility is normally the province of the trier of fact, remand to the administrative judge is the appropriate disposition. *Id.* at 557.

The Appellant's Other Claims

As noted above, the appellant also claimed that the agency retaliated against him for filing a Board appeal and discriminated against him because he is a black veteran. Thus, additionally, on remand, the administrative judge should inform the appellant of the Board's jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The scope of the Board's jurisdiction under USERRA differs from that under the Civil Service Reform Act of 1978, and other anti-discrimination statutes. For example, in addition to prohibiting discrimination on the basis of a person's status as a veteran as to personnel actions such as the alleged constructive demotion, USERRA prohibits discrimination as to any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of an employer policy, plan, or practice. See *Petersen v. Department of the Interior*, 71 M.S.P.R. 227, 231-32 (1996). The administrative judge should afford the appellant the opportunity to establish Board jurisdiction over his USERRA claim as it may relate to the agency's processing of his PS Form 1717 by showing that he is a veteran, and that the agency took any action covered by USERRA. See *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997). Further, if on remand the appellant establishes that his demotion was involuntary, the administrative judge should adjudicate the appellant's allegations of discrimination on the basis of race and retaliation for filing a Board appeal. Accordingly, we remand this appeal to the regional office for further proceedings consistent with this Opinion and Order.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.