UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RUSSELL B. WILLIS,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DE04329110283

DATE: FEB 22 1993

Scott Blanch, American Federation of Government Employees, Local 1592, Hill Air Force Base, Utah, for the appellant.

James B. Tadje, Esquire, Hill Air Force Base, Utah, for the agency.

BEFORE

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

Vice Chairman Amador issues a concurring opinion.

OPINION AND ORDER

The appellant has filed a petition for review and the agency has filed a cross petition for review of an initial decision that sustained the appellant's removal for unacceptable performance under 5 U.S.C. Chapter 43. For the reasons discussed below, we DENY the appellant's petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. We GRANT the agency's cross petition under 5 U.S.C. § 7701(e), VACATE the initial decision, and REMAND

the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

The appellant was a Production Management Specialist, GS-11, at Hill Air Force Base, Utah. He filed a petition for appeal with the Board's Denver Regional Office, asserting that on April 2, 1991, he involuntarily retired from his position after the agency informed him that he "could retire or be fired for alleged unacceptable performance." *See* Initial Appeal File (IAF), Tab 1.

In an order dated May 28, 1991, the administrative judge found it unnecessary to determine whether the appellant's decision to retire was voluntary. He found that the Board had jurisdiction over the appellant's appeal under 5 U.S.C. § 1221(j) because the appellant's removal was to have been effective March 31, 1991, and the appellant did not request retirement until after March 31, 1991. *See* IAF, Tab 11. In an order dated June 12, 1991, he further stated that he would not take evidence on the voluntariness of the appellant's retirement. *See* IAF, Tab 13.

In the initial decision, the administrative judge reiterated his finding that the appellant's retirement was "post-removal" and did not affect his right to appeal because the decision letter said the removal was to be effected on March 29, 1991; the agency did not assert or show that the decision to remove the appellant was held in abeyance; and the

appellant's representative first requested that the appellant be allowed to resign on April 1, 1991. *See* Initial Decision at 3 n.1. The administrative judge again cited 5 U.S.C. § 1221(j) as support for his conclusion.

ANALYSIS

Under the Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461 (1990), an employee's retirement will not necessarily preclude his appeal of a removal. Specifically, 5 U.S.C. § 7701(j) provides:

> In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

In *Jesko v. Department of Veterans Affairs*, 52 M.S.P.R. 517, 521 (1992), the Board found that this provision applies to adverse actions taken under 5 U.S.C. Chapter 75. Based on the plain language of the statute, we find that removals taken under 5 U.S.C. Chapter 43 are also covered by 5 U.S.C. § 7701(j).[1]

The starting point in every case involving construction of a statute is the language of the statute itself. *Landreth Timber Co. v. Landreth*, 105 S.Ct. 2297 (1985). *See also*

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[1] Because of our analysis of the appeal under 5 U.S.C. § 7701(j), we need not determine whether 5 U.S.C. § 1221(j) applies to this appeal. *See Drumheller v. Department of the Army*, MSPB Docket No. PH07529110279, slip op. at 5 n.1 (Oct. 30, 1992).

Martel v. Department of Transportation, 735 F.2d 504 (Fed. Cir. 1984) (where a matter of statutory interpretation is at issue, the responsibility of the court is to begin with the language and to hew closely to it), *cert. denied*, *Schapansky v. Department of Transportation*, 469 U.S. 1018 (1984). Here, 5 U.S.C. § 7701(j), by its very words, applies to a "removal."

Further, 5 U.S.C. § 7701(j) applies to "any [removal] case" filed under § 7701. Section 7701 is the jurisdictional basis not only for adverse actions taken to promote the efficiency of the service pursuant to 5 U.S.C. § 7513(d), but also for actions based on unacceptable performance under 5 U.S.C. § 4303(e). Moreover, the provision specifically states that it does not apply to the removal of a reemployed annuitant. Because it does not explicitly exclude any other removal action from coverage, other exclusions should not be readily implied. *See Andrus v. Glover Construction Co.*, 100 S.Ct. 1905 (1980) (where Congress exclusively enumerates certain exceptions, additional exceptions are not to be implied absent evidence of contrary legislative intent).

The language of a statutory provision must be regarded as conclusive absent a clearly expressed legislative intent to the contrary. *Consumer Product Safety Commission v. GTE Sylvania*, 100 S.Ct. 2051 (1980). Based on our review of the legislative history, we do not believe that Congress provided any clear message that it intended 5 U.S.C. § 7701(j) to apply only to removals taken under Chapter 75. Rather, we believe

that Congress intended to protect the due process rights of an employee who is removed under either Chapter 43 or Chapter 75.

Section 7701(j) was first drafted as part of the Whistleblower Protection Act of 1987. The legislative history of that Act establishes that one of the committee's primary objectives in drafting the section was to protect an employee's due process rights. The committee stated that it "believes it is unfair to force an employee to choose between exercising due process rights and claiming an entitlement to an annuity." *See* H.R. Rep. No. 274, 100th Cong., 1st Sess. 13 (1987).

Section 7701(j) was later eliminated from the Whistleblower Protection Act and incorporated into the Civil Service Due Process Amendments. As reported out of the Committee on Post Office and Civil Service, these Amendments granted Board appeal rights to members of the excepted service affected by "adverse personnel actions." H. Rep. No. 328, 101st Cong., 2d Sess. 1 (1990); 1990 U.S. Code Cong. & Admin. News 695. These adverse personnel actions ultimately included not only adverse actions under Chapter 75, but also actions based on unacceptable performance under Chapter 43. *Id.*; 1990 U.S. Code Cong. & Admin. News 696. The text of § 7701(j) was identical to the provision as enacted.

In *Jesko*, 52 M.S.P.R. at 520-21, the Board found that 5 U.S.C. § 7701(j) would not provide a basis for Board jurisdiction where an appellant retired rather than be demoted or separated pursuant to a reduction in force. For the

reasons discussed above, however, we find that a separation by reduction in force is distinguishable from a removal under Chapter 75 or Chapter 43. The word "removal" is a term of art employed in a personnel action based on poor performance under Chapter 43 or Chapter 75, or a personnel action based on misconduct under Chapter 75. Indeed, the words "remove" and "removal" are used in Chapter 43. *See, e.g.*, 5 U.S.C. §§ 4302, 4302a, 4303.

Thus, we find that under certain circumstances, 5 U.S.C. § 7701(j) might provide a basis for Board jurisdiction in a case involving a removal under Chapter 43. In *Drumheller v. Department of the Army*, MSPB Docket No. PH07529110279, slip op. at 5 (Oct. 30, 1992), however, the Board held that § 7701(j) does not provide a basis for appeal in situations where an employee's retirement was effective on or before the date on which the action appealed was scheduled to occur. Rather, the Board would have jurisdiction only if the appellant was removed before the effective date of his retirement or if his retirement was involuntary. *See Drumheller*, slip op. at 5-6; 5 U.S.C. § 4303(e); *Rysavy v. Department of Housing & Urban Development*, 28 M.S.P.R. 263, 265 (1985). In this regard, the agency asserts that the administrative judge erred in precluding it from presenting evidence to show that it never made a decision to separate the appellant and that the appellant voluntarily retired.

The record supports the agency's assertion. We acknowledge that the appellant's petition includes a decision

letter dated March 22, 1991, indicating that the appellant would be separated for unacceptable performance on March 29, 1991. However, it also includes a last-chance agreement, dated the same day, offering the appellant a voluntary demotion. *See* IAF, Tab 1. Moreover, the agency file contains evidence supporting a finding that the appellant retired before he was removed, including an SF-50 and an SF-52 documenting his retirement and memoranda for the record indicating that the appellant asked to retire. *See* Agency File, Tabs 4a, 4b, 4c, and 4e. Furthermore, the appellant's representative stated that the appellant "retired, in lieu of being fired." *See* IAF, Tab 9.

Moreover, in a May 8, 1991 order, the administrative judge stated that the appellant's removal "was apparently not effected because of the appellant's decision to retire." *See* IAF, Tab 5. Indeed, in his petition for appeal, the appellant stated that the conversation in which the agency informed him that he "could retire or be fired," occurred on April 1, 1991. *See* IAF, Tab 1. In light of this conflicting evidence, we find that the March 22, 1991 decision letter alone is insufficient to establish that the appellant was removed before his retirement was effective. Moreover, we note that it is the appellant's burden to establish Board jurisdiction over his appeal, not the agency's burden to rebut it. *See* 5 C.F.R. § 1201.56(a)(2)(i).

Thus, we find it necessary to remand this case for additional findings. The administrative judge should first

determine whether the agency removed the appellant before the effective date of his retirement. If the administrative judge determines that it did, he should proceed to adjudicate the merits of the appellant's removal. If the administrative judge determines that it did not, he should proceed to decide whether the appellant's retirement was involuntary. Before making his determinations, the administrative judge should allow the parties to present evidence on the issues of whether the appellant was removed and whether his retirement was involuntary. If the appellant makes a nonfrivolous allegation of jurisdiction, the administrative judge should afford him a hearing on this issue, if he desires one. *See, e.g., Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985).[2]

In this regard, we note that absent an allegation raising the issue, the administrative judge need not determine whether any failure to provide the appellant with the information described in the concurring opinion in this case would cause the appellant's retirement to be involuntary. Moreover, for the reasons stated below, even if the appellant raised this issue, the authorities and reasoning cited in the concurring opinion do not provide sufficient support for the view that an agency must provide the information in question to an employee

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[2] Because of our disposition of this case, we find it unnecessary to address the appellant's petition for review on the merits of his alleged removal and the portions of the agency's cross-petition for review that address the merits of the appellant's alleged removal.

who neither requests it nor otherwise puts the agency on notice that he is relying on misinformation concerning the matter.

One of the decisions cited in the concurring opinion is *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed. Cir. 1983). Although that decision supports the proposition that agency misinformation may cause a retirement to be involuntary, a failure to provide information does not qualify as misinformation.

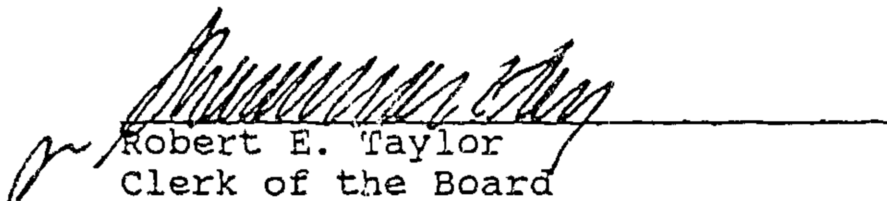
Covington v. Department of Health & Human Services, 750 F.2d 937 (Fed. Cir. 1984), is cited in the concurring opinion for the proposition that "the crucial inquiry is whether the appellant made an informed choice," and for the proposition that a "decision made 'with blinders on,' based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." The decision does support those statements. One of the bases for the court's finding that the employee's retirement (in the face of a separation by reduction in force) was involuntary was that the employee had not been informed that a transfer of function had occurred, and that he therefore had no grounds for believing an appeal of a separation by reduction in force might be "productive." *See Covington*, 750 F.2d at 943. In relying on this failure, however, the court pointed out that the employee "actually was informed to the contrary," i.e., the agency told him that there had been no transfer of function. *Id.* Furthermore, although the court also stated

that the "agency's additional failure to inform [the employee] that a retirement election would preclude a later appeal denied him the right to consider this fact in making his decision," *id.*, this does not appear to be a major basis for the court's conclusion that the appellant was "given a Hobson's choice, that is to say no real choice at all," *id.* That failure is mentioned briefly in a single sentence near the end of the analysis, while the agency's incorrect denial that there had been a transfer of function that could have given the employee a right to another job is mentioned repeatedly in the decision. *See id.* at 939-43. The agency's failure to provide information about the effect of the employee's retirement apparently became significant only in light of the misinformation the agency provided.

Williams v. Department of the Army, 44 M.S.P.R. 449 (1990), is cited in the concurring opinion for the proposition that "the Board has found that an agency is required to provide information that is not only correct in nature but adequate in scope to allow an employee to make an informed decision." The concurring opinion also indicates that, in *Williams*, "the Board specifically noted that this includes an obligation to correct any erroneous information that the agency has reason to know that the appellant is relying on." Again, the cited decision supports the propositions for which it is cited. *See Williams*, 44 M.S.P.R. at 451. It does not indicate, however, that an agency has an obligation to correct erroneous information absent "reason to know that the

appellant is relying on" that misinformation, and there appears to be no indication in the present appeal that the agency knew the appellant misunderstood his appeal rights. Most likely, the agency assumed the appellant's decision to retire was, in effect, a decision to give up his appeal right in return for a relatively clean record, an end to his job-related problems, and an annuity. This would seem to be a reasonable assumption.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIRMAN AMADOR

Willis v. Department of the Air Force, MSPB Docket No. DE04329110283

I agree with the majority that 5 U.S.C. § 7701(j) applies in general to removals taken under 5 U.S.C. Chapter 43. I also agree that remand is necessary in this case because, despite this general application, 5 U.S.C. § 7701(j) would not provide a basis for appeal if the appellant retired on or before the proposed effective date of the removal. In that event, the appellant would be limited to attempting to show that his retirement was involuntary.

I disagree with the majority, however, concerning what findings the administrative judge should make in determining whether the appellant's retirement was involuntary. Specifically, I would require the administrative judge to decide whether the agency informed the appellant that if he retired on or before the proposed effective date of the removal, he would not be able to appeal the removal, whereas if he retired after the removal was effected, he could appeal the removal. If the appellant was not so informed, I would require the administrative judge to determine whether this factor vitiated the voluntariness of the appellant's retirement.

The Court of Appeals for the Federal Circuit has long held that a retirement is involuntary if obtained, not only by agency deception, but by agency misinformation. *See, e.g.*, *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984); *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). It has stated that the crucial inquiry is whether the appellant made an informed choice. A decision made "with blinders on," based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process. *See* *Covington*, 750 F.2d at 943.

In applying these principles, the Board has found that an agency is required to provide information that is not only correct in nature but adequate in scope to allow an employee to make an informed decision. *See Williams v. Department of the Army*, 44 M.S.P.R. 449, 450 (1990). In *Williams*, 44 M.S.P.R. at 450-51, the Board specifically noted that this includes an obligation to correct any erroneous information that the agency has reason to know that the appellant is relying on.

The majority opines that in this case there is no indication that the agency knew that the appellant misunderstood his appeal rights. The majority asserts (without citing to any evidence) that the agency "most likely" assumed that the appellant's decision to retire was a rational choice to give up his appeal rights in return for a "relatively" clean record, an end to his problems, and an

annuity. The majority then simply concludes, "This would seem to be a reasonable assumption." If so, why did the appellant file this appeal with the Board?

I believe that there is every reason to suspect that this appellant did not know the enormous consequences of the timing of his decision to retire. We have no reason to assume that, as a GS-11 Production Management Specialist, appellant had any expertise in the intricacies of personnel law or that he understood the full consequences of retiring immediately before his proposed removal was to be effected as opposed to waiting until the day after it was effected. I sincerely doubt that this appellant understood that, if he took the latter option, he could still retain his right to an annuity while preserving his right to contest the merits of the removal action.

Thus, I do not believe that the administrative judge should decide whether the appellant's retirement was voluntary without first considering whether the agency informed him of the effect his retirement would have on his appeal rights to the Board.

FEB 22 1993
(Date)

Washington, D.C.

Antonio C. Amador
Vice Chairman