

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

75 M.S.P.R. 677

Docket Number DE-1221-95-0389-W-3

STEVEN E. SHELLY, Appellant,

v.

DEPARTMENT OF THE TREASURY, Agency.

Date: JUNE 23, 1997

Milan D. Tesanovich, Esquire, Tucson, Arizona, for the appellant.

Tom Dower, Esquire, and Patricia L. Makin, Esquire, Houston, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of the October 4, 1996 initial decision that denied corrective action for his alleged involuntary resignation. For the reasons set forth below, we DENY the petition for review, REOPEN the appeal on our own motion, AFFIRM the administrative judge's finding as to the voluntariness of the appellant's resignation, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

The appellant resigned from his GS-13 Criminal Investigator position. He then filed a complaint with the Office of the Special Counsel (OSC) claiming that the agency had created intolerable working conditions, thereby forcing him to resign, in retaliation for his whistleblowing and his filing of a discrimination complaint, and because of his sex. OSC declined to take corrective action, and the appellant timely filed this appeal. He timely refiled the appeal, after the appeal was twice dismissed without prejudice. Following a hearing, the administrative judge held that the appeal is within the Board's jurisdiction, but that corrective action is not warranted because the appellant resigned voluntarily. The appellant argues in his timely petition for review that the administrative judge abused his discretion in disallowing the testimony of his psychologist, that he proved that his resignation was involuntary, and that he proved that he made whistleblowing disclosures. The agency opposes the petition for review.

ANALYSIS

The appellant has not identified any reversible error in the initial decision. Accordingly, we DENY the petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN the appeal because, as explained below, the appeal is beyond our jurisdiction. See *Jackson v. Office of Personnel Management*, 62 M.S.P.R. 6 (1994) (the Board, as a limited-jurisdiction tribunal, must satisfy itself that it has authority to adjudicate the matter before it, and may raise the question of its own jurisdiction *sua sponte* at any time), *overruled in part on other grounds by Lary v. Office of Personnel Management*, 65 M.S.P.R. 291 (1994), *recons. denied*, 68 M.S.P.R. 206 (1995).

The administrative judge stated that the appeal is within the Board's jurisdiction under 5 U.S.C. §§ 1214 & 1221. Initial Decision at 1. Those provisions govern individual right of action (IRA) appeals. IRA jurisdiction attaches if: The appellant made, was perceived to have made, or was closely associated with someone who made, a disclosure protected under 5 U.S.C. § 2302(b)(8); the agency took or failed to take, or threatened to take or fail to take, a "personnel action" listed at 5 U.S.C. § 2302(a)(2)(A); and the appellant exhausted proceedings before OSC. See *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994); *Zimmerman v. Department of Housing & Urban Development*, 61 M.S.P.R. 75, 83 (1994); *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 446 (1991). The administrative judge, after a thorough review of the evidence, found that the appellant did not overcome the presumption that a resignation is voluntary. We have no reason to disturb this finding.

This finding entails the conclusion that the appeal is not within the Board's authority to adjudicate IRA appeals, however, because a separation pursuant to a voluntary resignation is not a personnel action. See 5 U.S.C. § 2302(a)(2)(A); *cf. Mintzmyer v. Department of the Interior*, 84 F.3d 419, 421, 424 (Fed. Cir. 1996) (where the appellant claimed that the agency forced her to retire by creating intolerable working conditions, in reprisal for her whistleblowing, and where she was collaterally estopped by a judgment in another forum from arguing that her retirement was involuntary, the Board lacked IRA jurisdiction). Furthermore, because the appellant did not show that his resignation was involuntary, his separation cannot be appealed directly to the Board. See 5 U.S.C. §§ 7512(1), 7513(d); *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136-37 (Fed. Cir. 1987).

Accordingly, we AFFIRM the finding in the initial decision that the appellant failed to show that he resigned involuntarily. Upon REOPENING, we DISMISS the appeal for lack jurisdiction.

ORDER

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,
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
Washington, D.C.