

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

2007 MSPB 176

Docket No. AT-3443-07-0156-I-1

**Bruce E. Paige,
Appellant,**

v.

**United States Postal Service,
Agency.**

July 20, 2007

Bruce E. Paige, Memphis, Tennessee, pro se.

Gillian Steinhauer, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review (PFR) of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we DENY the PFR under 5 C.F.R. § 1201.115, REOPEN the appeal on the Board's own motion for the limited purpose of clarifying the administrative judge's jurisdictional analysis, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING this appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a PS-3 Custodial Laborer with the U.S. Postal Service in Memphis, Tennessee, resigned from his position for personal reasons effective

February 22, 2005. Initial Appeal File (IAF), Tab 1, Attachments. Subsequently, the appellant made several requests for reinstatement beginning in February 2006. IAF, Tab 3. The agency denied the appellant's requests to return to work on August 23, 2006, stating that the appellant's former supervisor recommended that the appellant not be rehired. *Id.*

¶3 In his November 14, 2006 appeal, the appellant alleged, in pertinent part, that "I was told that there would not be a problem when I got ready to be reinstated to my USPS position." IAF, Tab 1, ¶ 27. The appellant also stated on the appeal form that he was not entitled to a veterans' preference. *Id.*, ¶ 17. The appellant submitted with his appeal the Notification of Personnel Action, PS Form 50, which documented his resignation. *Id.* This form also indicates that the appellant is not a preference-eligible employee.

¶4 The administrative judge (AJ) docketed the appeal as a denial of reinstatement/nonselection appeal. He informed the appellant that the Board may not have jurisdiction over the appeal, and ordered the appellant to file evidence and argument to prove that the appeal was within the Board's jurisdiction. IAF, Tab 2. In response, the appellant asserted that:

I resigned after talking to my supervisors, Mr. Kimball and Mr. Reinhart and my Human Resource Representative, Mr. Harrison concerning returning to my position before I resigned. [sic] My supervisors told me as long as they were in their positions, I could return to my job position. Also my Human Resource Representative told me that I could resign and that I could return with no problem. I resigned because of theses [sic] promises.

IAF, Tab 3 at 1. The agency did not file a response to the appeal, except to request a stay in the proceedings pending the Board's decision on jurisdiction. IAF, Tab 5.

¶5 The AJ issued an initial decision dismissing the appeal for lack of jurisdiction. Initial Decision (ID) at 1, 2. The AJ found that entitlement to reinstatement or restoration to a former position arises only if an employee was

separated due to a compensable injury and fully or partially recovers from the injury, or upon an employee's return from a period of uniformed service. *Id.* at 2. The AJ further concluded that there is no reinstatement or restoration right following a resignation for personal reasons, even if the appellant was informed that he would be reinstated or selected for a position. *Id.* The AJ therefore concluded that the appellant did not raise a non-frivolous allegation of jurisdiction. *Id.* at 7.

¶6 The appellant has timely filed a PFR, PFR File, Tab 1, to which the agency has timely responded in opposition, *id.*, Tab 3.

ANALYSIS

¶7 The appellant fails to present new and material evidence on review that, despite due diligence, was not available when the record closed. *See* 5 C.F.R. § 1201.115(d)(1). Nor has the appellant shown that the decision of the AJ dismissing his case as a restoration appeal was based on an erroneous interpretation of statute or regulation that should result in a different outcome in this appeal. 5 C.F.R. § 1201.115(d)(2).

¶8 However, the AJ erred to the extent that the initial decision states that an employee, who has been misinformed about his reinstatement or restoration rights, does not have an appeal right to the Board. Employee removal actions are appealable to the Board. *See* 5 U.S.C §§ 7701, 7512. For a removal to be covered by Section 7512, however, it must be involuntary. Absent evidence to the contrary, a resignation is presumed to be a voluntary act. *See Schultz v. Department of the Navy*, 810 F.2d 1133, 1135-36 (Fed. Cir. 1987); *Covington v. Department of Health & Human Services*, 750 F.2d 937, 941-42 (Fed. Cir. 1984). To determine whether a resignation is voluntary, however, we must examine "the surrounding circumstances to test the ability of the employee to exercise free choice." *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574 (Fed. Cir.

1983) (*citing Perlman v. United States*, 490 F.2d 928, 933, 203 Ct.Cl. 397, 407-08 (1974)).

¶9 One means by which an appellant may rebut the presumption of voluntariness is by presenting sufficient evidence to show that his resignation was based on agency-supplied misinformation. In particular, a resignation is involuntary if the agency made misleading statements upon which the employee reasonably relied to his detriment. *Scharf*, 710 F.2d at 1574-75. The appellant, however, need not show that the agency intentionally misled him. *Covington*, 750 F.2d at 942. That is, the agency could have provided the misleading information negligently or even innocently; if the appellant materially relied on the misinformation to his detriment, his resignation is considered involuntary. *Id.*

¶10 Here, the appellant's submissions below suggest that his resignation was involuntary because, before he resigned, he received assurances from his supervisors and a Human Resources representative that he would be rehired when he had resolved his personal issues. IAF, Tabs 1, 3. The appellant also indicates that he relied to his detriment upon these "promises." *Id.*, Tab 3. Taking these allegations as true, they present a non-frivolous allegation that the appellant's resignation for personal reasons was involuntary based upon agency-supplied misinformation. *See Tanner v. U.S. Postal Service*, 94 M.S.P.R. 417, ¶ 12 (2003) (a resignation may be involuntary based upon misinformation relating to the appellant's reinstatement rights that the agency provided to him when he resigned). The AJ, however, did not analyze these allegations of agency misrepresentation as an issue of involuntary resignation. Instead, he considered the case to be purely a denial of reinstatement or denial restoration filed pursuant to 5 C.F.R., Part 353. This was error. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

¶11 Nevertheless, we note that an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Here, the record is fully developed on a jurisdictional issue that we find is dispositive in this case. A Postal Service employee may file a Board appeal under chapter 75 only if he is covered by 39 U.S.C. § 1005(a) or 5 U.S.C. § 7511(a)(1)(B). 5 U.S.C. § 7511(b)(8). Thus, to appeal an adverse action under chapter 75, a Postal employee (1) must be a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity, and (2) must have completed one year of current continuous service in the same or similar positions. *Toomey v. U.S. Postal Service*, 71 M.S.P.R. 10, 12 (1996). In his appeal, the appellant has acknowledged that he is not a preference-eligible employee. IAF, Tab 1. In addition, it is apparent that his duties as a Custodial Laborer would not qualify him as a management or supervisory employee, or an employee engaged in confidential personnel work. Accordingly, we modify the initial decision to clarify that, to the extent that the appellant has raised a claim of involuntary resignation, it is dismissed as an appeal outside of the Board's jurisdiction on the basis that the appellant failed to show that he was an agency employee with chapter 75 appeal rights.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.