UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 20

Docket No. DA-0752-09-0059-B-2

David C. Potter,

Appellant,

v.

Department of Veterans Affairs,

Agency.

February 9, 2011

David C. Potter, El Paso, Texas, pro se.

Kenneth S. Carroll, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal as withdrawn. For the reasons discussed below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The facts underlying this appeal are fully set forth in the Board's Opinion and Order in *Potter v. Department of Veterans Affairs*, 111 M.S.P.R. 374 (2009).

As stated therein, the appellant, a Cook/Driver, resigned after the agency learned that his commercial drivers' license had been confiscated by police based on suspicion of drunk driving. *Id.*, ¶ 2. He later filed an appeal alleging that his resignation had been involuntary. *Id.*, ¶ 3. The parties settled the appeal under an agreement calling for the agency to hire the appellant as a Cook/Driver and pay him $4,000, and the administrative judge entered the agreement into the record. *Id.*

¶3 The appellant subsequently filed a petition for review alleging that the agreement was involuntary. *Id.*, ¶¶ 4-5. Although the Board denied the appellant's petition for review, determining that he had not established that the agreement was involuntary, it set the agreement aside on the grounds that it was based on a mutual mistake, i.e., the parties' erroneous belief that the agreement could be entered into the record for enforcement purposes. *Id.*, ¶¶ 8-9. The Board remanded the appeal for further consideration, including findings on the issue of whether the appellant's resignation was involuntary. *Id.*, ¶ 10.

¶4 On remand, the appeal was dismissed without prejudice for a period of 3 months based on the agency's assertion that it was in the process of providing the appellant with all of the relief that he would have received had the Board found that his resignation was involuntary. Remand Appeal File, MSPB Docket No. DA-0752-09-0059-B-1 (B-1 RAF), Tab 11 at 1-2.

¶5 The appellant refiled the appeal on September 22, 2009. Remand Appeal File, MSPB Docket No. DA-0752-09-0059-B-2 (B-2 RAF), Tab 1. The administrative judge subsequently issued an initial decision in which she stated that the appellant had withdrawn his refiled appeal, and in which she therefore dismissed it. *Id.*, Tab 5, Remand Initial Decision at 1.[1]

---

[1] The agency appears to have returned the appellant to the rolls pursuant to the agreement, and the appellant appears to have again resigned and to have filed an appeal alleging that his second resignation was also involuntary. *See Potter v. Department of*

¶6 In his petition for review of the remand initial decision, and in a document he filed subsequently, the appellant complains about his treatment by the agency and by the administrative judge in conferences that predated the dismissal without prejudice; he states that the administrative judge told him that he could not obtain damages from the agency; and he expresses his belief that he is entitled to damages in addition to back pay. Petition for Review (PFR) File, Tab 1 at 2; *id.*, Tab 4 at 7.[2] The agency has not filed a response to the appellant's petition for review.

ANALYSIS

¶7 When an appellant directly petitions the full Board for review of an initial decision dismissing an appeal as withdrawn, the Board will treat the petition as a request to reopen his appeal. *Lincoln v. U.S. Postal Service*, 113 M.S.P.R. 486, ¶¶ 10-13 (2010). Ordinarily, 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 merely because the appellant wishes to proceed before the Board or to cure an untimely petition for review. *Small v. Department of Homeland Security*, 112 M.S.P.R. 191, ¶ 4 (2009); *Rose v. U.S. Postal Service*, 106 M.S.P.R. 611, ¶ 7 (2007). However, a relinquishment of one's right to appeal to the Board must be by clear, unequivocal, and decisive action. *Rose*, 106 M.S.P.R. 611, ¶ 7. Further, the Board may relieve an appellant of the consequences of his decision to

---

Veterans Affairs, MSPB Docket No. DA-0752-09-0716-I-1, slip op. at 1 (Initial Decision, Dec. 2, 2009). That appeal is the subject of a separate petition for review.

[2] The appellant filed his petition for review approximately 5 weeks late. *See* PFR File, Tab 1; Remand Initial Decision at 2-3; 5 C.F.R. § 1201.114(d). Because of indications in the record that psychiatric disorders prevented the appellant from meeting the filing deadline, however, and in light of the appellant's pro se status, we find good cause for the delay in filing.

withdraw an appeal when the decision was based on misleading or incorrect information provided by the Board or the agency. *Id.*

¶8 The appellant appears to be alleging that his decision to withdraw his appeal on remand was based on incorrect information. He asserts in his petition for review that the administrative judge "explained to [him] that the agency was going to give [him his] back pay and full reinstatement and the case would be dismissed . . . ." PFR File, Tab 1 at 2. He states further that, when he told the administrative judge that he "wanted damages," she responded by saying that there were "no damages with this court." *Id.* In addition, he alleges that the administrative judge had indicated during a previous stage of his appeal that damages were available, and he states that he was "confused because now I am being told there are no damages." *Id.*

¶9 Because the appellant raised disability discrimination and whistleblower reprisal claims, *see* Initial Appeal File, MSPB Docket No. DA-0752-09-0059-I-1, Tab 1 at 3, 5-6, Tab 11 at 1-3, a statement that no damages could be awarded in connection with this appeal, if made, would be incorrect. *See Dey v. Nuclear Regulatory Commission*, 106 M.S.P.R. 167, ¶ 9 (2007) (an appellant who proves his whistleblower reprisal claim may be able to obtain consequential damages through his appeal); 5 C.F.R. § 1201.201(d) ("The Civil Rights Act of 1991 (42 U.S.C. 1981a) authorizes an award of compensatory damages to a prevailing party who is found to have been intentionally discriminated against based on . . . disability.").[3]

---

[3] The summary of the prehearing conference stated that the only issue in dispute was whether the appellant's resignation was involuntary and that additional issues were precluded. Initial Appeal File, MSPB Docket No. DA-0752-09-0059-I-1, Tab 15 at 1-2. The pro se appellant here did not object to that summary. The Board has recently held, however, that when an appellant raises affirmative defenses, the administrative judge must address those defenses in any close of record order or prehearing conference summary and order. *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 10 (2010). Further, if an appellant expresses an intention to withdraw an affirmative defense, in the close of record order or prehearing conference summary and order, the administrative

¶10 Based on the record before us, we find that the appellant's withdrawal was based on misinformation. The appellant asserted in an affidavit that on July 14, 2009, the administrative judge told him after he asked about damages that "there are no damages," and that "there are no damages with this court." PFR File, Tab 4 at 2-3, 7. He contends that he felt intimidated and "agreed to the request," but was confused because he believed that he could have received damages in addition to back pay. *Id.* at 7; *see* PFR File, Tab 1 at 2. The agency has not disputed the accuracy of the assertions by the appellant, and the Board has long held that an affidavit that is uncontested proves the facts asserted. *See, e.g.*, *Edwards v. Department of Veterans Affairs*, 111 M.S.P.R. 297, ¶ 6 (2009).

¶11 Moreover, the appellant's affidavit is corroborated by other evidence in the record. We note first that during the January 29, 2009 hearing in this case, the administrative judge stated that "there are no damages before me." Hearing Compact Disc at 1:04. The fact that the administrative judge made such a statement in January 2009 is consistent with the appellant's assertion that she made a similar statement in July 2009.

¶12 Furthermore, we note that on remand, the agency twice moved to dismiss the appeal as moot on the grounds that it had provided the appellant all the relief to which he would be entitled if he had prevailed in the appeal. B-1 RAF, Tab 7 at 1-2; *id.*, Tab 9 at 2. Nothing in the agency's motions, or elsewhere in the record, suggests that the agency had addressed the issue of damages. Instead, the record suggests that the relief to which the agency was referring consisted only of

---

judge must, at a minimum, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give the appellant an opportunity to object to withdrawal of the affirmative defense. *Id.* Here, the administrative judge did not address the appellant's affirmative defenses in her prehearing conference summary. Accordingly, even though the appellant did not object to that summary, we nevertheless find that he cannot be deemed to have abandoned his disability discrimination and whistleblower claims under the circumstances of this appeal. *Cf. Smart v. Department of the Army*, 105 M.S.P.R. 475, ¶ 11 (2007).

retroactive reinstatement and back pay. *See id.*, Tab 7 at 1 & Exhibit (Ex.) A; *id.*, Tab 9 at 1-2 & Exs. A-D. Although the administrative judge denied the agency's first motion, she relied in doing so only on the absence of evidence that the appellant had actually received all the relief that the agency had taken steps to provide him. *Id.*, Tab 8 at 1 ("The agency's Motion is **DENIED** because [the agency] has not asserted and the record fails to reflect that the appellant has received all of the relief that he would have received if I determined that the Board has jurisdiction over this appeal."). This reliance, the absence of any reference to damages, and the administrative judge's statement that the agency could "file another Motion to Dismiss" after "the appellant has received all of the relief," *id.*, appears to suggest that the administrative judge agreed that the appellant could obtain no relief beyond reinstatement and back pay.

¶13 In addition, although the administrative judge did not issue a written ruling on the second motion, she held a telephone conference following her receipt of that motion, indicated that the parties had jointly requested during the conference that she dismiss the appeal without prejudice for 3 months, requested and obtained the appellant's confirmation that he was requesting a dismissal without prejudice "to make sure [he] received all of the money, all of the back pay," to which he was entitled, *id.*, Tab 10, Audiotape, and subsequently dismissed the appeal without prejudice based on the agency's assertion that it was "in the process of providing the appellant with all of the relief he would have received had the Board found that the appellant's resignation was involuntary," *id.*, Tab 11 at 2. Again, these circumstances, in the absence of any indication that the agency had addressed the issue of damages, suggest that the administrative judge did not believe that damages were a remedy available to the appellant. Thus, the record supports a finding that the administrative judge informed the appellant in July 2009 that damages were not available in this case.

¶14 As we have noted above, the Board may relieve an appellant of the consequences of his decision to withdraw his appeal when he based that decision

on misleading or incorrect information. This is true regardless of whether the administrative judge provided the information, or whether the agency did so and the administrative judge failed to correct it. *See Fox v. Department of Transportation*, 66 M.S.P.R. 12, 14-15 (1994) (reinstating the appeal based on evidence that the appellant relied, in withdrawing it, on her belief that the Board could offer no remedy other than reinstatement if she prevailed on her claims of harassment and discrimination); *Scarboro v. Department of the Navy*, 55 M.S.P.R. 494, 498 (1992) (reinstating the appeal based on evidence that the appellant's express reason for withdrawing it was her erroneous belief that the Board lacked jurisdiction, and based on a finding that the administrative judge failed to correct this belief despite being in a position to do so during a conference call); *Dodd v. Department of the Interior*, 48 M.S.P.R. 582, 585 (1991) (remanding the appeal for a decision on the merits, based on a finding that the appellant had withdrawn it based on his erroneous belief that he could not obtain adjudication of his appeal without a hearing, and based on the administrative judge's failure to correct this belief during a telephone conference).

¶15 Based on the foregoing, we find that the administrative judge's statements that damages are unavailable in this appeal were incorrect. Therefore, the appellant is excused from the consequences of his decision to withdraw his appeal based on misinformation regarding the scope of applicable Board remedies.

ORDER

¶16 Accordingly, we VACATE the remand initial decision and REMAND this case. If the administrative judge determines on remand that the appellant has established by preponderant evidence that his resignation was involuntary and that the Board has jurisdiction over this appeal, she should also adjudicate the

appellant's affirmative defenses, providing the appellant with a hearing on his whistleblowing and discrimination claims if he requests one.[4]

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

[4] We find that a hearing on the appellant's discrimination claims is warranted under the standard set forth in *Redd v. U.S. Postal Service*, 101 M.S.P.R. 182, ¶ 13 (2006).