

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

63 M.S.P.R. 270

Docket Number SL-0752-93-0406-I-1

**REGINALD L. COOK, Appellant,**

**v.**

**DEPARTMENT OF DEFENSE, Agency.**

Date: June 22, 1994

**Nathaniel D. Boyd, American Federation of Government  
Employees, Memphis, Tennessee**

Emma L. Cole, Esquire, Memphis, Tennessee

**BEFORE**

Ben L. Erdreich, Chairman  
Jessica L. Parks, Vice Chairman  
Antonio C. Amador, Member

**OPINION AND ORDER**

The appellant has timely petitioned for review of an initial decision that dismissed his appeal for lack of Board jurisdiction. For the reasons stated below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and ORDER the agency to reinstate the appellant to his former position.

**BACKGROUND**

On August 3, 1993, the appellant submitted his resignation from his WG-5 Materials Handler (Fork Life Operator) position, effective August 31, 1993, under the agency's Voluntary Separation Incentive Pay (VSIP) program. Appeal File (AF), Tab 3, Subtab 4E. The appellant indicated on a Standard Form 52 (SF-52) that he understood that his request for resignation was irrevocable. See *id.* The appellant attempted to withdraw his resignation on August 13, 1993, however, because he claimed that the agency had dropped certain adverse action charges that it had proposed against him. See AF, Tab 3, Subtabs 4C, 4D. The agency denied the appellant's withdrawal request in an August 25, 1993 letter that stated:

Your request to withdraw your resignation to accept Voluntary Separation Incentive Pay is disapproved. The resignation SF 52 that you voluntarily signed states, "I understand this request for resignation is irrevocable."

AF, Tab 3, Subtab 3C.

The appellant filed a timely petition for appeal of the agency's denial of his request to withdraw his resignation. See AF, Tab 1 at 2-3. The appellant also claimed that he was coerced into resigning under the VSIP program by his supervisor, who allegedly threatened him with removal. See *id.* at 3. The appellant requested a hearing. *Id.* at 4.

The administrative judge informed the appellant in an acknowledgment order that the Board does not have jurisdiction over voluntary resignations. See AF, Tab 2 at 2. The administrative judge also informed the appellant that his appeal would be dismissed unless he alleged that his resignation was the result of duress, coercion, or misrepresentation by the agency, and he ordered the appellant to file evidence and argument on the jurisdictional issue. See *id.* The appellant, however, did not respond to the acknowledgment order.

The agency responded in opposition to the appeal and moved to dismiss the appeal based on its assertion that the appellant's resignation was voluntary. AF, Tab 3, Subtab 3. The agency contended that its authority to offer separation pay incentives was based on 5 U.S.C. § 5597(b), which provides:

In order to avoid or minimize the need for involuntary separations due to a reduction in force [(RIF)], base closure, reorganization, transfer of function, or other similar action affecting 1 or more defense agencies, the Secretary [of Defense] shall establish a program under which separation pay may be offered to encourage eligible employees to separate from service voluntarily (whether by retirement or resignation).

See AF, Tab 3, Subtab 3. The agency claimed that the appellant signed a voluntary irrevocable SF 52 requesting separation from Federal service. See *id.* at 3. It did not, however, provide any other argument or evidence demonstrating a valid reason for denying the appellant's withdrawal request.

The administrative judge dismissed the appeal upon finding that the agency showed that it had a valid reason not to allow the appellant to withdraw his resignation, and that its refusal to allow him to withdraw his request did not constitute a constructive removal. See Initial Decision (ID) at 4-5. The administrative judge reasoned that, because the purpose of the VSIP program was to create openings for other employees who might be impacted by a RIF, "administrative disruption caused by the conducting of a RIF or other involuntary action was a distinct possibility." *Id.* The administrative judge also found that the appellant failed to prove that the agency coerced his resignation. See ID at 5-7. The administrative judge did

not grant the appellant's request for a hearing because the appellant did not make a nonfrivolous allegation casting doubt on the presumption of voluntariness of his resignation. ID at 7 n.1.

The appellant asserts in his petition for review that his supervisor led him to believe that he would be removed, and that his only "way out of being removed from a frivolous charge of AWOL" was to resign under the VSIP program. Petition for Review File (PFRF), Tab 1 at 1-2. He also reasserts his claim that the agency should have allowed him to withdraw his request for resignation. See *id.* at 2. The agency has timely responded in opposition to the petition. See PFRF, Tab 3.

### ANALYSIS

We find that the appellant's argument on review that the agency coerced his resignation constitutes mere disagreement with the explained findings of the administrative judge and does not warrant full review of the record by the Board. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133?4 (1980), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam). We further find that the administrative judge correctly determined that the appellant failed to show that the agency coerced his resignation. See ID at 5-7.

We agree with the appellant, however, that the administrative judge erred in finding that the agency showed that it had a valid reason not to allow the appellant to withdraw his resignation before it became effective. The rule with respect to an employee's opportunity to withdraw a resignation is set forth at 5 C.F.R. § 715.202(b), which provides:

An agency may permit an employee to withdraw his resignation at any time before it has become effective. An agency may decline a request to withdraw a resignation before its effective date only when the agency has a valid reason and explains that reason to the employee. A valid reason includes, but is not limited to, administrative disruption or the hiring or commitment to hire a replacement. Avoidance of adverse action proceedings is not a valid reason.

Because the information that leads to a refusal to allow the withdrawal of a resignation is within the agency's control, the agency bears the burden of proving the validity of its reasons under this regulation by a preponderance of the evidence. *Browning v. Department of the Army*, MSPB Docket No. SE-0752-93-0175-I-1, slip op. at 7 (Mar. 11, 1994); *Almon v. National Aeronautics & Space Administration*, 16 M.S.P.R. 124, 128 (1983). In making the determination of whether the agency met its burden, the Board has held that the agency's discretion to refuse to accede to a withdrawal "is not unfettered, but rather is conditional," and "limited."

Browning, slip op. at 7 (quoting *McBeen v. Department of the Interior*, 27 M.S.P.R. 207, 210-11 (1985)).

We find that the agency has not met its burden of showing that it had a valid reason for declining the appellant's request to withdraw his resignation. The only reason that the agency offered and explained to the appellant was that the appellant's resignation under the VSIP program was irrevocable. See AF, Tab 3, Subtabs 3, 4C. We find that under the circumstances of this appeal, this assertion alone does not establish by preponderant evidence a valid reason for denying the appellant's request to withdraw his resignation. See 5 C.F.R. § 1201.56(c)(2); *McBeen*, 27 M.S.P.R. at 211 (the adverse effect meant to be avoided by giving the agency limited discretion to refuse resignation withdrawals is the disruption in staffing or prejudice to the employment rights of others that may result from retaining the resigning employee on the rolls).

The agency has not alleged or shown that it hired or made a commitment to hire a replacement, see 5 C.F.R. § 715.202(b), or that the appellant's position had been abolished, see *Almon*, 16 M.S.P.R. at 127. The agency has also failed to allege and present evidence showing that it is more likely true than untrue that administrative disruption would have occurred if it had accepted the appellant's withdrawal request before the effective date of his resignation. For example, it has not shown that it did not have enough resignations and retirements under its voluntary separation programs to avoid a RIF when the appellant requested a withdrawal of his resignation, or that permitting the appellant to withdraw his resignation would have adversely affected any employees whose jobs had been saved because of his resignation. See *Knox v. Equal Employment Opportunity Commission*, 13 M.S.P.R. 479, 482 (1982).

Although the purpose of the VSIP program is to avoid or minimize the need for involuntary separations due to a RIF, base closure, reorganization, transfer of function, or other similar action, see 5 U.S.C. § 5597(b), the administrative judge's mere speculation that administrative disruption might have occurred is not enough to sustain the agency's burden of proving a valid reason by preponderant evidence, see *Browning*, slip op. at 10-12 (the agency's desire to avoid a RIF that appeared to be at least 17 months away and might not occur at all did not constitute a sufficient showing of administrative disruption); see also *Einstein v. Department of the Army*, 26 M.S.P.R. 404, 408 (1985) (recruitment by an agency that does not reach the stage of actual hiring or commitment to hire a replacement did not constitute a valid reason such as "hiring or commitment to hire a replacement," or undue disruption absent special circumstances).

Therefore, we find that the agency failed to demonstrate a valid reason for denying the appellant's request to withdraw his resignation before its

effective date, that his resulting separation by resignation became involuntary and constituted a removal action within the Board's jurisdiction, and that the agency, in effect, removed the appellant without according him the adverse action rights to which he was entitled under 5 U.S.C. ch. 75 or even minimum due process. *See Robinson v. U.S. Postal Service*, 50 M.S.P.R. 433, 437 (1991); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81, 684 (1991); *Sunderland v. Veterans Administration*, 13 M.S.P.R. 618, 620 (1982). Accordingly, we reverse the agency's action for failure to afford the appellant minimum due process. *See Stephen*, 47 M.S.P.R. at 684.

### **ORDER**

We ORDER the agency to cancel the appellant's separation and to restore the appellant effective August 31, 1993. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

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.