UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 23

Docket No. DA-0752-11-0643-I-1

Isaac Freeborn,

Appellant,

v.

Department of Justice,

Agency.

March 29, 2013

Isaac Freeborn, Spicewood, Texas, pro se.

Loretta A. Burke, Grand Prairie, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed for lack of jurisdiction his appeal of his alleged involuntary resignation. For the following reasons, we GRANT the petition for review, REVERSE the initial decision, ORDER the agency to reinstate the appellant to

his former position, and REMAND the appeal for further proceedings regarding the appellant's claim of whistleblower reprisal.[1]

BACKGROUND

¶2 The appellant, a GS-15 Clinical Director at the agency's Bureau of Prisons (BOP), filed an August 22, 2011 appeal asserting that his April 27, 2011 resignation was involuntary. Initial Appeal File (IAF), Tab 1 at 2, 4. The appellant claimed that, after he admitted during an Office of Inspector General (OIG) investigation that he had permitted on two or three occasions "soft" contraband, namely, tennis shoes, to enter the prison facility in which he previously worked, the warden of his current facility told him that he was going to suspend him for 10 days immediately and begin his own administrative investigation, or the appellant could resign. *Id*. at 6; IAF, Tab 7 at 9-10; Hearing Compact Disc (HCD) (testimony of the appellant). The appellant asserted that he later learned that this was inaccurate information and that he unsuccessfully tried to rescind his resignation. IAF, Tab 1 at 6. The appellant also claimed that, if the warden had given him the proper notice to effect a 10-day suspension, he would have had the opportunity to explore all of his options and would not have felt the extreme time constraints and duress that led him to resign. *Id*. at 9.

¶3 The administrative judge ordered the appellant to file evidence and argument proving that the appeal was within the Board's jurisdiction. IAF, Tab 2. The administrative judge noted that the appellant would be granted a hearing only if he made allegations of duress, coercion, or misrepresentation supported by facts that, if proven, would establish that his resignation was

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered this matter under the previous version of the Board's regulations, the outcome would be the same.

involuntary. *Id*. The administrative judge also ordered the appellant to show that his appeal was timely filed or that good cause existed for the delay. *Id*. at 3.

¶4 In response, the appellant submitted a declaration under penalty of perjury alleging that the warden told him that the matter was very serious, that he was not "cut out" for correctional medicine, that he was suspending the appellant immediately for 10 days, and that if he resigned "right now" there would be no suspension in his personnel record. IAF, Tab 7 at 2, and Ex. A. The appellant asserted that he therefore believed that the only way for him to maintain a clean personnel record was immediate resignation, and that no one informed him that he would be entitled to notice and an opportunity to respond before a suspension could occur. *Id*. at 2-3. Regarding the timeliness issue, the appellant claimed that the agency did not provide him with notice of Board appeal rights of his involuntary resignation, and that he filed his appeal within 5 days after learning that he could do so. *Id*. at 6-7; IAF, Tab 11 at 1.

¶5 Subsequently, the appellant alleged that, after his receipt of discovery materials from the agency, he learned that the warden had in his possession at the time of the appellant's resignation a home duty status letter prepared for the appellant, but did not provide that letter to the appellant before he resigned. IAF, Tab 14 at 1-3. The home duty status letter stated that placement in a home duty status was not a disciplinary or adverse action, and that the appellant would receive full pay and benefits while on such status. *Id*., Ex. 1. The appellant asserted that this letter contradicted the warden's statement that the appellant would be suspended for 10 days immediately, which the appellant believed meant a disciplinary suspension without pay, and that he would not have resigned had he been provided this information. *Id*. at 2-3, and Ex. 2.

¶6 After a hearing, the administrative judge dismissed the appeal for lack of jurisdiction upon finding that the appellant did not prove by preponderant evidence that his resignation was involuntary. IAF, Tab 26, Initial Decision (ID) at 3-12. The administrative judge found that the warden testified in a forthright

and complete manner that he told the appellant that he was considering putting him on home duty status pending an investigation into the allegation that he introduced contraband into a correctional facility, that he explained to the appellant that home duty status was not an adverse action and that pay and benefits would not stop, and that if the investigation resulted in charges being brought, it could result in anything from a verbal reprimand to removal. ID at 5, 9. The administrative judge held that the warden's account was essentially undisputed because the appellant's testimony did not contradict the warden's description of the meeting, but at most reflected that the appellant did not understand the meaning of the term home duty status or did not remember that term being used. ID at 9. Furthermore, the administrative judge found that the appellant's claim that he did not understand or hear the term "home duty status" was undermined by the regional medical director, who testified without contradiction that the appellant telephoned her the same day he resigned and told her that the warden intended to place him on home duty status. ID at 7, 9. The administrative judge credited the warden's testimony that the appellant voluntarily decided to resign before the warden got to the point of notifying the appellant that he would actually be placed on home duty status and reading him the notice letter, and that the warden encouraged the appellant to talk to his wife before resigning. ID at 9-10.

¶7 The administrative judge found that the appellant's claim that the warden told him he would immediately serve a 10-day suspension lacked credibility because: (1) Both the warden and the appellant testified that the warden told the appellant that any discipline could range from a verbal reprimand to removal; (2) the appellant's inquiry about possible outcomes of an as-yet-unfinished investigation undermined his claim that he believed he was being immediately suspended; and (3) the warden distinguished discipline from the home duty status he was considering pending the outcome of the investigation. ID at 10.

ANALYSIS

¶8 The appellant asserts on review that, during his meeting with the warden of his correctional facility on the day he decided to resign, the warden did not provide him with the written letter explaining the term "home duty status," which the warden was going to implement with respect to the appellant pending an investigation into possible misconduct. Petition for Review (PFR) File, Tab 1 at 8-9. Thus, the appellant reiterates the contention he raised below that the warden gave him incomplete or inaccurate information regarding sending him home from work because the warden did not explain that home duty status was a paid status. *Id.* The appellant contends that he resigned because he incorrectly believed that the warden was immediately suspending him without pay for 10 days. *Id.* The appellant further asserts that, although the administrative judge addressed whether there was coercion, misrepresentation, or deceit by the agency, he did not address whether there was misinformation, which can be negligently or innocently provided. *Id.* at 10-11. In this regard, the appellant contends that the administrative judge should have applied the Board's decision in *Gibeault v. Department of the Treasury*, 114 M.S.P.R. 664, ¶ 8 (2010), which holds that an employee-initiated action is considered involuntary if it resulted from the employee's reasonable reliance on the agency's misleading statements or from the agency's failure to provide the employee with adequate information on which to make an informed choice. PFR File, Tab 1 at 8-9, 11.

¶9 A decision to resign is presumed to be a voluntary act outside the Board's jurisdiction, and the appellant bears the burden of showing by a preponderance of the evidence that his resignation was involuntary and therefore tantamount to a forced removal. *Baldwin v. Department of Veterans Affairs*, 111 M.S.P.R. 586, ¶ 15 (2009). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). One means by which an appellant may overcome the

presumption of voluntariness is by showing that the resignation was obtained by agency misinformation or deception. *See Baldwin*, 111 M.S.P.R. 586, ¶ 15.

¶10 The touchstone of the analysis of whether a retirement or resignation is voluntary is whether the employee made an informed choice. *Id.*, ¶ 16. A decision made "with blinders on," based on misinformation or lack of information, cannot be binding as a matter of fundamental fairness and due process. *Id.* (quoting *Covington v. Department of Health & Human Services*, 750 F.2d 937, 943 (Fed. Cir. 1984)). The Board has stated that the principles set forth in the court's decisions in *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983), and *Covington* require an agency to provide information that is not only correct in nature but adequate in scope to allow an employee to make an informed decision, and that this includes an obligation to correct any erroneous information that it has reason to know an employee is relying on. *Baldwin*, 111 M.S.P.R. 586, ¶ 16; *see Johnson v. U.S. Postal Service*, 66 M.S.P.R. 620, 627-28 (1995).

¶11 Here, even assuming that the warden credibly testified that he provided the appellant with correct information regarding the difference between home duty status and a disciplinary suspension,[2] the record reflects that the appellant erroneously believed that he was facing the choice of being immediately disciplined by means of a suspension for 10 days or resigning, and that the warden had reason to know of that erroneous information but did not correct it.

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[2] The appellant's sworn statement indicates that the warden informed him that he was being suspended immediately for 10 days, and that if he resigned there would be no suspension in his personnel record. IAF, Tab 7 at 10. The appellant testified that the warden did not inform him that he was being placed on home duty status, that such a status was non-disciplinary, and that he would continue to receive pay. HCD. Rather, the appellant testified that the warden merely informed him that he could either be sent home for 10 days or resign. *Id.*

¶12 The warden testified that, when the appellant asked him if there would be a "suspension" in his file if he resigned, the warden replied, "No," and told him that there would be no investigation. HCD. The warden also testified that, after the appellant asked him if there would be a "suspension" in his record, the warden said, "No," and the appellant replied, "OK, I'll resign." *Id*. Similarly, the warden again, when asked if he suggested that resignation would be an option to avoid home duty, replied that the appellant asked if there would be a "suspension" in his file if he resigned, and that the warden responded that if he resigned there would be no investigation. The appellant's attorney asked the warden if the appellant's question, regarding whether he would have a suspension in his file if he resigned, indicated to the warden that the appellant felt he needed to resign immediately to avoid a suspension. The warden replied, "No," and stated that it merely told him that he did not want any kind of suspension in his case. *Id*. The appellant testified that, when he asked the warden what would happen if he resigned, the warden stated that nothing would go in his personnel file. *Id*.

¶13 These questions by the appellant at the time of his resignation establish by preponderant evidence that he believed that he was being disciplined by means of a "suspension," and that he decided to immediately resign because he did not want a disciplinary suspension in his personnel file. This testimony reflects incorrect information upon which the appellant was relying that was not corrected by the warden or anyone else at the agency. If the appellant had been placed in a home duty status instead of resigning, there would still not have been a disciplinary suspension in his file. In this regard, the warden testified that home duty status is nondisciplinary and that, before issuing a disciplinary suspension, the agency would have to issue a written notice of proposed discipline before any discipline would take place. *Id*.

¶14 The above testimony by the appellant, that he believed he was being immediately suspended for 10 days and needed to resign immediately to avoid

having a disciplinary suspension in his record, is consistent with a letter he wrote to the assistant director for administration at the agency's central office 1 month after his resignation. That letter provides, in relevant part,

> [t]his letter is directed to you via Mr. Tammaro who I spoke with 5/19/2011 informing me of an approximately 150,000$ [sic] balance I owe to the BOP in regards to a recent transfer from Oakdale FCC [Federal Correctional Complex] to Bastrop FCI [Federal Correctional Institution]. I resigned from the BOP 4/27/11 as recommended by the warden after informing him that I gave affidavit [sic] to OIG in reference to an investigation regarding introduction of soft contraband. I was initially informed by OIG that this was not a criminal offense. I seemed to have inadvertently allowed soft contraband into Oakdale FCC by signing off on authorizations initiated by my former clinical director. This investigation was on going and was not completed. I was told by OIG that final report would be completed in several months. *Immediately following my affidavit I informed the warden on my own free will and at that point was told by the warden that I would be suspended immediately for approximately 10 days and placed under investigation by him or I could resign.* I at that point resigned. I discussed my decision with my wife that evening and attempted to speak with the warden again and rescind my resignation within 24 hrs: I was unable to reach the warden in that time frame and proceeded to obtain another position outside of the BOP.

IAF, Tab 12 at 6-7 (emphasis added). Although the administrative judge found the appellant not credible in part because both the warden and the appellant testified that the warden told the appellant that any discipline could range from a verbal reprimand to removal, and the appellant's inquiry about possible outcomes of an as-yet-unfinished investigation undermined his claim that he believed he was being immediately suspended, our review of the record reflects that the appellant testified that the warden never told him that the outcome could be a verbal reprimand to a removal. *See* HCD (testimony of the appellant on cross-examination). Moreover, the warden testified that it was possible for an employee to get confused between home duty status and a suspension, and that he had no idea if the appellant knew the distinction between those actions. HCD.

The warden further testified that he did not inform the appellant that he would be entitled to written notice of any proposed discipline before such discipline took place because it did not come up. *Id*.

¶15 We find that the above testimony demonstrates by a preponderance of the evidence that the appellant erroneously believed that he needed to resign to avoid having a disciplinary suspension placed in his personnel file, that the warden was aware of this erroneous belief, and that the warden did not correct this erroneous belief. The warden did not, for example, inform the appellant that if he did not resign, i.e., even if the agency placed him in a home duty status, he would not have a disciplinary suspension in his record because no such discipline had been proposed, nor had an administrative investigation taken place. Thus, we find that the appellant has shown that his resignation was involuntary and therefore tantamount to a forced removal within the Board's jurisdiction.

¶16 We further find that the appellant demonstrated good cause for the delay in filing his appeal. *See Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 588 (1995) (an appellant who was not provided a required notice of appeal rights is not required to show that he exercised due diligence in attempting to discover his appeal rights; the question is whether he was diligent in filing an appeal after he learned he could do so). There is no dispute that the agency did not inform the appellant of his right to appeal his alleged involuntary resignation to the Board. Moreover, the appellant filed his appeal within 5 days of learning of his right to do so. HCD (testimony of the appellant); IAF, Tab 7 at 11 (declaration of the appellant). Inasmuch as the action was taken without affording the appellant minimum due process of law, it cannot stand. *See Johnson*, 66 M.S.P.R. at 628.

¶17 Finally, we note that the appellant withdrew his claim of whistleblower reprisal in connection with his involuntary resignation so that he could possibly proceed before the Office of Special Counsel (OSC) regarding that claim. ID at 1 n.2; HCD; IAF, Tab 21 at 3 n.1. In this regard, the appellant's representative indicated that it "may be appropriate" for the appellant to pursue his claim of

whistleblower reprisal by filing a complaint with OSC and thereafter proceeding "if necessary" with an individual right of action (IRA) appeal before the Board. IAF, Tab 21 at 3 n.1. The appellant's representative therefore requested that the whistleblower issue be set aside without prejudice to a "possible IRA appeal at a later time." *Id*. It is unclear at this stage of the proceedings, and in light of our determination that we have jurisdiction over this appeal, whether the appellant wishes to pursue his claim of whistleblower reprisal. In addition, we note that this case may involve an election of remedy issue under 5 U.S.C. § 7121(g), under which the appellant's decision to first appeal to the Board could preclude his pursuit of a remedy through OSC and the IRA appeal process.

¶18 Accordingly, we REMAND this issue to the regional office. If the appellant informs the administrative judge that he wishes to pursue his whistleblower claim, the administrative judge should adjudicate that claim if he determines that the appellant made a binding election to proceed with that claim before the Board and that his decision to withdraw that claim in this appeal filed under 5 U.S.C. chapter 75 was based upon a material misunderstanding. *See Zendejas v. Department of Homeland Security*, 107 M.S.P.R. 348, ¶¶ 6-8 (2007). If the appellant informs the administrative judge that he does not wish to pursue his whistleblower claim, the administrative judge should issue a new initial decision that incorporates the findings in this Opinion and Order and affords the appellant notice of his appeal rights and his right to file a motion for attorney fees.

ORDER

¶19 Accordingly, we REMAND this appeal for further proceedings regarding the appellant's whistleblower claim. *See Cowart v. U.S. Postal Service*, 117 M.S.P.R. 572, ¶ 11 (2012); *Schibik v. Department of Veterans Affairs*, 98 M.S.P.R. 591, ¶ 13 (2005); *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 15 (2000).

¶20 Notwithstanding the remand proceedings on the appellant's claim of whistleblower reprisal, we ORDER the agency to cancel the appellant's resignation and to restore the appellant effective April 27, 2011. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶21 We also ORDER the agency to pay the appellant the correct 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 calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶22 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶23 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶24 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision

are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

FOR THE BOARD:

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc., with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.