

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,
Appellant,

DOCKET NUMBER
DC-0752-23-0457-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: May 3, 2023

<p style="text-align:center">THIS DOCUMENT CONTAINS IMPORTANT INFORMATION ABOUT THIS APPEAL AND ITS PROCESSING. PLEASE READ THE ENTIRE DOCUMENT CAREFULLY.</p>

There is a question whether this appeal is within the Board's jurisdiction. As a result, the Board might dismiss the appeal for lack of jurisdiction without addressing the merits of the case. This Order provides necessary information concerning the jurisdictional issue and steps the appellant must take to show that the Board should not dismiss the appeal for lack of jurisdiction.

ORDER TO SHOW CAUSE - JURISDICTION

The appellant's petition for appeal claims an involuntary retirement or resignation. I **ORDER** the parties to follow the procedures set out below. If either party has a question about any of the case processing instructions in this Order, you may telephone this office at the phone number listed at the end of the Order for assistance.

NOTICE TO THE APPELLANT

The Board may not have jurisdiction to decide an appeal from the kind of action you are challenging. Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board. I will dismiss your appeal, therefore, unless you make a nonfrivolous allegation that you resigned or retired because of duress, coercion, or misrepresentation by the agency. See 5 C.F.R. § 1201.4(s). If you are asking for a hearing, one will be held only if you support your claim with affidavits or other evidence of facts which, if proven, could show that your retirement or resignation was involuntary because of duress, coercion, or misrepresentation. Conclusory, vague, or unsupported allegations are not enough to meet this standard.

Specifically, you must make detailed factual allegations that one of the following things happened to you: (1) The agency made misleading statements on which you relied to your detriment; or (2) under all of the circumstances the agency made your working conditions so difficult because of discrimination or another reason that a reasonable person in your position would have felt compelled to resign or retire; or (3) you sought to withdraw your retirement or resignation prior to its effective date and the agency did not have a valid reason for not allowing its withdrawal; or (4) your resignation or retirement was the product of mental incompetence, or was secured in violation of the law; or (5) if you resigned or retired after the agency proposed to remove you, you may prove your claim by showing that the agency knew that the reason for the threatened removal could not be substantiated. Retirement after the agency issued its decision to remove you, however, does not raise a question of voluntariness, and instead allows the Board to consider the merits of the removal unless before you filed your appeal, the agency cancelled or rescinded the action or modified it to one that is not appealable. See *Taber v. Department of the Air Force*, 112 M.S.P.R. 124, ¶ 8 (2009).

If you make a nonfrivolous allegation supported by affidavits or other evidence that your retirement or resignation is within the Board's jurisdiction, you must then establish that the Board has jurisdiction over your appeal by proving the same matters by preponderant evidence. You will be provided the opportunity to do this either at a hearing or during a further opportunity for the parties to develop the written record. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a disputed fact is more likely true than untrue. 5 C.F.R. § 1201.4(q). In other words, you must show that it is more likely than not that you were prevented from making a voluntary decision to resign or retire in one of the ways listed above.

The Board lacks jurisdiction over claims of prohibited discrimination that are not made in connection with a matter that is appealable to the Board. Thus, if you claim that discrimination caused you to resign or retire, I may only address that claim insofar as it is relevant to the issue of involuntariness. Only if you eventually prove that the Board has jurisdiction over your resignation or retirement may I then consider the merits of your discrimination claim under the standards of the applicable antidiscrimination statute.

I **ORDER** you to file evidence and/or argument amounting to a nonfrivolous allegation that your claim of involuntary resignation or retirement is within the Board's jurisdiction. **Your submission must be filed so that it is receive by me and the agency no later than May 11, 2023.** If you fail to **timely respond to this Order, your appeal will be DISMISSED for lack of jurisdiction.** The agency may file a response on this jurisdictional issue no later than **May 18, 2023.**

Unless I tell the parties otherwise, the record on this issue will close on **May 18, 2023, or if the appellant fails to timely respond to this order, the record will close on May 11, 2023.** That means I will not accept any more evidence or argument prior to making a finding on whether you have made a

nonfrivolous allegation on the jurisdictional issue unless the party submitting it shows that the evidence or argument was not readily available prior to the close of the record or is in rebuttal to evidence or argument submitted by the other party just before the close of the record. 5 C.F.R. § 1201.58(c).

Stay of the Agency File and Discovery

The deadlines in the Acknowledgement Order in regard to the submission of the Agency File and initiation of discovery are STAYED.

FOR THE BOARD:

_____/S/
Joshua Henline
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

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May 3, 2023

(Date)

/s/

Tonya Holman
Paralegal Specialist