

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

HARRY L. HOLLINGSWORTH,
Appellant,

v.

DEFENSE COMMISSARY AGENCY,
Agency.

DOCKET NUMBER
AT-0752-98-0210-I-1

DATE: JUN 2 1999

Thomas B. Harris, Fort Stewart, Georgia, for the appellant.

Elliot J. Clark, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The agency petitions for review of the initial decision, issued on January 26, 1998, that found that the agency constructively suspended the appellant from the WG-7 position of Meatcutter. For the reasons set forth below, we GRANT the petition, VACATE the initial decision, and REMAND the appeal to the regional office for a jurisdictional hearing.

BACKGROUND

¶2 On September 17, 1997, the military police on Fort Stewart, Georgia, issued an investigation report based on information that the appellant had stolen U.S. Government meats from the commissary where he worked as a meatcutter. *See*

Initial Appeal File (IAF), Tab 6, Subtab 4t. Based on that report, on October 2, 1997, the Defense Commissary Agency (DCA), the appellant's employing agency, sent him a notice of proposed removal from the WG-7 position of Meatcutter based on the charges of making a false statement in a matter of official interest and theft of government property. *See* IAF, Tab 6, Subtab 4s.¹ DCA is a Department of Defense tenant agency on Fort Stewart, Georgia, an Army facility. *See* IAF, Tab 7. Also based on that report, on October 20, 1997, the Commanding General of Fort Stewart sent the appellant a bar letter prohibiting him from entering Fort Stewart for a period of six years. *See* IAF, Tab 6, Subtab 4l. The bar letter provided that, if the appellant entered Fort Stewart without permission during the six-year period, he risked arrest, detention, and delivery to a U.S. Marshal. *Id.* The bar letter provided further that the appellant could request reconsideration by sending a request and supporting evidence to the Staff Judge Advocate within fifteen days of the notice. *Id.*

¶3 On October 27, 1997, the appellant, through his union representative, responded to the bar letter. *See* IAF, Tab 6, Subtab 4j. He addressed his response to the Commissary Officer at DCA. *Id.* In the response, he denied stealing meat. *Id.* He expressed his opinion that he would continue to earn his salary, even though he could not report for work. *Id.* On October 29, 1997, DCA forwarded the appellant's letter to the Commanding General, and stated that the opinion that the appellant would continue to earn his salary even though he could not report for work was incorrect. *See* IAF, Tab 6, Subtab 4i. Also on October 30, 1997, DCA advised the appellant telephonically that he would be carried in an absent-without-leave (AWOL) status for any day that he did not report for work. *See* IAF, Tab 6, Subtab 4g. By letter dated November 5, 1997, the appellant advised

¹ On October 31, 1997, DCA issued a decision on the proposed removal, mitigating the penalty to a 45-day suspension. *See* Petition for Review File (PFRF), Tab 4.

DCA that he was ready, willing, and able to work, and stated his belief that DCA could request a limited bar which provides for "ingress and egress [sic] to the work place." IAF, Tab 6, Subtab 4e. He also stated that the bar letter was tantamount to a suspension without due process. *Id.* By letter of November 13, 1997, DCA responded stating that the appellant alone had the authority to present a case to the Commander for modification or removal of the bar.² *See* IAF, Tab 6, Subtab 4b. DCA stated that it did not participate in the decision to bar the appellant from Fort Stewart. *Id.*

¶4 The appellant petitioned for appeal. *See* IAF, Tab 1. He alleged that it was common practice for affected organizations to request from the Commanding General a "limited bar" which would allow an employee in the appellant's situation the opportunity to report for work and to leave the installation by the most direct route. *See* IAF, Tab 5. He asserted that, under the circumstances, DCA had constructively suspended him. *See* IAF, Tabs 1 and 5. He requested a Board hearing. *See* IAF, Tab 1. Without holding the requested hearing, the administrative judge found that the appellant was not absent from his work site by choice. *See* IAF, Tab 8 (Initial Decision (ID) at 4). He also found that DCA had choices other than placing the appellant in an AWOL status. *Id.* He found that the agency could have attempted to secure a modification of the bar letter, permitting the appellant the limited right of ingress and egress to his work site, could have proposed a separate suspension based on the bar itself, or could have placed the appellant on administrative leave. *Id.* He found that by failing to avail itself of any of these options, the agency constructively suspended the appellant. *Id.* The agency has petitioned for review. *See* Petition for Review File (PFRF), Tab 1.

² On March 6, 1998, the Commander, Fort Stewart, responded to the appellant's request for reconsideration of the bar letter by allowing the appellant limited access to Fort Stewart so that he could report for work. *See* PFRF, Tab 4.

ANALYSIS

¶5 In its petition, the DCA asserts that, because the bar letter was issued by the Commanding General of Fort Stewart, it did not take any action that prevented the appellant from reporting for work. DCA contends that, based on the bar letter, the appellant initiated the leave, and the agency properly carried him AWOL.

¶6 The Board's jurisdiction is not plenary but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. The appellant bears the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See Herring v. Department of Veterans Affairs*, 72 M.S.P.R. 96, 98 (1996). An agency's placement of an employee on enforced leave for more than 14 days constitutes a constructive suspension appealable to the Board. For purposes of jurisdiction, the key question is whether the agency or the appellant initiated the leave. *See Lohf v. U.S. Postal Service*, 71 M.S.P.R. 81, 84 (1996).

¶7 The Board has defined circumstances that constitute a nonfrivolous allegation that the agency initiated the absence and that the enforced absence constitutes a constructive suspension appealable to the Board. *See Thibodeaux v. Department of the Air Force*, 76 M.S.P.R. 178, 181 (1997); *Dize v. Department of the Army*, 73 M.S.P.R. 635, 639-40 (1997); *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 692 (1996). Taking guidance from *Thibodeaux*, *Dize* and *Baker*, we find that the following circumstances constitute a nonfrivolous allegation that an agency initiated an employee's absence, and that the enforced absence constitutes a constructive suspension appealable to the Board: (1) The employee is absent because of circumstances beyond his control; (2) he informs the agency, that, but for the circumstance beyond his control, he is ready, willing and able to work; (3) the agency is bound by agency policy, rule, regulation, contractual provision, or other authority to offer assistance to the employee with the circumstances beyond his control; and (4) the agency fails to offer the employee such assistance. *See*

Thibodeaux, 76 M.S.P.R. at 181; *Dize*, 73 M.S.P.R. at 639-40; *Baker*, 71 M.S.P.R. at 692. See also *Humphrey v. Department of the Army*, 76 M.S.P.R. 519, 525-526 (1997) (the Board will hold agencies obligated beyond the requirements of the law to provide employees the benefits they have established by policy, rule, or regulation).

¶8 Under the circumstances set forth above, the appellant made a nonfrivolous allegation that the Board has jurisdiction over his appeal as a constructive suspension. See *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. See *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). An appellant who makes a nonfrivolous allegation of Board jurisdiction over a constructive agency adverse action is entitled to a jurisdictional hearing. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985).

¶9 Here, the appellant alleged that he was absent due to circumstances beyond his control, the bar letter, and that he informed the agency that, but for the bar letter, he was ready, willing and able to work. See IAF, Tabs 1 and 5. He also alleged that it was common practice for affected organizations to request from the Commanding General a "limited bar" which would allow an employee in the appellant's situation the opportunity to report for work and to leave the installation by the most direct route, and that the agency failed to seek a limited bar for him. *Id.* Although the appellant made a nonfrivolous allegation of Board jurisdiction, he did not establish Board jurisdiction because he did not prove his assertion that it was common practice for affected organizations to request from the Commanding General a "limited bar" which would allow an employee in the appellant's situation the opportunity to report for work and to leave the installation by the most direct route. If the appellant can prove that there was

indeed such a practice, and that the practice was mandated by a binding agency policy, rule, regulation, contractual provision, or other authority, then the Board has jurisdiction over this appeal. *Cf. Griffin v. Defense Mapping Agency*, 864 F.2d 1579, 1580-81 (Fed. Cir. 1989) (when an employee loses the security clearance that is a requirement for his position, if the agency had "an 'existing policy,' manifested by regulation," to reassign such an employee to an available non-sensitive position, the agency can "be held to that policy and the Board c[an] review its efforts").

¶10 In its petition, the agency asserts that it is a part of the Department of Defense, and as such it is an agency separate from the Department of the Army, which issued the bar letter. *See* PFRF, Tab 1. It argues that, as a separate agency from the Department of the Army, it cannot be held responsible for actions taken by Fort Stewart in accordance with its own regulations. We note, however, that as a tenant agency, DCA performed certain functions in cooperation with the Department of the Army through memorandums of agreement (MOAs), memorandums of understanding (MOUs), interservice support agreements (ISAs), and other means. *See, e.g.*, AR 405-80, Para. 4.31 (Oct. 10, 1997) (MOUs and MOAs document areas of responsibility or mutual understanding between the installation provider/host and the customer/tenant, and the requirements for recurring support are documented on ISAs). Thus, we find that, even if DCA established that it is a separate agency from the Department of the Army, *see Francis v. Department of the Navy*, 53 M.S.P.R. 545 (1992), that fact is not dispositive of whether DCA constructively suspended the appellant under the circumstances of this appeal. Rather, the dispositive issue is whether DCA had a policy, rule, contractual provision, or regulation that obligated its cooperation with the Department of the Army to seek for the appellant a "limited bar," enabling him access to Fort Stewart so that, notwithstanding the bar letter issued by the Army Commander, the appellant could get to his job.

¶11 We find therefore that the administrative judge erred in finding that the appellant met his burden to prove that DCA constructively suspended him. Nonetheless, we find that the appellant made nonfrivolous allegations of fact that entitle him to a hearing on the issue of jurisdiction. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985); *Holden v. U.S. Postal Service*, 78 M.S.P.R. 420, 424 (1998).

ORDER

¶12 Accordingly, we remand this appeal to the regional office for a jurisdictional hearing and for such further proceedings as may be necessary consistent with this Opinion and Order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.