

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

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MELVIN W. PARK,)	DOCKET NUMBER
Appellant,)	AT-315H-97-0260-I-1 ¹
)	
v.)	
)	
DEPARTMENT OF HEALTH AND HUMAN)	DATE: MAY 29, 1998
SERVICES,)	
Agency.)	
)	
)	
)	
)	

Joyce E. Kitchens, Esquire, Atlanta, Georgia, for the appellant.

S. Elizabeth Henderson, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

The appellant has filed a timely petition for review of a January 29, 1997 initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115, VACATE the

initial decision, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

On November 11, 1995, the appellant was terminated from his permanent tenure (tenure group I), competitive service position of GS-12 Research Physiologist with the Department of the Army in Fort Benning, Georgia. The reason indicated on the Standard Form (SF) 50 documenting the termination was appointment in the Department of Health and Human Services (the agency). Initial Appeal File (IAF), Tab 4, subtab 4d. On November 12, 1995, the appellant received a career appointment to the competitive service position of GS-11 Technical Writer-Editor with the agency in Atlanta, Georgia. The November 14, 1995 SF-50 documenting the appointment indicated that the appellant had been selected from a certificate and his tenure was conditional (tenure group II). *Id.*, subtab 4c. On November 17, 1995, however, the agency issued a corrected SF-50 adding the remark that the appellant would be in tenure group II until he completed the one-year probationary period that began on November 12, 1995. *Id.*, subtab 4c.

On November 5, 1996, the agency notified the appellant that he would be terminated during his probationary period, effective November 8, 1996, for inefficient performance of duties. *Id.*, subtab 4b. On November 8, 1996, the appellant resigned from his position. *Id.*, subtab 4a. The appellant then filed a timely petition for appeal of his “dismissal,” alleging that his resignation was involuntary. IAF, Tab 1.

The administrative judge informed the appellant that the Board may lack jurisdiction over his appeal as a probationary employee, set out the appeal rights

¹ We note that the caption of the initial decision erroneously set forth the docket number in this appeal as AT-0752-97-0260-I-1. However, the above docket

for probationary employees, ordered him to file evidence and argument proving that his appeal is within the Board's jurisdiction, and informed the appellant that he would be granted a hearing only if he made a nonfrivolous allegation of jurisdiction. IAF, Tab 2. The appellant responded, in part, that he had over one year of service in a similar position and thus should have "full rights of appeal" to the Board. IAF, Tab 3 at 3. The agency asserted, in part, that the appellant was selected from an external certificate and that his previous federal service was not credited for probationary period purposes. IAF, Tab 4, subtab 1.

In a subsequent order, the administrative judge informed the appellant that he must show that he is an "employee" under 5 U.S.C. § 7511(a)(1) for the Board to have jurisdiction over his appeal. IAF, Tab 5. The appellant responded to the administrative judge's order, arguing that he was an employee under 5 U.S.C. § 7511(a)(1)(A)(i) because he was not serving a probationary period under an initial appointment but had been transferred to the competitive service Technical Writer-Editor position from a competitive service position in which he had already served a probationary period. To support his assertion that he had been transferred, he submitted a November 6, 1995 letter from Debra Dorsey, Personnel Management Specialist at the agency. The letter, in part, confirmed the appellant's acceptance of a "transfer" to the agency and stated that the appellant would be "transferred to a career, full-time permanent position as a Technical Writer-Editor, GS-1083-11, effective date November 12, 1995." IAF, Tab 6.

Citing 5 C.F.R. §§ 315.501, 315.502, and 315.801(b), the appellant argued that he was not required to serve another probationary period because the Department of Health and Human Services had transferred him to the position as a permanent career employee. He also reiterated that his resignation was involuntary. IAF, Tab 6.

number is the correct docket number in this appeal.

The administrative judge dismissed the appellant's appeal for lack of jurisdiction without holding the appellant's requested hearing. The administrative judge found that the appellant was not an employee under 5 U.S.C. § 7511(a)(1)(A)(i). In doing so, he cited the SF-50s, which he found clearly indicated that the appellant was serving a probationary period. Thus, he found that the Board lacks jurisdiction over the appellant's appeal. Because of this, he also found that the Board lacks jurisdiction to consider the appellant's allegations of discrimination and harmful error. Initial Decision (I.D.) at 2-3.

The appellant filed a petition for review to which he attached documents that are already part of the record below. Petition for Review (PFR) File, Tab 1. The agency did not respond to the appellant's petition.

The Board issued an Opinion and Order remanding this case to the regional office for further consideration. *Park v. Department of Health & Human Services*, MSPB Docket No. AT-315H-97-0260-I-1 (July 16, 1997). Subsequently, however, we issued an Order that vacated that Opinion and Order, directed that the case be forwarded from the regional office for further consideration, and notified the parties that we would issue a new Opinion and Order adjudicating this case. *Park v. Department of Health & Human Services*, MSPB Docket No. AT-315H-97-0260-I-1 (Nov. 18, 1997).

ANALYSIS

The appellant has presented a nonfrivolous allegation that he was transferred to his new position and thus is an "employee" entitled to appeal his removal to the Board.

The appellant contends, among other things, that the administrative judge erred in declining to hold a jurisdictional hearing. PFR at 2. We agree.

To be entitled to a jurisdictional hearing, an appellant must make a nonfrivolous allegation that the Board has jurisdiction over his appeal. 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. In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions. But, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *See, e.g., Collins v. Department of Justice*, 70 M.S.P.R. 334, 338 (1996); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

An "employee" who may appeal an adverse action to the Board means, inter alia, "an individual in the competitive service ... who is not serving a probationary or trial period under an initial appointment. ..." 5 U.S.C. § 7511(a)(1)(A)(i). The appellant asserts that he was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i), entitled to appeal to the Board, because he was transferred from a career position with the Department of the Army to a career position with the agency without a break in service. He cites the November 6, 1995 letter from Dorsey and the November 14, 1995 SF-50 to support his assertion. He argues, in effect, that under the regulations,² the agency had the authority to transfer him to a permanent position without requiring him to serve a new probationary period. Citing *Niles v. Department of Justice*, 9 M.S.P.R. 63 (1981), he further argues that the SF-50, by itself, could not retroactively change the nature of his appointment. PFR at 3.

² Sections 315.501 and 315.502, 5 C.F.R., provide that an agency may appoint by transfer to a competitive service position a current career or career-conditional employee of another agency and that an employee generally retains his career or career-conditional status upon transfer. Section 315.801(b) provides that a person who is transferred under section 315.501 before he has completed probation is required to complete the probationary period in the new position. *See Phillips v. Department of Housing & Urban Development*, 44 M.S.P.R. 48, 52 n.1 (1990).

As explained below, we find that the appellant has made a nonfrivolous allegation that he is an employee under 5 U.S.C. § 7511(a)(1)(A)(i). In *Niles*, the Board explained that, if the agency had appointed the appellant by transfer, he would retain, by reason of his career-conditional status prior to transfer, his right to appeal to the Board from his termination for misconduct under 5 U.S.C. Chapter 75. It further explained that, if the agency had appointed the appellant from a register, and thus the appellant, under 5 C.F.R. § 315.801(a) was serving a probationary period, he would have lost his right to appeal to the Board because the Board lacks jurisdiction under 5 U.S.C. Chapter 75 of removal cases involving probationary employees. *Niles*, 9 M.S.P.R. at 65. The Board further stated that the agency has the discretion to determine whether it will appoint from a register or, in the situation in *Niles*, by promotion transfer. Where the agency has the option to appoint an individual by either means, its decision becomes a question of fact. *Niles*, 9 M.S.P.R. at 66.

Here, as previously noted, the agency argued that the appellant was selected from an external certificate and received a career appointment to the GS-11 position. IAF, Tab 4, subtab 1. It presented an SF-50, stating that the appellant had been selected from a certificate, to support its assertion. IAF, Tab 4, subtab 4c. The issue, however, is not simply whether the appellant was selected from a register, but how he was appointed. In *Niles*, even though the appellant's name appeared on a certificate of eligibles, the Board found that he had been appointed by transfer. As a result, the Board there found that the appellant was not a probationary employee. *Niles*, 9 M.S.P.R. at 67.

Here, the administrative judge erred by not addressing the evidence presented by the appellant. Rather, he relied on the SF-50s submitted by the agency to find that the record indicated that the appellant was serving in a probationary period when he resigned. I.D. at 2; IAF, Tab 4, subtab 4c. In doing so, the administrative judge, in effect, weighed the evidence and resolved the

conflicting factual assertions by deeming the agency's evidence to be dispositive. The administrative judge thus committed prejudicial error, and the appeal must be remanded for a jurisdictional hearing and further adjudication. *See, e.g., Collins*, 70 M.S.P.R. at 339.

The appellant has not shown that the agency had an obligation to notify him of the effect of his acceptance of the position on his Chapter 75 adverse action appeal rights.

In our July 16, 1997 Opinion and Order in this case, we found that it was unclear whether the appellant was on notice, prior to his appointment, that he would be required to serve a probationary period and thus would lose his Chapter 75 adverse action appeal rights by accepting the position. Citing *Briggs v. National Council on Disability*, 60 M.S.P.R. 331 (1994), *aff'd*, 83 F.3d 1384 (Fed. Cir. 1996), and *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344 (1994), we found that the agency was obligated to give the appellant prior notice of the effect of his acceptance of the position. Because there was conflicting evidence on the issue of notice, we found that the administrative judge must also address that issue.

We have reconsidered this finding and conclude that it was incorrect. We have determined that our previous finding in this case was contrary to the Board's decision in *Phillips*. In *Phillips*, as in this case, the appellant left employment with one Federal agency to accept employment with another Federal agency. *Phillips*, 44 M.S.P.R. at 50. The Board acknowledged the appellant's claim that she had not been informed of the requirement that she serve a probationary period in her new position. The Board found, however, that it could not waive this requirement based on lack of notice. *Id.* at 52.

In contrast to *Phillips*, the holdings from *Briggs* and *Exum* set forth the following rule: An employee must receive notice from his employing agency regarding the effect of a change in tenure before he can relinquish an agency

appointment with career tenure and adverse actions appeal rights to accept another appointment within the agency that lacks such tenure and appeal rights. *Exum*, 62 M.S.P.R. at 349-50; *Briggs*, 60 M.S.P.R. at 335-36; *see also Kaiser v. Department of the Army*, 75 M.S.P.R. 440, 443-45 (1997). That rule depends, in part, on the principle that an employee has the rights incident to the position to which he is officially appointed. *Anderson v. General Services Administration*, 5 M.S.P.R. 316, 320, *aff'd*, 12 F.3d 1069 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2673 (1994). An employee who has not knowingly consented to the loss of career tenure and appeal rights in accepting another appointment with the agency thus is deemed not to have “accepted” the new appointment and to have retained the rights incident to the former appointment; the Board therefore may exercise jurisdiction over an appeal of an adverse action against that employee.

In practical terms, moreover, the Board’s rule takes into account the relative position of the two parties to a transaction involving a loss of tenure and appeal rights. As the individual’s employer, the agency has readily accessible information about the appointment currently held by an employee and the appointment that he may choose to accept, and it is not unreasonable to require it to disclose that information to the employee. The employee, on the other hand, may not have any indication of the implications of a change in position or assignment (*Exum*, for instance, involved only a change in the amount of scheduled work) because he remains with the agency and may not even have to leave the worksite to which he has been assigned.

Where an employee has left an appointment with one agency to accept an appointment with another agency, however, the situation is different. In *Briggs*, *Exum*, and *Kaiser*, involving a change of positions within the same employing agency, the agency had all of the necessary information at hand to inform the appellant properly of the consequences of the acceptance of the new position. In cases like this appeal, however, a new employing agency may not possess and

cannot be expected to have specific knowledge of the terms of the potential employee's previous employment. It should not have the same obligation to advise the employee of all possible consequences of changing positions.

With respect to such an interagency appointment, the appellant in this case has identified no law, rule, or regulation imposing an obligation on the new employing agency to notify him of the effect of the appointment on his Chapter 75 adverse action appeal rights. Imposing such a notice requirement on a new employing agency could be unduly onerous. For these reasons, the more general notice obligation set forth in *Briggs*, *Exum*, and *Kaiser* concerning a change of position within the same agency does not apply to this appeal involving an employee's new appointment with another employing agency. In circumstances like the present one, the potential new employee is generally in the best position to assess the situation because he knows his current employment status and may ask the potential employing agency about the terms of employment in the new position. Thus, here, the potential new employee and not the new employing agency should be held responsible for determining the consequences of the change of positions. If the appellant in this case is found on remand to have been subject to a new probationary period, the Board will not waive that requirement based on mere lack of notice at the time of his new appointment that he would be subject to a new probationary period.

The appellant has failed to establish a basis for Board jurisdiction as a probationary employee.

The Board has jurisdiction over a probationary employee's termination only if the employee makes a nonfrivolous allegation that his termination was based on partisan political reasons or marital status or that his termination was based on pre-appointment reasons and was not effected in accordance with the procedural requirements of 5 C.F.R. § 315.805. *See* 5 C.F.R. § 315.806; *Jafri v. Department of the Treasury*, 68 M.S.P.R. 216, 219-21 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir.

1996) (Table). Here, as previously noted, the administrative judge's acknowledgment order set out the appeal rights for probationary employees and informed the appellant that he would be granted a hearing only if he made a nonfrivolous allegation of jurisdiction. IAF, Tab 2. Thus, the appellant was placed on notice of what he had to show to establish Board jurisdiction as a probationary employee.

However, although the administrative judge found that the appellant was a probationary employee, he did not decide whether the appellant had any appeal rights to the Board under 5 C.F.R. § 315.806. We find, however, that if it is determined on remand that the appellant is a probationary employee rather than an employee under 5 U.S.C. § 7511(a)(1)(A)(i), the record is sufficiently developed for us to decide now that the appellant has no appeal rights to the Board under 5 C.F.R. § 315.806.

We find that the appellant failed to set forth a nonfrivolous allegation of Board jurisdiction under 5 C.F.R. § 315.806. The appellant alleged that the Board has jurisdiction under 5 C.F.R. § 315.806(c) because his termination was based on conditions arising before appointment and it was procedurally improper. IAF, Tab 3. Nowhere, however, has the appellant identified any pre-appointment conditions, much less alleged that they caused his termination. The only evidence of record shows that the appellant's planned termination was based on his performance after appointment to the position. IAF, Tab 4, subtab 4b. Although, the appellant disputes that his performance was the real reason for his termination, the reasons he cites for his termination all arose after his appointment to the position. IAF, Tab 3. None of these involve allegations of discrimination based on partisan political reasons or marital status. *See* 5 C.F.R. § 315.806(b). Thus, we find that, even if the appellant's resignation was involuntary, he failed to make a nonfrivolous allegation that he is entitled to

appeal to the Board as a probationary employee. *See, e.g., Jafri*, 68 M.S.P.R. at 219-20.

ORDER

We REMAND this appeal for a jurisdictional hearing so that the administrative judge may determine whether the appellant was an “employee” under 5 U.S.C. § 7511(a)(1)(A)(i). If the administrative judge finds that the appellant was an employee entitled to appeal a removal, he must then determine whether the Board has jurisdiction over the appeal as a constructive removal appeal based on the appellant’s assertion that his resignation was involuntary. *Spiegel v. Department of the Army*, 2 M.S.P.R. 140, 141 (1980) (an involuntary resignation is tantamount to a removal).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.