

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROSALYN FRANCIS,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
PH315H91068511

DATE: APR 10 1992

Albert C. Selkin, Esquire, Norfolk, Virginia, for the
appellant.

Raymond S. Webb, Portsmouth, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the initial decision dismissing, as outside the Board's jurisdiction, her appeal from her separation. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still dismissing the appeal for lack of jurisdiction.

BACKGROUND

The appellant worked for the Department of the Navy as a GS-9 Nurse Specialist from January 27, 1991, until she was separated effective July 1, 1991. See Initial Appeal File (IAF), Tab 4, Subtabs 1 and 6. The agency effected the separation under 5 C.F.R. part 315H, based upon the appellant's failure to effectively perform the duties of her position. The appellant filed an appeal with the Board's Philadelphia Regional Office. See IAF, Tab 1.

The administrative judge provided the appellant with an opportunity to file evidence and argument showing that her appeal was within the Board's jurisdiction. See *id.*, Tab 2. The appellant, in response to the order, argued that the Board had jurisdiction over the appeal because she had over one year of continuous service in her Nurse Specialist position. See *id.*, Tab 5. The agency moved for dismissal of the appeal for lack of jurisdiction. See *id.*, Tab 3.

In his initial decision, the administrative judge agreed with the agency. He found that the appellant had been serving in a probationary period at the time she was separated because (1) she was appointed from a register and therefore properly required to serve a one-year probationary period, (2) she was separated less than a year after her appointment, and (3) her prior service as a Clinical Nurse in the Department of the Army (beginning more than a year before her separation) was not creditable toward completion of the probationary period because it was not performed in the same agency as the one

that separated her. He found further that the appellant had not raised any allegation that her separation was based on partisan political reasons or marital status, and thus the Board lacked jurisdiction over the appeal. See Initial Decision at 1-4.

In her petition for review, the appellant contends that she completed her probationary period before she was separated, and that the Board therefore has jurisdiction over her appeal. See PFR File, Tab 5.

ANALYSIS

The appellant was separated from a position in the competitive service. See IAF, Tab 3, Subtab 1 at 1. Under 5 U.S.C. §§ 7511(a)(1)(A) and 7513, employees in the competitive service are entitled to appeal their separations to the Board only if they are not serving a probationary period under an initial appointment, or if they have completed a year of current continuous employment under other than a temporary appointment limited to a year or less.

Because the appellant was hired from a civil service register, she was required by law to serve a one-year probationary period. See 5 C.F.R. § 315.801(a)(1); *Sullivan v. Department of Agriculture*, 32 M.S.P.R. 194, 196 (1987).¹ As the administrative judge noted, the appellant was separated on July 1, 1991, less than a year after her January 27, 1991,

¹ The appellant's Standard Form 50, dated January 27, 1991, states that her "[a]ppointment is subject to completion of one year initial probationary period." IAF, Tab 4, Subtab 2.

appointment. See IAF, Tab 3, Subtabs 1, 6. The appellant alleges, however, in her petition for review, that her prior service as a Clinical Nurse in the Department of the Army should be credited toward completion of her probationary period, ~~and that, when this credit is given, she has completed her probationary period.~~

The Board has held that service prior to an appointment may be creditable toward completion of the probationary period if: (1) the prior service was rendered immediately preceding the appointment; (2) the prior service was performed in the same agency and in the same line of work as the service performed under the appointment; and (3) there has been no more than one break in service of less than 30 days. See *Peery v. Department of the Navy*, 40 M.S.P.R. 377, 379 (1989).

Here, according to the record, the appellant's prior service as a Clinical Nurse was performed immediately before her present appointment, and there was no break in her service as a Clinical Nurse and a Nurse Specialist. See IAF, Tab 3, Subtab 2, and Tab 5. Thus, the appellant has established that she has met the first and third criteria needed to show that her service as a Clinical Nurse should be credited toward completion of the probationary period.

The essential question in this case, then, is whether the appellant has met the second criterion.² The appellant argues

² The similar titles of the two positions, and the appellant's unchallenged characterization of the nature of her work, see IAF, Tab 5 (appellant's response to agency's motion to dismiss appeal), indicate that the appellant has met the "same line of

that, because both the Department of the Army and the Department of the Navy are part of the Department of Defense, they should be considered part of the "same agency."³ For the reasons stated below, we disagree.

~~The Board has never directly decided whether, for~~ part 315H purposes, military departments are part of the Department of Defense.⁴ Furthermore, we note that neither 5 C.F.R. part 315 nor chapter 315 of the Federal Personnel Manual (FPM), which includes instructions regarding the creditability of prior service toward completion of a probationary period,⁵ includes a definition of the term "agency." Subchapter 1 of FPM chapter 210, however, includes a list of definitions that apply generally throughout the FPM. In that subchapter, "executive agency" is defined as "an

work" requirement of the second criterion. In light of our conclusion below, however, we need not make a final determination regarding this matter.

³ She has cited no specific authority in support of this argument.

⁴ In *Long v. Department of the Navy*, 32 M.S.P.R. 438, 440, 442 (1987), the Board found that an employee's prior service as a GS-5 Supply Officer with the Defense Personnel Support Center could not be counted toward completion of her probationary period as a GS-5 Supply Clerk with the Naval International Logistics Control Office because these two periods of service were "not in the same agency." This decision does not indicate, however, that either party alleged that the two organizations were part of the same agency for part 315H purposes. In addition, although the Board addressed the meaning of the word "agency" in *Farrell v. Department of Justice*, 50 M.S.P.R. 504, 509-12 (1991), it was interpreting that term as it was used in connection with restorations of employees following partial recovery from compensable injuries.

⁵ See FPM ch. 315, Appendix A, § A-3c (1989).

executive department, a government corporation, and an independent establishment." FPM ch. 210, subch. 1, § 1b(8) (Dec. 7, 1973); see also 5 U.S.C. § 105 (defining the term in the same manner). Section 1b(9) of that FPM subchapter consists of a list of the ~~"executive departments."~~ That list includes the Department of Defense, but does not include either the Department of the Army or the Department of the Navy. See also 5 U.S.C. § 101 (identifying the "Executive departments" in the same manner). The latter two departments are identified instead as "military departments." FPM ch. 210, subch. 1, § 1b(16). See also 5 U.S.C. § 102 (identifying the "military departments" as the Department of the Army, the Department of the Navy, and the Department of the Air Force).

Under the definition of "executive agency" that is provided in this FPM subchapter, neither the Department of the Army nor the Department of the Navy would appear to constitute a separate executive department, and neither, accordingly, would appear to constitute a separate executive agency. Instead, both would appear to be military departments that, together with the Department of the Air Force, would make up a single executive department, the Department of Defense. We note further that this definition is significant because of its broad applicability. The FPM chapter in which it appears indicates, in section 1a of subchapter 1, that the definitions in that section "apply throughout this manual, except when a defined term is specifically modified in or specifically

defined for the purpose of a particular chapter." As indicated above, the term "agency" is not defined separately in the chapter of the FPM that deals specifically with probationary periods. Accordingly, the definition cited above ~~supports the appellant's position that her service with the~~ Department of the Army was performed in the same agency as her service with the Department of the Navy, and that the former service should be credited toward her completion of her probationary period.

We find, however, that this guidance in the FPM is heavily outweighed by other factors. Specifically, the organizational history of the Department of Defense indicates that the military service departments were intended to function -- at least, with respect to personnel matters -- with the independence that generally characterizes executive departments outside the Department of Defense, rather than the limited kind of independence that generally characterizes organizations within those departments.⁶

The departments of the Army, Navy, and Air Force were executive departments until the National Security Act

⁶ We note further that the FPM constitutes only guidance the Office of Personnel Management (OPM) has provided to agencies, rather than binding regulations. See *McClain v. Department of the Air Force*, 37 M.S.P.R. 653, 656 (1988). Thus, although we may find FPM material instructive regarding OPM's statutory or regulatory responsibility with respect to a matter, we are not bound to follow it. See *Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 296 (1985). The statute and legislative history described below therefore is more authoritative than the FPM. In addition, as we indicate below, the authority on which we rely is more directly relevant than the FPM to the matter in question.

Amendments of 1949, Pub. L. 81-216, § 4, 63 Stat. 578, redesignated them as military departments. A redesignation such as this might, under some circumstances, indicate that those departments ceased to be "agencies" as that term is used ~~for purposes of part 315. For the reasons stated below,~~ however, we find that this redesignation was not intended to have that effect.

First, the 1949 legislation itself provides that it was intended, *inter alia*, to "integrate[] policies and procedures for the departments, agencies, and functions of the Government relating to the national security," to "provide for [the military departments'] authoritative coordination and unified direction under civilian control of the Secretary of Defense," and "to provide for the effective strategic direction of the armed forces and for their operation under unified control and for their integration into an efficient team of land, naval, and air forces" *Id.*, § 2, 50 U.S.C. § 401. Congress explicitly stated, however, that its intent was "not to merge them [the military departments]." *See id.*, § 2. In addition, Congress provided specifically that the military departments are to "be separately administered by their respective Secretaries under the direction, authority, and control of the Secretary of Defense." *Id.*, § 5. While the legislation authorizes the Secretary of Defense to appoint "such civilian personnel as may be necessary for the performance of the functions of the Department of Defense," section 6(a) explicitly excludes the functions of the Departments of the

Army, Navy, and Air Force from this appointment authority. *Id.*, § 6(b).

Second, the legislative history provides strong support for the proposition that the military departments are to be ~~regarded as separate agencies for purposes related to the~~ appointment and employment of civilian personnel. The Senate Report affirms that the legislation "retains the three-department concept for administering the services, as opposed to a single-department administration"; it refers to the removal of the military departments from the list of executive departments, and to the addition of the Department of Defense in their place, as a "[t]echnical change"; and it indicates its "inten[tion] to emphasize the adherence to the three-department principle ... by insuring that each of the three military departments shall be administered as departments and not merged into one administrative grouping." S. Rep. No. 366, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S.C.C.A.N. 1771, 1776-77. In addition, it interprets a reference in the legislation as "mean[ing] that [the] Secretaries [of the three military departments] will continue to be vested with the statutory authority which was vested in them when they enjoyed the status of secretaries of executive departments." *Id.*, 1949 U.S.C.C.A.N. at 1798. The Conference Report further indicates that, under the conference agreement, the "military departments shall be separately administered by their respective Secretaries," Conf. Rep. No. 1142, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S.C.C.A.N. 1771,

1779, and it also points out that the appointment authority of the Secretary of Defense does not extend to civilian personnel in the military departments, see *id.*, 1949 U.S.C.C.A.N. at 1801.

~~The statutory provisions and legislative history~~ described above demonstrate that Congress intended, in redesignating the Department of the Army and the Department of the Navy as military departments, to allow their independent appointing authority and other personnel functions to continue, and to continue to treat the two departments as separate agencies for purposes of part 315. It follows, then, that service in one military department is not creditable toward completion of a probationary period in another military department.⁷

In light of this congressional judgment, we find here that the appellant's service in the Department of the Army cannot be credited toward completion of the probationary period she began when she was appointed by the Department of

⁷ This holding is consistent with the definition of "agency" that appears in FPM Supplement 296-33, entitled "The Guide to Processing Personnel Actions." Under that definition, "Departments of Army, Navy, and Air Force are considered to be individual agencies for the purposes of this supplement." FPM Supplement 296-33, subch. 35 (1991). See also *Brown v. Department of the Navy*, MSFB Docket No. PH07529010675, slip op. at 8-9 (April 10, 1992) (the Rehabilitation Act of 1973 does not require the Department of the Navy to accommodate its employees by placing them in positions outside that department). In addition, because the personnel functions of the Department of the Navy are separate from the personnel functions of the other military departments, the "same agency" definition set forth at FPM ch. 315, appendix A, § A-3c(2) does not apply here.

the Navy, and that the appellant therefore had not completed her probationary period when the latter agency separated her. For these reasons, the appellant is not an "employee" under 5 U.S.C. § 7511(a)(1), and she is thus not entitled to appeal ~~her separation to the Board under 5 U.S.C. § 7513(d).~~ Instead, any appeal right she might have would arise under 5 C.F.R. part 315, which governs the rights of employees separated during their probationary periods. Because the appellant was separated for unsatisfactory performance during her probationary period, she is entitled to appeal to the Board only if she raises a non-frivolous allegation that her separation was based on partisan political reasons or marital status. See 5 C.F.R. §§ 315.804, 315.806; *Von Deneen v. Department of Transportation*, 33 M.S.P.R. 420, 422, *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table); *Ceraso v. Department of the Army*, 3 M.S.P.R. 63, 64 (1980). Because the appellant raised no such allegation, we agree with the administrative judge that the Board lacks jurisdiction over this appeal.

This is the final order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

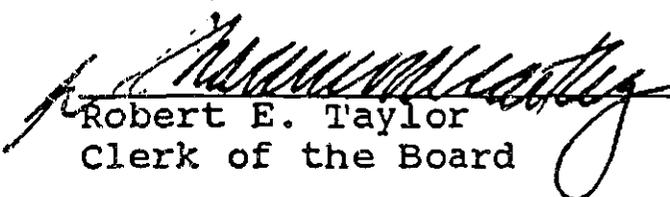
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
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:

Washington, D.C.


Robert E. Taylor
Clerk of the Board