

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DENNIS E. BURKE,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DC315H9110440

DATE: MAR 18 1992

Peter B. Broida, Esquire, Cohen, Broida & Associates,
Arlington, Virginia, for the appellant.

Joe Lazar, Esquire, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued May 21, 1991, sustaining his separation. For the reasons set forth in this Opinion and Order, the Board GRANTS the appellant's petition for review and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still sustaining the separation.

BACKGROUND

On March 11, 1990, the United States Marshals Service (USMS) appointed the appellant to a career-conditional position in the competitive service as a Detention Officer. This appointment was subject to his successful completion of a one-year probationary period, and the satisfactory completion of a full-field background investigation. See Initial Appeal File (IAF), Tab 7, (agency file) at Tab 4d. The appellant's tour of duty was from 6:00 a.m. to 2:30 p.m., Monday through Friday. On July 30, 1990, the USMS placed the appellant on administrative leave pending review of allegations of misconduct discovered during his background check; specifically, that he had provided false information on his Application for Federal Employment with the USMS (Standard Form 171) and Questionnaire for Sensitive Positions (Standard Form 86) concerning prior drug use, employment and arrest. See *id.*, Tab 5. On February 27, 1991, the USMS issued the appellant a notice proposing to terminate him. See *id.*, Tab 1. On March 8, 1991, the USMS sent the appellant a decision letter stating that he would be terminated during his probationary period effective at 2:00 p.m. that day. *Id.* However, because the appellant had been hospitalized for depression on March 5, 1991, and the agency had been unable to find him, he did not receive the removal letter until 8:30 p.m. on March 8. See *id.*, Tab 10.

In her initial decision, the administrative judge found that an agency may specify the moment that the termination of

a probationary employee's appointment is effective. She further found that whether the appellant had taken a lunch period on the day that he was terminated was irrelevant to a determination of when his tour of duty was officially completed. Consequently, the administrative judge concluded that the appellant's tour of duty on March 8, 1991, ended at 2:30 p.m., and the agency decision to terminate his appointment at 2:00 p.m. took place during his probationary period. Finally, the administrative judge found that the agency made reasonable and diligent attempts to deliver the decision to the appellant prior to the effective date and time of the termination, and that the appellant's failure to receive the notice until after such time did not preclude his termination from taking effect as of 2:00 p.m. on March 8, 1991. See Initial Decision at 1-6.

ANALYSIS

In his petition for review, the appellant contends that the administrative judge improperly denied him a hearing in violation of Board regulations. The appellant also contends that the administrative judge erroneously concluded that he was a probationary employee at the time of his termination, rather than a tenured employee. In addition, the appellant contends that "to the extent that the initial decision applied a harmful error analysis to [his] right to a hearing and the determination of [his] tenure, the decision violated OPM regulations and 5 USC 7513." See Petition for Review at 2. In this connection, the appellant requests that the Board

reconsider *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672 (1991), because the Board's harmful error analysis in that case "recasts the very nature of an adverse action," and, therefore, usurps the Office of Personnel Management's (OPM) authority to set the proper procedure for the termination of probationary employees. See *id.* at 11. Finally, the appellant argues that the agency failed to exercise reasonable diligence in delivering the notice of termination to him.

A probationary employee has no statutory right of appeal to the Board. See 5 U.S.C. § 7511(a); *Von Deneen v. Department of Transportation*, 33 M.S.P.R. 420, 422, *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table). Such an employee has a regulatory right of appeal to the Board, however, if he makes a nonfrivolous allegation that he was terminated due to discrimination based on partisan political reasons or marital status, or because of conditions arising before his appointment to the position in question. 5 C.F.R. §§ 315.805-.806; *Von Deneen*, 33 M.S.P.R. at 422. In the latter instance, the only ground for appeal is that the agency did not follow the procedural requirements of 5 C.F.R. § 315.805. *Coleman v. Veterans Administration*, 3 M.S.P.R. 274, 276 (1980).

Pursuant to 5 C.F.R. § 315.805(c), "[t]he agency shall deliver the decision to the employee at or before the time the action will be made effective." In addition, a separation action must be effected prior to the end of the probationer's "tour of duty" on the last day of probation, which is the day

before the anniversary date. See *Jeffery v. Department of the Treasury*, 3 M.S.P.R. 402, 404 (1980). In this case, the agency attempted to make the appellant's termination effective at 2:00 p.m. on March 8, 1991, half an hour before the completion of his tour of duty on the last work day before the anniversary date of his appointment.¹

The appellant contends that he had completed his probationary period of employment at the time of his termination because he had completed his tour of duty on the last day of his probationary period at 2:00 p.m., the effective time of his termination. Therefore, the appellant argues that he was entitled to the procedural protections afforded by 5 U.S.C. § 7511 to tenured employees subject to termination, and, thus, that the agency's termination was ineffective. The basis for the appellant's argument is that although his tour of duty usually ended at 2:30 p.m., because he did not take lunch on the day that the agency terminated him, his tour of duty was completed at 2:00 p.m. that day.

Contrary to the appellant's allegation, 5 C.F.R. § 610.102(h) defines "tour of duty" as the hours of a day and the days of an administrative workweek that constitute an employee's regularly scheduled administrative workweek. Further, the regulation defines "regularly scheduled" as work that is scheduled in advance. See 5 C.F.R. § 610.102(g). Therefore, whether the appellant took a lunch period on the

¹ March 8, 1991, was the last day on which the appellant had a scheduled tour of duty.

date of his termination is irrelevant to determining when he completed his tour of duty. Since it is undisputed that the appellant's regularly scheduled workweek was from 6:00 a.m. to 2:30 p.m., Monday through Friday, the administrative judge properly found that the appellant's tour of duty on the day of his termination ended at 2:30 p.m., and that the agency decision to terminate his appointment at 2:00 p.m. was a termination during his probationary period.

The appellant further argues that his tour of duty on the day of his termination ended at 2:00 p.m. because 5 C.F.R. § 610.111(c)(2) excludes "meals" from the regularly scheduled administrative workweek of an employee on standby duty. As noted above, the agency had placed the appellant on administrative leave on July 30, 1990. However, on August 14, 1990, it issued a memo that refers to both administrative leave and stand-by status. While the later memo is somewhat unclear, we interpret it to mean that the appellant was placed on administrative leave for an indefinite duration, and that it does not inform him that he is to be placed on stand-by time as that term is used in Chapter 610 of the FPM. Support for this position can be found in the statement to the appellant in the memo that "you are to remain in stand-by status" (emphasis added). This indicates that the USMS intended simply to continue the appellant's administrative leave status. Moreover, the circumstances outlined in the memo meet neither the intent nor the requirements of stand-by duty. See FPM ch 610, subchapter 1-3c(2)(a) (1969); IAF Tab

5. We therefore conclude that the appellant's tour of duty ended at 2:30 rather than 2:00.

The administrative judge found that the agency made reasonable and diligent attempts to deliver the termination decision to the appellant prior to the effective date and time of the termination. Also, she noted that the record contained uncontradicted evidence that William Colquit, Supervisory Deputy U.S. Marshal, telephoned the appellant at approximately 11:00 a.m. on March 8, 1991, to order him to report to the agency, and that after Mr. Colquit was unable to reach the appellant, he called the appellant's girlfriend, Prudence B. Mathews, who told him that the appellant was in the hospital. See IAF, Tab 11.

However, the administrative judge failed to properly consider the sworn statement of Ms. Mathews in finding that the agency acted with diligence in its attempt to deliver the notice of termination.² In her sworn statement, Ms. Mathews states that Mr. Colquit first telephoned her at 2:45 p.m. Mr. Colquit states that he telephoned her between 12:00 p.m. and 2:00 p.m. See IAF, Tab 10. The administrative judge suggested, without explicitly stating, that it did not matter when Mr. Colquit called Ms. Mathews, because the agency,

² We note that although Ms. Mathews' statement was submitted by the appellant after the record in this case had closed, the administrative judge considered it in her initial decision without, however, fully addressing its implications. Therefore, since the administrative judge admitted Ms. Mathews' statement as evidence, the Board will consider it on review.

reasonably expecting the appellant to be at home, had already acted with reasonable diligence when it had called the appellant's home at 11:00 a.m. Therefore, the administrative judge found that the appellant's failure to abide by the terms of the administrative leave, which required that he stay at home or provide a telephone number where he could be reached, thwarted the agency's attempt to deliver the termination notice.

We agree. We find that the exact timing of Mr. Colquit's telephone call to Ms. Mathews is of no consequence to the outcome of this case because the appellant had been instructed by the agency to remain at home or to provide a telephone number where he could be reached. Furthermore, since the appellant was hospitalized three days before his termination, he had ample time to notify the agency of his whereabouts. Therefore, the agency's initial effort to notify the appellant of his termination was sufficiently diligent under the circumstances. See *Fangarova v. Department of Army*, 42 M.S.P.R. 319, 325 (1989) (where appellant refused to accept a notice of proposed removal and then intentionally avoided mail delivery when the notice was mailed to her, agency had nonetheless complied with the procedural requirements of 5 U.S.C. § 7513(b)(1) and effected constructive delivery of the notice because appellant had acted unreasonably); see also *Cephas v. Department of Treasury*, 27 M.S.P.R. 69, 72 (1985) (employee's failure to actually receive notice of removal letter until after end of her tour of duty on last day of her

probationary period did not preclude her termination from becoming effective on that date, where agency sent two representatives to employee's home to deliver letter, and finding no one at home, they taped one copy of decision letter to her door, and placed another copy in nearby mailbox), *aff'd*, 785 F.2d 321 (Fed. Cir. 1985) (Table); *Shaw v. United States*, 622 F.2d 520, 527, 233 Ct.Cl. 532 (agency's attempts to give prior notification of termination constituted constructive delivery of notice before the effective date of action), *cert. denied*, 436 U.S. 881 (1980); *cf. Lavelle v. Department of Transportation*, 17 M.S.P.R. 8, 15 (1983) (while notice of termination need not be received by probationary employee prior to its effective date, the agency must have made diligent and reasonable efforts under the circumstances to effect timely service), *modified on other grounds, Stephen v. Department of the Air Force*, 47 M.S.P.R. 672 (1991).

Therefore, because we agree with the administrative judge that the agency's initial effort to notify the appellant of his termination was sufficiently diligent under the circumstances, we need not resolve the issue of when Mr. Colquit first attempted to contact Ms. Mathews. Consequently, although the administrative judge did not properly consider all of the evidence on this issue, we find that it did not affect the appellant's substantive rights. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's

substantive rights provides no basis for reversal of an initial decision).³

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 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:


Robert E. Taylor
Clerk of the Board

Washington, D.C.

³ We find that the administrative judge properly cited *Stephen* in the initial decision, and we decline the appellant's invitation to overrule it.