

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

2006 MSPB 234

Docket No. SF-0752-05-0625-I-1

**Kimberly K. Lopez,
Appellant,**

v.

**Department of the Navy,
Agency.**

August 8, 2006

James S. Sable, Esquire, Seattle, Washington, for the appellant.

Stephanie E. Pappas, Esquire, Bremerton, Washington, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition and REMAND the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a nonpreference eligible, began her career with the agency in April of 2001 in an excepted service position as a Student Trainee (Pipefitter). Initial Appeal File (IAF), Tab 6, Exhibit (Ex.) 1. After completing the requisite

1-year trial period, she became a permanent employee as a Pipefitter Helper in the competitive service. *Id.*, Ex. 2. On July 13, 2003, the appellant was appointed to the excepted service position of Student Trainee (Sheet Metal Mechanic) (hereinafter “Sheet Metal Trainee”), pursuant to 5 C.F.R. § 213.3202(b), the regulation covering appointments in the Student Educational Employment Program. *Id.*, Ex. 4. The Standard Form 50 (SF-50) covering this appointment indicated that the appellant was subject to a 1-year trial period beginning July 13, 2003. *Id.* Effective April 25, 2005, the agency terminated the appellant from her Sheet Metal Trainee position for failing to meet the academic requirements of “the [c]o-op Agreement.”¹ IAF, Tab 2 at 3; Tab 6, Ex. 7.

¶3 The appellant filed an appeal of her termination, arguing, inter alia, that she was an “employee” within the meaning of 5 U.S.C. § 7511(a)(1)(C), and, therefore, that the agency should have afforded her due process rights, including 30 days notice of her termination and an opportunity to respond. IAF, Tab 1 at 5, 7-8. The appellant further asserted that the agency removed her on the basis of sex. *Id.* at 9-10. The administrative judge issued a jurisdictional notice informing the appellant of the criteria for establishing Board jurisdiction under 5 U.S.C. § 7511(a)(1)(B)-(C), and ordered her to submit evidence and argument on the jurisdictional issue.² IAF, Tab 3. In response, the appellant claimed that she qualified under both prongs of 5 U.S.C. § 7511(a)(1)(C) because she was not serving a probationary or trial period under an initial appointment at the time of

¹ According to the agency, it rehired the appellant on September 26, 2005, as a WG-05 Painter Helper. Petition for Review File (PFRF), Tab 3 at 3.

² Because the appellant was a nonpreference eligible in the excepted service at the time of her termination, the applicable statutory provision in this appeal is 5 U.S.C. § 7511(a)(1)(C). Under subsection (C), an individual qualifies as an employee if that individual (i) “is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service”; or (ii) “has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less[.]”

her termination, and she had over 2 years of service as a Pipefitter prior to her appointment as a Sheet Metal Trainee. IAF, Tab 4.

¶4 After the agency filed its initial response on the jurisdictional issue, the administrative judge issued a second order, noting that it appeared from the appellant's SF-50 that she had completed her 1-year probationary period prior to the effective date of her termination. IAF, Tab 8. In response, the agency claimed that the 1-year probationary period indicated on the appellant's original SF-50 was an administrative error and that the Sheet Metal Trainee position was actually subject to a 2-year probationary period, which the appellant had not completed at the time of her termination. IAF, Tab 10. In support of its assertion, the agency submitted the following documents: (1) The Declaration of Sandra Y. Edmonds, an agency Human Resources Specialist, attesting that the appellant's initial Sheet Metal Trainee SF-50 reflecting a 1-year trial period was erroneous, and that "it appears that [the appellant] was in a two-year probationary period in the apprentice program"; (2) a "recently corrected" SF-50, retroactive to July 13, 2003, which does not identify any probationary or trial period; (3) a copy of an excerpt from the "Standards of Apprenticeship," bearing a March 2005 revision date, stating that "[a]ll non-veteran applicants selected for Apprenticeship shall serve an initial probationary period of two years"; and (4) a copy of the Sheet Metal Trainee position description. *Id.*, Attachments 1-3. The appellant subsequently requested a jurisdictional hearing. IAF, Tab 11.

¶5 The administrative judge then issued a third order, instructing the appellant to submit evidence and argument establishing that she had 2 years of current continuous service in the same or similar positions under other than a temporary appointment for 2 years or less pursuant to 5 U.S.C. § 7511(a)(1)(C)(ii).³ IAF,

³ The administrative judge's order did not address whether the agency's documentary evidence was sufficient to establish that the appellant was serving in a 2-year probationary or trial period at the time of her termination. IAF, Tab 12.

Tab 12. In response to the order, the appellant reiterated that she met the requirements of both prongs of subsection (C), and objected to the agency's "new" SF-50 because she "would not have received any actual notice of what this new probationary period would be until after she had accepted the position of Sheet Metal Trainee." IAF, Tab 13 at 5.

¶6 The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant was a nonpreference eligible in the excepted service, without 2 years of current continuous service in the same or similar position at the time of her termination, as required by 5 U.S.C. § 7511(a)(1)(C)(ii). Initial Decision (ID) at 1-4. He further found that, absent an appealable action, the Board has no jurisdiction to hear the appellant's sex discrimination claim. ID at 3. The administrative judge did not decide whether the appellant qualified as an "employee" under subsection (C)(i), i.e., whether she was serving a probationary or trial period in an initial appointment pending conversion to the competitive service.

¶7 The appellant has filed a petition for review. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 3.

ANALYSIS

¶8 On review, the appellant argues that her July 14, 2002, to July 13, 2003 service as a Pipefitter Helper should be tacked onto her July 13, 2003, through April 25, 2005 service as a Sheet Metal Trainee to meet the 2-year minimum service requirement of 5 U.S.C. § 7511(a)(1)(C)(ii) because the two positions are "sufficiently similar." PFRF, Tab 1 at 2-3. We have reviewed the respective position descriptions in the record and agree with the administrative judge's finding that the appellant failed to establish that the Pipefitter Helper and Sheet Metal Trainee positions were the "same or similar." Two positions are "similar" for purposes of section 7511(a)(1)(C)(ii) if they "involv[e] related or comparable

work that requires the same or similar knowledge, skills, and abilities.” *Jolivette v. Department of the Navy*, 100 M.S.P.R. 216, ¶ 11 (2005) (citations omitted). The Board has explained that the factors to be considered include whether the two positions require the same qualifications, whether they are in the same competitive level for reduction-in-force purposes, and whether interchange between the two positions is possible without significant training and without unduly interrupting the work. *See Beets v. Department of Homeland Security*, 98 M.S.P.R. 451, ¶¶ 10-11 (2005).

¶9 Here, the position description for the WG-05 Pipefitter Helper shows that the incumbent is responsible for the installation, operation, maintenance, and removal of pipe lines, pumping, gas freeing, and washing of marine liquid fuel tanks, water tanks, and the installation and operation of pumping and washing systems. IAF, Tab 14, Ex. 8 at 2. In addition, a Pipefitter Helper must have knowledge and skills in fitting and hose layouts, pressure and temperature limits, control valves, and liquid levels in portable and fixed tanks. *Id.* The position description for the Sheet Metal Trainee, in contrast, shows that the incumbent “removes, ships, stores, discards, manufactures, lays-out, modifies, repairs, assembles and installs sheetmetal items” and is required to know how to operate the tools of the trade in order to work with Welders to assemble and install sheetmetal items. IAF, Tab 14, Ex. 9 at 2. Clearly, these positions, which are in two wholly different crafts, are not similar. Further, there is no indication in the record that the incumbent of one position could be assigned to the other position without training and without unduly interrupting the work. *See Beets*, 98 M.S.P.R. 451, ¶ 10. Given the differences in the appellant’s positions, the requisite trial period began on July 13, 2003, when she began working as a Sheet Metal Trainee. Because she was removed less than 2 years later, on April 25, 2005, the appellant does not meet the definition of “employee” under 5 U.S.C. § 7511(a)(1)(C)(ii).

¶10 While not addressed by the administrative judge in the initial decision, we further find that the appellant, an appointee in the Student Educational Employment Program, also fails to meet the definition of “employee” under 5 U.S.C. § 7511(a)(1)(C)(i). See *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999) (subsections (C)(i) and (C)(ii) of section 7511(a)(1) are alternative criteria such that an individual is an “employee” if he or she meets the requirements of *either* subsection 7511(a)(1)(C)(i) or (ii)). Under subsection (C)(i), and the Office of Personnel Management’s (OPM’s) corresponding regulations, a nonpreference eligible individual in the excepted service has standing to appeal to the Board if he or she is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service. 5 C.F.R. § 752.401(d)(11) (a nonpreference eligible in the excepted service who is serving a probationary or trial period under an initial appointment pending conversion to the competitive service is excluded from coverage of 5 C.F.R. part 752, governing adverse action appeals). Time spent prior to conversion in an appointment under the Student Educational Employment Program, however, constitutes a probationary or trial period within the meaning of 5 U.S.C. § 7511(a)(1)(C)(i), and such employees do not gain adverse action appeal rights until they are converted to the competitive service. *Taylor v. Department of the Navy*, 63 M.S.P.R. 99, 102 (1994), *overruled on other grounds by Van Wersch*, 197 F.3d at 1151. According to OPM’s comments accompanying the issuance of the interim version of 5 C.F.R. § 752.401(d)(11), the eligibility requirements of these types of work-study programs, which “include a demonstration of satisfactory performance or training, . . . constitute ‘the probationary or trial period’ referred to in 5 U.S.C. 7511(a)(1)(C)(i).” 57 Fed. Reg. 20,041 (May 11, 1992). OPM concluded that “[e]mployees under these appointments have no procedural or appeal rights, but gain such rights upon conversion to the competitive service.” *Id.*; see *Newman v.*

Love, 962 F.2d 1008, 1012 (Fed. Cir. 1992) (great deference should normally be given to OPM’s interpretation of the statutes Congress charges it to administer).

¶11 Here, the agency terminated the appellant from her position in the Student Educational Employment Program prior to her conversion to the competitive service. *See* IAF, Tab 6, Ex. 7. Therefore, she was still serving a probationary or trial period pending conversion to the competitive service when the agency terminated her, and she does not have appeal rights to challenge the agency’s personnel action. *See Taylor*, 63 M.S.P.R. at 102; 57 Fed. Reg. 20,041. While the appellant’s initial SF-50 incorrectly indicated that she was subject to completion of a 1-year trial period, it is well settled that an “SF-50 is not a legally operative document controlling on its face an employee’s status and rights.” *Grigsby v. Department of Commerce*, 729 F.2d 772, 776 (Fed. Cir. 1984). Rather, it is the true nature of the appointment that governs, not the SF-50.

¶12 Nevertheless, we remand this appeal because there is a jurisdictional issue not addressed below regarding whether the agency put the appellant on notice of the correct time period for which she would forfeit her appeal rights when she accepted the excepted service appointment to the Sheet Metal Trainee position from her competitive service position as a Pipefitter Helper. When an employee moves between positions within the same agency, and forfeits her appeal rights as a result of accepting the new appointment, the agency must inform the employee of the effect the move will have on her appeal rights. *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349 (1994). If the agency does not inform the employee of the impact of the conversion, the administrative judge must assess whether the employee would have accepted the conversion had she been properly informed of its effect on her appeal rights. *See id.* at 350-51. “An employee who has not knowingly consented to the loss of career tenure and appeal rights in accepting another appointment with the agency ... is deemed not to have ‘accepted’ the new appointment and to have retained the rights incident to the

former appointment.” *Park v. Department of Health & Human Services*, 78 M.S.P.R. 527, 534 (1998). Thus, if the administrative judge concludes that the appellant was not made aware that she was forfeiting her appeal rights for 2 years, and would not have accepted the conversion had she known, the action against the appellant will be adjudicated under the appellate rights associated with the pre-conversion position.

¶13 The appellant claimed below that she was unaware that the SF-50 documenting her appointment to the Sheet Metal Trainee position was in error as to the length of her required probationary or trial period until well after she had accepted the position. IAF, Tab 13 at 5. In fact, she argued that she was not made aware of the “new” SF-50 until the agency produced it in response to her Board appeal. *Id.* On review, the appellant asserts that she reasonably believed her appointment was subject to a 1-year probationary or trial period because, apart from the initial SF-50, she was promoted twice after her appointment but was never notified of the error and because her previous appointment to the excepted service position of Student Trainee (Pipefitter) was subject to completion of a 1-year probationary period. PFRF, Tab 1 at 6-7.

¶14 The agency has not specifically addressed the appellant’s claim regarding what she knew, or what it told her, about the length of the probationary or trial period to which she would be subject when she accepted the appointment to the Sheet Metal Trainee position. If the agency knew or should have known that the appellant wrongly believed she was subject to a 1-year probationary or trial period, then it was required to correct that erroneous impression. *See, e.g., Exum*, 62 M.S.P.R. at 348 (noting that, in the context of retiring employees, an agency is required to “correct any erroneous information that it ha[d] reason to know an employee [was] relying on”) (citing *Kolstad v. Department of Agriculture*, 30 M.S.P.R. 143, 145, *rev’d and vacated on other grounds*, 809 F.2d 790 (Fed. Cir. 1986) (Table)).

¶15 The AJ did not alert the parties to the significance of, or otherwise address, whether the appellant knew that she was accepting a position with a 2-year probationary or trial period. Nor, however, has the appellant specifically contended that she would not have accepted the appointment if the probationary or trial period was more than 1 year. For these reasons, remand is necessary. *See Exum*, 62 M.S.P.R. at 350.

ORDER

¶16 On remand, the administrative judge shall order the parties to submit evidence and argument concerning whether the appellant was aware of the correct duration of her new probationary or trial period and, if not, whether she would have accepted the Sheet Metal Trainee position had she known about its effect on her appeal rights. The administrative judge shall hold a jurisdictional hearing on this issue if necessary. If the Board has jurisdiction over the appellant's termination, the administrative judge shall adjudicate the merits of the termination appeal, as well as her sex discrimination claim.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.