

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

2006 MSPB 126

Docket No. DC-0752-05-0636-I-1

**Linda Y. Cruz-Packer,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

May 11, 2006

Crystal A. G. Fisher, Esquire, Alexandria, Virginia, for the appellant.

Bryan A. Bonner, Esquire, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed her appeal for lack of jurisdiction. For the following reasons, we GRANT the petition for review, REVERSE the initial decision, FIND that the Board has jurisdiction over this appeal, and REMAND the appeal for adjudication of the merits of the agency's removal action.

BACKGROUND

¶2 The agency's Transportation Security Administration (TSA) removed the appellant from her SV-1811-J Special Agent (Criminal Investigator) position

based on a charge of “Unsuitability for Federal Service,” which was supported by two specifications. Appeal File (AF), Tab 4, Subtabs 5, 7. The agency determined that the appellant had been terminated by a prior employer for misconduct, and had failed to disclose that termination on her Standard Form 86, Questionnaire for National Security Positions. *Id.*, Subtab 5. After the appellant filed a timely appeal of the removal with the Board, AF, Tabs 1, 3, the agency moved to dismiss the appeal for lack of jurisdiction, AF, Tab 4, Subtab 1. The agency asserted that the appellant was an excepted service employee with no right to appeal the “suitability determination” because such an appeal right to the Board is granted only to applicants for, or employees in, competitive service or Senior Executive Service positions. *Id.* at 1, 12.

¶3 The administrative judge (AJ) assigned to this case ordered the appellant to submit evidence and/or argument showing that the Board had jurisdiction over the appeal, and to address the specific arguments made by the agency in its motion to dismiss. AF, Tab 6. After the appellant did not file a timely response,¹ the AJ dismissed the appeal for lack of jurisdiction. AF, Tab 8, Initial Decision (ID). Relying on the Board’s decision in *Zufan v. Department of Transportation*, 91 M.S.P.R. 258 (2002), the AJ found that TSA employees are in the excepted service, and therefore have no right to appeal suitability determinations under 49 U.S.C. § 40122(g) and 5 C.F.R. § 731.501. ID at 7-8.

ANALYSIS

¶4 The appellant asserts on review that the Board has jurisdiction over her appeal of her removal because she was a preference-eligible employee in the excepted service who had completed at least one year of current continuous

¹ The appellant filed a jurisdictional response after the deadline for doing so, and one day after the issuance of the initial decision. AF, Tab 9.

service in the same or similar position. Petition for Review File (PFRF), Tab 3.² The agency asserts on review that, among other things, the appellant is not a preference-eligible employee. PFRF, Tab 5 at 6-7. As set forth below, regardless of whether the appellant is a preference eligible, the Board has jurisdiction over this appeal.

¶5 The Board is not obligated to accept the assertion of a party as to the nature of a personnel action, but may make its own independent determination regarding the matter. *Russell v. Department of the Navy*, 6 M.S.P.R. 698, 704 (1981). Thus, it is the nature of the action, and not the agency's characterization of the action, that determines the Board's jurisdiction. *Czarkowski v. Department of the Navy*, 87 M.S.P.R. 107, ¶ 20 (2000); see *Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 313-25 (1994) (the employees' assignments constituted reduction in force demotions within the Board's jurisdiction, despite the agency's characterization of them as reassignments).

¶6 As set forth above, the agency characterizes the action in this case as a "suitability determination" and contends that the appellant may not appeal such an action because she occupied a position in the excepted service.³ However, 5 C.F.R. part 731, relating to "Suitability," establishes the criteria and procedures

² The appellant filed a supplement to her petition for review one day after the deadline set forth by the Clerk of the Board, but before the record closed on review. PFRF, Tabs 2, 3. The Board's regulations provide that, once the record on review closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed. 5 C.F.R. § 1201.114(i). Thus, we have considered the arguments set forth in the appellant's supplement to her petition for review. See *Owens v. Department of the Army*, 82 M.S.P.R. 279, ¶ 4 n.1 (1999) (the appellant filed a timely supplement to her petition for review); *Dunn v. Office of Personnel Management*, 60 M.S.P.R. 426, 430 (1994) (the appellant filed a timely petition for review and supplement to the petition for review), *appeal dismissed*, 91 F.3d 169 (Fed. Cir. 1996) (Table).

³ The appellant agrees that she occupied a position in the excepted service, PFRF, Tab 3 at 7, and the record reflects that the appellant received an excepted appointment by reassignment to the Criminal Investigator position, AF, Tab 4, Subtab 7.

for making determinations of suitability for employment only for “positions in the competitive service and for career appointments in the Senior Executive Service.” 5 C.F.R. § 731.101(a). Thus, section 731.103, under which the Office of Personnel Management delegates to agency heads limited authority for adjudicating suitability cases involving applicants for and appointees to competitive service positions, and section 731.105(b), under which an agency, exercising delegated authority, may take a suitability action “under this part,” do not serve as authority for the agency’s removal action in this case.

¶7 Because the appellant worked for TSA, the Aviation and Transportation Security Act (ATSA) applies in this case. *Lara v. Department of Homeland Security*, 97 M.S.P.R. 423, ¶ 9 (2004). Under ATSA, TSA employees are covered by the personnel management system that is applicable to employees of the Federal Aviation Administration (FAA) under 49 U.S.C. § 40122, except to the extent that the Under Secretary of Transportation for Security⁴ modifies that system as it applies to TSA employees. 49 U.S.C. § 114(n); *Lara*, 97 M.S.P.R. 423, ¶ 9. Under the personnel management system that is applicable to FAA employees, the removal of an individual who meets the definition of an “employee” under 5 U.S.C. § 7511 may be appealed to the Board. *See* 5 U.S.C. §§ 7511(a)(1), 7512(1), 7513(d) (providing “employees,” as defined in section 7511(a)(1), with the right to appeal removals and other adverse actions to the Board); *Zambito v. Department of Homeland Security*, 100 M.S.P.R. 550, ¶ 6 (2005); *Goldberg v. Department of Transportation*, 97 M.S.P.R. 441, ¶ 6 (2004) (under 49 U.S.C. § 40122(g)(3), an FAA employee is entitled to appeal an adverse action covered by 5 U.S.C. § 7512 to the Board).

⁴ The agency notes that the title of the Under Secretary of Transportation for Security was changed to Administrator upon TSA’s transfer to the Department of Homeland Security. AF, Tab 4, Subtab 1 at 7 n.1. To avoid confusion, we will use the term “Under Secretary” throughout this decision.

¶8 Thus, as long as the Under Secretary has not modified the FAA's personnel management system so as to preclude TSA employees such as the appellant from appealing their removals, the appellant would have Board appeal rights if she is: (1) A preference eligible in the excepted service who has completed one year of current continuous service in the same or similar positions in an Executive agency; or (2) an individual in the excepted service (other than a preference eligible) who has completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less. 5 U.S.C. § 7511(a)(1).

¶9 Here, there is no indication, and the agency has not argued, that the Under Secretary has modified the FAA's personnel management system so as to preclude TSA employees such as the appellant from appealing their removals.⁵ Moreover, the record reflects that the agency appointed the appellant to an SV-1801-J Transportation Security Specialist position on or about June 17, 2002, and reassigned her to the SV-1811-J Criminal Investigator position effective June 30, 2002. AF, Tab 4, Subtabs 6, 7. The agency removed the appellant from the Criminal Investigator position effective upon her November 19, 2004 receipt of the agency's November 18, 2004 decision notice. *Id.*, Subtab 5; AF, Tab 1 at 3. Thus, regardless of whether the appellant was a preference-eligible employee, she has shown by preponderant evidence that the Board has jurisdiction over her appeal because she was an individual in the excepted service who completed two years of current continuous service in the same Criminal Investigator position and she was subjected to an adverse action that is appealable to the Board.

¶10 We also find that *Zufan*, which involved an appeal filed by an applicant for employment from a suitability determination made by the FAA, does not require

⁵ In *Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 14 (2005), the Board found that neither HRM Letter 752-1 nor TSA Management Directive 1100.75-1, which were issued by the Under Secretary, indicated that employees other than screeners did not retain the right they previously had to appeal removals to the Board.

dismissal of this case for lack of jurisdiction. The Board noted in *Zufan* that the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 2000 U.S.C.C.A.N. (114 Stat.) 61 (Ford Act), added 49 U.S.C. § 40122(g)(3), which states that, under the new personnel management system for FAA employment matters, an employee of the FAA may submit an appeal to the Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996. *Zufan*, 91 M.S.P.R. 258, ¶ 15. The Board found that Mr. Zufan had no right to appeal his nonselection under the Ford Act because he was an applicant, but never an FAA employee as required by the Act. *Id.*, ¶ 16. In dictum, the Board noted that, even assuming that Mr. Zufan could have established that he was an “employee” under section 40122(g)(3), “the right to appeal negative suitability determinations relates only to applicants for, or employees in, the competitive service or SES positions.” *Id.*, ¶ 16 n.*. Thus, the Board held that, to “establish jurisdiction,” Mr. Zufan would have to show that the position he applied for was in the competitive service. *Id.*

¶11 The footnote in *Zufan* addressed the narrow question of whether, even if Mr. Zufan had been an “employee” under 49 U.S.C. § 40122(g)(3), the Board would have had jurisdiction over the appeal of the appellant’s nonselection as a suitability determination under 5 C.F.R. § 731.501. It did not address whether the Board had jurisdiction under 5 U.S.C. §§ 7511(a)(1), 7512(1), and 7513(d). As set forth above, the agency in this case did not take a suitability action under 5 C.F.R. part 731 against an “appointee” in the competitive service. *See* 5 C.F.R. § 731.101(b) (defining “appointee” as a person who has entered on duty and is in the first year of a subject-to-investigation appointment). Instead, it took an action against an appellant who, unlike Mr. Zufan, was an “employee” who has the right to appeal the agency action at issue, i.e., a removal, to the Board under 5 U.S.C. §§ 7511(a)(1), 7512(1), and 7513(d). In any event, the footnote in *Zufan* was unnecessary to the decision in that case, and therefore not binding on

the Board. *See Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988) (broad language unnecessary to a court's decision cannot be considered binding authority); *Harding v. Department of Veterans Affairs*, 98 M.S.P.R. 296, ¶ 6 n.3 (2005) (declining to follow dicta in Board decisions). Thus, *Zufan* does not require a different result in this appeal.

ORDER

¶12 Accordingly, we REVERSE the initial decision, FIND that the Board has jurisdiction over this appeal, and REMAND the appeal for adjudication of the merits of the appellant's removal.

FOR THE BOARD:

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