

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

2006 MSPB 36

Docket No. CH-315H-04-0557-I-1

**Charles C. Wiley, Jr.,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

March 6, 2006

Dale L. Ingram, Esquire, Kansas City, Missouri, for the appellant.

Michael L. Ramsey, St. Louis, Missouri, 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 the initial decision that dismissed his appeal for lack of Board jurisdiction. We DENY the petition, REOPEN this case on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal to the Central Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency terminated the appellant from the position of Housekeeping Aide during his probationary period for omitting two criminal convictions on his

pre-employment Form 306. Initial Appeal File (IAF), Tab 4, Subtabs 4b, 4e. The agency afforded the appellant notice of the reason for his termination and an opportunity to respond within one day of the notice. IAF, Tab 4, Subtab 4e.

¶3 The appellant filed a petition for appeal, alleging, inter alia, that the interval to respond to the notice was too short. IAF, Tab 1. The administrative judge found that the appellant had made a written reply during the one-day notice period and failed to make a nonfrivolous allegation that the agency did not follow the procedures for terminating a probationary employee for pre-employment reasons. IAF, Tab 16 ((Initial Decision) (ID)) at 2, 8. She therefore dismissed the appeal for lack of jurisdiction. ID at 8.

¶4 The appellant has petitioned for review and the agency has responded in opposition to the petition. Petition for Review File, Tabs 1, 3.

ANALYSIS

¶5 A probationary employee in the competitive service who has not completed one year of current continuous service has no statutory right of appeal to the Board. See 5 U.S.C. § 7511(a)(1)(A); *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341 (Fed. Cir. 2002). 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 marital status or for partisan political reasons, or because of conditions arising before appointment to the position in question. 5 C.F.R. §§ 315.805-.806. 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).

¶6 A probationary employee in the competitive service who has not completed one year of current continuous service at the time of his termination also has a regulatory right of appeal to the Board if he was terminated as a result of a suitability disqualification or a debarment action taken by Office of Personnel

Management (OPM) based on evidence of material, intentional false statement or deception or fraud in examination or appointment. *See* 5 C.F.R. §§ 731.103, 731.105(c). OPM retains jurisdiction in all competitive service cases involving evidence of material, intentional false statement or deception or fraud in examination or appointment, and the Board lacks jurisdiction over an appeal from a negative suitability determination on that basis when the determination was made by an employing agency without delegated authority from OPM. 5 C.F.R. § 731.103; *Brady v. Department of the Treasury*, 94 M.S.P.R. 439, ¶¶ 6-7 (2003); *Metzenbaum v. General Services Administration*, 83 M.S.P.R. 243, ¶ 8 (1999). An agency must refer such cases to OPM for adjudication or contact OPM for prior approval if the agency wants to take action under its own authority at 5 C.F.R. part 315 or 5 C.F.R. part 752. *See* 5 C.F.R. § 731.103(a); *Saunders v. Department of Justice*, 95 M.S.P.R. 38, ¶¶ 6-7 (2003).

¶7 Here, the agency learned of the appellant's alleged omission of two criminal convictions on his pre-employment Form 306 from OPM's Office of Federal Investigations (OFI). IAF, Tab 4, Subtab 4g. An agency employee, Susan Harris, stated that an employee of the OPM OFI telephoned her and informed her that "[the appellant] ha[d], as many as three arrests and convictions, which he failed to disclose on his Optional Form 306." *Id.* Harris stated further that "OPM concluded their call to me by indicating that they were intending, in the next few days, to send a communication to [the appellant] regarding his suitability for continued Federal employment." *Id.* Harris also stated that, in a subsequent telephone conversation with Kim Cook, who was on staff with OPM's OFI, Harris learned that, according to OFI's most recent record, "there are two arrests and convictions regarding [the appellant] which he was required to list on his OF-306 There is apparently a third possible criminal incident . . . [that] should have been stated on [the appellant's] OF-306 However, this cannot be corroborated until . . . the next few days or so." IAF, Tab 4, Subtab 4d.

¶8 The record below therefore indicated OPM’s involvement in the situation. Based on OPM’s interest in the appellant’s suitability for Federal employment, we find that the appellant’s omission that formed the basis of the agency’s termination action is an intentional false statement or deception in appointment that could form the basis of a negative suitability determination.* Thus, the Board lacks jurisdiction over this appeal unless the agency establishes that it had prior approval from OPM to take action under its own authority at part 315. *See Harris v. Department of the Navy*, 99 M.S.P.R. 355, ¶ 7 (2005).

¶9 In an affidavit provided for the record in this appeal, the agency’s Facilities Program Manager, Pat Landon, avers that OPM had advised his office that it was initiating action to remove the appellant from Federal employment for suitability reasons. IAF, Tab 12 at 16. He avers further that he has been “provided absolutely **no** information by . . . the USOPM, or the Center’s HRMS Office, that indicates or suggests, in any way, that my decision to terminate the Appellant was inappropriate in any fashion.” *Id.* at 19 (emphasis in original). We find that OPM’s silence is insufficient to show that it delegated authority to the agency to take action against the appellant under its own authority at part 315.

¶10 The administrative judge did not issue a jurisdictional order allowing the parties to file evidence and argument on the jurisdictional question of whether OPM delegated authority to the agency to terminate the appellant during his probationary period under part 315 for a material intentional false statement or deception or fraud in examination or appointment, and the record is not sufficiently developed to allow the Board to make that determination. *See id.* Accordingly, we remand this case to the administrative judge to issue such a

* We note that, at this stage of the appeal, the assertions concerning the appellant’s alleged criminal record and arrest history are merely allegations. We make no finding in this Opinion and Order as to whether the appellant actually had the criminal record identified by the OPM OFI or whether he omitted to report a criminal record on his OF-306.

jurisdictional order and to allow the parties to develop the record on this jurisdictional question.

ORDER

¶11 We remand the appeal to the Central Regional Office to issue a jurisdictional order that directs the parties to file additional evidence and argument to show why this appeal should not be dismissed for lack of Board jurisdiction because the agency did not have delegated authority from OPM to take action against the appellant under part 315. The administrative judge must issue a new ID deciding the question of whether the agency had authority from OPM to take this action and whether the Board has jurisdiction under part 315. If she finds that the agency had such authority and that the Board has jurisdiction under part 315, she may incorporate her findings in the vacated ID into the new ID and afford the appellant an opportunity to file a petition for review on all the findings in the new ID, including the question of whether the agency afforded him the procedural protections of part 315.

FOR THE BOARD:

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