UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 159

Docket No. AT-315H-06-0986-I-1

Yiying Liu,

Appellant,

v.

Department of Agriculture,

Agency.

June 19, 2007

Yiying Liu, Greenville, Mississippi, pro se.

Alan B. Robinson, Beltsville, Maryland, 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 filed a petition for review of an initial decision that dismissed her appeal for lack of Board jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 On March 6, 2005, the appellant received a temporary appointment not to exceed March 5, 2006, as an excepted service GS-0404-05 Biological Science Laboratory Technician. Initial Appeal File (IAF), Tab 9 at 8. On August 7,

2005, without a break in service, the agency appointed the appellant to a career-conditional GS-0404-06 Biological Science Laboratory Technician position subject to a one-year probationary period. IAF, Tab 6, Subtab 4(c). Effective August 3, 2006, the agency terminated the appellant. *Id.*, Subtabs 4(a), 4(b). The appellant filed an appeal, arguing that her removal was based on incidents that were "arbitrary," untrue, and exaggerated. IAF, Tab 1 at 5. She also claimed that her removal was in retaliation for filing complaints with human resources and the agency's equal employment opportunity (EEO) office, and for reporting her supervisor for an "illegal" use of her computer. *Id*.

¶3 The administrative judge issued an acknowledgment order informing the appellant, inter alia, that the Board may lack jurisdiction over her appeal of her termination during a probationary period. IAF, Tab 2. The administrative judge subsequently informed the parties of Board precedent concerning the "tacking" of prior service in the "same line of work" toward completion of a probationary period in a new position, and ordered the agency to file evidence on the jurisdictional issue. IAF, Tab 7 at 3-4. In response to the administrative judge's orders, the appellant argued that she completed her probationary period because she had more than one year of continuous service "in the same research unit of the same agency." IAF, Tab 5 at 1. She also argued that she completed her probationary period because she was in a leave without pay (LWOP) status on August 4, 2006, the last day in her tour of duty before her anniversary date. *Id.* The appellant subsequently alleged that her supervisor discriminated against her when she made comments about her Chinese ancestry, and that the agency's decision to terminate her was based on retaliation for her "protected whistleblowing" and EEO activity. IAF, Tab 8 at 3-10.

¶4 After considering the parties' submissions on the jurisdictional issue, the administrative judge issued an initial decision, without holding a hearing, dismissing the appeal for lack of jurisdiction. Initial Decision (ID) at 1-5. The administrative judge found that the agency terminated the appellant during her

probationary period, she failed to show that she was on LWOP on August 4, 2006, and she failed to raise non-frivolous allegations that she was terminated for partisan political or marital status reasons. ID at 2-5. He also found that the Board could not consider her prior service in determining whether she had more than one year of current continuous service because her March 5, 2005 appointment was temporary. ID at 3. The administrative judge did not address whether the appellant's prior GS-05 service was creditable toward the completion of her probationary period. Finally, the administrative judge found that the appellant's national origin discrimination claim was insufficient to bring the appeal within the Board's jurisdiction. ID at 5.

¶5 On petition for review, the appellant argues that the administrative judge erred in failing to find that her prior service was creditable toward the completion of her probationary period because it was in the same line of work in the same agency. Petition For Review File (PFRF), Tab 1 at 1-4, 9-10. She further appears to reassert that she completed her probationary period because the evidence shows that she worked 80 hours during her final pay period. *Id.* at 5, 11-12. Finally, she contends that the administrative judge erred in failing to adjudicate her claims of retaliation and discrimination. *Id.* at 5-6, 9-11. The agency has filed a response in opposition to the appellant's petition. PFRF, Tab 3.

ANALYSIS

¶6 Under 5 U.S.C. § 7511(a)(1)(A), an "employee" is an individual in the competitive service:

> (i) who is not serving a probationary or trial period under an initial appointment; or
>
> (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less[.]

An appellant has Board appeal rights if she meets either prong of this definition. *See McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341-42 (Fed.

Cir. 2002) (an individual who does not meet one prong of the definition of "employee" under 5 U.S.C. § 7511(a)(1) has appeal rights if she meets the other prong). On review, the appellant argues that she satisfies both prongs of this definition. PFRF, Tab 1 at 4.

¶7 First, we agree with the administrative judge that the appellant cannot satisfy subsection (ii) of section 7511(a)(1)(A) because her prior service from March 6, 2005, to on or about August 6, 2005, was pursuant to a temporary appointment. ID at 2-3; *see* IAF, Tab 9 at 5. Service in temporary appointments limited to one year or less do not count toward completion of the one-year service requirement of section 7511(a)(1)(A)(ii). *Williams v. Department of Defense*, 96 M.S.P.R. 335, ¶ 13 (2004). As noted above, the appellant was not appointed to a permanent position until August 7, 2005, and she was removed effective August 3, 2006. Therefore, she did not have one year of current continuous service, and does not satisfy the criteria under subsection (ii).

The appellant is entitled to a hearing to determine whether she completed her probationary period and thus is an "employee" under subsection (i) of 5 U.S.C. § 7511(a)(1)(A).

¶8 The appellant has the burden of proof on the issue of jurisdiction, 5 C.F.R. § 1201.56(a)(2)(i), and where an appellant makes a non-frivolous allegation that the Board has jurisdiction over an appeal, the appellant is entitled to a hearing on the jurisdictional question, *Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). Non-frivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon*, 60 M.S.P.R. at 329. To meet the non-frivolous standard, an appellant need only plead allegations of fact which, if proven, could show jurisdiction, though mere pro forma allegations are insufficient to satisfy the non-frivolous standard. *Id.*; *Lara*, 101 M.S.P.R. 190, ¶ 7. In determining whether the appellant has made a non-frivolous allegation of

jurisdiction entitling her to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Ferdon*, 60 M.S.P.R. at 329.

¶9 Here, the appellant alleged that she completed her probationary period because she was in LWOP status on August 4, 2006, the last workday of her probationary period. IAF, Tab 5 at 1. In support of her contention, she submitted a Statement of Earnings and Leave showing that, from July 23, 2006, to August 5, 2006, she worked 80 hours, including 70 hours of regular time, 2 hours of sick leave, and 8 hours of LWOP. *Id.* at 9. The administrative judge subsequently ordered the agency to submit documentary evidence on this issue, including "an affidavit or declaration under penalty of perjury concerning whether the appellant was in a pay status on Friday, August 4, 2006, and, if appropriate, an explanation why her pay records reflect leave without pay on that date." IAF, Tab 7 at 3. In response to the administrative judge's order, the agency submitted a Standard Form (SF) 50 reflecting that the effective date of the appellant's termination was August 3, 2006, and an SF-52, indicating that the appellant's supervisor dated his request for personnel action "August 3, 2006," and asked that the action be effective on the same date. IAF, Tab 6, Subtab 4a, Tab 9 at 7. The agency also submitted the appellant's Time and Attendance Report for the relevant pay period and a work schedule that reflected that the appellant was not in pay status on August 4, 2006, and an affidavit from an agency official attesting that the appellant was not on LWOP on August 4, 2006. IAF, Tab 9 at 9-11. On November 16, 2006, the day after the agency filed its evidence, the administrative judge issued an initial decision discussing the agency's evidence and concluding that "the appellant failed to make a non-frivolous allegation that she was in a pay status on August 4, 2006, based solely on her argument that her leave and earning

statement reflects eight hours of leave without pay during her last pay period with the agency." ID at 4.

¶10 Based on the foregoing, we find that the appellant met the requisite non-frivolous standard under *Ferdon* when she alleged that she completed her probationary period because she was in LWOP status on August 4, 2006, entitling her to a jurisdictional hearing. The appellant's allegation of fact, if proven, could show Board jurisdiction over her appeal, and she supported her allegation by alleging that her earnings statement reflected that she worked 80 hours during the relevant pay period, with 8 hours of LWOP reflected. This suggests that her allegations are not merely pro forma. *See Ferdon*, 60 M.S.P.R. at 329. We further find that the agency's documentary submissions, including the agency's affidavit, constituted mere factual contradiction of the appellant's otherwise prima facie showing of jurisdiction and, therefore, that the administrative judge impermissibly solicited and weighed the evidence without holding a jurisdictional hearing in order to resolve the parties' conflicting assertions regarding the Board's jurisdiction over this appeal. *Id.* (the Board may not weigh evidence and resolve conflicting assertions of the parties absent a jurisdictional hearing, nor may the agency's evidence be dispositive).

¶11 In addition, the administrative judge failed to address whether the appellant's 5 months of prior temporary service in her GS-05 position could be "tacked" on to her near 12 months of service in her career-conditional GS-06 appointment and credited towards completion of her probationary period to satisfy subsection (i) of section 7511(a)(1)(A). Prior service under a temporary limited appointment may count toward completion of a later probationary or trial period if it was: (1) rendered immediately prior to the career or career-conditional appointment; (2) in the same line of work; (3) in the same agency; and (4) completed with no more than one break in service of less than 30 days. *See* 5 C.F.R. § 315.802(b); *Sosa v. Department of Defense*, 102 M.S.P.R. 252, ¶ 9 (2006). This concept applies to the excepted as well as the competitive service.

See McCrary v. Department of the Army, 103 M.S.P.R. 266, ¶¶ 10-15 (2006) (finding that the appellant, who was terminated from her excepted service Guidance Counselor position during her probationary period, but who had prior service as a Guidance Counselor in a series of consecutive term appointments in the competitive service, had completed her probationary period).

¶12 Here, it is undisputed that the appellant's temporary service as a GS-0404-05 Biological Science Laboratory Technician was rendered immediately prior to her career-conditional appointment to the GS-0404-06 position of the same title, in the same agency, i.e., in the Department of Agriculture, Agricultural Research Service Field Organization in Stoneville, Mississippi, and with no break in service. *See* IAF, Tab 9 at 5, 7; Tab 6, Subtab 4(c). Thus, the only remaining issue is whether her temporary appointment was "in the same line of work" as her subsequent permanent appointment. In determining whether an appellant has been employed "in the same line of work," the nature and character of the duties actually performed controls over the intent or job titles. *See* 5 C.F.R. § 315.802(b)(2) (the "same line of work" is "determined by the employee's actual duties and responsibilities"); *Sosa*, 102 M.S.P.R. 252, ¶ 11; *Kaiser v. Department of the Army*, 75 M.S.P.R. 440, 447 (1997) (section 315.802(b)(2) of 5 C.F.R. "requires a close analysis of the 'actual duties and responsibilities' of the two positions to determine whether the appellant's prior service is creditable towards his probationary period").

¶13 The appellant alleged below that her temporary position was similar to her permanent position and that after she was hired as a permanent employee she still performed work for her former supervisor. IAF, Tab 8. She also stated that her temporary and permanent positions were in the "same research unit in the same agency." *Id.*; IAF, Tab 5. Given these assertions, and the fact that the appellant's temporary and permanent positions shared the same title, i.e., Biological Science Laboratory Technician, we find that she has raised non-frivolous allegations that she served "in the same line of work" throughout her 17

months of service with the agency.[*] Thus, the appellant is entitled to a hearing to determine whether she is an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i) because her prior service as a GS-0404-05 Biological Science Laboratory Technician was creditable toward completion of her probationary period in the GS-0404-06 position of the same title. *See Sosa*, 102 M.S.P.R. 252, ¶ 13 (remanding for a hearing based on the appellant's non-frivolous allegations that he performed the same duties in two different positions and thus may have completed his probationary period).

ORDER

¶14 Accordingly, we REMAND this appeal to the Atlanta Regional Office for a jurisdictional hearing. Should the administrative judge determine that the appellant is an "employee" within the meaning of 5 U.S.C. § 7511(a)(1)(A)(i) and, therefore, that the Board has jurisdiction over her appeal, he should provide her notice of the relevant burdens of proof on her affirmative defenses of discrimination and retaliation and adjudicate those claims.

FOR THE BOARD:

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Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.

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[*] On review, the appellant submits what appears to be part of a vacancy announcement for the GS-0404-06 position, containing only an abbreviated description of the duties of the position, PFRF, Tab 1 at 17, and pages from an evaluation sheet for the GS-0404-05 position, which includes some, but not all, of the appellant's duties, *id.* at 19-20. There is no information regarding the qualifications for the positions. Regardless, because the appellant has made non-frivolous allegations that the actual duties she performed remained the same under both positions, the position descriptions are not dispositive.