

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

2007 MSPB 195

Docket No. AT-315H-07-0463-I-1

**Chris C. Coleman,
Appellant,**

v.

**Department of the Army,
Agency.**

August 27, 2007

Abner Merriweather, Huntsville, Alabama, for the appellant.

Karen Tomaine, Esquire, Tobyhanna, Pennsylvania, 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, for lack of jurisdiction, his appeal of his termination. For the following reasons, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a preference eligible, filed this appeal of the agency's action terminating him from his GS-9 Inventory Management Specialist position in the excepted service based on performance-related reasons. Initial Appeal File (IAF), Tab 1. The agency notified the appellant, who was appointed on

February 19, 2006, that the effective date of the action was February 6, 2007, and that he was being removed during his 1-year trial period. IAF, Tab 5, Subtab 4a.

¶3 On appeal, the appellant asserted that the agency did not provide him with any counseling, warning, performance improvement plan, or notice of proposed termination, and based the action on unsubstantiated information. IAF, Tab 1 at 5-7. The appellant also alleged that the action was based on an August 1, 2006 disclosure he made to the Occupational Safety & Health Administration. *Id.* at 14-15, 23-24. The appellant indicated, however, that he had not requested corrective action from the Office of Special Counsel. *Id.* at 13.

¶4 The administrative judge (AJ) informed the appellant that an employee with less than 1 year of current, continuous service in the same or similar position has limited appeal rights to the Board, and that such an employee would be granted a hearing only if he makes a nonfrivolous claim that his termination was based on partisan political reasons or marital status. IAF, Tab 2 at 2. The AJ ordered the appellant to file evidence and argument proving that the action was within the Board's jurisdiction. *Id.* In response, the appellant asserted that the agency did not provide him with advance notice of the termination and an opportunity to respond. IAF, Tab 4. The appellant also asserted that, because the agency had placed him in a leave without pay (LWOP) status after February 6, 2007, he was on the agency's rolls for more than 1 year after he entered on duty. *Id.* He further claimed that, because the Standard Form (SF) 50 effecting his termination was approved on March 8, 2007, he completed his 1-year trial period, and is entitled to appeal to the Board. *Id.* The agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tab 5, Subtab 1.

¶5 The AJ issued a second order, dated April 4, 2007, noting that, "although appellant has provided what appears to be copies of perfunctory personnel actions that were effected after his termination, that evidence does not establish that appellant was actually employed by the agency when the routine personnel actions were processed." IAF, Tab 6 at 2. The AJ noted that: (1) The agency

had submitted an SF 50 indicating that the termination was effective February 6, 2007; (2) the appellant did not assert that he worked for the agency after that date; (3) objections to the merits of the termination were not within the Board's jurisdiction; and (4) it did not appear that the appellant had made a nonfrivolous allegation of jurisdiction. *Id.* The AJ again ordered the appellant to show why his appeal should not be dismissed, and indicated that “[a]ny response . . . must be RECEIVED by the Board no later than close of business on April 23.” *Id.*

¶6 On April 26, 2007, the AJ issued an initial decision dismissing the appeal upon finding that the appellant did not make a nonfrivolous allegation of jurisdiction. IAF, Tab 7, Initial Decision (ID). The AJ found that, although the appellant submitted copies of “perfunctory” personnel actions that were issued after his termination, “that evidence does not establish that appellant was actually employed by the agency when the personnel documents were produced.” ID at 2-3. The AJ noted that the agency submitted an SF 50 indicating that the appellant was terminated effective February 6, 2007, and that the appellant did not file a reply to the April 4, 2007 show-cause order. ID at 3.

ANALYSIS

¶7 The appellant asserts on review that he “submitted a nonfrivolous allegation to the [B]oard 21 April 2007,” and that “[r]eceipt of mail is beyond . . . my control.” Petition for Review File (PFRF), Tab 1 at 3. In support of this assertion, the appellant submits a Postal Service (PS) Form 3811 (Domestic Return Receipt) appearing to show that a certified mail item, addressed to the Board's regional office in Atlanta, was received on April 26, 2007. *Id.* at 9. The appellant contends that he waited until April 21st to mail his response because he was waiting for a response from the agency to his discovery request. *Id.* at 3. The appellant also contends that the Board's discovery regulations were not followed in this case, and that the AJ “failed to view appellant's documents as

official, [and] only viewed agency's documents as such." *Id.* at 4-5. The agency has timely opposed the petition for review. PFRF, Tab 3.

¶8 We first note that, even assuming that the appellant mailed a response to the April 4, 2007 show-cause order on April 21, 2007, there is no indication that such a response was *received* by the AJ before the April 23, 2007 deadline set forth in the show-cause order. *Cf.* 5 C.F.R. § 1201.58(b) (if the appellant waives the right to a hearing, the record will close on the date the judge sets as the final date for "the receipt or filing" of submissions of the parties). In addition, the appellant has not shown that the AJ erred with respect to discovery, especially given the appellant's failure to file a motion to compel discovery. Nevertheless, as set forth below, we find that the appellant has made a nonfrivolous allegation of jurisdiction that warrants a jurisdictional hearing on remand.

¶9 The appellant has the burden of proof on the issue of jurisdiction, 5 C.F.R. § 1201.56(a)(2)(i), and when an appellant makes a nonfrivolous allegation that the Board has jurisdiction over an appeal, he is entitled to a hearing on the jurisdictional question, *Liu v. Department of Agriculture*, 106 M.S.P.R. 178, ¶ 8 (2007). Nonfrivolous 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. *Id.* Pro forma allegations, however, are insufficient to satisfy the nonfrivolous standard. *Id.* In determining whether the appellant has made a nonfrivolous allegation of jurisdiction, the AJ 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 AJ may not weigh the evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Id.*

¶10 Under 5 U.S.C. §§ 7511(a)(1)(B), 7512, and 7513(d), the Board has jurisdiction over an appeal of a removal filed by a preference eligible in the excepted service who has completed 1 year of current continuous service in the

same or similar positions in an Executive agency. Thus, if the appellant completed 1 year of current continuous service in the same or similar position, he would have the right to appeal his separation to the Board. “Current continuous service” is a period of employment or service immediately preceding an adverse action without a break in Federal civilian service of a workday. *See Dade v. Department of Veterans Affairs*, 101 M.S.P.R. 43, ¶ 10 (2005).

¶11 Although the appellant asserted below that he completed his 1-year probationary period because the SF 50 documenting his termination was approved on March 8, 2007, this fact generally does not show that the effective date of his termination was March 8, 2007. *See Vandewall v. Department of Transportation*, 52 M.S.P.R. 150, 155 (1991) (approval of an SF-50 is treated as a clerical task which customarily occurs after the effective date of the action; such approval does not affect the effective date of the action as long as the action is requested and approved by an individual with the proper authority). The appellant also asserted, however, that the agency’s pay records showed that he was in an LWOP status after his apparent termination. The appellant submitted a Civilian Leave and Earnings Statement for the pay periods ending February 17, 2007, and March 3, 2007, which indicated that the appellant earned 16 hours of regular pay, with 8 hours of “holiday” and 64 hours of LWOP in the former pay period, and 80 hours of LWOP in the latter. IAF, Tab 4, Subtab 4 at 1-2. Thus, the appellant has submitted evidence that calls into question the effective date of his termination, which is set forth in the termination notice and the SF 50.

¶12 In *Liu*, 106 M.S.P.R. 178, ¶ 9, the appellant alleged that she completed her probationary period, and was therefore an “employee” under 5 U.S.C. § 7511(a)(1)(A)(i), because she was in an LWOP status on the last workday of her probationary period. Ms. Liu submitted, in support of her contention, 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.* The Board found that Ms. Liu met the requisite

nonfrivolous standard when she alleged that she completed her probationary period because she was in an LWOP status on August 4, 2006, and that this allegation was not merely pro forma given her submission of the earnings statement. *Id.*, ¶¶ 9-10. The Board found that the agency's documentary submissions, including an SF 50 showing a termination date of August 3, 2006, a time and attendance report and work schedule showing that Ms. Liu was not in a pay status on August 4, 2006, and an affidavit attesting that Ms. Liu was not on LWOP on August 4, 2006, constituted mere factual contradiction of Ms. Liu's otherwise adequate prima facie showing of jurisdiction. *Id.*, ¶¶ 9, 10. The Board concluded that the AJ impermissibly weighed the evidence without holding a jurisdictional hearing. *Id.*, ¶ 10.

¶13 Here, as in *Liu*, the appellant alleges that he was on LWOP through March 3, 2007, which would have been over one year after his February 19, 2006 appointment. The appellant has supported this allegation with leave and earnings statements similar to the one submitted in *Liu*. The agency's SF 50, relied upon by the AJ in dismissing this appeal, constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction.

ORDER

¶14 Accordingly, we REMAND this appeal to the regional office for a jurisdictional hearing. If the AJ finds that the appellant is an "employee" under 5 U.S.C. § 7511(a)(1)(B), and that the Board therefore has jurisdiction over this appeal, he shall determine whether the agency's action deprived the appellant of his right to minimum due process of law, i.e., notice and an opportunity to

respond; provide the appellant with notice of the relevant burden of proof on his affirmative defense of reprisal for whistleblowing; and adjudicate that claim.

FOR THE BOARD:

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