

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

2009 MSPB 214

Docket No. AT-0752-09-0432-I-1

**Joyce Rutherford,
Appellant,**

v.

**United States Postal Service,
Agency.**

October 28, 2009

Stewart Lee Karlin, Esquire, New York, New York, for the appellant.

Barry D. Thorpe, Esquire, Pembroke Pines, Florida, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant filed a petition for review (PFR) of a March 24, 2009 initial decision that affirmed the agency's decision to place her on enforced leave due to her medical restrictions. For the following reasons, we DENY the PFR for failure to meet the review criteria under [5 C.F.R. § 1201.115\(d\)](#), REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND the appeal for a jurisdictional hearing, and further adjudication if appropriate, consistent with this Opinion and Order.

BACKGROUND

¶2 Effective January 9, 2009, the appellant was placed on enforced leave because light duty work, which was previously given to her, was no longer available due to declining work volume and tour compression. *See* Initial Appeal File (IAF), Tab 9, subtabs 4B (decision letter), 4E (proposal letter). The appellant filed this appeal, requested a hearing, and alleged that the agency committed harmful procedural error, that the action was the result of discrimination, and that it violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) and the Veterans Employment Opportunities Act of 1998 (VEOA). IAF, Tab 1.

¶3 The administrative judge issued an Order on Jurisdiction and Proof Requirements. IAF, Tab 3. In it, he noted, among other things, that a constructive suspension may arise “when an agency places an employee on enforced leave pending an inquiry into his ability to perform” or “when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request.” *Id.* at 2. The administrative judge instructed the appellant to file evidence and argument amounting to a nonfrivolous allegation that her claim of a constructive suspension was within the Board’s jurisdiction, and he explained that if she satisfied this burden, she would be given an opportunity to establish that the Board has jurisdiction over her appeal by proving by preponderant evidence that her absence was involuntary “either at a hearing or during a further opportunity for the parties to develop the written record.” *Id.* at 3-4. The administrative judge separately issued an Order on VEOA Jurisdiction and Notice of Proof Requirements. IAF, Tab 4. The appellant submitted a response to the Order on Jurisdiction and Notice of Proof Requirements at IAF, Tab 5. The agency filed a Motion to Dismiss for lack of jurisdiction and, later, a copy of its file. IAF, Tabs 7, 9. During the prehearing conference, the administrative judge denied the

agency's motion to dismiss. IAF, Tab 18 at 1. The administrative judge also indicated that the appellant withdrew her "Title VII allegations of discrimination," but she was still pursuing her affirmative defenses of harmful error, disability discrimination (disparate treatment and failure to accommodate), USERRA discrimination and a VEOA violation. *Id.* at 2. The administrative judge issued a Notice of Proof Requirements regarding the appellant's claims of disability discrimination, a USERRA violation and harmful procedural error. IAF, Tab 19.

¶4 A hearing was held on March 10, 2009. Hearing CD (HCD). The administrative judge issued an initial decision, finding jurisdiction over the appeal, sustaining the agency's decision to place the appellant on enforced leave, rejecting all of the appellant's affirmative defenses, and affirming the enforced leave "penalty." IAF, Tab 22. After requesting two extensions of time, both of which were granted by the Office of the Clerk of the Board, the appellant filed a PFR and the agency filed a response. Petition for Review File (PFRF), Tabs 1-6.

ANALYSIS

¶5 The appellant's PFR does not meet the Board's criteria for review, and therefore we deny it. *See* [5 C.F.R. § 1201.115](#)(d). However, we reopen this appeal on the Board's own motion under 5 C.F.R. § 1201.118 to address the issue of jurisdiction.

Jurisdiction

¶6 As a preliminary matter, the agency did not dispute that the appellant was a preference eligible Postal Service employee, *see* IAF, Tab 1 at 1; *id.*, Tab 9, subtab 4B at 1, and, accordingly, she has Board appeal rights with respect to the agency's action. [39 U.S.C. § 1005](#)(a); [5 U.S.C. § 7511](#)(a)(1)(B)(ii). We note, however, that the administrative judge did not provide an analysis of the constructive suspension jurisdictional issue. Rather, the initial decision contains only a single reference to the Board's jurisdiction. *See* IAF, Tab 22 at 1-2 ("The

Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511(a)(1)(B), 7512(1)[¹] and 7513(d).”).

¶7 In *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344 (Fed. Cir. 2006), our reviewing court clarified the following procedures for an appellant to establish jurisdiction in a constructive adverse action appeal:

[U]nder [5 U.S.C. §§ 7701](#) and 7512, once a claimant makes non-frivolous claims of Board jurisdiction, namely claims that, if proven, establish the Board’s jurisdiction, then the claimant has a right to a hearing. At the hearing, the claimant must prove jurisdiction by a preponderance of the evidence. If the Board determines that the claimant fails to prove jurisdiction by a preponderance of the evidence, then the Board does not have jurisdiction and the case is dismissed for lack of jurisdiction.

Because a hearing was held on March 10, 2009, we assume that the administrative judge concluded, at a minimum, that the appellant nonfrivolously alleged Board jurisdiction. However, we do not believe the jurisdictional issue is as clear as the initial decision implies.

¶8 In the appellant’s initial appeal paperwork, when asked to describe the action that she was appealing, she checked the box marked “Other action,” but she did not explain her response. *See* IAF, Tab 1 at 2. She noted, however, that the effective date of the agency’s action was December 5, 2008. *Id.* The record reveals that on this date, while she was working on the automated flat sorter machine (AFSM 100), agency officials handed her a letter, explaining that, because of tour compression, there was no longer light duty work available to her within her restrictions, and her request for light duty work was thus denied. IAF, Tab 5 at 8; *see id.* at 5 (the agency’s December 5, 2008 letter, noting that she had been provided with light duty work for an extended period of time and that, if she continued to be unable to perform her position due to her medical restrictions and

¹ We assume that the administrative judge intended to cite [5 U.S.C. § 7512](#)(2), relating to suspensions, instead of subsection (1), relating to removals.

she could not report to her regular assignment, she was required to report her absence by dialing the attendance call number). The appellant did not dispute that she subsequently received the agency's proposal and decision letters, placing her on enforced leave, and she did not return to work after December 5, 2008. HCD (appellant); *see* IAF, Tab 9, subtabs 4B, 4E.

¶9 The termination of a light duty assignment is not, *per se*, an adverse action that is appealable to the Board. *Johnson v. U.S. Postal Service*, [110 M.S.P.R. 679](#), ¶ 12 (2009). However, the termination of a light duty assignment resulting in an employee's absence for more than 14 days and a loss of pay may be a constructive suspension appealable under [5 U.S.C. §§ 7512\(2\)](#) and 7513(d). *Pittman v. Merit Systems Protection Board*, [832 F.2d 598](#), 599-600 (Fed. Cir. 1987); *see Johnson*, [110 M.S.P.R. 679](#), ¶¶ 8, 12. As identified by the administrative judge, constructive suspension claims may arise in two situations: when an agency places an employee on enforced leave pending an inquiry into his ability to perform, or when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *McFadden v. Department of Defense*, [85 M.S.P.R. 18](#), ¶ 9 (1999). If an employee absent due to medical restrictions requests work within those restrictions, and the agency is bound by policy, regulation or contract to offer available light duty work, the employee's continued absence due to the agency's failure to offer available light duty work constitutes a constructive suspension. *Id.*, ¶ 10.

¶10 The dispositive issue in determining whether a constructive suspension occurred is who initiated the absence. *Alston v. Social Security Administration*, [95 M.S.P.R. 252](#), ¶ 11 (2003), *aff'd*, 134 F. App'x 440 (Fed. Cir. 2005). If the appellant initiated the absence, then it is not a constructive suspension. *Id.* An appellant who asserts a constructive suspension claim bears the burden of establishing that her absence was involuntary. *Id.* We note further that "[t]he issue of whether the appellant was ready, willing and able [to work] during the

entire period of his absence is relevant to the question of back pay or compliance; it is not relevant to a determination of jurisdiction, *i.e.*, whether a constructive suspension occurred.” *Sherrod v. Department of the Navy*, [90 M.S.P.R. 347](#), ¶ 23 (2001); *see Rivas v. U.S. Postal Service*, [61 M.S.P.R. 121](#), 128 n.7 (1994), *overruled on other grounds*, [72 M.S.P.R. 383](#) (1996).

¶11 In response to the Order on Jurisdiction and Proof Requirements, the appellant stated that, on December 5, 2008, when she received the agency’s letter, she informed agency management that “[her] restrictions [while on “Light/limited duty”] had not prevented [her] from performing [her] duties [on the AFSM 100]; that is working for eight hours in [her] hired position.” IAF, Tab 5 at 8. She also “told them [she] did not want leave since [she] was not volunteering to go home.” *Id.* at 9. The appellant indicated that on Wednesday, December 10, 2008, she called to speak to her supervisor, Blanca Romero, and she reiterated that she was “not requesting leave since it was not [her] desire to be on leave[, she] was forced to go home” and that “[her] desire was to be at work and not on leave.” *Id.*

¶12 We have also considered the agency’s December 11, 2008 enforced leave proposal letter, which described the appellant’s medical restrictions and stated that she would remain in that leave status “until [she was] able to furnish medical documentation demonstrating to the satisfaction of management that [she was] able to perform the duties of [her] position.”² IAF, Tab 9, subtab 4E. In response, the appellant submitted a December 15, 2008 light duty request, documenting her restrictions, which we note were almost identical to the restrictions cited by the agency in its proposal notice. IAF, Tab 5 at 22. She also submitted the functional requirements for the mail processor/flat sorter machine (FSM) clerk position, and her doctor certified on December 23, 2008, that she could perform the duties of this position “[w]ith restrictions.” *Id.* at 25.

² We note that the decision letter contains almost identical language. *See* IAF, Tab 9, subtab 4B at 1.

¶13 Jurisdictional determinations in enforced leave cases are fact-specific. For instance, in *Dize v. Department of the Army*, [73 M.S.P.R. 635](#), 639 (1997), the agency advised the appellant that light duty work was no longer available. The Board concluded that the appellant was entitled to a jurisdictional hearing because she nonfrivolously alleged that the agency initiated her absence, having stated that “she was fully able to work during the entire period of the alleged constructive suspension” and that “she returned to work and requested that she be placed on duty but the agency told her there was no work available.” *Id.* It was unclear, however, whether Dize asked to return to her regular position, or her former light duty position, and the Board instructed the administrative judge to decide that point on remand. *Id.* at 639-40.

¶14 Conversely, in *Moon v. Department of the Army*, [63 M.S.P.R. 412](#), 419 (1994), the agency’s enforced leave letter told the appellant that “she would no longer be given light duty and that she could apply for leave or [Office of Workers’ Compensation Programs (OWCP)] benefits.” The Board dismissed the appeal for lack of jurisdiction, concluding that the agency did not bar her from reporting to work or performing her assigned duties because it “offered her the choice of returning to her regular position or requesting leave and/or applying for OWCP benefits,” and noting that a choice of unpleasant alternatives did not make her decision not to return to her regular position involuntary. *Id.* at 419-20; *see Johnson*, [110 M.S.P.R. 679](#), ¶ 15 (“The appellant was faced with the unpleasant alternatives of returning to work with duties outside his medical restrictions, or requesting leave The appellant's decision not to return to his regular duties or to his October 2007 light-duty work, however unpleasant, was nonetheless voluntary.”).

¶15 We find that the appellant’s response to the administrative judge’s jurisdictional order constitutes a nonfrivolous allegation that the agency initiated her absence on December 5, 2008. In particular, the appellant alleged that, on this date, she informed management that she was able to perform the functions of

her position, she wanted to work, and she did not want to take leave. At the same time, the agency's letter did not present the appellant with any alternatives, like in *Moon*, and she was essentially at the agency's mercy regarding whether her medical documentation sufficiently demonstrated that she could perform the duties of her position. Because the agency appeared to be the sole decisionmaker regarding her return to work, she has nonfrivolously alleged that her initial placement on enforced leave was involuntary, and because we regard the facts of this appeal as similar to *Dize*, they warrant a similar jurisdictional finding. As was the case in *Dize*, it is unclear in this matter whether the appellant has asserted that she could perform her position of record, as opposed to her light duty position. Therefore, like *Dize*, remand for a determination on that issue and to provide the appellant an opportunity to prove jurisdiction by preponderant evidence is appropriate. *See Dize*, 73 M.S.P.R. at 639-40. Consistent with *Garcia*, the appellant is entitled to a jurisdictional hearing.

¶16 However, while the administrative judge initially informed the appellant of her two-part jurisdictional burden as described in *Garcia*, *see* IAF, Tab 3 at 3-4, the record does not reflect that the administrative judge told her *when* she would have an opportunity to prove jurisdiction by preponderant evidence, or that she satisfied that particular burden. While the prehearing conference would have been a logical time to discuss the appellant's further jurisdictional burden, the Order and Summary of Telephonic Prehearing Conference indicates that the administrative judge denied the agency's motion to dismiss for lack of jurisdiction without an explanation, he did not remind the appellant that she still had to prove jurisdiction by preponderant evidence, nor did he otherwise determine that she had satisfied this burden. *See* IAF, Tab 18. In fact, it appears that, during the prehearing conference, the administrative judge regarded the March 10, 2009 hearing as a merits hearing, instead of a jurisdictional hearing, because he only discussed the agency's enforced leave action and the appellant's affirmative defenses. *See id.* at 1-3 (explaining, among other things, that the

agency must prove by preponderant evidence that the charged conduct occurred, that there was a nexus between the conduct and the efficiency of the service and that the penalty was reasonable). Because the record is deficient regarding the jurisdictional issue, we vacate the initial decision and remand the appeal so that the administrative judge can provide the appellant an opportunity to prove jurisdiction by preponderant evidence, *i.e.*, a jurisdictional hearing, and for the administrative judge to make specific findings regarding the voluntariness of the appellant's absence.

¶17 We recognize that a resolution of the jurisdictional issue will likely be impacted by other issues in this appeal. For instance, the appellant originally alleged that the effective date of the agency's action was December 5, 2008. IAF, Tab 1 at 2. Prior to the hearing, the parties negotiated a settlement agreement with respect to the timeframe of December 5, 2008, through January 8, 2009, and the administrative judge dismissed that portion of the appellant's claim as settled. *See Rutherford v. U.S. Postal Service*, MSPB Docket No. AT-0752-09-0245-I-1 (Initial Decision, Mar. 19, 2009). Neither party has filed a PFR of that initial decision. However, there was no indication in the record that the administrative judge discussed with the parties the impact, if any, of the settlement agreement on the appellant's jurisdictional burden in this matter.

¶18 "An initially voluntary absence can subsequently become involuntary, and vice versa." *Lewis v. U.S. Postal Service*, [82 M.S.P.R. 254](#), ¶ 6 (1999). Thus, even if we concluded that the appellant's absence during the timeframe of December 5, 2008, through January 8, 2009, was *involuntary*, in light of the settlement agreement, this timeframe may no longer be relevant to an analysis of the remainder of the appellant's constructive suspension claim.

¶19 Therefore, the pertinent question is: Who initiated the appellant's absence for the time period relevant in *this* appeal? The current record lacks any findings regarding whether the appellant's absence, starting on January 9, 2009, was voluntary or involuntary, likely because there was little evidence in the record

regarding either party's actions or statements after this date, except for the agency's January 9, 2009 decision letter and its January 13, 2009 Memorandum to the appellant.³ Given this lack of evidence, we are unable to make a determination of voluntariness in the first instance. Therefore, on remand, the administrative judge shall allow the parties to supplement the record on the issue of voluntariness with respect to this latter timeframe, so that he can make the requisite jurisdictional findings.

¶20 We note also that the record contains confusing, and seemingly contradictory, evidence regarding the appellant's position from November 2008 through January 2009, and these discrepancies will impact the administrative judge's jurisdictional findings. As stated previously, it is unclear whether the appellant claimed that she could return to perform her position of record or her former light duty position. This is a critical point because if she only claimed she could perform her light duty position and the agency had no light duty work available, as it contended, her absence would not be considered involuntary and the Board would lack jurisdiction. *See Dize*, 73 M.S.P.R. at 639-40; *see also McFadden*, [85 M.S.P.R. 18](#), ¶ 10.

¶21 From the current record, we cannot discern what the appellant's position of record was during the relevant time period. For instance, in her initial appeal paperwork, the appellant referred to her position as an "FSM [flat sorter machine] clerk," *see* IAF, Tab 1 at 1, but on PFR, she refers to her position as a mail processing clerk, *see* PFRF, Tab 5 at 2. The agency's November 17, 2008 Memorandum to the appellant indicated that, effective November 22, 2008, the appellant would have a new reporting time for pay location 351. IAF, Tab 21, exhibit 2 at 1. Senior Plant Manager John Michael Bender testified that pay

³ As discussed below, the agency's January 13, 2009 Memorandum to the appellant informed her, among other things, that her schedule had changed, that her bid position had changed due to tour compression, and that she could bid on current and future vacant assignments. IAF, Tab 21, exhibit 1 at 1.

location 351 was the AFSM 100, which was presumably her light duty assignment. HCD (Bender). According to the November 22, 2008 reassignment PS-50, however, the appellant's position title was a mail processing clerk and she had been reassigned to an unassigned regular position.⁴ *See* IAF, Tab 9 subtab 4G.

¶22 It appears that, even though the appellant may have been an unassigned regular as of November 22, 2008, she continued to work the AFSM 100 in an apparent light duty assignment as an FSM clerk until her light duty request was denied on December 5, 2008. HCD (appellant); *see* IAF, Tab 5 at 5. We note that the appellant did not return to work after this date. HCD (appellant). The record also reveals that, as part of the tour compression, the appellant's apparent light duty assignment was reposted, and another employee, Carlos Mercado, successfully bid on the FSM clerk position and he began work in that position on January 3, 2009. *See* IAF, Tab 21, exhibit 3 at 1-2 (discussing job identification number 95104628). These documents further indicate that the appellant vacated the FSM clerk position on November 21, 2008. *Id.* They also appear to indicate that the official title for this position is mail processing clerk and FSM clerk is a particular assignment within that position. *Id.* However, the FSM clerk and mail processing clerk positions have separate position descriptions. IAF, Tab 14, exhibit 2; IAF, Tab 21, exhibit 4.

¶23 The agency's January 9, 2009 decision letter indicated that the appellant's position was a mail processing clerk. *See* IAF, Tab 9, subtab 4B. However, in the agency's January 13, 2009 Memorandum, which was directed to the appellant at pay location 351 (the location for an FSM clerk), it informed her that her

⁴ Mr. Bender testified that unassigned regulars were directed to report to a resource room each day of their schedule, they would be assigned on a daily basis to fill positions of any assigned clerks who did not report for work, and, as a result, an unassigned regular could be assigned to any position or operation in his/her assigned craft. HCD (Bender).

schedule had changed, that she was *then* becoming an unassigned regular because another employee had displaced her (presumably Mercado), and that she could bid on current and future vacant assignments. IAF, Tab 21, exhibit 1 at 1.

¶24 We are unable to reconcile the discrepancies in the appellant's position(s) over this short period of time, nor can we determine their impact on the jurisdictional issue, based on the current record. Rather, the issues regarding the appellant's position of record and the impact of the settlement agreement on the question of voluntariness shall be addressed on remand. Again, it will be crucial for the administrative judge to identify the appellant's position of record and light duty assignment for the relevant time period in order to determine which position(s) the appellant claimed she could perform. *See Dize*, 73 M.S.P.R. at 639-40.

ORDER

¶25 For the foregoing reasons, we VACATE the initial decision and REMAND the appeal for the administrative judge to provide the appellant with a jurisdictional hearing, so that she may have an opportunity to prove the Board's jurisdiction by preponderant evidence. The administrative judge shall issue an initial decision that explains whether the appellant proved jurisdiction by preponderant evidence. The initial decision shall also include: findings regarding the appellant's position of record for the relevant time period; findings regarding the impact of the settlement agreement on jurisdiction; and findings regarding whether the appellant's absence during the relevant time period was voluntary or involuntary. Based on these findings, the administrative judge shall either dismiss the appeal for lack of jurisdiction or, if he determines that the

appellant proved jurisdiction by preponderant evidence, proceed to adjudicate the agency's enforced leave action and the appellant's affirmative defenses.⁵

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

⁵ With respect to the appellant's failure to accommodate claim, the administrative judge must give her proper notice of her burden in light of the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, § 8 (codified at [42 U.S.C. §§ 12101 et seq.](#) (2008)), which became effective on January 1, 2009.