UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 234

Docket No. AT-315H-09-0446-I-1

Asaad E. Abdullah,

Appellant,

v.

Department of the Treasury,

Agency.

December 23, 2009

Asaad E. Abdullah, Atlanta, Georgia, pro se.

Jeffrey S. Morris, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for review, REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency terminated the appellant, a Contact Representative/Tax Examining Technician, GS-0962-05, effective February 17, 2009, during his

purported probationary period, for providing inaccurate information on his employment application. Initial Appeal File (IAF), Tab 1 at 1, 14, Tab 4, Exhibits (Exs.) 1, 4, Tab 9 at 2. The Standard Form (SF)-50 documenting the appellant's March 17, 2008 appointment indicated that his career-conditional appointment in the competitive service was subject to the completion of a 1-year probationary period beginning on March 17, 2008. IAF, Tab 4, Ex. 1. The appellant filed an appeal with the Board asserting that he was wrongfully terminated. IAF, Tab 1 at 3, 5. The appellant also claimed that he was not a "new hire" because he had over 5 years of service as a "permanent competitive full-time employee" in the position from which he was terminated. IAF, Tab 1 at 5, 8. In addition, he raised claims of harmful procedural error and prohibited discrimination based on sex and religion. *Id.* at 4, 8-10.

¶3 In a jurisdictional order, the administrative judge informed the appellant that probationary employees have no statutory right of appeal because they are excluded from the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A), but probationary employees have a limited regulatory right of appeal. IAF, Tab 3 at 1. The administrative judge advised the appellant that under 5 C.F.R. § 315.806(a) and (b) probationary employees terminated for post-appointment reasons may appeal if they make a "good faith allegation" that their termination was based on partisan political reasons or marital status.[1] *Id.* In addition, the administrative judge advised the appellant that probationary employees terminated for pre-appointment reasons may appeal on the grounds that the action violated the procedures stated in 5 C.F.R. § 315.805. *Id.*; *see* 5 C.F.R. § 315.806(c). The administrative judge informed the appellant of his

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[1] Under 5 C.F.R. § 315.806(a) and (b), a probationary employee terminated for a pre-appointment reason may also appeal a termination that allegedly was based on partisan political reasons or marital status discrimination. In the initial decision, the administrative judge correctly advised the appellant of his right to appeal on this basis. IAF, Tab 10 at 3-4. On review, however, the appellant makes no such allegations.

burden of proof and ordered him to file evidence and argument proving the Board's jurisdiction over his appeal. IAF, Tab 3 at 2.

¶4 In response to the jurisdictional order, the appellant alleged, inter alia, that he had completed his probationary period based on his prior federal service and his termination was inconsistent with 5 C.F.R. § 315.801. IAF, Tab 8 at 4. The agency contended that the appellant's prior federal service was inapplicable to his 1-year probationary period pursuant to 5 C.F.R. § 315.802, because he resigned from his prior federal service in August 2004, and he had a break in service that lasted over 3 years. IAF, Tab 4 at 2, Exs. 1 & 3. The agency asked the administrative judge to dismiss the appeal for lack of jurisdiction. IAF, Tab 7.

¶5 Without holding the hearing requested by the appellant, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 1 at 2, Tab 10, Initial Decision (ID) at 1-2, 4. Specifically, the administrative judge found that the appellant had no statutory right of appeal because he had not completed his required 1-year probationary period at the time of his termination. ID at 3. The administrative judge also found that the appellant had no regulatory right of appeal because: (1) he did not allege that his termination was based on partisan political reasons or marital status, pursuant to 5 C.F.R. § 315.806(b); and (2) he did not allege that he was denied the procedural protections of 5 C.F.R. § 315.805. ID at 3-4.

¶6 The appellant has filed a petition for review challenging the merits of his termination and reasserting his claim that he had satisfied his 1-year probationary period before the agency terminated him. Petition for Review File (PFRF), Tab 1 at 4. The agency has filed a response contending that the petition fails to meet the Board's review criteria. PFRF, Tab 4 at 1.

ANALYSIS

¶7 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit*

Systems Protection Board, 759 F.2d 9, 10 (Fed. Cir. 1985). To qualify as an "employee" with appeal rights under 5 U.S.C. chapter 75, an individual in the competitive service, like the appellant, must show that he either is not serving a probationary or trial period under an initial appointment or has completed 1 year of current continuous service under an appointment other than a temporary one limited to a year or less. 5 U.S.C. § 7511(a)(1)(A); *Dodson v. Department of the Navy*, 111 M.S.P.R. 504, ¶ 4 (2009).

¶8 In his petition for review, the appellant has not alleged or presented any argument based on new and material evidence previously unavailable below despite his due diligence, nor has he established that the administrative judge based his decision on an erroneous interpretation of statute or regulation. Rather, he addresses the merits of his claim and reasserts his argument below that he had prior federal service and completed his 1-year probationary period before his termination. PFRF, Tab 1 at 4; IAF, Tab 1 at 5. For these reasons, we deny his petition for review for failure to meet the Board's review criteria. *See* 5 C.F.R. § 1201.115(d).

¶9 However, the Board has the authority to reopen and reconsider a case on its own motion. 5 C.F.R. § 1201.118. We reopen this appeal to consider an issue that was not addressed below, namely, whether the appellant qualifies as an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i) because he was not serving a probationary or trial period under an initial appointment. If so, the appellant may have chapter 75 adverse action appeal rights regarding his termination. *See Dodson*, 111 M.S.P.R. 504, ¶ 9.

¶10 Under 5 C.F.R. § 315.801(a)(1), the first year of service of an employee who is given a career or career-conditional appointment is a probationary period when the employee was appointed from a competitive list of eligibles pursuant to 5 C.F.R. § 315.301. *Dodson*, 111 M.S.P.R. 504, ¶ 9. Under certain limited circumstances, the employee's prior federal service may count toward the completion of the probationary period. 5 C.F.R. § 315.802(b). Such

circumstances are not present here, however, because the appellant had a break of more than 3 1/2 years between his August 2004 resignation from his prior federal service and his March 2008 appointment. ID at 3; IAF, Tab 4, Exs. 1, 3; *see* 5 C.F.R. § 315.802(b)(3) (prior federal civilian service counts toward the completion of probation when the prior service contains or is followed by a single break in service that does not exceed 30 calendar days). Thus, if the appellant's 2008 appointment met the criteria of 5 C.F.R. § 315.801(a)(1), then the appellant was not an "employee" with adverse action appeal rights under 5 U.S.C. § 7511(a)(1)(A)(i) [2] when the agency terminated his appointment. Further, the Board would not have jurisdiction over this appeal because the appellant was a probationer with no regulatory right of appeal under 5 C.F.R. § 315.806, as the administrative judge correctly determined. ID at 3-4.

¶11 On the other hand, the first year of service of an employee who is given a career or career-conditional appointment is also a probationary period when the employee "[w]as reinstated under [5 C.F.R.] subpart D . . . *unless* during any period of service which affords a current basis for reinstatement, the employee completed a probationary period or served with competitive status under an appointment which did not require a probationary period." 5 C.F.R. § 315.801(a)(2) (emphasis added); *Dodson*, 111 M.S.P.R. 504, ¶ 9. Thus, if the appellant's 2008 appointment was a reinstatement that met the criteria of 5 C.F.R. § 315.801(a)(2), then the appellant apparently was an "employee" with adverse action appeal rights under 5 U.S.C. § 7511(a)(1)(A)(i) when the agency terminated his appointment. *See Dodson*, 111 M.S.P.R. 504, ¶ 9.

¶12 On appeal, the appellant challenged the agency's use of the probationary employee termination process based on his contention that he had over 5 years of experience as a permanent competitive service employee in the position from

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[2] Because of the appellant's break in service, he would not qualify as an employee under 5 U.S.C. § 7511(a)(1)(A)(ii).

which he was terminated. IAF, Tab 1 at 5, 8. Moreover, in response to the show cause order on jurisdiction, he specifically alleged that the agency "inappropriately categorized" him as a probationary employee, and contended that his termination was inconsistent with 5 C.F.R. § 315.801. IAF, Tab 8 at 4. The pro se appellant[3] may have been attempting to argue that he was an employee with appeal rights because his 2008 appointment was actually by reinstatement, and he was not required to serve a probationary period because he met the criteria of 5 C.F.R. § 315.801(a)(2). *See Smart v. Department of the Army*, 105 M.S.P.R. 475, ¶ 10 (2007) (a pro se appellant is not required to plead the issues with the precision of an attorney).

¶13 We note that the SF-50 documenting the appellant's 2008 appointment does not indicate that the agency appointed him by reinstatement. Instead, the SF-50 identifies the legal authority for the appellant's 2008 appointment as "OPM DELE AGR CERT NO." IAF, Tab 4, Ex. 1. Regardless, it is well established that "the SF-50 is not a legally operative document controlling on its face an employee's status and rights," and the administrative judge made no finding on this issue. *Stoute v. Department of the Navy*, 98 M.S.P.R. 409, ¶ 13 (2005) (quoting *Grigsby v. Department of Commerce*, 729 F.2d 772, 776 (Fed. Cir. 1984)). Because the record has not been developed with the above-described issues in mind, we cannot resolve them at this stage. *See Dodson*, 111 M.S.P.R. 504, ¶ 9.

ORDER

¶14 Accordingly, we VACATE the initial decision and REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this opinion.

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[3] Although the appellant designated an attorney representative on his appeal form, the attorney notified the Board that he was not representing the appellant. IAF, Tab 1 at 11, Tab 5.

The administrative judge shall afford the parties an opportunity to submit evidence and argument on whether the appellant was a statutory employee under 5 U.S.C. § 7511(a)(1)(A)(i), the nature of his appointment, and whether he was properly serving a probationary period when he was terminated. The administrative judge shall afford the appellant a jurisdictional hearing, if he requests one and if there are factual matters in dispute the resolution of which could be the basis for determining jurisdiction.

FOR THE BOARD:

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