UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 1

Docket No. AT-315H-09-0847-I-1

Linda D. Hurston,

Appellant,

v.

Department of the Army,

Agency.

January 6, 2010

Arnold E. Taylor, Port Gibson, Mississippi, for the appellant.

Lewis H. Burke, Vicksburg, Mississippi, 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 (PFR) of an initial decision (ID) dismissing her probationary termination appeal for lack of jurisdiction. As set forth below, we GRANT the PFR and AFFIRM the ID as modified.

BACKGROUND

¶2 Effective July 7, 2008, the agency appointed the appellant to a career-conditional, competitive service position as a Research Support Assistant with the U.S. Army Engineer Research and Development Center, Environmental Laboratory, Ecosystem Evaluation and Engineering Division, Ecological

Resources Branch in Vicksburg, Mississippi, subject to her completion of a 2-year probationary period.* Initial Appeal File (IAF), Tab 4 at 6. Effective June 30, 2009, the agency terminated the appellant based upon the following charges: failure to follow instructions to process a voucher; and improper conduct in displaying discourteous and unprofessional behavior towards a colleague seeking the appellant's assistance. *Id.* at 7-9.

¶3 The appellant appealed her probationary termination and alleged race discrimination and harmful error. IAF, Tab 1 at 2-3, 5. She requested a hearing and designated a representative. *Id.* at 2, 6. The administrative judge (AJ) issued an August 7, 2009 Order that apprised the appellant of the limited appeal rights afforded to probationary employees under 5 C.F.R. §§ 315.801, 805, and 806. IAF, Tab 3. He ordered the appellant to file evidence and argument within 15 days of the date of the Order to establish why her probationary termination appeal should not be dismissed for lack of jurisdiction. *Id.* at 2. The appellant did not respond, and the agency moved to dismiss the appeal. IAF, Tab 4.

¶4 Without holding the requested hearing, the AJ issued an ID dismissing the appeal for lack of jurisdiction. ID at 1, 4. He found that the appellant had no prior service and was terminated during her probationary period, less than 1 year from the date of her appointment and, thus, the appellant had no statutory right to appeal; he further found that there was no basis upon which the Board has jurisdiction over this probationary termination appeal. ID at 2-3. The appellant's representative has filed a PFR of this decision on her behalf. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition. PFRF, Tab 3.

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* Although the SF-50 documenting her appointment indicates there was a 2-year probationary period, under 5 C.F.R. § 315.801(a), a 1-year probationary period is contemplated for career-conditional appointments in the competitive service. However, this apparent error on the SF-50 does not affect our analysis in this appeal.

ANALYSIS

The AJ failed to provide the appellant with proper jurisdictional notice.

¶5 The appellant has the burden of proof by preponderant evidence on the issue of jurisdiction. 5 C.F.R.§ 1201.56(a)(2)(i). Where an appellant makes a nonfrivolous allegation of Board jurisdiction over an appeal, she is entitled to a hearing on the jurisdictional question. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc). Nonfrivolous allegations of Board jurisdiction are allegations of facts which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985).

¶6 Based on our review of the record, we find that the AJ failed to provide the appellant with explicit information regarding the jurisdictional standard to show that she qualifies as an "employee" with appeal rights under 5 U.S.C. Chapter 75. *See* IAF, Tab 3. The AJ merely stated in the August 7, 2009 Order that probationary employees have no statutory appeal rights because they are excluded from the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A). *Id.* at 1. Neither the agency's motion to dismiss, nor the ID, cured the defective *Burgess* notice by apprising the appellant of what she must do to establish jurisdiction as an "employee" in order to afford her the opportunity to meet her jurisdictional burden. *See* ID; IAF, Tab 4; *Easterling v. U.S. Postal Service*, 110 M.S.P.R. 41, ¶ 11 (2008). The ID merely apprised the appellant of the AJ's finding that "there is no record of prior service." ID at 2.

¶7 Although the appellant did not receive proper jurisdictional notice on appeal below, she asserts on review that she requested information from the agency's human resources department regarding her prior service, but did not receive the information "after several inquiries." *See* PFRF, Tab 1 at 1-2. She

now submits an SF-144 Statement of Prior Federal Service dated July 23, 2008, and numerous SF-50s to show her prior service. *See id.*, Exs. 1-2. On appeal below, the appellant made the bare assertions that she had 3 ½ years of total Federal service, and served in the same line of work for 15 months. IAF, Tab 1 at 1, 3. Considering the undisputed evidence that the appellant had completed 11 months and 23 days of her probationary period prior to her termination, PFRF, Tab 1 at 1; IAF, Tab 4 at 6-9, and that she had 2 ½ years of prior service as a Clerk-Typist, PFRF, Tab 1, Ex. 1, Tab 3 at 2, the record supports the appellant's assertion that she had approximately 3 ½ years of total Federal service. *See* PFRF, Tab 3 at 2. Because the record now contains evidence concerning the appellant's prior service, it is unnecessary to remand the appeal to the Atlanta Regional Office for proper jurisdictional notice to be given. We therefore analyze whether or not the appellant has nonfrivolously alleged jurisdiction.

The Board has no jurisdiction over the appellant's termination during her probationary period.

¶8 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). Generally, the Board lacks jurisdiction over a probationary employee's appeal from a termination during the probationary period; however, the Board may consider an appeal when the employee alleges that her termination was based on partisan political reasons or marital status. *Stokes v. Federal Aviation Administration*, 761 F.2d 682, 684-85 (Fed. Cir. 1985); *see Baggan v. Department of State*, 109 M.S.P.R. 572, ¶ 4 (2008); 5 C.F.R. § 315.806(b). A probationary employee may appeal on the basis of procedural deficiencies only if she is terminated for reasons arising before her appointment. 5 C.F.R. § 315.806(c). Here, the appellant does not challenge the AJ's findings that the agency terminated the appellant for post-appointment reasons, and the appellant has not alleged that her termination was for partisan

political reasons or due to marital status discrimination. *See* PFRF, Tab 1; ID at 2-3. Thus, we discern no reason to disturb these findings.

¶9 The primary issue on review is whether the appellant qualifies as a competitive service "employee" with appeal rights under 5 U.S.C. Chapter 75. To qualify as an "employee," the appellant must show that she either is not serving a probationary period 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); *see McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341-43 (Fed. Cir. 2002), *pet. for reh'g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003); *Baggan*, 109 M.S.P.R. 572, ¶ 5. An appellant who has not served a full year under her appointment can show that she has completed the probationary period, and so is no longer a probationer, by tacking on prior service if: (1) the prior service was rendered immediately preceding the probationary appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. *Baggan*, 109 M.S.P.R. 572, ¶ 5 (citing *Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 16 (2005)); *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶¶ 10-15 (2006); 5 C.F.R. § 315.802(b). Alternatively, an employee can show that, while she may be a probationer, she is an "employee" with Chapter 75 appeal rights because, immediately preceding the adverse action, she had completed at least 1 year of current continuous service in the competitive service without a break in Federal civilian employment of a workday. *Baggan*, 109 M.S.P.R. 572, ¶ 5 (citing *Ellefson*, 98 M.S.P.R. 191, ¶ 14).

¶10 Here, it is undisputed that the appellant was appointed to an excepted service Clerk-Typist position effective in March 1998, and served in that position through sometime in September 2000. PFRF, Tab 1, Exs. 1-2, Tab 3 at 2. Although prior service in the excepted service may be counted toward completion of a probationary period in the competitive service, *see McCrary*, 103 M.S.P.R.

266, ¶¶ 2, 10-15 (counting prior competitive service toward completion of an excepted service probationary period), the appellant still could not satisfy each criterion under *Baggan* and 5 C.F.R. § 315.802(b). The record evidence shows that the appellant's prior Federal service ended almost 8 years before her probationary appointment to the position from which she was terminated. PFRF, Tab 1, Ex. 1 at 1; IAF, Tab 4 at 6. Thus, her prior service did not immediately precede her probationary appointment, and there was a break in service of more than 30 days. *See Baggan*, 109 M.S.P.R. 572, ¶ 5; 5 C.F.R. § 315.802(b). Additionally, it is undisputed that the agency terminated the appellant just shy of her completion of 1 year of service in the competitive service. *See* IAF, Tab 4 at 6, 9. Therefore, the appellant had not yet completed 1 year of current continuous service without a break in Federal civilian employment prior to her termination. *See* IAF, Tab 4 at 6-9; *Baggan*, 109 M.S.P.R. 572, ¶ 5. Based on the foregoing, the appellant has not nonfrivolously alleged that she qualifies as an "employee" with appeal rights under 5 U.S.C. Chapter 75.

¶11 Since the Board has no jurisdiction over this probationary termination appeal, the Board has no independent jurisdiction to adjudicate the appellant's discrimination and harmful error claims. *Rhone v. Department of the Treasury*, 66 M.S.P.R. 257, 260 (1995); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982); IAF, Tab 1 at 3, 5.

¶12 Accordingly, we AFFIRM the ID dismissing the appeal for lack of jurisdiction over the appellant's probationary termination, as modified herein.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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