UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 47

Docket No. AT-0752-10-0275-I-1

Jacqueline H. McNair,
Appellant,
v.
Equal Employment Opportunity Commission,
Agency.

March 29, 2011

Willan F. Joseph, Esquire, Lansdowne, Pennsylvania, for the appellant.

Jason Hegy, Washington, D.C., 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 the administrative judge's initial decision that dismissed her purported removal appeal for lack of jurisdiction. For the reasons discussed below, we DENY the petition for review. The removal appeal is DISMISSED for lack of appellate jurisdiction.

BACKGROUND

¶2 The agency promoted the appellant from a GS-15 Regional Attorney position to a position in the Senior Executive Service (SES) as Program Manager of the Miami District Office effective December 7, 2008. Initial Appeal File

(IAF), Tab 16 at 30. She was removed from her SES position, effective Sunday, December 6, 2009, based on her allegedly unacceptable performance, and assigned to a GS-15 Attorney Advisor position. *Id.* at 6.

¶3 The appellant filed an appeal with the Board and requested a hearing, asserting that the agency's action was appealable under 5 U.S.C. § 7701. IAF, Tab 1 at 2, 5. The appeal was docketed by the regional office as an adverse action appeal and assigned to an administrative judge. IAF, Tab 2. After affording the parties the opportunity to file evidence and argument, the administrative judge dismissed the appeal for lack of jurisdiction without holding a hearing, finding that, because the appellant was removed from the SES during her 1-year probationary period for performance-based reasons, she failed to make a nonfrivolous allegation of Board jurisdiction and had no right to appeal the agency's action to the Board. *Id.*, Tab 31, Initial Decision (ID).

¶4 The appellant has filed a petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the petition for review. *Id.*, Tab 3.

ANALYSIS

¶5 The appellant's initial submission in this matter was fashioned and submitted as a removal appeal under 5 U.S.C. § 7701. IAF, Tab 1 at 3, 5. It was therefore docketed as a removal appeal and assigned to an administrative judge. IAF, Tab 2 (Acknowledgment Order). However, it is apparent from the record that the appellant was not actually removed from the civil service entirely; instead, she was removed from the SES and placed in a GS-15 position. IAF, Tab 16 at 6.

¶6 Title 5, United States Code, chapter 75, subchapter V, with its implementing regulations at 5 C.F.R. part 752, subpart F, applies to actions initiated against SES appointees for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of

function." 5 U.S.C. § 7543(a). Actions covered by chapter 75, subchapter V are specified as "a removal *from the civil service* or suspension for more than 14 days." 5 U.S.C. § 7542 (emphasis added). Because the appellant has not made a nonfrivolous allegation that she was removed from the civil service or suspended, or that the action taken against her was for any of the reasons set forth in section 7543(a), the Board does not have jurisdiction over her appeal under 5 U.S.C. § 7543(d). We therefore need not reach the issue of whether the appellant completed her SES probationary period in this appeal. Accordingly, we dismiss the removal appeal for lack of appellate jurisdiction.

¶7 Title 5, United States Code, chapter 35, subchapter V, with its implementing regulations at 5 C.F.R. part 359, concerns the removal of an individual from the SES and the placement of the individual in a civil service position outside of the SES based on "less than fully successful executive performance," and provides for guaranteed placement in a civil service position at or above the GS-15 level or its equivalent for an individual who completed her SES probationary period. 5 U.S.C. §§ 3592, 3594; 5 C.F.R. §§ 359.501, 359.702; *see Berger v. Department of Energy*, 36 M.S.P.R. 48, 51 (1987). Subchapter V provides for an "informal hearing before an official designated by the . . . Board" for non-probationary SES appointees removed "from the [SES] to a civil service position outside of the [SES]" for performance reasons, but also expressly provides that such appointees are not entitled to initiate an action before the Board under 5 U.S.C. § 7701. 5 U.S.C. § 3592(a); *Charrow v. Federal Retirement Thrift Investment Board*, 102 M.S.P.R. 345, ¶ 11 (2006). SES career appointees removed during their statutory 1-year probationary period set forth at 5 U.S.C. § 3393(d) have no right to even the informal hearing provided for in 5 U.S.C. § 3592(a). 5 U.S.C. § 3592(a)(1); *Wynes v. General Services Administration*, 14 M.S.P.R. 482, 483 (1983); *Gaines v. Department of Housing & Urban Development*, 14 M.S.P.R. 473, 474-75 (1983).

¶8 In the instant case, the letter to the appellant informing her of her removal from the SES and placement in a GS-15 position indicates that unacceptable performance was the reason for the action and invokes 5 C.F.R. § 359.402 regarding removal from the SES during an employee's probationary period. IAF, Tab 12 at 17. The appellant, however, contends that she completed her probationary period. PFR File, Tab 1 at 5-6; IAF, Tab 8 at 7-14. If the appellant's contention were correct, she could be entitled to an informal hearing under 5 U.S.C. § 3592(a). However, it is not clear whether the appellant wants an informal hearing. Therefore, if the appellant is interested in an informal hearing, she should file a request with the Clerk of the Board in accordance with 5 C.F.R. § 1201.143.

ORDER

¶9 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 dismissing your removal appeal. 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:

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