UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 57

Docket No. SF-0752-09-0879-I-1

Rodolfo A. Rivera,
Appellant,
v.
Department of Homeland Security,
Agency.

May 31, 2011

Andres M. Grajales, Esquire, Washington, D.C., for the appellant.

Kimberly A. Jones, Esquire, Laguna Niguel, California, 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 initial decision that dismissed his termination appeal for lack of jurisdiction without a hearing. For the reasons set forth below, we AFFIRM the initial decision as MODIFIED by this Opinion and Order, and still DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 Effective July 8, 2007, the agency appointed the appellant under the Federal Career Intern Program (FCIP) to the position of GS-09 Applications Adjudicator. Initial Appeal File (IAF), Tab 4 at 28. The FCIP appointment was

an excepted service appointment expected to continue for 2 years, with a potential for noncompetitive conversion to a career or career-conditional appointment in the competitive service upon satisfactory completion of the internship. *Id*.

¶3 The agency issued the appellant a letter, dated July 1, 2009, stating that it would not be converting his FCIP appointment to a competitive service appointment because the appellant's "performance was not at an acceptable level of competence." *Id*. at 8. The letter stated that the appellant's FCIP appointment would expire on July 7, 2009, and that he would be separated from service upon its expiration. *Id*. The letter was postmarked July 6, 2009, and mailed to the appellant's home address. *Id*. at 10. The appellant, however, was on approved leave overseas beginning June 29, 2009, and did not return home until July 12, 2009. IAF, Tab 1 at 5, Tab 4 at 4, 12-13. He alleged that he did not actually receive the agency's letter until July 13, 2009. IAF, Tab 1 at 3, 5, Tab 4 at 4. The agency subsequently issued an SF-50 indicating that the appellant had been terminated effective July 7, 2009. IAF, Tab 4 at 26.

¶4 The appellant filed a Board appeal of the agency's action and requested a hearing. IAF, Tab 1 at 3. He alleged that the agency removed him without affording him due process and argued that his FCIP appointment automatically converted to a competitive service appointment because the agency failed to take timely action to effect his termination. *Id*. at 2-3, 5-6, 10. The appellant also alleged that the agency failed to afford him adequate training and that the agency's action was motivated by age discrimination. *Id*. at 6, 9-10; IAF, Tab 17 at 5, 12-15.

¶5 The administrative judge issued two orders regarding jurisdiction, stating that the Board may not have jurisdiction over the appeal because termination of employment on the date that an appointment is set to expire is generally not an adverse action within the Board's jurisdiction. IAF, Tab 2 at 2-3, Tab 9 at 1-2. The administrative judge informed the appellant that he must make a nonfrivolous

allegation of Board jurisdiction in order to be entitled to his requested hearing, and he ordered the appellant to file evidence and argument on the matter. IAF, Tab 2 at 2-3, Tab 9 at 1-3. Both the appellant and the agency filed evidence and argument on the jurisdictional issue. IAF, Tabs 4, 6, 8, 14, 17, 18.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing. IAF, Tab 19, Initial Decision (ID) at 1, 11. The administrative judge found that the appellant's termination upon the expiration of his FCIP appointment was not an adverse action appealable to the Board. ID at 6-11. He found the fact that the appellant did not actually receive the termination notice until after the appointment expired was immaterial to the jurisdictional issue. ID at 10. He also found that the appellant's allegations regarding the alleged lack of training were immaterial to the jurisdictional issue. *Id*. Having found the Board lacks jurisdiction over the appeal, the administrative judge declined to adjudicate the appellant's age discrimination claim. ID at 11.

¶7 The appellant has filed a petition for review, arguing that (1) the agency's failure to provide him appropriate training precluded it from terminating his employment based on his alleged unsatisfactory performance, Petition for Review File (PFR File), Tab 3, Petition for Review at 7-10, (2) his FCIP appointment converted automatically to a career or career-conditional appointment in the competitive service when it expired without the agency giving him timely notice of the termination, *id*. at 10-11, and (3) the agency's defective termination of his employment constituted a removal without the benefit of due process, *id*. at 11-13. The agency has filed a response, addressing the appellant's arguments on review and arguing that the petition for review should be denied for failure to meet the Board's review criteria. PFR File, Tab 4 at 7-12. On review, the Board exercised its authority under 5 U.S.C. § 1204(3)(1)(A) to request that the Office of Personnel Management (OPM) provide an advisory opinion concerning the interpretation of certain OPM regulations governing FCIP appointments. PFR File, Tab 5. OPM has provided an advisory opinion, and the appellant has filed a

response to OPM's submission. *Id.*, Tabs 8, 10. We have considered these additional pleadings in reaching this decision.

ANALYSIS

¶8 Shortly after the record on review closed, the Board issued a precedential decision regarding its jurisdiction over an appeal of a termination pursuant to the expiration of an FCIP appointment. *Scull v. Department of Homeland Security*, 113 M.S.P.R. 287 (2010). As the Board explained in *Scull*, "an FCIP intern's termination upon the expiration of his appointment is generally not an adverse action appealable to the Board because it merely carries out the terms of the appointment." 113 M.S.P.R. 287, ¶ 7 (citing *Endermuhle v. Department of the Treasury*, 89 M.S.P.R. 495, ¶ 9 (2001), *Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199-200 (1980), and 5 C.F.R. § 752.401(b)(11)); *see* 5 C.F.R. § 213.3202(o)(1)-(2), (6)-(7). However, the Board in *Scull* declined to consider the legal effect of an agency's failure to take any action upon the expiration of an FCIP appointment because the agency in that case took timely, affirmative steps to terminate the appellant's employment upon the expiration of his FCIP appointment. *Scull*, 113 M.S.P.R. 287, ¶ 12 & n.3. Specifically, the Board declined to decide whether, in the absence of any agency action at the expiration of an FCIP appointment, the appointment automatically converts to a career or career-conditional appointment in the competitive service pursuant to 5 C.F.R. § 213.3202(o)(6)(i) or the intern's federal employment automatically terminates pursuant to 5 C.F.R. § 213.3202(o)(7). *See id.*; *see generally Myles v. Social Security Administration*, 108 M.S.P.R. 471, 473-74 (2008) (separate opinion of Chairman Neil A. G. McPhie).

¶9 The parties in the instant appeal appear to take opposing positions on the issue, IAF, Tab 1 at 2-3, 5, Tab 4 at 4-5, Tab 6 at 5, Tab 8 at 5, 7, Tab 14 at 3, 5, Tab 17 at 7-12, Tab 18 at 6-9, and the administrative judge appears to have agreed with the agency that "the appointment of a FCIP intern simply expires at

the end of the 2 year internship period," ID at 9-10 & n.7. The appellant challenges the administrative judge's finding on review. PFR File, Tab 3, Petition for Review at 10-11. After fully considering the submissions and the record in this appeal, we affirm the initial decision because we find that an FCIP appointment automatically terminates upon its expiration unless the agency takes affirmative steps to extend the appointment or convert it to the competitive service. In reaching this conclusion, we find OPM's advisory opinion persuasive. PFR File, Tab 8.

¶10 As we noted in *Scull*, an FCIP appointment expires at the end of the intern's tour of duty on the last day of the internship, which is, with exceptions not applicable here, the day before the 2-year anniversary date of the appointment. *Scull*, 113 M.S.P.R. 287, ¶¶ 6, 12; 5 C.F.R. § 213.3202(o)(1). In this case, the last day of the appellant's FCIP internship was July 7, 2009, which was the day before the 2-year anniversary of his July 8, 2007 appointment.[1] IAF, Tab 4 at 26, 28. Because we find that an FCIP appointment automatically terminates upon the expiration of its term unless the agency takes affirmative steps to extend the appointment or convert it to the competitive service, and the record here shows that the agency did not take any such steps to extend the appellant's FCIP appointment, we conclude that the appellant's termination upon expiration of his FCIP appointment was not an appealable adverse action.

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[1] The appellant argues that his internship expired on July 2, 2009, because the "2 years" of his internship period should have been measured in terms of pay periods rather than calendar years. IAF, Tab 1 at 5; PFR File, Tab 3, Petition for Review at 11. The appellant's argument is without merit because it lacks legal support and is contrary to longstanding Board precedent and the ordinary meaning of the term "year." *See Dean v. Department of Agriculture*, 99 M.S.P.R. 533, ¶ 16 (2005) (absent a distinct definition in a statute or regulation, the words therein are assumed to carry their "ordinary, contemporary, common meaning" (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))), *aff'd on recons.*, 104 M.S.P.R. 1 (2006); *cf. Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶ 7 (2006) (a competitive service probationary period is 1 calendar year).

Endermuhle, 89 M.S.P.R. 495, ¶ 9; *Berger*, 3 M.S.P.R. at 199-200; 5 C.F.R. § 752.401(b)(11)); *see* 5 C.F.R. § 213.3202(o)(1)-(2), (6)-(7).

¶11 Furthermore, we note, in the alternative, that even if the agency was required to take affirmative steps to terminate the appellant in order to prevent his FCIP appointment from converting to a competitive service appointment, the agency was not required to actually afford the appellant prior notice of its intention to do so as long as it acted diligently and reasonably in attempting to afford him prior notice. *See Scull*, 113 M.S.P.R. 287, ¶ 12; *cf. Santillan v. Department of the Air Force*, 54 M.S.P.R. 21, 26 (1992) (it is not a requirement that a probationary employee actually receive a termination notice prior to the effective date of the termination if the agency acted diligently and reasonably in attempting to afford the employee prior notification).[2] In this case, it is undisputed that the appellant was overseas on July 7, 2009, when his FCIP appointment expired. IAF, Tab 1 at 5, Tab 4 at 4, 12-13, Tab 6 at 6. The appellant does not claim that the agency should have attempted to notify him of its action while he was overseas, but argues instead that due diligence required the agency to notify him prior to his departure since he informed the agency well in advance that he would be out of the country on the date his appointment was set to expire. IAF, Tab 14 at 3-4, Tab 17 at 8-12; PFR File, Tab 3, Petition for Review at 12-13.

¶12 We decline to establish a rule that would require an agency to make its termination decision in advance of the date that it would otherwise be required to do so merely because it is aware that the employee in question will be unavailable

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[2] Although the record in this case was developed prior to the Board's decision in *Scull*, the parties extensively briefed the issue of whether the agency acted diligently and reasonably in attempting to afford the appellant timely notice of his termination in light of analogous Board decisions. IAF, Tab 4 at 4-6, Tab 6 at 5-7, Tab 14 at 3-4, Tab 17 at 8-12, Tab 18 at 8-9; PFR File, Tab 3, Petition for Review at 12-13, Tab 4 at 11-12. Thus, the record on this issue is sufficiently developed for the Board to address it on review.

to receive the decision on that date. The regulations governing the FCIP are calculated to afford agencies a full 2 years to observe and consider an intern's performance and conduct before deciding whether to convert him to a competitive service appointment. 5 C.F.R. § 213.3202(o)(1), (6)(i). If the agency had actually made its termination decision before the appellant went overseas, the agency's knowledge that he would be unavailable to receive the decision when the agency was required to deliver it might be relevant to whether the agency acted diligently under the circumstances. In this case, however, there is no indication that the agency made its decision until July 1, 2009, when it issued the termination letter. IAF, Tab 4 at 8. Moreover, the agency's decision appears to have been based on a performance evaluation that was not actually completed until June 30, 2009, the day after the appellant left the country. IAF, Tab 4 at 4, 8, 12-24. In addition, there is no indication in the record that the appellant informed the agency of how it might contact him while he was overseas. Under the particular circumstances of this case, we find that the agency made reasonable and diligent efforts to provide the appellant with notice of its decision by mailing the termination notice to his home address on July 6, 2009.

¶13 The appellant has also argued that the agency failed to provide him adequate training in his FCIP position, as required by 5 C.F.R. § 213.3202(o)(9), and that the agency should therefore be precluded from terminating him for failing to satisfactorily complete the internship. IAF, Tab 17 at 5, 12-15 & n.2; PFR File, Tab 3, Petition for Review at 7-10. Specifically, the appellant argues that an agency must be required to comply with paragraph (o)(9) before terminating an FCIP intern for failing to complete the internship satisfactorily; otherwise, that paragraph will be rendered superfluous. PFR File, Tab 3, Petition for Review at 9. However, we find that the appellant's argument is immaterial to the jurisdictional issue because it pertains only to the merits of his termination. *See Weaver v. Department of the Army*, 14 M.S.P.R. 465, 466-67 (1983) (the appellant's argument that his termination was improper because of a lack of

training pertained to the merits of the agency's action and was immaterial to the jurisdictional issue); *see also Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) (the Board must first resolve the threshold issue of jurisdiction before proceeding to the merits of an appeal). We agree with the administrative judge that the agency's option to terminate an FCIP intern upon the expiration of his appointment is not predicated upon the agency having provided the training required by 5 C.F.R. § 213.3202(o)(9). ID at 10; *see* 5 C.F.R. § 213.3202(o)(6)-(7). Furthermore, we disagree with the appellant's argument that our interpretation of the regulation renders paragraph (o)(9) superfluous or violates any other rule of regulatory construction. PFR File, Tab 3, Petition for Review at 9. The fact that an agency's alleged violation of law or regulation provides no basis for a Board appeal does not render that law or regulation superfluous. *See Johnson v. U.S. Postal Service*, 67 M.S.P.R. 573, 577 (1995) (the Board does not have jurisdiction over all matters regarding a federal employee that are allegedly unfair or incorrect; rather, the Board's jurisdiction is limited to matters over which it has been given jurisdiction by statute or regulation).

¶14 Additionally, although the Board generally lacks jurisdiction over the termination of an FCIP intern upon the expiration of his appointment, the FCIP regulations provide the Board with jurisdiction over such a termination under limited circumstances. *Scull*, 113 M.S.P.R. 287, ¶¶ 15-17. Specifically, an appellant may establish Board jurisdiction over an appeal of such a termination by establishing the following elements by preponderant evidence: (1) Immediately prior to his FCIP appointment, he held a career or career-conditional appointment in the same agency; (2) his failure to complete the internship successfully was for reasons unrelated to misconduct or suitability; and (3) he is an "employee" within the meaning of 5 U.S.C. § 7511. *Id.*, ¶ 17; *see* 5 C.F.R. § 213.3202(o)(6)(ii).

¶15 We find that the undisputed documentary evidence shows that the appellant would be unable to establish the first jurisdictional element because he did not hold a career or career-conditional appointment with the agency immediately prior to his FCIP appointment. Rather, the appellant held a term appointment under tenure group III in the competitive service. IAF, Tab 4 at 29-35; *see* 5 C.F.R. § 351.501(b) (tenure group III is reserved for employees who lack career or career-conditional status, such as those on term appointments); *see also* 5 C.F.R. § 315.201(a) (an individual employed in the competitive service for other than temporary, term, or indefinite employment is appointed as a career or career-conditional employee).[3] In addition, prior to the effective date of his FCIP appointment, the appellant executed a document acknowledging that his failure to complete the internship successfully would result in the termination of his federal employment upon the expiration of his appointment, rather than placement in a career or career-conditional position at no lower grade or pay than the one he left. IAF, Tab 8 at 10. Although this document in itself is insufficient to establish the nature of the appellant's prior appointment, it is consistent with the other record evidence showing that it was not a career or career-conditional appointment. Because the appellant did not hold a career or career-conditional appointment in the agency immediately prior to his FCIP appointment, he was not entitled to placement under 5 C.F.R. § 213.3202(o)(6)(ii) when the agency decided not to convert his appointment. *See Scull*, 113 M.S.P.R. 287, ¶¶ 15-17; 5 C.F.R. § 213.3202(o)(7). Therefore, the Board lacks jurisdiction over his termination appeal. *See Scull*, 113 M.S.P.R. 287, ¶ 17.

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[3] We need not decide in the instant appeal whether the term "career or career-conditional appointment" as used in 5 C.F.R. § 213.3202(o)(6)(ii) refers only to competitive service appointments under 5 C.F.R. part 315, or whether it also encompasses "career-type" excepted service appointments with equivalent tenure. *See generally* 5 C.F.R. §§ 317.304(a)(2), 334.102 (definition of "employee"), 351.502(b)(2)(i)-(ii), 412.302(d)(5).

¶16 Although the appellant did not have the benefit of the proper jurisdictional standard before the record closed in this appeal, we decline to remand the appeal for further adjudication because the record on jurisdiction has been fully developed and the undisputed documentary evidence shows that the appellant would be unable to establish Board jurisdiction over his appeal even if he were aware of the proper jurisdictional standard. *See Beets v. Department of Homeland Security*, 98 M.S.P.R. 451, ¶ 9 (2005) (the jurisdictional issue may be resolved based on undisputed documentary evidence). Accordingly, we DISMISS the appeal for lack of jurisdiction. Because the Board lacks jurisdiction over the appeal, we also lack jurisdiction to hear the appellant's age discrimination claim and his claim that the agency violated his due process rights. *See Burnett v. U.S. Postal Service*, 104 M.S.P.R. 308, ¶ 15 (2006); *Smith v. U.S. Postal Service*, 81 M.S.P.R. 92, ¶ 11 (1999).

ORDER

¶17 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:

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