UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 96

Docket Nos. CB-1208-12-0002-U-2
CB-1208-12-0002-U-3

Special Counsel
ex rel. Paul T. Hardy,
Petitioner,
v.
Department of Health and Human Services,
Agency.

November 23, 2011

Bruce D. Fong, Esquire, Oakland, California, and Anne M. Gullick, Esquire, Dallas, Texas, for the petitioner.

Keian Weld, Esquire, 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 agency has filed a motion requesting that the Board terminate the stay of Paul Hardy's performance evaluation that went into effect by operation of law. The petitioner has filed a request for an extension of the stay. For the reasons set forth below, the Board JOINS these matters pursuant to 5 C.F.R. § 1201.36, and, because the Board lacks jurisdiction over claims of reprisal for whistleblowing brought by individuals who do not meet the statutory definition of an

"employee," we GRANT the agency's motion and DENY the petitioner's extension request. The stay is hereby TERMINATED.

BACKGROUND

¶2 On October 7, 2011, the petitioner Office of Special Counsel (OSC) filed a request pursuant to 5 U.S.C. § 1214(b)(1)(A)(i) for a retroactive stay of the performance evaluation given by the Department of Health & Human Services (agency) to Paul Hardy pending OSC's completion of its investigation of alleged prohibited personnel practices. *Special Counsel ex rel. Hardy v. Department of Health & Human Services*, MSPB Docket No. CB-1208-12-0002-U-1 (U-1 File), Tab 1. At the time, Hardy was a commissioned officer, Lieutenant Junior Grade, in the U.S. Public Health Service Corps (USPHSC) who was hired in April 2007 to work in the agency's Food & Drug Administration as a civilian Regulatory Review Officer. OSC argued that a retroactive stay of Hardy's December 3, 2010 Marginal performance evaluation was appropriate while it completed its investigation because, based on the evidence it had gathered to date, it had reasonable grounds to believe that Hardy's performance evaluation was based on reprisal for protected disclosures he had made in violation of 5 U.S.C. § 2302(b)(8), and that it would result in his termination from the Public Health Service Commission Corps effective October 9, 2011.[1] *Id.*

¶3 On October 12, 2011, the agency submitted a pleading contending that Hardy is not an "employee" covered by the Whistleblower Protection Act (WPA), and that therefore the Board lacks jurisdiction to issue a stay under the provisions

---

[1] OSC further asserted that: (1) Based on Hardy's Marginal performance evaluation, he received a negative USPHSC Reviewing Officer Statement (ROS); (2) based on the ROS, the 2011 Engineer Annual Promotion Board had recommended against Hardy's promotion; and (3) USPHSC directives require that officers with less than 20 years of service who are not promoted, like Hardy, be terminated from federal service. U-1 File, Tab 1 at 4.

of 5 U.S.C. § 1214(b)(1)(A).[2] *Id.*, Tab 2. No Board member acted on OSC's stay request and, on October 14, 2011, a 45-day stay went into effect by operation of law pursuant to 5 U.S.C. § 1214(b)(1)(A)(iii). *Id.*, Tab 3. In the order advising the parties that the stay went into effect by operation of law, the Board noted that the agency had contended that the Board lacks jurisdiction to issue the stay, but given the statutory time restraints,[3] the Board had made no ruling on the issue. *Id.*

¶4 On November 2, 2011, the agency filed a motion under 5 C.F.R. § 1201.136(d) requesting that the Board terminate the stay for lack of jurisdiction on the basis that, at the time of the alleged prohibited personnel practice(s), Hardy occupied a position in the uniformed services and therefore was not an "employee" for purposes of the WPA.[4] *Special Counsel ex rel. Hardy v. Department of Health & Human Services*, MSPB Docket No. CB-1208-12-0002-U-2 (U-2 File), Tab 2. The Board afforded OSC and Hardy an opportunity to comment on the agency's motion. *Id.*, Tab 3; 5 C.F.R. § 1201.136(d)(1). Both parties responded, *Special Counsel ex rel. Hardy v. Department of Health & Human Services*, MSPB Docket No. CB-1208-12-0002-U-3 (U-3 File), Tab 1; U-2 File, Tab 11, and their responses have been considered. OSC also sought an extension of the stay, pursuant to 5 U.S.C. § 1214(b)(1)(B). U-3 File, Tab 1.

---

[2] The agency subsequently acknowledged that Hardy's commission was terminated by the Commissioned Corps on October 9, 2011. *Special Counsel ex rel. Hardy v. Department of Health & Human Services*, MSPB Docket No. CB-1208-12-0002-U-2 File, Tab 2 at 3.

[3] A Special Counsel request for an initial stay of 45 days will be granted within 3 working days after the filing of the request unless a Board member determines that the stay would not be appropriate, but if it is not denied within the 3-day period, it is considered granted by operation of law. 5 C.F.R. § 1201.136(a).

[4] As required, the agency submitted evidence showing that it had complied with the Board's notice. U-2 File, Tabs 1, 4, 7; 5 C.F.R. § 1201.136(c).

ANALYSIS

¶5 In support of its initial request for a stay, OSC argued that the agency's issuance to Hardy of a Marginal performance evaluation was in violation of 5 U.S.C. § 2302(b)(8). Under the WPA, an agency may not take or threaten to take certain personnel actions against an "employee" in a covered position (or an applicant for employment) because of a protected whistleblowing disclosure. 5 U.S.C. § 2302(a)(2), (b)(8). The right to appeal to the Board alleging a violation of 5 U.S.C. § 2302(b)(8) derives from 5 U.S.C. § 1221(a). *Fishbein v. Department of Health & Human Services*, 102 M.S.P.R. 4, ¶ 11 (2006). Section 1221(a) provides a right to seek corrective action from the Board on behalf of "an employee, former employee, or applicant for employment" against whom a personnel action is taken, or proposed to be taken, as a result of a prohibited personnel practice described in section 2302(b)(8). *Fishbein*, 102 M.S.P.R. 4, ¶ 11. As noted, OSC has statutory authority to seek a stay on behalf of such an individual. 5 U.S.C. § 1214(b)(1)(A)(i).

¶6 To be an "employee" under 5 U.S.C. § 1221(a), an individual must meet the definition of "employee" under 5 U.S.C. § 2105(a). *Usharauli v. Department of Health & Human Services*, 116 M.S.P.R. 383, ¶ 16 (2011); *Fishbein*, 102 M.S.P.R. 4, ¶¶ 12, 14; *Simmons v. Department of Agriculture*, 80 M.S.P.R. 380, ¶ 6 (1998). Unless otherwise clearly indicated, the definition of "employee" at 5 U.S.C. § 2105(a) applies for all purposes of Title 5. *Simmons*, 80 M.S.P.R. 380, ¶ 6; *see Horner v. Acosta*, 803 F.2d 687, 696 (Fed. Cir. 1986). Under 5 U.S.C. § 2105(a)(1), an "employee," in relevant part, is an officer and an individual who is appointed in the civil service by one of the types of individuals enumerated in the statute acting in their official capacity.[5] The "civil service" is

---

[5] Among the types of individuals who may appoint an "employee" to the civil service are the President, a Member of Congress, a member of the uniformed service, and an individual who is an employee under the statute. 5 U.S.C. § 2105(a)(1).

defined as "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." 5 U.S.C. § 2101(1). The "uniformed services" is defined as the "armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration." 5 U.S.C. § 2101(3). As a commissioned officer in the USPHSC at the time of the alleged retaliatory action, Hardy was a member of the uniformed services and thus explicitly excluded from the definition of "employee" in section 2105(a)(1).

¶7 OSC argues that Hardy was an employee under 5 U.S.C. § 2105 in that he was engaged in the performance of a federal function under the supervision of federal officials while so engaged and was appointed by one of the types of federal officials identified in the statute acting in his official capacity. In so arguing, OSC ignores the language in the statute which requires that, to be an "employee," the individual must be "appointed in the civil service." 5 U.S.C. § 2105(a)(1). As noted above, Hardy does not meet that requirement. Regardless of whether he meets the other requirements of the statute, his failure to be "appointed in the civil service" precludes him from being an "employee" entitled to protection under the WPA. Therefore the Board lacks jurisdiction over OSC's stay request on behalf of Hardy because he does not meet the statutory definition of "employee" under 5 U.S.C. §§ 1221 and 2302. *See Verbeck v. United States*, 89 Fed. Cl. 47, 61 (Fed. Cl. 2009) (finding that, as an officer of the commissioned corps of the Public Health Service, Verbeck was not covered by the WPA pertinent to civilian government employees).[6]

---

[6] While we are not bound by decisions of the U.S. Court of Federal Claims, we are persuaded by the court's reasoning in *Verbeck*. *See Mynard v. Office of Personnel Management*, 108 M.S.P.R. 58, ¶ 14 (2008) (decisions of courts other than the Federal Circuit, although not binding on the Board, may be followed if the Board finds the reasoning persuasive).

¶8 While not disputing that Hardy was a commissioned officer in the Public Health Service, OSC also argues that, until it investigates the circumstances of his employment, it cannot know the exact nature of his appointment at the time of the alleged retaliatory action. Again, the civil service to which Hardy must have been appointed in order to be considered an "employee" for these purposes specifically excludes positions in the uniformed services, which is defined as specifically including the commissioned corps of the Public Health Service. 5 U.S.C. § 2101(1), (3). OSC urges that *Verbeck* is distinguishable in that Verbeck was supervised by two other Public Health Service officers, whereas Hardy was supervised by civilian managers. In so arguing, OSC misreads *Verbeck*. The U.S. Court of Federal Claims specifically held that, as an officer in the Public Health Service Commissioned Corps, Verbeck was a member of a uniformed service and was thus not eligible for the protections of the WPA. *Verbeck*, 89 Fed. Cl. at 61. *Verbeck* is not, as OSC suggests, distinguishable.

¶9 Other cases cited by OSC in support of its position do not require a contrary result. In *Fishbein*, the Board found that nothing in 42 U.S.C. § 209(f) expressly exempts special consultants appointed under that section from coverage under the WPA.[7] *Fishbein*, 102 M.S.P.R. 4, ¶ 10. Section 209(f) provides that such consultants may be appointed without regard to the civil service laws. The Board found however that a section 209(f) appointee could bring "an [individual right of action (IRA)] appeal based on his termination from employment **if he otherwise meets the statutory requirements for doing so**." *Id.* (emphasis added). The Board in *Fishbein* was unable to determine whether the appellant met all the parts of the definition of "employee" under 5 U.S.C. § 2105(a) and remanded the appeal for that purpose. *Fishbein*, 102 M.S.P.R. 4, ¶ 14. In *Usharauli*, the Board

---

[7] The agency asserts that Hardy became a member of USPHSC under the authority of 42 U.S.C. § 209 and that, as a Commissioned Corps Officer, he was appointed into the Reserve Corps under 42 U.S.C. § 204(a)(2). Notwithstanding, he was not an "employee" under 5 U.S.C. § 2105(c) and that matter is dispositive.

found that a research fellow appointed to the National Institutes of Health under 42 U.S.C. § 209(g) is covered under 5 U.S.C. § 2302(b)(8) as long as he meets the definition of an "employee" under 5 U.S.C. § 2105(a). *Usharauli*, 116 M.S.P.R. 383, ¶¶ 12-13, 16-18. The Board further found, based on the record evidence, that Usharauli was "appointed in the civil service," *id.*, ¶ 17, and it remanded the case for a determination as to whether he was appointed by or subject to the supervision of an individual named under 5 U.S.C. § 2105(a)(1) and was engaged in the performance of a federal function under authority of law or executive act. *Id.* In neither *Fishbein* nor *Usharauli* did the Board find, as here, that the appellant was specifically excluded from the statutory definition of "employee" under 5 U.S.C. § 2105(a).

¶10 OSC further argues that, based on the Board's decision in *Kostan v. Arizona National Guard*, 50 M.S.P.R. 182 (1991), the Board should find, by analogy, that Hardy is entitled to protected under the WPA. U-2 File, Tab 10 at 13 n.3. In *Kostan*, the Board held that a National Guard technician must be considered a civilian employee of the Department of the Army or Air Force, and thus an "employee of an agency in the executive branch" who has the same right as other civilian employees of the Army and Air Force to file an appeal concerning restoration following active duty military service. *Kostan*, 50 M.S.P.R. at 183-87. The Board in *Kostan* did not, however, nor was it required to, address the requirement that, to be an employee under 5 U.S.C. § 1221(a), the individual must be an "employee" as defined by 5 U.S.C. § 2105(a). Thus, no basis exists on which to analogize the situation in *Kostan* to the one presented here.[8]

---

[8] In any event, the holding in *Kostan* is no longer applicable because subsequent legislation, specifically, the Uniformed Services Employment and Reemployment Rights Act of 1994, has eliminated Board jurisdiction in such cases. 38 U.S.C. chapter 43; *Melendez v. Puerto Rico National Guard*, 70 M.S.P.R. 252, 254 n.1 (1996), *dismissed*, 152 F.3d 943 (Fed. Cir. 1998) (Table).

¶11 OSC also urges the Board to apply the "joint employer" doctrine to find that Hardy was an employee of the agency. Citing *Service Employees International Union v. National Labor Relations Board*, 647 F.3d 435, 442-43 (2d Cir. 2011), OSC contends that applying to this case the five factors set out by the court to determine whether an alleged employer is a joint employer establishes that the agency, not the USPHSC, acted as Hardy's primary employer. This case does not support OSC's position. It does not address the public sector but rather private companies, and the analysis does not apply to 5 U.S.C. § 2105(a). We also are not persuaded by OSC's argument that we should apply either of two similar common law of agency tests to determine whether a person is an "employee."

¶12 In *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), the court considered whether an independent contractor for a government agency could also be considered an employee within the meaning of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. The court noted the definition of "employee" found at 5 U.S.C. § 2105(a), but found that that definition applied only to Title 5 so that "resort to the civil service definition is unwarranted," since the issue to be decided was whether the appellant "may in any respect be deemed an employee under Title VII as amended." *Spirides*, 613 F.2d 826, 830-31; *see Ma v. Shalala, Secretary, Department of Health & Human Services*, EEOC Appeal Nos. 01962389-90, 1998 WL 295965 at *7-*8 (1998) (since no provision in Title VII provides specific guidance on the meaning of the term "employee," the common law of agency test will be applied to determine whether the appellants should be deemed to be "employees" under Title VII).

¶13 Similarly, in *National Labor Relations Board v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), the court considered whether an individual could be considered an "employee" of two organizations at the same time. The court found that, in applying the "joint employer" standard to the facts of the case, the National Labor Relations Board correctly concluded that

both employers were "joint employers" "within the meaning of the [National Labor Relations Act]." *Browning-Ferris*, 691 F.2d 1117, 1124. None of these cases in the previous paragraphs provide support for OSC's position that Hardy is an "employee" of the agency. The National Labor Relations Board and Equal Employment Opportunity Commission cases considered statutes that do not provide a specific definition of "employee," and so they resorted to common law doctrines. In contrast, the issue in the instant case is whether Hardy is an "employee" as clearly defined under Title 5.

¶14 Citing *Special Counsel ex rel. Borgo v. National Aeronautics & Space Administration*, 66 M.S.P.R. 29 (1994), wherein the Board granted OSC's stay extension request even though it had earlier dismissed Ms. Borgo's IRA appeal for lack of jurisdiction, Hardy's attorney argues that jurisdictional questions do not bar a stay extension. U-2 File, Tab 11. We are not persuaded that *Borgo* requires a finding in favor of OSC and Hardy. An administrative judge of the Board had dismissed Borgo's IRA appeal for lack of jurisdiction on the basis that she did not demonstrate that she engaged in whistleblowing activities. *Borgo*, 66 M.S.P.R. at 30-31. We note that *Borgo* was decided before the U.S. Court of Appeals for the Federal Circuit clarified jurisdictional and merits issues in IRA appeals. Specifically, in *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001), the court held that the Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. Under *Yunus*, the administrative judge's finding in *Borgo* was a merits finding, not a jurisdictional one. Regardless, *Borgo* is distinguishable from the situation present here since Hardy is specifically excluded under the statute from protection under the WPA.

¶15 Finally, Hardy's attorney argues that the question of whether Hardy is an "employee" entitled to protection under the WPA is a merits question and is not jurisdictional. In support, he cites to *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and cases which followed it. In *Arbaugh*, the Court held that the defendant's status as an "employer" within the meaning of 42 U.S.C. § 2000e was a question that went to the merits of the case as an essential element of the claim for relief, and not a jurisdictional question. *Arbaugh*, 546 U.S. at 500-01, 516. The Court examined Title VII's numerosity threshold and concluded, based on the language of 28 U.S.C. §§ 1331 and 1332, the basic statutory grants of federal court subject-matter jurisdiction, and 42 U.S.C. § 2000e-5(f)(3), Title VII's jurisdictional provision, that the threshold was not tied to subject-matter jurisdiction. *Id.* at 513-15. The *Arbaugh* Court was not, however, reviewing the definition of "employee" applicable to the WPA, which is a jurisdictional matter.

¶16 Moreover, our reviewing court has upheld decisions in which the Board dismissed for lack of jurisdiction IRA appeals filed by individuals who were found not to be "employees" under 5 U.S.C. § 2105. *See, e.g., Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1381 (Fed. Cir. 2007) (agreeing that the Board did not have jurisdiction to adjudicate Stoyanov's allegations that the agency was taking, or proposing to take, actions against his brother in retaliation for Stoyanov's whistleblowing activities); *Clark v. Merit Systems Protection Board*, 361 F.3d 647, 651 (Fed. Cir. 2004) (agreeing that an employee serving in a nonappropriated fund instrumentality has no right to appeal to the Board for alleged violations of the WPA); *Levering v. Merit Systems Protection Board*, 259 F. App'x 321, 323 (Fed. Cir. 2007) (agreeing that an employee of a local Farm Service Agency is not an "employee" under 5 U.S.C.§ 2105 and therefore could not bring an IRA appeal before the Board).

¶17 The WPA is remedial legislation, the provisions of which the Board construes liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the WPA. *Fishbein*, 102 M.S.P.R. 4, ¶ 8. However, even a liberal

construction of the provisions of the WPA cannot confer jurisdiction where, as here, the law precludes it. *See Adkins v. Office of Personnel Management*, 104 M.S.P.R. 233, ¶ 12 (2006) (where the language of a statute is clear, it controls, absent an express indication of an intent to the contrary), *aff'd*, 525 F.3d 1363 (Fed. Cir. 2008); *see also Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985) (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).

ORDER

¶18 Because the Board lacks jurisdiction over claims of reprisal for whistleblowing brought by individuals who, like Mr. Hardy, are in the commissioned corps of the Public Health Service, we are compelled to TERMINATE the stay, effective immediately.[9]

FOR THE BOARD:

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

[9] OSC's request for an extension of the stay is denied. The agency has asked the Board to stay OSC's investigation and Hardy's attorney has asked the Board not to take such an action. By this decision, the Board terminates the stay of Hardy's performance evaluation. OSC, not the Board, is charged with investigating prohibited personnel practices. 5 U.S.C. § 1214. We also note that the agency has requested an extension of time in which to respond to OSC's filings. That request is rendered moot by this decision.