

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 80

Docket No. DE-315H-11-0178-I-1

**Michael A. Honea,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

July 9, 2012

Michael A. Honea, Douglas, Arizona, pro se.

Brian R. McBride, Esquire, and Rory J. Juneman, Esquire, Tucson,
Arizona, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of an initial decision that reversed the appellant's probationary termination. For the following reasons, we GRANT the agency's petition for review, VACATE the initial decision, and DISMISS this appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant received an appointment to the position of GS-11 Telecommunications Specialist, effective January 4, 2010. Initial Appeal File

(IAF), Tab 13 at 25. The appointment was subject to completion of a 1-year probationary period beginning on that date. *Id.* at 24. On January 3, 2011, the agency notified the appellant that he was terminated effective that day, because a review of his performance revealed that he lacked the necessary technical skills and abilities, and because unapproved software was discovered on his agency-provided thumb drive, in violation of agency policy. *Id.* at 17-18.

¶3 On petition for appeal, the appellant argued that he completed his probationary period on January 3, 2011, IAF, Tab 1 at 5, 7-8, and, therefore, he was entitled to the due process rights of an employee. *Id.*, Tab 16. He requested a hearing. *Id.*, Tab 1 at 2. The agency asserted that the appellant was, in fact, terminated during his probationary period, and, because he had failed to allege discrimination based on marital status or partisan politics, his appeal must be dismissed for lack of jurisdiction. *Id.*, Tab 13 at 6.

¶4 After considering submissions from both parties, IAF, Tabs 5-7, 11-18, 20, the administrative judge issued an order in which he found that the appellant had made a nonfrivolous allegation of jurisdiction entitling him to a jurisdictional hearing. *Id.*, Tab 21. Subsequently the administrative judge determined, and the parties agreed, that there were no facts in dispute, and that, in lieu of testimony, the parties presented oral argument supporting their respective positions. *Id.*, Tab 29. After they did so telephonically, Hearing Transcript (HT) at 3-27, the administrative judge issued a bench decision. He found that agency personnel actions are generally effective at midnight on the effective date unless another time is specified; that the letter of termination, which indicated that the appellant would be terminated on January 3, 2011, did not specify a time of day when the action would be effective; and that, therefore, consistent with Board case law, the appellant's termination became effective at midnight¹ on January 3, 2011, at

¹ "Midnight" is generally defined as the beginning of a calendar day, i.e., 12:00 a.m. However, consistent with Office of Personnel Management (OPM) guidance for processing personnel actions, IAF, Tab 6 at 9, the administrative judge found that the

which time he had completed his probationary period. HT at 36-38. The administrative judge further found that, because the agency did not afford the appellant the minimum due process rights under [5 U.S.C. § 7513](#), the action must be reversed. *Id.* at 38-39. The administrative judge subsequently issued an initial decision incorporating the bench decision. IAF, Tab 31, Initial Decision (ID). He ordered the agency to provide the appellant interim relief, if either party filed a petition for review. ID at 3.

¶5 In its petition for review,² the agency argues that the administrative judge erred in finding that “the only way to effectuate a last-probationary day termination is via a time on the written termination notice.” Petition for Review (PFR) File, Tab 1 at 4. The appellant has responded to the agency’s petition, *id.*, Tab 3.

ANALYSIS

¶6 It is well-settled that to terminate a person while that person is still a probationer, the separation action must be effected prior to the end of the probationer's tour of duty on the last day of probation, which is the day before the anniversary date of his appointment. *See Scull v. Department of Homeland Security*, [113 M.S.P.R. 287](#), ¶ 12 (2010). The dispositive issue in this appeal is whether the agency, in fact, terminated the appellant during his probationary appointment, as it intended. If it did, then the appellant has no statutory right to appeal the action, but only a limited regulatory right of review. [5 C.F.R. § 315.801](#) *et seq.* Specifically, because he was terminated for post-appointment reasons, the appellant would be required to allege that his termination was based on partisan political or marital status reasons, [5 C.F.R. § 315.806](#)(a), (b) for the

appellant’s termination occurred at the end of the day, i.e., 11:59:59 p.m., on January 3, 2011; rather than nearly 24 hours earlier at 12:00 a.m. (midnight).

² With its petition, the agency submitted a statement certifying that it had complied with the administrative judge’s interim relief order. PFR File, Tab 1 at 9.

Board to exercise jurisdiction over his termination. However, if the agency did not terminate the appellant before he completed his probationary period, then he is an “employee” under [5 U.S.C. § 7511\(a\)\(1\)\(a\)](#), who is entitled to the due process protections of 5 U.S.C. § 7513.

¶7 In this case, it is undisputed that the appellant’s anniversary date was January 4, 2011; that his tour of duty on January 3, 2011, was from 6:00 a.m. to 2:30 p.m.; that the agency notified him in writing on January 3, 2011, that his termination was effective that day without specifying a particular time of day; and that, upon such notification, he turned in all of his government-issued property, including his computer gear, radio and entry badge, and was escorted from the workplace by 8 a.m. on January 3, 2011. IAF, Tab 13 at 14-18, 21. The record establishes that the agency took all actions necessary to out-process the appellant from employment on January 3, 2011, and did not allow him to complete his tour of duty on his last day of probation.

¶8 In finding that the appellant had nevertheless completed his probationary period at the time of his termination, the administrative judge relied on *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#) (1991). HT at 37-38. In *Stephen*, the agency appointed the appellant to a Clerk-Typist position, effective July 29, 1985. *Id.* at 676. The appellant received written notice that her termination would be effective on July 28, 1986, but neither the notice nor the SF-50 documenting the termination specified the time of day that it would go into effect. *Id.* at 679. The record did not document any other actions that the agency took to effectuate the appellant’s termination prior to the end of her tour of duty on July 28.

¶9 Citing the now defunct Federal Personnel Manual (FPM), Ch. 315, subch. 8-4(d) (Apr. 27, 1982)³ for the general principles that a probationary separation

³ The FPM was abolished on December 31, 1993. However, we recognize that OPM’s current Operating Manual, *The Guide to Processing Personnel Actions*, www.opm.gov/feddata/gppa/gppa.asp, similarly provides that all separations are

must occur prior to the end of the tour of duty on the last day before the anniversary date and that separations otherwise generally occur at midnight – or more precisely at 11:59 p.m. – on the date indicated, the Board concluded that the agency’s notice of termination and the SF-50 supported the conclusion that the employee’s termination was not effective before the end of her probationary period. *Stephen*, 47 M.S.P.R. at 679. However, the Board in *Stephen* did not hold that written notice identifying the precise time of separation is the *only* way for an agency to effectuate a probationary termination on the last day of the probationary period.

¶10 We agree with the agency that the undisputed record in this appeal supports the conclusion that the appellant was separated prior to the end of his tour of duty on his last day of probation. Specifically, where, as here, the evidence clearly establishes that the agency took all necessary actions prior to completion of the appellant’s last probationary tour of duty to carry out his termination, its failure to identify in the notice letter the time at which the separation was to go into effect is not dispositive on the question of whether the appellant’s termination was effected prior to the conclusion of his tour of duty. The agency has presented sufficient evidence to demonstrate that it completed the actions required to separate the appellant from employment prior to the completion of his tour of duty on January 3, 2011. We, therefore, find that the appellant was still serving his probationary period at the time that his termination became effective. Furthermore, the appellant has not alleged that his termination was based on partisan political or marital status reasons, [5 C.F.R. § 315.806](#)(a), (b).

effective at the end of the day (midnight) unless an earlier time is indicated on the SF-50, Chapter 31, section 5, and it cautions that, if an agency decides to “terminate the employee during the probationary period, the SF-50 must be effective on a day prior to the last day of the probationary period, or at a specific time of day before the end of the employee’s work day on the last day of the probationary period.” Chapter 31, section 5(b); IAF, Tab 6 at 9.

Accordingly, we vacate the initial decision and dismiss this appeal for lack of jurisdiction.

ORDER

¶11 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.ca9.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.