UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 101

Docket No. CH-315H-11-0479-I-2

George T. Claiborne,
Appellant,
v.
Department of Veterans Affairs,
Agency.

August 30, 2012

George T. Claiborne, Waukegan, Illinois, pro se.

Robert Vega, Esquire, Hines, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, 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. For the reasons set forth below, we VACATE the initial decision and REVERSE the appellant's separation.

BACKGROUND

¶2 Effective May 26, 2009, the appellant, a preference eligible, received a temporary appointment to the competitive service position of Carpenter for a period not to exceed May 25, 2010. *Claiborne v. Department of Veterans Affairs*,

MSPB Docket No. CH-315H-11-0479-I-1, Initial Appeal File (IAF), Tab 9, Subtab 4B at 18. Effective November 8, 2009, his appointment was converted to a term appointment not to exceed December 7, 2010. Refiled Appeal File (RAF), Tab 13 at 18. On June 20, 2010, his term appointment was converted to a career-conditional appointment to the competitive service position of Maintenance Inspector, subject to a 1-year probationary period. *Id.* at 9. Effective March 31, 2011, the agency terminated the appellant "because of performance issues and failure to follow proper procedures when answering calls to the work order desk." IAF, Tab 9, Subtab 4A at 1, 4.

¶3 The appellant filed a Board appeal challenging his termination and he requested a hearing. IAF, Tab 1. The administrative judge issued an order, notifying the appellant that his appeal of his probationary termination raised a jurisdictional issue and setting forth the elements for establishing Board jurisdiction over a probationary termination. IAF, Tab 2. Both parties responded to the jurisdictional order. IAF, Tabs 4, 9. Because the appellant had a formal equal employment opportunity complaint pending with the agency and the complaint included his termination, IAF, Tab 11, the administrative judge dismissed the appellant's termination appeal without prejudice to refiling. IAF, Tab 12. The appellant subsequently refiled his Board appeal. RAF, Tab 1.

¶4 After holding a jurisdictional hearing, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant was terminated during his probationary period and that he did not allege marital status discrimination or contend that his termination was based on partisan political reasons. RAF, Tab 15 (Initial Decision) at 5-6. The administrative judge also found that the appellant could not "tack on" his service as a Carpenter to exceed the 1-year requirement allowing for a statutory right of appeal for a position in the competitive service because he was unable to show that his employment as a Carpenter was in the "same line of work" as the Maintenance Inspector position. *Id.* at 4-5. In addition, the administrative judge found that the appellant did not

acquire standing to appeal to the Board based on his service as a Carpenter because that position was in the competitive, not excepted, service. *Id*. at 3.

¶5 The appellant has filed a petition for review, with supplements. Petition for Review (PFR) File, Tabs 1, 3, 4. The agency has filed a response opposing the petition. PFR File, Tab 5.

ANALYSIS

The appellant is an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii).

¶6 An individual is entitled to appeal to the Board under 5 U.S.C. § 7513(d) if he is an "employee" as that term is defined at 5 U.S.C. § 7511(a), which provides, in pertinent part: "(1) 'employee' means— (A) an individual in the competitive service— (i) who is not serving a probationary or trial period under an initial appointment; or (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less . . . ." 5 U.S.C. § 7511(a)(1)(A). The Federal Circuit has held that an individual who is excluded from "employee" status under 5 U.S.C. § 7511(a)(1)(A)(i) is nevertheless an "employee" if the individual meets the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1342-43 (Fed. Cir. 2002). Accordingly, a competitive service employee serving a probationary or trial period may appeal to the Board if he "has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." *Id.* The Board has held that current continuous service need not be in the same or similar positions in order for an individual in the competitive service to qualify as an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). *Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 14 (2005); *see Samble v. Department of Defense*, 98 M.S.P.R. 502, ¶ 9 n.1 (2005). The Board has also held that, for competitive service employees, "current continuous service" means a period of employment or service immediately preceding an adverse action without a break in federal civilian employment of a

workday. *Samble*, 98 M.S.P.R. 502, ¶ 9; *Ellefson*, 98 M.S.P.R. 191, ¶ 14; *see also* 5 C.F.R. § 752.402.

¶7 The appellant has shown that he was appointed to a term appointment[1] with the agency immediately preceding his career-conditional appointment. RAF, Tab 13 at 9, 18. The appellant served in the term appointment as a Carpenter from November 8, 2009, to June 20, 2010, and worked in the Maintenance Inspector position from June 20, 2010, through March 31, 2011. IAF, Tab 9, Subtab 4A at 1; RAF, Tab 13 at 9, 18. Thus, the appellant completed more than 1 year of current continuous service under other than a temporary appointment limited to 1 year or less immediately preceding his termination from his competitive service appointment without a break in federal employment of a workday. *See Dade v. Department of Veterans Affairs*, 101 M.S.P.R. 43, ¶ 11 (2005); *see also Samble*, 98 M.S.P.R. 502, ¶ 11; *Ellefson*, 98 M.S.P.R. 191, ¶ 15. Based on the foregoing, the appellant qualifies as an "employee" as defined by 5 U.S.C. § 7511(a)(1)(A)(ii) with Board appeal rights. In light of this conclusion, there is no need to address whether he meets the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A)(i). *See Payano v. Department of Justice*, 100 M.S.P.R. 74, ¶ 6 (2005).

The agency's action violated the appellant's right to due process of law.

¶8 An agency's failure to provide a tenured public employee with an opportunity to present a response, either in person or in writing, to an appealable agency action that deprives him of his property right in his employment

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[1] A term appointment is for a period of more than 1 year but not more than 4 years. 5 C.F.R. § 316.301(a). A temporary appointment is generally for a specified period not to exceed 1 year. 5 C.F.R. § 316.401(c). Because the appellant's appointment to the Carpenter position, effective November 8, 2009, and not to exceed December 7, 2010, was not limited to a year or less, it was not a "temporary" appointment for the purpose of determining whether the appellant was an employee under 5 U.S.C. § 7511(a)(1)(A). *See Murdock-Doughty v. Department of the Air Force*, 74 M.S.P.R. 244, 251 (1997).

constitutes an abridgement of his constitutional right to minimum due process of law, i.e., prior notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). The record shows that: the appellant received written notice of his separation by letter dated March 30, 2011;[2] the notice did not provide the appellant with an opportunity to reply; and he was separated the following day. IAF, Tab 9, Subtab 4A at 1, 4-5. Therefore, the agency's procedures for effecting the appellant's separation did not comport with a tenured employee's constitutional right to minimum due process of law because he was not provided with an opportunity to respond. Accordingly, the agency's action must be reversed. *See Daniel v. Department of Veterans Affairs*, 68 M.S.P.R. 459, 461-62 (1995) (reversing an agency's action where the appellant was not provided with an opportunity to respond to the charges).

ORDER

¶9 We ORDER the agency to cancel the appellant's separation and restore the appellant effective March 31, 2011. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶10 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due,

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[2] The agency initially notified the appellant of his termination by letter dated March 29, 2011, which identified the effective date of the appellant's separation as March 30, 2011. IAF, Tab 9, Subtab 4A at 5-6. The agency rescinded that letter via its March 30, 2011 letter. *Id.* at 4.

and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶11 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶12 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶13 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶14 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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of

the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630