UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 109

Docket No. SF-3443-12-0040-I-1

Sonia G. Sapla,

Appellant,

v.

Department of the Navy,

Agency.

September 21, 2012

Sonia G. Sapla, FPO AP, pro se.

Traci Williams Jones, San Diego, California, 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 in this case asking us to reconsider the initial decision that dismissed for lack of jurisdiction her appeal challenging the agency's withdrawal of a job offer for a position in Guam. For the reasons set forth below, we DENY the petition for review.

BACKGROUND

¶2 In March 2011, the appellant, who was then a GS-13 Contract Specialist with the agency's Marine Corps Systems Command in Quantico, Virginia, applied for a position as a GS-11 Contract Specialist with the agency's Military Sealift

Fleet Support Command in Guam. Initial Appeal File (IAF), Tab 1 at 3, 15-17; Tab 7, Subtab 4r. On June 9, 2011, the agency tentatively selected the appellant for the position, and she accepted the tentative job offer the following day. IAF, Tab 7, Subtab 4m. By letter dated September 7, 2011, the agency confirmed the appellant's acceptance of its firm offer for the position and directed her to provide a copy of her travel itinerary. IAF, Tab 7, Subtab 4h. Shortly thereafter, the agency became aware that the appellant had been residing and working in Guam under a telework arrangement since June 6, 2011. *Id.*, Subtab 4f. Consequently, she was ineligible for a Permanent Change of Station (PCS) move. *Id.*, Subtab 4g at 1. By memorandum dated September 20, 2011, the agency informed the appellant of its decision to withdraw its job offer for the position due to her lack of candor regarding her PCS eligibility. *Id.*, Subtab 4d.

¶3 On appeal to the Board, the appellant challenged the withdrawal of the job offer and checked the box on the Board appeal form indicating that she was appealing a negative suitability determination. IAF, Tab 1 at 4. The appellant raised claims of harmful error and prohibited discrimination. *Id.* at 7. She did not request a hearing. *Id.* at 4.

¶4 The administrative judge issued an acknowledgement order apprising the appellant of the requirements for establishing Board jurisdiction over her appeal and ordering her to file evidence and argument to prove that the appeal is within the Board's jurisdiction. IAF, Tab 2. Both parties filed responses to the order, and the agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tabs 4, 5; Tab 7, Subtab 1. The administrative judge issued a show cause order in which he again apprised the appellant of the requirements for establishing Board jurisdiction over her appeal and ordered her to file evidence and argument to prove that the appeal is within the Board's jurisdiction. IAF, Tab 12. The appellant did not respond to the order.

¶5 Based on the parties' written submissions, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 13,

Initial Decision (ID) at 1, 7. The administrative judge also found that, because the appellant did not raise an otherwise appealable issue, the Board lacks jurisdiction over her allegations of discrimination and harmful procedural error. *Id.* at 7.

¶6 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed an untimely response to the petition for review. PFR File, Tab 3.[*]

ANALYSIS

¶7 In her petition for review, the appellant reasserts her arguments from below that the agency defamed her character and the agency was aware of her employment status because she notified the agency of her planned travel to Guam. PFR File, Tab 1 at 4-5; IAF, Tab 1 at 4-5; Tab 5 at 2-3. The appellant's arguments are not relevant to the issue currently before the Board – whether the Board has jurisdiction over this appeal. *See Fassett v. U.S. Postal Service*, 76 M.S.P.R. 137, 139 (1997) (arguments on review that address the merits of the agency's removal action, rather than the Board's jurisdiction over the appeal, do not meet the criteria for review).

¶8 It is well settled that the Board generally does not have jurisdiction to review an agency's decision not to select a particular applicant for a vacant position. *Brown v. Office of Personnel Management*, 91 M.S.P.R. 314, ¶ 7 (2002); *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 93 (1992). Although exceptions to this general rule exist in the context of an individual right of action appeal under the Whistleblower Protection Act and when the unsuccessful candidate claims that the agency's decision was in violation of his rights under the Veterans Employment Opportunities Act of 1998 or the

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[*] We have not considered the agency's response to the petition for review because the agency did not request an extension of time to file its response before the due date for filing the response, as required by the Board's regulations. 5 C.F.R. § 1201.114(e).

Uniformed Services Employment and Reemployment Rights Act of 1994, the appellant did not allege that any of these exceptions applies.

¶9 To establish Board jurisdiction over the cancellation of a promotion or appointment, the appellant must show that: (1) the promotion or appointment actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion or appointment; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant actually performed in the position. *Deida v. Department of the Navy*, 110 M.S.P.R. 408, ¶ 14 (2009).

¶10 Applying this standard, the administrative judge found that the appellant failed to nonfrivolously allege that her appointment to the position in Guam actually occurred because there is no evidence that an authorized appointing official, aware that he or she was making an appointment, actually approved the appellant's appointment. ID at 6. The administrative judge further found that, even if the appointment had actually occurred, the Board lacks jurisdiction over the appeal because the agency rescinded its job offer on September 20, 2011, prior to the appellant actually performing in the position. *Id*.

¶11 On review the appellant alleges, as she did below, that the September 20, 2011 memorandum informing her of the agency's decision to rescind its job offer was not sent to her and she had no knowledge of this memorandum until November 2, 2011. PFR File, Tab 1 at 5; IAF, Tab 5 at 3, Attachment 4 at 1. To the extent that the appellant is arguing that the agency's withdrawal of the offer is ineffective because the agency's September 20, 2011 memorandum was not sent to her, we find this argument unavailing. Even assuming that this memorandum was not sent to her, she was certainly aware of the agency's decision to rescind the offer, as the agency also sent her a letter dated September 20, 2011, notifying her of its decision to withdraw the job offer, as well as a September 23, 2011 email explaining its reasons for withdrawing the job offer. IAF, Tab 7, Subtabs

4b, 4e. In any event, as the administrative judge noted, it is undisputed that the agency rescinded its offer before the appellant actually performed in the position. ID at 6. Therefore, the administrative judge correctly found that even if an appointment occurred, the Board does not have jurisdiction over the agency's cancellation of the appellant's appointment.

¶12 We also agree with the administrative judge that the Board lacks jurisdiction over this appeal as a suitability action. ID at 6-7. The Office of Personnel Management's regulations governing suitability actions specify that a denial of appointment or non-selection for a position is not a suitability action. 5 C.F.R. § 731.203(b); *see also Upshaw v. Consumer Product Safety Commission*, 111 M.S.P.R. 236, ¶ 8 (2009). As the administrative judge correctly found, the agency's withdrawal of the employment offer resulted in the denial of the appointment and the non-selection of the appellant for the position in Guam. ID at 6-7. Consequently, no suitability action took place here.

ORDER

¶13 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:

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