UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 29

Docket No. PH-315H-12-0281-I-1

Kathryn Michelle Walker,
Appellant,
v.
Department of the Army,
Agency.

April 12, 2013

Kathryn Michelle Walker, Frederick, Maryland, pro se.

Jeffrey B. Miller, Esquire, Fort Detrick, Maryland, 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 in which the administrative judge dismissed her probationary termination appeal for lack of jurisdiction without a hearing. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

BACKGROUND

¶2 On March 28, 2011, the agency appointed the appellant to a competitive service GS-07 Training Technician position subject to a 1-year initial probationary period. Initial Appeal File (IAF), Tab 4 at 34. On September 11, 2011, the agency promoted the appellant to a competitive service GS-12 supervisory Installation Transportation Officer position subject to a supervisory probationary period. *Id*. at 32. On March 9, 2012, the agency furnished the appellant a letter notifying her that it was terminating her employment effective the same day for various alleged performance and conduct deficiencies. *Id*. 15-24.

¶3 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 3. She argued that the termination action was improper for two reasons: (1) She was an "employee" under 5 U.S.C. § 7511(a)(1)(A) when the agency summarily terminated her; and (2) the agency terminated her for pre-appointment reasons without following the procedures of 5 C.F.R. § 315.805. IAF, Tab 1 at 4, 9-12. After affording the appellant accurate and complete jurisdictional notice, IAF, Tab 2, the administrative judge issued an initial decision finding that the appellant failed to make a nonfrivolous allegation as to either theory of jurisdiction, IAF, Tab 7, Initial Decision (ID). He dismissed the appeal for lack of jurisdiction without a hearing. ID at 1, 5.

¶4 The appellant has filed a petition for review essentially reiterating her arguments from below. Petition for Review (PFR) File, Tab 1, Petition for Review (PFR). She argues that she was an "employee" under both 5 U.S.C. § 7701(a)(1)(A)(i) and 5 U.S.C. § 7701(a)(1)(A)(ii), *id*. at 3-4, and that she was terminated for pre-appointment reasons without the proper procedural protections, *id*. at 4-5. She argues that the administrative judge impermissibly weighed

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

conflicting evidence on these matters in arriving at his decision to dismiss the appeal without a hearing. *Id*. at 3-6. The agency has filed a response in opposition. PFR File, Tab 3.

ANALYSIS

¶5 In order to establish Board jurisdiction under 5 U.S.C. chapter 75, an individual must, among other things, show that she satisfies one of the definitions of "employee" in 5 U.S.C. § 7511(a)(1). 5 U.S.C. § 7513(d); *see Sosa v. Department of Defense*, 102 M.S.P.R. 252, ¶ 6 (2006). For an individual in the competitive service, this means that she must either: (1) not be serving a probationary or trial period under an initial appointment, or (2) have 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). Individuals in the competitive service who do not satisfy either definition may nevertheless have the right to appeal a termination to the Board under 5 C.F.R. § 315.806. However, the Board's jurisdiction over termination appeals under that section is limited to situations in which: (1) The employee was discriminated against based on her marital status; (2) the agency action was based on partisan political reasons; or (3) the agency action was based (in whole or part) on pre-appointment reasons and agency did not follow the procedures of 5 C.F.R. § 315.805. *Tarr v. Department of Veterans Affairs*, 115 M.S.P.R. 216, ¶ 10 (2010); *Morrison v. Department of Justice*, 34 M.S.P.R. 281, 282-83 (1987); 5 C.F.R. § 315.806(a)-(c).

¶6 There is no statutory requirement that the Board hold a hearing on the threshold issue of jurisdiction. *Campion v. Merit Systems Protection Board*, 326 F.3d 1210, 1215 (Fed. Cir. 2003); *Rose v. Department of Health & Human Services*, 721 F.2d 355, 357 (Fed. Cir. 1983). Nevertheless, if an appellant

makes a nonfrivolous allegation[2] of jurisdiction, but a determination cannot be made based on the documentary evidence, the Board should hold an evidentiary hearing to resolve the jurisdictional question. *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1332 (Fed. Cir. 2006).

The appellant made a nonfrivolous allegation that she completed 1 year of current continuous service.

¶7 The appellant argues that she was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) because she had completed 1 year of current continuous service before the agency effected her termination. PFR at 3-4. Specifically, she argues that the agency did not actually separate her from service on March 9, 2012, but rather carried her on the rolls in leave without pay status until April 6, 2012 – well after her March 28, 2012 1-year service anniversary date.[3] PFR at 3-4; IAF, Tab 6 at 2-3. In support of her argument, the appellant submitted copies of leave and earnings statements reflecting that the agency carried her in an annual leave status from March 12, 2012, to March 24, 2012, and then in a leave without pay status from March 26, 2012, through April 6, 2012. IAF, Tab 6, Subtabs E-G.

¶8 The agency argues that the leave and earnings statements do not reflect a belated separation as the appellant claims they do. PFR File, Tab 3 at 9-11; IAF,

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[2] "Nonfrivolous allegations" are allegations of fact that, if proven, could establish that the Board has jurisdiction over the matter at issue. *Tarr*, 115 M.S.P.R. 216, ¶ 13. Pro forma allegations are insufficient to satisfy the nonfrivolous standard for establishing "employee" status. *See Coleman v. Department of the Army*, 106 M.S.P.R. 436, ¶ 9 (2007).

[3] Although the appellant frames her argument with reference to 5 U.S.C. § 7511(a)(1)(A)(ii), it applies with equal force to her status as an employee under 5 U.S.C. § 7511(a)(1)(A)(i) because her 1-year probationary period was set to expire on the same date that she completed 1 year of current continuous service. IAF, Tab 4 at 34. In any event, the appellant is an employee with chapter 75 appeal rights if she satisfies either one or both of those criteria. *McCormick v. Department of the Air* Force, 307 F.3d 1339, 1342-43 (Fed. Cir. 2002).

Tab 6 at 5. Rather, they reflect that Defense Finance and Accounting Services (DFAS) was unaware of the separation until some weeks after it occurred. *Id*. The agency explains that DFAS generates leave and earnings statements based on time cards submitted by the organizations it services. When DFAS stopped receiving time cards for the appellant (because she had been terminated), according to its rules, it began to generate leave and earnings statements reflecting that the appellant was being carried in leave status. It continued to do so until the agency completed the SF-50 notifying DFAS of the separation. *Id.* In support of its argument, the agency submitted an SF-50, an employee information report, and an explanatory declaration indicating that the date of the appellant's termination was March 10, 2012. IAF, Tab 6 at 6-10.

¶9 Thus, the appellant and the agency have presented conflicting explanations of what the leave and earnings statements show. The appellant argues that the administrative judge impermissibly weighed this evidence in finding that she failed to make a nonfrivolous allegation of Board jurisdiction. PFR at 2-6; *see Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994) (in determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling her to a hearing, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive). In support of her argument, the appellant cites *Liu v. Department of Agriculture*, 106 M.S.P.R. 178, ¶¶ 8-10 (2007), in which the Board found, under nearly identical circumstances, that the appellant made a nonfrivolous allegation of jurisdiction, PFR at 3-4. In *Liu*, the appellant alleged that the agency did not separate her from the rolls on the last day of her probationary period as it claimed; rather, it continued to carry her in a leave without pay status through the following day. 106 M.S.P.R. 178, ¶ 9. In support of her allegation, the appellant submitted a leave and earnings statement that seemed to show that she was indeed still on the rolls in leave without pay status as she alleged. *Id*. The agency submitted evidence to contradict the appellant's explanation for the leave and

earnings statement, including an SF-50, an SF-52, a time and attendance report, and an affidavit from an agency official, all tending to show that the appellant did not actually remain on the employment rolls as the leave and earnings statement seemed to indicate. *Id*. Nevertheless, the Board found that the appellant's allegation of fact accompanied by the leave and earnings statement constituted a nonfrivolous allegation that the agency did not effect her termination before her probationary period expired, and she therefore became an "employee" under 5 U.S.C. § 7701(a)(1)(A). *Id*., ¶ 10. The Board found that, in dismissing the appeal for lack of jurisdiction, the administrative judge impermissibly weighed the evidence without holding a jurisdictional hearing in order to resolve the parties' conflicting assertions regarding the Board's jurisdiction over the appeal. *Id*. Subsequently, in *Coleman*, 106 M.S.P.R. 436, ¶¶ 11-13, the Board was again presented with a set of facts materially identical to those in *Liu*. Once again, the Board found that notwithstanding the agency's evidence and argument to the contrary, the appellant's allegation in conjunction with a leave and earnings statement was sufficient to entitle him to a jurisdictional hearing. *Id.* Therefore, the Board remanded the appeal to resolve the question of whether the agency continued to carry him on the rolls after his termination was supposed to have been effective. *See id.*, ¶ 14. We see no basis to distinguish the instant appeal from either *Liu* or *Coleman*. Accordingly, we find that the appellant has made a nonfrivolous allegation that the agency did not effect her termination until after she completed 1 year of current continuous service on March 28, 2012.

¶10 The agency tacitly recognizes that, under *Liu*, the appellant has made a nonfrivolous allegation that requires a remand for a jurisdictional hearing. *See* PFR File, Tab 3 at 6-7. The agency, however, urges the Board to reconsider this precedent. *Id*. at 6-8. It argues that the discrepancy reflected in the leave and earnings statement is a product of the delay in approving the SF-50, but that approving the SF-50 is merely a "clerical documentation task" and the date of approval is not necessarily the date that the termination actually occurred. PFR

File, Tab 3 at 7-12. The agency reminds the Board that the SF-50 itself is not the personnel action and that the relevant date is the "Effective Date" reflected on that document rather than the subsequent "Approval Date." *Id*. The agency argues that the Board should return to its precedent prior to *Liu*, and follow *Vandewall v. Department of Transportation*, 52 M.S.P.R. 150, 155 (1991). *Id*. The agency states that therein the Board recognized that approval of an SF-50 customarily occurs after the date of the action and "does not affect the effective date of the action taken as long as the action is requested and approved by an individual with the proper authority." *Id*. at 6 (quoting *Vandewall*, 52 M.S.P.R. at 155).

¶11 We agree with the agency that the approval date on the SF-50 is immaterial to the effective date of the termination. However, we disagree that *Liu* stands for any contrary proposition. In fact, the Board in *Coleman*, which followed *Liu*, specifically recognized the fact and rejected the appellant's argument that the belated approval of the SF-50 served to extend his appointment. 106 M.S.P.R. 436, ¶ 11. As in *Liu* and *Coleman*, our finding that the appellant made a nonfrivolous allegation of Board jurisdiction does not rely on the approval date of the SF-50. Instead, it is based on the discrepancy documented in the leave and earnings statement. Whether this was merely due to the belated approval of the SF-50 as the agency alleges, or to the agency's failure to effect the action before the appellant's 1-year anniversary date, is an issue of fact that must be resolved after a jurisdictional hearing on remand.

¶12 Further, neither *Liu* nor *Coleman* disturb the Board's finding in *Vandewall* that the effective date of a termination is the date that it was approved by an individual with proper authority. 52 M.S.P.R. at 155; *see Coleman*, 106 M.S.P.R. 436; *Liu*, 106 M.S.P.R. 178. Rather, a discrepancy in a leave and earnings statement calls into question whether the deciding official actually had proper authority to effect the termination without subsequent ratification. On remand,

the administrative judge shall determine whether the deciding official herself had authority to effect the termination.

¶13 Further adjudication of the jurisdictional issue shall be limited to the issues discussed above. For the reasons explained below, the appellant's other arguments on jurisdiction are unsuccessful.

The agency terminated the appellant for post-appointment reasons.

¶14 An agency that wishes to terminate a competitive service probationary employee for pre-appointment reasons must follow the procedures of 5 C.F.R. § 315.805. *James v. Department of the Army*, 55 M.S.P.R. 124, 126 & n.1 (1992). A probationer whose termination is subject to 5 C.F.R. § 315.805 may appeal to the Board on the ground that her termination was not effected in accordance with those requirements. 5 C.F.R. § 315.806(c). These pre-appointment reasons, or "conditions arising before appointment," include matters such as falsification of an employment application and omitting information during a pre-employment interview. *E.g.*, *Munson v. Department of Justice*, 55 M.S.P.R. 246, 249-50 (1992). They do not include post-appointment performance or conduct deficiencies, as was the case here. IAF, Tab 4 at 15-24; *see* 5 C.F.R. § 315.804. The appellant's bare assertion to the contrary does not constitute a nonfrivolous allegation that would entitle her to a jurisdictional hearing. *See Robinson v. Department of Justice*, 48 M.S.P.R. 141, 143-44 (1991). We therefore agree with the administrative judge that the appellant has not made a nonfrivolous allegation of Board jurisdiction under 5 C.F.R. § 315.806(c). ID at 4-5.

The appellant's 5 C.F.R. § 315.801 probationary period continued even after her promotion to a supervisory position.

¶15 The appellant argues that she was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i) because she was not serving a 5 C.F.R. § 315.801 probationary period under an initial appointment. PFR at 1-3. She reasons that

she was instead serving a 5 C.F.R. § 315.904 supervisory probationary period. PFR at 1-3; IAF, Tab 1 at 10-11. Under 5 C.F.R. § 315.907(a), an employee's failure to successfully complete a supervisory probationary period does not subject her to summary termination of employment; rather, she is to be returned to her former position or its equivalent.

¶16 The gravamen of the appellant's argument is that her promotion to supervisory Installation Transportation Officer somehow ended her initial appointment probationary period, which she began serving as a Training Technician 5 months earlier. It is not entirely clear whether the appellant is contending that she was no longer serving under "an initial appointment" or whether she is contending that an initial appointment probationary period cannot run concurrently with a supervisory probationary period. In either case, however, we agree with the administrative judge that the appellant remained subject to her initial probationary period despite her subsequent promotion. ID at 3-4. The Office of Personnel Management's regulations explicitly address this situation: "A person who is . . . [p]romoted, demoted, or reassigned; before he completed probation is required to complete the probationary period in the new position." 5 C.F.R. § 315.801(b). There is simply no authority to support the proposition that supervisory and initial appointment probationary periods are mutually exclusive or that an employee cannot serve both types of probationary periods concurrently. *Cf. Flowers v. Department of the Navy*, 60 M.S.P.R. 167, 171 n.5 (1993) (an employee appointed to a supervisory position may serve concurrent periods of probation, one on the initial appointment and one on the appointment to a supervisory position, with the former taking precedence).

ORDER

¶17 Because the appellant made a nonfrivolous allegation of jurisdiction, we remand this appeal for further adjudication consistent with this Opinion and Order, including a jurisdictional hearing.

FOR THE BOARD:

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