UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 211

Docket No. DC-0752-06-0040-I-1

Gail M. Clarke,

Appellant,

v.

Department of Defense,

Agency.

July 14, 2006

Thomas B. Corbin, Esquire, Baltimore, Maryland, for the appellant.

Jack W. Rickert, Esquire, Bethesda, Maryland, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the December 16, 2005 initial decision (ID) that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the PFR under 5 C.F.R. § 1201.115(d), VACATE the ID, FIND that the Board has jurisdiction, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On September 19, 2005, the agency removed the appellant from the position of Office Coordinator, NI-0000-03, with the National Geospatial-

Intelligence Agency (NGA). Initial Appeal File (IAF), Tab 4, subtabs 4A at 1, 4D at 1. The agency based the removal on a charge of absence without leave. *Id.* Before removing the appellant, the agency provided her with notice of the charge and an opportunity to respond to it. IAF, Tab 4, subtab 4D at 3-4. The agency informed the appellant in its decision letter that she had the right to appeal her removal to the Board. *Id.*, subtab 4D at 1-2.

¶3 The appellant filed a petition for appeal of her removal, IAF, Tab 1, which the agency moved to dismiss for lack of jurisdiction, *id.*, Tab 4, subtab 1. Following the agency's motion, the administrative judge (AJ) issued a show-cause order providing the parties with an opportunity to address the jurisdictional issue. *Id.*, Tab 8. Both parties responded to the order. *Id.*, Tabs 10, 11.

¶4 The AJ dismissed the appeal for lack of jurisdiction without holding the appellant's requested hearing. ID at 1, 6. The AJ found that the NGA, formerly known as the National Imagery and Mapping Agency (NIMA), is an "intelligence component of the Department of Defense" under 10 U.S.C. § 1614(2)(C). ID at 4. She found that 5 U.S.C. § 7511, which defines an "employee" entitled to appeal adverse actions to the Board, does not apply to an individual whose position is within such a component. ID at 4; *see* 5 U.S.C. § 7511(b)(8). She acknowledged that 10 U.S.C. § 1612(b) provides that employees otherwise excluded from Board jurisdiction under 5 U.S.C. § 7511(b)(8) may appeal adverse actions to the Board if they worked for the former Defense Mapping Agency (DMA) and remained in the same position at NIMA without a break in service. ID at 2-3. But she found that the appellant, who moved directly from DMA to NIMA without a break in service, did not fall within that category of employees because she had changed positions twice since NIMA's creation. ID at 4-5; *see* IAF, Tab 4, subtab 4A at 3-5.

¶5 The AJ acknowledged the appellant's argument that the Board has jurisdiction because her two reassignments in 1999 and 2002 were involuntary and because she was not informed that the position changes would adversely

affect her appeal rights. The AJ found, though, that this argument would not affect the jurisdictional determination in this case. The AJ found that, even if the appellant filed appeals challenging the alleged involuntary reassignments, and assuming that she could show that the appeals were timely filed or that good cause existed for waiving the filing deadlines, it did not appear that the appellant was reduced in grade or pay. The AJ noted that, generally, reassignments that do not result in a reduction in grade or pay are not appealable to the Board. ID at 5.

¶6 The AJ thus found that the Board lacks jurisdiction over the appellant's removal appeal. Absent an otherwise appealable action, the AJ similarly found that the Board lacks jurisdiction over the appellant's discrimination allegations. Because she found that the appellant had not raised issues of fact sufficient to support a finding of Board jurisdiction, she found that a hearing was not warranted. ID at 5-6.

¶7 The appellant has filed a PFR. PFR File, Tab 1. The agency has not responded to the PFR.

ANALYSIS

¶8 The appellant contends that the AJ misinterpreted her primary argument concerning Board jurisdiction. Specifically, the appellant asserts that she was denied the opportunity to make an informed decision to accept the reassignments because the agency failed to tell her that doing so would adversely affect her Board appeal rights. PFR Form, ¶¶ 4, 7. Citing *Exum v. Department of Veterans Administration*, 62 M.S.P.R. 344 (1994), she argues that, because the agency did not provide her with that information, she is entitled to appeal her removal to the Board. PFR Form, ¶¶ 9, 11.

¶9 We find that the appellant has established Board jurisdiction over her appeal. Under 5 U.S.C. Chapter 75, subchapter II, an individual who meets the definition of an "employee" in 5 U.S.C. § 7511(a)(1) generally may challenge her removal from the federal service by filing a Board appeal. *See* U.S.C.

§§ 7512(1), 7513(d); *Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447, ¶ 6 (2005). That subchapter states that it does not apply, with exceptions not relevant here, to an employee whose position is within "an intelligence component of the Department of Defense (as defined in section 1614 of title 10)." 5 U.S.C. § 7511(b)(8). The NGA is an intelligence component of the DOD. 10 U.S.C. § 1614(2)(C). However, NGA employees who had adverse action appeal rights under 5 U.S.C. Chapter 75 before NIMA's creation retain those rights "for as long as the person continues to serve in the position without a break in service." *See* 10 U.S.C. § 1612(b).

¶10 The parties do not dispute that the appellant, as a former DMA employee, would have Board appeal rights if she had not changed positions after NIMA's creation. Although the appellant suggested below that her duties did not change, *see, e.g.*, IAF, Tab 10, Appellant's Amended Decl., the undisputed evidence shows that she was reassigned twice after NIMA's creation, *id.*, Tab 4, subtab 4A at 3-4. From that, it would appear that she lacks the right to appeal her removal to the Board.

¶11 As the appellant points out, however, the Board has found that an employee must receive notice from her employing agency regarding the effect of a change in tenure before she can relinquish an agency appointment with career tenure and adverse action appeal rights to accept another appointment within the agency that lacks such tenure and appeal rights. *Edwards v. Department of Justice*, 86 M.S.P.R. 404, ¶ 6 (2000) (citing *Exum*, 62 M.S.P.R. at 349-50); *see also Park v. Department of Health & Human Services*, 78 M.S.P.R. 527, 534 (1998). Here, the appellant declared under penalty of perjury that the agency never informed her that the 1999 and 2002 changes in her position would adversely affect her appeal rights. IAF, Tab 10, Appellant's Amended Decl. The agency has not asserted, and the record does not indicate, that the agency informed the appellant that she would lose her Board adverse action appeal rights if she changed positions. Because the appellant did not knowingly consent to the loss of her

appeal rights, she is deemed to have retained the rights incident to her former position. *Edwards*, 86 M.S.P.R. 404, ¶ 10. Therefore, the Board has jurisdiction over her removal appeal. *Id.*

ORDER

¶12 For the reasons stated above, we remand this case to the regional office for adjudication on the merits of the appellant's removal appeal.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.