

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

RUBEN L. FLOWERS,  
Appellant,

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
AT07528710735

DATE: OCT 13 1988

Harry F. Tasset, Jacksonville, Florida, for the  
appellant.

Ron Midkiff, Jacksonville, Florida, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued September 30, 1987, that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the case for further adjudication.

BACKGROUND

The appellant filed an untimely appeal with the Board's Atlanta Regional Office contending that the agency

improperly furloughed him by denying him light-duty assignments and forcing him to take annual leave and leave without pay. The administrative judge assigned to adjudicate the appellant's case then ordered the appellant to show cause for his untimely appeal, and the agency to submit its response.

In its response, the agency requested the administrative judge to dismiss the appellant's appeal for lack of jurisdiction. In light of this motion, the administrative judge directed the appellant to submit evidence and argument that his enforced leave constitutes an appealable suspension under the criteria set forth in *Pittman v. Department of the Army*, 33 M.S.P.R. 67 (1987).<sup>1</sup>

The appellant responded to the timeliness issue by arguing that the time limit for filing an appeal should be waived because the agency did not provide him with any notice regarding his right to appeal the action to the Board. With respect to the jurisdictional issue, the appellant asserted that he was not appealing a suspension, and that the agency action was an improper furlough.

Based upon the documentary evidence in the record, the administrative judge dismissed the appeal for lack of jurisdiction finding that: (1) A finding on whether the appellant established that his enforced leave constituted a

---

<sup>1</sup> The Board's decision in *Pittman* was later reversed by the United States Court of Appeals for the Federal Circuit in *Pittman v. Merit Systems Protection Board*, 832 F.2d 598 (Fed. Cir. 1987).

suspension under the criteria set forth in *Pittman* was unnecessary because the appellant expressly elected not to pursue this matter; (2) the appellant did not establish that he was furloughed because the evidence indicated that he was in leave status during the time in question; (3) the appellant did not raise a non-frivolous allegation that warranted a hearing on the jurisdiction question; (4) because the appellant failed to establish that the Board had jurisdiction over his appeal, findings on the issues of timeliness, and handicap and race discrimination were unnecessary; and (5) the Board lacks jurisdiction over the appellant's claim of a right of reassignment to a permanent light duty position.

The appellant has now petitioned for review contending that the evidence establishes that the agency action constituted an improper furlough.

#### ANALYSIS

Because the appellant has raised a non-frivolous allegation that the Board has jurisdiction over the agency action, remand for further adjudication is necessary.

The Board has statutory and regulatory authority to adjudicate employee appeals of furlough actions. 5 U.S.C. § 7511(a)(5) defines a furlough as the placing of an employee in a temporary status without duties and pay because of lack of work or funds, or other non-disciplinary reasons. Under 5 U.S.C. § 7512(5) and 5 C.F.R. § 1201.3(a)(2), an employee may appeal a furlough of thirty

days or less to the Board. Further, under 5 C.F.R. §§ 351.201(a)(2) and 351.901, employees may also appeal furloughs of more than thirty days to the Board.

The appellant contends that the agency furloughed him because it placed him in non-duty status due to the lack of light-duty work, and that he was in non-pay status after his annual leave was exhausted.

In *Schuck v. United States Postal Service*, 30 M.S.P.R. 624 (1986), the Board affirmed the conclusion that, under the terms of the collective bargaining agreement, the agency's placing of employees, who were performing light-duty assignments, due to medical disabilities in temporary non-duty and non-pay status because of lack of work, constituted appealable furloughs. See also *James v. United States Postal Service*, 30 M.S.P.R. 628 (1986).

In the present case, the appellant has presented a non-frivolous allegation that he was furloughed. The agency's Wage and Separation Information form, dated May 19, 1987, states that the appellant worked light-duty assignments until April 29, 1987, due to an on-the-job injury, and that he was currently in non-duty status. Appeal File, Tab 1. The record also establishes that the appellant requested light-duty assignments under the terms of the collective bargaining agreement, but was denied such duty due to lack of work. Appeal File, Tab 1. Further the appellant alleged, and the administrative judge found, that after exhausting his accrued leave, the appellant was in a leave

without pay status. Appeal File, Tab 1; Initial Decision at 3. Thus, the appellant has presented evidence that, under the Board's interpretation of the collective bargaining agreement in the *Schuck* and *James* decisions,<sup>2</sup> he was furloughed because he was placed in a non-duty, non-pay status due to lack of work.

This evidence, however, does not dispose of the jurisdictional issue because the agency has alleged that the appellant took voluntary leave during the period in question. Agency File, Tab 7. Because the Board lacks jurisdiction over voluntary actions, the appellant must prove that the action in question, placement on annual leave and leave without pay status, was involuntary. See *Swaney v. Department of the Army*, 19 M.S.P.R. 440, 442 (1984).

Thus, we find that a genuine issue of fact exists regarding the jurisdictional issue in this case. Because the appellant has raised a non-frivolous allegation that the Board has jurisdiction over the alleged furlough action, he

---

<sup>2</sup> In his initial decision, the administrative judge distinguished the present case from *Schuck*, finding that the appellant here was placed in leave status while the appellants in *Schuck* were not. We do not find leave status a distinguishing factor. Both furloughs and suspensions require the placement of an employee in non-duty, non-pay status. 5 U.S.C. §§ 7501(2), 7511(1)(2), 7511(a)(5). The Board has found on numerous occasions that the improper placement of employees on enforced leave status is a suspension, and thus, by definition, placement on non-duty, non-pay status. See, e.g., *Pifer v. United States Postal Service*, 31 M.S.P.R. 395 (1986). Thus, placing an employee on leave status does not preclude a finding that the employee was furloughed. Moreover, as discussed above, there is specific evidence in the present case that the appellant was in both non-pay and non-duty status.

is entitled to a hearing on this matter. See *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985); *Woodall v. Federal Energy Regulatory Commission*, 21 M.S.P.R. 290, 293 (1984).

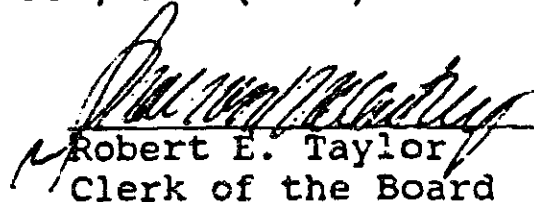
Moreover, on remand the appellant may also argue that he was improperly suspended. As discussed earlier, the administrative judge ordered the appellant to establish that he was improperly suspended under the criteria set forth in the Board's decision in *Pittman*. Because that decision was reversed by the Federal Circuit during the course of the present appeal, the appellant is entitled to the opportunity to amend his petition for appeal to make a *Pittman*-type argument that his enforced leave constitutes an appealable suspension.

ORDER

We, therefore, REMAND this case for a hearing on the question of whether the Board has jurisdiction over the appellant's case, and, if so, for adjudication of all other issues presented in this appeal. See *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board