

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DEBRA L. GRIBBEN,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DE315H92026411

DATE: OCT - 8 1992

Mark S. Bove, Esquire, Denver, Colorado, for the
appellant.

Ruby Navarro-Villarreal, Phoenix, Arizona, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision, issued April 23, 1992, that dismissed her petition for appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition under 5 U.S.C. § 7701(e), VACATE the initial decision, and REMAND the case to the Board's Denver Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

The agency removed the appellant from the position of Secretary, GS-6, with the Bureau of Prisons (BOP), in Florence, Colorado, on February 27, 1992. In the decision letter, James M. Greco, the appellant's supervisor, charged the appellant with unauthorized use of government property and lying during an official investigation. Under the first charge, Mr. Greco specified that, during an Office of Internal Affairs investigation, the appellant admitted that she misused an official government telephone to make personal calls to Charles W. Ala, Instructor at the Federal Law Enforcement Training Center, Glynco, Georgia, on at least three occasions. Under the second charge, Mr. Greco specified that, during the investigation, the appellant falsely stated that he had asked her to call Glynco, Georgia, to inquire about BOP decals. See Agency File, Tab 4a. In her petition for appeal of the removal, the appellant alleged that the charges were false and that the agency removed her because of her extramarital relationship with Mr. Ala. See Initial Appeal File (IAF), Tab 1.

After allowing the appellant to present written evidence and argument on the issue of jurisdiction, the administrative judge dismissed her appeal without granting her the hearing she requested. The administrative judge found that the appellant was a probationary employee at the time she was removed and that she was removed for post-appointment reasons. He further found that, even assuming the appellant's

assertions were true, they did not amount to "a prima facie case of marital status discrimination." Citing *Kukula v. Department of Agriculture*, 13 M.S.P.R. 543 (1982), the administrative judge found that, to the extent that the agency might have taken action against the appellant because of her extramarital relationship, the action was based on the appellant's "conduct" while in that relationship. The administrative judge also stated that, "given my finding that the appellant's removal was based upon conduct rather than marital status," her contention that she was treated differently from unmarried female probationary status employees who were romantically involved with agency employees was also without merit.

ANALYSIS

In her petition for review, the appellant asserts that the administrative judge erred in denying her request for a hearing. We agree.

In *Stokes v. Federal Aviation Administration*, 761 F.2d 682, 686 (Fed. Cir. 1985), the court explained that a probationary employee faced a two-step process in establishing Board jurisdiction over an appeal such as the one in this case. First, she must allege marital status discrimination and support the allegation with factual assertions indicating that it is not a pro forma pleading. If she makes such a facially non-frivolous and supported allegation, she is entitled to a hearing. Second, at the hearing, she must

support her allegation with a showing of facts that would, if not controverted, require a finding that marital status discrimination was the basis for her discharge. If she fails to make this showing, the case may be dismissed for failure to support the jurisdictional allegation, i.e., for "lack of jurisdiction." See also *Brown-Cummings v. Department of Health & Human Services*, 36 M.S.P.R. 94, 98 (1987).

Here, although the administrative judge cited *Stokes*, he erroneously required the appellant to satisfy the second step of the process before granting her a hearing. Compare Initial Decision at 3 with *Stokes*, 761 F.2d at 686. For the same reason, the administrative judge's citation of *Kukula* is inapposite. A hearing was held in that case. See *Kukula*, 13 M.S.P.R. at 544.

We find that the appellant has made a non-frivolous allegation that the Board has jurisdiction over her appeal and thus is entitled to a hearing on this issue. See, e.g., *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 642-43 (Fed. Cir. 1985). In response to the regional office's show-cause order, the appellant submitted an affidavit in which she detailed her reasons for believing that her removal resulted from marital status discrimination. Specifically, she averred that, when Mr. Greco learned of her extramarital relationship, he spoke to her in an abusive manner and commented about her morals, her relationship with her children, and the scandal that had been created. She further stated that Mr. Greco commented about her husband's virtuous

nature, the innocence of her children, her married status, and the effect of the affair on her husband. In addition, she stated that Mr. Greco began to give her the "silent treatment," and made it clear that her affair had jeopardized her employment with the agency. The appellant attached her contemporaneous notes of statements made by Mr. Greco. The appellant further averred that during these conversations, Mr. Greco did not refer to any issue regarding telephone calls. See IAF, Tab 3.

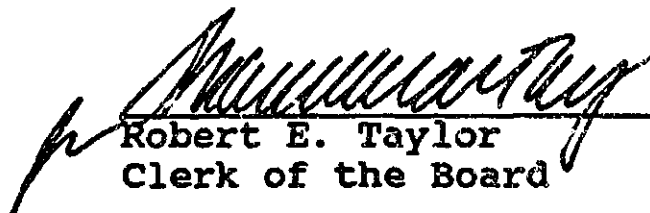
We find that the appellant has made a non-frivolous allegation of jurisdiction entitling her to a hearing. See, e.g., *Graham v. Department of Justice*, 50 M.S.P.R. 285, 288 (1991); *Brown-Cummings*, 36 M.S.P.R. at 96, 98 (the appellant's allegation that the agency terminated her because she was pregnant and "just another unwed mother" was a sufficient allegation of marital status discrimination to establish "initial jurisdiction" over her case and entitle her to a hearing, although she later failed to substantiate her claim of discrimination at her hearing) * Accordingly, we remand this case to the regional office for a hearing and the issuance of a new initial decision. If the administrative law judge finds that the Board has jurisdiction over the

* Because these allegations are sufficient to entitle the appellant to a hearing on jurisdiction, we find it unnecessary to address whether the appellant has also made a non-frivolous allegation of jurisdiction based on the fact that she was related to her marital status.

appellant's appeal, he should proceed to decide the merits of that appeal.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board