UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 122

Docket No. PH-0752-09-0478-I-1

Esperanza Harris,

Appellant,

v.

Department of Veterans Affairs,

Agency.

June 29, 2010

John V. Valenti, Newington, Connecticut, for the appellant.

Kimberly Jacobs, Esquire, Newington, Connecticut, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed for lack of jurisdiction her appeal of an alleged involuntary reduction in grade. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 Effective March 7, 2004, the appellant received a career-conditional appointment to the position of Medical Support Assistant, GS-0679-05, Step 1,

with the VA Connecticut Healthcare System in West Haven, Connecticut. Initial Appeal File (IAF), Tab 14, Subtab 4r. On March 6, 2005, the agency awarded her a within-grade pay increase (WIGI), from Step 1 to Step 2. IAF, Tab 30, Attachment 1. On November 23, 2005, following an unsatisfactory mid-year review, the agency placed the appellant on a 30-day Employee Assistance Plan (EAP). IAF, Tab 14, Subtab 4p. The agency found that the appellant had not displayed satisfactory performance during the EAP, and on February 15, 2006, the agency placed her on a performance improvement plan (PIP). *Id.*, Subtabs 4m, 4n. The agency then awarded the appellant a second WIGI, from Step 2 to Step 3, effective March 5, 2006. IAF, Tab 30, Attachment 1. By letter signed on June 6, 2006, the agency notified the appellant that her performance continued to be unacceptable. IAF, Tab 14, Subtab 4l. On June 23, 2006, the agency issued a performance appraisal for the period April 1, 2005, through March 31, 2006, finding the appellant's performance unacceptable in all five critical elements of her position. *Id.*, Subtab 4k.

¶3 By notice dated March 20, 2007, the agency proposed to remove the appellant, citing the appellant's failure to meet the established performance standards for five critical elements during the period from February 15, 2006, through June 2, 2006. *Id.*, Subtab 4f. On May 15, 2007, Ron Reynolds, a representative of the American Federation of Government Employees (AFGE), met with the deciding official, Roger Johnson, and Donna Bennett, from the agency's Human Resources department. *Id.*, Subtab 4e. At the meeting, Reynolds suggested that Bennett, Ray Knox from AFGE, and the appellant "get together and work on a demotion or reassignment" in lieu of removal. *Id.*

¶4 By letter dated June 12, 2007, Johnson informed the appellant of his decision to remove her effective June 22, 2007. *Id.*, Subtab 4d. The letter included the following language:

> 3. [I]n lieu of the removal and as requested by your union representatives, I have agreed to assign you to another position at

> VA Connecticut Healthcare System. Therefore, you are being offered a choice to be assigned to one of the following two positions within the agency: a File Clerk, GS-305-4, Step 6 at the Newington campus with an annual salary of $32,712; or a Housekeeping Aid, WG-3566-2, Step 5 at the West Haven campus with a salary rate of $15.34 per hour. If you wish to accept one of the above assignments, you must, with your union representative's concurrence, indicate so in writing prior to the effective date of this removal.
>
> 4. If you agree to one of the above assignments, the effective date of your discharge will be stayed and the assignment to the new position will become effective on the first day of the pay period following the date that you accept the new assignment or as soon as possible thereafter.
>
> 5. When an employee is removed, the employee has the right to appeal the decision through either the negotiated grievance procedures, the Merit Systems Protection Board (MSPB), or in accordance with EEO discrimination complaint procedures. However, in the acceptance of one of the aforementioned assignments, you agree to waive the MSPB, and all other civil and administrative appeal and EEO rights you may have related to the decision to discharge you.

Id. The appellant refused to sign the decision letter. Id.; IAF, Tab 25, Appellant's Reply to Interrogatory #1. In a sworn statement, the appellant related that, following her receipt of Johnson's decision, Knox showed her a letter that "he and Bennett had written up and demanded that [she] sign it or that [she] would be removed." IAF, Tab 20, Appellant's Declaration. She further declared that she signed the letter from Knox, "but added a statement in writing that [she] did not agree with the demotion." Id. Effective July 8, 2007, the appellant was reduced in grade and pay from the position of Medical Support Assistant, GS-0679-05, Step 3, to the position of File Clerk, GS-0305-04, Step 6, in Newington, Connecticut. IAF, Tab 14, Subtab 4b. The appellant continued working in the Medical Support Assistant position through July 13, 2007, and on July 16, 2007, she reported to the File Clerk position in Newington. IAF, Tabs 20, 22.

¶5 On May 29, 2009, the appellant filed a Board appeal, alleging that her reduction in grade to the File Clerk position was an involuntary demotion. IAF,

Tab 1. She requested a hearing. *Id*. In separate orders, the administrative judge notified the appellant that her appeal appeared to be both untimely filed and outside the Board's jurisdiction, and ordered her to submit evidence and argument on both issues. IAF, Tabs 2, 11, 17. In response to the show-cause order on jurisdiction, the appellant alleged that union officials had barred her from attending the response meeting concerning the removal action, and then pressured her to sign a document without explaining the contents of the document or the options available to her, including possible appeals. IAF, Tab 13. The appellant indicated that she did not understand the document, which she refused to sign, and that no one at the agency responded to her queries concerning the decision letter or her appeal options. *Id*. She further alleged that the agency and union officials involved did not understand the difference between an EAP and a PIP. *Id*. In a supplemental response, she contended that the agency knew or should have known that it could not prevail on its threatened removal action, because she received a WIGI on about March 7, 2006, during the period she allegedly failed to demonstrate satisfactory performance. IAF, Tab 16.

¶6 The administrative judge dismissed the appeal without a hearing, finding that the appellant had failed to make a non-frivolous allegation that her reduction in grade was an involuntary action within the Board's jurisdiction. IAF, Tab 32 (Initial Decision, Dec. 17, 2009). In reaching that conclusion, the administrative judge found, based in part on the agency's documentary evidence of the appellant's performance issues, that she failed to make a non-frivolous allegation that the agency knew or should have known that it could not prevail on its proposed removal action. *Id*. at 9-10. The initial decision did not reach the issue of timeliness. *Id*. at 10-11.

¶7 On petition for review, the appellant again argues that the agency knew or should have known that the threatened removal action could not be sustained because her performance was in fact satisfactory, and that her acceptance of the

reduction in grade was therefore involuntary. Petition for Review (PFR) File, Tab 1. The agency has filed a response. PFR File, Tab 3.

ANALYSIS

¶8 A reduction in grade that an employee accepts voluntarily is not within the Board's jurisdiction. *McAlexander v. Department of Defense*, 105 M.S.P.R. 384, ¶ 8 (2007). However, an appellant may establish that her acceptance of a reduction in grade was involuntary, and thus within the Board's jurisdiction, by presenting sufficient evidence that it was the result of duress or coercion brought on by the agency, or her reasonable reliance on misleading statements by the agency. *Reed v. U.S. Postal Service*, 99 M.S.P.R. 453, ¶ 12 (2005), *aff'd*, 198 F. App'x 966 (Fed. Cir. 2006). The fact that an employee faces a choice between two unpleasant options does not render her acceptance of the agency's proposal involuntary. *Id.* On the other hand, if the appellant can establish that she accepted a reduction in pay or grade to avoid a threatened removal, and if she can further show that the agency knew or should have known that the action could not be substantiated, then the decision to accept the demotion in lieu of removal may be considered coerced and therefore involuntary. *McAlexander*, 105 M.S.P.R. 384, ¶ 8; *Huyler v. Department of the Army*, 101 M.S.P.R. 570, ¶ 5 (2006); *Soler-Minardo v. Department of Defense*, 92 M.S.P.R. 100, ¶ 6, *review dismissed*, 53 F. App'x 545 (Fed. Cir. 2002); *O'Connell v. U.S. Postal Service*, 69 M.S.P.R. 438, 443 (1996).

¶9 If an appellant makes a non-frivolous allegation casting doubt on the voluntariness of her acceptance of a reduction in grade, she is entitled to a hearing at which she must prove jurisdiction by a preponderance of the evidence. *Huyler*, 101 M.S.P.R. 570, ¶ 7. To meet the non-frivolous standard, an appellant need only plead allegations of fact that, if proven, could show jurisdiction. *Goodwin v. Department of Transportation*, 106 M.S.P.R. 520, ¶ 12 (2007). Merely pro forma allegations are insufficient to meet the standard, however. *Id.*

In determining whether the appellant has made such a non-frivolous allegation, the administrative judge may consider the agency's documentary submissions. However, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶10 The record reflects that the appellant received a WIGI pursuant to 5 C.F.R. part 531, subpart D, on March 5, 2006. IAF, Tab 30, Attachment 1. With exceptions not applicable here, approval of a WIGI requires a determination that an employee's performance is at an acceptable level of competence, which in turn requires that the employee's most recent rating of record be at least at the fully successful level. 5 C.F.R. § 531.404(a). It appears that, as of March 5, 2006, the appellant's rating of record was fully successful. IAF, Tab 13 at 5. However, the appellant's WIGI was soon followed by an unsatisfactory rating for the period from April 1, 2005, through March 31, 2006. IAF, Tab 14, Subtab 4k. If the appellant's performance was unacceptable as of March 5, 2006, the agency could have issued a new rating reflecting current performance so as to avoid granting an undeserved WIGI. 5 C.F.R. § 531.404(a)(1). Hence, the agency's approval of a WIGI on March 5, 2006, could support a finding that, contrary to the agency's allegations, the appellant's performance was satisfactory at that time. In finding otherwise, the administrative judge prematurely weighed the agency's documentary evidence of performance issues. *See Ferdon*, 60 M.S.P.R. at 329.

¶11 We therefore find that the appellant has alleged facts which, if proven, could establish that she accepted a reduction in grade under the threat of a removal action that the agency knew or should have known could not be substantiated. Because the appellant has made a non-frivolous allegation that her reduction in grade was involuntary, she is entitled to a hearing on the issue of

jurisdiction.[*] *See Huyler*, 101 M.S.P.R. 570, ¶ 7; *Goldberg v. Department of Transportation*, 97 M.S.P.R. 441, ¶¶ 9-10 (2004).

ORDER

¶12 Accordingly, we remand this appeal to the Northeastern Regional Office for further development on the record on the issue of jurisdiction, including a jurisdictional hearing. After such further proceedings as the administrative judge may find appropriate, he shall issue a new initial decision.

FOR THE BOARD:

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

[*] We note there remains a question as to the timeliness of the appeal, which the appellant filed approximately 22 months after her reduction in grade. Whether the appellant had good cause for the delay in filing hinges on whether the agency had a duty to inform her of appeal rights with respect to her reduction in grade, which in turn depends on whether the reduction in grade was an appealable action. *See Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 587 (1995). In an appropriate case, the Board may assume arguendo that an appellant was subjected to an appealable action and has standing to appeal, and go on to dismiss the appeal as untimely filed if the record is sufficiently developed on the issue of timeliness. *Id.* at 586. However, such an approach is not appropriate where, as here, the jurisdictional and timeliness issues are "inextricably intertwined." *Id.*