UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 58

Docket No. DC-0731-08-0531-I-1

Johnnie M. Riggsbee,

Appellant,

v.

Office of Personnel Management,

Agency.

April 21, 2009

James Q. Butler, Esquire, Washington, D.C., for the appellant.

Darlene M. Carr, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the October 6, 2008 initial decision (ID) that affirmed the negative suitability determination by the Office of Personnel Management (OPM). For the reasons discussed below, we GRANT the PFR under 5 C.F.R. § 1201.115(d) and AFFIRM the ID as MODIFIED by this Opinion and Order, STILL AFFIRMING OPM's negative suitability determination.

BACKGROUND

¶2 On April 22, 2008, OPM issued a negative suitability determination based on its finding that the appellant, a GS-6 Human Resources Assistant with the

Patent and Trademark Office (PTO), made material, intentional false statements concerning her August 21, 2003 separation from the Department of Homeland Security (DHS). Specifically, OPM found that the appellant answered "no" to Question 12 in her September 13 and 26, 2006 Optional Form (OF)-306, Declarations for Federal Employment. Question 12 asked, in part, whether the appellant had been fired from any job for any reason, quit after being told that she would be fired, or left any job by mutual agreement because of specific problems, during the last 5 years. OPM found that the appellant was required to answer "yes" because she had resigned from DHS after being told that she would be fired for failing a drug test. OPM directed the PTO to separate the appellant from its rolls, cancelled her eligibilities for reinstatement obtained from her current appointment and any other eligibilities she had on existing competitive registers, and debarred her from competition for, or appointment to, any position in the competitive federal service for a 3-year period, i.e., until April 22, 2011. Initial Appeal File (IAF), Tab 16, subtab 2c. The PTO separated the appellant effective April 25, 2008, and the appellant filed an appeal. *Id.*, Tabs 1, 16, subtab 2a.

¶3 The administrative judge (AJ) decided the case based on the written record because the appellant withdrew her hearing request. IAF, Tab 38. The AJ affirmed OPM's negative suitability determination. ID at 1, 7. The AJ found that the appellant's "no" answer to Question 12 was false, that the appellant's false statement was intentionally made, and that a falsification offense is enough by itself to uphold a negative suitability determination. *Id.* at 5-6.

¶4 The appellant has filed a PFR. PFR File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

¶5 The appellant asks the Board to accept her "Written Statement in Lieu of Oral Argument" into the record and to consider it. She states as follows: The record below closed on October 1, 2008. Her attorney timely submitted the

written statement on September 30, 2008, using commercial delivery service DHL. DHL, however, mistakenly returned it for lack of address information, even though she had provided the correct information. On October 6, 2008, she notified the regional office of the mistake. The regional office did not receive her resubmitted written statement until October 7, 2008, i.e., after the AJ issued the October 6, 2008 ID. The regional office told her to file a PFR. PFR File, Tab 1 at 1-3.

¶6 The appellant acknowledges the AJ's statement that she was an e-filer, and, thus, that her final submission of evidence and argument should have been received on October 1, 2008. She notes, however, that she subsequently designated an attorney who is not an e-filer to represent her. She further argues that, regardless, an e-filer would not be restricted from filing by other acceptable methods. PFR File, Tab 1 at 2 n.1; *see* ID at 5 n.2.

¶7 First, the AJ erred to the extent that she found that the appellant's attorney was precluded from filing the appellant's written statement by non-electronic means simply because the appellant had registered as an e-filer. When a party who is an individual is represented, the party and the representative can make separate determinations whether to register as e-filers. 5 C.F.R. § 1201.14(e)(3). Thus, the appellant's registration as an e-filer did not preclude her attorney from filing by commercial delivery. In any event, even if both the appellant and her attorney were registered as e-filers, her attorney was permitted to file his written statement by non-electronic means, including by commercial delivery. *See* 5 C.F.R. § 1201.14(f).

¶8 Second, the AJ erred in issuing the ID before receiving and considering the appellant's written statement. In her September 15, 2008 Summary of Status Conference, the AJ stated that the record would close on October 1, 2008, and that all evidence and argument must be "filed" by that date. IAF, Tab 38 at 1. The date of "filing" by commercial delivery is the date the document was delivered to the commercial delivery service. 5 C.F.R. § 1201.4(l). Here, the

appellant submitted evidence that she delivered her written statement to DHL, with the correct regional office address, on September 30, 2008. PFR File, Tab 1. Thus, the appellant's written statement was timely filed and should have been considered by the AJ before the AJ issued her ID.

¶9 The Board has long recognized that it is error for an AJ to issue an order or ID prior to the expiration of the time allowed for a party's response. *Phillips v. Department of the Air Force*, 104 M.S.P.R. 229, ¶ 4 (2006); *Crumpton v. Department of the Treasury*, 98 M.S.P.R. 115, ¶ 8 (2004); *Edeburn v. U.S. Postal Service*, 95 M.S.P.R. 486, ¶ 7 (2004). Where such a procedural error appears, the Board will determine whether the affected party's substantive rights were harmed. The proponent of the alleged error bears the burden of demonstrating that the error adversely affected those rights. Absent an adverse effect on substantive rights, the error is harmless and of no legal consequence. *Crumpton*, 98 M.S.P.R. 115, ¶ 8; *Edeburn*, 95 M.S.P.R. 486, ¶ 7. Because the AJ issued her ID without considering the appellant's timely submitted written statement, we have considered it on review. *See, e.g., Phillips*, 104 M.S.P.R. 229, ¶ 4; *Crumpton*, 98 M.S.P.R. 115, ¶ 9.

¶10 We find that the AJ's error in not considering the appellant's written statement did not affect the disposition of this case. In large part, the appellant has simply reiterated the argument that she made in other submissions below, and which was addressed by the AJ, that she was tricked into resigning from DHS because DHS could not sustain a removal based on her testing positive for drug use and that she was unsure whether her separation was ultimately documented as a removal or a resignation. PFR File, Tab 1, Written Statement at 6-17. The AJ acknowledged the appellant's apparent argument that she did not give a false answer on the September 2006 OF-306s because either she was unsure of the "official" reason for her separation, i.e., resignation or termination, or because the threat to terminate her was improper. The AJ found, though, that, even if the appellant was unsure whether her separation had been documented as a

resignation or a removal, and even if she believed that she was incorrectly advised to resign, she knew when she signed the form that she quit after being told that she would be fired and/or left her job by mutual agreement because of specific problems. The AJ therefore found that the "no" answer was "false." ID at 5.

¶11 The AJ proceeded to find that the appellant's "false statement was intentionally made." ID at 6. The AJ found that, if the appellant had supplied the correct information on her employment application, it is likely that she would not have been hired. She further found that the appellant failed to provide any credible explanation for her misrepresentation if it was not to withhold the reason for her 2003 separation from DHS. *Id*. The appellant's mere disagreement with the AJ's explained factual findings and legal conclusions does not warrant the Board's full review of the record. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Therefore, although the AJ issued the ID prematurely, the error did not harm the appellant's substantive rights, and thus is of no legal consequence. *See Phillips*, 104 M.S.P.R. 229, ¶ 6; *Edeburn*, 95 M.S.P.R. 486, ¶ 9.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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