UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

76 M.S.P.R. 178

Docket Number DC-0752-97-0092-I-1

STELLA THIBODEAUX, Appellant,

v.

DEPARTMENT OF THE AIR FORCE, Agency.

Date: Aug 8,1997

Neil C. Bonney, Esquire, Neil C. Bonney & Associates, P.C., Virginia Beach, Virginia, for the appellant.

Captain Thomas J. Jackson, Esquire, Seymour Johnson Air Force Base, North Carolina, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order. 5 C.F.R. § 1201.117.

BACKGROUND

On May 23, 1996, the appellant, a GS-5 Child Development Program Technician, was hospitalized for a mental illness. She remained on sick or annual leave until her leave balance was exhausted and thereafter was placed in a leave without pay status. Initial Appeal File (IAF), Tab 5, Subtabs 1, 4a, 4c. On September 26, 1996, the appellant's psychologist, Lori V. Van Meir and psychiatrist, Dr. M.P. Krishnaraj, issued a report stating that the appellant would be able to return to work on October 14, 1996, with certain restrictions. *Id.*, Subtab 4c. These restrictions were somewhat ambiguous in that it is unclear from the September 26, 1996 medical report whether the appellant was advised not to work in the Child Development Center (CDC) at all, not to work directly with children or not to work directly with children in a classroom setting. *Id*., Subtab 4c. In an October 10, 1996 letter, Chief, Youth Programs Flight, Elizabeth

Hodge informed the appellant that she had received the September 26 report, and stated:

> The appropriate agencies on base ... have researched other jobs that you are currently qualified for and found that there is no specific job available that falls into the request that your Doctor has made on your behalf at this time. Therefore, if you cannot return to work at the Child Development Center on 15 Oct., your only alternative is to remain at home on leave status (of your choice), until your Doctor has re-evaluated your medical situation. Please have your Doctor provide me an estimated date of when you can return to work at the Child Development Center.

Id., Subtab 4b. The appellant did not return to work and on November 1, 1996, filed this appeal asserting that she was placed on enforced leave for more than 14 days and requesting a hearing. IAF, Tab 1.

The administrative judge issued a show cause order directing the appellant to submit evidence and argument to show that her appeal was within the Board's jurisdiction as a constructive suspension and advising her of her burden of proof and the requirements for entitlement to a jurisdictional hearing. IAF, Tab 2. The appellant timely responded and the agency timely replied on the jurisdictional issue. IAF, Tabs 4-6. Without affording the appellant a hearing, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction, finding that the appellant had not made nonfrivolous allegations of fact which, if proven, would establish that the agency constructively suspended her. IAF, Tab 9.

On petition for review, the appellant asserts that the administrative judge erred in failing to hold a jurisdictional hearing and renews her arguments made below regarding Board jurisdiction. Petition For Review File, Tab 1. The agency has timely responded in opposition to the petition for review. *Id*., Tab 3.

ANALYSIS

The Board's jurisdiction is not plenary but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. The appellant bears the burden of proving by preponderant evidence that the Board has jurisdiction over her appeal. *See Herring v. Department of Veterans Affairs*, 72 M.S.P.R. 96, 98 (1996). An agency's placement of an employee on enforced leave for more than 14 days, based on an alleged physical or mental disability, constitutes a constructive suspension appealable to the Board. For purposes of jurisdiction, the key question is whether the agency or the appellant initiated the leave. *See Lohf v. U.S. Postal Service*, 71 M.S.P.R. 81, 84 (1996).

The Board has held that the following circumstances constitute a nonfrivolous allegation that the agency initiated the absence and that the enforced absence constitutes a constructive suspension appealable to the Board: (1) The employee is absent because of a medical condition; (2) she requests work within her medical restrictions; (3) the agency is bound by agency policy, regulation, or contractual provision to offer available light-duty work to such an employee; and (4) the agency fails to offer the employee any available light-duty work. *See Dize v. Department of the*

Army, 73 M.S.P.R. 635, 639-40 (1997); *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 692 (1996).

Here, under the terms of the collective bargaining agreement which applies to the appellant, the agency agreed to the following term:

[W]hen an eligible employee cannot perform in his/her current position due to temporary physical disability and is recommended for light duty by his/her personal physician, corroborated by a competent base physician, [the agency] will exert reasonable effort to assign the employee to light duty commensurate with mission requirements and subject to availability of appropriate work within the employee's capability.

IAF, Tab 5, Subtab 2b at 14. We find that this evidence constitutes a nonfrivolous allegation that the agency was obliged to look for work within the appellant's medical restrictions and thus a nonfrivolous allegation that, under *Baker*, the Board has jurisdiction over the action as a constructive suspension of more than 14 days. *Dize*, 73 M.S.P.R. at 639-40.

The evidence of the agency's attempts to assign the appellant to light duty is inconsistent. In her October 10, 1996 letter, Hodge indicated that a search for a position within "[t]he appropriate agencies on base" was undertaken with negative results. IAF, Tab 5, Subtab 4b. However, according to the agency, the appellant telephoned Hodge on October 16, 1996, and Hodge allegedly told the appellant that the only jobs available in the CDC required working with children or possibly light duty filing or typing in the CDC. The appellant asserted to Hodge that the agency was obligated to find her a job outside of the CDC and inquired about a job in the base library. In response, Hodge stated that the agency was not required to find the appellant a job and that she already had a job in the CDC. IAF, Tab 6 at 4.

As we noted above, the appellant's medical restrictions are ambiguous. *See* IAF, Tab 5, Subtab 4c. Thus, as set forth in *Dize* and *Baker*, unresolved questions of fact related to the Board's jurisdiction exist. Accordingly, the appellant is entitled to an opportunity at a hearing to show that the agency was required to attempt to find her a position within her medical restrictions under the terms of the collective bargaining agreement and that the agency did not fulfill its obligation.

ORDER

Accordingly, we REMAND this appeal for a jurisdictional hearing at which the appellant may offer evidence and argument to prove that the Board has jurisdiction over her appeal as a constructive suspension appeal. The administrative judge shall determine whether this appeal is within the Board's jurisdiction and, if so, adjudicate the appeal on the merits.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.