KENNETH TYNDALL
v.
DEPARTMENT OF THE NAVY

Docket No.
AT07528010053

OPINION AND ORDER

Appellant, an Aircraft Mechanic, WG-10, with the Department of the Navy, was advised by his personal physician that working around toxic vapors (JP-4, JP-5, Varsol, etc.) was detrimental to his health, and that unless a change was made, retirement would be recommended.

The agency's Industrial Medical Officer conducted a medical evaluation examination of appellant and advised a six (6) week trial period away from toxic chemicals (JP-5, Varsol, Aircraft stripper and zinc chromate). Since appellant did not have any sick leave or annual leave available, he was, thereupon, placed on leave without pay (LWOP) while efforts were made by the agency to accommodate appellant in an available vacancy for which he was qualified.

After being on leave for six weeks, appellant underwent a reevaluation examination by the Industrial Medical Officer and was returned to duty with the restriction "not to enter fuel cells." Appellant, thereafter, appealed to the Board's Atlanta Field Office contending that, during his leave, he was ready, willing and able to work and that his LWOP status constituted a suspension of more than fourteen (14) days. The presiding official dismissed the appeal for want of appellate jurisdiction.

A suspension, as described in 5 U.S.C. 7501(2), is the placing of an employee, for *disciplinary* reasons, in a temporary status without duties and pay. A suspension can occur when an employee is placed on leave, without consent, while he/she is ready, willing and able to work. *See Mosely v. Department of the Navy*, 4 MSPB 220 (1980). If it is found that appellant's LWOP status constitutes a suspension for more than fourteen (14) days, this matter falls within the Board's appellate jurisdiction.[1] However, 5 C.F.R. 1201.56(a)(2), requires that appellant sustain the burden of proving that this is an appealable action within the Board's jurisdiction. The appellant has not met this requirement.

The record, herein, does not reflect nor does the appellant furnish any evidence to show that his placement in a LWOP status was a disciplinary measure or, in any way, connected with a proposed or pending

[1]In *Mosley*, *supra*, 221, the Board enumerated the following questions which must be answered in order to determine if the matter at issue is one within its jurisdiction:

1. Was the appellant placed on sick leave without his consent?
2. Was the appellant, in fact, ready, willing and able to work during the period of leave?
3. Was the enforced leave used in a personal, disciplinary-type of situation?

disciplinary action against him. To the contrary, the record reveals that it was the advice of appellant's personal physician that prompted the agency to grant appellant his choice of leave while it made efforts to find an available position which would accommodate his physical limitation. Agency enclosures 5–8. Although appellant may have been ready and willing to work, his "ability" to perform his required duties was, in fact, hindered by his physical condition and professional medical advice.

Having fully considered appellant's petition for review, the Board finds that the agency action was not a suspension predicated on a disciplinary action, and thus was not within the Board's jurisdiction. Since the petition for review does not meet the criteria for review set forth in 5 C.F.R. 1201.115, the petition is hereby DENIED.

This is the final decision of the Merit Systems Protection Board. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *March 23, 1981*