UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

72 M.S.P.R. 662

Docket Number DC-0752-96-0049-I-1

MONIQUE VAN WERSCH, Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.

Date: DEC 13,1996

John P. Mahoney, Esquire, Passman & Kaplan, P.C., Washington, D.C., for the appellant.

Dawn E. McGonnell, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

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

BACKGROUND

In 1989, the appellant was appointed to a temporary GS-1 Copier Duplicating Equipment Operator position which, according to the SF-50 documenting the appointment, was a competitive service position. Initial Appeal File (IAF), Tab 6, Agency Exhibit 12. At the expiration of that appointment, the appellant was converted to an excepted appointment not to exceed October 31, 1989, and then in December 1989 appointed to an excepted service GS-2 Copier Duplicating Equipment Operator position. The legal authority for those appointments was 5 C.F.R. § 213.3102(u), a regulation permitting agencies to appoint non-competitively certain "severely physically handicapped persons" to positions that, when filled by disabled persons, are Schedule A excepted service positions. *Id*., Agency Exhibit 11.

Subsequently, the appellant was reassigned a number of times and in December 1992 she was promoted under the same regulatory appointing authority to the GS-3 Clerk-Typist position from which she was ultimately terminated. *Id*., Agency Exhibit 3. On January 10, 1993, the agency issued an SF-50 documenting its action converting the appellant's tenure from "conditional" to "permanent" as a GS-3 Clerk-Typist. IAF, Tab 6, Agency Exhibit 2, and Tab 8, Appellant's Exhibit 2. Effective September 6, 1995, the agency terminated her from that position based on unacceptable conduct. IAF, Tabs 1, 6.

The appellant filed an appeal with the Board. IAF, Tab 1. After the agency filed a motion to dismiss for lack of jurisdiction, the administrative judge issued an order informing the appellant of the jurisdictional issue and ordering her to submit evidence and argument to show cause why her appeal should not be dismissed. IAF, Tabs 6, 7. The appellant and the agency responded. IAF, Tabs 8, 11. Without affording the appellant her requested hearing, the administrative judge dismissed her appeal for lack of jurisdiction, finding that the appellant was excluded from the definition of "employee" under 5 U.S.C. § 7511(a)(1)(C) and thus had no right of appeal to the Board. IAF, Tab 12.

On petition for review, the appellant asserts that the administrative judge misinterpreted 5 U.S.C. § 7511(a)(1)(C) and that she was an "employee" with appeal rights as an individual in the excepted service. Petition for Review (PFR) File, Tab 3. We see no error in the administrative judge's determination in this regard and the appellant's mere disagreement with the administrative judge's explained findings does not warrant a full review of the record by the Board. *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). The appellant also argues that the administrative judge erred in finding that she was not an individual in a competitive service position with a right of appeal to the Board under 5 U.S.C. § 7511(a)(1)(A)(ii). PFR File, Tab 3. The agency has timely responded in opposition to the petition for review. PFR File, Tab 4.

ANALYSIS

Under 5 U.S.C. § 7511(a)(1)(A)(ii), an individual in the competitive service "who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less" is an "employee" with a right to appeal a removal action to the Board. The appellant argues that the agency converted her to the competitive service when it changed her tenure from conditional to permanent effective January 10, 1993, citing "5 C.F.R. § 315.202" as authority for the action and she was thus an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) at the time of her September 6, 1995 termination. PFR File, Tab 3 at 12-13; *see* IAF, Tab 6, Agency Exhibit 2, and Tab 8, Appellant's Exhibit 2. That regulation, 5 C.F.R. § 315.202 provides that "[a] career-conditional employee becomes a career employee automatically on completion of the service requirement for career tenure." It does not address conversion to the competitive service from the excepted service.

However, other regulations indirectly address conversion from excepted to competitive service. First, 5 C.F.R. § 315.709 provides that an individual, like the

appellant, who was appointed to the excepted service under 5 C.F.R. § 213.3102(u), may have her appointment converted to career or career-conditional when she completes 2 or more years of satisfactory service in other than a temporary appointment, is recommended for conversion by her supervisor, meets all of the pertinent requirements for career or career-conditional appointment, and is converted without a break in service of 1 workday. An individual converted to career or career-conditional employment under 5 C.F.R. § 315.709(a) acquires competitive *status** automatically upon conversion to career or career-conditional employment. 5 C.F.R. § 315.709(c). An individual appointed to the excepted service under the regulation providing for appointments of "severely physically handicapped persons," may qualify for conversion to competitive status under the provisions of Executive Order 12125 and OPM's implementing regulations after completion of 2 years of satisfactory service. 5 C.F.R. § 213.3102(u). The requirements for conversion to competitive status under Executive Order 12125 are similar to those under 5 C.F.R. § 315.709 for conversion to career or career-conditional tenure and include a recommendation for conversion by the employing agency.

The agency argued below that it did not convert the appellant to the competitive service on January 10, 1993. IAF, Tab 6, Agency's Motion to Dismiss Appeal at 4. However, under 5 C.F.R. § 1.3(d) and 5 C.F.R. § 212.401, if the appellant had competitive status and occupied a competitive position, she is considered to be in the competitive service.

This conclusion is further supported by a comparison of the nature of excepted and competitive service positions. With certain exceptions, positions are designated as competitive service or excepted service based on the nature of the position without regard to the individual appointed to the position. *See generally* 5 C.F.R. parts 212, 213; *Bey-Ali v. Department of the Navy*, 51 M.S.P.R. 207, 210-11 (1991). The appellant's GS-3 Clerk-Typist position does not appear to fall within any of the categories of positions designated as excepted service based on the nature of the position. *See* 5 C.F.R.
part 213; *Bey-Ali*, 51 M.S.P.R. at 210-11. Some appointments are designated excepted service when filled by a particular class of individual. Excepted service appointments under 5 C.F.R. § 213.3102(u) are made to a particular class of individuals, i.e., "severely physically handicapped persons," and it may be that the position being filled would be in the competitive service if it were occupied by an individual who is not a severely physically disabled person.

We also note that competitive *status* is not synonymous with competitive *service*. Nevertheless, the Board has previously considered whether an individual had a right to appeal to the Board as an individual in the competitive service after allegedly acquiring competitive status under a 5 C.F.R. § 213.3102(u) excepted service appointment. *See Reed v. Department of the Army*, 14 M.S.P.R. 271 (1982). In that case, the agency had not converted the individual to competitive status and the Board held that the individual

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* "Competitive status" means "basic eligibility to be
non-competitively selected to fill a vacancy in a competitive position." 5 C.F.R. § 1.3(c).

had no automatic right to such conversion or any right to appeal the denial of conversion. *Id*. at 273-76.

In conclusion, while the January 10, 1993 SF-50 does not prove that the agency converted the appellant to the competitive service, it is evidence that the agency determined that, as of January 10, 1993, she was entitled to "permanent" tenure because she met the requirements for career or career-conditional tenure. Although the agency's SF-50 relied on by the appellant cited 5 C.F.R. § 315.202 as the authority for converting the appellant's tenure, the regulation specifically providing for conversion to career or career-conditional tenure of an individual appointed under 5 C.F.R. § 213.3102(u) is 5 C.F.R. § 315.709, which requires that she complete 2 years of satisfactory service and her supervisor recommend her conversion to "permanent" tenure. However, upon conversion to career or career-conditional employment, the appellant would automatically acquire competitive status pursuant to 5 C.F.R. § 315.709(c) and, if she also occupied a competitive position, that, in combination with competitive status, would place her in the competitive service and afford her a right to appeal her termination to the Board. Thus, we find that the January 10, 1993 SF-50 constitutes a nonfrivolous allegation that the agency converted the appellant to the competitive service, a fact which, if proven, would establish the Board's jurisdiction over her September 6, 1995 termination.

When an appellant makes a nonfrivolous allegation of Board jurisdiction, she is entitled to a hearing on the jurisdictional issue. Although an administrative judge may consider documentary evidence to determine whether the appellant's allegation is nonfrivolous, he may not weigh such evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *See Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). Thus, we find it necessary to remand this appeal so that the administrative judge may determine whether the agency converted the appellant from her excepted service GS-3 Clerk-Typist appointment to a position in the competitive service, and whether she was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) at the time of her termination. *See Collins v. Department of Justice*, 70 M.S.P.R. 334, 338-39 (1996).

ORDER

We REMAND this appeal to the Washington Regional Office for further development of the record, a jurisdictional hearing, and a jurisdictional determination. If the administrative judge determines that the Board has jurisdiction over this appeal, she shall adjudicate it on the merits.

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