UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SHERI ELLIS-SMITH, Appellant, v. DEPARTMENT OF DEFENSE, Agency.	DOCKET NUMBER DC-315I-13-0266-I-1 DATE: July 10, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Shaun Southworth, Esquire, Atlanta, Georgia, for the appellant.

John D. Douglas, Fort Meade, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which dismissed her appeal of an agency action, which terminated her initial appointment as a supervisor during her probationary period, for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

petition for review and AFFIRM the initial decision AS MODIFIED, still dismissing the appeal for lack of jurisdiction. Except as modified by this Final Order, the initial decision is the Board's final decision.

BACKGROUND

Effective December 18, 2011, the agency appointed the appellant to the GS-14 position of Supervisory Contract Specialist. Initial Appeal File (IAF), Tab 5 at 19-20. Effective December 16, 2012, the agency returned the appellant to the position Contract Specialist, GS-12, for failure to satisfactorily complete the probationary period for a supervisory or managerial position. IAF, Tab 10 at 18. In taking this action, the agency cited poor performance and misconduct on the appellant's part. *Id.* at 24-26. The administrative judge dismissed the appeal for lack of jurisdiction without a hearing, finding that the appellant was required to complete a supervisory probationary period, that the only basis on which she could appeal her demotion was if the agency took the action for partisan political reasons or because of her marital status, and that the appellant had made no such allegations.

In her petition for review, the appellant contends, among other things, that she was not required to perform a supervisory probationary period, that, even if a probationary period were otherwise required, it should be waived because she was assured at the time that she accepted the position and thereafter that she was not required to serve a probationary period, and that the administrative judge improperly refused to consider her rebuttal to the agency's pleading regarding jurisdiction. Petition for Review (PFR) File, Tab 1.

ANALYSIS

<u>The administrative judge erred in refusing to consider the appellant's Supplementary Response to the Jurisdictional Order.</u>

The administrative judge set February 21, 2013, the date on which the agency's pleading was due, as the date on which the record would close vis-à-vis

the jurisdictional issue, and the agency submitted its pleading on that date. IAF, Tabs 9-10. The agency's pleading included a Standard Form (SF) 50, not previously submitted, which listed a requirement that the appellant complete a 1-year supervisory probationary period. IAF, Tab 10 at 14. In a pleading submitted on March 4, 2013, the appellant stated, among other things, that she had not seen that SF-50 before and questioned its authenticity. IAF, Tab 11 at 9. The administrative judge declined to consider the appellant's pleading, finding that it did not constitute new evidence because it did not contain information that was shown by the appellant to have been unavailable despite her due diligence before the record closed. IAF, Tab 13, Initial Decision (ID) at 7 n.2.

The agency attached to its February 21 pleading three SF-50s that memorialized the appellant's appointment to the GS-14 position of Supervisory Contract Specialist effective December 18, 2011; two indicate that they were approved on December 15, and the third shows an approval date of December 20. IAF, Tab 10 at 14-16. Neither of the SF-50s approved on December 15 listed a requirement that the appellant complete a supervisory probationary period. *Id.* at 15-16. One of the December 15 SF-50s contained the notation "Initial probationary period completed." *Id.* at 16.[2] In her March 4 declaration, the appellant said this was the only SF-50 she ever received. IAF, Tab 11 at 9.

Once the record closes, additional evidence or argument will ordinarily not be accepted unless it is in rebuttal to new evidence or argument submitted by the other party just before the record closed. 5 C.F.R. § 1201.58(c)(2). The regulation is fully applicable to the appellant's March 4 pleading. According to the appellant's March 4 pleading, the agency's pleading of February 21 contained new evidence—the SF-50 purportedly approved on December 20, 2011, which listed a requirement of a 1-year supervisory probationary period. The appellant

[2] An "initial probationary period" under 5 C.F.R. § 315.801 is not the same thing as a supervisory probationary period under 5 U.S.C. § 3321 and 5 C.F.R. § 315.904.

was entitled to rebut that evidence and the judge erred in refusing to consider her rebuttal.

Depending on the circumstances, the remedy for a judge's improper refusal to consider a party's pleading is for the Board to consider the pleading on review or to remand the case to the regional office for further consideration. Here, it is sufficient for us to consider the pleading on review, assuming without deciding that the appellant's assertions in that pleading are true, i.e., that prior to the agency's pleading of February 21, 2013, she was never given an SF-50 or other document indicating that she was required to serve a supervisory probationary period. As discussed below, we conclude that the appellant was required to serve a supervisory probationary period in her GS-14 position, regardless of whether she was so advised at the time she was appointed to that position.

The appellant was required to serve a supervisory probationary period under 5 U.S.C. § 3321, 5 C.F.R. § 315.904, and the agency's regulations.

By statute, a person appointed to a supervisory position must successfully complete a probationary period:

> An individual—(1) who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and (2) who does not satisfactorily complete the probationary period under subsection (a)(2) of this section,[3] shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted.

5 U.S.C. § 3321(b). OPM's implementing regulation provides as follows:

> (a) An employee is required to serve a probationary period prescribed by the agency upon initial appointment to a supervisory and/or managerial position.
>
> (b) An employee is required to complete a single probationary period in a supervisory position and a single probationary period in a

[3] Subsection (a)(2) provides that the "President may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation . . . . before initial appointment as a supervisor or manager becomes final."

> managerial position, regardless of the number of agencies, occupations, or positions in which the employee serves . . . .

5 C.F.R. § 315.904. The agency's regulations similarly provide:

> To ensure that fully competent personnel are placed in supervisory positions, employees selected for assignment to supervisory positions will be evaluated during the 1-year probationary period. Employees who do not satisfactorily complete the 1-year supervisory or managerial probationary period will be returned to a nonsupervisory or nonmanagerial position of no lower grade or pay than the position from which the employee was transferred, assigned, or promoted.

IAF, Tab 5 at 44.

Under these authorities, the appellant was required to complete a 1-year supervisory probationary period in her GS-14 position with the agency unless she had already successfully completed a 1-year supervisory or managerial probationary period.

A. Although the appellant appears to have served as a supervisor for more than a year, she has provided no evidence that she successfully completed a supervisory probationary period.

The appellant's contention that she was not required to serve a supervisory probationary period is based on her prior service as a supervisor with the Department of the Army. Her statement of previous service included the following overlapping periods of employment:

> 22. From **07/24/05 to 01/16/2011**, I served as a Senior Contract Specialist, YA-1102-02, through the U.S. Army Corps of Engineers Europe District in Wiesbaden, Germany.
>
> 23. From **04/09 to 05/10**, I served as Deputy Chief of Contracting, GS-1102-13/14 and performed as Acting Chief of Contracting, GS-1102-15 through the U.S. Army Corps of Engineers Afghanistan District in Kabul, Afghanistan, where I performed supervisory duties.

IAF, Tab 5 at 17 (emphasis added).

The appellant's own description of her previous federal service thus indicates that her service as a supervisor during the 13-month period from April

2009 to May 2010 in Afghanistan was done on a detail or temporary promotion, while her position of record remained as a Senior Contract Specialist in Wiesbaden, Germany.

The statute, OPM's implementing regulations, and the agency's regulations do not merely require that an individual have previously served as a supervisor in order to avoid a supervisory probationary period in a new appointment to a supervisory position; they require that the individual have successfully completed a probationary period in that previous service as a supervisor. The appellant has submitted no evidence indicating that she completed a supervisory probationary period during her service as a supervisor in 2009-2010, as required by 5 U.S.C. § 3321, 5 C.F.R. § 315.904, and the agency's regulations.

B. The appellant was "transferred" to the GS-14 position within the meaning of section 3321.

The appellant contends that she was not "transferred," "assigned," or "promoted" to the GS-14 position in question within the meaning of section 3321(b). She argues, based on dictionary definitions, that the terms "transferred," "assigned," and "promoted" refer only to changes of position within a single agency. PFR File, Tab 1 at 4. She also notes that none of the SF-50s memorializing her appointment to the GS-14 position with the Department of Defense list the GS-12 position she held with the Department of the Army immediately preceding that appointment. IAF, Tab 5 at 4-5.

"Transfer" is a term of art in personnel actions in the competitive service, defined as "a change of an employee, without a break in service of 1 full workday, from a position in one agency to a position in another agency." 5 C.F.R. § 210.102(b)(18). According to the appellant's own statement of her service, this is exactly how she was appointed to the GS-14 position in the Department of Defense. *See* IAF, Tab 5 at 16. The mere fact that the SF-50 documenting her appointment to that position did not list any position in the "From" column does not negate this fact.

C. The appellant has not established a basis for waiving the requirement that she complete a supervisory probationary period.

OPM's regulation grants federal agencies limited authority to make exceptions to the general requirement that employees serve a supervisory probationary period: "However, an agency may by regulation provide for exceptions to the probationary period for managers who have satisfactorily completed a probationary period for supervisors when justified on the basis of performance and experience." 5 C.F.R. § 315.904(b). The appellant has submitted no evidence that the Department of Defense has issued a regulation providing for waiver along the lines set forth in section 315.904(b). She nevertheless argues that the agency's regulations "permit the Agency to credit service in determining that the supervisory probationary period was completed." PFR File, Tab 1 at 7. The cited agency regulation does not support the appellant's contention that the agency could have or did credit her 2009-2010 service as supervisory in nature:

> Time served in a temporary service in a supervisory or managerial temporary reassignment prior to probation is creditable toward the completion of the probationary period only if the temporary appointment, temporary promotion, or temporary reassignment is projected to last for at least a year. *Prior service under a detail may be credited only when a detail to a supervisory or managerial position is made permanent without a break in service*.

IAF, Tab 5 at 46 (§ 4.1 of Chapter 315, Section B) (emphasis added).

Assuming that the appellant met the 1-year requirement of supervisory service, there was a break between her detail as a supervisor, which lasted from April 2009 to May 2010, and her appointment to the GS-14 position, which did not occur until December 2011.

The appellant also cites 5 C.F.R. § 315.905 for the proposition that the agency had broad discretion in determining the length of a supervisory probationary period and whether to credit prior service. PFR File, Tab 1 at 7. That regulation provides as follows:

> The authority to determine the length of the probationary period is delegated to the head of each agency, provided that it be of reasonable fixed duration, appropriate to the position, and uniformly applied. An agency may establish different probationary periods for different occupations or a single one for all agency employees.

As discussed above, the agency has by regulation provided for a "fixed duration" of a supervisory probationary period, and that period is 1 year. Section 315.905 does not purport to govern whether to credit prior service as a supervisor.

Although the appellant has made a nonfrivolous allegation that she relied to her detriment on the agency's incorrect assurances that she would not be required to complete a supervisory probationary period, there is no legal remedy for such detrimental reliance.

The appellant has asserted, under penalty of perjury and without contradiction, that she was assured by two agency officials, Major Blackington and Mr. Youman, that she would not be required to serve a supervisory probationary period because she had already served as a supervisor. IAF, Tab 5 at 16-17. These assurances were given both prior to and after her appointment to the GS-14 position at issue in this appeal. *Id.* The appellant has asserted under penalty of perjury that she would not have accepted the GS-14 position without these assurances. IAF, Tab 11 at 9.

The appellant's unrebutted assertions constitute nonfrivolous allegations that she reasonably relied on assurances that she would not be required to complete a supervisory probationary period. The question is whether such detrimental reliance provides a basis for the conclusion that she was not required to complete a supervisory probationary period as required by law and regulation. The legal doctrine most obviously pertinent to detrimental reliance on misinformation is equitable estoppel. Application of the doctrine of equitable estoppel requires proof of two elements, "affirmative misconduct" by the agency and reasonable reliance on that conduct. *Perez Peraza v. Office of Personnel Management*, 114 M.S.P.R. 457, ¶ 9 (2010). The negligent provision of

misinformation does not constitute affirmative misconduct. *McDonald v. Office of Personnel Management*, 115 M.S.P.R. 236, ¶ 12 (2010), *overruled on other grounds by Cerilli v. Office of Personnel Management*, 119 M.S.P.R. 404, ¶ 10 (2013).

The appellant has not alleged that Major Blackington and Mr. Youman intentionally misled her into believing that she would not be required to complete a supervisory probationary period. They apparently believed, as did the appellant, that she would not be required to serve a supervisory probationary period because of her previous service as a supervisor with the Department of the Army. As discussed above, that belief turned out to be incorrect, but the officials' incorrect assurances to the appellant do not meet the requirements for the application of equitable estoppel.

The appellant has cited dicta in Board and United States Court of Appeals for the Federal Circuit decisions that suggest that something less than the "affirmative misconduct" required for equitable estoppel should be sufficient for a detrimental reliance assertion. PFR File, Tab 1 at 8. In *Grigsby v. Department of Commerce*, 729 F.2d 772, 776 (Fed. Cir. 1984), the court stated: "While we hold that the SF-50 is not legally binding, we note that the Government may not be free in all circumstances to elude the effects of its own errors." In *Ramos v. Department of Justice*, 94 M.S.P.R. 623, ¶ 12 (2003), the Board held that the appellant was bound by the terms of a Probationary Period Agreement that he had signed but noted that the appellant had not alleged that he misunderstood the language of the agreement, that he was coerced into agreeing to the probationary period, or that the agency misrepresented the terms of his appointment.[4]

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[4] In *Ramos*, the Federal Circuit reversed the Board's decision on the ground that the Board erred in applying a waiver theory, instead of applying the court's decision in *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), under which Mr. Ramos had appeal rights as an "employee" within the meaning of 5 U.S.C. § 7511(a)(1)(A)(ii). *Ramos v. Department of Justice*, 240 F. App'x 409, 410 (Fed. Cir. 2005).

The dicta in cases such as *Grigsby* and *Ramos* is not a sufficient basis for concluding that negligent misrepresentation provides a basis for not enforcing the requirements of 5 U.S.C. § 3321, 5 C.F.R. § 315.904, and the agency's regulations, that mandated that the appellant complete a 1-year supervisory probationary period in her position as GS-14 Supervisory Contract Specialist.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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:

_____
William D. Spencer
Clerk of the Board

Washington, D.C.