UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

62 M.S.P.R. 344

Docket Number BN-0752-94-0015-I-1

CHARLOTTE EXUM, Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS, Agency.

Date: May 9, 1994

William J. Lafferty, Esquire, Lafferty and Lafferty, Boston, Massachusetts, for the appellant.

Alan L. Rosenman, Esquire, Boston, Massachusetts, for the agency.

BEFORE

Ben Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision dismissing tier appeal as outside the Board's jurisdiction. For the reasons stated below, we GRANT the appellant's petition and VACATE the initial decision.

BACKGROUND

On May 11, 1987, the agency appointed the appellant to the full-time position of licensed practical nurse in the Veterans Health Administration. *See* Appeal File, Tab 3(1). In doing so, it relied on the appointing authority it was granted under 38 U.S.C. § 4104(3), *see id.,* a section that has now been replaced by 38 U.S.C. § 7401(3). On September 24, 1989*,* in response to the appellant's request for a part-time work schedule, the agency changed the appellant's appointment to one that was limited to 1,248 hours per annum. *See id.,* Tab 3(3). The form documenting this change shows that the agency relied on the appointing authority it was granted under *38* U.S.C. *§* 4114, *see id.,* a section that has now been replaced by *38* U.S.C. *§ 7405.*

The agency separated the appellant involuntarily effective October *11, 1993,* and the appellant filed an appeal with the Board's Boston Regional Office. The agency argued that the Board lacked jurisdiction over the appeal because employees appointed under 38 U.S.C. § *7405,* the authority under which the appellant had been appointed in

1989, were excluded from coverage under 5 U.S.C. chapter 75. In his initial decision dismissing the appeal, the administrative judge agreed.

ANALYSIS

As the agency acknowledges, Response to Petition for Review (PFR) at 2, PFR File, Tab 3, employees appointed under *38* U.S.C. § 4104(3) or its successor provision, 38 U.S.C. § 7401(3), are entitled to appeal their involuntary separations to the Board under 5 U.S.C. chapter *75. See* 5 U.S.C. § 7511(b)(1); *Agcaoili* v. *Veterans Administration,* 49 M.S.P.R. 82, 83-84 (1991). If the appellant's 1987 appointment under *38 U.S.C.* § *4104(3)* had remained in effect until the time of the separation giving rise to this appeal, therefore, the appellant would have been entitled to appeal her separation to the Board. As the agency points out, however, the nature of the appointment in effect at the time of the action appealed generally determines whether the Board has jurisdiction over the appeal. *See Godfrey v.* Veterans *Administration,* 40 M.S.P.R. 438, 441 (1989); *Pratt v. Veterans Administration,* 3 M.S.P.R. 288, 289 (1980). We agree with the agency and the administrative judge that employees properly appointed under 38 U.S.C. § 7405 are not covered by 5 U.S.C. chapter 75 and are therefore not entitled to appeal adverse actions, such as involuntary separations, to the Board. *See 5* U.S.C. § 7511(b)(10) (generally excluding from chapter 75 those employees of the Veterans Health Administration whose positions have been excluded from the competitive service by or under a provision of title 38); 38 U.S.C. § 7405(a) (authorizing the agency head to employ personnel "without regard to civil service ... laws, rules, or regulations"); *Woods v. Milner,* 760 F. Supp. 623, 630 (E.D. Mich. 1991) (temporary employees appointed under 38 U.S.C. § 4114(a)(1)(a) "are subject to termination at-will"), *aff'd,* 955 F.2d 436 (6th Cir. 1992).

The appellant seems to argue that her 1989 appointment preceded the exclusion of part-time positions such as hers from coverage under chapter 75. See PFR at 2-3, 6, PFR File, Tab 1. The basis for this argument is not entirely clear. The appellant may be relying on the 1992 addition to 5 U.S.C. § 7511 of a paragraph that generally excludes positions in the Veterans Health Administration from coverage under 5 U.S.C. chapter 75, see 5 U.S.C. § 7511(b)(10). That paragraph, however, does not appear to have excluded from coverage under chapter 75 any employees who were not already excluded by 38 U.S.C. § 7405. In fact, the section of P.L. 102-378 that added the paragraph is entitled "Restoration of Coverage of Certain Federal Personnel Provisions to Certain Veterans Health Administration Employees." 106 Stat. 1346, 1358 (emphasis added). This title seems to reflect that the addition of the paragraph affected only those employees whose appointments, unlike the 1989 appointment of the appellant in this case, were effected under 38 U.S.C. § 7401(3) and who therefore were covered by chapter 75. Furthermore, if the argument addressed here is based on the fact that the title 38 statutory provisions on which the agency relies were added to chapter 74 of that title by legislation not enacted until 1991, this reliance also would seem to be misplaced. While the 1991 legislation affected matters such as the manner in which certain agency personnel were to be paid, it does not appear to have affected the statutory provisions applicable here, except by moving them from chapter 41 to chapter 75 of title 38. *See* 105 Stat. 187, 210, 221; 1991 U.S. Code Cong. & Admin. News 100 et seq.

As we have indicated above, the agency's 1989 conversion of her appointment was prompted by the appellant's request for a reduction in her working hours. The appellant argues that the agency should not have replaced one appointment with another, and that all that was necessary was "a document in the nature of a temporary detail such as some variation of a Form 50.0 PFR at 11, PFR File, Tab 1. The agency contends, however, that it could not assign the appellant to a part-time position without reappointing her, since only full-time appointments may be made under 38 U.S.C.§ 7401(3), which now includes the statutory provision under which the 1987 appointment was made.

The agency has cited no statutory basis for its argument, and none is apparent to us. An agency manual that describes the manner in which appointments under the authority at issue are to be made, however, provides that "[o]nly full-time appointments will be made under authority of 38 U.S.C. § 4104(1) [now 38 U.S.C. § 7401(3)]." VA Manual MP-5, part II, ch. 2, S 7a, PFR File, Tab 3; *see also Woods,* 760 F. Supp. at 632 (quoting brief in which agency referred to former section 4104(1) of title 38 as authorizing employment of "[f]ull-time employees"). Even if the agency's hiring authority under 38 U.S.C. § 7401(3) was not limited in this manner by statute, we know of no basis for finding that the agency lacked the authority to impose this limitation on itself. For this reason, and in light of the manual provision quoted above, we see no error in the agency's conclusion that granting the appellant's request for part-time employment required it to convert her appointment to one not authorized by 38 U.S.C. § 7401(3).

The appellant argues further that the agency handled her change to part-time status improperly in that it never informed her, at the time she requested part-time work, that the change would result in her exclusion from coverage under chapter 75 of title 5, U.S. Code.[1] For the reasons stated below, we agree.[2]

First, we note that there is no indication in the record that the agency misinformed, misled, or deceived the appellant about the effects of the 1989 change at any time material to this appeal. Furthermore, as we have indicated above, the appellant initiated the change by requesting part-time status. We do not agree with the agency, however, that the appellant's "voluntary action ... in requesting part time employment relieve[d]

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[1] The agency does not deny that the appellant would have been entitled, in 1989, to appeal an adverse action under 5 U.S.C. chapter 75. Although she was employed in the excepted service, and although the only excepted service employees covered by chapter 75 at that time were those with preference-eligible status, see 5 U.S.C. § 7511(a)(1), the appellant asserts that she is a preference eligible, Appeal File, Tab 9 (appellant's response to show-cause order at 1-3). See 5 U.S.C. § 2108(3)(D) (term "preference eligible" includes the unmarried widow of a veteran). While the record includes personnel documents noting briefly that the appellant is not entitled to preference, see Appeal File, Tab 3 (agency's response to order acknowledging receipt of appeal), the agency has not challenged the appellant's assertion that she is a preference-eligible. The documents therefore appear to reflect only an oversight.

[2] Although the appellant raised this argument below, Appeal File, Tab 9 (appellant's response to show-cause order at 4), the administrative judge did not address it in his initial decision.

the Agency of any duty it may have had to advise" the appellant regarding the effects of granting the request, Response to PFR at 3, PFR File, Tab 3.

Both the Board and the U.S. Court of Appeals for the Federal Circuit have held that, under some circumstances, an agency's failure to provide adequate information to an employee may cause an action of a kind that ordinarily is voluntary and therefore binding to be nonbinding. In *Covington v.* Department *of* Health & *Human Services,* 750 F.2d 937, 943 (Fed. Cir. 1984), for example, the U.S. Court of Appeals for the Federal Circuit pointed out that a "decision made 'with blinders on', based on misinformation or a lack of information, [could not] be binding as a matter of fundamental fairness and due process." There, the court found that the employee's retirement could not deprive the employee of his right to appeal a reduction-in-force (RIF) action because the employee had not been informed that the action constituted a RIF action, and because the agency's "additional, failure to inform him that a retirement election would preclude a later appeal denied him the right to consider this fact in making his decision" regarding retirement. *Id*.[3] Relying on this and other authority, the Board subsequently held that an agency was required "to provide information that [was] not only correct in nature but adequate in scope to allow an employee to make an informed decision." *Kolstad v. Department of Agriculture,* 30 M.S.P.R. 143, 145, *rev'd and vacated on other grounds, 809* F.2d 790 (Fed. Cir. 1986); *see also Williams v. Department of the Army,* 44 M.S.P.R. 449, 451-52 (1990) (citing *Kolstad).* It held further that this requirement "include[d] an obligation to correct any erroneous information that it ha[d] reason to know an employee [was] relying on." *Kolstad, 30* M.S.P.R. at 145; *see also Drummonds v. Department of Veterans Affairs, 58* M.S.P.R. *579, 583-84* (1993).[4]

In the present appeal, the appellant does not appear to have expressly informed the agency, when requesting a change to part-time work, that she believed she would continue to occupy a position covered by *5* U.S.C. chapter *75.* Her request indicates, however, that she expected -- and, in fact, was requesting --only a limited change in her employment, i.e., a change in the number of hours she would be working. *See* Appeal File, Tab 3(2) (appellant's request that she "be placed on part time status of three days a week until further notice" in light of her plan to "start[] school this week"). The agency has not challenged the appellant's uncontradicted assertion that she did not anticipate

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3 The court also relied on the agency's having informed the appellant that no RIF action had in fact occurred. *Covington*, 750 F.2d at 943. In light of the court's reference to a "decision . . . based on misinformation 2r a lack of information," *Id*. (emphasis added), however, we do not believe that this reliance on misinformation indicates that inadequate information is not a sufficient basis on which to find certain actions involuntary.

4 The agency relies, in arguing that it had no obligation "to advise Appellant of her appeals rights," on *Ricci v. Veterans Administration, 40 M.S.P.R.* 113 (1989). Agency Response to PFR at 3, PFR File, Tab *3.* That decision, however, is not relevant to the issues in this appeal. It concerns only the issue of whether the agency's failure to advise the appellant of her possible right to appeal her allegedly involuntary resignation warranted waiver of the deadline for filing the appeal. See *Ricci, 40 M.S.P.R.* at 116-17. It does not concern the issue of whether an agency's failure to provide an employee with appropriate information about the consequences of an action vitiates the voluntariness of that action

that her request would have the effect of excluding her from coverage under chapter *75.* In addition, there is no indication in the record that the exclusion of part-time employment from coverage under *38 U.S.C. §* 7401(3) and, accordingly, from coverage under *5* U.S.C. chapter *75 is* a matter of general knowledge among licensed practical nurses in the agency. In fact, this exclusion is not apparent even from the language of 38 U.S.C. § 7401(3) itself. Finally, the appellant's request that the change be made "until further notice," Appeal File, Tab 3(2), indicates that the appellant expected that even the limited change she had requested would have only a temporary effect on her employment status.

Under the circumstances described above, we find that the agency should have known that the appellant was acting under the erroneous impression that the only effects of her requested change would be to limit her working hours temporarily. For this reason, and because of the obviously important effect this erroneous impression could have on the appellant's employment and therefore on her decision to change to part-time employment, we find that the agency had an obligation to inform the appellant of the effects the change would have. *See Williams,* 44 M.S.P.R. at 454 (while the agency's advice may have presented "technically accurate" information regarding the employee's retirement options, its failure to inform the employee of an additional option of which he was unaware constituted a failure to provide "information adequate in scope to make an informed decision, and [the agency] failed to correct the erroneous information it had reason to know [the employee] was relying on"). We find further that this information should have included information regarding the inapplicability of chapter 75 to positions in the Veterans Health Administration that are not filled under 38 U.S.C. § 7401(3). The agency does not claim, and the record does not indicate, that it provided the appellant with this information.

By itself, however, the agency's evident failure to provide appropriate information to the appellant does not establish that the appellant would not have consented to the conversion of her appointment if she had been adequately informed. For this reason, and because neither the parties nor the administrative judge have addressed this matter specifically, we must remand this appeal to the regional office for further consideration. *See id.* at 455 (because the parties had not litigated the adequacy of the agency's retirement advice, and because the administrative judge therefore had not determined whether the appellant would have pursued the same course of action with a full understanding of his rights, the Board remanded the appeal to the regional office for further consideration). On remand, the administrative judge shall provide the parties with an opportunity to address the matter described above. If appropriate, he also shall hold a hearing on this matter.

Finally, we note that the appellant argues that the statutory provision under which the agency effected the 1989 change, as that provision applies to licensed practical nurses such as the appellant, authorizes only temporary appointments not to exceed 1 year, and that the agency therefore erred in converting her appointment to one authorized by that provision. A finding that 38 U.S.C. § 7405 authorizes only the temporary appointment of persons such as the appellant would not show error in the agency's conclusion that it could not effect the requested change without removing the appellant's position from the coverage of 38 U.S.C. § 7401(3), and thereby removing it

from coverage under chapter 75. It could, however, have a bearing on the issue of whether, if properly informed of her options, the appellant would have chosen to have her appointment converted as it was. That is, if the agency could not provide the appellant with part-time employment without converting her appointment to a temporary one, the appellant might have been less likely than she otherwise would have been to pursue her request for a change in her hours. We therefore consider that argument here.

In addressing the appellant's argument, the administrative judge found that the statutory section in question might permit only those full-time appointments that were temporary, but it did not include a similar restriction on part-time appointments. Initial Decision at 3. This finding is inconsistent with decisions indicating that all appointments under 38 U.S.C. § 7405 and its predecessor, 38 U.S.C. § 4114, are temporary. *See, e.g., Quilico v. Kaplan,* 749 F.2d 480, 485 (7th Cir. 1984) (distinguishing between doctors, dentists, and nurses with career appointments and those "who accept a temporary assignment ... under section 4114"). It also is inconsistent with the provision in section 7405 that "[a] part-time appointment may not be for a period of more than one year, except for appointments of persons specified in subsection (a)(1)(A) and interns, residents, and other trainees in medical support programs ...," 38 U.S.C. § 7405(d). The appellant was neither an intern nor a resident in 1989. Furthermore, there is no indication that she was a trainee in any medical support programs. In addition, the "*p*ersons specified in subsection (a)(1)(A)" consist only of physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries. 38 U.S.C. § 7401(1), *cited in 38 U.S.C. §* 7405(a)(1)(A).

For the reasons stated above, we find that *38* U.S.C. *§ 7405* did not authorize the agency to appoint the appellant to any part-time position other than one that was not to exceed 1 year. We note further that there appears to be no other authority on which the agency could have effected the appellant's part-time appointment, and that granting the appellant's request for part-time work therefore would seem to have required converting the appellants appointment to a temporary one not to exceed a year. Accordingly, in determining on remand whether the appellant would have consented to the conversion of her appointment if she had been adequately informed, the administrative judge shall take into account the agency's apparent inability to offer the appellant a nontemporary part-time appointment.

ORDER

For the reasons stated above, we REMAND this appeal to the administrative judge for further consideration and for a new initial decision consistent with this Opinion. If the administrative judge finds that the appellant would not have accepted part-time employment if the agency had adequately informed her about the consequences of that acceptance, he should adjudicate the appellants appeal of her 1993 separation. See *Covington,* 750 F.2d at 944 (because retirement was based on inadequate information, Board was required to adjudicate RIF separation appeal over which it otherwise would have lacked jurisdiction).

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