UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

63 M.S.P.R. 99

Docket Number SF-0752-94-0081-I-1

ANDRE L. TAYLOR, Appellant,

v.

DEPARTMENT OF THE NAVY, Agency.

Date: June 8, 1994

Harry Berman, Esquire, National Association of Government Employees, Port Hueneme, California, for the appellant.

Peggy Newberry, San Diego, California, for the agency.

BEFORE

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

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued February 8, 1994, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

On August 13, 1990, the appellant was appointed under 5 C.F.R. § 213.3202(a), to the excepted service, career-conditional position of Student Trainee (Contract Specialist). This regulatory provision governs career-related, work-study programs. Pursuant to this enabling authority, the appellant's standard Form (SF) 50 effecting his appointment stated that his appointment was intended to co[n]tinue through completion of education and study-related work requirements, and that, within 120 days after the appellant satisfactorily completed his Co-op Program requirements, the

agency could noncompetitively convert him to a career or career-conditional appointment. On September 9, 1993, the agency told the appellant that it was dissatisfied with his performance and had decided not to convert him. The agency then effected the appellant's termination on October 19, 1993, based upon the expiration of his appointment.

The appellant filed an appeal of this action with the Board's San Francisco Regional Office. Following submissions of evidence and argument regarding the Board's jurisdiction over the appeal, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the purpose of appointments under 5 C.F.R. § 213.3201 is to provide the employee (student) with the eligibility for noncompetitive conversion to an appointment in the competitive service, and that the period of such an appointment is the probationary or trial period required under the definition of "employee" in 5 U.S.C. § 7511(a)(1)(C). Thus, the administrative judge fund that the appellant was not an "employee," and that the appellant's allegations of prohibited personnel practices do not provide an independent basis for jurisdiction.

In his petition for review, the appellant contends that he was not a probationary employee because he had graduated and completed all required college courses before his termination. The appellant also asserts that the agency's grant of "tenure" further evidences his completion of any probationary period, and that the agency could not deprive his of his property interest in employment without-due process.

ANALYSIS

Prior to the Civil Service Due Process Amendments of 1990, a nonpreference eligible in the excepted service was not included within the definition of "employee" in 5 U.S.C. § 7511(a), and, therefore, did not have statutory and regulatory protection provided to an "employee" subjected to a removal action. *See Briggs v. National Council on Disability,* 60 M.S.P.R. 331, 333 (1994). Under the Due Process Amendments, nonpreference eligibles in the excepted service have adverse action appeal rights if they have completed two years of current continuous service in the same or similar positions in an executive agency under other than a temporary appointment limited to two years or less. *Id., citing 5* U.S.C. § 7511(a)(1)(C)(ii).

Thus, an argument could be trade that the appellant is an "employee" entitled to appeal his termination because he was an excepted service employee who served in the ease position for three years. Section 7511(a)(1)(C)(i), however, excludes from the definition of 'employee' excepted service employees serving a probationary or trial period under an initial appointment pending conversion to the competitive service. *See also* 5

C.F.R. § 752.401(d)(10). The comments accompanying issuance of the interim version of 5 C.F.R. § 1752.401(d)(10) specifically discuss the effect of the Due Process Amendments on appointments under the Student Work-Study Programs, stating that the time spent prior to conversion to the competitive service is a probationary or trial period within the meaning of 5 U.S.C. § 7511(a)(1)(C)(i), and that such employees do not gain adverse action appeal rights until they are converted into the competitive service. 57 Fed. Reg. 20041 (May 11, 1992) (Appeal File, Tab 5).

Thus, the appellant here did not obtain adverse action appeal rights because the agency did not convert him to competitive service following his trial period. The administrative judge, therefore, correctly found that the appellant is not an 'employee' for purposes of Board jurisdiction, and none of the reasons stated in the appellant's petition provides a basis for disturbing this conclusion. *See Kane v. Department of the Army*, 60 M.S.P.R. 605, 609-11 (1994) (appellant not an "employee" under section 7511(a)(1)(C)(i) where he was serving in a trial period pending conversion to the competitive service as a condition of his appointment).

We further find that the appellant does not have appeal rights under 5 U.S.C. § 7511(a)(1)(C)(ii), which provides appeal rights to a nonpreference eligible in the excepted service who has completed two years of current continuous service in an Executive agency under other than a temporary appointment limited to two years or less. As discussed in *Kane*, Congress intended that individuals serving trial periods of employment under section 7511(a)(1)(C)(i) were not to be afforded appeal rights under section 7511(a)(1)(C)(ii). *Id.* at 610-11.

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or

receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

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