

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 89

Docket No. AT-315H-09-0034-I-1

**Stephen Strausbaugh,
Appellant,**

v.

**Government Printing Office,
Agency.**

May 27, 2009

Norman Jackman, Esquire, Cambridge, Massachusetts, for the appellant.

Thomas Kelly, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the case to the Board's Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The agency appointed the appellant to the position of electrician effective March 17, 2008. Initial Appeal File (IAF), Tab 13, Subtab 1. It terminated the appellant's employment effective September 26, 2008, before the end of his 1-year probationary period, citing his personal conduct and failure to follow instructions. *Id.*, Subtab 3.

¶3 The appellant thereafter sought to appeal his termination and requested a hearing, claiming that the agency's action was based on marital status discrimination. IAF, Tab 1 at 1-7.* The administrative judge thereafter issued an acknowledgment order advising the appellant of the jurisdictional issue presented by this appeal and affording him the opportunity to provide evidence and argument regarding that issue. IAF, Tab 3. In his response, the appellant claimed, inter alia, that his supervisor, David Spiers, made derogatory comments concerning his marital status and excluded his fiancé and child from an official function on the ground that he was not married to his fiancé, and that the supervisor told him that he wouldn't be having "these problems" if he were married. IAF, Tab 8 at 4-6.

¶4 The administrative judge thereafter dismissed the appeal for lack of jurisdiction without conducting a hearing, finding that the appellant presented virtually "no evidence . . . of a bias based on marital status," that the appellant's exclusion from the official function "evidence[d] only that the appellant's supervisor enforced . . . what he considered to be a rule," that fiancées were not family members "for most governmental purposes," that there was "seemingly no

* The administrative judge docketed a separate appeal to address the appellant's allegations that his termination also violated the Uniformed Services Employment and Reemployment Right Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)). See IAF, Tab 14 at 1 n.*; see *Strausbaugh v. Government Printing Office*, MSPB Docket No. AT-4324-09-0264-I-1.

connection between the [official function] and the appellant's termination," and that the appellant therefore had not made a nonfrivolous claim of marital status discrimination. IAF, Tab 14, Initial Decision (ID) at 4.

¶5 In his timely petition for review, the appellant asserts that the administrative judge erred in denying his request for a hearing and in finding that he failed to make a nonfrivolous allegation of jurisdiction. Petition for Review File, Tab 1 at 4-6.

ANALYSIS

¶6 A probationary employee has no statutory right of appeal to the Board. [5 U.S.C. §§ 7511-7514](#); *Stokes v. Federal Aviation Administration*, [761 F.2d 682](#), 684 (Fed. Cir. 1985). The Office of Personnel Management (OPM) has, however, granted limited appeal rights to career or career-conditional employees who are terminated during their first year of employment. Specifically, OPM's regulations provide, inter alia, that "[a]n employee may appeal . . . a termination not required by statute which he or she *alleges* was based on . . . marital status." [5 C.F.R. § 315.806\(b\)](#) (emphasis added); see *Stokes*, 761 F.2d at 684-85. In *Stokes*, the court explained that

[t]he Board would . . . have no jurisdiction to consider an appeal filed by a probationary employee who does not "allege" marital discrimination . . . and may simply dismiss such an appeal on sight. The regulation, however, establishes a probationary employee's right to appeal, and thus the Board's initial jurisdiction to act, i.e., to consider that appeal, when the probationary employee does so allege.

761 F.2d at 685. A probationary employee faces a two-step process in establishing Board jurisdiction over an appeal such as this one. First, the employee must allege marital status discrimination and support the allegation with factual assertions indicating that it is not a pro forma pleading. *Id.* at 686. If the appellant meets this requirement by making a facially nonfrivolous allegation of marital status discrimination, he has a right to a hearing. *Id.*

Second, at the hearing, he must support his allegation with a showing of facts which would, if not controverted, require a finding that marital status discrimination was the basis for his discharge. *Id.*

¶7 In *Gribben v. Department of Justice*, [55 M.S.P.R. 257](#), 259 (1992), the Board found that the administrative judge had erroneously required the appellant to satisfy the second step of the process before granting her a hearing. Gribben had alleged that the agency removed her because of an extramarital relationship with another agency employee. Among the factual assertions she made in support of this claim were the following: (1) When her supervisor learned of her extramarital relationship, he spoke to her in an abusive manner, and commented about her morals, her relationship with her children and the scandal that had been created; (2) the supervisor commented about the appellant's husband's virtuous nature, the innocence of her children, her married status, and the effect of the affair on her husband; and (3) the supervisor began to give her the "silent treatment," and made it clear that the affair had jeopardized her employment with the agency. *Id.* The Board found that these assertions constituted a non-frivolous allegation of marital status discrimination entitling her to a jurisdictional hearing. *Id.* at 259-60.

¶8 The assertions made by the appellant in the instant case are comparable to those made in *Gribben*. In each, the supervisor allegedly showed a keen interest in the state of the probationer's marital status. The supervisor in *Gribben* allegedly "made it clear" to the probationer that her extramarital relationship had jeopardized her employment with the agency, 55 M.S.P.R. at 259, while the appellant in the instant case alleged that his supervisor, Spiers, told him that "[i]f you were married to your fiancée instead of living with her you would not be having these problems," which he claims "turned out to be a reference to losing his job." IAF, Tab 8 at 4. Further, the appellant alleged that Spiers made

“[d]erogatory statements . . . regarding [his] marital status”; that “[w]hen [he] asked for family leave to take care of his 3 year old child, he was told . . . that ‘if you were married she could do that’”; that “management officials asked questions regarding [his] living with a woman and having a baby but not being married to her”; and that Spiers, “after telling [him] that he could bring his spouse and 3 year old child with him to [an official function], . . . fired him for bringing his companion (the mother of his child with whom he had been living for the past 13 years)” *Id.* at 4-5. In addition, the appellant asserts that his termination notice includes only one reason for his separation, i.e., that he violated rules which allegedly limited participation in the official function to “immediate family members”; and he alleges that his “fiancee was the real object of the termination action because she did not fit the description of spouse.” *Id.* at 5. Thus, the appellant has stated a basis for his belief that there was a causal connection between his marital status and the decision to terminate his employment. *See also Edem v. Department of Commerce*, [64 M.S.P.R. 501](#), 504-505 (1994) (the appellant’s assertion that conversations in which her supervisor allegedly showed a keen interest in the state of her marriage, and in the manner in which any marital difficulties might affect her children, constituted a nonfrivolous allegation of marital status discrimination). The appellant’s allegations constitute nonfrivolous allegations of marital status discrimination, rather than a mere pro forma pleading. *See id.* at 505; *Gribben*, 55 M.S.P.R. at 259-60.

¶9 We find further that the administrative judge misapplied the above standards by dismissing this appeal for lack of evidence that the appellant’s termination was the result of marital status discrimination. *ID* at 4. As stated above, proof is not necessary at this stage of the proceedings, where the appellant need only make a nonfrivolous allegation of jurisdiction to obtain a jurisdictional hearing. *See Stokes*, 761 F.2d at 686.

ORDER

¶10 Accordingly, we remand this case to the regional office for a hearing and the issuance of a new initial decision.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.