

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

2009 MSPB 118

Docket No. AT-315H-09-0053-I-1

**Maria S. Gamble,
Appellant,**

v.

**Department of the Army,
Agency.**

June 24, 2009

Herman E. Millender, Bynum, Alabama, for the appellant.

Susan B. Bennett, Esquire, Anniston, Alabama, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision, issued on January 12, 2009, that dismissed the appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition, REOPEN the appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND the appeal for further adjudication pursuant to this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal alleging that the agency improperly terminated her from her position of General Equipment Mechanic Helper, WG-

4737-05. Initial Appeal File (IAF), Tab 1. The record indicates that the appellant was appointed on April 14, 2008, for a term not to exceed May 13, 2009. IAF, Tab 1 at 7. The agency informed the appellant in a written memorandum dated September 16, 2008, that it was terminating her from her position effective September 18, 2008, based on the charge of submitting false information on the resume that was part of her application for the position. *Id.*

¶3 Because it appeared that the Board may not have jurisdiction over the appeal, the administrative judge (AJ) advised the appellant that the Board lacks jurisdiction over the termination of a probationary employee for providing an intentional false statement or for deception in appointment, unless it is established that the agency took such action with the prior approval of the Office of Personnel Management (OPM). IAF, Tab 3 at 2. The appellant was ordered to provide evidence and argument to establish that the Board has jurisdiction over this appeal. *Id.* The agency was also ordered to provide any evidence regarding its contacts with OPM concerning the appellant's termination. *Id.* at 3.

¶4 The agency's response included a declaration from its Human Resources (HR) Officer stating that it did not consult OPM or seek its approval prior to terminating the appellant. IAF, Tab 4. The appellant filed a response in which she asserted that another individual tampered with and falsified her resume without her approval. IAF, Tab 5.

¶5 Despite the fact that the record did not specifically address whether the appellant's position was in the competitive or excepted service, the AJ assumed it was in the competitive service for purposes of the initial decision. Initial Decision (ID) at 3 n.2. The AJ found that, normally when a probationary employee alleges that she was terminated for reasons arising before her appointment, and that the agency did not provide her with advance written notice of her termination and a reasonable time to file a written answer and to furnish affidavits in support of her answer as required by [5 C.F.R. § 315.805](#)(a), (b), the Board has jurisdiction over the appeal. ID at 3-4. However, in this case, because

the appellant did not allege that the agency obtained OPM's prior approval for terminating her, and the evidence indicated that the agency did not obtain OPM's prior approval, the AJ found that under *Wiley v. Department of Veterans Affairs*, [101 M.S.P.R. 207](#), ¶ 8 (2006), the appellant failed to raise nonfrivolous allegations of fact which, if proven, would establish Board jurisdiction over her probationary termination for falsifying her application materials. ID at 5. Thus, the AJ dismissed the appeal for lack of jurisdiction. *Id.*

¶6 On PFR, the appellant asserts that she has appeal rights under [5 C.F.R. §§ 315.805](#) and 315.806. Specifically she argues that, as a probationer terminated for conditions arising before her appointment, the agency failed to follow the procedures required in [5 C.F.R. § 315.805](#) when it terminated her employment. Petition for Review File (PFRF), Tab 1. In response to the PFR, the agency asserts that the AJ correctly found that the agency did not obtain prior approval from OPM to terminate the appellant and that, under *Wiley* the Board does not have jurisdiction over this appeal. PFRF, Tab 3.

ANALYSIS

¶7 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The appellant bears the burden of proving Board jurisdiction by a preponderance of the evidence. [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#).

¶8 Here, although the record does not include the Standard Form (SF) 50 documenting the appellant's termination, it is undisputed that the appellant was appointed to a term position and that she was terminated during her first year of service, which was a trial period. IAF, Tab 1 at 2, Blocks 5 and 10; *id.* at 7; IAF, Tab 4 at 3. The first year of service of a term employee is a trial period, and a term employee terminated during her trial period is entitled to the same

procedures as competitive service probationary employees under [5 C.F.R. §§ 315.804](#) and 315.805.¹ 5 C.F.R. § 316.304(a), (b).

¶9 As a trial employee with less than 1 year of current continuous service, the appellant has no statutory right of appeal. *See* [5 U.S.C. § 7511\(a\)](#). Moreover, the appellant did not allege that her termination was based upon either partisan politics or marital status, which would give rise to a regulatory right of appeal under [5 C.F.R. § 315.806\(b\)](#). However, a probationer who was terminated pursuant to [5 C.F.R. § 315.805](#) for reasons based wholly or partially on pre-appointment conditions, may appeal her termination if she alleges the agency failed to follow the procedural requirements of 5 C.F.R. § 315.805, i.e., advance written notice of the proposed termination and the opportunity to provide a written response. 5 C.F.R. § 315.806(a), (c).

¶10 It is undisputed that the agency terminated the appellant based on the charge of submitting false information on the resume that was part of her application for the position. Thus, because the appellant was terminated for reasons arising pre-appointment involving evidence of material, intentional false statement or deception or fraud in examination or appointment, there are two separate regulations in effect which must be considered in determining whether the Board has jurisdiction over this appeal.

¶11 Because the appellant's termination was based on the charge of submitting false information on her resume, the AJ properly determined that, if her appointment was in the competitive service, OPM's suitability regulations must

¹ Under [5 C.F.R. § 316.304](#), prior federal civilian service of an individual with a term appointment is credited toward completion of the trial period in the same manner as it is in [5 C.F.R. § 315.802](#), meaning that such prior service must have been in the same agency and the same line of work, and it contained or was followed by no more than a single break in service that did not exceed 30 calendar days. We note that the appellant has not alleged, and the record does not indicate, that she has any prior federal civilian service, *see* IAF, Tab 1 at 7-9, but if she has such service she should so indicate on remand.

be considered.² A suitability inquiry is directed toward whether the “character or conduct” of a candidate or current employee is such that employing or continuing to employ her would adversely affect the efficiency of the service. [5 C.F.R. §§ 731.101](#)(a), 731.201. The many factors that might be relied upon in rendering a negative suitability determination include material, intentional false statements, or deception or fraud in the examination or appointment process. [5 C.F.R. § 731.202](#)(b). Under 5 C.F.R. § 731.501(a), “[w]hen OPM or an agency acting under delegated authority under this part takes a suitability action . . . that person may appeal the action to the [Board].”

¶12 Prior to June 16, 2008, OPM’s suitability regulations provided that an agency that wanted to take an action against a probationary competitive service employee under 5 C.F.R. Part 315 in a case involving evidence of material, intentional false statement or deception or fraud in examination or appointment must contact OPM for prior approval. [5 C.F.R. § 731.103](#)(a). Based upon that regulation, the Board has held that it lacks jurisdiction to consider the termination of a probationary competitive service employee that was based on evidence of an intentional false statement or deception in appointment that could form the basis of a negative suitability determination unless it is established that the agency had prior approval from OPM to take action under its own authority under 5 C.F.R. Part 315. *See Wiley*, [101 M.S.P.R. 207](#), ¶ 8.

¶13 However, in April 2008, OPM issued revised suitability regulations, “effective June 16, 2008,” 73 Fed. Reg. 20,149 (Apr. 15, 2008), which altered the above provisions. Under the new [5 C.F.R. § 731.103](#)(a),

[s]ubject to the limitations and requirements of paragraphs (f) and (g) of this section, OPM delegates to the heads of agencies authority

² The suitability regulations apply to positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service. [5 C.F.R. § 731.101](#)(b).

for making suitability determinations and taking suitability actions (including limited, agency-specific debarments under § 731.205) in cases involving *applicants* for and *appointees* to covered positions in the agency.

¶14 The regulation at [5 C.F.R. § 731.101](#)(b) defines an applicant as “a person who is being considered or has been considered for employment,” and an appointee as “a person who has entered on duty and is in the first year of a subject-to-investigation appointment (as defined in § 731.104).” In this case, because the appellant has entered on duty, she is an appointee.

¶15 Under the new [5 C.F.R. § 731.103](#)(g), “OPM retains jurisdiction to make final determinations and take actions in all suitability cases where there is evidence that there has been a material, intentional false statement, or deception or fraud in examination or appointment,” and agencies are required to refer these cases to OPM for suitability determinations and suitability actions under this authority. This regulation states further that,

[a]lthough no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (5 CFR part 315, 5 CFR part 359, or 5 CFR part 752) in cases involving material, intentional false statement in examination or appointment, or deception or fraud in examination or appointment.

[5 C.F.R. § 731.103](#)(g).

¶16 In addition, [5 C.F.R. § 731.105](#)(e), provides that

[n]othing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this chapter or terminating a probationary employee under the procedures of part 315 or part 359 of this chapter. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

The new [5 C.F.R. § 731.203](#)(f) further clarifies § 731.105(e), by stating that

[a]n action to remove an appointee or employee *for suitability reasons* under this part is not an action under part 315, 359, or 752 of this chapter. Where behavior covered by this chapter may also form the basis for an action under parts 315, 359, or 752 of this chapter, an agency may take the action under part 315, 359, or 752 of this

chapter, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

Under the new [5 C.F.R. § 731.203](#)(g), agencies no longer need approval from OPM prior to taking unfavorable suitability actions within their delegated authority, but “they are required to report to OPM all unfavorable suitability actions taken under this part within 30 days after they take the action.”

¶17 OPM explained that its new regulations were issued, in part, to correct Board case law which had held that “what matters is the substance of the action, not the form,” which OPM determined to be erroneous and beyond the intent of Congress. 73 Fed. Reg. at 20,152. OPM concluded that “when adjudicating an appeal of an agency action, the Board must assess the agency’s action under the procedures elected by the agency and may not hold the agency to standards relating to a legal authority that the agency did not invoke.” *Id.* Because OPM’s new suitability regulations became effective prior to the date that the appellant was terminated, the AJ erred in not applying those regulations to this case.

¶18 Moreover, we interpret the new regulations to mean that agencies no longer have to request specific authority to take suitability actions, since the suitability regulations now delegate authority to all agencies to take action in most suitability cases involving applicants for and appointees to covered positions in the agency under 5 C.F.R. part 731. However, where the case involves a material, intentional false statement, or deception or fraud in examination or appointment, as in this case, OPM retains jurisdiction and the agency **must** refer the case to OPM for a suitability determination. Thus, in this case, if the authority for the agency’s termination action was under 5 C.F.R. part 731, the agency was required to refer this case to OPM for a suitability determination, which it apparently did not do.

¶19 However, as we stated above, the revised regulations allow an agency to take an action under 5 C.F.R. parts 315, 359, or 752, instead of under part 731, in

cases involving a material, intentional false statement, or deception or fraud in examination or appointment, as in this case, but the agency **must** comply with the requirements in those regulations and the agency must notify OPM that it intends to take, or has taken, action under these authorities.

¶20 Here, the appellant argues that, as a probationer, the agency terminated her for conditions arising before her appointment and that the Board has jurisdiction over her appeal because the agency failed to follow the procedures prescribed in [5 C.F.R. § 315.805](#). PFRF, Tab 1. It is undisputed that the agency terminated the appellant's employment during her trial period based on the charge of submitting false information on the resume that was part of her application for the position. As stated previously, under [5 C.F.R. § 315.805](#)(a), (b), when a probationary employee establishes that she was terminated for reasons arising before her appointment and that the agency did not provide her with advance written notice of her termination and a reasonable time to file a written answer and to furnish affidavits in support of her answer, the Board has jurisdiction over the appeal. 5 C.F.R. § 315.806(c).

¶21 In this case, the record shows that the appellant received a written notice on September 16, 2008, that the agency was terminating her from her term appointment effective September 18, 2008, for "submitting false information on the resume which was submitted as part of your application for the position." IAF, Tab 1 at 6. Although the notice specifically advised the appellant of the reasons behind the agency's action, the record contains no evidence that the agency provided the appellant with advance notice of the proposed termination and an opportunity to respond, as would be required under [5 C.F.R. § 315.805](#). Thus, if the agency elected to take the termination action on its own authority under 5 C.F.R. part 315, it may not have complied with the procedures required under those regulations, and, if it did not, as the appellant correctly asserts, the Board would have jurisdiction over this appeal.

¶22 However, we are unable to determine from the record what regulatory authority the agency relied upon to terminate the appellant. Specifically, the termination notice does not state the authority for the action and the record does not include a copy of the SF-50 documenting the termination. IAF, Tabs 1, 4. Further, it is unclear whether the appellant's term appointment was in the competitive or excepted service. Nor is there any evidence in the record showing that the agency ever notified OPM, before or after the appellant's termination, that it took an action under 5 C.F.R. part 315 or part 731. Moreover, the only evidence submitted by the agency to address the jurisdictional issue is a declaration from Brenda Gurley, HR Officer, which states that "at no time did the Agency consult with [OPM] or seek its approval to proceed with the disciplinary action," but the declaration does not identify the regulatory authority used to terminate the appellant's employment. IAF, Tab 4. Because it is unclear on what authority the agency based its termination action, and because the AJ did not apply OPM's new suitability regulations to this case, we find it necessary to remand this appeal for further adjudication by the AJ.

ORDER

¶23 On remand, the AJ shall take evidence and argument concerning whether the appellant was in the competitive or excepted service, and concerning what authority the agency used to terminate the appellant's employment. The AJ shall

apply OPM's new suitability regulations to the extent they are applicable to this case. If the appellant makes a nonfrivolous allegation of jurisdiction, a jurisdictional hearing should be held.

FOR THE BOARD:

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