UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 123

Docket No. SF-0752-09-0049-I-1

John Yeressian,

Appellant,

v.

Department of the Army,

Agency.

July 2, 2009

William H. Brawner, Esquire, Ventura, California, for the appellant.

Lawrence N. Minch, Los Angeles, California, 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 set forth below, we GRANT the petition under 5 C.F.R. § 1201.115(d), VACATE the initial decision, and REMAND the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The material facts of this case are not disputed. The non-preference eligible appellant began his career with the agency on November 15, 2004, pursuant to the Student Educational Employment Program - Student Temporary

Employment Program under 5 C.F.R. § 213.3202(a), as a GS-0318-4 Secretary (Office Automation). Initial Appeal File (IAF), Tab 5, Ex. 1. Such appointments are not to exceed 1 year and may be repeated in 1-year increments. 5 C.F.R. § 213.3202(a)(10)(i). Such appointments are in the excepted service, 5 C.F.R. § 213.3201(a), are not eligible for non-competitive conversion to career or career-conditional appointments, 5 C.F.R. § 213.3202(a)(10)(iii), and may only be converted to a Student Career Experience Program (SCEP) appointment, 5 C.F.R. § 213.3202(a)(10)(iii), (15).

¶3 The appellant was subsequently converted to an excepted service appointment in the SCEP as a GS-0399-5 Student Trainee (Administration & Support) pursuant to 5 C.F.R. § 213.3202(b)(1)(i), effective October 2, 2005. IAF, Tab 5, Exs. 2-3. After serving approximately 2 years and 6 months in this position, the appellant accepted a new SCEP excepted service appointment as a GS-1199-5 Student Trainee (Realty), effective April 13, 2008. IAF, Tab 5, Ex. 7. The agency terminated the appellant from that position effective October 17, 2008, for unsatisfactory performance. IAF, Tab 3, Subtabs 4a-4b.

¶4 The appellant filed an appeal that challenged the merits of the agency's basis for his termination and asserted the affirmative defenses of discrimination based on race, color, religion, sex, national origin, and disability, as well as retaliation for prior protected equal employment opportunity and whistleblower activity. IAF, Tab 1. The appellant also checked the boxes of the appeal form indicating that the agency had committed discrimination based on political affiliation and marital status, as well as several forms of prohibited personnel practices. *Id.* The administrative judge (AJ) informed the appellant of what he would need to do to establish the Board's jurisdiction over his appeal as an adverse action appeal, or as an individual right of action (IRA) appeal regarding his claim of whistleblower reprisal, and he ordered the appellant to file evidence and argument showing that the Board has jurisdiction over his appeal. IAF, Tab 2 at 2-4.

¶5 The appellant's jurisdictional response asserted, inter alia, that he had held an excepted service SCEP position for more than 2 years and, thus, he was an "employee" with adverse action appeal rights under 5 U.S.C. § 7511(a)(1)(C)(ii). IAF, Tab 5 at 2-10. The appellant further asserted that his appointment to the new SCEP position in April 2008 did not extinguish his acquired appeal rights, because the agency had failed to notify him that acceptance of the new position would result in the loss of his established appeal rights. *Id.* at 10-12. The appellant asserted that the agency's termination action must be reversed because the agency had failed to afford him the due process rights to which he was entitled as an employee. *Id.* at 12-13. The appellant filed evidence, including a sworn affidavit, in support of his jurisdictional arguments. *Id.*, attachments. The appellant's response did not address the Board's IRA jurisdiction over a claim of whistleblower reprisal. The agency moved to dismiss the appeal based on its assertion that the appellant was not an employee as defined under 5 U.S.C. § 7511(a)(1)(C)(ii), because that provision requires that the 2 years of current continuous service be in the same or similar positions, the two SCEP positions the appellant had held were not the same or similar, and the appellant had only held the position from which he was terminated for approximately 6 months. IAF, Tab 6. However, the agency did not dispute the appellant's sworn assertion that the agency had failed to inform him that he would lose the appeal rights he had acquired prior to accepting the new SCEP position from which he was terminated.

¶6 In the initial decision based on the record evidence, the AJ found that the Board's jurisdiction over this appeal is governed by whether the appellant satisfies the definition of "employee" under 5 U.S.C. § 7511(a)(1)(C). IAF, Tab 8, Initial Decision (ID) at 2. The AJ found that the appellant was not an employee under 5 U.S.C. § 7511(a)(1)(C)(i), because he was still serving a probationary or trial period under an initial appointment pending conversion to the competitive service. ID at 2-3. The AJ found that the appellant was not an

employee under 5 U.S.C. § 7511(a)(1)(C)(ii), because he had served for only 6 months in the SCEP position from which he was terminated and his prior SCEP position was not the same or similar to the SCEP position from which he was terminated; thus, he did not have 2 years of current continuous service in the same or similar positions. ID at 3-4. The AJ found that the appellant did not acquire appeal rights as a result of his more than 2 years of service in the previous SCEP position, because such positions are probationary or trial appointments until such time as the appointee is actually converted to a competitive service appointment and, thus, the appellant could not have obtained appeal rights in accordance with 5 U.S.C. § 7511(a)(1)(C)(i) while in that excepted service position. ID at 4-5. Accordingly, the AJ dismissed the appeal for lack of jurisdiction. ID at 1, 6.

¶7 The appellant has filed a petition for review and a supplement to the petition. Petition for Review File (PFRF), Tabs 1-2. The appellant's union, the National Federation of Federal Employees, Local 777, has filed an amicus curiae brief in support of the appellant's petition. PFRF, Tab 5. The agency has filed a response in opposition to the petition. PFRF, Tab 8. The appellant reasserts on review, inter alia, that he had acquired appeal rights as a result of his more than 2½ years of service in his previous SCEP position and that the agency failed to inform him that he would lose those appeal rights upon his acceptance of the new SCEP position. PFRF, Tab 1 at 9-15.

ANALYSIS

¶8 An individual who is involuntarily separated for cause is entitled to appeal to the Board under 5 U.S.C. §§ 7512(1), 7513(d), only if the person meets the definition of "employee" under 5 U.S.C. § 7511(a)(1). *Johnson v. Department of Veterans Affairs*, 99 M.S.P.R. 362, ¶ 4, *review dismissed*, 161 F. App'x 945 (Fed. Cir. 2005); *Baker v. Department of Homeland Security*, 99 M.S.P.R. 92, ¶ 4 (2005). As a non-preference eligible in the excepted service, the appellant had to

satisfy the definition of employee under 5 U.S.C. § 7511(a)(1)(C), which provides that an "employee" means:

> (C) an individual in the excepted service (other than a preference eligible) –
>
> (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
>
> (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less.

The appellant only needed to satisfy the requirements under (C)(i) or (C)(ii) in order to be an employee with adverse action appeal rights; he did not need to satisfy both sets of requirements. *See Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999).

¶9 The appellant's first assertion on review is that he satisfied the definition of employee under 5 U.S.C. § 7511(a)(1)(C)(i), because he had completed the "one year trial period beginning 02-OCT-2005" that the agency had indicated on the SF-50 documenting his October 2, 2005 appointment to the Student Trainee (Administration & Support) position. PFRF, Tab 1 at 9-10, 14-15; IAF, Tab 5, Ex. 2. We see no error in the AJ's finding that the appellant was not an employee as defined under 5 U.S.C. § 7511(a)(1)(C)(i), because the Board has found that SCEP appointments constitute probationary or trial periods under an initial appointment pending conversion to the competitive service and that such appointees do not gain adverse action appeal rights under (C)(i) until they are converted to the competitive service. *See Lopez v. Department of the Navy*, 103 M.S.P.R. 55, ¶¶ 10-11 (2006).

¶10 The appellant asserts that the AJ did not need to consider whether the two SCEP positions he held were the "same or similar" in order to determine whether he had 2 years of current continuous service that satisfied the definition of employee under 5 U.S.C. § 7511(a)(1)(C)(ii). PFRF, Tab 1 at 10-12. The

appellant asserts that the AJ correctly found that he had 2 years of continuous service in the SCEP position he held from October 2005 to April 2008 and he asserts that his more than 2 years of continuous service in that position was sufficient to satisfy the 2 years of current continuous service required to qualify him as an employee under 5 U.S.C. § 7511(a)(1)(C)(ii). *Id.* at 12. The appellant's assertion is without legal merit. Consistent with the Office of Personnel Management's definition of "current continuous employment" under 5 C.F.R. § 752.402(b), the Board has held that the term "current continuous service" means service immediately prior to the action at issue without a break in service of a work day and, further, that the definition applies to both competitive and excepted service positions. *See McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 8 (2006). The appellant's 2 years of continuous service in his first SCEP position was not rendered immediately prior to his removal and, thus, his service in that position does not satisfy the requirements of 5 U.S.C. § 7511(a)(1)(C)(ii), because it was not "current continuous service." We note that the appellant has not challenged on review the AJ's finding that the two SCEP positions he held were not the "same or similar" so as to allow his service in both SCEP positions to be combined for the purpose of satisfying the required 2 years of current continuous service under 5 U.S.C. § 7511(a)(1)(C)(ii).

¶11 The appellant also asserts that the AJ should have found that the agency had erred by failing to advise him that he would lose his acquired appeal rights upon his acceptance of the new position. PFRF, Tab 1 at 13-14. The uncontested record evidence establishes that the appellant had completed more than 2 years of continuous service in his previous SCEP position prior to his acceptance of the SCEP position from which he was subsequently terminated. IAF, Tab 5, Exs. 2-3, 7 (regarding his appointment as a Student Trainee (Administration & Support) from October 2, 2005, to April 1, 2008). The Board and its reviewing court have found that the completion of 2 years of continuous service in the same excepted service position satisfies the definition of employee under 5 U.S.C.

§ 7511(a)(1)(C)(ii), notwithstanding the appellant's inability to satisfy the definition of employee under 5 U.S.C. § 7511(a)(1)(C)(i). *See Van Wersch*, 197 F.3d at 1151; *Beck v. General Services Administration*, 86 M.S.P.R. 489, ¶ 11 (2000). Thus, upon completing 2 years of continuous service in his previous SCEP position, the appellant had satisfied the definition of employee under 5 U.S.C. § 7511(a)(1)(C)(ii) and he had acquired appeal rights under 5 U.S.C. § 7513(d). The AJ's finding that the appellant did not acquire appeal rights in his previous SCEP position is legally erroneous because it impermissibly required the appellant to have satisfied the requirements of both 5 U.S.C. § 7511(a)(1)(C)(i) and (C)(ii) while in that position. ID at 4-5; *see Van Wersch*, 197 F.3d at 1151; *Beck*, 86 M.S.P.R. 489, ¶ 11.

¶12 When an employee moves between positions within the same agency, and forfeits his appeal rights as a result of accepting the new appointment, the agency must inform the employee of the effect the move will have on his appeal rights. *See Lopez*, 103 M.S.P.R. 55, ¶ 12; *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349 (1994). An employee who has not knowingly consented to the loss of appeal rights in accepting another appointment with the agency is deemed not to have accepted the new appointment and to have retained the rights incident to his former appointment. *See Lopez*, 103 M.S.P.R. 55, ¶ 12; *Park v. Department of Health & Human Services*, 78 M.S.P.R. 527, 534 (1998). Thus, if an AJ finds that an appellant was not informed of the loss of his appeal rights and that he would not have accepted the new position if he had been properly informed of the loss of his appeal rights, the AJ should afford the appellant the appeal rights he possessed prior to accepting the new position. *See Lopez*, 103 M.S.P.R. 55, ¶ 12; *Park*, 78 M.S.P.R. at 534; *Exum*, 62 M.S.P.R. at 350-51.

¶13 We find that the uncontested record evidence establishes that the agency failed to inform the appellant that he would lose the appeal rights he had acquired in his former SCEP position prior to his acceptance of the SCEP position from which he was terminated. IAF, Tab 5 at 16-18 (Declaration of the appellant); Tab

6. Indeed, the agency has consistently maintained that the appellant has never acquired appeal rights. IAF, Tab 6; PFRF, Tab 8. However, the appellant did not assert in his sworn affidavit that he would not have accepted the new SCEP position if he had been informed that he would lose his appeal rights upon accepting the new position. IAF, Tab 5 at 16-18. Thus, the AJ must address that factual issue upon remand.

ORDER

¶14 Accordingly, we VACATE the initial decision and REMAND this appeal to the Western Regional Office for further adjudication as set forth in this Opinion and Order. On remand, the AJ shall order the parties to submit evidence and argument concerning whether the appellant would have accepted the Student Trainee (Realty) appointment if he had known that he would lose his appeal rights by accepting that position. The AJ shall hold a jurisdictional hearing on this issue if necessary. If the Board has jurisdiction over the appellant's termination, the AJ shall adjudicate the merits of the termination appeal, as well as the appellant's affirmative defenses.

FOR THE BOARD:

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