

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

2010 MSPB 37

Docket No. AT-315H-09-0681-I-1

**Socorro Ramirez-Evans,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

February 19, 2010

Muriel Newman, Gainesville, Florida, for the appellant.

James A. Mantia, Orlando, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her 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 appeal on our own motion under [5 C.F.R. § 1201.118](#), however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and still DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed a Board appeal indicating that she was a non-preference eligible competitive service employee terminated during her initial probationary period and that the agency wrongfully terminated her based on her marital status. Initial Appeal File (IAF), Tab 1 at 1, 3, 5. She attached a copy of the agency's notice of termination, which informed her that she could appeal her termination to the Board if she believed that it was based on discrimination because of marital status or partisan political reasons. *Id.* at 8. The appellant requested a hearing. *Id.* at 2.

¶3 The administrative judge issued an order advising the appellant of the limited appeal rights available to probationary employees under [5 C.F.R. §§ 315.805-.806](#), and that probationary employees have no statutory right of appeal because they are excluded from the definition of "employee" in [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#). IAF, Tab 3 at 1. The administrative judge advised the appellant of how to establish jurisdiction over her appeal, and ordered her to file evidence and argument on the issue. *Id.* at 2. The appellant responded, contesting the agency's stated reasons for terminating her employment and alleging that her termination was the result of marital status discrimination. IAF, Tab 5, Subtabs 1-2.

¶4 The agency's response to the order included the appellant's termination notice and a Standard Form 52 showing that the appellant's appointment was in the excepted service position of Registered Respiratory Therapist. IAF, Tab 4, Subtabs 4b-1, 4d-1. The agency's response also stated that the appellant was subject to a 1-year initial "probationary" period, and that she had 11 months and 25 days of federal service at the time of her termination. *Id.*, Subtabs 4a-1, 4b-1, 4f-1. The agency also indicated that the appellant had no prior creditable civil or military service. *Id.*, Subtab 1.

¶5 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without holding the requested hearing. IAF, Tab 6, Initial

Decision (ID) at 1, 6. The administrative judge found that the appellant received a career-conditional appointment in the competitive service on May 27, 2008, that she had no statutory right of appeal under [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#) because she was terminated during her 1-year probationary period, and that she had not shown that she had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. ID at 2. In addition, the administrative judge found that the appellant had no regulatory right of appeal under [5 C.F.R. § 315.806\(b\)](#) because she failed to make a nonfrivolous allegation that her termination was based on marital status discrimination. ID at 5.

¶6 The appellant has filed a petition for review offering additional evidence and argument in support of her claim that her termination was the result of marital status discrimination. Petition for Review (PFR) File, Tabs 1, 3-4. The agency has filed a response opposing the appellant's petition.¹ PFR File, Tab 5.

ANALYSIS

¶7 On review, the appellant has submitted an organizational chart and additional documentation to correct the agency's alleged misrepresentation of her supervisor's title, which has no bearing on the jurisdictional issue before the Board. IAF, Tab 1 at 3-4, Tabs 3-4. The appellant has failed to present new and material evidence on review that, despite due diligence, was not available when the record was closed. *See* [5 C.F.R. § 1201.115\(d\)\(1\)](#). Nor has the appellant shown that the administrative judge's decision dismissing her appeal for lack of jurisdiction was based on an erroneous interpretation of statute or regulation that

¹ On November 24, 2009, the appellant filed a pleading captioned "Appellant's Response to Agency's Response to Petition for Review," which raised additional arguments after the record closed on review. PFR File, Tabs 2, 6. We have not considered the appellant's submission because the Board's regulations do not provide for a reply to the agency's response, and the appellant has not shown that her reply is based on evidence that "was not readily available before the record closed." *See* [5 C.F.R. § 1201.114\(i\)](#).

should result in a different outcome in this appeal. See 5 C.F.R. § 1201.115(d)(2). We therefore deny the petition for review.

¶8 We reopen this appeal because the documentary evidence indicates that the agency appointed the appellant to the excepted service, not the competitive service, in which case neither [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#) nor [5 C.F.R. § 315.806\(b\)](#) applies to the appellant. IAF, Tab 4, Subtabs 4b-1, 4d-1; see *Barrand v. Department of Veterans Affairs*, [112 M.S.P.R. 210](#), ¶ 13 (2009) (holding that [5 C.F.R. § 315.806](#) applies only to individuals in the competitive service). See generally *Pennington v. Department of Veterans Affairs*, [57 M.S.P.R. 8](#), 9 (1993) (noting the agency’s authority under Title 38 to appoint Registered Respiratory Therapists in the excepted service). Although the administrative judge based his decision on the belief that the appellant was appointed to the competitive service, it appears that he did so based on misleading information in the appellant’s appeal form, which indicated that she was a competitive service employee, and in the agency’s notice of termination, which stated that the appellant could file a Board appeal if she believed her termination was based on discrimination because of marital status or partisan political reasons -- regulatory grounds for appeal that are only available to individuals in the competitive service. IAF, Tab 1 at 1, 8; see *Barrand*, [112 M.S.P.R. 210](#), ¶ 13; 5 C.F.R. § 315.806. For the following reasons, we find that, at most, the administrative judge made a non-prejudicial error that had no effect on the appellant’s substantive rights or the outcome of this appeal.

¶9 Only an “employee,” as defined under 5 U.S.C. chapter 75, subchapter II, can appeal to the Board from an adverse action such as a removal.² *Barrand*, [112 M.S.P.R. 210](#), ¶ 8; see [5 U.S.C. §§ 7511\(a\)\(1\), 7512\(1\), 7513\(d\)](#). A non-

² Although the record is not fully developed regarding the nature of the appellant’s appointment, we assume for the sake of argument that the appellant was appointed under [38 U.S.C. § 7401\(3\)](#), and thus not denied appeal rights under [5 U.S.C. § 7511\(b\)\(10\)](#). See *Barrand*, [112 M.S.P.R. 210](#), ¶ 9; *Pennington*, 57 M.S.P.R. at 9-10.

preference eligible individual³ in the excepted service is an “employee” within the meaning of [5 U.S.C. § 7511](#) only if she: (1) is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (2) 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. [5 U.S.C. § 7511](#)(a)(1)(C)(i)-(ii). Although the appellant did not receive explicit jurisdictional notice below regarding [5 U.S.C. § 7511](#)(a)(1)(C), we may rule on the jurisdictional issue without prejudicing the appellant’s substantive rights because the record on the dispositive facts is fully developed and plainly shows that the Board is without jurisdiction over this appeal. *See Paige v. U.S. Postal Service*, [106 M.S.P.R. 299](#), ¶ 11 (2007); *Pennington*, 57 M.S.P.R. at 11. Section 7511(a)(1)(C)(i) does not apply in this case because there is no indication that the appellant held an initial appointment pending conversion to the competitive service. *See Forest v. Merit Systems Protection Board*, [47 F.3d 409](#), 411-12 (Fed. Cir. 1995). Further, it is undisputed that the appellant had fewer than 2 years of federal service to her credit. IAF, Tab 1 at 1, Tab 4, Subtab 1. Thus, the appellant does not satisfy section 7511(a)(1)(C)(ii). Accordingly, the appellant is not an “employee” who may appeal to the Board under 5 U.S.C. chapter 75. *See Allen v. Department of the Navy*, [102 M.S.P.R. 302](#), ¶ 10 (2006).

¶10 As an individual appointed in the excepted service, the appellant has no regulatory right to appeal under [5 C.F.R. § 315.806](#), which applies only to individuals in the competitive service. *See Barrand*, [112 M.S.P.R. 210](#), ¶ 13. The agency’s erroneous notice of appeal rights could not expand the Board’s jurisdiction. IAF, Tab 1 at 8; *see Barrand*, [112 M.S.P.R. 210](#), ¶ 13. Thus, the Board lacks the authority to review the appellant’s allegation that she was

³ The appellant acknowledges that she is not a preference eligible. IAF, Tab 1 at 1, 3.

terminated from an excepted service position based on marital status discrimination.

¶11 Accordingly, we DISMISS the appeal for lack of jurisdiction.

ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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