UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 40

Docket No. SF-0752-09-0565-I-1

William E. Scull,

Appellant,

v.

Department of Homeland Security,

Agency.

February 19, 2010

Ronald P. Ackerman, Esquire, Culver City, California, for the appellant.

Robert P. Erbe, Esquire, Tucson, Arizona, 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 his termination appeal for lack of jurisdiction without a hearing. For the reasons set forth below, we find that the petition does not meet the Board's review criteria set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. However, we REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant was a preference eligible individual serving in a non-temporary appointment in the competitive service as a GS-11 Customs and Border Patrol Officer for the agency's Bureau of Customs and Border Protection (CBP). Initial Appeal File (IAF), Tab 10, Subtabs 4r, 4u. Effective April 15, 2007, the agency converted the appellant under the Federal Career Intern Program (FCIP) to the position of GL-07 Immigration Enforcement Agent for the agency's Immigration and Customs Enforcement (ICE) division. *Id*. The FCIP appointment was an excepted service appointment expected to continue for 2 years, with a potential to convert to a career or career-conditional appointment in the competitive service upon satisfactory completion of the internship. *Id*.

¶3 On April 14, 2009, the agency issued a notice to the appellant captioned "Notification of Non-conversion." IAF, Tab 10, Subtab 4c at 1. The notice stated that the agency had determined not to convert the appellant's excepted service FCIP appointment to a career or career-conditional appointment, the appellant's FCIP appointment would expire effective April 15, 2009, and the appellant's employment with the agency was terminated. *Id*. The notice stated that the reason for the agency's decision was that the appellant displayed a lack of candor regarding an accident in a government-owned vehicle. *Id*. However, on April 14, 2009, the appellant was on approved leave, and the agency had difficulty delivering the notice to him in person. IAF, Tab 10, Subtab 4h. The agency recognized the problem and took steps to inform the appellant of its action by other means. *Id*., Subtabs 4a, 4d-4i. On April 15, 2009, the agency issued an SF-50 indicating that the appellant had been terminated effective April 14, 2009. *Id*., Subtab 4b.

¶4 The appellant filed a Board appeal and requested a hearing. IAF, Tab 1 at 3. He asserted, among other things, that he did not receive the termination notice until April 18, 2009, and that he had completed his 2-year internship and was a career employee when the agency improperly removed him without due process.

Id. at 4, 6. The administrative judge issued orders regarding the jurisdictional matters at issue, IAF, Tab 2 at 2-3, Tab 12, and the parties filed evidence and argument regarding jurisdiction, IAF, Tabs 3, 10, 13, 14. The administrative judge then issued an initial decision, dismissing the appeal for lack of jurisdiction without a hearing. IAF, Tab 15, Initial Decision (ID) at 1, 14. The administrative judge found it undisputed that the appellant was an employee as defined under 5 U.S.C. § 7511(a)(1)(B)(i) with the right to appeal an adverse action to the Board under 5 U.S.C. chapter 75. ID at 7. However, he also found that the appellant failed to make a nonfrivolous allegation that he was subjected to an adverse action within the Board's jurisdiction because the appellant was separated pursuant to the terms of his FCIP internship appointment upon the expiration of that appointment, which was not to exceed 2 years. ID at 6-11. He found it undisputed that the appellant knowingly accepted the terms of the FCIP appointment, including his lack of any right to appeal his separation upon the expiration of the appointment. ID at 11-13. The administrative judge further found that the Board lacks jurisdiction over the agency's failure to return the appellant to a career appointment upon the expiration of his FCIP internship. ID at 13-14.

¶5 The appellant has filed a petition for review, arguing that: (1) The agency's action constituted a removal within the Board's jurisdiction because the agency failed to take timely action to effect his non-conversion upon the expiration of his internship, Petition for Review File (PFRF), Tab 1 at 5-6; and (2) even if the agency took proper steps to effect his non-conversion, the agency failed to return him to a career or career-conditional appointment as required by Executive Order, regulation, and the FCIP agreement between him and the agency, *id*. at 6-7. The agency has filed a response, addressing the appellant's arguments and arguing that the petition for review should be denied for failure to meet the Board's review criteria. PFRF, Tab 3 at 7-14.

ANALYSIS

The termination of an FCIP intern upon the expiration of his internship is generally not appealable to the Board

¶6 The FCIP was established in 2000 by Executive Order 13,162, 65 Fed. Reg. 43,211 (July 6, 2000), *reprinted in* 5 U.S.C.A. § 3301 note (Supp. 2006) "to provide for the recruitment and selection of exceptional employees for careers in the public sector." The Office of Personnel Management (OPM) has promulgated implementing regulations. 5 C.F.R. § 213.3202(o); 65 Fed. Reg. 78,077 (Dec. 14, 2000); 70 Fed. Reg. 44,219 (Aug. 2, 2005). Appointments under the FCIP are to positions in Schedule B of the excepted service and are not to exceed 2 years, unless extended by the agency, with the concurrence of OPM, for up to 1 additional year. 5 C.F.R. § 213.3202(o)(1)-(2). Upon successful completion of the internship, the agency may effect the intern's noncompetitive conversion to a career or career-conditional appointment in the competitive service. 5 C.F.R. § 213.3202(o)(6)(i). If the intern is not converted at the end of the internship period, his FCIP internship appointment generally terminates with no further right to federal employment. 5 C.F.R. § 213.3202(o)(6)-(7).

¶7 The termination of an appointment on the expiration date specified as a basic condition of employment at the time the appointment was made simply carries out the terms of the appointment; it does not constitute an adverse action appealable to the Board under 5 U.S.C. chapter 75. *Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199-200 (1980); 5 C.F.R. § 752.401(b)(11). OPM has explicitly stated that agencies should document FCIP internship appointments without the not-to-exceed dates used with other temporary or time-limited appointments because there is a potential for conversion to the competitive service upon the expiration of the internship period. 70 Fed. Reg. at 44,219. Nevertheless, the absence of such a date in the ministerial documentation of the appointment does not alter the actual time-limited nature of the appointment. *See* Exec. Order No. 13,162 § 4(a); 5 C.F.R. § 213.3202(o)(1)-(2). The FCIP

regulations provide that, as a condition of employment, the appointment of an intern expires at the end of 2 years, plus any applicable extension. 5 C.F.R. § 213.3202(o)(7). Although the regulations describe a number of ways that an FCIP appointment might end, i.e. conversion to the competitive service, return to a position equivalent in grade and pay to a formerly held career or career-conditional appointment, or termination of employment, 5 C.F.R. § 213.3202(o)(6)-(7), the regulations remain clear that the appointment will expire. The regulations are also clear that service as a career intern generally confers no rights to further federal employment upon the expiration of the internship period. 5 C.F.R. § 213.3202(o)(6). We therefore find that an FCIP intern's termination upon the expiration of his appointment is generally not an adverse action appealable to the Board because it merely carries out the terms of the appointment.[1] *See Endermuhle v. Department of the Treasury*, 89 M.S.P.R. 495, ¶ 9 (2001).

¶8 FCIP appointments are similar to appointments under the former Presidential Management Intern Program (PMIP).[2] PMIP appointments, which were limited to 2 years unless extended by OPM for up to 1 additional year, could result in the intern's noncompetitive conversion to the competitive service if the intern successfully completed the internship. Federal Personnel Manual (FPM), Chapter 362, §§ 2-3, 2-7 (July 31, 1986). However, if the agency did not convert the intern upon the expiration of his internship, his federal employment terminated. *Id.*, § 2-8. The Board found, based on the official guidance

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[1] This case is unlike *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶¶ 2, 9, 15 (2006), in which the Board found that an FCIP intern was subjected to an appealable adverse action when the agency terminated her less than 1 year into her internship. In that case, the appellant was separated during her internship – not pursuant to the expiration of her internship.

[2] The PMIP has been superseded by the Presidential Management Fellows Program. Exec. Order No. 13,318 § 5, 68 Fed. Reg. 66,317 (Nov. 21, 2003); 5 C.F.R. § 362.210; 70 Fed. Reg. 28,775 (May 19, 2005); *see* 5 C.F.R. § 213.3102(ii)-(jj).

governing PMIP appointments, that a PMIP intern's separation from service pursuant to the expiration of his appointment was not appealable to the Board. *See Soehngen v. Department of Justice*, 47 M.S.P.R. 169, 172, *aff'd*, 945 F.2d 418 (Fed. Cir. 1991) (Table). We find that the regulations governing the FCIP are relevantly similar to the official guidance governing the PMIP. *Compare* 5 C.F.R. § 213.2302(o)(1)-(2), (6)-(7) *with* FPM, Chapter 362, §§ 2-3a(1), 2-6, 2-7, 2-8.

¶9 We acknowledge that OPM's regulations contain some language suggesting that an FCIP appointment ends only if the intern's federal employment is terminated at the end of the internship period: "*If* an employee is not converted to a career or career-conditional appointment, the career intern appointment terminates, *unless* the employee is specifically eligible for placement under paragraph (o)(6)(ii) of this section." 5 C.F.R. § 213.3202(o)(7) (emphasis added). However, for the reasons explained above, we find that the regulation, read as a whole, provides that the appointment expires in any event at the end of 2 years, plus any applicable extension; any contrary indication in paragraph (o)(7) is inconsistent with the regulation as a whole and may best be attributed to imprecise language used in drafting that subsection. *See Phipps v. Department of Health & Human Services*, 767 F.2d 895, 897 (Fed. Cir. 1985) (regulations must be read as a whole). To be read consistently with the rest of the regulation, the phrase "the career intern appointment terminates" in the language quoted above must be read as "the career intern's employment terminates." Although FCIP appointments serve functionally as competitive service probationary periods, the expiration of an FCIP appointment is unlike the expiration of a normal probationary period. Upon the expiration of a normal probationary period, the employee continues to serve in the same appointment to which he was initially appointed, albeit no longer as a probationer, *see* 5 C.F.R. § 315.801, but upon the expiration of an FCIP appointment, the employee must either receive a new appointment or be separated from service, *see* OPM, Guide to Processing

Personnel Actions, Chapter 11, at 3 (a conversion changes an employee from one appointment to another appointment), *available at* http://www.opm.gov/feddata/gppa/gppa.asp. For all these reasons, we find that the termination of an FCIP intern's employment upon the expiration of his internship is generally not appealable to the Board.

¶10 It is undisputed that, at the time of his termination, the appellant was an employee with the right to appeal an adverse action to the Board under 5 U.S.C. chapter 75. The appellant was a preference eligible individual in the excepted service who had completed 1 year of current continuous service in the same position. IAF, Tab 10, Subtabs 4b, 4r; *see* 5 U.S.C. § 7511(a)(1)(B)(i); *Dade v. Department of Veterans Affairs*, 101 M.S.P.R. 43, ¶ 12 (2005). Nevertheless, the appellant's status as an employee with adverse action appeal rights has no bearing on the question of whether he was actually subjected to an adverse action within the Board's jurisdiction. *See Schall v. U.S. Postal Service*, 73 F.3d 341, 344 (Fed. Cir. 1996); *Soehngen*, 47 M.S.P.R. at 172.

The agency took timely affirmative steps to terminate the appellant upon the expiration of his internship appointment

¶11 The appellant argues that the agency failed to take timely action to terminate him upon the April 14, 2009 expiration of his internship. PFRF, Tab 1 at 5-6. In support of his argument, the appellant alleges that he did not actually receive the agency's termination letter until April 18, 2009, and that he remained on the agency's payroll in approved leave status from April 14 through 17, 2009. *Id*. He argues that the agency's failure to take any action upon the expiration of his internship appointment resulted in his automatic conversion to a career or career-conditional appointment in the competitive service, and that his termination was therefore tantamount to a removal over which the Board has jurisdiction. *Id*. at 6.

¶12 We need not consider the legal effect of an agency's failure to take any action upon the expiration of an FCIP internship because, even if the agency was

required to take timely affirmative steps to prevent the appellant's automatic conversion,[3] there is no genuine dispute that it did so. In this regard, we find it appropriate to analogize to terminations of probationary employees. Although an agency must effect the termination of a probationer prior to the end of the probationer's tour of duty on the last day of probation, which is the day before the anniversary date, *Burke v. Department of Justice*, 53 M.S.P.R. 372, 375 (1992), it is not a requirement that a probationary employee actually receive a termination notice prior to the effective date of the termination if the agency acted diligently and reasonably in attempting to afford the employee prior notification, *Santillan v. Department of the Air Force*, 54 M.S.P.R. 21, 26 (1992). Likewise, we find that even if the appellant in this case did not receive actual notice of his termination until April 18, 2009, this does not mean that the agency's action was not effective before that date. Rather, the question is whether the agency acted diligently and reasonably in attempting to notify the appellant of his termination in a timely manner. For the following reasons, we conclude that the appellant has not made a nonfrivolous allegation that the agency failed to do so.

¶13 It is undisputed that the appellant was on leave during the last day of his internship, IAF, Tab 10, Subtab 4h, and that the agency therefore sent copies of the termination notice to the appellant via e-mail and to the appellant's residence via overnight delivery and certified mail, *id*., Subtabs 4d-4f. It is also undisputed that, on April 14, 2009, the appellant's third-level supervisor, Assistant Field Office Director Raymond Kovacic, left voice mail messages on the appellant's personal and government cell phones "informing him that his position was not being converted and that he was terminated as of close of business on April 14, 2009." *Id*., Subtab 4a.

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[3] The Board has made no determination regarding whether an automatic conversion could ever occur, as it is unnecessary for the adjudication of this matter.

¶14 Although the appellant did not dispute that the agency took these steps to notify him of his termination, he argued below that the agency was also required to attempt personal delivery of the termination notice to his home on April 14, 2009. IAF, Tab 11 at 4-5, Tab 13 at 5-6. However, we are aware of no law, rule, or regulation requiring the agency to take this particular step in attempting to notify the appellant of his termination, and in light of the agency's other diligent efforts to notify the appellant, we find that the appellant has failed to make a nonfrivolous allegation that the agency did not act diligently under the circumstances to inform him of its decision to terminate him prior to the end of his tour of duty on April 14, 2009. *See Burke*, 53 M.S.P.R. at 377 (under the circumstances of the case, the agency's telephone calls to the appellant's residence and to the appellant's girlfriend constituted a sufficiently diligent attempt to notify him of his termination). Likewise, the appellant's contention that he remained on the agency's payroll in approved leave status until April 17, 2009, is immaterial. PFRF, Tab 1 at 5. Even if the appellant's first-line supervisor had granted him leave from April 14 through 17, 2009, this does not mean that the appellant could not have been terminated while he was on leave. IAF, Tab 10, Subtab 4b; *see Cephas v. Department of the Treasury*, 27 M.S.P.R. 69, 71-72 (1985) (the agency properly terminated the appellant while she was on leave), *aff'd* 785 F.2d 321 (Fed. Cir. 1985) (Table). We therefore find that the appellant failed to make a nonfrivolous allegation that he was not terminated upon the expiration of his FCIP internship appointment consistent with the documentation of that termination in the applicable SF-50. IAF, Tab 10, Subtab 4b.

It is unclear whether the agency was required to reinstate the appellant upon his non-conversion

¶15 Although an FCIP intern's non-conversion upon the expiration of his internship generally terminates his federal employment with no right to further employment, OPM's regulations provide an exception:

> An employee who held a career or career-conditional appointment in an agency immediately before entering the FCIP in the same agency, and who fails to complete the FCIP for reasons unrelated to misconduct or suitability, shall be placed in a career or career-conditional position in the current agency at no lower grade or pay than the one the employee left to accept the position in the FCIP. For purposes of this paragraph, "agency" means an Executive agency as defined in 5 U.S.C. 105. An Executive department may treat each of its bureaus or components (first major subdivision that is separately organized and clearly distinguished from other bureaus or components in work function and operation) as a separate agency or as part of one agency, but must do so by agency directive in establishing the Program.

5 C.F.R. § 213.3202(o)(6)(ii); *see also* Exec. Order No. 13,162 § 4(b)(5). The regulations explicitly state that an intern's employment will not terminate upon his non-conversion if he is eligible for placement under section 213.3202(o)(6)(ii). 5 C.F.R. § 213.3202(o)(7). According to OPM, this exception was included in the FCIP to ensure that current federal employees can participate in the program without fear of losing their jobs if they cannot successfully complete their internships. 70 Fed. Reg. at 44,220.

¶16 We find that, where an intern is eligible for placement under 5 C.F.R. § 213.3202(o)(6)(ii) and otherwise has Board appeal rights under 5 U.S.C. chapter 75, the termination of his employment upon the expiration of his FCIP internship constitutes an adverse action within the Board's jurisdiction. Because the terms of an FCIP appointment do not provide for the summary termination of such an employee upon his non-conversion, his termination under those circumstances does not simply carry out the terms of the appointment. *Cf. Berger*, 3 M.S.P.R. at 199-200. Rather, it constitutes an appealable adverse action – a removal of the employee from the rolls when he is entitled by regulation to continuing federal employment. *See* 5 C.F.R. § 213.3202(o)(6)(ii), (7); *see also* 5 U.S.C. §§ 7512(1), 7513(d).

¶17 Thus, where an FCIP intern is separated from service upon the expiration of his internship, he may establish Board jurisdiction over the action by

establishing the following elements by preponderant evidence: (1) Immediately prior to his FCIP appointment, he held a career or career-conditional appointment in the same agency; (2) his failure to complete the internship successfully was for reasons unrelated to misconduct or suitability; and (3) he is an "employee" within the meaning of 5 U.S.C. § 7511. *See* 5 C.F.R. § 213.3202(o)(6)(ii); *see also Palmer v. Merit Systems Protection Board*, 550 F.3d 1380, 1382 (Fed. Cir. 2008) (an appellant bears the burden of establishing Board jurisdiction by a preponderance of the evidence); *Hartman v. Merit Systems Protection Board*, 77 F.3d 1378, 1380 (Fed. Cir. 1996) (only an "employee," as defined under 5 U.S.C. § 7511, can appeal to the Board from an adverse action such as a removal under 5 U.S.C. § 7513(d)).

¶18 It is undisputed that the appellant satisfies the third jurisdictional element in this case. However, it is unclear whether the appellant satisfies the first jurisdictional element. The record shows that, immediately prior to his FCIP appointment in the agency's ICE division, the appellant held a career or career-conditional appointment in the agency's CBP division. IAF, Tab 10, Subtabs 4r, 4u. Because both of these divisions are within the Department of Homeland Security, they would be considered part of the same agency unless the agency has issued an appropriate directive requiring their treatment as separate agencies for FCIP purposes. *See* 5 C.F.R. § 213.3202(o)(6)(ii); *see also* 5 U.S.C. §§ 101, 105. Although the appellant signed paperwork suggesting that such a directive exists, IAF, Tab 10, Subtab 4v, the evidence of record is inconclusive.

¶19 It is also unclear whether the appellant satisfies the second jurisdictional element. Although the agency's stated reason for not converting the appellant was apparently related to misconduct, i.e., the appellant's alleged lack of candor involving his accident in a government-owned vehicle, IAF, Tab 10, Subtab 4c, Subtab 4m at 19-22, Subtab 4n, the appellant argued below that he could have provided an explanation for his actions that would have merited "a more favorable outcome" for his situation, IAF, Tab 1 at 7. Although this does not

constitute a nonfrivolous allegation that his failure to complete the internship successfully was "unrelated to misconduct or suitability," 5 C.F.R. § 213.3202(o)(6)(ii); *see Marcino v. U.S. Postal Service*, 344 F.3d 1199, 1204 (Fed. Cir. 2003) (mere conclusory allegations, unsupported by evidence or argument, do not constitute nonfrivolous allegations), the appellant was not informed of the proper jurisdictional standard below, and he should be given the opportunity to present his case with full knowledge of his jurisdictional burden, *see Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). Accordingly, we find it appropriate to remand this appeal for the appellant to receive proper jurisdictional notice and an adequate opportunity to establish Board jurisdiction. *See Brown v. Department of Defense*, 109 M.S.P.R. 493, ¶ 16 (2008).

ORDER

¶20 Accordingly, we remand this appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order. On remand, the appellant shall have the opportunity to establish that he is eligible for placement under 5 C.F.R. § 213.3202(o)(6)(ii). If the appellant makes a nonfrivolous

allegation of Board jurisdiction under that section, he shall be entitled to a jurisdictional hearing.

FOR THE BOARD:

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