

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

2010 MSPB 87

Docket No. PH-315H-09-0459-I-1

**Juan A. Rivera, Jr.,
Appellant,
v.
Department of the Navy,
Agency.**

May 7, 2010

Dennis L. Friedman, Esquire, Philadelphia, Pennsylvania, for the appellant.

Douglas T. Frydenlund, Portsmouth, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his appeal for lack of Board jurisdiction. For the reasons set forth below, we GRANT the appellant's petition and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The agency separated the appellant less than 6 months after he received a career-conditional appointment as a Police Officer, stating as the reason for the

action his failure to secure approval for a government credit card. Initial Appeal File (IAF), Tab 6 at 15, 19-20, 28. The administrative judge dismissed the appellant's appeal of that action for lack of jurisdiction without conducting the hearing that the appellant had requested. IAF, Tab 1 at 6, *id.*, Tab 19, Initial Decision (ID) at 1. She found that the agency made the appointment subject to satisfactory completion of a 1-year probationary period, that it separated him for post-appointment reasons, that he was not entitled to the procedures set forth at [5 C.F.R. § 315.805](#), and that he therefore was not entitled to appeal based on a claim that he was denied those procedures. ID at 4-5. The administrative judge also found that the Board lacked jurisdiction to consider the appellant's claims of discrimination based on race, national origin, and disability, that the appellant had raised his claim of a constructive negative suitability determination on an untimely basis, and that, even if she were to consider the latter claim, it was without merit. ID at 5-7.

¶3 The appellant has filed a timely petition for review in which he contends that the agency separated him for pre-appointment reasons, and that he was therefore entitled to the procedural rights set forth in section 315.805. According to the appellant, the administrative judge erred in failing to hold a hearing on appeal, in making findings of fact in the absence of an evidentiary hearing, and in rejecting his constructive suitability claim. PFR File, Tab 3. The agency has responded to the appellant's petition. *Id.*, Tab 4.

ANALYSIS

¶4 As a probationary employee with less than 1 year of current continuous service, the appellant has no statutory right to appeal his separation.* *See* [5 U.S.C. § 7511\(a\)](#); *Stokes v. Federal Aviation Administration*, [761 F.2d 682](#), 684

* The appellant does not dispute that he was serving a probationary period at the time he was terminated. *See* IAF, Tab 1 at 4.

(Fed. Cir. 1985). Under [5 C.F.R. § 315.806\(b\)](#), however, an employee may appeal his termination during his probationary period to the Board if he alleges that the action was based on partisan political reasons or marital status. In addition, if his termination was based in whole or in part on conditions arising before his appointment, he may appeal on the ground that the agency did not provide him with the procedural rights to which probationary employees are entitled under those circumstances. 5 C.F.R. §§ 315.805, 315.806(c).

¶5 The appellant in this case did not allege that his termination was based upon either partisan politics or marital status. He alleged that he was terminated for reasons arising before his appointment, however, and it is undisputed that the agency did not provide the appellant with the procedural rights to which an employee terminated for such reasons is entitled. IAF, Tab 15 at 3; *see* [5 C.F.R. § 315.805](#) (an employee whose separation is proposed for reasons arising before his appointment is entitled, *inter alia*, to advance notice of the proposed action, to an opportunity to respond to the proposal, and to have the agency consider his response).

¶6 The appellant bears the burden of proving Board jurisdiction by a preponderance of the evidence. [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#). Where an appellant makes a nonfrivolous allegation that the Board has jurisdiction, he is entitled to a hearing on the jurisdictional question. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994). Nonfrivolous allegations are allegations of fact that, if proven, could establish a *prima facie* case that the Board has jurisdiction over the matter in issue. *Id.*

¶7 Although the administrative judge referred to the need for a nonfrivolous allegation of jurisdiction, ID at 3, she did not determine whether the appellant had made such an allegation. Instead, she weighed the persuasiveness of the appellant's argument that having a government credit card was not a requirement of his position against the agency's evidence to the contrary. In doing so, she found that the inability to obtain a government credit card prevented the appellant

from attending training required of him in his position, and that the appellant's argument to the contrary was "not persuasive." *Id.* at 4-5. Based on these findings, and on the appellant's failure to identify another basis on which the Board could exercise jurisdiction over the appeal, she dismissed the appeal. *Id.* at 1, 7. The appellant argues on review that, in making the foregoing findings, the administrative judge improperly weighed evidence and resolved the parties' conflicting assertions without conducting a hearing. PFR File, Tab 3 at 5-8. We agree. Although an administrative judge may consider the agency's documentary submissions in determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, she may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon*, 60 M.S.P.R. at 329. Moreover, whether the agency acted properly in requiring the appellant to have a government credit card, and in concluding that his failure to obtain a credit card was a proper and sufficient basis for separating him, concerns the merits of the separation. In an appeal pursuant to [5 C.F.R. § 315.806](#), the merits of the agency's decision are not before the Board, and the administrative judge erred in considering them.

¶8 We find, however, that the appellant did not make a nonfrivolous allegation of Board jurisdiction over his appeal, and that the administrative judge did not err in declining to hold a hearing in this appeal. The appellant contends that his termination for failure to secure approval for a government credit card constituted a termination for reasons occurring before his appointment because the agency based the denial on his pre-appointment credit history. PFR File, Tab 3 at 11; IAF, Tab 15 at 2; *id.*, Tab 4 at 2-3. Even assuming that the appellant's failure to qualify for a credit card was attributable to his pre-appointment credit history, his termination for failure to secure approval for a government credit card nonetheless would constitute a post-appointment reason for termination under [5 C.F.R. § 315.804](#) because, in essence, the agency charged the appellant with failing to meet the requirements of his position during his probationary period.

See Rhone v. Department of the Treasury, [66 M.S.P.R. 257](#), 259-60 (1995); *Von Deneen v. Department of Transportation*, [33 M.S.P.R. 420](#), 422-23, *aff'd*, 837 F.2d 1098 (Fed. Cir. 1987) (Table). The Board in *Von Deneen* explained that there is a distinction between a pre-existing condition and the effect that condition has on an employee's performance during his probationary period. *Von Deneen*, 33 M.S.P.R. at 423. In that case, the Board recognized that the denial of a security clearance renders the appellant's performance deficient because it precludes him from performing the duties of his position, and "tracing back" a performance deficiency to a pre-appointment condition could possibly transform almost every separation of a probationer into a case involving a condition arising before appointment. *Id.* Similarly here, even if the appellant's failure to qualify for a credit card was attributable to his pre-appointment credit history, he was ultimately terminated for a post-appointment deficiency, i.e., his failure to obtain a government credit card. *See id.* For these reasons, the appellant has not made a nonfrivolous claim that the agency separated him for reasons arising in whole or in part before his appointment, and he therefore has not made a nonfrivolous claim that he was entitled to the procedures provided in [5 C.F.R. § 315.805](#). The agency's apparent failure to provide him with those procedures accordingly cannot provide a basis for Board jurisdiction over this appeal.

¶9 Finally, we find no merit in the appellant's contentions on review that the administrative judge erred in rejecting his claim that the decision to separate him was a constructive negative suitability determination. PFR File, Tab 3 at 8-11; *see* ID at 6-7; [5 C.F.R. § 731.203\(f\)](#).

ORDER

¶10 The initial decision is AFFIRMED as MODIFIED.

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.