UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 107

Docket No. DE-315H-09-0509-I-1

Warren L. Niemi,

Appellant,

v.

Department of the Interior,

Agency.

June 10, 2010

Warren L. Niemi, Zillah, Washington, pro se.

Amy Duin, Esquire, Lakewood, Colorado, 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 (PFR) of an initial decision (ID) that dismissed his appeal of his termination during his probationary period for lack of jurisdiction. For the reasons set forth below, we DENY the PFR, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the ID as MODIFIED, still dismissing the appellant's appeal for lack of jurisdiction.

BACKGROUND

¶2 On December 7, 2008, the agency appointed the appellant to a career-conditional position in the competitive service, subject to a 1-year probationary period, as a hydrologist at the Bureau of Land Management's facility in Buffalo, Wyoming. Initial Appeal File (IAF), Tab 8. His supervisor placed him on a performance improvement plan on June 17, 2009. IAF, Tab 1; Tab 9, Subtab 4o. The agency terminated the appellant's appointment during his probationary period for unsatisfactory performance on August 28, 2009. IAF, Tab 9, Subtabs 4a, 4b, 4e.

¶3 The appellant filed an appeal to the Board, arguing that any agency criticism of his performance was baseless and any difficulties were due to his supervisor's shortcomings. IAF, Tab 1. The administrative judge issued an acknowledgment order that noted the Board may not have jurisdiction over the appeal because the appellant was a probationary employee. IAF, Tab 2. The order advised the appellant that the Board would only have jurisdiction over his appeal if he was terminated based upon marital status or for partisan political reasons or because of a preappointment reason. *Id*. The administrative judge directed the appellant to file evidence and argument establishing the Board's jurisdiction. *Id*.

¶4 Both the appellant and the agency responded to the order. IAF, Tabs 4, 7, 8, 9. The appellant's response largely focused on the merits underlying his termination, but he suggested that he may have been terminated for political reasons because of his supervisor's "socialistic mentality" or "dictatorial mentality." IAF, Tab 1 at 1; Tab 4, Attachment 2 at 1. In his ID, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a non-frivolous allegation of Board jurisdiction over the termination during the probationary period. IAF, Tab 10 at 3-4.

¶5 The appellant has filed a PFR. Petition for Review File (PFR File), Tab 1. The agency has filed a response in opposition to the PFR. PFR File, Tab 3.

ANALYSIS

¶6 The Board will grant a PFR only when significant new evidence is presented or the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, 108 M.S.P.R. 384, ¶ 16 (2008); 5 C.F.R. § 1201.115. Mere disagreement with the administrative judge's factual findings or legal conclusions does not show legal error. *Cirella v. Department of the Treasury*, 108 M.S.P.R. 474, ¶ 15, *aff'd*, 296 F. App'x 63 (Fed. Cir. 2008). On PFR, the appellant has presented neither new evidence nor any developed argument showing error in the administrative judge's decision in any respect. "Partisan political reasons" refers to discrimination based upon affiliation with a political party or candidate, not the "office politics" and personality clashes that the appellant alleged. *See generally Bante v. Merit Systems Protection Board*, 966 F.2d 647, 649 (Fed. Cir. 1992); *Rhodes v. Department of Commerce*, 86 M.S.P.R. 476, ¶ 9 (2000). Therefore, we deny his PFR.

¶7 We reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, to address a jurisdictional issue. To resolve the issue, we must assess the administrative judge's jurisdictional order and resolve an ambiguity in the record below.

Legal Standards

¶8 The appellant has the burden of proving the Board's jurisdiction by a preponderance of the evidence. *Blount v. Department of the Treasury*, 109 M.S.P.R. 174, ¶ 5 (2008); 5 C.F.R. § 1201.56(a)(2). But if an appellant makes a nonfrivolous allegation that the Board has jurisdiction over his appeal, the appellant is entitled to a hearing on the jurisdictional question. *Upshaw v. Consumer Products Safety Commission*, 111 M.S.P.R. 236, ¶ 13 (2009). The administrative judge must provide the appellant with explicit information on what is required to establish an appealable jurisdictional issue. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985).

¶9 To qualify as an "employee" in the competitive service with adverse action appeal rights to the Board, an individual must show that he is not serving a probationary period or has completed 1 year of current continuous service under an appointment other than a temporary one limited to 1 year or less. 5 U.S.C. § 7511(a)(1)(A); *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341-43 (Fed. Cir. 2002); *Baggan v. Department of State*, 109 M.S.P.R. 572, ¶ 5 (2008). A probationary employee in the competitive service can only bring an appeal of his termination to the Board in three very limited circumstances: (1) the employee was discriminated against on account of his marital status; (2) the employee was discriminated against based on partisan political affiliation; or (3) the agency action was based (in whole or part) on issues that arose preappointment and the required procedures were not followed. *Blount*, 109 M.S.P.R. 174, ¶ 5; 5 C.F.R. §§ 315.805, 315.806.

¶10 An appellant who has not served a full year under his appointment can show that he has completed the probationary period, and so is no longer a probationer, by tacking on prior service if: (1) the prior service was rendered immediately preceding the probationary appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. *Hurston v. Department of the Army*, 113 M.S.P.R. 34, ¶ 9 (2010); 5 C.F.R. § 315.802(b). Alternatively, an employee can show that, while he may be a probationer, he is an "employee" with Chapter 75 appeal rights because, immediately preceding the adverse action, he had completed at least 1 year of current continuous service without a break in federal civilian employment of a workday. *Hurston*, 113 M.S.P.R. 34, ¶ 9.

Jurisdictional Issue

¶11 The administrative judge's jurisdictional notice presumed the appellant was a probationary employee, and, as a consequence, only advised the appellant how to establish jurisdiction under 5 C.F.R. §§ 315.805, 315.806. *See* IAF, Tab 2 at 2.

The administrative judge failed to provide the appellant requisite notice on how to establish jurisdiction by showing that he was an "employee" under 5 U.S.C. § 7511(a)(1)(A) based upon prior federal service. *See, e.g.*, *Smart v. Department of Justice*, 111 M.S.P.R. 147, ¶ 10 (2009). This omission is problematic given an anomaly in the record.

¶12 While the appellant has not described any prior federal service in his initial appeal or PFR, the SF-50s in the record on appeal nonetheless suggest that he did have prior federal service. In particular, the SF-50 documenting the appellant's hiring on December 7, 2008, shows a service computation date of January 7, 2006. IAF, Tab 8, Subtab 4u. This entry suggests approximately 3 years of prior federal service. Nothing in the appellant's presentation or the agency's materials explains this potential prior federal service by the appellant.

¶13 Thus, the Board could not initially determine whether it had jurisdiction in this case because it was unclear whether the appellant had prior service with the agency or had completed 1 year of current continuous service. If the appellant had prior federal service, he was entitled to receive explicit information on what was required to establish an appealable jurisdictional issue on that basis, and the administrative judge's failure to do so was error. *See Burgess*, 758 F.2d at 643-44.

¶14 To resolve this ambiguity in the record, the Clerk of the Board issued an order to show cause directing the parties to provide information about the appellant's federal service, if any. PFR File, Tab 4. The order to show cause provided the appellant with information on how to establish the Board's jurisdiction; thus, the order rectified any *Burgess* shortcoming in the administrative judge's jurisdictional order. *See generally Mapstone v. Department of the Interior*, 106 M.S.P.R. 691, ¶ 9 (2007) (subsequent orders or pleadings can supply the requisite *Burgess* notice to the appellant if the initial jurisdictional order fails to do so).

¶15 Both parties responded to the order to show cause. The agency submitted a corrected SF-50 that properly reflected the appellant's approximately 3 years of military service. PFR File, Tab 5, Attachment. The appellant stated that he served on active duty from 1968 to 1971, served in the reserves in 1977, and held a temporary civilian position as a geological engineer in 1977-1978. PFR File, Tab 6.

¶16 Because the record now contains evidence concerning the appellant's prior service, it is unnecessary to remand the case to the regional office. *See Hurston*, 113 M.S.P.R. 34, ¶ 7. Based upon the supplemental evidence, we conclude that the appellant was not an "employee" with adverse action appeal rights, given his prior service did not immediately precede his instant appointment. *See McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 8 (2006); *see also Hurston*, 113 M.S.P.R. 34, ¶ 10 (an 8 year gap between prior service and current appointment foreclosed a finding of continuous service). Therefore, the administrative judge correctly dismissed the appellant's appeal for lack of jurisdiction. *See Baggan*, 109 M.S.P.R. 572, ¶ 9.

ORDER

¶17 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.