

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

**2010 MSPB 243**

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Docket No. DC-0752-10-0329-I-1

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**Tanneika Berryman,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

December 15, 2010

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M. Jefferson Euchler, Esquire, Virginia Beach, Virginia, for the appellant.

Jeffery J. Hatch, Esquire, Roanoke, 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 filed a petition for review of the initial decision that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#)(d), VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

**BACKGROUND**

¶2 The appellant filed an appeal of her termination by the Veterans Administration Medical Center, Durham, North Carolina. Initial Appeal File

(IAF), Tab 1 at 1-2. She submitted a January 27, 2010 memorandum from the Acting Chief of the Human Resources Management Service stating that her “temporary Excepted Appointment as a Time and Leave Clerk position in Nursing Service” would terminate on February 5, 2010, and that the action was necessary “due to regulatory requirements related to [her] appointment.” *Id.*, Ex. A. She argued that her termination was improper because, although she was initially hired as a “temporary student Nursing Assistant,” she suffered from job-related medical issues and was detailed in April 2007 to a Time and Leave Clerk position with the understanding that she would be converted to a permanent career conditional employee in that position at the end of the detail. *Id.* at 1-2.

¶3 The administrative judge issued an Acknowledgment Order notifying the appellant that the Board might lack jurisdiction over her appeal, informing her of the standard for proving Board jurisdiction under 5 U.S.C. Chapter 75 over a termination from an excepted service position, and ordering her to prove jurisdiction. IAF, Tab 2 at 2. Both parties responded to the administrative judge’s order with argument and evidence, the agency moving to dismiss the appeal for lack of jurisdiction. *Id.*, Tabs 4-9.

¶4 The administrative judge set forth the background of the appeal, mainly taken from the agency’s narrative response, as follows: The agency hired the appellant on June 25, 2006, as a GS-0621-03 Nursing Assistant under [38 U.S.C. § 7405\(a\)\(1\)\(D\)](#) on a temporary excepted appointment not-to-exceed June 24, 2008. The agency appointed her under the mistaken assumption that she was still a student in an accredited nursing program, and, thus, qualified for appointment as a Student Trainee. On April 15, 2007, the agency detailed her to a “CNO Timekeeper” position not-to-exceed July 14, 2007, due to an on-the-job injury. On December 8, 2009, the agency informed her that she was serving an “illegal appointment.” Effective that day, it converted her to a “special needs” temporary, excepted service appointment as a GS-0544-05 Time and Leave Clerk not-to-exceed January 6, 2010, which was extended until her February 5, 2010

termination. It could not convert her to a permanent appointment because its attempts to “regularize” her appointment by reaching her on a Delegated Examining Unit Certificate were unsuccessful. The appellant was not a veteran and lacked any prior Federal service. Initial Decision (ID) at 2-5.

¶5 The administrative judge recounted the appellant’s arguments that the agency’s references to its handbook did not show that her June 25, 2006 appointment to the student Nursing Assistant position was prohibited, that Standard Form (SF) 52s and e-mails from the Human Resources Supervisor made clear that the agency intended to place her as a permanent employee in the Time and Leave Clerk position, and that she had received pay adjustments and within-grade increases with no indication that she was not permanent. ID at 3-5. The administrative judge noted that the agency submitted affidavits to support its argument that the Board should dismiss the appeal for lack of jurisdiction. *Id.* at 6.

¶6 The administrative judge first found that “to the extent that the appellant might be attempting to challenge the termination of her appointment to the temporary, excepted, Nursing Assistant, GS-0621-03, position on December 8, 2009,” that appointment was under [38 U.S.C. § 7405\(a\)\(1\)\(D\)](#), and, thus, “it appears that she was not an ‘employee’ entitled to appeal an adverse action under 5 U.S.C. Chapter 75.” ID at 6-7. The administrative judge therefore dismissed any such appeal for lack of jurisdiction. *Id.* at 7.

¶7 The administrative judge next found that “[w]ith regard to the appellant’s termination from the temporary, excepted service, Time and Leave Clerk (OA), GS-0544-05, position, effective February 5, 2010,” the record showed that she was appointed to that position on December 8, 2009, and terminated only 2 months later, at the end of her appointment. The administrative judge acknowledged the appellant’s argument that she was a permanent employee “when she was reassigned to the Time and Leave Clerk position,” but found that the documents the appellant submitted did not indicate “that her appointment to

the Time and Leave Clerk position was anything other than temporary.” ID at 7. The administrative judge further acknowledged that an October 8, 2009 e-mail from Human Resource Specialist Agripina Varela to the appellant stated that Varela was going to “research” why the appellant was still in a temporary excepted appointment. The administrative judge found, though, that affidavits from Varela and Human Resources Chief Zetta Ferguson, as well as the SF-50, Notification of Personnel Action, “appointing the appellant to the Time and Leave Clerk position,” all showed that the appointment was temporary. *Id.* at 7-8. The administrative judge further found that, “[i]n any event,” because the appellant had held the Time and Leave Clerk position for only 2 months when she was terminated, as a non-preference eligible excepted service employee, she did not have Board appeal rights under 5 U.S.C. Chapter 75. *Id.* at 8.

¶8 The administrative judge found that the appellant was not entitled to her requested hearing because she did not make a non-frivolous allegation that would establish Board jurisdiction. ID at 8. The administrative judge concluded:

the appellant’s appeal of her termination from the temporary, excepted service, Time and Leave Clerk, GS-0544-05 position, and any appeal that she might have intended to file from the termination of her temporary, excepted service, Nursing Assistant, GS-0621-03, position, are both DISMISSED for lack of Board jurisdiction.

*Id.* at 8.

¶9 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response opposing the petition for review. *Id.*, Tab 3.

### ANALYSIS

#### The Temporary Student Nursing Assistant Position

¶10 The appellant disagrees with any finding by the administrative judge that she could not have been appointed to “her original student position” because she had graduated 2 months before her appointment. PFR at 4. She contends that the

agency cited no regulation prohibiting the appointment, that its handbook does not forbid such an appointment, and that the administrative judge did not reference any such prohibition. *Id.* at 4-5.

¶11 Although the administrative judge summarized the agency's argument that the appellant's appointment to the temporary student Nursing Assistant position was illegal, the initial decision does not show that the administrative judge accepted the argument. To the contrary, by addressing the appellant's possible challenge to the termination of that appointment on "December 8, 2009," the administrative judge implicitly found that the appellant properly occupied the position from her June 25, 2006 appointment as a "temporary, excepted, Nursing Assistant," ID at 6, until her December 8, 2009 appointment as a "temporary, excepted service, Time and Leave Clerk," *id.* at 7. In any event, the agency has failed to establish that the appellant's appointment was illegal because, as the appellant asserts, it referenced only its handbook to support its argument. IAF, Tab 5, subtabs 1, 4K. An appointment is illegal only if it is made in violation of an absolute statutory prohibition and the appointee is not qualified for appointment in the civil service. *See, e.g., Hope v. Department of the Army*, [108 M.S.P.R. 6](#), ¶¶ 5-6 (2008). Here, the agency has cited no such statutory prohibition.

¶12 The appellant has not specifically contested the administrative judge's finding that the Board lacks jurisdiction over her any appeal of her termination from a temporary excepted appointment as a student Nursing Assistant under [38 U.S.C. § 7405\(a\)\(1\)\(D\)](#). In any event, we conclude that the administrative judge's finding was correct under the undisputed facts of this case. *See, e.g., Mfotchou v. Department of Veterans Affairs*, [113 M.S.P.R. 317](#), ¶ 8 (2010) (the right to appeal an adverse action to the Board does not accrue to an individual "who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

[5 U.S.C. § 7511\(b\)\(10\)](#)”). Thus, we find it unnecessary to further address the issue.

#### The Time and Leave Clerk Position

¶13 The appellant asserts that the administrative judge erred in finding that she was appointed to a temporary position as time keeper and that she served in the position for only 2 months. PFR at 3-4. She contends that she worked in the position “for years.” *Id.* at 4. She further contends that she was selected for a permanent position, that she received SF-50s and within-grade increases with no indication that she was not permanent and all reflected that she was a timekeeping clerk, and that, at a minimum, she is entitled to a jurisdictional hearing to produce further evidence concerning the nature of her appointment. *Id.*

¶14 The undisputed evidence indicates that the appellant was serving in an excepted service position as a Time and Leave Clerk from the beginning of her April 15, 2007 detail until her February 5, 2010 termination.\* IAF, Tab 1, Ex. C; Tab 4, Exs. A, C, E; Tab 5, subtabs 4A, 4D, 4E; Tab 9, Aff. of Sabrina Mack. By referring to the December 8, 2009 termination of the appellant’s appointment to the student Nursing Assistant position, the administrative judge apparently implicitly found that all of the appellant’s service as a Time and Leave Clerk until that date was a detail. *See, e.g., Barton v. Department of Education*, [20 M.S.P.R. 451](#), 453 (1984) (an employee, when detailed, remains the official incumbent of his most recent position of record). The administrative judge should not have made such an implicit finding, however, without addressing the

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\* Although the record indicated that the agency detailed the appellant to a “CNO Timekeeper” position and removed her from a “Time and Leave Clerk” position, it also indicated that those were the same positions. IAF, Tab 5, subtab 1, Agency’s Resp. (“On 15 April 2007, Appellant was detailed, temporarily and not to exceed 14 July 2007, to a Timekeeper position due to an on the job injury. **Tab 4E. Appellant remained in that position until her termination on 5 February 2010. Tabs 4A and B.**”) (underlining added).

appellant's argument that she was not on detail, but had received a permanent appointment as a Time and Leave Clerk.

¶15 In determining whether the appellant has made a non-frivolous allegation of jurisdiction entitling her to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994). Here, the appellant has submitted evidence that agency officials intended to permanently appoint her to a Time and Leave Clerk position after her detail ended on July 14, 2007, and, in fact, believed that she had been appointed or should have been appointed to that position. IAF, Tab 1, Exs. B, D; Tab 4, Exs. A-C. The administrative judge erred to the extent that she considered the agency's contrary evidence dispositive.

¶16 If the appellant's detail to the Time and Clerk position became permanent in July 2007, she would have served over 2 years in that excepted service position by December 2009, when she was converted to an excepted appointment not-to-exceed January 6, 2010. Thus, she may have rights under [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#) to appeal her termination to the Board. Accordingly, we find that she has made a non-frivolous allegation of jurisdiction entitling her to her requested jurisdictional hearing.

ORDER

¶17 We remand this case to the regional office for further proceedings consistent with this Opinion and Order. The administrative judge should afford the appellant her requested jurisdictional hearing and issue a new initial decision.

FOR THE BOARD:

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