UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 85

Docket No. SF-0752-10-1007-I-1

David J. Azolas,

Appellant,

v.

United States Postal Service,

Agency.

September 29, 2011

THIS ORDER IS NONPRECEDENTIAL*

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

Kris Ashman, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a separate dissenting opinion.

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

* This Order may not be cited or referred to except by a party asserting collateral estoppel (issue preclusion), res judicata (claim preclusion), or law of the case.

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant, a non-preference eligible, asserts that the administrative judge erred in dismissing his appeal of his September 11, 2010 removal for lack of jurisdiction on the basis that he had not performed 1 year of current continuous service in his EAS-17 Supervisor, Customer Service position as required by 39 U.S.C. § 1005(a)(4)(A)(ii). Although he concedes that he was not "officially" deemed to be a supervisor prior to his March 27, 2010 promotion from City Carrier, he contends that he met the definition of a "supervisor" because he was assigned to a position as a temporary supervisor for approximately 18 years prior to his promotion. He cites *Strope v. U.S. Postal Service*, 71 M.S.P.R. 429 (1996), as holding that a temporary appointment may satisfy the 1-year requirement. He further contends that he met the statutory requirement because his actual job responsibilities during those years were supervisory. He cites *Waldau v. Merit Systems Protection Board*, 19 F.3d 1395, 1399 (Fed. Cir. 1994), as holding that the determination of whether an employee is a "manager" is not controlled by his job title, but by his actual responsibilities. Petition For Review at 1-5.

Although the administrative judge correctly found that service while on detail is not the same as service pursuant to a temporary appointment, we find that the appellant's 18 years of service in an acting capacity prior to his permanent appointment, by definition, does not constitute a "detail." *See, e.g., Wafford v. U.S. Postal Service*, 34 M.S.P.R. 691, 693 (1987) (stating that a detail constitutes a temporary assignment to a different position for a specified period) (emphasis added). Rather, the appellant's service was akin to a temporary

appointment, which may be counted toward the completion of 1 year of service under 39 U.S.C. § 1005(a)(4)(A)(ii). *See, e.g.*, *Strope*, 71 M.S.P.R. at 438. We therefore remand this appeal for a jurisdictional hearing as to whether the appellant's service as a temporary supervisor constituted employment in the same or similar positions as required by 39 U.S.C. § 1005(a)(4)(A)(ii).

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

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

DISSENTING OPINION OF MARY M. ROSE

in

David J. Azolas v. United States Postal Service

MSPB Docket No. SF-0752-10-1007-I-1

¶1 I respectfully dissent for two interrelated reasons. First, the initial decision was correctly decided according to applicable law and precedent. Second, if a majority of the Board has concluded that existing precedent is wrong, or that the present case presents circumstances in which that precedent cannot be applied in accordance with law, the appropriate course of action would be to issue a precedential Opinion and Order that overrules existing precedent or carves out an exception to that precedent that would apply in future similar cases. Instead, the majority has written what purports to be a nonprecedential decision applying settled law. In my view, the majority's disposition of this case is not in accordance with settled law, and a nonprecedential decision should not be used to change the law.

Merits of the Jurisdictional Issue

¶2 The facts in this case are undisputed. After serving for many years as a City Carrier, the appellant was promoted to the position of EAS-17 Supervisor in March 2010. Less than 6 months later, the agency removed him for alleged misconduct. Because the appellant was not a preference eligible employee, he was required to show that he had one year of current, continuous service in a supervisory or management position in order for the Board to have jurisdiction. The appellant alleges that, although he was not formally appointed to the EAS-17 Supervisor position until March 2010, he served as an acting, or 204B, supervisor for 18 years prior to his official promotion. He contends that his performance of supervisory duties in an acting capacity should count towards completion of the 1-year current continuous service requirement.

¶3 Relying on *Strope v. U.S. Postal Service*, 71 M.S.P.R. 429 (1996), and *Wafford v. U.S. Postal Service*, 34 M.S.P.R. 691 (1987), the administrative judge ruled that the appellant's rights were based solely on the position to which he was officially appointed, and that his service in an acting capacity did not entitle him to permanently occupy the EAS-17 position or receive the rights of that position. The judge's reliance on *Strope* and *Wafford* was well placed. As the Board stated in *Strope*,

> It is well settled that an employee's rights are based solely on the position to which he or she has been officially appointed. *See Wafford v. U.S. Postal Service*, 34 M.S.P.R. 691, 693 (1987). Further, service in an acting capacity while on detail does not entitle an employee to permanently occupy that position or receive the rights of that position. *Id.* at 693-94 (the employee's service as an acting supervisor during a detail did not entitle him to the rights of the position to which he was detailed).
>
> Here, the appellant was officially appointed to the PMR position in November 1990, and she officially remained the incumbent of that position while serving as an OIC on detail. . . . Thus, the appellant's position while on detail, even assuming that her service in that position was as a management or supervisor employee, cannot confer Board jurisdiction over her appeal. *See Wafford*, 34 M.S.P.R. at 693-94. Our jurisdictional determination, then, must be based on the appellant's appointed status as a PMR.

Strope, 71 M.S.P.R. at 434-35. The administrative judge also explained why our reviewing court's emphasis on an employee's actual job duties in *Waldau v. Merit Systems Protection Board*, 19 F.3d 1395 (Fed. Cir. 1994), did not alter the result, stating that the appellant's reliance on *Waldau* "is misplaced as the appellant there established he was a manager based on the duties he performed in his position of record and not based on any duties performed as part of an acting assignment."

¶4 Applying these principles to the present case is straightforward. Regardless of whether the appellant's actual duties were managerial in nature during his 18 years as an acting 204B supervisor, his official position during that entire period was as a City Carrier. Because he did not serve one year of current,

continuous service as an EAS-17 Supervisor, he did not establish Board jurisdiction over the termination of his employment.

¶5 The majority opinion concludes that the appellant's service as a 204B supervisor was not a "detail" because it did not have an identifiable end point. Even if I were to agree with that conclusion, the primary basis for the decisions in *Strope* and *Wafford* was that it is the employee's official position of record that controls. If the majority wants to change the rule so that it is the employee's official position of record that controls, except when an employee's service in an acting supervisory capacity does not have an identifiable end point, then it must overrule or at least modify existing precedent.

Use of a Nonprecedential Decision to Overrule or Modify Binding Precedent

¶6 About a year ago, the Board changed its longstanding practice of issuing what were known internally as short-form Final Orders in most of the cases in which the Board was not issuing a precedential Opinion and Order. These short-form Final Orders typically denied a petition for review and affirmed the initial decision without specifically addressing the petitioner's arguments on review.[*] The Board articulated the purpose of the new procedure and revised regulation as follows:

> This amendment, adding a new paragraph (c) to 5 CFR 1201.117, which reflects recent changes in the Board's internal procedures, is intended to give the parties greater insight into the reasoning supporting the Board's decision in a particular case without requiring the Board to issue a precedential decision. The Board believes that including more information in its nonprecedential decisions will be beneficial to both appellants and agencies because both parties will more fully understand the Board's reasoning and have added assurance that the Board fully considered their arguments on appeal.

75 Fed. Reg. 61321 (Oct. 5, 2010).

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[*] Regardless of the format of its final decisions, the Board has always carefully considered the arguments made by the parties on review.

¶7 As discussed above, the straightforward application of existing precedent would require that we affirm the initial decision. If the majority believes that the "well settled" principle that "an employee's rights are based solely on the position to which he or she has been officially appointed" is no longer valid, the only appropriate action would be to issue a precedential Opinion and Order that overrules or modifies existing precedent.

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Mary M. Rose
Member