UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 123

Docket No. DC-0752-11-0837-I-1

Jason Levy,

Appellant,

v.

Department of Labor,

Agency.

November 6, 2012

Bobby Devadoss, Esquire, Dallas, Texas, for the appellant.

Daniel L. Garry, Esquire, and James V. Blair, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-14 Information Technology (IT) Specialist, applied for promotion to a GS-15 Supervisory IT Project Manager position within the same office. Initial Appeal File (IAF), Tab 4 at 27, 32. The selecting official selected the appellant for the promotion on June 30, 2011, and the appellant accepted the position on Friday, July 1, 2011. *Id*. at 25, 29. In an e-mail dated July 1, 2011, an agency human resources specialist indicated that the agency would assign the appellant to the position effective Sunday, July 3, 2011. *Id*. at 25. The appellant was out of the office on annual leave from Monday, July 4, 2011, through Friday, July 22, 2011. *Id*. at 18-19. When the appellant returned to work on Monday, July 25, 2011, the agency's acting administrator, William W. Thompson, informed the appellant that his appointment to the GS-15 Supervisory IT Project Manager position was being held "in abeyance" and that the appellant was being placed on administrative leave while the agency's Office of Inspector General conducted an investigation. *Id*. at 23.

¶3 The appellant filed an appeal alleging that the agency demoted him from a GS-15 position to a GS-14 position without affording him due process. IAF, Tab 1. He requested a hearing. *Id*. at 3. The administrative judge dismissed the appeal for lack of jurisdiction without holding the requested hearing, finding that the appellant failed to make a nonfrivolous allegation that he ever performed the duties of the GS-15 Supervisory IT Project Manager position. IAF, Tab 10.

¶4 The appellant has petitioned for review. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the petition. PFR File, Tab 4.

ANALYSIS

¶5 To be entitled to a jurisdictional hearing, an appellant need only raise nonfrivolous allegations that the Board has jurisdiction over his appeal. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006). In determining whether an appellant has made a nonfrivolous allegation of

jurisdiction entitling him 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).

¶6 The Board has jurisdiction to review an appeal of a reduction in grade or pay. 5 U.S.C. § 7512. "Grade" is defined as "a level of classification under a position classification system." 5 U.S.C. § 7511(a)(3). A cancellation of an effected promotion constitutes an appealable reduction in grade. *See Marrero v. Department of Veterans Affairs*, 100 M.S.P.R. 424, ¶ 7 (2005), *overruled on other grounds*, *Deida v. Department of the Navy*, 110 M.S.P.R. 408, ¶ 16 (2009). Where a promotion to a higher grade was not effected, however, there was not an appealable reduction in grade or pay. *Id*. For a promotion or appointment to take effect, an authorized appointing officer must take an action that reveals his awareness that he is making a promotion or appointment in the United States civil service, and the affected appointee must take some action denoting acceptance. *Watts v. Office of Personnel Management*, 814 F.2d 1576, 1580 (Fed. Cir. 1987); *Marrero*, 100 M.S.P.R. 424, ¶ 7.

¶7 The Board has held that, to establish jurisdiction in an appeal from the cancellation of a promotion as a reduction in grade, the appellant must show that: (1) the promotion actually occurred; that is, it was approved by an authorized appointing official aware that he or she was making the promotion; (2) the appellant took some action denoting acceptance of the promotion; and (3) the promotion was not revoked before the appellant actually performed in the position. *Deida*, 110 M.S.P.R. 408, ¶ 14. In enumerating those jurisdictional elements, the Board has cited *National Treasury Employees Union v. Reagan*, 663 F.2d 239, 253 (D.C. Cir. 1981), for the proposition that "an appointment that

has been effected may still be revoked prior to the employee's entrance on duty or performance in the higher grade." *Deida*, 110 M.S.P.R. 408, ¶ 13.

¶8 In *National Treasury Employees Union v. Reagan*, the U.S. Court of Appeals for the District of Columbia Circuit considered the status of a class of individuals who had received written confirmation of their selection for federal employment, but whose appointments were withdrawn in accordance with a hiring freeze ordered by the President. 663 F.2d at 242. The court held that the members of the class were appointees, but that "[a]ppointee status, by itself, does not offer class members any of the statutory protection due federal employees." *Id.* at 246. The court therefore remanded the appeal to the district court to determine whether the appointments of particular class members had been revoked properly. *Id.* at 248. The court noted, however, that 22 class members who had "inadvertently been allowed to enter onto duty in violation of the hiring freeze" and had been administered the oath of office were federal employees with statutory procedural rights. *Id.* at 248 & n.14.

¶9 Because the court in *National Treasury Employees Union v. Reagan* was addressing the status of appointees to federal service, it was required to consider whether class members met the definition of "employee[s]" under 5 U.S.C. § 2105(a). 663 F.2d at 246 & n.10. The court held that most of the class members did not meet that definition because they were neither "engaged in the performance of a Federal function under authority of law or an Executive act," nor "subject to the supervision of an individual (authorized to make appointments to the civil service) while engaged in the performance of the duties of his position." *Id.*; *see* 5 U.S.C. § 2105(a)(2)-(3). Accordingly, the court determined that those employees were not entitled to the statutory protections provided to federal employees. *National Treasury Employees Union v. Reagan*, 663 F.2d at 246. In the present case, however, there is no question that the appellant was, at all relevant times, a federal employee; the only question is what position and

grade the appellant occupied. It is therefore not necessary for us to address the requirements of 5 U.S.C. § 2105(a) in this appeal.[1]

¶10 Although the court in *National Treasury Employees Union v. Reagan* held that an appointment cannot properly be revoked once the appointee has entered onto duty, we do not read the court's decision as requiring the actual performance of duties in a position in every case in order for an appointment or promotion to become irrevocable. In most cases, if an appointment or promotion has gone into effect, the employee will have entered onto duty and performed some of the duties of the position. However, in cases like the present one, where the appellant alleges that he was promoted and immediately went on annual leave, the effective date of the action precedes the date on which the appellant technically enters onto duty in the higher graded position. In such cases, we find that the effective date of the action is the point at which the promotion is no longer revocable. We therefore modify the Board's jurisdictional test as follows: To establish jurisdiction in an appeal from the cancellation of a promotion as a reduction in grade, the appellant must show that: (1) the promotion actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion; (2) the appellant took some action denoting acceptance of the promotion; and (3) the promotion was not revoked before it became effective.[2]

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[1] We note that in *Rossebo v. Defense Logistics Agency*, 20 M.S.P.R. 447 (1984), the Board applied the requirements of 5 U.S.C. § 2105(a) in the context of a cancelled promotion. However, the appellant in that case was transferring to a position in another agency, and therefore the Board applied 5 U.S.C. § 2105(a) to determine which agency employed the appellant at the time of the challenged personnel action. *Rossebo*, 20 M.S.P.R. at 448-50. No such determination is necessary in the present case, however, because the appellant was, at all relevant times, employed by the Department of Labor.

[2] Because the present case involves a promotion, rather than an initial appointment to the civil service, we need not determine at this time whether the Board's jurisdictional test with respect to the cancellation of an appointment should be modified.

¶11 In some cases, such as this one, there will be an additional jurisdictional element. An "initial appointment as a supervisor" does not "become[] final" until the appointee completes a period of supervisory probation. 5 U.S.C. § 3321(a). The regulations implementing this statute provide that an employee "is required to serve a probationary period prescribed by the agency upon initial appointment to a supervisory . . . position." 5 C.F.R. § 315.904. The regulations further provide:

> The authority to determine the length of the probationary period is delegated to the head of each agency, provided that it be of reasonable fixed duration, appropriate to the position, and uniformly applied. An agency may establish different probationary periods for different occupations or a single one for all agency employees.

5 C.F.R. § 315.905. An employee who was promoted to a supervisory position and does not satisfactorily complete the supervisory probationary period "shall be returned to a position of no lower grade and pay than the position from which the individual was . . . promoted." 5 U.S.C. § 3321(b). A return to a lower-graded position under such circumstances is not appealable as a reduction in grade under 5 U.S.C. §§ 7512(3) & 7513(d). *Burton v. Department of the Air Force*, 118 M.S.P.R. 210, ¶ 7 (2012); *DeCleene v. Department of Education*, 71 M.S.P.R. 651, 656 (1996). Where, as here, the facts suggest that the appellant would have been a probationary supervisor at the time of the alleged reduction in grade, to establish jurisdiction the appellant must show that he was not required to serve a supervisory probationary period or that he completed such a probationary period before the reduction in grade.[3]

¶12 As stated above, an agency official selected the appellant, who was in a nonsupervisory GS-14 position, for the supervisory GS-15 position, and the appellant accepted the position. IAF, Tab 4 at 25, 29. Further, another agency

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[3] Although the agency has not raised the issue of supervisory probation, we are obligated to do so sua sponte because it relates to a potential jurisdictional defect. *Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996).

official indicated that the agency assigned the appellant to the position effective July 3, 2011. *Id.* at 25. The appellant alleges that his promotion went into effect on July 3, 2011, and that he was on annual leave for 3 weeks before the agency informed him that it was holding his promotion in abeyance. IAF, Tab 1 at 8. We find that those allegations, if true, are sufficient to establish Board jurisdiction over the revocation of his promotion as an appealable reduction in grade, regardless of whether the appellant actually performed any duties in the higher level position, as long as the appellant was not required to serve a supervisory probationary period or completed such a probationary period before he was returned to the GS-14 position. *See Marrero*, 100 M.S.P.R. 424, ¶ 9. The appellant has not made a nonfrivolous allegation that he was not a probationer when he was allegedly returned to the GS-14 position, but he also has not been placed on notice, until now, that he must make a nonfrivolous allegation in this regard in order to get a jurisdictional hearing. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985).[4]

¶13 The agency's documentary evidence appears to show that the appellant continued to be paid at the GS-14 level during the period he alleges that his promotion to the GS-15 position was in effect. *See* IAF, Tab 4 at 18-19. That evidence, however, contradicts the appellant's otherwise adequate prima facie showing of jurisdiction. Therefore, the agency's evidence cannot be dispositive at this stage of the appeal. *See Ferdon*, 60 M.S.P.R. at 329. However, such evidence may be relevant in determining whether the appellant has established jurisdiction by preponderant evidence after a hearing. *See* 5 C.F.R. § 1201.56(a)(2)(i).

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[4] On his appeal form, the appellant checked "No" in response to the question: "Were you serving a probationary or trial period at the time of the decision or action you are appealing?" IAF, Tab 1 at 2. We do not find this to be a nonfrivolous allegation.

ORDER

¶14 For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Opinion and Order. On remand, the administrative judge shall afford the parties a chance to address the question of whether—assuming that the appellant's promotion to the GS-15 position went into effect when he says it did—the appellant was serving a supervisory probationary period when he was returned to the GS-14 position. If the appellant makes a nonfrivolous allegation that he was not serving a supervisory probationary period at that time, the administrative judge shall hold a hearing on the question of whether the appellant was subjected to an appealable reduction in grade. The administrative judge should also provide the appellant with notice of the limited bases under which an employee who is returned to a lower-graded position for failure to satisfactorily complete supervisory probation may appeal. *See* 5 C.F.R. § 315.908(b) ("[a]n employee who alleges that an agency action under this subpart was based on partisan political affiliation or marital status, may appeal to the Merit Systems Protection Board"). If the appellant makes a nonfrivolous allegation of discrimination under section 315.908(b), and if the administrative judge has otherwise determined that a hearing is warranted, he should include that issue in the hearing as well.

FOR THE BOARD:

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