UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 4

Docket No. DE-3443-11-0109-B-1

Lara Nelson,

Appellant,

v.

Department of Health and Human Services,

Agency.

January 15, 2013

Norman Jackman, Esquire, Lincoln, New Hampshire, for the appellant.

Scott S. Driggs, Esquire, Denver, Colorado, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the remand initial decision that found that she did not satisfy the definition of "employee" with Board appeal rights under 5 U.S.C. § 7511(a)(1)(C)(i). For the following reasons, we DENY the petition for review and AFFIRM the initial decision, as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 The appellant was appointed to a position with the Indian Health Service under 5 C.F.R. § 213.3116(b)(8),[2] a Schedule A excepted service hiring authority granting Indian hiring preference. MSPB Docket No. DE-3443-11-0109-I-1, Initial Appeal File (IAF), Tab 1 at 1, Tab 7 at 6; *see* 5 C.F.R. § 213.3101;[3] 42 C.F.R. § 136.42(b). The agency terminated her employment on November 18, 2010, less than 2 years after the November 23, 2008 effective date of her appointment. IAF, Tab 1 at 11, Tab 7 at 1, 6. She filed an appeal, arguing that she was entitled to Board appeal rights and that she was improperly terminated. IAF, Tab 1 at 6. She asserted that she was not serving a probationary period and that, even if she was required to serve a 2-year probationary period, she had already served the 2 years because she was appointed on October 31, 2008, and the agency terminated her employment on November 18, 2010. IAF, Tab 6 at 4, Tab 13 at 3-4, 6.

¶3 The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant was required to serve a 2-year probationary period under 5 U.S.C. § 7511(a)(1)(C). IAF, Tab 15, Initial Decision (ID) at 1-2. He

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[2] Title 5 of the Code of Federal Regulations, section 213.3116(b)(8) (5 C.F.R. § 213.3116(b)(8)) identifies as Schedule A appointments: "All positions in the Public Health Service and other positions in the Department of Health and Human Services directly and primarily related to providing services to Indians when filled by the appointment of Indians." 64 Fed. Reg. 48,462, 48,468 (Sept. 3, 1999); *see generally* 5 C.F.R. § 213.3101 (concerning the authorization for and recording of appointments to Schedule A positions).

[3] Title 5 of the Code of Federal Regulations, section 213.3101 (5 C.F.R. § 213.3101) states in part: "Positions filled under this authority are excepted from the competitive service and constitute Schedule A. For each authorization under this section, [the Office of Personnel Management] shall assign an identifying number from 213.3102 through 213.3199 to be used by the appointing agency in recording appointments made under that authorization." *See* 5 C.F.R. § 213.103(c) (requiring the Office of Personnel Management to annually publish in the Federal Register a consolidated listing of Schedule A, B, and C excepted appointing authorities); 64 Fed. Reg. at 48,468.

further found that her probationary period began on November 24, 2008, the date that she reported to work. ID at 3. He concluded that she did not satisfy the definition of employee because she did not serve in her position for 2 years prior to her termination on November 18, 2010. ID at 2-4. The Board affirmed the administrative judge's finding that the appellant did not satisfy the definition of "employee" set forth in 5 U.S.C. § 7511(a)(1)(C)(ii) but remanded on the issue of whether the appellant satisfied the definition of employee set forth in 5 U.S.C. § 7511(a)(1)(C)(i) because there was evidence in the record that she was serving in an initial appointment pending conversion to the competitive service. MSPB Docket No. DE-3443-11-0109-I-1, Remand Order at 2-3 (Sept. 8, 2011).

¶4 On remand, the administrative judge found that the appellant was serving in an initial appointment pending conversion to the competitive service and that she was serving a probationary period at the time of her termination because, as a matter of law, the entire time served in such appointments is a probationary or trial period within the meaning of 5 U.S.C. § 7511(a)(1)(C)(i), irrespective of the probationary requirement specifically imposed by the agency. Remand File (RF), Tab 18, Remand Initial Decision (RID) at 4-6. Thus, he concluded that the appellant was not an "employee" as defined in 5 U.S.C. § 7511(a)(1)(C)(i). RID at 8. He also incorporated his prior finding, which the Board had affirmed, that the appellant was not an "employee" as defined in 5 U.S.C. § 7511(a)(1)(C)(ii) because she had not completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less. RID at 8.

¶5 On review, the appellant argues that the agency failed to cite to any statutory or regulatory provisions requiring her appointment under 5 C.F.R. § 213.3116(b)(8) to be subject to a probationary period. Petition for Review (PFR) File, Tab 1 at 5. Further, she asserts that the administrative judge erroneously relied upon *Lopez v. Department of the Navy*, 103 M.S.P.R. 55 (2006), and *Taylor v. Department of the Navy*, 63 M.S.P.R. 99 (1994), *overruled*

on other grounds by Van Wersch v. Department of Health & Human Services, 197 F.3d 1144 (Fed. Cir. 1999), to find that the period of time that she served in the excepted service prior to conversion to the competitive service was a probationary or trial period within the meaning of 5 U.S.C. § 7511(a)(1)(C)(i). PFR File, Tab 1 at 5-6. The agency has filed an opposition to her petition for review. PFR File, Tab 4.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). An individual who meets the definition of an "employee" in 5 U.S.C. § 7511(a)(1) may challenge her removal from the federal service by filing an appeal with the Board. *See* 5 U.S.C. §§ 7512(1), 7513(d). As relevant in this case, the definition of "employee" includes a nonpreference eligible[4] individual in the excepted service "who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service." 5 U.S.C. § 7511(a)(1)(C)(i).

¶7 It is undisputed that the appellant was appointed to a Schedule A excepted service position under 5 C.F.R. § 213.3116(b)(8), an Indian preference hiring authority, in an initial appointment pending conversion to the competitive service. IAF, Tab 7 at 6; RF, Tab 13 at 2; *see* 25 U.S.C. § 450i(m); 42 C.F.R. § 136.42(b); 5 C.F.R. § 213.3101; 64 Fed. Reg. at 48,468. The parties dispute whether the appellant was serving a probationary or trial period at the time of the termination of her employment. As discussed above, the administrative judge

[4] In this context, a preference eligible generally means a veteran who served on active duty in the armed forces during a war or in a campaign or expedition for which a campaign badge has been authorized, or during certain other designated periods; a disabled veteran; or, in some cases, a widow or widower, spouse, or mother of a veteran. 5 U.S.C. § 2108(3); *see Alley v. U.S. Postal Service*, 100 M.S.P.R. 283, ¶ 6 (2005).

found that the appellant was serving a probationary period in the excepted service on the basis that any service prior to conversion to the competitive service was a probationary or trial period within the meaning of 5 U.S.C. § 7511(a)(1)(C)(i). RID at 5-7; *see Lopez*, 103 M.S.P.R. 55, ¶¶ 10-11; *Taylor*, 63 M.S.P.R. at 102.

¶8 In *Lopez*, the Board cited the interim guidance of the Office of Personnel Management (OPM) concerning its adoption of 5 C.F.R. § 752.401(d)(11), which applies to "nonpreference eligible employees in excepted service appointments pending conversion to the competitive service." 103 M.S.P.R. 55, ¶ 10; 57 Fed. Reg. 20,041 (May 11, 1992);[5] *see Taylor*, 63 M.S.P.R. at 102. The guidance specifically states:

> These special types of appointments are made with the intent of converting the employee to an appointment in the competitive service and provide noncompetitive conversion eligibility if the employee has satisfied eligibility requirements. Those requirements include a demonstration of satisfactory performance or training, and constitute the "probationary or trial period" referred to in 5 U.S.C. 7511(a)(1)(C)(i). Employees under these appointments have no procedural or appeal rights, but gain such rights upon conversion to the competitive service. These special appointments include those made under the Presidential Management Intern Program, the Student Work-Study Program ("co-ops"), Veterans Readjustment Appointments (VRA), certain Schedule A appointments of the severely disabled, and others.

57 Fed. Reg. at 21,041.

¶9 As evident by the language above, OPM's regulations apply to Schedule A appointments, including an Indian hiring preference appointment under 25 U.S.C. § 450i(m). Furthermore, *Lopez* and *Taylor* adopted OPM's interpretation of the statute to mean that the entire period of these special appointments is a

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[5] OPM has revised 5 C.F.R. § 752.401(d)(11) since the *Lopez* and *Taylor* decisions, but the revisions do not affect our analysis here. *See* 5 C.F.R. § 752.401(d)(11) (2007); 73 Fed. Reg. 7,187, 7,188 (Feb. 7, 2008).

"probationary or trial period" in which the incumbent does not obtain appeal rights.

¶10 However, we find that this interpretation of the statute is contrary to accepted canons of statutory construction. *See Holley v. United States*, 124 F.3d 1462, 1468 (Fed. Cir. 1997) (a statute should not be interpreted so as to render part of it meaningless). If the entire period of an appointment pending conversion to the competitive service is a "probationary or trial period," then 5 U.S.C. § 7511(a)(1)(C)(i) should simply state that appeal rights attach if an individual "is not serving under an initial appointment pending conversion to the competitive service." Instead, the complete language of the section states the definition of employee includes an individual in the excepted service (other than a preference eligible) "who is not serving *a probationary or trial period* under an initial appointment pending conversion to the competitive service." 5 U.S.C. § 7511(a)(1)(C)(i) (emphasis added). The highlighted language strongly suggests that whether an individual had the type of appointment covered by the section and whether the individual had completed a probationary or trial period are separate inquiries. Indeed, defining the entire period of an excepted service appointment pending conversion to the competitive service as a trial period would make 5 U.S.C. § 7511(a)(1)(C)(i) meaningless because, upon conversion, the individual's rights are governed by the competitive service appeal rights provision in 5 U.S.C. § 7511(a)(1)(A). In other words, under this interpretation of the statute, there could never be a scenario under which an individual would have appeal rights under section 7511(a)(1)(C)(i) because any individual with this type of appointment would always be serving a probationary or trial period.

¶11 The statute, which on its face sets out "alternative" ways under subsections (C)(i) and (ii) for a nonpreference eligible in the excepted service to attain tenure and appeal rights, *Van Wersch*, 197 F.3d at 1151, should not be interpreted as foreclosing satisfaction of the first alternative in every conceivable situation. In this regard, the Board has already rejected by implication, a reading

of the statute that would treat a Federal Career Intern Program (FCIP) internship as a trial period per se. *See McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶¶ 9-15 (2006) (finding that an individual whose FCIP appointment was terminated in its first 2 years had appeal rights under subsection (C)(i) because she was entitled to credit toward completion of probation based on prior service); *see also Martinez v. Department of Homeland Security*, 118 M.S.P.R. 154, ¶ 6 (2012) (remanding an appeal to determine whether the appellant could tack his prior service toward completion of the probationary or trial period of an FCIP appointment under section 7511(a)(1)(C)(i)). The better reading of the statute, as illustrated in *McCrary* and *Martinez*, is that it is possible to complete a probationary or trial period under these special appointments prior to the expiration of the appointment. Therefore, to avoid making this provision meaningless, we find that the statute contemplates that appointments to an excepted service position pending conversion to the competitive service may include some period after completion of a probationary or trial period when the individual qualifies as an "employee" under section 7511(a).

¶12 Accordingly, to the extent that *Lopez* and *Taylor* interpret 5 U.S.C. § 7511(a)(1)(C)(i) to require that the entire period of these special appointments is a probationary or trial period in which the incumbent does not obtain appeal rights, they are overruled. Instead, we find that the necessary determination on jurisdiction to be made with regard to these special appointments is whether the agency required the appellant to serve a probationary or trial period and whether the appellant successfully completed the probationary period at the time of her termination or removal.

¶13 Here, the record shows that the agency required nonpreference eligible employees hired under its Schedule A Indian Preference program to serve a 2-year probationary period, and the appellant was informed of this requirement. *See* RF, Tab 8, Agency Exhibits 7, 8, 9, 10, 11. Furthermore, as we found previously, the appellant served in her position for less than 2 years; therefore,

the agency terminated the appellant's employment prior to the completion of her probationary period. Accordingly, this appeal was properly dismissed for lack of jurisdiction.

ORDER

¶14 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 the date of this order. 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. *See* 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, 126 Stat. 1465, 1469. Additional information about the United States Court of Appeals for the Federal Circuit 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.