UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 91

Docket No. PH-0752-10-0405-B-1

Derek G. Boudreault,[1]

Appellant,

v.

Department of Homeland Security,

Agency.

December 2, 2013

Lawrence Berger, Esquire, Glen Cove, New York, for the appellant.

Steven M. Tapper, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

OPINION AND ORDER

¶1 This matter is before the Board based on the administrative judge's July 9, 2013 order certifying an interlocutory appeal of her June 10, 2013 order finding Board jurisdiction over the appellant's appeal. For the reasons set forth below, we AFFIRM the administrative judge's ruling, VACATE the order that stayed the

[1] We note that the Board's previous decision in this matter spelled the appellant's name incorrectly. In referring to the Board's prior decision in this matter, we have spelled the appellant's name correctly.

processing of the appeal, and RETURN this case to the Northeastern Regional Office for further adjudication consistent with this decision.

BACKGROUND

¶2 The agency appointed the appellant to a Security Assistant position effective November 12, 2006. MSPB Docket No. PH-0752-10-0405-I-1, Initial Appeal File (IAF), Tab 7, Subtab 4p. Thereafter, the appellant applied for and accepted a position as a Federal Air Marshal (FAM) effective April 12, 2009. *Id.*, Subtab 4j. Both positions were within the Transportation Security Administration of the Department of Homeland Security. *Id.*, Subtabs 4j, 4p.

¶3 The agency removed the appellant from his FAM position effective April 6, 2010, based on charges of lack of candor and failure to appear in court. *Id.*, Subtabs 4a, 4b. The appellant timely filed an appeal with the Board, arguing that the agency erroneously deemed him to be serving in a probationary period and failed to notify him of his Board appeal rights. IAF, Tab 1. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to meet the statutory definition of an "employee" and, therefore, he lacked Board appeal rights. IAF, Tab 25.

¶4 The appellant filed a petition for review, and in a nonprecedential order the Board granted the petition and remanded the appeal for further adjudication. MSPB Docket No. PH-0752-10-0405-I-1, Petition for Review File, Tab 1; *Boudreault v. Department of Homeland Security*, MSPB Docket No. PH-0752-10-0405-I-1, Remand Order (Oct. 31, 2012). In remanding the appeal, the Board relied on precedent holding that: (1) when an employee moves to a new position within the same agency and forfeits his Board appeal rights as a result, the agency must inform the employee of the effect the move will have on his appeal rights; and (2) if the employee was unaware of the loss of Board appeal rights that would result from accepting the new position and he would not have accepted the new position had he known of the loss of appeal rights, he is deemed not to have

accepted the new appointment and to have retained the rights incident to his former appointment. *Boudreault*, MSPB Docket No. PH-0752-10-0405-I-1, Remand Order at 2-3; *see Yeressian v. Department of the Army*, 112 M.S.P.R. 21, ¶ 12 (2009); *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349-50 (1994). The Board concluded that remand was necessary for the administrative judge to take evidence regarding whether the agency notified the appellant when he accepted the FAM appointment that he would lose his appeal rights and whether the appellant would have accepted the FAM position had he been informed that he would lose his Board appeal rights upon accepting the position. *Boudreault*, MSPB Docket No. PH-0752-10-0405-I-1, Remand Order at 3.

¶5 After a jurisdictional hearing, the administrative judge found in a June 10, 2013 order that the appellant acquired Board appeal rights during his service as a Security Assistant. MSPB Docket No. PH-0752-10-0405-B-1, Remand File (RF), Tab 13 at 6. The administrative judge also found that, because the appellant did not knowingly consent to the loss of appeal rights, he was deemed not to have accepted the FAM appointment and he retained the rights incident to his former appointment. *Id.* at 5-6. The administrative judge concluded that the appellant had appeal rights to the Board and was entitled to the procedural protections afforded by 5 U.S.C. § 7513. *Id.* at 6. A "hearing on the merits" was scheduled for July 26, 2013.[2] *Id.* at 1, 6.

¶6 The agency timely filed a Motion For Certification of an Interlocutory Appeal of the June 10, 2013 order and argued that, under the United States Court of Appeals for the Federal Circuit's decision in *Carrow v. Merit Systems*

---

[2] If, as the administrative judge found in her June 10, 2013 order, the appellant was entitled to Board appeal rights, it is unclear what would have been addressed at the "hearing on the merits" since, according to the administrative judge, the appellant was a tenured federal employee removed from his position without due process. *See Thomas v. Department of Housing & Urban Development*, 78 M.S.P.R. 25, 29 (1998) (reversing an agency action where an employee was removed without minimum due process).

Protection Board, 626 F.3d 1348 (Fed. Cir. 2010), and other legal authority, the Board lacks jurisdiction over the appellant's appeal of his termination from the FAM position. RF, Tab 16 at 5-9; *see* 5 C.F.R. § 1201.93(a). The appellant also sought certification of an interlocutory appeal, asserting that his appeal of his removal from the FAM position is now moot because, pursuant to the administrative judge's order on jurisdiction, he "is deemed not to have accepted the new appointment as a FAM" and as a result "no longer encumbers the FAM position." RF, Tab 17 at 2-3. In a July 9, 2013 order, the administrative judge granted the parties' motions and certified her June 10, 2013 ruling set forth above for an interlocutory appeal. RF, Tab 19 at 5-7; *see* 5 C.F.R. § 1201.93(b). The administrative judge also stayed the processing of the appeal pending the Board's resolution of the interlocutory appeal. RF, Tab 19 at 7; *see* 5 C.F.R. § 1201.93(c).

ANALYSIS

¶7 The essence of the question presented by the administrative judge's certified ruling is whether the Board has jurisdiction over an appeal by an appellant who unknowingly lost Board appeal rights as the result of accepting a new appointment within the same agency.[3] In *Carrow*, the employee left a

[3] Under the Board's regulations at 5 C.F.R. § 1201.92, an administrative judge should certify a ruling for interlocutory appeal only if: "(a) [t]he ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) [a]n immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public." Both the Board's decision remanding this appeal to the administrative judge and the Federal Circuit's decision in *Carrow* explained that the *Exum* line of cases was undisturbed by *Carrow*. *See Carrow*, 626 F.3d at 1354; *Boudreault*, MSPB Docket No. PH-0752-10-0405-I-1, Remand Order at 3 (stating that, because *Exum* and *Yeressian* remain binding precedent, the administrative judge shall apply the standard set forth in those cases on remand). Thus, it is questionable whether the first criterion for certification of an interlocutory appeal has been met. Moreover, it is unclear to us how the proceedings before the administrative judge after the jurisdictional order was issued would be complex or time-consuming. *See* supra note 2. Thus, it is also questionable whether the second regulatory criterion has been met. Nevertheless, rather than

position with the Department of the Army, in which he had gained Board appeal rights, for a position with the Department of Veterans Affairs (DVA). *Carrow*, 626 F3d. at 1349, 1352. Four months after his appointment, DVA terminated him. *Id*. at 1350. The Federal Circuit held that, by statute, Carrow's position with DVA did not afford him Board appeal rights and "DVA's failure to advise Mr. Carrow of the terms of his appointment does not create appeal rights for positions" which were not otherwise authorized. *Id*. at 1353.

¶8 In *Exum*, in contrast, the Board addressed a situation involving a licensed practical nurse with DVA who held a full-time position with Board appeal rights but then requested a reduction in her work schedule, which, because of the nature of DVA's appointing authorities, apparently required her reappointment to a part-time position without Board appeal rights. *Exum*, 62 M.S.P.R. at 345-47. In that appeal, the Board found that, because the employee did not anticipate the effect of a change in her schedule, the nature of part-time appointments was not generally known among agency nurses, and the employee believed that the change in her employment status would only be temporary, the agency should have known that the employee was acting under the erroneous impression that her appeal rights would not be effected by the change. *Id*. at 349. The Board found that the agency should have informed Exum of the effect of the change in her position on her Board appeal rights and remanded that appeal to, among other things, determine whether Exum would have accepted the new position if she had known of the effect on her Board appeal rights. *Id*. at 349-50.

¶9 The Board applied the principle developed in *Exum* to the situation in *Yeressian v. Department of the Army*. In that case, the employee acquired Board appeal rights during a Student Career Experience Program (SCEP) appointment

---

returning this matter to the administrative judge, *see Cooper v. Department of the Navy*, 98 M.S.P.R. 683 (2005) (returning a case to the administrative judge where the criteria for certification of an interlocutory appeal were not met), we will address the certified ruling.

and then accepted a new SCEP appointment with the same agency. *Yeressian*, 112 M.S.P.R. 21, ¶¶ 2-3, 11. According to the agency, as a result of accepting the new appointment, Yeressian no longer met the statutory definition of an employee and thus lost his Board appeal rights. *Id.*, ¶ 5. On appeal of Yeressian's subsequent separation, the Board summarized the holding in *Exum* as follows:

> When an employee moves between positions within the same agency, and forfeits his appeal rights as a result of accepting the new appointment, the agency must inform the employee of the effect the move will have on his appeal rights. An employee who has not knowingly consented to the loss of appeal rights in accepting another appointment with the agency is deemed not to have accepted the new appointment and to have retained the rights incident to his former appointment.

Id., ¶ 12 (citations omitted). The Board went on to explain that, if an employee was not informed of the loss of his appeal rights and he would not have accepted the new position if he had been properly informed of the loss of his appeal rights, the employee was entitled to the appeal rights he possessed prior to accepting the new position. *Id.* Accordingly, the Board remanded the appeal to determine whether Yeressian would have accepted the new SCEP position had he known about the loss of appeal rights. *Id.*, ¶¶ 13-14.

¶10 While the Federal Circuit's decision in *Carrow* clearly addressed circumstances where an individual employed by one federal agency accepted an appointment with a different federal agency, the court also stated that its decision did not "approve or disapprove the Board's rule in *Exum* and its progeny." *Carrow*, 626 F.3d at 1354. Thus, by its own terms, nothing in the Federal Circuit's *Carrow* decision disturbed the Board's holdings in *Exum* and *Yeressian*.[4] Moreover, while the agency cites to numerous decisions regarding

[4] We note that the Office of Personnel Management has not issued regulations regarding the rights and notice due to an employee who changes positions within an agency and, as a result, loses his Board appeal rights.

the limited nature of the Board's jurisdiction, RF, Tab 16 at 5-9, after a careful review, we discern no reason to disturb our prior holdings in *Exum* and *Yeressian*.[5]

¶11 We disagree with the appellant's assertion that his removal appeal is now moot as a result of the administrative judge's rulings on jurisdiction in this matter. The Board has held that, when an employee has not knowingly consented to the loss of appeal rights in accepting another appointment with the agency and would not have accepted the new position if he had been properly informed of the loss of appeal rights, the remedy is for the appellant to retain the appeal rights he possessed prior to accepting the new position and for the administrative judge to adjudicate the merits of the removal appeal. *E.g.*, *Yeressian*, 112 M.S.P.R. 21, ¶¶ 12, 14; *Lopez v. Department of the Navy*, 103 M.S.P.R. 55, ¶¶ 12, 16 (2006), *overruled in part on other grounds by Nelson v. Department of Health & Human Services*, 119 M.S.P.R. 276 (2013); *Clarke v. Department of Defense*, 102 M.S.P.R. 559, ¶¶ 11-12 (2006); *Edwards v. Department of Justice*, 86 M.S.P.R. 404, ¶ 10 (2000). In her order on jurisdiction, the administrative judge correctly determined that the next step in this matter is adjudication on the merits of the removal action. RF, Tab 13 at 6.

ORDER

¶12 For the reasons set forth above, we AFFIRM the administrative judge's ruling applying the principles articulated in *Exum* and *Yeressian* to the facts of

---

[5] In *Park v. Department of Health & Human Services*, 78 M.S.P.R. 527, 534-35 (1998), the Board explained its rationale for the distinction between situations when an employee moves within an agency and when an employee moves to a new agency. In that case, the Board explained that, when an employee moves to a new position within the same agency, the agency has readily accessible information about the employee's new and previous positions, while, when an employee moves to a new agency, the new employer may not possess and cannot be expected to have specific knowledge of the employee's previous position. *Id*. We see no reason to question that reasoning.

the instant case.[6] We VACATE the stay order and RETURN this matter to the Northeastern Regional Office for further adjudication consistent with this interlocutory decision.

FOR THE BOARD:

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

[6] Other than our affirmation of the administrative judge's certified ruling, nothing in this interlocutory decision constitutes a finding on the correctness of the administrative judge's other findings.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

Derek G. Boudreault v. Department of Homeland Security

MSPB Docket No. PH-0752-10-0405-B-1

¶1 For the reasons given below, I believe the Board should overrule the case law upon which the majority relies in this order and would dismiss the appeal for lack of jurisdiction.

¶2 The administrative judge found, after a jurisdictional hearing at which the appellant testified, that the agency did not inform the appellant that he would lose his tenure and appeal rights upon reassignment from his Security Assistant position to an Air Marshal position. The administrative judge further found that the appellant would not have accepted the Air Marshal position if he had been so informed. Remand File, Tab 13. Although the agency has argued that this latter finding is questionable given the substantial increase in salary that accompanied the reassignment, as well as the appellant's statement that being an Air Marshal was his "dream job," *see* Remand File, Tab 9 at 5; Tab 12 at 19, for purposes of discussion I accept the administrative judge's finding as correct. *See Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (ordinarily the Board should give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing).

¶3 The relevant statute provides that an individual is an "employee" with tenure and appeal rights if he has "completed 1 year of current continuous service in the same or similar positions." 5 U.S.C. § 7511(a)(1)(B). It is undisputed that the appellant did not complete 1 year of service as an Air Marshal and that his prior Security Assistant position was not "similar" to the Air Marshal position. Case law holds, however, that, if an agency fails to inform an employee who is moving to a new position in the same agency that he will lose his tenure and

appeal rights, and if the employee would not have accepted the new position had he been so informed, the employee is deemed not to have accepted the new appointment and to have retained the rights incident to his former position. *See Yeressian v. Department of the Army*, 112 M.S.P.R. 21, ¶ 12 (2009); *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344, 349-50 (1994).

¶4 The problems with the *Exum-Yeressian* line of cases are manifold. To begin with, the plain language of 5 U.S.C. § 7511(a)(1) contains no exception for employees who do not understand their circumstances. Assuming arguendo that there is a statutory "gap" concerning employees with appeal rights who accept reassignments to positions without appeal rights, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984), the agency with the authority to promulgate regulations under chapter 75, the Office of Personnel Management, *see* 5 U.S.C. § 7514, has not filled the gap administratively.

¶5 Furthermore, "[a]ppointment, not contract law, is the central concept" in federal employment. *Bartel v. Federal Aviation Administration*, 14 M.S.P.R. 24, 36 (1982). The *Exum-Yeressian* line of cases flies in the face of this principle by suggesting that the rights of a federal employee are not always determined by the statute that governs the employee's appointment but instead may depend upon whether there was a meeting of the minds between the employee and the agency at the time of appointment.

¶6 A related principle is that parties cannot confer jurisdiction on the Board by agreement or consent where it otherwise does not exist. *Metzenbaum v. General Services Administration*, 96 M.S.P.R. 104, ¶ 9 (2004); *Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996). If this is so, then a fortiori a party (the agency) cannot unilaterally confer Board jurisdiction by neglect, i.e., by failing to warn an employee of the effect of changing positions.

¶7 Another problem with *Exum* and *Yeressian* is the confusion those decisions create. If an employee with appeal rights is truly deemed not to have accepted a

reassignment to a position without appeal rights and to have retained the rights incident to his first position, it is difficult to explain which position the employee is considered to have been removed from and the remedy if the Board appeal is successful. *Exum* and *Yeressian* appear inconsistent in this regard. *Compare Exum*, 66 M.S.P.R. at 419-20 (finding that the appellant's due process rights were violated and ordering her reinstatement to the position she held before her reassignment), *with Yeressian*, 112 M.S.P.R. 21, ¶¶ 12, 14 (directing the administrative judge to adjudicate the propriety of the appellant's removal from the position he held after he was reassigned).

¶8 The biggest obstacle to taking jurisdiction in this case under the *Exum-Yeressian* doctrine is *Carrow v. Merit Systems Protection Board*, 626 F.3d 1348 (2010). There, an individual who had appeal rights while employed by the Army accepted a transfer to a position with the Department of Veterans Affairs (VA) in which he was required to complete a new period of current continuous service before regaining appeal rights. When the VA separated him before he completed that new period of service, he appealed and argued that he should be considered to have retained his appeal rights because the VA had not warned him about the effect of accepting the transfer. The court disagreed. It observed that there was no "statutory or regulatory requirement" that the VA provide such a warning and held that the lack of such a warning could not "create appeal rights" for someone who does not fall within the plain terms of section 7511(a)(1). *Carrow*, 626 F.3d at 1353. According to the court, the relevant inquiry was not what Mr. Carrow may or may not have known when he took the job at the VA but simply whether he met the plain terms of the statute at the time he was separated from the VA. *Id.*

¶9 It is true that, in *Carrow*, the court expressly declined to say whether *Exum* and *Yeressian* were correctly decided. 626 F.3d 1354. This was because it was "not necessary" for the court to do so, *id.*, inasmuch as Mr. Carrow moved from one agency to another rather than to a new position in the same agency.

Nonetheless, the logic of *Carrow* applies equally to the facts presented here. There is no statutory or regulatory requirement that an agency inform an employee who has appeal rights that by accepting a reassignment he will lose those rights. Further, an agency's failure to provide such information to an employee who is moving to another position in the same agency cannot "create appeal rights" where the employee does not meet the plain terms of the statute at the time of separation.

¶10 For all of the reasons above, I believe the Board should overrule the *Exum-Yeressian* line of cases and dismiss this appeal for lack of jurisdiction.

_____
Mark A. Robbins
Member