UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

60 M.S.P.R. 605

Docket Number NY0752930194-I-1

John J. Kane, Jr, Appellant,

v.

Department of the Army, Agency.

Date: January 19, 1994

Donald F. Cleary, American Federation of Government Employees, Black River, NY, for the appellant.

Carl J. Disalvatore, Fort Drum, NY, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has petitioned, and the agency has cross petitioned, for review of the July 8, 1993 initial decision affirming the appellant's removal. For the reasons discussed below, we DENY the appellant's petition, GRANT the agency's cross petition, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

The agency removed the appellant, an Operations Coordinator, GS-9, Directorate of Plans, Training, Mobilization, and Security, because he had pled guilty to and was convicted of two Class A Misdemeanors: Sexual abuse in the second degree; and endangering the welfare of a child. *See* Initial Appeal File (IAF), Vol. 2, Tab 6, Subtab 4C.

After the appellant filed his appeal, the agency moved to dismiss it for lack of jurisdiction on the basis that he was not an "employee" under 5 U.S.C. § 7511(a). *See* IAF, Vol. 1, Tab 4. The agency stated that the

appellant was not a preference eligible and that he was serving a two-year probationary period or trial period in the excepted service pursuant to his Veterans Readjustment Act (VRA) appointment of December 16, 1990. The agency further stated that the appellant had not completed this probationary period when he was indefinitely suspended without pay on October 21, 1992, and that he never returned to a pay status before his removal on February 20, 1993. *Id.*

In this connection, the agency stated that the computation method for determining whether a VRA appointee completed this probationary period was set forth in the Federal Personnel Manual (FPM), Ch. 315, subch. 7—7c (July 21, 1992) and was the same as that set forth at FPM Ch. 315, subch. 8—4 (June 9, 1992) for probationers in the competitive service (i.e., that it excludes time in non-pay status in excess of 22 workdays), as well as the Office of Personnel Management's (OPM) explanatory notes accompanying its May 11, 1992 interim rule amending 5 C.F.R. § 752.401(d)(10). *See* 57 Fed.Reg. 20043 (May 11, 1992) (stating that nonpreference eligible VRA appointees do not have Chapter 75 appeal rights until completion of this probationary period).

The administrative judge denied the agency's motion. *See* IAF, Vol. 3, Tab 9. In her order, she found that the Board had jurisdiction over the appeal, and that the "twenty-two workday" policy set forth in FPM Ch. 315, Appendix A-3(2), was inapplicable.[1] *Id.*

Subsequently, in her initial decision, the administrative judge found that the agency had established its charge by preponderant evidence. *See* Initial Decision (ID) at 1-4. Finding that the appellant's off-duty misconduct was sufficiently egregious to give rise to a rebuttable presumption of nexus, and that the appellant had not rebutted that presumption, she concluded that the agency had established a nexus between his misconduct and the efficiency of the service. *See* ID at 4-7. Further, she did not consider the appellant's prior disciplinary record because he did not have the opportunity to appeal that action to a higher authority. *See* ID at 7–8. She also found that he had not established disparate treatment by the agency. *See* ID at 8. Finally, she found that the penalty of removal was within the bounds of reasonableness. *See* ID at 8.

In his petition for review, the appellant challenges the administrative judge's procedural rulings on discovery witnesses and he further argues that the requisite nexus was not shown. Petition for Review File, Tab 1. In its cross petition, the agency contends that the administrative judge erred in finding jurisdiction and also argues that she erred in not considering the appellant's prior disciplinary action. Because we agree with the agency's contention that the appellant is not an employee under 5 U.S.C. § 7511(a), and find that he has limited appeal rights, as we discuss below, we do not

reach the parties' contentions regarding the merits of the removal action, and conclude that they do not set forth a basis for review under 5 C.F.R. § 1201.115.[2]

ANALYSIS

Sections 7511(a)(1)(A) and (B) of Title 5 U.S.C. provide that for removal (and other adverse action) purposes, an "employee" includes a non-probationary individual in the competitive service, as well as a preference eligible in the "excepted service" who has completed one year of current continuous service. Since we find that the appellant is in the excepted service--not the competitive service--pursuant to his VRA appointment, and it is undisputed that he is not a preference eligible,[3] he does not have appeal rights under these statutory provisions. *See Collaso v. Merit Systems Protection Board,* 775 F.2d 296, 297 (Fed.Cir.1985).

We further find that, while 5 U.S.C. § 7511(a)(1)(C)(i) applies to the appellant, it does not provide him with appeal rights from his separation. This provision defines "employee" as 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.

Under the terms of his VRA appointment, the appellant was required to serve a two-year probationary period after which he would be placed non-competitively into the competitive service. *See* 38 U.S.C. § 4214(b)(1)(D)(ii); IAF, Vol. I, Tab 4, Subtab 4. Although it is undisputed that the appellant would have completed this period on December 16, 1992, if he had not been indefinitely suspended from October 20, 1992, until the date of his removal, we find that his placement in a non-duty, non-pay status prevented him from completing this probationary period. *See* IAF, Vol. 2, Tab 6, Subtabs A, 4C; *David v. Department of Health and Human Services,* 13 MSPB 126, 14 M.S.P.R. 467, 469 (1983) (probationary period was properly extended by employee's time on nonpaid leave which exceeded 22 working days). *Cf. Tom v. Department of the Interim;* 32 M.S.P.R. 126, 128-30 (1987) (finding appellant met current continuous service requirement where his placement on nonduty, nonpay status was not due to adverse suspension action).[4]

In this connection, we note that the administrative judge, in effect, rejected the agency's reliance on FPM Ch. 315, subch. 7–7c, 8–4c,[5] finding the twenty-two work day rule to be inapplicable. *See* IAF, Tab 4 at 5–6. *See also* FPM Ch. 315, Appendix A–3(2) (September 19, 1989). These provisions apply, respectively, to the computation of "substantially continuous" service to qualify a veterans readjustment appointee for conversion to a competitive service position and to the computation of service to complete the

probationary period in the competitive service. While neither application specifically determines the end of the trial period of an excepted service appointment made pending conversion to the competitive service, we find that the purposes of the rule are sufficiently similar that the same rule should apply for this related purpose. *See* 5 C.F.R. § 315.803; *Hawkins v. Department of the Treasury,* 52 M.S.P.R. 686, 690 (1992) (since demotion from supervisory position to lower-graded position and termination of probationer in competitive service were analogous, FPM guidance for probationary terminations was applied to demotion). We also find that, if the appellant had completed the two year trial period, he would have been converted to the competitive service, and thus he would have been an "employee" with appeal rights under 5 U.S.C. § 7511(a)(1)(A).

We further find that the appellant does not have appeal rights under 5 U.S.C. § 7511(a)(1)(C)(ii). This provision affords appeal rights to a nonpreference eligible in the excepted service who has completed two years of current continuous service in an executive agency under other than a temporary appointment limited to two years or less. Based on our review of the legislative history of the Civil Service Due Process Amendments,[6] we find that Congress intended sections 7511(a)(1)(C)(i) and 7511(a)(1)(C)(ii) to be mutually exclusive. In this connection, the legislative history refers to 7511(a)(1)(C)(i) as "[t]he probationary exclusion," stating that the exclusion is intended to address specific job situations such as VRA appointments. *See* 136 Cong.Rec. S11,135 (daily ed. July 30, 1990) (statement of Sen. Pryor). The legislative history indicates that Congress intended that those individuals serving trial periods of employment under 5 U.S.C. § 7511(a)(1)(C)(i) were not to be afforded appeal rights under 5 U.S.C. 7511(a)(1)(C)(ii). *Id. Cf. Pennington v. Department of Veterans Affairs,* 57 M.S.P.R. 8, 10–11 (1993) (5 U.S.C. § 7511(a)(1)(C)(ii) applied to nonpreference eligible in the excepted service serving under a permanent appointment; 7511(a)(1)(C)(i) did not apply to him since he was not serving under a probationary or trial period pending conversion to the competitive service). Consequently, 7511(a)(1)(C)(ii) does not provide the appellant with appeal rights because he was serving in a trial period of employment pending conversion to the competitive service.

The appellant does have the same limited appeal rights as probationers in the competitive service who make a non-frivolous allegation that their terminations resulted from discrimination based on marital status or partisan political reasons. *See Polite v. Department of the Navy,* 49 M.S.P.R. 653, 656 (1991). Because the administrative judge found that the appellant was an employee with full appeal rights to the Board, she never properly informed him of what he needed to show to establish an appealable jurisdictional issue. *See Burgess v. Merit Systems Protection Board,* 758 F.2d

641, 643–44 (Fed.Cir.1985). Accordingly, we find that remand is appropriate.

ORDER

On remand, the administrative judge shall give the appellant the opportunity to submit evidence and argument to make a non-frivolous claim that his termination resulted from discrimination due to marital status or partisan political reasons. To make such a showing, the appellant must allege facts that, if proven, would establish such discrimination. If he makes such a showing, the administrative judge shall afford the appellant a hearing, and then issue a new initial decision.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

1. The administrative judge did not explain her reasoning, however.

2. On October 2, 1993, the appellant filed a submission with the Board in which he states that the Jefferson County Court has vacated his conviction for improper procedure, and remanded his case to the Watertown City Court. He also states that he has moved to remove his guilty plea. *See* PFR File, Tab 6. In light of our jurisdictional finding, however, the court's decision is immaterial to the issues in this appeal. *See Watson v. Department of the Treasury,* 49 M.S.P.R. 237, 241-42 n. 3 (1991). We have not considered his other submissions filed after the record closed because there is no showing that they are based on evidence that was not readily available prior to the close of the record under 5 C.F.R. § 1201.114(i). See PFR File, Tabs 4, 5.

3. See IAF, Vol. 1, Tab 4, Subtab 4. The term "preference eligible" includes disabled veterans and certain veterans who have served in times of conflict from 1952 through 1976, excluding short terms of service and some service in the National Guard and reserves. See 5 U.S.C. § 2108; 38 U.S.C. § 101(21). Here, the appellant was not a preference eligible because he served from 1979 to 1987, is not disabled, and did not directly participate in an armed conflict. *See id.;* IAF, Tab 4, Subtab 6. On the other hand, a VRA appointment may be given to a nondisabled Post-Vietnam era veteran such as the appellant. *See 5* C.F.R. § 307.103(d).

4. In the appellant's "Objection to Agency Motion to Dismiss" his appeal for lack of jurisdiction, he stated that he was serving in his "fourth temporary appointment" immediately prior to receiving his VRA appointment on December 16, 1990. *See* IAF, Vol. 3, Tab 7. As a nonpreference eligible in the excepted service, however, the appellant's prior temporary employment does not count under the two year service requirement of the VRA. See FPM Ch. 307, subch. 1-8(b). *Cf: Hales v. U.S. Postal Service,* 53 M.S.P.R. 503, 507 (1992) (preference eligible employees in the excepted service may count their service in a temporary position toward completion of the 1 year of current continuous service requirement of 5 U.S.C. § 7511(a)(1)(B)); *Compton v. Department of the Navy,* 31 M.S.P.R. 402, 403 (1986) (while service in a temporary excepted service position may be counted toward the completion of one year

under 5 U.S.C. § 7511(a)(1)(B), service under a temporary limited appointment may not be counted in determining whether an employee in the competitive service has completed one year of current continuous service).

5. In regard to the termination of probationary employees, the FPM states that the agency may extend the probationary period to reflect the probationer's absence in a nonpay status in excess of 22 workdays. FPM Ch. 315, subch. 8-6(a). Nonpay time in excess of 22 workdays extends the probationary period by an equal amount. FPM Ch. 315, subch. 8-4(c). *See also* FPM Ch. 315, subch. 7-7(c).

6. Pub.L. 101-376, 104 Stat. 461 (1990).

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