UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 219

Docket No. AT-315H-10-0148-I-1

Anne Visser Ney,

Appellant,

v.

Department of Commerce,

Agency.

November 9, 2010

Anne Visser Ney, St. Petersburg, Florida, pro se.

Elise B. Steinberg, Esquire, Silver Spring, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review challenging the administrative judge's initial decision that dismissed her appeal for lack of jurisdiction on the ground that she failed to nonfrivolously allege that her probationary termination was based upon her marital status. For the reasons that follow, we GRANT the petition for review, REOPEN the appeal on the Board's own motion to address additional jurisdictional issues, VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 On October 14, 2008, the agency appointed the appellant to a term position (not to exceed 13 months) as a Fish Biologist, GS-0482-09, with the National Oceanic and Atmospheric Administration facility in St. Petersburg, Florida. Initial Appeal File (IAF), Tab 7 at 11. Effective October 8, 2009, the agency terminated the appellant during her probationary period for poor performance. IAF, Tab 1, Attachments 1, 2. The appellant appealed to the Board. IAF, Tab 1.

¶3 The administrative judge issued an order to show cause directing the appellant to show that the Board has jurisdiction over her appeal. IAF, Tab 3. The order informed the appellant that, because she was a probationary employee, the Board only had jurisdiction over her appeal if she was terminated on account of pre-employment reasons, partisan political reasons, or her marital status. *Id*. Both the appellant and the agency responded, with the agency moving to dismiss on the ground that the appellant failed to raise nonfrivolous allegations showing Board jurisdiction. IAF, Tabs 6, 7. In light of the agency's motion, the administrative judge gave the appellant an additional opportunity to show that her termination was based upon her marital status. IAF, Tab 8. The appellant provided an additional response, as did the agency. IAF, Tabs 9, 10. The administrative judge did not hold the hearing the appellant had requested. IAF, Tab 1 at 2.

¶4 In his initial decision, the administrative judge held that the appellant failed to raise nonfrivolous allegations that she was terminated due to her marital status. IAF, Tab 12 at 6. The administrative judge concluded that the appellant's allegations, although specific, were actually claiming discrimination based upon her "family status" -- in particular having a working spouse rather than a stay-at-home spouse -- not marital status. *Id*. at 4-6.

¶5 The appellant has filed a timely petition for review. Petition for Review File (PFR File), Tab 1. The agency has responded with a motion to dismiss

stating that the appellant's pleading was not intended as a petition for review. PFR File, Tab 3.[1]

ANALYSIS

¶6 The Board will grant a petition for review only when significant new evidence is presented or the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, 108 M.S.P.R. 384, ¶ 16 (2008); 5 C.F.R. § 1201.115. Mere disagreement with the administrative judge's factual findings or legal conclusions does not show legal error. *Cirella v. Department of the Treasury*, 108 M.S.P.R. 474, ¶ 15, *aff'd*, 296 F. App'x 63 (Fed. Cir. 2008). Because we conclude that the appellant has raised a nonfrivolous allegation that her termination was due to her marital status, we grant the appellant's petition for review.

¶7 We also reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, to address three jurisdictional issues that the administrative judge failed to resolve. The issue of the Board's jurisdiction is always before the Board, and it may be raised by either party or *sua sponte* by the Board at any time. *Zajac v. Department of Agriculture*, 112 M.S.P.R. 160, ¶ 8 (2009).

Marital Status Issue

¶8 The appellant has the burden of proving the Board's jurisdiction by a preponderance of the evidence. *Blount v. Department of the Treasury*, 109 M.S.P.R. 174, ¶ 5 (2008); 5 C.F.R. § 1201.56(a)(2). If an appellant makes a nonfrivolous allegation that the Board has jurisdiction over her appeal, the

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[1] The Board construes pro se pleadings liberally. *See Jordan v. Office of Personnel Management*, 108 M.S.P.R. 119, ¶ 19 (2008). Because the appellant in her submission has challenged the correctness of the initial decision, PFR File, Tab 1 at 4-5, we find her submission is properly characterized as a petition for review, 5 C.F.R. § 1201.115. Thus, we deny the agency's motion to dismiss.

appellant is entitled to a hearing if she requests one, on the jurisdictional question. *Hurston v. Department of the Army*, 113 M.S.P.R. 34, ¶ 5 (2010).

¶9 A probationary employee in the competitive service can only bring an appeal of her termination to the Board in three very limited circumstances: (1) The employee was discriminated against on account of her marital status; (2) the employee was discriminated against based on partisan political affiliation; or (3) the agency action was based (in whole or part) on issues that arose pre-appointment and the required procedures were not followed. *Blount*, 109 M.S.P.R. 174, ¶ 5; 5 C.F.R. §§ 315.805, 315.806. A probationary employee faces a 2-step process in establishing Board jurisdiction based upon marital status discrimination: (1) The probationer must first make facially nonfrivolous allegations of marital status discrimination to be entitled to a hearing; and (2) at the hearing, the probationer must support her allegations with facts which (if uncontroverted) would establish marital status discrimination. *See Strausbaugh v. Government Printing Office*, 111 M.S.P.R. 305, ¶ 6 (2009).

¶10 We find that this pro se appellant alleged enough sufficiently specific instances of "marital status" discrimination to establish that she raised a nonfrivolous allegation that her termination was based upon marital status discrimination. *See generally Jordan*, 108 M.S.P.R. 119, ¶ 19 (pro se pleadings are to be construed liberally).

¶11 In particular, the appellant specifically alleged that (1) she had good performance reviews and no one explained her termination; (2) her supervisor regularly raised questions about her marital status; (3) she was assigned menial tasks not assigned to single employees; (4) married employees were subjected to harsher standards; (5) married employees were objects of ridicule; (6) her responsibilities were given to an inexperienced single employee; and (7) single employees received better treatment and preferences for telework. IAF, Tab 6 at 4-6; Tab 9 at 6-12, 14. The Board has found similar allegations sufficient to entitle an appellant to a jurisdictional hearing. *See, e.g., Smirne v. Department of*

the Army, 115 M.S.P.R. 51, ¶ 11 (2010) (the appellant alleged that her purported performance problems were fabrications, she was the only single, pregnant, newly hired secretary, and she was the only new secretary terminated); *Strausbaugh*, 111 M.S.P.R. 305, ¶ 8 (the appellant alleged that his supervisor made derogatory remarks about his marital status, told him he would not be having "problems" if he was married, and excluded his fiancée and young child from an official function); *Kiser v. Department of Education*, 66 M.S.P.R. 372, 379-81 (1995) (the appellant alleged that his supervisor made repeated comments about his marriage and social life, he was terminated despite a superior performance review, and single employees were treated less harshly for the same conduct); *Edem v. Department of Commerce*, 64 M.S.P.R. 501, 504-505 (1994) (the appellant alleged that her supervisor questioned her three times about her relationship with her husband (from whom she was separated) and children); *Paine v. Department of Health & Human Services*, 32 M.S.P.R. 135, 137 (1987) (the appellant alleged that the agency overlooked more serious acts of misconduct and performance deficiencies for married employees than single employees). Thus, the appellant presented facially nonfrivolous allegations regarding her marital status discrimination claim, and the administrative judge erred in dismissing her case without holding a jurisdictional hearing. *See Stokes v. Federal Aviation Administration*, 761 F.2d 682, 686 (Fed. Cir. 1985) (if a probationary employee presents a facially nonfrovolous allegation of marital status discrimination, she is entitled to a hearing).

Omitted Issues

¶12 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). Further, an appellant must receive explicit information on what is required to establish an appealable jurisdictional

issue. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). Here, the administrative judge failed to consider three issues that implicate the Board's jurisdiction and the intended scope of the pro se appellant's claims.

¶13 First, the appellant referred to prior federal service, and this prior service is documented in the appellant's SF-50, which shows approximately 15 years of prior service. IAF, Tab 1 at 8 & Attachment 1. The current record, however, provides no real information about the nature or timing of this prior service. Therefore, this prior service raises the possibility that the appellant could be an "employee" with appeal rights to the Board.

¶14 An appellant who has not served a full year under her appointment can show that she has completed the probationary period, and so is no longer a probationer, by tacking on prior service if: (1) the prior service was rendered immediately preceding the probationary appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. *Hurston*, 113 M.S.P.R. 34, ¶ 9. Alternatively, an employee can show that, while she may be a probationer, she is an "employee" with Chapter 75 appeal rights because, immediately preceding the adverse action, she had completed at least 1 year of current continuous service in the competitive service without a break in federal civilian employment of a workday. *Id.* Given the appellant's prior federal service, the administrative judge erred in failing to provide an appropriate *Burgess* notice informing the appellant how she could establish that she was an employee with adverse action appeal rights to the Board. *See generally Smart v. Department of Justice*, 113 M.S.P.R. 393, ¶¶ 12-15 (2010); *see also McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341-43 (Fed. Cir. 2002).

¶15 Second, the appellant repeatedly referred to her military service and how it was a source of tension with her supervisor. *See, e.g.*, IAF, Tab 1 at 8, Tab 9 at 9. The appellant also specifically requested that the Board exercise its

jurisdiction, *inter alia*, over the "USERRA violations" in her complaint. IAF, Tab 6 at 4. Yet the administrative judge never acknowledged this claim, and he never provided the appropriate *Burgess* notice informing the appellant what she needed to do to establish the Board's jurisdiction over a possible Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) claim.[2] *See generally Morris v. Department of the Army*, 113 M.S.P.R. 304, ¶ 7 (2010) (the administrative judge erred in dismissing the appeal for failure to establish jurisdiction without informing the appellant of the jurisdictional issue).

¶16 Third, the appellant may have been trying to raise a Veterans Employment Opportunities Act of 1998 (VEOA) claim. In addition to her comments about her military service, she also states that she "believed that she was hired under Veterans Employment Opportunities Act rules, which explains why I would be hired but still, discriminated against." IAF, Tab 6 at 5 n.1. This allegation also suggests tension with her supervisors based upon her military service. Under the circumstances, the pro se appellant may have been attempting to raise a VEOA claim instead of, or in addition to, a USERRA claim. *See Loggins v. U.S. Postal Service*, 112 M.S.P.R. 471, ¶ 16 (2009). As a consequence, the administrative judge erred in dismissing the appeal without apprising the appellant of what is required to establish the Board's jurisdiction over a VEOA claim. *Id.* at 15; *see also Hamner v. Department of Housing and Urban Development*, 93 M.S.P.R. 84, ¶ 19 (2002).

¶17 The administrative judge failed to address these issues, indicate to the parties that these were issues that required adjudication, or provide proper

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[2] Indeed, the appellant, after mentioning her USERRA claim in her response to the order to show cause, focused entirely upon marital status discrimination as "Ordered" by the administrative judge. IAF, Tab 6 at 4.

Burgess notices. Therefore, it is appropriate to vacate the initial decision and remand the appeal for further proceedings. *See Harellson v. U.S. Postal Service*, 113 M.S.P.R. 534, ¶ 14 (2010).

ORDER

¶18 Accordingly, we grant the appellant's petition for review, vacate the initial decision, and remand the appeal to the regional office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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