UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

77 M.S.P.R. 30

Docket Number DC-0752-97-0345-I-1

CYNTHIA F. LAW, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: October 28,1997

Shannon M. Salb, Esquire, Lippman & Associates, Washington, D.C., for the appellant.

Roderick D. Eves, Esquire, Washington, D.C, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

This case is before the Board upon the appellant's timely petition for review of the April 8, 1997 initial decision that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the case to the Washington, D.C., Regional Office for further adjudication and for the issuance of a new initial decision consistent with this Opinion and Order.

BACKGROUND

The appellant timely refiled her appeal of her alleged "[c]onstructive [v]oluntary [d]emotion" from an EAS-14 Senior Legal Secretary position to an EAS-7 Legal Clerk position. She requested a hearing. Appeal File (AF), Tab 2.

In an acknowledgment order, the administrative judge informed the appellant that the Board might not have jurisdiction over her appeal because voluntary demotions are not appealable to the Board, and her appeal would be dismissed unless she alleged that her demotion resulted from duress, coercion, or misrepresentation. The administrative judge informed her that she would be granted a hearing only if she made nonfrivolous allegations that her demotion was involuntary. Thus, the administrative judge ordered her to file evidence and argument to prove that her appeal is within the Board's jurisdiction. AF, Tab 3 at 2.

In response to the acknowledgment order, the appellant alleged that she accepted the demotion in order to avoid removal, with which she claimed her supervisor threatened her based on her performance, even though he had not allowed her sufficient time to improve her performance. She claimed that she accepted the demotion because she has financial responsibilities to her family and she was afraid that she would be unable to find another position because of her age and job seniority. She argued that her allegations were sufficient to entitle her to a hearing. AF, Tab 4, Subtab 1, Memorandum of Points and Authorities in Support of Appellant's Proffer of Evidence in Support of Her Claim of This Board's Jurisdiction (Memorandum of Points and Authorities) at 1-2, and Second Affidavit of Cynthia F. Law at 1-2.

The agency then moved to dismiss the appeal for lack of jurisdiction, stating that the appellant failed to allege or to show that she was a preference eligible employee, a manager, a supervisor, or a confidential employee and that only those Postal employees have a right of appeal to the Board. Further, the agency asserted, the appellant's demotion was voluntary. AF, Tab 5. Based on the agency's assertions, the administrative judge issued a show-cause order directing the appellant to show why her appeal should not be dismissed for lack of jurisdiction and ordering her to show that she is entitled to appeal to the Board under the Postal Employee Appeal Rights Act of 1987 (PEARA), codified in pertinent part at 39 U.S.C. § 1005(a)(4)(A)(ii), or as a "preference eligible" employee under 5 U.S.C. § 2108. AF, Tab 6.

In response, the appellant asserted that she has a right of appeal to the Board under PEARA, because, in her EAS-14 Senior Legal Secretary position, she "was 'engaged in personnel work in other than a purely nonconfidential clerical capacity,'" describing the duties of her position. AF, Tab 8. In reply to the appellant's response, the agency argued that, even if the appellant's allegations were true, they did not establish that she met the definition of a confidential employee. Further, it argued that the appellant was not a confidential employee because, while the appellant was not a member of a collective bargaining unit, she was not precluded from joining one. AF, Tab 9, Agency's Reply at 1-6.

The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to show that she is an employee entitled to appeal to the Board under PEARA because she failed to show that, in her EAS-14 Senior Legal Secretary position, she was "an employee engaged in personnel work in other than a purely nonconfidential clerical capacity." Initial Decision (ID) at 2-3. In this regard, the administrative judge found that the appellant did not satisfy the two-part test established by the National Labor Relations Board (NLRB) for determining whether an employee is a "confidential employee[.]" Thus, she found that the appellant failed to make a nonfrivolous allegation of the Board's jurisdiction over her appeal and denied her request for a hearing. ID at 3-5.

In her petition for review, the appellant reiterates the contentions she made below, submitting clarifying arguments, and contends that the administrative judge misinterpreted applicable law in finding that she did not qualify as a "confidential employee." Petition for Review (PFR) File, Tabs 1, 4, 5. The agency has timely responded in opposition to the petition for review. *Id.*, Tab 6.

ANALYSIS

The appellant made below a nonfrivolous allegation of Board jurisdiction over her appeal that entitled her to a jurisdictional hearing.

Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case of the Board's jurisdiction over an appeal. *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986); *Miyashiro v. U.S. Postal Service*, 66 M.S.P.R. 199, 201 (1995); *Bell v. U.S. Postal Service*, 66 M.S.P.R. 32, 34 (1994), *aff'd*, 74 F.3d 1259 (Fed. Cir. 1996) (Table). An appellant who makes a nonfrivolous allegation of Board jurisdiction is entitled to a jurisdictional hearing if the jurisdictional issue cannot be decided based on the documentary evidence of record. *See Leiser v. Department of Justice*, 64 M.S.P.R. 543, 550 (1994), *aff'd*, 64 F.3d 678 (Fed. Cir. 1995) (Table). While the Board may consider an agency's documentary submissions in determining whether an appellant has made a nonfrivolous allegation of the Board's jurisdiction over an appeal, "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); *see also Dvorin v. Department of the Air Force*, 70 M.S.P.R. 407, 411 (1996).

Here, it is undisputed that the appellant is a nonpreference eligible employee. A nonpreference eligible employee of the Postal Service has appeal rights to the Board under PEARA from adverse actions taken under 5 U.S.C. chapter 75 if the employee is a manager, supervisor, or employee engaged in personnel work in other than a purely nonconfidential clerical capacity and has completed 1 year of current continuous service in the same or similar positions. 39 U.S.C. § 1005(a)(4)(A)(ii); *Dodson v. U.S. Postal Service*, 67 M.S.P.R. 84, 86 (1995). The Board has adopted the definition of the term "confidential employees" set forth by the NLRB, which includes "those employees who: (1) '[A]ssist and act in a confidential capacity to persons who formulate, determine and effectuate management policy in the field of labor relations,' or (2) 'regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.'" *McCandless v. Merit Systems Protection Board*, 996 F.2d 1193, 1199 (Fed. Cir. 1993).

The appellant alleged below that the duties of the EAS-14 Senior Legal Secretary position "included typing briefs in cases of employee grievances and appeals, assuming basic legal research for those briefs, such as checking citations, maintaining docket calendars for that litigation, and maintaining and copying confidential documents related to employee grievances." AF, Tab 8, Third Affidavit of Cynthia F. Law at 1. She stated that she "regularly handled [o]fficial [p]ersonnel [f]iles and other confidential information regarding employees and personnel matters in the context of M.S.P.B. and federal court employment actions." *Id*. She further stated that her "bosses were responsible for formulating Postal Service policies regarding employment matters, which were kept confidential prior to promulgation," and that, as a staff employee of the Postal Service Law Department, she "had contact with these draft policies and working documents of a

sensitive nature." *Id.*; *see also* AF, Tab 8, Appellant's Response to the Board's Show Cause Order at 1-3.

In her initial decision, the administrative judge found that the appellant failed to allege or to submit evidence showing that she satisfied either of the two NLRB criteria for eligibility as a "confidential employee," as set forth in *McCandless*. ID at 4-5. She found that the appellant did not show that the employment matters for which she alleged her supervisors formulated Postal Service policies concerned labor relations or collective bargaining. The administrative judge further found that the appellant did "not allege that she had access to labor relations policy data" and that "it appear[ed] that she merely handled, viewed, and typed the confidential paperwork, and that she had no input into the substantive creation of such documents." ID at 4. Therefore, the administrative judge found that the appellant did not show that she qualified as a "confidential employee" entitled to appeal to the Board. Moreover, the administrative judge found, her review of the appellant's position description did not indicate that the appellant met the applicable requirements under 39 U.S.C. § 1005(a)(4)(A)(ii)(I). ID at 4-5.

On review, the appellant argues that she indeed meets the definition of "confidential employee" as set forth in *McCandless*. She contends that the administrative judge erred by interpreting her Third Affidavit as not including duties relating to labor relations. She claims that her statement in her Third Affidavit that her "bosses were responsible for formulating Postal Service policies regarding employment matters, which were kept confidential prior to promulgation," referred to "collective-bargaining matters." PFR at 2. In an attempt to clarify her Third Affidavit, the appellant has submitted on review a fourth affidavit, stating that her duties as a Senior Legal Secretary included "typing briefs in cases of employee grievances and arbitrations ... [and] maintaining and copying confidential documents related to labor arbitrations and union grievances." PFR File, Tab 1, Fourth Affidavit of Cynthia F. Law (Fourth Affidavit) at 1. The appellant also states that she "regularly handled Official Personnel Files and other confidential information regarding employees and personnel matters in the context of M.S.P.B., federal court, and arbitration and union grievance actions." *Id.* She further states that her "bosses were responsible for formulating Postal Service policies regarding postal union matters, including revisions to the collective-bargaining agreement, which were kept confidential prior to promulgation," *id.*, and that she "had contact with these draft policies and working documents of a sensitive nature," *id.*, Fourth Affidavit at 2.

The agency has not submitted any documentary evidence to refute the appellant's allegations. Rather, it has merely disputed her description of her duties and her assertion regarding her ability to join a bargaining unit. *See* AF, Tab 9, Agency's Reply at 1-6. We find, however, that the appellant's allegations, as stated above, are sufficient to establish a prima facie showing that she meets the definition of a "confidential employee" under PEARA. *See McCandless*, 996 F.2d at 1199.

We further find that the appellant's allegations regarding the voluntariness of her demotion are also sufficient to warrant a jurisdictional hearing in that regard. An action initiated by an employee is presumed to be voluntary, and thus outside the Board's jurisdiction, unless the employee can show that the action was obtained through duress

or coercion or shows that a reasonable person would have been misled by the agency. *Nicoletti v. Department of Justice*, 60 M.S.P.R. 244, 250 (1993). Thus, if an employee can show that he or she accepted a demotion to avoid a threatened removal and can further show that the agency knew or should have known that the removal could not be substantiated, then the demotion may be considered coerced and therefore involuntary. *O'Connell v. U.S. Postal Service*, 69 M.S.P.R. 438, 443 (1996). To establish entitlement to a jurisdictional hearing based on the voluntariness of a demotion, an employee must make a nonfrivolous allegation that he or she was coerced into accepting the demotion; the allegation must be supported by factual assertions indicating that it is not a mere pro forma pleading. *Hartman v. U.S. Postal Service*, 53 M.S.P.R. 565, 567 (1992).

Here, the appellant alleged below that her demotion was involuntary because, shortly after her assignment to the EAS-14 Senior Legal Secretary position, her first-line supervisor threatened to remove her if she made just one more mistake, unless she accepted the demotion. She stated that she believed that the probability of her not making another mistake was "non-existent," and, therefore, she "believed that her removal was all but guaranteed." AF, Tab 4, Subtab 1, Memorandum of Points and Authorities at 2. She stated that her supervisor threatened her before affording her an adequate opportunity to improve her performance and that he failed to follow the agency's progressive discipline policy. She stated that, for these reasons, as well as her financial obligations to her family, her age, and her job seniority, she signed a voluntary demotion form under duress. *Id*. at 2-5. We find that the appellant's allegations of duress are sufficient to entitle her to a jurisdictional hearing on the involuntariness of her demotion. *See Hartman*, 53 M.S.P.R. at 567-68.

Accordingly, we REMAND this case to the Washington, D.C. Regional office for further proceedings.

ORDER

On REMAND, the administrative judge shall afford the appellant a jurisdictional hearing on the issue of whether she qualifies as a "confidential employee" under PEARA. If the appellant makes this showing, the administrative shall afford her a jurisdictional hearing on the voluntariness of her demotion. The administrative judge shall issue a new initial decision consistent with this Opinion and Order.

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