

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

93 M.S.P.R. 70

JAMES CAMPBELL,
Appellant,

DOCKET NUMBER
DC-752S-02-0057-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: October 18, 2002

John B. Roten, Asheville, North Carolina, for the appellant.

Tanya B. Burton, Esquire, Winston-Salem, North Carolina, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Beth S. Slavet, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision, issued February 1, 2002, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we REVERSE the initial decision and REMAND the appeal for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 Effective September 23, 2001, the agency took two personnel actions affecting the appellant. It suspended him without pay for 14 calendar days, and it reassigned him from his position as a Supervisor, Food Service Worker,

WS-7408-03 (step 5), to the position of Program Support Assistant, GS-0303-07 (step 8). Initial Appeal File (IAF), Tab 1, Subtabs 6, 9. In a petition for appeal filed with the Board on October 23, 2001, the appellant stated that the reason given by the agency for taking these two personnel actions was that he was guilty of sexual harassment. IAF, Tab 1. The appellant denied he was guilty of such misconduct, and alleged that the agency discriminated against him on the basis of race, color, and handicap, and in reprisal for prior equal employment opportunity activity. *Id.*

¶3 In his acknowledgment order, and in a later show-cause order, the administrative judge (AJ) advised the appellant that the Board does not have jurisdiction over suspensions of 14 days or less, and that the Board does not have jurisdiction over reassignments unless they entail a loss of grade and/or pay. IAF, Tabs 2, 4. He further advised that claims of prohibited discrimination are not appealable to the Board in the absence of another, appealable action, and ordered the appellant to submit evidence and argument to establish the Board's jurisdiction. IAF, Tab 4. After considering the parties' responses, the AJ issued an initial decision finding that the appellant had not suffered a reduction in grade or pay, or any other action appealable to the Board. IAF, Tab 7. He therefore dismissed the appeal. *Id.*

¶4 In a timely-filed petition for review, the appellant asserts that he did suffer a reduction in pay, contending that the AJ improperly considered the appellant's locality pay under the General Schedule in considering whether his basic rate of pay was reduced.

ANALYSIS

¶5 The Board's jurisdiction 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); *see* 5 U.S.C. § 7701(a). The appellant

has the burden to establish jurisdiction by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(i).

¶6 An employee has a right of appeal to the Board from a reduction in pay. 5 U.S.C. §§ 7512(4), 7513(d). "Pay" is defined as "the rate of basic pay fixed by law or administrative action for the position held by an employee." 5 U.S.C. § 7511(a)(4). In concluding that the appellant did not suffer a reduction in pay, the AJ compared the appellant's rate of pay as a WS-03 employee, which was \$16.94 per hour, to his salary as a GS-07 employee, \$36,102 per annum, which is equivalent to \$17.29 per hour.¹ As the appellant points out on review, however, the appellant's salary of \$36,102 in the GS-07 position includes basic pay of \$33,527, plus locality pay of \$2,575. IAF, Tab 1, Subtab 9. For purposes of determining whether an employee has suffered a reduction in pay, locality pay is not considered part of an employee's basic pay.² *See Shifflett v. Department of the Navy*, 83 M.S.P.R. 472, ¶ 5 n.2 (1999). Accordingly, we find that the appellant's rate of basic pay went from \$16.94 per hour, which is equivalent to \$35,354 per annum, to a basic pay of \$33,527 per annum. He thus sustained a reduction in pay.

¶7 Because the appellant suffered a reduction in pay, and it is undisputed that the appellant is an "employee" as defined in 5 U.S.C. § 7511(a), the Board has subject matter jurisdiction, and the appeal must be remanded to the regional office for further adjudication. The precise nature of that adjudication is unclear, however. The record indicates that the appellant filed a formal complaint of discrimination with the agency on May 17, 2001, which was supplemented with

¹ The agency stated that an hourly wage is converted to an annual salary by multiplying the hourly wage by 2,087. IAF, Tab 6. This method of calculation is consistent with government-wide regulations. *See* 5 C.F.R. §§ 531.303, .605, .702; 5 C.F.R. §§ 550.113(d), .1303.

² Locality pay is considered basic pay for some purposes. *See* 5 C.F.R. § 531.606(b).

additional allegations on June 26, 2001. IAF, Tab 1, Subtab 3. Those complaints obviously do not include the later personnel actions taken by the agency on September 23, 2001. On remand, the AJ should determine whether those personnel actions are the subject of an EEO complaint before the agency and, if so, the status of such complaint.

¶8 If the AJ determines that the Board is in receipt of a timely-filed mixed case appeal,³ he should then determine whether the 14-day suspension is reviewable, along with the reduction in pay, as part of a "unitary penalty" under *Brewer v. American Battle Monuments Commission*, 779 F.2d 663 (Fed. Cir. 1985) (holding that, where a reduction in grade and a reassignment were part of a unified penalty arising out of the same set of circumstances, the Board's jurisdiction extended to both actions). The AJ should also determine whether the agency provided minimum due process of law in effecting its personnel action(s). See *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 682 n.11 (1991) (an agency action effected without affording the employee any of the procedures required by statute and regulation constitutes a violation of constitutional minimum due process). We note that, even if the underlying action is overturned on procedural grounds, the Board must decide a discrimination issue in a case. *Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987).

³ When an employee who has been subjected to an action that is appealable to the Board alleges that the action was based on race, color, religion, sex, national origin, age, or handicap, he has the option of filing a "mixed case complaint" with the Equal Employment Opportunity Commission (EEOC), or a "mixed case appeal" with the Board, but not both. See 29 C.F.R. § 1614.302(a)-(b); 5 C.F.R. § 1201.154(a). If he elects a mixed case complaint with the EEOC, he must file an appeal with the Board within 30 days after he receives the agency's decision or, if the agency has not resolved the matter or issued a final decision within 120 days, he may file an appeal with the Board at any time after the expiration of 120 calendar days. 5 C.F.R. § 1201.154(b). If the appellant files a premature mixed case appeal, the AJ may dismiss the appeal without prejudice to later refiling, or may hold the appeal for a short time if that would allow it to become timely. 5 C.F.R. § 1201.154(c).

ORDER

¶9 We REMAND this appeal for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.