

RICHARD C. RUSSELL  
v.  
DEPARTMENT OF THE NAVY

Docket No.  
BN075299001

## OPINION AND ORDER

### I. BACKGROUND

This action was initially commenced before the Board's Boston Field Office on February 2, 1979, when appellant sought to enter an appeal from his January 16, 1979, reassignment from the position of Supervisory Employee Development Specialist, GS-235-11, to the position of Employee Development Specialist, GS-235-11. The agency had previously processed an identical reassignment, effective October 23, 1978, as an adverse action, i.e., reduction in rank, in accordance with the provisions of 5 C.F.R. Part 752-B (1978), but vacated the action on January 5, 1979. The January 16, 1979, reassignment had not been effected pursuant to adverse action procedures.

The Boston Field Office, by decision dated March 20, 1979, found that since the reassignment was effected after January 11, 1979, the effective date of the Civil Service Reform Act of 1978, it was governed by the provisions of the Reform Act, which repealed prior law that had included a reduction in rank as an appealable matter. Accordingly, the Field Office declined to accept the appeal for adjudication.

The Board, by Order dated April 19, 1979, reopened the initial Field Office decision and requested the agency to submit a brief within 20 days of receipt of the Order. The agency, after obtaining a clarification of the issues to be addressed and an extension, furnished its brief on June 4, 1979, and appellant submitted his response on June 22, 1979. In addition, on August 22, 1979, the Office of Personnel Management (OPM) intervened in support of the Field Office decision, and by motion filed September 12, 1980, OPM requested that the case be consolidated with two other cases then pending before the Board.

The two issues in this case, as set forth by the Board's Order of May 14, 1979, are: (1) Whether and the extent to which the Civil Service Reform Act of 1978 is applicable to the action appealed from; and (2) Whether appellant was constructively reduced in rank or grade by his January 16, 1979, reassignment.

The undisputed evidence of record shows that on June 30, 1979, the agency established the position of Supervisory Employee Development Specialist (EDS), GS-235-12. This position was thereafter filled through competitive promotion procedures, resulting in the selection of a candidate other than appellant.

The agency contends that the GS-12 Supervisory EDS position was established through planned management action, based on a need to

realign work in the division, and that it only contained some of the duties of the GS-11 Supervisory EDS position previously occupied by appellant. It therefore asserts that it was not permitted to promote appellant noncompetitively under the provisions of FPM Chapter 335, subchapter 4-2d. The agency further claims that it vacated the October 23, 1978, adverse action because of its discovery that the notice of its decision in the action had been received by appellant after the effective date of the reassignment, thereby rendering the entire action fatally procedurally defective. The agency states, moreover, that it did not follow adverse action procedures in instituting the January 16, 1979, reassignment because reductions in rank are no longer defined as adverse actions under the Reform Act, 5 U.S.C. § 7512.

Appellant disputes the agency's claim that the GS-12 Supervisory EDS position was established as a result of planned management action and asserts, further, that a comparison of the position description for the GS-11 and GS-12 Supervisory EDS positions reflects no major change in duties. He also contends that his January 16, 1979, reassignment should be considered a continuation of the original action of October 23, 1978, and that his appeal should be governed by the former Civil Service Commission (Commission) rules and regulations in effect on the earlier date. Another argument advanced along this line is that since the original action was found to be faulty due to the agency's error, and since even after it was vacated the agency had four work days within which to reinstate the action before the effective date of the Reform Act, the agency's actions are suspect and should not, in any case, serve to deny appellant the review to which he was previously entitled by law and Commission regulation.

OPM's memorandum in support of its intervention focuses primarily on the second issue noted above. OPM argues, basically, that the failure to promote an employee whose position has been upgraded does not constitute an adverse action, as that term is defined by the Civil Service Reform Act, because it does not entail any loss of grade or pay; and that the decision to reassign instead of promote cannot be considered a constructive reduction in grade because the employee has no legal entitlement to a promotion.

## II. SAVINGS PROVISION

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, became effective on January 11, 1979. However, the savings provision of the Act, § 902, 92 Stat. 1223-4, makes the Act inapplicable to cases which were pending before its effective date. Moreover, both the Board and OPM have issued regulations implementing this provision. Accordingly, the Act's applicability to the instant case depends on whether the personnel action at issue was instituted prior to the effective date of the Act or is otherwise excluded from coverage by the savings provision and the Board and OPM implementing regulations.

The savings provision of the Act, *supra*, provides in subsection (b):

No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this act had not been enacted.

The legislative history of the Act fails to shed any light on this provision. The preamble to the Board's interim regulations, published on January 19, 1979, but effective January 11, 1979, 44 Fed. Reg. 3946, states, essentially, that administrative proceedings instituted prior to the effective date of the Act will be conducted in accordance with formerly applicable regulations. The preamble to OPM's interim adverse action regulations, published on January 16, 1979, and also effective as of January 11, 44 Fed. Reg. 3444, provides that:

The requirements for an adverse action in process on January 11, 1979, will be determined by the date on which the employee received the notice of proposed adverse action. If the notice is received by the employee before January 11, 1979, the entire action will be governed by the law and regulation in effect on that date. If the notice is received by the employee on or after January 11, 1979, the requirements of this interim regulation will apply.

The actual OPM and Board interim regulations are, however, silent in respect to the savings provision. The Board's final regulations, published on June 29, 1979, 44 Fed. Reg. 38342, 38360-38361, 5 C.F.R. § 1201.191(b), do provide the following:

*Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. 'Pending' is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

Based on the foregoing discussion, it is clear that while neither the Act nor its legislative history fully explains the language in subsection (b) of the savings provision, OPM and the Board have established the date of receipt of the advance notice as the key criterion in determining which actions are to be deemed administrative proceedings that were pending on the effective date of the Act. It is also clear that the savings provision and the pertinent implementing regulations do not provide special consideration for: (1) those actions vacated by an agency prior to the effective date of the Act and reinstated thereafter, and (2) those actions involving rights otherwise destroyed because of an agency's delay in instituting the administrative proceeding. Accordingly, since the facts in this case show that there was no appealable agency action, nor any outstanding notice of proposed agency action pending on January

11, 1979, there was no pending administrative proceeding on the effective date of the Act. The Board therefore concludes that the savings provision does not apply, and that the Act is, consequently, fully applicable to the case at hand. See, e.g., *Ellis v. United States*, 613 F.2d 49 (6th Cir. 1980); *Kyle v. Interstate Commerce Commission* 609 F.2d 540 (D.C. Cir. 1979); *Motley v. United States*, 608 F.2d (5th Cir. 1979).

### III. REDUCTION IN RANK OR GRADE

Turning to the second issue, the Board notes that it has jurisdiction to accept appeals "from any action which is appealable to . . . [it] under any law, rule, or regulation," 5 U.S.C. § 7701, and that there is no law, rule, or regulation authorizing appeals from reductions in rank. However, appellant also seeks to invoke the Board's jurisdiction on the ground that his agency reduced him in grade. Since a statute does authorize reduction-in-grade appeals to the Board, 5 U.S.C. §§ 7512 and 7513, the second ground for appeal does relate to a matter within the Board's jurisdiction.

OPM and the agency challenge appellant's contention that the personnel action he appeals from is a reduction in grade. They contend that the action is a reduction in rank, and they point out that although under previous statutes a reduction in rank was an appealable action, Congress did not list it in the Act as appealable. Compare 5 U.S.C. § 7511 (1976) with 5 U.S.C. § 7511 (1978).<sup>1</sup>

The Board, of course, is not obligated to accept the assertion of a party as to the nature of a personnel action; we may make such a determination independently. See *Ragland v. Internal Revenue Service*, 2 MSPB 167 (1980); *Murray v. Defense Mapping Agency*, 1 MSPB 338 (1980). Cf. *Goodman v. United States*, 352 F.2d 532 (D.C. Cir. 1966); *Dabney v. Freeman*, 358 F.2d 533 (D.C. Cir. 1965).

Congress has left a substantial legislative history on what it intended to accomplish when it excluded reduction in rank as a personnel action which could be appealed. This history shows that Congress intended to accomplish three purposes: (1) to establish a standard based on job classification principles; (2) to narrow employee appeals to those which involve substantive employee rights; (3) to increase management flexibility. We will examine the legislative history and determine which of the parties' positions most closely corresponds to Congress' intentions.

Congress has enacted a large number of laws involving job classification, 5 U.S.C. Chapter 51, and because Congress intended that appeals be viewed in light of the principles announced by these laws, we will also review these statutes and compare the parties' positions to them.

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<sup>1</sup>Competitive service employees and certain preference eligibles in the excepted service previously had a regulatory right to appeal reductions in rank, see 5 C.F.R. Part 752 (1978); OPM amended these regulations to conform with the Congressional change. See 5 C.F.R. Part 752 (1979).

### A. *Establishing a Standard Based on Job Classification Principles*

The Executive Branch task force that developed the Act was the first to recommend the abolition of the reduction-in-rank standard. See I The President's Reorganization Project, *Personnel Management Project 66-67* (December 1977) [hereinafter cited as I PMP]. The task force, and subsequently others, defined the standard as requiring a determination of whether a personnel action causes an employee to be further down in the organizational structure than before. I PMP at 67. See S. Rep. No. 95-969, 95th Cong., 2d Sess. 49 (1978) [hereinafter cited as S. Rep.]; H. Rep. 95-1403, 95th Cong., 2d Sess. 7-8, 22 (1978) [hereinafter cited as H. Rep.]; President's Reorganization Project, *Federal Personnel Management Project Option Paper Number One 154* (September 1977) [hereinafter cited as PMP Option Paper I].

This definition represented an incorporation of the definition established by the former United States Civil Service Commission. The Commission's Federal Personnel Manual Supplement 752-1 (FPM Supp. 752-1), subchapter 4, paragraph S4-1b defined "rank" and "reduction in rank" as follows:

. . . the term *rank* means *something more than* a numerical grade, or class, or level under a classification system or its equivalent in the Coordinated Federal Wage System. Basically, it means an employee's relative standing in the agency's organizational structure, as determined by his official personnel assignment. An employee's position assignment may be changed only by an official personnel action. Consequently, a reduction in rank can occur only when the employee is moved from one position to another by an official personnel action. (Emphasis added.)

FPM Supp. 752-1, at subchapter 4, paragraph S4-1b, offered examples of "reductions in rank":

(1) Reassignment to a position which is subordinate to the position previously held or subordinate to a position equivalent to the position previously held.

(2) Reassignment from a position which has been determined to be worth a higher grade, either on the basis of a new classification standard or as the result of correction of an original error, when the incumbent meets the legal requirements and qualifications standards for promotion to the higher grade. The incumbent of a position is entitled to promotion to the grade determined appropriate for the work he has been performing, if he is eligible for promotion, in two specific circumstances: (i) when issuance of a new classification standard shows that the work is actually of a higher grade and (ii) when error in classification has deprived him of the proper grade.

(When there is a significant change in job content see SI-4c(1).) His assignment to a position in a grade below the proper grade of his position is a reduction in rank whether or not the upgrading

decision has been put into effect by official classification action at the time of the assignment. The employee may be reduced in rank in this situation only for reasons unrelated to the upgrading decision—for reasons, that is, which would support a reduction in rank in any event, whether or not his position was being upgraded.

(3) Reassignment with loss of rank during reorganization when the reassignment is to a vacant position in a different competitive level and the agency does not process the action under the reduction-in-force procedure.

The Executive Branch task force determined that because the "reduction in rank" standard was ambiguous, it was not a worthwhile standard for determining what personnel actions should be appealed and therefore should be replaced by a standard involving the application of position classification criteria, such as duties and responsibilities. See I PMP at 66-67; II The President's Reorganization Project, *Personnel Management Project 23, 25* (December 1977).

The President, in the version of the Act that he submitted to Congress, did not include "reduction in rank" as a standard but added "reduction in grade." See Message From the President Transmitting A Draft of Proposed Legislation to Reform The Civil Service Law, H. Doc. No. 95-299, 95th Cong., 2d Sess. 22 (1978). Executive Branch officials explained the change by pointing out that when originally formulated, the reduction-in-rank standard was needed because "many employees were not under uniform position classification, grading, and pay systems" but that now the standard "serves no useful purpose . . . [and] cause[s] pointless misunderstandings between employees and managers as to what constitutes rank . . ." Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S. 2640, S. 2707, and S. 2830 Before the Committee on Governmental Affairs United States Senate 95th Cong., 2d Sess. 100 (1978) (statement of Alan K. Campbell) [hereinafter cited as S. Hearings]; Hearings on H. R. 11280 Before the Committee on Post Office and Civil Service House of Representatives, 95th Cong., 2d Sess. 30 (1979) (statement of Alan K. Campbell) [hereinafter cited as H. Hearings].

The Senate and House Committees considering the Act agreed with the task force's analysis and recommended the reduction-in-grade standard. S. Rep. at 49-50; H. Rep. at 7, 8, and 22. The Senate Committee's comments were typical:

The present statutory language includes a reference to "reduction in rank." This reference is deleted so as to eliminate reduction in rank as an appealable action. In 1944, when the procedural rights were first extended employees, thousands of positions were not covered by any position classification system. Consequently, where there was no reduction in compensation, it was necessary to look to something else, for example, the individual's relative standing in the agency's organizational structure, to determine whether an

adverse action had been taken. *However, all or most positions in the competitive service, with rare exception, are now covered by position classification or job-grading systems, with pay related directly to the grade of the position as determined under those systems.* The concept of "rank" as a separate category of appealable actions is no longer necessary. This change will also more closely relate the protections afforded to the severity of the action taken. It will increase the flexibility of agencies to assign employees to positions and duties where they are needed without having to take an adverse action against an employee when the job title or duties have changed, *but the grade has not.* (Emphasis added.) S. Rep. at 49-50.

Congress adopted the view of the House and Senate Committees. It eliminated "reduction in rank" as a standard; it added "reduction in grade"; and it assured that reduction-in-grade appeals would be decided according to job classification principles, by stating that "'grade' means a level of classification under a position classification system." 5 U.S.C. § 7511(a)(3).

The Board construes the statutory language and legislative history to show that by eliminating reduction in rank as a standard, Congress intended to eliminate only those appeals not relating to an employee's grade and that by adding reduction in grade as a standard, it intended to enable employees to appeal personnel actions where a reduction in grade can be demonstrated by the application of position classification principles.

Appellant's appeal, assuming his allegation to be true, fits the requirement that it be determinable by the application of classification criteria. He claims that if such criteria were applied to the position from which he was reassigned, the position would be shown to be properly classifiable at the GS-12 level. There is no dispute that the position to which he was reassigned was a GS-11 position.

*B. Limiting Employee Appeals to Actions Involving Substantive Employee Rights*

The Executive Branch also reported to Congress that the "reduction-in-rank" standard was undesirable because under it, employees were able to appeal minor, unimportant personnel actions. It sought to limit appealable personnel actions to those involving "substantive rights," and it gave as examples of such actions, those which resulted in "loss of pay" and which, therefore, could be remedied by a grant of "back pay." See S. Hearings at 100; H. Hearings at 30.

The Senate Governmental Affairs Committee expressed the same reasons for its position on reduction-in-rank appeals; it observed that the reduction-in-grade replacement standard "will also more closely relate the protections afforded to the severity of the action taken." S. Rep. at 49.

There is case law which suggests that appellant's appeal involves substantive rights. Employees who were reassigned from a position which was subsequently upgraded and who, but for the reassignment, would have been promoted to the upgraded position, have been held to suffer an injury compensable by back pay. See *McCourt v. Hampton*, 514 F.2d 1365 (4th Cir. 1975); *Ciambelli v. United States*, 203 Ct. Cl. 680 (1974). But see *Testan v. United States*, 424 U.S. 392 (1976); *Goutos v. United States*, 552 F.2d 922 (Ct. Cl. 1976). Such employees also suffer other adverse pay consequences; they lose a promotion and all the resulting "front pay." As a relief for this kind of injury, employees have been entitled to an order requiring their agency to promote them. See *Jarecki v. United States*, 590 F.2d 670 (7th Cir. 1979); *Leopold v. U.S. Civil Service Commission*, 450 F. Supp. 154 (E.D. N.Y. 1978); *McCourt v. Hampton*, *supra*.

Commission issuances also directed that an employee like appellant, again assuming his allegations to be true, would be entitled to a promotion. FPM Chapter 335, subchapter 4-3b, provided that:

b. *Promotion to positions upgraded without significant change in duties and responsibilities.* An agency must provide for an exception to competitive promotion procedures to allow for the promotion of an incumbent of a position which has been upgraded without significant change in duties and responsibilities on the basis of either the issuance of a new classification standard or the correction of a classification error. If the incumbent meets the legal and qualification requirements for the higher grade, he must be promoted noncompetitively unless removed from the position by appropriate personnel action. See FPM Supplement 752-1.

OPM revisions of this issuance, although no longer mandating a promotion, appear to continue the policy that employees who are reassigned from a position which is upgraded under the conditions set forth in the Commission issuance have a substantive claim to a promotion.<sup>2</sup>

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<sup>2</sup>FPM Chapter 335-1 was revised effective March 15, 1979. The applicable language is now contained in the following sections. FPM 335 subchapter 1, paragraph 1-5b(1) states:

B. Competitive procedures do not apply to: (1) A promotion resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error.

FPM Chapter 335-1 Appendix A, paragraph A-4 provides that:

#### A-4 CORRECTIVE ACTIONS

In general (1) 15.1 Alternative actions. Failure to adhere strictly to laws, OPM regulations and instructions, agency policies and guidelines, and agency promotion plans is to be rectified promptly by the OPM or the agency involved. Action to rectify a violation may involve an employee who was erroneously promoted, an employee or employees who were not promoted or considered because of the violation. It also may involve correction of program deficiencies. The nature and extent of actions to be taken in any case have to be determined on the basis of all the facts in the case, with due regard to the circumstances surrounding the violation, to the equitable and legal rights of the parties concerned, and to the interests of the Government.

The Board, from its review of the legislative history, case law, and administrative practice, finds that an employee who rests his or her appeal on reduction-in-grade grounds may demonstrate a substantive right in at least two ways: (1) by showing that he or she has suffered an injury that is plainly measurable and substantial in pay terms; and (2) by showing that the personnel action being appealed would, if not voided, deprive him or her of a substantial benefit, such as a promotion.<sup>3</sup> Appellant has pleaded facts which, if true, establish that his appeal involves the requisite substantial rights.

### *C. Increasing Management Flexibility*

The Executive Branch task force informed Congress that the reduction-in-rank standard "is an unnecessary impediment to reassignments to meet the needs of the agency." S. Hearings at 100; H. Hearings at 30. In a similar vein, the Senate Governmental Affairs Committee wrote that the elimination of the reduction-in-rank standard will increase the flexibility of agencies to assign employees to positions and duties where they are needed . . . ." S. Rep at 49-50.

The Board has not been presented with any argument that construing the reduction-in-grade standard to allow appeals like that of Mr. Russell runs counter to the Congressional intention that agencies have sufficient flexibility to assign employees to positions and duties where they are needed. To be sure, one of the consequences of designating a personnel action as appealable is lessened management flexibility. But Congress did not intend that under the Act management was to have unbridled flexibility.

The Board concludes that allowing appeals from appellants like Mr. Russell will not reduce agency flexibility below the level Congress intended the Act to establish.

### *D. Carrying Out the Purposes of the Classification Laws*

When Congress eliminated "reduction in rank" as an appealable action, it did not intend to diminish the protection afforded by the position classification and job grading statutes. Congress was keenly aware of the role classification played in maintaining the integrity of the entire merit systems. 5 U.S.C. § 2301 provides:

Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

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<sup>3</sup>The employee is not required to show that he or she is entitled to back pay, because of the general rule that an employee is only entitled to the pay of a position to which he or she is actually appointed. *Testan v. United States*, *supra*; *Goutos v. United States*, *supra*; *Walton v. United States*, 213 Ct. Cl. 755 (1977).

There can be no question that Congress intended that this merit principle be implemented by the position classification and job grading system.<sup>4</sup>

An employee's entitlement to the correct grade is a benefit which results from the proper operation of the position classification and job grading system. Classification decisions made under these systems affect not only the classified position, but the incumbent of that position as well. Both agencies and the Office of Personnel Management are required to promote, demote, reassign and adjust pay based on classification decisions made pursuant to statutory and regulatory authority. 5 U.S.C. §§ 5101(2), 5105(c), 5107, 5112, and 5346; 5 C.F.R. § 335.102; 5 C.F.R. Parts 511 and 532. If an employee's position has been reclassified to a grade higher than that actually held by the employee based upon issuance of a new classification standard and/or classification error, the courts will require agencies to promote the employee to the higher grade, noncompetitively. See *Jarecki v. United States*, *supra*; *Haneke v. Secretary of HEW*, 535 F.2d 1291, 1295 (D.C. Cir. 1976); *Leopold v. U.S. Civil Service Commission*, *supra*. This entitlement is created by proper operation of the position classification and job grading statutes.

The Board finds that an employee's right to a promotion under classification laws is certainly within the range of employee interests that Congress intended to remain protected by the adverse action procedures. Congress was careful to replace the term "reduction in rank" with the term "reduction in grade." 5 U.S.C. § 7512(3). Congress defined grade as a level of classification under a position classification system. 5 U.S.C. § 7511(3). The new statutory term, "reduction in grade," must be read in *pari materia* with the statutes and regulations relating to the position classification and job grading systems, just as the Civil Service Commission construed the term "reduction in rank" in relationship to these same statutes and regulations. *Reale v. United States*, 188 Ct. Cl. 586, 591 (1969); *Piccone v. United States*, 182 Ct. Cl. 752 (1969).

#### IV. CONCLUSION

Therefore, the Board concludes that where an employee is reassigned from a position which due to issuance of a new classification standard or correction of classification error is worth a higher grade, the employee

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<sup>4</sup>5 U.S.C. § 5105 provides in part,

It is the purpose of this chapter to provide a plan for classification of positions whereby—

(1) . . .

(A) the principle of equal pay for substantial equal work will be followed.

5 U.S.C. § 5341 provides in part,

It is the policy of Congress that . . .

(1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment within the same local wage area.

meets the legal and qualification requirements for promotion to the higher grade, and where the employee who held that position is permanently reassigned to a position classified at a grade level lower than the grade level to which the employee would otherwise be promoted, then the employee is reduced in grade. 5 U.S.C. § 7512(3). This conclusion renders Congress' statutory design fully effective in terms of the policy behind its enactment, and is totally consistent with the plain language of the statute. *National Petroleum Refiners Association v. FTC*, 482 F.2d 172, 189 (D.C. Cir. 1973).

To decide whether a reduction in grade took place in the instant case, the Board must still make the required findings of fact and conclusions of law. *The facts at issue are: (1) whether the position appellant encumbered at the time of his reassignment was worth a higher grade due to a change in classification standard or classification error or whether the position was upgraded due to planned management action; and (2) if appellant's position was upgraded due to a change in classification standard or classification error, did appellant meet the legal and qualification requirements for promotion at the time of his reassignment.*<sup>5</sup> Since the evidence of record is inadequate for proper resolution of these issues, the initial field office decision is hereby VACATED, and the case REMANDED to the presiding official for further proceedings consistent with this opinion and order. Finally, OPM's September 12, 1980, motion to consolidate this case with two other cases pending before the board is hereby DENIED.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., June 12, 1981

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<sup>5</sup>These are issues of jurisdiction. The appellant bears the burden of proof. 5 C.F.R. § 1201.56(2).