

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

2009 MSPB 170

Docket No. DA-0752-09-0263-I-1

**Gilberto Mancha, Jr.,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

August 28, 2009

Dan L. Hargrove, Esquire, San Antonio, Texas, for the appellant.

Jennifer G. Cook, Del Rio, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued April 23, 2009, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we, therefore, DENY it. We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The agency terminated the appellant from his excepted service Border Patrol Agent position during his probationary period based upon pre-appointment reasons. Appeal File, Tab 1. Upon filing an appeal of this action, the administrative judge informed the appellant that a question existed regarding whether the Board had jurisdiction over the appeal. Appeal File, Tabs 1, 2. Specifically, the administrative judge explained that, because the appellant was in the excepted service, he was required to show under [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#) and (C) that he was a preference-eligible employee who had completed 1 year of current, continuous service in the same or similar positions, or an employee who was not serving a probationary or trial period under an initial appointment pending conversion to the competitive service or who had completed 2 years of current, continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less. Appeal File, Tab 2 at 2.

¶3 In response, the appellant asserted that he had appeal rights to the Board pursuant to [5 C.F.R. §§ 315.806](#) and 9701.704(c). Appeal File, Tab 6. The appellant argued that, when an agency terminates a probationary employee for pre-appointment reasons, it is required to afford him the procedural protections mandated by [5 C.F.R. § 315.805](#), that the failure to provide these rights is appealable under 5 C.F.R. § 315.806, and that these rights apply to Department of Homeland Security (DHS) employees, such as him, pursuant to [5 C.F.R. § 9701.704\(c\)](#). The appellant, therefore, asserted that his appeal was within the Board's jurisdiction. *Id.*

¶4 The agency then submitted evidence and argument showing that it appointed the appellant to an excepted service position subject to a 2-year trial period, and that it terminated him before the trial period had expired. Appeal File, Tab 7, subtabs 4a, 4h. The agency, therefore, argued that the appellant was not an "employee" with Board appeal rights under [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#) and (C). Appeal File, Tab 7, subtab 1.

¶5 The administrative judge then afforded the appellant a second chance to show that his appeal was within the Board's jurisdiction. Appeal File, Tab 8. The administrative judge noted the appellant's reliance on [5 C.F.R. §§ 315.806](#) and [9701.704](#), but explained that it appeared that the appellant was appointed to an excepted service position and that the appellant was not a preference-eligible employee. Appeal File, Tab 8. The administrative judge then explained that, as an excepted service, non-preference eligible, the appellant could show that he was an employee with Board appeal rights only by satisfying the conditions in [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#). *Id.* The administrative judge, therefore, ordered the appellant to show that he was not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, or that he completed 2 years of current continuous service in the same or similar positions in an Executive branch agency under other than a temporary appointment limited to 2 years or less. *Id.*

¶6 In response the appellant reiterated his claim that Congress intended that DHS employees receive adequate due process and fair treatment in their appeals, that [5 C.F.R. § 9701.704\(c\)](#) effectuated this intent without distinguishing between excepted or competitive service employees, and that the appellant could, therefore, appeal his termination under [5 C.F.R. § 315.806\(c\)](#). Appeal File, Tab 9.

¶7 The administrative judge then dismissed the appeal for lack of jurisdiction, finding as follows: (1) The agency appointed the appellant to an excepted service position not to exceed 2 years with the possibility of being non-competitively converted to a career or career-conditional appointment; (2) the appellant did not establish that he was a preference eligible or that he had completed more than 2 years in the same or similar position in an Executive agency, as required under [5 U.S.C. § 7511\(a\)](#); (3) the appellant's reliance on [5 C.F.R. §§ 315.806](#) and [9701.704\(c\)](#) was misplaced because those regulations only pertain to probationary employees in the competitive service; and (4) the appellant was not entitled to the

hearing he sought because he did not present a nonfrivolous allegation of jurisdiction. Appeal File, Tab 10.

¶8 In his petition for review, the appellant again argues that the agency denied him due process and that the Board has jurisdiction over his appeal under [5 U.S.C. § 9701\(f\)](#) and [5 C.F.R. §§ 315.806](#) and 9701.704(c). Petition for Review File, Tab 1.

ANALYSIS

¶9 Board jurisdiction over non-preference eligibles in the excepted service is governed by [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#), which requires that the individual: (1) Is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (2) has completed 2 years of current continuous service in the same or similar position in an Executive agency under other than a temporary appointment limited to 2 years or less. *See Allen v. Department of the Navy*, [102 M.S.P.R. 302](#), ¶ 10 (2006). As the administrative judge correctly found, the appellant did not present a nonfrivolous allegation that he satisfied these requirements. Appeal File, Tab 10.

¶10 The administrative judge also correctly found that jurisdiction does not lie under [5 C.F.R. § 315.806](#) because that regulation only applies to probationary employees in the competitive service. *Id.*; *see Allen*, [102 M.S.P.R. 302](#), ¶ 6. We further find that the appellant's reliance on [5 C.F.R. § 9701.704\(c\)](#) is misplaced both for the reason found below and because that regulation was rescinded prior to the appellant's termination. 73 Fed. Reg. 58435 (Oct. 7, 2008); Appeal File, Tab 7, subtab 4a; *see also Dodson v. Department of the Navy*, [111 M.S.P.R. 504](#), ¶ 8 (2009).

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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