UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 207

Docket No. DA-3330-09-0397-I-1

James E. Harrell,

Appellant,

v.

United States Postal Service,

Agency.

October 15, 2009

James E. Harrell, Beeville, Texas, pro se.

Eric B. Fryda, Esquire, Dallas, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the June 5, 2009 initial decision (ID) that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the PFR under 5 C.F.R. § 1201.115(d) and AFFIRM the ID as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a PS-6 Part-Time Flexible (PTF) Sales and Services/Distribution Associate at the Beeville, Texas Post Office, filed an appeal contesting an alleged negative suitability determination and a "[p]osit[i]on

affected by excessing and RIF [reduction in force]." Initial Appeal File (IAF), Tab 1 at 3, 10, Tab 5 at 37. He apparently asserted, inter alia, that the actions violated a settlement agreement in a "1997 RIF action." *Id.*, Tab 1 at 3. He also asserted that the agency had discriminated against him. *Id.* at 4-6. He asked "[t]o be assigned to PS-6 Regular Position or Restored to original PS-7 position." *Id.* at 3. In response to the administrative judge's (AJ's) Acknowledgment Order, he stated that his appeal "was to reduction in pay and demotion affected by a RIF and date of action 03/23/2009 and that I am a preference[] eligible veteran with previous MSPB activity which was settled in my favor due to a previous RIF within the United States Postal Service."[1] IAF, Tab 4 at 3.

¶3 The agency moved to dismiss the appeal for lack of jurisdiction on the bases that the appellant had not been subjected to a RIF, an appealable adverse action, a breach of a prior settlement agreement, or a negative suitability determination. IAF, Tab 5 at 4-8. The agency asserted that the appellant voluntarily sought a transfer from Denver, Colorado, to Beeville; that it granted his request on June 24, 2006; and that, to the extent that there was a 1997 settlement agreement, he voluntarily relinquished any rights under the agreement when he requested the transfer. *Id.* at 6-7. It submitted a June 13, 2006 letter from its Rio Grande District Personnel Services office to the appellant stating that his request for reassignment from Ramp Clerk AMF, PS-07, in Denver to PTF Mail Processing Clerk, PS-05, in Beeville had been approved and was effective June 24, 2006. *Id.* at 39. It also submitted the PS-50 indicating that the "change-to-lower level" from the PS-7 Full-Time (FT) Ramp Clerk AMF position in Denver to the PS-5 PTF Mail Processing Clerk in Beeville was "effected at employee's request." *Id.* at 38.

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[1] Although the appellant initially claimed that the agency violated his veterans' preference rights, IAF, Tab 1 at 3, 4, 8, he later explicitly stated that he did not intend to file an appeal under the Veterans Employment Opportunities Act of 1998, *id.*, Tab 4 at 3; ID at 6.

¶4 The AJ issued a May 7, 2009 jurisdictional order stating that it was unclear whether the appellant had been affected by an action over which the Board has jurisdiction. Noting that the appellant bears the burden of proving jurisdiction by preponderant evidence, the AJ ordered him to specifically identify the agency action he was challenging, provide any documentation he had that related to the action, and submit evidence and argument explaining why the Board has jurisdiction. IAF, Tab 6 at 2. She stated that "[t]he appellant's submission must be filed with the Board no later than **May 17, 2009**." *Id.* at 2. She further stated that the record on the identified jurisdictional issues would close on that date, and that, absent receipt of a non-frivolous allegation of facts which, if true, would establish jurisdiction, she would dismiss the appeal. *Id.* at 2-3.

¶5 In her June 5, 2009 ID, the AJ recounted the background of the appeal and then stated that the appellant did not respond to her May 7, 2009 jurisdictional order. ID at 1-4. The AJ found as follows: The appellant filed a 1997 appeal challenging a RIF demotion, the parties settled the appeal, and the appeal was dismissed in 1998 in a decision that became the Board's final decision. The appellant's 1999 petition for enforcement of the settlement agreement was denied in a decision that also became the Board's final decision. The settlement agreement transferred the appellant to the Ramp Operator position in Denver. The appellant did not explain the intervening events between that action and his assignment to Beeville. *Id.* at 5.

¶6 The AJ dismissed the appeal for lack of jurisdiction without providing the appellant his requested hearing because she found that he failed to raise non-frivolous allegations of fact which, if proven, would establish Board jurisdiction. ID at 1 n.2, 2, 6. The AJ found that the appellant had not alleged or provided any evidence that, since 1997, he had been demoted, separated, or furloughed for more than 30 days by RIF. She further found that excepted-service Postal Service employees such as the appellant have no right to appeal suitability determinations to the Board. She thus found that the appellant failed to show that he had been

affected by an action over which the Board has jurisdiction. *Id.* at 5-6. Because she found that the Board lacks jurisdiction, she similarly found that the Board lacks jurisdiction over the appellant's discrimination claims. *Id.* at 6 n.5.

¶7 The appellant has filed a PFR. PFR File, Tab 1. The agency has not responded to the PFR.

ANALYSIS

¶8 The appellant asserts that, contrary to the AJ's statement, he filed a response to her jurisdictional order. He contends that it detailed, with supporting documents, "RIF affecting pay and demotion" and "previous MSPB appeal dated year 1997 decided in [his] favor due to RIF, displacement/downgrade in duties and enforcement of decision." He states that his "[p]ay status and career permanent position was affected by a RIF," and apparently requests "regular fulltime status." PFR at 3.

¶9 As the appellant asserts, he filed a response to the AJ's jurisdictional order. The record below contains his "Response to Order to show cause dated 5/7/2009," which indicates that it was apparently electronically filed with the regional office at 11:58 p.m. on Sunday, May 17, 2009, and apparently received at approximately 12:56 a.m. on Monday, May 18, 2009. IAF, Tab 7. The filing noted that he could not upload the documents supporting his response and that he would fax them. *Id.* at 3. He faxed the documents to the regional office on Monday, May 18, 2009. IAF, Tab 8. The ID does not indicate that the AJ was aware of the submissions. But, if she was, she erred to the extent that she rejected one or both of them as not submitted by the May 17, 2009 deadline identified in her jurisdictional order because they were timely filed by the next work day following the Sunday deadline. *See* 5 C.F.R. § 1201.23.

¶10 Because the AJ issued her ID without considering the appellant's timely response to her jurisdictional order, we have considered the response on review. *See, e.g., Riggsbee v. Office of Personnel Management*, 111 M.S.P.R. 129, ¶ 9

(2009); *Senyszyn v. Department of the Treasury*, 110 M.S.P.R. 437, ¶¶ 6-7 (2009). The evidence the appellant submitted in response to the AJ's jurisdictional order included the following: A PS-50 indicating that he was placed in the FT PS-6 Ramp Clerk AMF position in Denver effective March 28, 1998, as "Result of MSPB Settlement Agreement"; a PS-50 indicating that the position was later upgraded to PS-7; a January 2007 PS-50 identifying him as a PTF PS-5 Sales and Services/Distribution Associate at Beeville, with the remark "Senior Qualified Applicant"; a PS-50 indicating that the position was later upgraded to PS-6; a March 2009 Step 1 "Maximization Grievance" filed by the union, in which it charged the agency with violating the collective bargaining agreement by failing to maximize the number of FT employees and minimize the number of PT employees at Beeville and asked the agency to convert the senior PTF Clerk to FT status; Beeville Postmaster Art Contreras's April 1, 2009 denial of the grievance, in which he stated that Theresa Andy had been reassigned to Beeville as a FT Mail Processing Clerk as part of the forced reassignment of excessed employees out of the Dallas office and that he assumed that the reassignment would make the grievance moot since she would increase the percentage of FT to PTF employees at Beeville; and a PS-50 documenting Andy's involuntary reassignment to Beeville as a Full Time PS-6 Mail Processing Clerk effective March 28, 2009. IAF, Tab 8 at 4-10. Thus, the appellant apparently argued that Andy was subjected to a RIF; that the RIF affected him because, as the senior PTF employee, he would have received a FT position under the grievance; and that the agency actions somehow violated his previous settlement agreement. IAF, Tab 7 at 3.

¶11 The appellant's response to the AJ's jurisdictional order does not present a non-frivolous allegation of jurisdiction over his appeal. The AJ noted the appellant's failure to provide a copy of the settlement agreement reached in his previous Board appeal or to indicate whether the appeal was subject to the Board enforcement authority. She also noted the agency's argument that the settlement

agreement might have been superseded by the appellant's voluntary request for a transfer from Denver to Beeville. IAF, Tab 6 at 2. The appellant has still not provided a copy of the settlement agreement or contested the agency's assertion that he voluntarily transferred to Beeville at a lower grade. Thus, he has not made a non-frivolous allegation of Board jurisdiction over his appeal because of any jurisdiction to enforce a previous settlement agreement. *See, e.g., Gerdts v. Department of Labor*, 111 M.S.P.R. 412, ¶ 16 n.2 (2009); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994) (in determining whether the appellant has made a non-frivolous allegation of jurisdiction entitling him to a hearing, the AJ may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the AJ may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive). Similarly, although Contreras's memorandum indicated that Andy's transfer would affect PTFs' hours, IAF, Tab 8 at 6, the appellant has not non-frivolously alleged that he was subjected to an appealable RIF in the form of a demotion, separation, or furlough for more than 30 days, thereby providing the Board with jurisdiction, *Adams v. Department of Defense*, 96 M.S.P.R. 325, ¶ 9, *review denied*, 112 F. App'x 14 (Fed. Cir. 2004); 5 C.F.R. § 351.901. Rather, he appears to assert that, in effect, he was denied a promotion to a full-time position by Andy's transfer. The Board generally lacks jurisdiction over an appellant's non-selection for a promotion.[2] *See, e.g., Morales v. Social Security Administration*, 108 M.S.P.R. 583, ¶ 5 (2008).

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[2] In his PFR, the appellant also alleges retaliation because of previous Board and equal employment opportunity activities. PFR at 3. Even if the appellant had raised these affirmative defenses below, we would lack jurisdiction to address them absent an otherwise appealable action. *See, e.g., Flores v. Department of the Army*, 98 M.S.P.R. 427, ¶ 9 (2005); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

¶12 Accordingly, we DISMISS the appeal for lack of jurisdiction.

ORDER

¶13 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:

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