UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 2

Docket No. DC-0353-09-0535-I-1

Frederick J. Beverly,

Appellant,

v.

United States Postal Service,

Agency.

January 7, 2010

Frederick J. Beverly, District Heights, Maryland, pro se.

Charles Dudek, Esquire, Landover, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that dismissed the appeal for lack of Board jurisdiction. We GRANT the PFR; VACATE the ID; and REMAND the case to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a preference eligible Letter Carrier with the Washington, D.C. Customs House Station. Initial Appeal File (IAF), Tab 5, subtab 4(a). Effective February 8, 2007, the agency placed him on indefinite emergency off-

duty status without pay while it decided whether or not to take disciplinary action against him for improper conduct. *Id.*, subtab 4(d). In May 2007, the agency proposed to remove the appellant for improper conduct in the form of inappropriate retention of agency funds, and the removal was later effected on July 31, 2007. *Id.*, subtab 4(b) at 3, subtab (c). The appellant grieved the removal action, and on November 20, 2007, the parties executed a Formal Step A Grievance Resolution that mitigated the removal to a 7-day suspension. IAF, Tab 8 at 12, Tab 9 at 4.

¶3 On May 12, 2009, the appellant filed a pro se Board appeal, checking the boxes for failure to restore/reemploy/reinstate or improper restoration/reemployment/reinstatement, and a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). IAF, Tab 1 at 3-8. He alleged that although the agency cleared him to return to duty in December 2007, the agency refused to restore him to duty. *Id.* at 5-6, 10. The appellant did not request a hearing. *Id.* at 2.

¶4 The administrative judge (AJ) ordered the appellant to demonstrate that he timely filed his appeal, and that the Board has jurisdiction over his restoration and USERRA claims. IAF, Tab 2 at 2, Tab 3 at 2-8. However, the appellant did not respond. The agency subsequently filed a motion to dismiss the appeal for lack of jurisdiction and as untimely filed. IAF, Tab 5, subtab 1.

¶5 The AJ issued an ID dismissing the appeal for lack of jurisdiction. ID at 1, 5. The appellant has filed a PFR of this decision. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition. PFRF, Tab 5.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it 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). An employee's

voluntary absence from work is unappealable. *Johnson v. U.S. Postal Service*, 110 M.S.P.R. 679, ¶ 8 (2009). If, however, an agency bars an employee from duty for more than 14 days, the employee's absence is considered a constructive suspension appealable to the Board. *Id.*; *see* 5 U.S.C. §§ 7512(2), 7513(d). An employee who alleges that he was constructively suspended must prove by preponderant evidence that his absence was involuntary. *Johnson*, 110 M.S.P.R. 679, ¶ 8; 5 C.F.R. § 1201.56(a)(2)(i). The dispositive question in such a case is whether the agency or the employee initiated the absence. *Johnson*, 110 M.S.P.R. 679, ¶ 8. If the employee initiated the absence, then it is not a constructive suspension. *Id.* The Board has recognized that constructive suspension claims generally arise in two situations: when an agency places an employee on enforced leave pending an inquiry into his ability to perform; or when an employee who is absent from work for medical reasons asks to return to work with altered duties, and the agency denies the request. *Id.*, ¶ 9.

¶7 On review, the appellant argues that the AJ erred in "consider[ing] this case as an injury compensation issue rather than a simple case of failure to rightfully reinstate following an on the job incident in which [he] was ultimately vindicated and is thus entitled to restoration to duty." PFRF, Tab 1 at 3. Although on review and on appeal below, the appellant uses the terms "restoration" and "reinstatement," and checked boxes on his appeal form to indicate that he was filing restoration and USERRA claims, we glean from the appellant's submissions on appeal below and his arguments on review that the appellant was actually alleging constructive suspension and USERRA discrimination claims. PFRF, Tab 1 at 3-4; IAF, Tab 1 at 3-8, Tab 8 at 1-2, 12. "Pro se petitioners are not expected to frame issues with the precision of a common law pleading." *Roche v. U.S. Postal Service*, 828 F.2d 1555, 1558 (Fed. Cir. 1987).

¶8 It is undisputed that on November 20, 2007, the parties entered a Formal Step A Grievance Resolution that mitigated the removal to a 7-day suspension,

and that the appellant remains on the rolls. IAF, Tab 5, subtab 1 at 1, subtab 4(a), Tab 8 at 12, Tab 9 at 4. The appellant alleged that despite his attempts to return to work since December 2007, the agency has refused to return him to duty status with pay. PFRF, Tab 1 at 3-4; IAF, Tab 1 at 5-6. Thus, the appellant asserted that, at the time he filed his appeal, he had been in leave without pay status involuntarily for approximately 1 year and 3 months. IAF, Tab 1 at 5. He also apparently contended that the delay in returning him to duty may have involved his work-related injuries. *Id.* at 5, 10.

¶9 The appellant's allegations and supporting documentation on appeal below appear to describe a constructive suspension claim, although the appellant did not label it as such or specifically describe the circumstances of his continued absence. *See Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 9 (2005). An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). The AJ's orders did not provide the appellant with explicit information concerning what was required to establish Board jurisdiction over a constructive suspension claim. IAF, Tab 3. They only apprised the appellant of his burden to establish that he timely filed his appeal, and that the Board has jurisdiction over the appellant's purported restoration and USERRA claims. IAF, Tabs 2-3. We must therefore remand this appeal to afford the appellant an opportunity to submit evidence and argument to show that the Board has jurisdiction over his constructive suspension claim. *See Sage v. Department of the Army*, 108 M.S.P.R. 398, ¶ 7 (2008) (remanding the appeal with instructions to advise the appellant of the elements of a constructive suspension claim).

¶10 Because of his disposition of the appeal, the AJ did not determine whether it was timely filed. *See* ID at 5 n.∗. Although there is no time limit for filing an appeal under USERRA, *Tierney v. Department of Justice*, 89 M.S.P.R. 354, ¶ 6

(2001), the timeliness of a constructive suspension appeal is also at issue.* If the AJ finds that the Board has jurisdiction over the appellant's constructive suspension appeal, then he must further determine whether such an appeal was timely filed. *See Clavin*, 99 M.S.P.R. 619, ¶ 10.

ORDER

¶11 Accordingly, we REMAND this appeal for further adjudication consistent with this Opinion and Order. The AJ shall issue a jurisdictional notice advising the appellant of what he must establish in order to make a nonfrivolous allegation that he was constructively suspended, and afford the parties an opportunity to submit additional evidence and argument relating to jurisdiction over the appellant's constructive suspension appeal. If the appellant nonfrivolously alleges jurisdiction, then he is entitled to a hearing at which he must prove jurisdiction by preponderant evidence.

FOR THE BOARD:

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

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* While the appellant checked the box for a USERRA claim on his appeal form, and mentions it cursorily on PFR, his specific allegations regarding USERRA are unknown. IAF, Tab 1 at 4; PFRF, Tab 1 at 4. He responded to USERRA-related questions on the appeal form with "Not Applicable" and "More research required." IAF, Tab 1 at 7-8.