UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 69

Docket No. DA-0752-10-0273-I-1

Arturo Martinez, III,

Appellant,

v.

Department of Homeland Security,

Agency.

April 30, 2012

Walter E. Dresslar, Austin, Texas, for the appellant.

Kimberly B. Elliott, Esquire, Laredo, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his termination appeal for lack of jurisdiction without a hearing. For the reasons set forth below, we GRANT the petition for review and REMAND the case for further adjudication.

BACKGROUND

¶2 On June 26, 2006, the appellant, a nonpreference eligible, received an excepted service appointment in the Federal Career Intern Program (FCIP) as a Border Patrol Agent (BPA), GS-1896-05. Initial Appeal File (IAF), Tab 7, Subtab 4aaa. Pursuant to the FCIP, his appointment continued for 2 years, and

upon satisfactory completion of the internship, he was converted to a career-conditional appointment in the competitive service as a BPA, GL-1986-09. *Id.*, Subtab 4nn. On December 7, 2008, he was converted to the excepted service pursuant to the FCIP as a Customs and Border Protection Officer (CBPO), GS-1985-09. *Id.*, Subtab 4w. Like the appellant's first FCIP appointment, the December 7, 2008 appointment was expected to continue for 2 years, with a potential conversion to a career or career-conditional appointment in the competitive service upon satisfactory completion of the internship. *Id.* On January 28, 2010, the agency notified the appellant that he would be terminated from his appointment, effective that same day, based on his arrest for resisting arrest, evading arrest using vehicle, engaging in a "drag racing-acceleration contest," and violating the agency's directive related to limited use of government property.[1] *Id.*, Subtab 4d. The appellant filed a timely appeal with the Board and requested a hearing. IAF, Tab 1.

¶3 On March 9, 2010, the administrative judge issued an order informing the appellant that, because he was not a preference eligible, and because he had less than 2 years of current continuous service, there was a question as to whether the Board had jurisdiction over his appeal. IAF, Tab 5. The administrative judge set forth the elements of proof required to establish that the appellant was an

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[1] For the first time with his petition for review, the appellant submits an order of dismissal, dated March 29, 2010, dismissing the criminal action in which he was charged with "resist arrest search or transport." Petition for Review (PFR) File, Tab 1 at 29. Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant asserts that the document was not available at the time of the deadline to file his submission on jurisdiction and that he received it from the court "just prior" to the issuance of the initial decision. PFR File, Tab 1 at 6. The appellant fails to explain why he did not submit the document to the administrative judge as soon as he received it even though he admits to receiving it prior to the issuance of the initial decision. Accordingly, the document is not new. Moreover, even if the document were new, it is not material. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

"employee" with Board appeal rights under 5 U.S.C. § 7511(a), and ordered the appellant to file evidence and argument on the issue. *Id*. After receiving responses from both parties, the administrative judge found, based on the written record, that the appellant failed to make a nonfrivolous allegation that he was an employee with appeal rights. IAF, Tab 15, Initial Decision at 7. Accordingly, the administrative judge dismissed the appeal for lack of jurisdiction based on the written record, without conducting a hearing. *Id*.

ANALYSIS

¶4 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 appellant who makes a nonfrivolous allegation of jurisdiction, i.e., claims that, if proven, would establish the Board's jurisdiction, is entitled to a hearing at which he must then prove jurisdiction by a preponderance of the evidence. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc).

¶5 Because the appellant is a nonpreference eligible who was terminated from a position in the excepted service, he may appeal his termination to the Board if and only if he qualifies as an "employee" under 5 U.S.C. § 7511(a)(1)(C). *See* 5 U.S.C. § 7513(d). Under § 7511(a)(1)(C), a nonpreference eligible in the excepted service is an "employee" if he

> (i) is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
>
> (ii) has completed 2 years of current continuous service in the same or smiliar positions in an Executive agency under other than a temporary appointment limited to 2 years or less[.]

5 U.S.C. § 7511(a)(1)(C). The Board has jurisdiction if either § 7511(a)(1)(C)(i) or (ii) is satisfied. *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999).

¶6 Assuming without deciding that the appellant was serving under an initial appointment pending conversion to the competitive service,[2] he qualifies as an employee under § 7511(a)(1)(C)(i) if and only if he was not serving a probationary or trial period at the time of his termination. An individual's prior service may be tacked toward the completion of a probationary or trial period in the excepted service where the prior service was: (1) performed in the same agency; (2) performed in the same line of work; and (3) completed with no more than one break in service of less than 30 days. *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 12 (2006). It is undisputed that the appellant's prior service as a BPA—which, if tackable, was of sufficient duration to complete the appellant's 2-year trial period—was performed in the same agency, with no break in service.[3] Thus, if the appellant was serving under an initial appointment pending conversion to the competitive service, he qualifies as an employee under § 7511(a)(1)(C)(i) if and only if the BPA and CBPO positions are in the same line

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[2] Our reviewing court has held that § 7511(a)(1)(C)(i) covers only excepted service employees serving "under an initial appointment pending conversion to the competitive service." *Forest v. Merit Systems Protection Board*, 47 F.3d 409, 412 (Fed. Cir. 1995). It is undisputed that the appellant was appointed to the CBPO position under the FCIP, and we have held that appointments under the FCIP are appointments to the excepted service pending conversion to the competitive service upon successful completion of a 2-year trial period. *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 9 (2006); *see also* 5 C.F.R. § 213.3202(o)(6). However, in light of the fact that the appellant had previously served under another FCIP appointment, it is unclear whether, at the time of his termination, he was serving under an "initial" appointment pending conversion to the competitive service, as required under § 7511(a)(1)(C)(i).

[3] The administrative judge erroneously cited *Forest* for the proposition that competitive service time cannot be tacked with temporary excepted service time in the FCIP. *See* Initial Decision at 6. The court in *Forest* did not consider or apply the rules allowing for tacking prior service toward completion of a trial or probationary period in the excepted service under § 7511(a)(1)(C)(i). Rather, the Federal Circuit held that Mr. Forest was not an excepted service "employee" under 5 U.S.C. § 7511(a)(1)(C)(i) because he was not serving "under an initial appointment pending conversion to the competitive service" when he was terminated, as required under § 7511(a)(1)(C)(i). *Forest*, 47 F.3d at 412.

of work. The term "same line of work" is akin to the "same or similar" language found in § 7511(a)(1)(B) and (C)(ii), and is governed by the same standards and case law. *See Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988); *Davis v. Merit Systems Protection Board*, 340 F. App'x 660, 663 (Fed. Cir. 2009); *Sandoval v. Department of Agriculture*, 115 M.S.P.R. 71, ¶ 12, n.2 (2010). Consequently, in order to show that he qualifies as an employee under § 7511(a)(1)(C)(i), the appellant must, at a minimum, establish that the BPA and CBPO positions are the same or similar.

¶7 Whether the BPA and CBPO positions are the "same or similar" is likewise dispositive of the appellant's employee status under § 7511(a)(1)(C)(ii). As noted above, a nonpreference eligible in the excepted service qualifies as an employee under § 7511(a)(1)(C)(ii) if he has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less. The Office of Personnel Management (OPM) has clarified that appointments made under the FCIP are not temporary appointments:

> Career intern appointments are made without the not-to-exceed (NTE) dates used with other temporary or time-limited appointments.
>
> The internship portion of the FCIP is generally made for 2 years, but because the appointment permits the noncompetitive conversion to a permanent job, the appointment is not treated as temporary or time-limited.

70 Fed. Reg. 44,219 (Aug. 2, 2005). Consistent with that guidance, the Standard Form 50 recording the appellant's December 7, 2008 conversion to the excepted service under the FCIP does not include an NTE date, and bears the nature of action code "570," which OPM has reserved for non-temporary excepted service appointments of employees already on an agency's rolls. IAF, Tab 7, Subtab 4w; *see Guide to Processing Personnel Actions*, Chapter 11, Table 11-A, *available at* http://www.opm.gov/feddata/gppa/gppa11.pdf. We therefore conclude that the appellant was not serving under a temporary appointment limited to 2 years or

less while serving under the FCIP. Furthermore, between his service as a CPBO and his prior service as a BPA, the appellant had more than 2 years of current continuous service in an Executive agency at the time of his termination. *See Beets v. Department of Homeland Security*, 98 M.S.P.R. 451 (2005) ("current continuous service" under § 7511(a)(1)(C)(ii) means service immediately prior to the action at issue with no break in service). Thus, if the BPA and CPBO positions are the same or similar, the appellant qualifies as an employee under § 7511(a)(1)(C)(ii).

¶8 In sum, the Board's jurisdiction over this appeal turns on whether the BPA and CPBO positions are the same or similar for purposes of § 7511(a)(1). If they are not, then the appellant is not an employee under either subsection (C)(i) or (C)(ii), and he may not appeal his termination to the Board. If the positions are the same or similar, then he qualifies as an employee under subsection (C)(ii), which is sufficient to establish his right of appeal. *See Van Wersch*, 197 F.3d at 1151. In the latter event, it is unnecessary to decide whether the appellant is also an employee under subsection (C)(i).

¶9 The regulations implementing 5 U.S.C. chapter 75, subchapter II, define "similar positions" as "positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work." 5 C.F.R. § 752.402. Moreover, as noted above, positions may be deemed "similar" if they are in the "same line of work," which has been interpreted as involving "related or comparable work that requires the same or similar skills." *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988). Our reviewing court has interpreted such language to mean that positions are similar "if experience in [one] position demonstrates the knowledge, skills, and abilities required to perform the work of the other job." *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1333 (Fed. Cir. 2006); *accord Mathis*, 865 F.2d at 234; *Spillers v. U.S. Postal*

Service, 65 M.S.P.R. 22, 26 (1994). In conducting this analysis, the Board must focus on the employee's actual duties and the work actually performed. *Davis v. Merit Systems Protection Board*, 340 F. App'x 660, 663 (Fed. Cir. 2009); *Maibaum v. Department of Veterans Affairs*, 116 M.S.P.R. 234, ¶ 15 (2011); *see also Coradeschi*, 439 F.3d at 1333-34; *Mathis*, 865 F. 2d at 233-35.

¶10 The CBPO position description indicates that the primary responsibility of the CBPO is to identify potential terrorists and instruments of terror and to perform enforcement activities to prevent the entry of terrorists and instruments of terror, harmful pests and diseases, illegal drugs and contraband, and illegal aliens and importations/exportations contrary to law and trade agreements from entering/exiting the United States. IAF, Tab 6, Attachment D. The description further states that the CBPO performs the full range of inspection, intelligence analysis, examination, and law enforcement activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry, and interprets the laws and regulations of a broad range of federal, state, and local agencies, relating to the admissibility of people, cargo, and conveyances. *Id*.

¶11 The BPA position description indicates that the incumbent is responsible for detecting and preventing the illegal entry of aliens into the United States, and apprehending persons suspected of such violations, as well as detecting and apprehending persons making false claims to legal status in the United States, persons who have violated the conditions of their admission, and any other persons have violated Immigration and Nationality or related laws. *Id*., Attachment C. Like the CBPO position, the BPA position requires proficiency with firearms. *See id*., Attachments C, D. The position description also provides that, in addition to the enforcement of immigration laws, the BPA works closely with U.S. Customs, and has incidental responsibility for detecting violations of customs laws committed in his/her presence, referring violators encountered, and safeguarding any contraband involved. *Id*., Attachment C.

¶12 In addition to the customs-related duties described in the position description, the record further reflects that the Commissioner of U.S. Customs and Border Protection has designated BPAs to serve as customs officers, effective upon completion of a 12-hour training course, covering the Fourth Amendment, vessel search, document checks, expanded arrest authority, and currency violations. *See* IAF, Tab 8, Subtab 1 at 2-5. BPAs designated as customs officers acquire significant additional enforcement authorities pursuant to title 19, including, inter alia, border search authority under 19 U.S.C. § 1581(a) for all items, inbound and outbound; authority to enter the property of others pursuant to 19 U.S.C. § 1595(b); document check authority pursuant to 19 U.S.C. § 1581(a); broad seizure authority pursuant to 19 U.S.C. §§ 1581(f), 1595a(a) and (c); and general arrest authority pursuant to 19 U.S.C. § 1589a. IAF, Tab 8, Subtab 1 at 6. The appellant asserts that, as a BPA, he routinely searched persons, baggage, cargo, and carriers for contraband, and exercised judgment necessary to apprehend, detain, or arrest persons for violations of customs law as well as federal immigration and other laws. IAF, Tab 6 at 9.

¶13 Based on the written record, we conclude that the appellant has made a nonfrivolous allegation that the BPA and CBPO positions are similar for purposes of 5 U.S.C. § 7511(a)(1)(C). While there are notable differences between the job descriptions, such as the fact that CPBOs work primarily at ports of entry, whereas BPAs work primarily between ports of entry, our reviewing court has cautioned against placing too much emphasis on job description dissimilarities. *See Coradeschi*, 439 F.3d at 1334 (appellant made nonfrivolous allegation that Federal Air Marshal (FAM) position was similar to Immigration & Naturalization Service (INS) Agent position, notwithstanding the fact that FAMs enforce criminal laws primarily in the confines of planes while INS agents enforce immigration laws primarily within business establishments); *Mueller v. Merit Systems Protection Board*, 991 F.2d 811, slip op. at 2 (Fed. Cir. 1993) (Table) (finding that the administrative judge "placed too much reliance on the position

descriptions instead of actual work performed"). Rather, the Board should look to skills and fundamental character of the positions, which the appellant has nonfrivolously alleged are closely related. *See id*. (noting that both FAM and INS Agent positions required firearm proficiency and the ability to enforce laws and apprehend criminals); *see also Mathis*, 865 F.2d at 235 (finding jobs of special delivery messenger and distribution clerk to be similar because the duties of each position involved handling of the mail). The fact that the BPA and CPBO positions do not share the same occupational code is not dispositive of whether the positions are similar, and therefore does not render the appellant's allegations frivolous. *See, e.g.*, *Davis*, 340 F. App'x at 662; *Mueller*, 991 F.2d 811, slip op. at 1-4; *see also Maibaum*, 116 M.S.P.R. 234, ¶ 17. We note that the agency has provided documentary evidence concerning the differing training requirements for the two positions; however, in light of the appellant's allegations, that evidence is likewise not dispositive at this stage of the proceedings. *See Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). We conclude, therefore, that the appellant is entitled to an evidentiary hearing at which he may attempt to prove by a preponderance of the evidence that the BPA and CBPO positions are similar for purposes of 5 U.S.C. § 7511. *See Coradeschi*, 439 F.3d at 1334.

ORDER

¶14 Accordingly, we REMAND this appeal to the Dallas Regional Office for further proceedings, including a jurisdictional hearing and, if appropriate, adjudication on the merits.

FOR THE BOARD:

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