UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

98 M.S.P.R. 354

TODD M. JACK,
Appellant,

v.

DEPARTMENT OF COMMERCE,
Agency.

DOCKET NUMBER
DC-531D-03-0557-I-1

DATE: March 24, 2005

Todd M. Jack, Winchester, Virginia, pro se.

Susan Kane, Esquire, Arlington, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Susanne T. Marshall, Member
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed this appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and REMAND the appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a GS-13 Patent Examiner at the agency's Patent and Trademark Office. On September 22, 2002, he completed the waiting period

necessary to receive a within-grade increase to step 3 of the GS-13 grade.[1] Initial Appeal File (IAF), Tab 4, Subtab 4(o). However, on September 17, 2002, the appellant's supervisor certified that his performance was not at an acceptable level of competence to warrant an increase to the next step of his grade. *Id.* Accordingly, as reflected in a form SF-50, the appellant's within-grade increase was denied. *Id.*, Subtab 4(l). The agency did not provide the appellant with written notice of its action.

¶3 By letter dated November 6, 2002, the appellant wrote to Esther Kepplinger, Deputy Commissioner of Patent Operations, "formally request[ing]" that the agency's decision to deny his within-grade increase be reversed and that his step increase be retroactively granted. IAF, Tab 10. The letter also stated, "[i]f you do not have the authority to grant my request, please see that the individual with that power does so." *Id.* The agency did not respond to this request.

¶4 Over seven months after his within-grade increase had been denied, the appellant received written notice of the agency's decision. IAF, Tab 9. The notice, dated May 15, 2003, also advised the appellant of his right to request reconsideration. The notice explained that, if the appellant desired to make such a request, the request must be in writing and be directed to Margaret Focarino, his second-line supervisor, within 15 calendar days of his receipt of the notice. *Id.* Although the appellant submitted a timely request for reconsideration, it was directed to his immediate supervisor instead of Focarino. *Id.*, Tab 10. No response to this request was ever provided. On May 29, 2003, the appellant filed the instant appeal. IAF, Tab 1.

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[1] At the time the appellant completed the waiting period for his within-grade increase, he was on administrative leave pending completion of an agency investigation. *See* IAF, Tab 4, Subtab 4(at). During this time, the agency proposed his removal. *Id.*, Subtab 4(aj). He remained on administrative leave until January 6, 2003, when his removal was mitigated to a 120-day suspension. *Id.*, Subtab 4(i).

¶5 The administrative judge (AJ) issued a notice to show cause advising the parties, *inter alia*, that the Board may lack jurisdiction over the appeal because it only has jurisdiction over the denial of a within-grade increase if the agency has affirmed its initial determination upon reconsideration or has unreasonably refused to act on a reconsideration request. *Id.*, Tab 11. According to the AJ, it appeared that the appellant did not request reconsideration in accordance with the agency's instructions and that the Board may, therefore, lack jurisdiction over the appeal. *Id.* After both parties filed argument and evidence concerning this issue, the AJ dismissed the appeal for lack of jurisdiction without conducting a hearing. *Id.*, Tabs 12, 13, 14, 15.

¶6 In dismissing the appeal, the AJ noted that, under 5 C.F.R. § 531.410(a), an employee may request reconsideration of a negative determination by filing a written response not more than 15 days after receiving notice of the determination. *Id.*, Tab 15 at 4. The AJ found that in this case, because the appellant's letter to Kepplinger was written before he received official written notice of the denial of his within-grade increase, it did not constitute a request for reconsideration. *Id.* The AJ further found that, because the agency's instructions for filing a request for reconsideration clearly stated that the request was required to be filed with Focarino, the appellant's request, which was filed with his immediate supervisor, did not constitute a request for reconsideration. *Id.* at 7. She additionally determined that the appellant failed to show that the agency had unreasonably refused to act on his request. *Id.* The AJ, accordingly, concluded that the Board did not have jurisdiction over the denial of the appellant's within-grade increase. *Id.*

¶7 In his timely petition for review (PFR), the appellant contends that the AJ erred in "ignor[ing]" the fact that he twice attempted to obtain reconsideration of the denial of his within-grade increase. PFR File, Tabs 1, 3. In support of this contention, the appellant asserts that he submitted his first request to Kepplinger after the agency's Office of Human Resources orally confirmed that his within-

grade increase had been denied but refused to provide him with written confirmation. The appellant further asserts that the regulations governing within-grade increases do not require that requests for reconsideration be submitted to any particular agency official. Notwithstanding these regulatory provisions, the appellant points out that, although he asked Kepplinger to forward his request to the appropriate reconsideration official, Kepplinger failed to do so.

¶8 With regard to his second reconsideration request, the appellant asserts that on May 15, 2003, he received notice of the denial of his within-grade increase from his supervisor. He contends, however, that, because he was not provided with information regarding requests for reconsideration, he followed the instructions set forth in the parties' collective bargaining agreement.[2] According to the appellant, the agency's failure to act on either of his requests effectively denied him due process. The agency has filed a response in which it opposes the appellant's petition. PFR File, Tab 6.

ANALYSIS

¶9 An employee under the General Schedule earns periodic increases in pay, or within-grade increases, as long as his performance is at an acceptable level of competence. 5 U.S.C. § 5335(a). When an agency determines that an employee is not performing at an acceptable level of competence and that a within-grade increase should be withheld, the employee is entitled to "prompt written notice of that determination" and an opportunity for reconsideration under regulations prescribed by the Office of Personnel Management (OPM). 5 U.S.C. § 5335(c).

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[2] We note that the appellant submitted several provisions of a collective bargaining agreement in support of this contention. *See* IAF, Tab 12. However, the agency maintains, citing *Munson v. Merit Systems Protection Board*, 216 F.3d 1037 (Fed. Cir. 2000), that no collective bargaining agreement exits. In the absence of any evidence to the contrary and, in accordance with the court's decision in *Munson*, we find that no collective bargaining agreement was in effect at the time the appellant submitted his request for reconsideration to his immediate supervisor.

OPM's regulations provide that an employee must seek reconsideration of a decision to withhold a within-grade increase in writing within 15 days of receiving the decision from the agency. 5 C.F.R. § 531.410(a)(1). The time limit to request a reconsideration may be extended, however, if the employee shows that he was not notified of the time limit and was not otherwise aware of it. 5 C.F.R. § 531.410(b). The statute provides that the employee may appeal to the Board if the agency affirms its decision to withhold a within-grade increase on reconsideration. 5 U.S.C. § 5335(c).

¶10 The Board has found, however, that it can also exercise jurisdiction over an appeal from the denial of a within-grade increase if the agency denied the appellant an opportunity for reconsideration by failing to give notice of the right to reconsideration or if the agency unreasonably refused to act on a request for reconsideration. *See, e.g., Priselac v. Department of the Navy*, 77 M.S.P.R. 332, 335 (1998); *Worthington v. Department of Agriculture*, 43 M.S.P.R. 620, 625 (1990). Consistent with this precedent, we find that the AJ erred in concluding that the Board does not have jurisdiction over the appellant's appeal.

¶11 The record reflects that the appellant's within-grade increase was denied effective September 22, 2002, because his supervisor determined that his work was not at an acceptable level of competence. IAF, Tab 4, Subtab 4(l). The record further reflects that the agency did not provide the appellant with prompt written notice of its action. Indeed, in an agency response to an order to show cause, the agency states that the appellant learned of the denial of his within-grade increase when it was not reflected in his paycheck. IAF, Tab 9 at 7. The agency further states that the denial was subsequently confirmed, not by written notice, but in a telephone conversation with an agency representative. *Id.*

¶12 On review, the agency asserts that, at the time of the appellant's November 6, 2002 letter to Kepplinger, he was on administrative leave pending a decision on his proposed removal. PFR File, Tab 6, at 4. According to the agency, it did not provide written notification and justification for the denial of his within-grade

increase until May 15, 2003, because he did not return to work until earlier that month. *Id.* Nevertheless, as 5 U.S.C. § 5335(c) makes clear, if an agency makes a determination that an employee's work is not at an acceptable level of competence, the employee is entitled to "prompt" written notice of that determination and an opportunity for reconsideration. No exceptions are provided for employees who are on administrative leave or any other type of leave. Moreover, although the Board has not specifically addressed the meaning of the word "prompt" as it is used in this statutory provision, common sense dictates that written notice provided more than seven months after a negative determination does not fall within its terms.

¶13 Thus, we find that the agency's failure to provide written notification of the right to request reconsideration cannot defeat Board jurisdiction, and that the appellant's November 6, 2002 letter to Kepplinger satisfied the requirements for making a timely request. *See, e.g.*, *Priselac*, 77 M.S.P.R. at 336 (indicating that the Board may find that the appellant presented sufficient evidence to justify extending the deadline for requesting reconsideration). Accordingly, we conclude that the Board has jurisdiction over this appeal because the agency failed to provide the appellant with prompt written notice of the denial of his within-grade increase, failed to advise him of his right to reconsideration of that determination, and failed to act on his letter to Kepplinger.[3]

ORDER

¶14 Accordingly, we REVERSE the initial decision and REMAND the appeal to the Washington Regional Office for adjudication on the merits of the agency's denial of the appellant's within-grade increase. On remand, the AJ shall allow

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[3] In view of this determination, we find it unnecessary to reach the appellant's remaining contentions.

the parties a reasonable opportunity to supplement the record and afford the appellant a hearing on the merits.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.