

WILLIAM UTTERBACK

v.

DEPARTMENT OF TRANSPORTATION

DOCKET No.

DA752B8120285

OPINION AND ORDER

This case is before the Board upon a petition for review of an initial decision, dated June 9, 1981, dismissing for lack of jurisdiction appellant's appeal of three separate agency decisions.

The presiding official dismissed as untimely appellant's 1981 appeal of his removal for inefficiency in 1972, concluding that the appellant had not shown that he was prevented from meeting the appeal deadline by certain alleged circumstances beyond his control. In his petition, appellant merely reiterates those allegations. Further, his contention that he was continuously "working within the system" to achieve reinstatement since 1972 did not in any way require the presiding official to extend the time limitation for an appeal in this case. Accordingly, appellant's petition with respect to this portion of the initial decision is hereby **DENIED**.

The second and third actions appealed were the agency's failure to reinstate appellant after he had requested reinstatement on June 11, 1973 and May 1, 1980, respectively. As to the second action, the presiding official properly found that appellant had failed to provide any statutory or regulatory authority in effect prior to the Civil Service Reform Act of 1978 which would support his contention that the Board had jurisdiction over such an appeal. Appellant's petition, as it pertains to this portion of the initial decision, does not meet the criteria for review set forth in 5 C.F.R. § 1201.115 and is, therefore, **DENIED**.

With regard to the third action, appellant argued that he had a right of appeal to the Board under 5 C.F.R. § 1201.3(a)(7) (1980). The presiding official rejected that argument, based upon his own analysis of that regulation, finding effectively that the Board's jurisdiction over "[a]ctions involving reinstatement of preference eligibles . . ." is limited to reinstatement after military duty under 38 U.S.C. §§ 2021(a) and 2023. While we agree with the result reached by the presiding official, we disagree with his restrictive interpretation of the Board's appellate jurisdiction.

Section 1201.3 of 5 C.F.R. is merely a non-inclusive summary of the types of actions made appealable to the Board by statute or jurisdiction over any action. Rather, the Board derives its appellate jurisdiction from Reorganization Plan No. 2, from the Civil Service Reform Act of 1978 and from other appropriate provisions of statutes

and regulations. *Kaapana v. Department of the Interior*, 1 MSPB 536 (1980). Appellant has failed to identify any proper source of Board jurisdiction in this case. His reliance, in the petition, on such rules as 5 C.F.R. §§ 315.401(a) and 332.406(b), transgressions of which are not made appealable to the Board by any statute or regulation, is insufficient to confer jurisdiction over his appeal upon the Board. Indeed, the Board has previously found that there is no statute or Federal regulation which provides an employee, such as appellant, with the right to appeal a non-selection for a position or for a reinstatement absent a tenable allegation of entitlement pursuant to 5 C.F.R. part 352 (Reemployment Rights) or 5 C.F.R. part 353 (Restoration Rights). *Humphries v. Veterans Administration*, 3 MSPB 80 (1980).

Accordingly, appellant's petition for review with respect to the third and final portion is also hereby DENIED. Nonetheless, we REOPEN the appeal under 5 C.F.R. § 1201.117, and AFFIRM the initial decision as MODIFIED herein.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., February 9, 1982