

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM D. TINES,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DE3443920447-I-1

DATE: DEC 11 1992

William D. Tines, New Underwood, South Dakota, pro se.

Captain Russell R. Sibbell, Esquire, Ellsworth Air Force
Base, South Dakota, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has timely petitioned for review of an initial decision that dismissed his petition for appeal as untimely filed. For the reasons set forth below, we DENY the petition for review because it fails to meet the criteria for review under 5 C.F.R. § 1201.115. We REOPEN the appeal, however, on our own motion under 5 C.F.R. § 1201.117, VACATE the initial decision, and DISMISS the appeal for lack of Board jurisdiction.

BACKGROUND

On March 7, 1991, the agency informed the appellant that he would be separated from his WG-8 Engineering Equipment Operator position by reduction-in-force (RIF) effective May 11, 1991. See Initial Appeal File (IAF), Tab 4, Subtab 4e. On May 23, 1991, however, the agency assigned the appellant to a permanent intermittent WG-3 Laborer position; the appellant retained his WG-8 grade and pay. *Id.*, Subtab 4d. On October 6, 1991, the agency assigned the appellant to a permanent intermittent WG-8 Airfield Clearing Equipment Operator position that provided employment during the winter months. *Id.*, Subtab 4b.

The appellant remained interested in the WG-3 Laborer position because it provided employment during the summer months. He therefore apparently asked the agency if he could be automatically reassigned to the WG-3 Laborer position during the summer months. *Id.*, Subtab 4a. By letter dated May 29, 1992, the agency denied his request and informed the appellant that, when he accepted the WG-8 position, he became ineligible for an automatic transfer to the WG-3 summer position. *Id.*

The appellant filed a July 10, 1992 petition for appeal in which he sought review of his "termination" from the WG-3 Laborer position. *Id.*, Tab 1. In a July 16, 1992 acknowledgment order, the administrative judge informed the appellant that the Board may not have jurisdiction over his appeal and ordered him to submit evidence and argument

establishing Board jurisdiction. *Id.*, Tab 2 at 2. The administrative judge also noted that the appeal appeared to have been untimely filed and he directed the appellant to submit evidence and argument showing that the appeal was timely filed or that good cause existed for the delay. *Id.* at 2-3.

In response to the acknowledgment order, the appellant contended, *inter alia*, that his appeal was timely filed because he first discovered that he would not receive summer employment with the agency when he received a July 2, 1992 agency letter.¹ *Id.*, Tab 3 at 2-3. The agency submitted its file, *id.*, Tab 4, and moved that the appeal be dismissed as untimely filed. *Id.*, Tab 5. The agency argued that it informed the appellant in its May 29, 1992 letter that he would not automatically be placed in the WG-3 Laborer position, that any right of appeal to the Board would begin accruing as of that date, and that the appellant's July 10, 1992 petition for appeal was due on June 18, 1992. *Id.*; see IAF, Tab 4, Subtab 4a. The agency further noted that the appellant stated in his petition for appeal that the effective date of the action appealed was May 13, 1992. IAF, Tab 5; see IAF, Tab 1.

The appellant argued in reply that the May 29, 1992 letter merely informed him that he would not "automatically"

¹ Although the letter was undated, the appellant submitted a copy of the envelope in which the letter was allegedly sent that indicates the letter was postmarked July 2, 1992. IAF, Tab 3 at 3-4.

be assigned to the WG-3 Laborer position. IAF, Tab 7 (original emphasis). He asserted that he did not know that he definitely would not receive summer employment until he received the July 2, 1992 letter, and thus his appeal was timely filed. *Id.*

In an August 27, 1992 initial decision, the administrative judge dismissed the appeal as untimely filed without a showing of good cause for the delay in filing. See Initial Decision (I.D.) at 2. He found that the appellant's right of appeal to the Board accrued as of October 6, 1991, when the appellant accepted the WG-8 Airfield Clearing Equipment Operator position that did not entitle him to automatic placement in a WG-3 summer position. *Id.* at 4. He further found that the appellant's October 6, 1991 acceptance of the WG-8 position derived from the agency's May 11, 1991 RIF. He therefore determined that the appellant should have filed his petition for appeal within 20 days of the effective date of the RIF, or by May 31, 1991. *Id.* Because he dismissed the appeal as untimely, the administrative judge declined to address the issue of jurisdiction. *Id.* at 4 n.2.

In his petition for review the appellant contends that it is unfair to dismiss his appeal as untimely without addressing the merits of his appeal.² See Petition for Review File, Tab 1. The agency has not responded to the petition.

² With his petition, the appellant includes a copy of a September 8, 1992 letter that he submitted to the regional office after the issuance of the initial decision and that the

ANALYSIS

A petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record. See, e.g., *Goldberg v. Department of Defense*, 39 M.S.P.R. 515, 518 (1990). The appellant's petition for review contains neither evidence nor argument demonstrating error by the administrative judge. See *id.* at 518. The appellant merely objects to the administrative judge's dismissal of his appeal based on "a trumped up and false technicality," rather than addressing the merits of the decision. PFRF, Tab 1 at 2. Therefore, the petition for review does not meet the criteria for review under 5 C.F.R. § 1201.115. See *Goldberg*, 39 M.S.P.R. at 518.

The appellant's petition for appeal was timely filed.

Under 5 C.F.R. § 1201.22(b), an appeal must be filed within 20 days of the effective date of the agency action being appealed. The administrative judge found that the appellant's claim derived from the May 11, 1991 RIF, and that his petition for appeal was due by May 31, 1991. I.D. at 4. We disagree.

regional office rejected as untimely filed after the close of the record without a showing that it was based on new and material evidence not previously available. See IAF, Tab 9; PFRF, Tab 1. In this letter, he addressed the merits of his appeal but did not address the issue of timeliness. Because he has not shown why, despite his due diligence, he could not have submitted this argument before the close of the record below, we will not consider it now. See *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

Although the appellant characterizes the agency's action as a "termination," he did not occupy the intermittent WG-3 Laborer position from which he was allegedly terminated at the time of the action of which he complains. Although he had previously been appointed to the WG-3 Laborer position from May 23 to October 6, 1991, his complaint is not that he was terminated on October 6, 1991, when he accepted the WG-8 Airfield Clearing Equipment Operator position, but rather that he was not selected for the WG-3 Laborer position for summer seasonal work in 1992. Thus, the action of which the appellant complains is actually a nonselection for a position, not a termination. Because the appellant first received notice that he was not selected for summer employment through the agency's July 2, 1992 letter,³ his July 10, 1992 petition for appeal was timely filed.

The Board lacks jurisdiction over the appeal.

It is well-settled that the Board lacks jurisdiction over nonselections. See, e.g., *Tankesley v. Tennessee Valley Authority*, 54 M.S.P.R. 147, 150 (1992); *Diamond v. U.S. Postal Service*, 51 M.S.P.R. 448, 450 (1991), *aff'd*, 972 F.2d 1353 (Fed. Cir. 1992) (Table). Although the administrative judge

³ The agency contended below that the appellant first received notice that he would not receive summer employment through its May 29, 1992 letter. IAF, Tab 5 at 2. That letter appears to be in response to the appellant's request for information and is somewhat ambiguous in that it states that the appellant would not be "automatically" placed in a summer position. *Id.*, Tab 4, Subtab 4a. This letter thus did not unequivocally inform the appellant that he would not receive summer employment.

did not address the jurisdictional issue in his initial decision, he did afford the appellant an opportunity to establish Board jurisdiction over his appeal. See IAF, Tab 2. In response, the appellant alleged that he was "appealing an adverse action due to termination of a previously held position that [he is] unable to return to resulting in loss of employment and salary." *Id.*, Tab 3 at 1. As noted above, despite the fact that the appellant characterizes the agency's July 2, 1992 action as a termination, it is actually a nonselection for a position. We therefore find that the appellant has failed to meet his burden of proving Board jurisdiction over his appeal. Accordingly, we dismiss the appeal. See *Tankesley*, 54 M.S.P.R. at 151.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

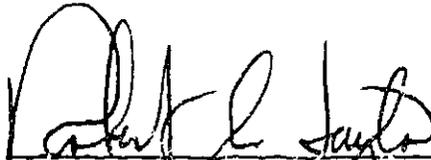
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally,
whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.