UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

98 M.S.P.R.451

SCOTTY W. BEETS,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DA-0752-04-0518-I-1

DATE: April 27, 2005

Gail M. Dickenson, Esquire, Dallas, Texas, for the appellant.

Melissa Mehring, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed this appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant served in the competitive service position of Border Patrol Agent (BPA) in the Immigration & Naturalization Service of the Department of Justice for more than four years until June 2, 2002, when he was appointed to the excepted service position of Civil Aviation Security Specialist (Federal Air Marshal) (FAM) in the Federal Aviation Administration of the Department of Transportation. Initial Appeal File (IAF), Tab 4, Exhibits 1-4, Tab 6, Subtabs 1-4. Effective May 25, 2004, he was terminated from his FAM position.[1] *Id.*

¶3 On appeal from the termination, IAF, Tab 1, the administrative judge (AJ) issued a jurisdictional notice informing the appellant of the criteria for establishing the Board's jurisdiction as an "employee" under 5 U.S.C. § 7511(a)(1), and ordered him to submit evidence and argument to establish the Board's jurisdiction. IAF, Tab 3. After the parties filed their jurisdictional submissions, IAF, Tabs 4, 6, 10, 11, the AJ issued the initial decision dismissing the appeal for lack of jurisdiction, Initial Decision (ID), IAF, Tab 12. She applied the jurisdictional criteria under 5 U.S.C. § 7511(a)(1)(C)(ii) and concluded that the appellant did not satisfy the criteria because he did not have two years of service in his FAM position and his prior competitive service could not be tacked to satisfy the minimum service requirement. ID at 4. She noted that she need not hold a hearing because the appellant failed to raise a nonfrivolous allegation of jurisdiction. ID at 1 n.1.

¶4 The appellant has timely filed a petition for review, arguing that the AJ erred by finding that prior competitive service could not be tacked under section 7511(a)(1)(C)(ii). Petition for Review File (PRF), Tab 1. The agency has timely filed a response opposing the appellant's petition. PRF, Tab 3.

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[1] It is unclear from the record whether the appellant completed his probationary period by the time he was terminated from the FAM position on May 25, 2004. For the reasons discussed in the text below, we find it unnecessary to resolve this issue.

ANALYSIS

¶5 An "employee," as defined in 5 U.S.C. § 7511(a)(1), has appeal rights to the Board from certain agency actions such as a removal. *See* 5 U.S.C. §§ 7512(a), 7513(d). Section 7511(a)(1) defines "employee" as:

> **(A)** an individual in the competitive service--
>
> > **(i)** who is not serving a probationary or trial period under an initial appointment; or
> >
> > **(ii)** who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
>
> **(B)** a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--
>
> > **(i)** in an Executive agency; or
> >
> > **(ii)** in the United States Postal Service or Postal Rate Commission; and
>
> **(C)** an individual in the excepted service (other than a preference eligible)--
>
> > **(i)** who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
> >
> > **(ii)** who 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[.]

Thus, section 7511(a)(1) sets forth different jurisdictional criteria for "an individual in the competitive service" under subsection (A), "a preference eligible in the excepted service" under subsection (B), and "an individual in the excepted service (other than a preference eligible)" under subsection (C).

¶6 The record supports the AJ's undisputed finding that: The appellant's FAM position was in the excepted service; the appellant is not a preference eligible; he was *not* serving "under an initial appointment pending conversion to the competitive service"; and he served "under other than a temporary appointment limited to 2 years or less." IAF, Tab 6, Subtabs 1, 3; ID at 2-4. Therefore, as "an individual in the excepted service (other than a preference eligible)" who was

serving "under other than a temporary appointment limited to 2 years or less," the appellant is subject to the criteria under subsection (C)(ii), as the AJ correctly found. *See Forest v. Merit Systems Protection Board*, 47 F.3d 409, 412 (Fed. Cir. 1995) (subsection (C)(i) applies "only [to] excepted service employees serving 'under an initial appointment pending conversion to the competitive service'"); *cf. Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996) (the Board, as a limited-jurisdiction tribunal, must satisfy itself that it has authority to adjudicate the matter before it, and may raise the question of its own jurisdiction *sua sponte* at any time); ID at 4.

¶7 Subsection (C)(ii) grants Board jurisdiction if the individual "has completed 2 years of current continuous service in the same or similar positions in an Executive agency …." "Current continuous service" means service immediately prior to the action at issue with no break in service. *See* 5 C.F.R. § 752.402(b); *Williams v. Department of Defense*, 96 M.S.P.R. 335, ¶ 11 (2004). Since the appellant did not complete two years of service in the FAM position, he may establish jurisdiction under subsection (C)(ii) only if his BPA service, from which he moved to the FAM position without a break in service, could be tacked to satisfy the two-year minimum service requirement under the subsection. Therefore, we must examine the remaining question -- whether his service in the two positions constituted "service in the same or similar positions in an Executive agency."

¶8 In resolving this question, the AJ found it "not necessary … to decide whether the duties of the two positions are the same or similar," simply "because it is undisputed that, as a BPA, [the appellant] served in the competitive service…." ID at 4. The AJ did not provide any legal support for this finding, and we are unaware of any clear legal support for it.[2] We find it unnecessary to

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[2] In *Williams v. Department of Defense*, 96 M.S.P.R. 335, ¶¶ 12-13 (2004), the Board found it unnecessary to resolve whether the appellant's prior excepted service may be tacked to his subsequent competitive service under section 7511(a)(1)(A)(ii).

resolve this issue here because the undisputed evidence of record shows that the two positions are not "the same or similar positions" and thus cannot be tacked to satisfy the minimum two years of "current continuous service" under subsection (C)(ii).

¶9 Although the appellant requests on review that we remand this "same or similar positions" issue to the AJ for adjudication, we find that a remand is unnecessary because the parties submitted evidence and argument regarding this issue below, IAF, Tabs 4, 6, 11, and the undisputed evidence of record is sufficient to resolve it. *See Spillers v. U.S. Postal Service*, 65 M.S.P.R. 22, 28 (1994) ("The Board can make factual findings [without a hearing] on the threshold issue of jurisdiction when such findings are based on undisputed documentary evidence."); *see also Lowmack v. Department of the Navy*, 80 M.S.P.R. 491, ¶ 10 (1999) (a jurisdictional hearing may be warranted "if the jurisdictional issue cannot be decided based on the documentary evidence of record") (emphasis added); *Pennington v. Department of Veterans Affairs*, 57 M.S.P.R. 8, 11 (1993) (the AJ's failure to issue an adequate jurisdictional notice below did not warrant a remand where the record evidence plainly showed that the Board was without jurisdiction over the appeal).

¶10 The appellant has argued that the two positions are "similar" within the meaning of subsection (C)(ii) because they are both "law enforcement positions" with the "same or similar purposes and … the same or similar core duties" involving national security. IAF, Tab 4 at 1. OPM's implementing regulations 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(g) (emphases added).

¶11 In addition, positions may be deemed "similar" within the meaning of section 7511(a)(1) when they are in "the same line of work," which has been

interpreted as involving related or comparable work that requires the same or similar knowledge, skills, and abilities. *See Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988). The Board has defined "same line of work" to mean "work that is so similar that the positions require the same qualifications, and the nature of the work would place them in the same competitive level for reduction in force purposes." *Ramos v. Department of Justice*, 94 M.S.P.R. 623, ¶ 8 (2003) (emphasis added). "Positions belong in the same competitive level, if they are in the same grade and classification series, and are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one could successfully perform the critical elements of the other position upon entry into it, without undue interruption." *Id.* We stress, though, that "the competitive level for reduction in force purposes is but one factor in determining whether two positions are in the same line of work." *Aizin v. Department of Defense*, 52 M.S.P.R. 146, 150 (1991). In fact, the Board has stated that "the difference in grade levels [which would warrant placing the positions in different competitive levels] alone [i]s not sufficient to make the two positions dissimilar" for purposes of section 7511(a)(1). *Enocencio v. Department of Veterans Affairs*, 79 M.S.P.R. 130, ¶ 6 (1998); *see Spillers*, 65 M.S.P.R. at 26, 28 (in a case involving positions in different grade levels, the Board remanded the case for a determination of whether the positions are "similar" enough to permit tacking under section 7511(a)(1), thereby finding in effect that a difference in grade levels does not, by itself, preclude a finding that the positions are not "similar"). Thus, whether the positions are in the same competitive level is not necessarily determinative of whether they are "similar" under section 7511(a)(1).

¶12 Here, the BPA (GS-9, Occupational Code 1896) and FAM (FV/SV-G, Occupational Code 1801) positions are in different grades and different

classification series,[3] and thus would be placed in different competitive levels. IAF, Tab 4, Exhibits 2, 4, Tab 6, Subtabs 1-4. As noted above, that the positions would be placed in different competitive levels may not be sufficient, by itself, to preclude a finding that the positions are "similar" under section 7511(a)(1). However, the fact that the positions are not only in different grades but also in different classification series *tends* to show that they are not "similar" under section 7511(a)(1). *See Ramos*, 94 M.S.P.R. 623, ¶ 8.

¶13 In addition, the undisputed evidence of record shows that the two positions require significantly different qualifications, as follows: FAMs must complete Advanced Federal Air Marshal Training, which BPAs need not complete,[4] IAF, Tab 4, Exhibit 2, Tab 6, Subtabs 2, 7; and FAMs must have a Top Secret clearance, which BPAs need not have**,** *id.*[5] IAF, Tab 4, Tab 6, Subtabs 1-5, 7. As

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[3] The appellant contended in an affidavit that the two positions are both "classified in the same series, 1800" for "federal law enforcement agent positions." IAF, Tab 11, Affidavit at 1. However, he has not provided any support for this contention, and we find that the GS-1896 and FV/SV-1801 classification series are distinct series. *See Warren v. Department of Defense*, 87 M.S.P.R. 426, ¶ 19 (2001) (GM-301 and GS-343 are different classification series); *see also Sonneborn v. Department of Defense*, 80 M.S.P.R. 215, ¶ 8 n. (1998) (a classification series is a "subdivision of an occupational group consisting of positions similar as to specialized line of work and qualification requirements").

[4] The appellant averred in an affidavit that he "was never sent for [the additional] training" mentioned in the memorandum offering him the FAM position and that it was his "understanding" that his prior BPA experience made "such additional training unnecessary." IAF, Tab 4, Exhibit A at 2. He conceded in a subsequent affidavit, however, that, although he "did not attend the FAM academy training," he did "attend a one week tactical training session" and "received advance Air Marshall [sic] training during [his] tenure with the FAM Service," IAF, Tab 11, Affidavit at 1-2.

[5] It appears from the documentary evidence of record that FAMs are required to be "on-call 24 hours a day," IAF, Tab 6, Subtab 5 at 3, and that BPAs are required "to work long irregular hours, on weekends and at night, frequently changing shifts and duty stations," with assignments being "subject to change without advance notice," *id.*, Subtab 7 at 6. The appellant contended in an affidavit that "[b]oth the FAMs and BPAs are on call 24 hours a day." IAF, Tab 11, Affidavit at 5. We need not determine whether both positions require the incumbent to be on call 24 hours a day because we

the appellant was notified in the agency's written offer of the FAM position, which he accepted and signed, the stringent qualification requirements of the FAM position are mandatory. IAF, Tab 4, Exhibit 2, Tab 6, Subtab 2. The FAM position requires "a background investigation, drug test, Federal Law Enforcement Training, Advanced Federal Air Marshal Training and any pending medical evaluations," and mandates that an incumbent's "[f]ailure to successfully complete the[se] … requirements … or to obtain a Top Secret Clearance, *will* result in termination of employment as a Federal Air Marshal." *Id.* (emphasis added). Moreover, "[a]ny subsequent placement in another position is not guaranteed and employment with the FAA [Federal Aviation Administration] can be terminated." *Id.*

¶14 In light of these significant differences between the BPA and FAM positions, we find that they are not sufficiently "similar" to permit tacking under section 7511(a)(1)(C)(ii). We therefore find that the appellant failed to satisfy the jurisdictional criteria for an "employee" under section 7511(a)(1), and we DISMISS this appeal for lack of jurisdiction.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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find, as discussed in the text, that other significant differences render the positions insufficiently "similar" to permit tacking under section 7511(a)(1)(C)(ii).

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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.