

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

60 M.S.P.R. 325

Docket Number AT-0752-92-0930-I-1

Marcus V. Ferdon, Appellant,

v.

United States Postal Service, Agency.

Date: January 5, 1994

Marcus V. Ferdon, pro se.

Thomas J. Blum, Memphis, Tennessee, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of an October 13, 1992 initial decision that dismissed his appeal as outside the Board's jurisdiction. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND this appeal to the Board's Atlanta Regional Office for further adjudication.

BACKGROUND

On August 10, 1992, the appellant, by his designated representative, filed a petition for appeal in which, inter alia, he stated that he occupied the level 5 position of Modified Distribution Clerk, requested a hearing, and alleged that effective July 31, 1992:

I was working in a level 5 position and have been receiving level 5 pay, until I was told that I was no longer going to receive level 5 pay. I am currently performing all the duties of the level 5 position. I was told I was going to be paid level 4 pay and continue to do level 5 work. My tour II Forman [sic] Mr[.] Charles Talley told me this.

Initial Appeal File (IAF), Tab 1 at 2. He also contended that the agency's action constituted handicap discrimination and violated his Constitutional right of free speech.

Id.

The agency submitted its case file and moved to dismiss the appeal for lack of Board jurisdiction. *Id.*, Tab 3. According to the agency, the appellant occupied a level 4 position, and was never promoted to a level 5 position but was temporarily assigned to such a position and received the higher pay of that position for limited periods of time as the result of an on-the-job injury. *Id.*

In a September 11, 1992 order, the administrative judge ordered the appellant to respond to the motion to dismiss within 10 days of the date of the order. *Id.*, Tab 4. The administrative judge also stated that "[t]he appellant is entitled to a hearing only if he makes a non-frivolous allegation that he suffered a reduction in pay." *Id.* In his timely filed response to the administrative judge's order, the appellant, by his representative, stated as follows:

As a matter of fact [the appellant] has been paid higher level from 1989 thru 1992. He continues to perform the higher level work and yet he is now being paid at the lower level. What has changed? Management contends that the PS form 1723 is "a temporary assignment order ..[.]" and that "this is in no way a guaranteed promotion . . . [] but merely a temporary assignment." However, the PS form 1723 has been used and continues to be used to make *permanent* assignments within the Postal Service.

Id., Tab 5 at 1 (original emphasis).

In the initial decision, the administrative judge made the following finding:

Although the appellant argues that he suffered a reduction in pay, he has not shown that he received a reduction in the rate of basic pay for the position he holds, which is a level 4, Modified Distribution Clerk Position. The fact that he was assigned duties and pay at level 5 on a temporary basis between November 13, 1990, and March 21, 1991, does not create Board jurisdiction over the agency's refusal to continue his assignment at that level.

Id., Tab 8, Initial Decision (ID) at 3. In making these and other findings, the administrative judge relied on a number of documents in the agency's file. ID at 2-3; see IAF Tab 3. The administrative judge denied the appellant's request for a hearing and dismissed the appeal for lack of jurisdiction. ID at 1, 3-4.

The appellant alleges in his petition for review that, on July 9, 1992, his grade level was permanently changed to level 5 but was subsequently lowered.¹ Petition for

¹ The appellant also argues in his petition for review that: The agency refused to give him reasonable time to prepare his appeal; the agency compromised the appeal process when it submitted his interrogatories to the administrative judge; and the agency denied him a choice of representatives when it took reprisal against his representative, who is also an agency employee, by forcing him to withdraw his representation of the appellant. Petition for Review File, Tab 1 at 1. These arguments do not pertain to the issue of Board jurisdiction and thus need not be considered by the Board. The appellant may present these contentions for

Review File (PFRF), Tab 1 at 1. The agency has responded in opposition to the petition for review.² *Id.*, Tab 3.

ANALYSIS

We note that the appellant stated in his petition for appeal that he had filed a formal discrimination complaint concerning his alleged reduction in grade and pay on July 31, 1992, prior to filing his appeal. IAF, Tab 1. The agency acknowledged in its file that the appellant had filed a formal discrimination complaint concerning this matter on July 31, 1992, but did not submit a copy of the complaint. IAF, Tab 3. The Board has held that, where an appellant files a formal discrimination complaint with the agency prior to appealing to the Board, the right to appeal to the Board does not vest until either the agency issues a final decision on the complaint or 120 days elapse. 5 C.F.R. § 1201.154(b); *Grunfelder v. U.S. Postal Service*, 56 M.S.P.R. 119, 122 (1992); *Nichols v. Department of the Navy*, 39 M.S.P.R. 41, 42-43 (1988). The administrative judge should have determined whether the appellant's right to appeal to the Board had vested and, if it had not vested, she should have dismissed the appeal as premature. This error is now irrelevant, however, because 120 days have passed since the filing of the formal discrimination complaint and there is no indication that the agency has issued a final decision on the appellant's complaint. *Grunfelder*, 56 M.S.P.R. at 122; *Nichols*, 39 M.S.P.R. at 41-42. Thus, the appeal is no longer premature.

We also note that, because the agency did not resolve the appellant's formal discrimination complaint or issue a final decision on the complaint within 120 days, the appellant could appeal the matter directly to the Board at any time after the expiration of the 120-day period. 5 C.F.R. § 1201.154(b)(2). Thus, this appeal was timely filed.

Although the threshold issue of whether the Board has jurisdiction over an appeal may be disposed of on the basis of the documentary record in appropriate cases, such disposition is not always permissible. *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed. Cir. 1986); *Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984). The United States Court of Appeals for the Federal Circuit and the Board have held that, where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over an appeal, the appellant is entitled to a hearing on the jurisdictional question. *Dumas*, 789 F.2d at 894; *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985); *Schmidt v. U.S. Postal Service*, 39 M.S.P.R. 188, 192 (1988). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter in issue. *Dumas*, 789 F.2d at 894. In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a

consideration by the administrative judge if, on remand, the administrative judge finds that this appeal is within the Board's jurisdiction.

² After the close of the record on review, see 5 C.F.R. § 1201.114(d), the appellant submitted a reply to the agency's response to the petition for review. PFRF, Tab 4. Because the appellant has not shown that this untimely submission is based on evidence not readily available before the record closed, the Board will not consider it. See 5 C.F.R. § 1201.114(i).

hearing, an administrative judge may consider an agency's documentary submissions. See *Dumas*, 789 F.2d at 894; *Manning*, 742 F.2d at 1428; see also *Hill v. Department of the Air Force*, 796 F.2d 1469, 1472 (Fed. Cir. 1986) (Newman, J., additional views). But, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. See *Dumas*, 789 F.2d at 893-94.

The administrative judge may consider the agency's documentary evidence which tends to show that the appellant has no right to appeal to the Board. In *Manning*, 742 F.2d at 1428, for example, the administrative judge properly considered the agency's un rebutted evidence that Manning was not on forced leave for a period of 14 days or more. Similarly, where an appellant makes a nonfrivolous allegation that his resignation was involuntary due to coercion, the administrative judge may consider the agency's uncontradicted documentary evidence that the appellant was a probationary employee who would not be entitled to appeal rights absent a nonfrivolous claim of marital status or partisan political discrimination. To the extent that the Board's decision in *Collins v. Defense Logistics Agency*, 55 M.S.P.R. 185, 189 (1992), held that the agency's evidence may not be considered at all, we modify it here.

The appellant alleged below that the agency reduced the pay level of his position in that he had been paid at level 5 but was now paid at level 4 despite performing the same work. IAF, Tabs 1, 5. The Board has jurisdiction over such an adverse action. 5 U.S.C. §§ 7511(a)(4) and 7512(4); see *Lake v. U.S. Postal Service*, 40 M.S.P.R. 26, 29 (1989); *Sheehan v. U.S. Postal Service*, 27 M.S.P.R. 115, 117-18 (1985). Thus, the appellant's allegation, if proven, could establish a prima facie case of Board jurisdiction, and therefore the appellant made a nonfrivolous claim of Board jurisdiction over the alleged adverse action.

While the agency submitted some evidence supporting the view that the appellant never suffered a reduction in pay, the evidence is not undisputed. The document pertaining to the appellant's July 15, 1992 assignment to the duties of a Modified Distribution Clerk is ambiguous. IAF, Tab 3, Subtab 4c. Additionally, the record is unclear as to the appellant's basic rate of pay between March 21, 1991, the termination date of his third temporary assignment for which he received pay at level 5, and July 31, 1992, the alleged effective date of the appellant's reduction in pay. Resolution of these disputed issues requires weighing the evidence and resolution of conflicting factual assertions. Accordingly, the administrative judge erred by dismissing the appellant's appeal without affording him a jurisdictional hearing. See *Dumas*, 789 F.2d at 894.

ORDER

Accordingly, we remand this appeal to the Atlanta Regional Office for further development of the record on the issues of jurisdiction, a jurisdictional hearing, and a new jurisdictional determination. If the administrative judge finds that the appellant has established Board jurisdiction over this appeal, she shall adjudicate this appeal on the merits.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.