

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

2009 MSPB 8

Docket No. DC-0752-08-0598-I-1

**Steven A. Deida,
Appellant,**

v.

**Department of the Navy,
Agency.**

January 30, 2009

Tim J. Hargraves, Guantanamo Bay, Cuba, for the appellant.

Susan D. Beck, Gulfport, Mississippi, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was employed as a Firefighter (HAZMAT Technician), GS-0081-07, Step 08, at the Naval Construction Battalion Center in Gulfport, Mississippi. Initial Appeal File (IAF), Tab 13, subtab 4G. On March 14, 2007, the agency issued vacancy announcement number DON0081-OS for several

positions under GS, YL, and YN pay plans at various grades and locations. *Id.*, subtab 4A. The appellant applied for and was selected for the position of Fire Protection Inspector, GS-0081-08, with a duty location at the U.S. Naval Station in Guantanamo Bay, Cuba (GTMO). *Id.*, subtab 4C.

¶3 Under the GS pay system, the appellant's selection for the position was considered a promotion, and was subject to the two-step increase method for setting pay upon promotion. See [5 C.F.R. § 531.214](#). Following this method, upon the appellant's reassignment to GTMO on November 16, 2007, the agency promoted the appellant to the Fire Protection Inspector position as a GS-08, Step 7, and increased his basic pay from \$39,146 to \$42,183. IAF, Tab 13, subtab 4C. The agency documented this action on a Standard Form (SF) 50, Notice of Personnel Action. *Id.* The appellant then began working in his new position at GTMO under the GS pay system.

¶4 However, prior to the appellant's reassignment, on November 11, 2007, the agency converted GTMO to the National Security Personnel System (NSPS).^{*} IAF, Tab 13, subtab 4B. On February 19, 2008, the agency discovered that some of its commands that had been converted to NSPS still had encumbered GS positions. The agency determined that the position to which the appellant had been recruited was covered by NSPS, and that, although his appointment would have been a promotion under the GS pay system, his new position and the position that he previously occupied were both assigned to the same broader pay

^{*} The National Defense Authorization Act for Fiscal Year 2004, Pub.L. No. 108-136, 117 Stat. 1621 (2003) authorized the creation of NSPS, which was established to provide a flexible and contemporary civilian personnel system within the Department of the Defense. One major feature of NSPS is that it has replaced the artificial limitations and restrictions of the traditional federal pay and classification system of multiple grade levels with a broader pay banding structure, which allows the agency to be able to move employees more freely between positions without being bound by narrowly described work definitions. See *National Security Personnel System*, 73 Fed. Reg. 56,344 (Sept. 26, 2008). The NSPS is codified at [5 U.S.C. § 9901](#) *et seq.* Further, the implementing regulation for the system is set forth at 5 C.F.R. Part 9901.

band in NSPS. Therefore, the agency determined that the appellant had not been entitled to a promotion when he was converted to the NSPS pay system. *Id.*, subtabs 4K, 4L, 4N. On June 12, 2008, the agency prepared a SF-50, which cancelled his promotion to the GS-08 position, and a second SF-50, which reassigned him, effective November 16, 2007, from his former position of Firefighter (HAZMAT Technician), GS-0081-07, in Gulfport, Mississippi, to the GTMO position of Fire Protection Inspector, YL-0081-02, with a basic pay rate of \$41,104. *Id.*, subtabs 4E, 4G, 4L. As a result, the agency determined that the appellant's basic pay previously had been set too high by the amount of \$1,079 per year. *Id.*, Tab 13.

¶5 The appellant filed an appeal alleging that the agency improperly cancelled his promotion and reduced his pay. IAF, Tab 1. He specifically asserted that the agency's action constituted harmful error, and was not in accordance with the law. *Id.* He requested a hearing. *Id.*

¶6 The administrative judge (AJ) informed the appellant that the Board might not have jurisdiction over the appeal, and ordered the parties to file evidence and argument on the issue. IAF, Tab 3. The appellant responded that he had accepted and received a promotion to the GS-08 Fire Protection Inspector position from an authorized official, that he had performed in this higher grade from November 2007 until June 2008, and that he had experienced a loss of pay. *Id.*, Tab 4. The agency responded by filing a motion to dismiss, which argued that its action had been a correction of an administrative error in setting the appellant's pay at a rate that was contrary to law and regulation. Specifically, the agency contended that the appellant's appointment to the Fire Protection Inspector position, including the setting of his pay, was required to be processed under the applicable regulations as a voluntary reassignment and not as a promotion. *Id.*, Tab 13.

¶7 Based on the written record, the AJ dismissed the appeal for lack of jurisdiction. She found that, although it was undisputed that the promotion action had taken place, the appellant had failed to meet his burden of showing that the

agency was not “merely correcting an error” when it cancelled the promotion. *Id.*, Tab 14 at 4 (Initial Decision, Sept. 3, 2008). The AJ specifically found that the appellant did not dispute that the agency was required to convert his Fire Protection Inspection position from the GS pay system to a pay band under NSPS. *Id.* at 3.

¶8 The appellant has filed a petition for review. Petition for Review File (PFRF), Tab 1. The appellant argues, among other things, that the agency properly promoted him from GS-07 to GS-08 in November 2007, he served in this position for 7 months, the agency’s action in canceling his promotion constituted a reduction in pay, and the agency’s action in converting him to NSPS was improper and constituted harmful error. *Id.* The agency filed a response arguing that the appellant’s PFR did not meet the Board’s criteria for review and that the appellant was improperly attempting to shift the burden of proof to the agency to show that it reduced his pay to correct a pay rate that was contrary to law, rule, or regulation. *Id.*, Tab 5.

ANALYSIS

¶9 The Board has jurisdiction to review an appeal of a reduction in grade or pay. [5 U.S.C. § 7512](#). “Grade” is defined as “a level of classification under a position classification system.” [5 U.S.C. § 7511\(a\)\(3\)](#). In this case, it is undisputed that the appellant was not reduced in grade because a GS-07 Firefighter and a GS-08 Fire Protection Inspector are in the same NSPS pay band or level of classification. Thus, the agency’s action here has not resulted in a reduction in grade. Instead, when the agency cancelled the appellant’s promotion and converted his position into NSPS, the appellant experienced a loss of pay. Therefore, the issue before the Board is whether it has jurisdiction to consider the appellant's appeal as a reduction in pay.

¶10 “Pay” is defined as “the rate of basic pay fixed by law or administrative action for the position held by the employee.” [5 U.S.C. § 7511\(a\)\(4\)](#). The general

rule is that a reduction in an employee's rate of basic pay is appealable to the Board. *See* [5 U.S.C. §§ 7511\(a\)\(4\), 7512\(4\), 7513\(d\)](#). However, an exception to this rule is when an agency reduces an employee's basic pay “from a rate that is contrary to law or regulation.” [5 C.F.R. § 752.401\(b\)\(15\)](#). Such an action is not appealable to the Board. *Id.*; *see also* *Hall v. Department of the Navy*, [73 M.S.P.R. 251](#), 254 (1997); *Warren v. Department of Transportation*, [19 M.S.P.R. 560](#), 565 (1984).

¶11 It is well-established that the appellant bears the burden of establishing jurisdiction over an appeal. [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#). In this type of case, an employee may make a prima facie showing entitling him to a jurisdictional hearing by establishing that the amount of his basic pay was reduced. *See Vega v. U.S. Postal Service*, [108 M.S.P.R. 221](#), ¶ 11 (2008).

¶12 Further, when an agency contends that it reduced the employee's pay to correct what it believes was an error in setting pay, then the agency bears the burden of showing that it set the employee's pay at a rate contrary to law or regulation. *See Lomax v. Department of Defense*, [78 M.S.P.R. 553](#), 559-60 (1998). We have held that an employee should not be forced to prove that the agency did not make an error in setting his pay, since the agency is in a much better position to know why it originally set the employee's pay as it did and what later led it to conclude that it made an error. *Vega*, [108 M.S.P.R. 221](#), ¶ 11.

¶13 Frequently, when it is apparent from the outset that an agency's action was to correct an allegedly erroneous decision, the Board has analyzed the case under an alternative jurisdictional approach, considering whether the agency's action constituted a cancellation of a promotion or an appointment. *See Marrero v. Department of Veterans Affairs*, [100 M.S.P.R. 424](#), ¶ 7 (2005); *Kimzey v. U.S. Postal Service*, [94 M.S.P.R. 457](#), ¶ 14 (2003). It is well settled that promotions generally are not appealable to the Board. *See Clark v. Department of the Interior*, [68 M.S.P.R. 453](#), 457 (1995). In particular, where a promotion to a higher grade never went into effect, there was not an appealable reduction in

grade or pay. *Id.* For a promotion or appointment to take effect, an authorized appointing officer must take an action that reveals his awareness that he is making a promotion or appointment in the United States civil service, and the affected employee must take some action denoting acceptance. *Watts v. Department of the Navy*, [814 F.2d 1576](#), 1580 (Fed. Cir.), *cert. denied*, 484 U.S. 913 (1987). In addition, an appointment that has been effected may still be revoked prior to the employee's entrance on duty or performance in the higher grade. *See National Treasury Employees Union v. Reagan*, 663 F.2d 239, 253 (D.C. Cir. 1981).

¶14 Accordingly, to establish Board jurisdiction in an appeal from the cancellation of a promotion or an appointment, we have found that the appellant must show that: (1) the promotion or appointment actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion or appointment; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant actually performed in the position. *Shafford v. U.S. Postal Service*, [103 M.S.P.R. 657](#), ¶ 8 (2006). However, the Board has also indicated that the appellant must also show that, in canceling the promotion or appointment, the agency was not correcting an error. *Id.*; *Marrero*, [100 M.S.P.R. 424](#), ¶ 7; *Kimzey*, [94 M.S.P.R. 457](#), ¶ 14; *Trotter v. U.S. Postal Service*, [91 M.S.P.R. 282](#), ¶ 9 (2002).

¶15 To be entitled to a jurisdictional hearing when a promotion or appointment has been cancelled, an appellant need only raise nonfrivolous allegations that the Board has jurisdiction over his appeal. *Shafford*, [103 M.S.P.R. 657](#), ¶ 9, *citing Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344 (Fed. Cir. 2006). In making this determination, the AJ may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the AJ may not weigh evidence and resolve

conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994).

¶16 After reviewing our decisions in cases involving a cancellation of a promotion or an appointment, we find it necessary to clarify the parties' respective burdens of proof. The issue in such cases is identical to that involved in determining whether a reduction in grade or pay is appealable. Indeed, the origin of this jurisdictional matter is the same regulatory provision. See [5 C.F.R. § 752.401\(b\)\(15\)](#); see also, *Lovoy v. Department of Health and Human Services*, [94 M.S.P.R. 571](#), ¶¶ 29-30 (2003). Therefore, we find that, once an appellant has made a prima facie case of jurisdiction by showing that he was appointed to a position by an authorized official, that he took some action to denote acceptance of the promotion, and that he actually performed in the position, the burden of production shifts to the agency to show that the promotion or appointment was an error contrary to law or regulation. *Lomax*, [78 M.S.P.R. 559-60](#). To the extent that our prior decisions regarding the cancellation of a promotion or an appointment have indicated that the appellant bears the burden of production on this issue, they are overruled. See *Shafford*, [103 M.S.P.R. 657](#), ¶ 8; *Marrero*, [100 M.S.P.R. 424](#), ¶ 7; *Kimzey*, [94 M.S.P.R. 457](#), ¶ 14; *Trotter v. U.S. Postal Service*, [91 M.S.P.R. 284](#), ¶ 9 (2002).

¶17 As noted above, the AJ dismissed this appeal for lack of jurisdiction on the basis that the appellant failed to make a nonfrivolous allegation that the agency was not “merely correcting an error.” Initial Decision at 4. Based on the above clarification of the parties’ jurisdictional burdens, we find that the burden was wrongly placed on the appellant, and that the agency bears the burden of showing that it set the appellant's pay at a rate contrary to law or regulation. See *Lomax*, 78 M.S.P.R. at 559-60. Because the appellant nonfrivolously alleged that he was actually promoted, that he accepted the promotion, and that it was not revoked before he performed in the position, he is entitled to a jurisdictional hearing, and we remand this appeal for that purpose. The agency must be afforded an

opportunity to show that the appellant's promotion was an error contrary to law or regulation. *See Mulligan v. U.S. Postal Service*, [81 M.S.P.R. 1](#), ¶ 12 (1999). Given that the appellant bears the ultimate burden of proof on the issue of jurisdiction, he must be afforded the opportunity to rebut any showing that the agency may make. *Id.*

ORDER

¶18 Accordingly, we REMAND this appeal to the Washington Regional Office for further proceedings, a hearing, and the issuance of a new initial decision.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.