UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 49

Docket No. SF-315H-08-0709-B-1

Eric Smart,

Appellant,

v.

Department of Justice,

Agency.

March 9, 2010

Eric Smart, Los Angeles, California, pro se.

Joe Lazar, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the remand decision that dismissed his appeal of his termination during his probationary period as untimely filed. For the reasons set forth below, we GRANT the appellant's petition, VACATE the remand decision, and REMAND the appeal for further consideration consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant received a career appointment in the competitive service as a Deputy U.S. Marshal on June 9, 1991, subject to completion of a 1-year

probationary period. *See* Initial Appeal File (IAF), Tab 1 at 71; *id.*, Tab 4, Ex. 4F at 1. By letter dated August 30, 1991, the appellant was notified that he would be terminated during his probationary period, effective September 20, 1991, due to unacceptable performance and conduct. IAF, Tab 4, Ex. 4F at 1. The termination letter advised the appellant of his limited right to appeal to the Board as a probationary employee and his right to file an equal employment opportunity (EEO) complaint. *Id.* at 1-2.

¶3 The appellant filed an EEO complaint on January 30, 1992, alleging that he was discriminated against because of his race when he was terminated from his position. IAF, Tab 1 at 9. On December 6, 1994, the Equal Employment Opportunity Commission (EEOC) affirmed the agency's final decision on the appellant's discrimination complaint, finding that the appellant failed to prove that he was discriminated against on the basis of race. IAF, Tab 4, Ex. 4E at 8. On September 1, 2008, the appellant filed an appeal with the Board. IAF, Tab 1. He alleged that he began his federal service in July 1979, that he was not given the option of appealing to the Board at the time of his dismissal, and that his dismissal was improper. IAF, Tab 1 at 1, 5-6, 71. The appellant did not request a hearing.

¶4 The administrative judge issued an acknowledgment order advising the appellant of his jurisdictional burden for appealing a probationary termination and ordering him to file evidence and argument proving that the appeal is within the Board's jurisdiction. IAF, Tab 2 at 2. After considering the appellant's response and the agency file, the administrative judge dismissed the appeal for lack of Board jurisdiction without holding a hearing, noting that the appellant did not assert that his probationary termination was based on either partisan political reasons or marital status. IAF, Tab 5, Initial Decision (ID) at 2. Given his decision on the jurisdictional issue, the administrative judge did not address the timeliness of the appeal. *Id.* at 2 n.1.

¶5 The appellant filed a timely petition for review, asserting that the administrative judge failed to consider his previous federal employment in dismissing his appeal for lack of jurisdiction due to his probationary status. *See* Petition for Review File 1 (PFRF 1), Tab 1 at 1. On review, the Board vacated the ID, finding that the administrative judge failed to provide the appellant with explicit information as to how he could show that his prior service can be "tacked" to his probationary period or that he meets the definition of an employee under 5 U.S.C. § 7511(a)(1)(A)(ii). *See Smart v. Department of Justice*, 111 M.S.P.R. 147, ¶ 10 (2009). The Board also found that the record was not sufficiently developed to address these issues, and thus the Board remanded the appeal for the issuance of an appropriate jurisdictional order and determinations as to whether, during the year immediately preceding his separation, the appellant's service was without a break in service of a workday and was under other than a temporary appointment limited to 1 year or less, and whether the appellant's prior service can be "tacked" to his probationary period. *Id.*, ¶¶ 10-11. The Board instructed the administrative judge to also determine the timeliness of the appeal if he found that the appeal is within the Board's jurisdiction. *Id.*, ¶ 11.

¶6 On remand, the administrative judge issued a jurisdictional order and later, in response to the agency's assertion that the appeal was untimely, issued a timeliness order as well. Remand Appeal File (RAF), Tab 3; *id.*, Tab 6 at 2; *id.*, Tab 7. The appellant responded to both orders. *See* RAF, Tabs 5, 9. The administrative judge dismissed the appeal as untimely filed. RAF, Tab 11, Remand Decision (RD) at 1. He noted that the August 30, 1991 notice of termination informed the appellant that he had the right to appeal the termination action to the Board if he alleged marital discrimination or partisan political discrimination or that, alternatively, he could file an EEO complaint of discrimination. *Id.* at 2, 4. He further found that, even if the appellant did not receive the notice at the time of his termination, he should have been aware of his

Board appeal rights by June 2, 1993, when the admissibility of the termination notice was stipulated without objection prior to the appellant's EEOC hearing. *Id.* at 4. The administrative judge found that the appellant failed to show excusable neglect or demonstrate that there were circumstances beyond his control that affected his ability to comply with the time limits. *Id.* at 4-5. He thus found that the appellant failed to establish good cause for waiving the Board's filing deadline. *Id.* at 5.

¶7 The appellant has filed a timely petition for review of the remand decision, Petition for Review File 2 (PFRF 2), Tab 1, and the agency has filed a response in opposition, *id.*, Tab 3.

ANALYSIS

Timeliness

¶8 Under 5 C.F.R. § 1201.21, an agency must advise an employee of his right to file a Board appeal, and the time limit for doing so, when it takes an appealable action. Where an agency subjects an appellant to an appealable action without notifying him of his Board appeal rights, the appellant must demonstrate that he was diligent in exercising his Board appeal rights once he learned of them, regardless of whether he was diligent in discovering his appeal rights, in order to show good cause to justify waiving the Board's filing deadline. *See Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 588 (1995).

¶9 The appellant has asserted both below and on review that the agency did not provide him with the August 30, 1991 notice of termination setting forth his appeal rights to the Board. *See* IAF, Tab 3 at 5; RAF, Tab 9 at 2; PFRF 2, Tab 1 at 2-3. He further asserts that if the agency had advised him of his rights initially he would have "been able to make such a decision to file immediately with the" Board and that he initiated his appeal in September 2008 "upon learning that [he] could have done so, verses [sic] filing an EEOC complaint." PFRF 2, Tab 1 at 2, 4. As we have noted above, the administrative judge found that the appellant had

been provided with the notice of termination by the time its admissibility was stipulated to by the parties during the appellant's EEO proceeding in June 1993. RD at 4. The administrative judge thus found that the appellant was, or should have been, aware of his Board appeal rights by June 2, 1993, but did not file an appeal with the Board until September 2008. RD at 4. Consequently, he found that the appeal was untimely with no good cause shown for the delay. *Id.* at 4-5.

¶10 The appellant does not contest on review the administrative judge's finding that he was aware of his rights by June 2, 1993. Instead, he acknowledges that he "saw this [termination] letter . . . **after** [he] filed with the EEOC . . . ." PFRF 2, Tab 1 at 3. Assuming that the appellant was provided with the notice of termination during his EEO proceeding in 1993, however, such notice informed him that he could file an appeal with the Board of his probationary termination only if he believed that his termination was a result of discrimination based on partisan political reasons or marital status, neither of which the appellant relied on to file his EEO complaint or this Board appeal. *See* IAF, Tab 4, Subtab 4F at 1. It further informed him that claims of discrimination based on "race, color, religion, sex, national origin, age or handicapping condition" could only be raised in addition to an allegation of discrimination based upon partisan political reasons or marital status. *See id.* However, *if* the appellant qualified as an "employee" under 5 U.S.C. § 7511(a)(1)(A), his Board appeal rights were not limited to claims of discrimination based on partisan political reasons or marital status; rather, he was entitled to the appeal rights of an "employee" under 5 U.S.C. § 7513(d). Under such a scenario, even if the appellant received the notice of termination in June 1993 during his EEO proceeding, it is foreseeable that he would have assumed, based on the explanation of his appeal rights provided in the notice of termination, that he was not entitled to file a Board appeal as his claims were not based on discrimination due to partisan political beliefs or marital status. Therefore, whether the agency failed to provide the appellant with proper and complete notice of his appeal rights, and whether such

failure would justify a waiver of the time limit to file his Board appeal, depends on whether the appellant was an "employee" with appeal rights under 5 U.S.C. § 7511(a)(1)(A), which the administrative judge did not address in the remand decision.

¶11 We have found that where jurisdiction may be lacking, but where the record is sufficiently developed on the timeliness issue, an administrative judge may, in an appropriate case, assume *arguendo* that an appeal presents a matter within the Board's jurisdiction and dispose of the appeal on timeliness grounds. *See Popham v. U.S. Postal Service*, 50 M.S.P.R. 193, 197-98 (1991). The administrative judge in the present appeal seems to have taken this approach on remand. However, where the issues of the Board's jurisdiction and the timeliness of the appeal are inextricably intertwined, as in this case, we have found that the administrative judge must first address the jurisdictional issue before addressing the timeliness of the appeal. *See Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 9 (2006). Accordingly, because the issues of timeliness and jurisdiction are inextricably intertwined and because the record is not sufficiently developed on the timeliness issue, this appeal should not have been disposed of on timeliness grounds without first addressing jurisdiction. *Hanna v. U.S. Postal Service*, 101 M.S.P.R. 461, ¶ 6 (2006).

Jurisdiction

¶12 As we noted in our prior decision in this appeal, the pertinent jurisdictional issue here is whether the appellant has prior service that meets the current continuous service requirement of 5 U.S.C. § 7511(a)(1)(A)(ii) or whether his prior service can be "tacked" to his probationary period. *See Smart*, 111 M.S.P.R. 147, ¶ 11. The Board has held that current continuous service need not be in the same or similar positions in order for an individual in the competitive service to qualify as an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). *See Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 14 (2005); *see also Samble v. Department of Defense*, 98 M.S.P.R. 502, ¶ 9 n.1 (2005). The Board

has also held that, for competitive service employees, "current continuous service" means a period of employment or service immediately preceding an adverse action without a break in federal civilian employment of a workday. *See Ellefson*, 98 M.S.P.R. 191, ¶ 14; *Samble*, 98 M.S.P.R. 502, ¶ 9; *see also* 5 C.F.R. § 752.402(b). Moreover, prior service in competitive service positions can be credited towards completion of a later probationary or trial period in a competitive service position if the employee shows that: (1) The prior service was rendered immediately preceding the appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. *See Ellefson*, 98 M.S.P.R. 191, ¶ 16; 5 C.F.R. § 315.802(b).

¶13 On remand below and on review, the agency asserted that the Board erred in applying the holding in *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), i.e., that 5 U.S.C. § 7511(a)(1)(A) provides two alternative definitions of "employee," to this case because the underlying events at issue here occurred before *McCormick* was issued. *See* RAF, Tab 8 at 4 n.3; PFRF 2, Tab 3 at 5-6; *see also Smart*, 111 M.S.P.R. 147, ¶ 8. The agency has shown no error in the Board's application of *McCormick* to the instant appeal. The Board relies on the standard articulated by the Supreme Court in *Harper v. Virginia Department of Taxation* 509 U.S. 86 (1993) for determining whether a new rule of law should be applied retroactively. In *Harper*, the Court stated:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97. In *Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶¶ 12-14 (2005), we found that *McCormick* must be applied to claims for actions that predated the Federal Circuit's decision. This rule applies to appeals that were

pending at the time *McCormick* was announced as well as to those, such as this instant appeal, filed after *McCormick* was announced.

¶14 In response to the administrative judge's jurisdictional order on remand, the appellant asserted that he "transferred from the **Department of the Treasury** to the **Department of Justice**"[1] and that his prior service in the Department of the Treasury was "rendered **immediately preceding** [his] appointment with the **Department of Justice**, and was completed with ***no break in service***." RAF, Tab 5 at 1-2. He submitted two forms, entitled Notice of Change in Health Benefits Enrollment, showing that the agency transferred the appellant's health benefits enrollment out of the Internal Revenue Service (IRS), effective June 8, 1991, and accepted the incoming transfer of the appellant's enrollment, effective June 9, 1991. *See id.*, Attachments 1A-1B. The agency's August 30, 1991 notice of termination indicates that the appellant was appointed to his probationary position with the agency on June 9, 1991. IAF, Tab 4, Subtab 4F at 1. In response to the administrative judge's jurisdictional order, the appellant also submitted a Standard Form (SF) 50 showing that he was employed in the competitive service at the IRS as of September 9, 1990.[2] RAF, Tab 5, Attachment 2B (indicating that the appellant was reassigned to the position of Management Assistant from the position of Secretary effective September 9,

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[1] Under 5 C.F.R. § 210.102(b)(18), a "transfer" means "a change of an employee without a break in service of 1 full workday, from a position in one agency to a position in another agency."

[2] At first glance, the effective date of the SF-50 effecting the appellant's transfer from the position of Secretary to Management Assistant at the IRS appears to be "09-09-91." *See* RAF, Tab 5, Attachment 2B. A closer look, however, reveals that the one in the year is most likely a faded zero, given that the "Approval Date" of the SF-50 is clearly "09-12-90," *see id.*, and that evidence in the record indicates that the appellant was appointed to his position with the Department of Justice in June 1991, *see* IAF, Tab 4, Subtab 4F at 1.

1990). He asserted, however, that due to the fact that his Official Personnel File (OPF) is archived at the National Personnel Records Center, he was "unable to secure copies of all of [his] SF-50, Notification of Personnel Actions, to submit as evidence when [he] transferred from the **Department of the Treasury** to the **Department of Justice**, noting that there was no break in coverage." RAF, Tab 5 at 2. He explained that a response to a written request for copies of his OPF records would take up to 30 days to receive and noted that he was therefore unable to secure such copies within the 15 days he was given to respond to the administrative judge's jurisdictional order. *Id.* Given that such copies were never submitted below and have not been submitted on review, it is unclear whether the appellant ever actually submitted a request for copies of OPF file documents to the National Personnel Records Center and received a response.

¶15 The administrative judge did not consider this evidence or these jurisdictional issues in the remand decision and therefore the appeal must again be remanded. Because the appellant asserts that he transferred from the Department of the Treasury to the Department of Justice in June 1991, *see* RAF, Tab 5 at 1-2; *id.*, Attachments 1A-1B, the appellant's prior service at the Department of the Treasury cannot be tacked to his probationary period with the Department of Justice because it was not performed in the same agency, *see Ellefson*, 98 M.S.P.R. 191, ¶ 16; 5 C.F.R. § 315.802(b). Moreover, the appellant therefore cannot show that he had completed his probationary period by the time of his separation on September 20, 1991. *See* IAF, Tab 4, Subtab 4F at 1. Accordingly, on remand, the administrative judge need not address the issue of whether the appellant completed his probationary period. Rather, he must determine whether, during the year immediately preceding the appellant's separation, he was without a break in service of a workday and was under other than a temporary appointment limited to 1 year or less.

ORDER

¶16 Accordingly, we VACATE the remand decision and REMAND the appeal for further consideration of whether the appellant has established Board jurisdiction over his appeal, specifically whether he was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). The administrative judge shall issue a new initial decision on remand. If he finds that the appeal is within the Board's jurisdiction, then he shall make a timeliness determination in accordance with his jurisdictional findings.

FOR THE BOARD:

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