

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

2010 MSPB 58

Docket No. SF-0752-09-0417-I-1

**Tyrone D. Scott,
Appellant,**

v.

**Department of the Air Force,
Agency.**

March 29, 2010

Tyrone D. Scott, Smyrna, Georgia, pro se.

Laurence Soybel, Esquire, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that affirmed his removal. For the reasons discussed below, we find that the PFR 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, VACATE the ID, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed an appeal of his April 2, 2009 termination from the position of YA-0170-02 Historian at the Yokota Air Base in Japan. Initial Appeal File (IAF), Tab 2, Tab 8, subtabs, 4b, 4d, Tab 24 at 6. The agency moved to dismiss the appeal for lack of jurisdiction on the basis that it separated the appellant at the expiration of his 3-year term of appointment. *Id.*, Tab 8, subtab 1 at 4-8, Tab 19 at 5, Tab 24 at 5, Tab 34 at 4-6. The appellant responded to the motions to dismiss, arguing that he was a permanent employee and not serving in a term position. *Id.*, Tab 43 at 4. In a prehearing order, the administrative judge (AJ) denied the agency's motions, stating: "I find that the appellant is an employee entitled to appeal rights before the Board." *Id.*, Tab 47 at 1. She further noted that the appellant had completed his probationary period. *Id.*

¶3 After holding a hearing, the AJ issued the ID. *Id.*, Tab 68. She found that "the first charge against the appellant is that his tour of duty had expired," ID at 8, and that "[t]he second charge is that the appellant was ineligible to register for the PPP [Priority Placement Program]," *id.* at 9. She ultimately sustained the "charges," found nexus, rejected as unproven the appellant's affirmative defense of retaliation for filing equal employment opportunity complaints, and determined that removal was a reasonable penalty. *Id.* at 8-15.

¶4 The appellant has filed a PFR of the ID and several supplements.¹ PFR File, Tabs 1, 3-4, 6. The agency has filed a response opposing the PFR. *Id.*, Tab 5.

¹ We have not considered the appellant's submissions at PFR File, Tabs 7, 10-11 because they were filed after the record closed on review, *id.*, Tab 2, and the appellant has failed to show that his argument was based on evidence that was not readily available before the record closed. See [5 C.F.R. § 1201.114](#)(i). Additionally, the appellant has not shown that the purported new evidence he has submitted and discussed at PFR File, Tabs 4, 12-15 is of sufficient weight to warrant a different outcome in this matter. See *Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 347 (1980).

ANALYSIS

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). The existence of Board jurisdiction is a threshold issue in adjudicating an appeal, and the appellant bears the burden of establishing jurisdiction by preponderant evidence. *Morales v. Social Security Administration*, [108 M.S.P.R. 583](#), ¶ 5 (2008). The issue of Board jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time during a Board proceeding. *Boechler v. Department of the Interior*, [109 M.S.P.R. 619](#), ¶ 16 (2008), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009). The Board has an interest in ensuring that jurisdictional determinations are correct. *Id.* We have reopened this appeal because we find that the AJ erred in denying the agency's motions to dismiss for lack of jurisdiction.²

¶6 The undisputed evidence shows as follows: Effective April 3, 2006, the appellant was appointed to the position of Historian at the Yokota Air Base in Japan. IAF, Tab 8, subtab 4p. Prior to his appointment, he had signed a Department of Defense (DOD) Transportation Agreement, Transfer of Civilian Employees Outside CONUS [Continental United States]. The agreement stated, inter alia, that it was an initial agreement; that the appellant was a new appointee; that his "prescribed tour of duty" was 36 months; and that, when he had completed his prescribed tour of duty, he would be eligible for return travel and transportation allowances to his actual residence at the time of his appointment "for purpose of separation from the service." IAF, Tab 8, subtab 4r. He also

² We find that the agency's motions to dismiss were sufficient to place the appellant on notice of the jurisdictional standard in this case. *See, e.g., Collins v. Department of Justice*, [70 M.S.P.R. 334](#), 338 (1996) (where an agency's submissions are sufficient to place the appellant on notice of the jurisdictional issue, the AJ's failure to notify the appellant of the issue does not prejudice the appellant's substantive rights).

signed a document, entitled “Overseas Employment Agreement (Without Return Rights),” in which he acknowledged that his initial period of Foreign Service was limited to the prescribed tour of duty for the area to which he was assigned and that any extension beyond that period was subject to both his and management’s approval. He agreed as follows:

When notified that my foreign service will not be extended beyond that initial or subsequent tour of duty, or when advised that my return is required because of the DOD rotation program, I agree to return to the United States. I understand that I will need to register for return placement to Continental United States (CONUS) on the Priority Placement Program (PPP), until I am offered or decline a valid, continuing position. I understand that if I do not receive a valid offer within 90 days of PPP registration, the registration must be amended to include one grade interval below my current grade. Otherwise I may resign or be separated from the Air Force.

IAF, Tab 8, Subtab 4q at 1 (emphasis omitted). He further agreed that he did “not have return rights back to a position in the United States[,]” and that to continue employment in the civil service, he could apply for positions after his tour expired. *Id.*

¶7 On February 23, 2009, Colonel Dan Rogers issued the appellant a Notice of Proposed Separation based on the expiration of his 3-year overseas tour of duty and his ineligibility to register in the DOD PPP due to an overall Level 1 performance rating.³ IAF, Tab 8, Subtab 4d. On March 17, 2009, Brigadier General Salvatore Angelella upheld the decision to remove the appellant. *Id.*, Subtab 4b. As previously noted, the appellant’s separation was effective April 2, 2009. IAF, Tab 8, subtab 4a, Tab 24 at 6.

¶8 We find that the evidence establishes that the appellant received a term appointment. Admittedly, the Standard Form (SF) 50 documenting the appellant’s appointment stated that he received a career-conditional appointment in the competitive service, IAF, Tab 8, subtab 4p, and the Office of Personnel

³ A Level 1 performance rating is an unacceptable rating. IAF, Tab 8, subtab 4l at 5, 7.

Management's regulations differentiate between such appointments and term appointments, [5 C.F.R. § 315.201\(a\)](#). An SF-50, however, is not a legally operative document controlling on its face an employee's status and rights. *Grigsby v. U.S. Department of Commerce*, [729 F.2d 772](#), 776 (Fed. Cir. 1984). Although the issuance of an executed SF-50 is the customary documentation for a federal personnel action, it does not constitute the personnel action itself. *Scott v. Department of the Navy*, [8 M.S.P.R. 282](#), 287 (1981). Rather, the Board looks at the totality of the circumstances in determining the nature of the appointment. *See, e.g., Scott*, 8 M.S.P.R. at 287 (looking at the totality of the circumstances in determining whether an appointment has been effected). Here, despite any indication in the SF-50, the appellant's specific employment agreements, as described above, showed that he was appointed to a 3-year term and that he was separated at the expiration of that term. IAF, Tab 8, subtabs 4q at 1, 4r.

¶9 The expiration of a term appointment is not an action appealable to the Board. *See, e.g., Williams v. Department of the Army*, [109 M.S.P.R. 206](#), ¶ 2 (2008); *Endermuhle v. Department of the Treasury*, [89 M.S.P.R. 495](#), ¶ 9 (2001); *Law v. Department of the Navy*, [77 M.S.P.R. 474](#), 476 (1998); [5 C.F.R. § 752.401\(b\)\(11\)](#). That the appellant met the definition of "employee" at [5 U.S.C. § 7511\(a\)\(1\)](#) and had completed his probationary period is irrelevant to that determination. *See, e.g., Endermuhle*, [89 M.S.P.R. 495](#), ¶¶ 6-7. Further, that the agency considered the appellant's performance in deciding not to reappoint him fails to establish jurisdiction. *See Shelton v. Federal Deposit Insurance Corporation*, [38 M.S.P.R. 303](#), 306 (1988). Moreover, the agency's admitted error in notifying the appellant of a right of Board appeal, IAF, Tab 8, subtabs 1 at 4, 4b, does not serve to confer jurisdiction on the Board, *see Miles-Townsend v. U.S. Postal Service*, [37 M.S.P.R. 405](#), 407 (1988).

¶10 Similarly, the agency's failure to place the appellant in the PPP is not an adverse action appealable to the Board. *See, e.g., Hill v. Department of the Air*

Force, 309 F. App'x 413, 416 (Fed. Cir. 2009)⁴; *Wilson v. Department of the Navy*, [3 M.S.P.R. 295](#), 298 (1980); *cf. Sturdy v. Department of the Army*, [440 F.3d 1328](#), 1335-36 (Fed. Cir. 2006) (the Board has jurisdiction over a reemployment priority rights claim asserted by an individual who registered for a reemployment priority list or an Office of Personnel Management-approved PPP during a reduction-in-force). Absent an appealable action, the Board also lacks jurisdiction to adjudicate the appellant's affirmative defense. *See, e.g., Law*, 77 M.S.P.R. at 477; *Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff'd*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

¶11 Thus, we DISMISS the appeal for lack of jurisdiction.

ORDER

¶12 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:

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

⁴ The Board has held that it may rely on unpublished Federal Circuit decisions if it finds the court's reasoning persuasive. *See, e.g., Vores v. Department of the Army*, [109 M.S.P.R. 191](#), ¶ 21 (2008), *aff'd*, 324 F. App'x 883 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 485 (2009).

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, www.cafc.uscourts.gov. 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:

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