

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
2010 MSPB 108**

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Docket No. DA-315H-09-0700-I-1

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**Glinda M. Henderson,  
Appellant,**

**v.**

**Department of the Treasury,  
Agency.**

June 10, 2010

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Glinda M. Henderson, Austin, Texas, pro se.

Bridgette M. Gibson, Esquire, Dallas, Texas, 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 an initial decision (ID) that dismissed her appeal of her termination during her probationary period for lack of jurisdiction. For the reasons set forth below, we DENY the PFR, REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), and AFFIRM the ID as MODIFIED, still dismissing the appellant's appeal for lack of jurisdiction.

## BACKGROUND

¶2 The agency appointed the appellant to a career-conditional appointment, subject to a 1-year probationary period, to the position of Tax Examining Technician in its Austin, Texas, processing center on March 16, 2009. Initial Appeal File (IAF), Tab 1; Tab 4, Subtab 4d. On August 7, 2009, the agency terminated the appellant from her position during her probationary period based upon poor performance. IAF, Tab 4, Subtabs 4a, 4b.

¶3 The appellant filed an appeal with the Board, arguing that she did not have enough time to show her ability, she received inadequate training, her shortcomings were exaggerated, and the agency's action was bigoted. IAF, Tab 1. The administrative judge issued an acknowledgment order that noted the Board may not have jurisdiction over the appeal because the appellant was a probationary employee, and he directed her to present evidence and argument on the question of jurisdiction. IAF, Tab 2. The appellant did not respond to the order. Thereafter, the administrative judge issued an order to show cause again directing the appellant to address the question of jurisdiction. IAF, Tab 3. The order to show cause provided detailed guidance for establishing jurisdiction as a probationer or as an "employee" if she had prior Federal service. *Id.*

¶4 The appellant failed to respond to the order to show cause. The agency responded to the order and moved to dismiss the appeal as untimely filed. IAF, Tab 4. In his ID, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a non-frivolous allegation of Board jurisdiction over the termination during the probationary period. IAF, Tab 5 at 5.

¶5 The appellant has filed a PFR. Petition for Review File (PFR File), Tab 1. The agency has filed a response in opposition to the PFR. PFR File, Tab 3.

### ANALYSIS

¶6 The Board will grant a PFR only when significant new evidence is presented or the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, [108 M.S.P.R. 384](#), ¶ 16 (2008); [5 C.F.R. § 1201.115](#). Mere disagreement with the administrative judge’s factual findings or legal conclusions does not show legal error. *Cirella v. Department of the Treasury*, [108 M.S.P.R. 474](#), ¶ 15, *aff’d*, 296 F. App’x 63 (Fed. Cir. 2008). On PFR, the appellant has presented neither new evidence nor any developed argument showing error in the administrative judge’s decision in any respect. Therefore, we deny her PFR.

¶7 We reopen the appeal on our own motion under [5 C.F.R. § 1201.118](#), however, solely to address a jurisdictional issue. We must resolve an ambiguity in the record regarding the appellant’s prior Federal service.

#### Legal Standards

¶8 The appellant has the burden of proving the Board’s jurisdiction by a preponderance of the evidence. *Blount v. Department of the Treasury*, [109 M.S.P.R. 174](#), ¶ 5 (2008); [5 C.F.R. § 1201.56\(a\)\(2\)](#). But if an appellant makes a nonfrivolous allegation that the Board has jurisdiction over her appeal, the appellant is entitled to a hearing on the jurisdictional question. *Hurston v. Department of the Army*, [113 M.S.P.R. 34](#), ¶ 5 (2010). The administrative judge must provide the appellant with explicit information on what is required to establish an appealable jurisdictional issue. *See Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985).

¶9 To qualify as an “employee” in the competitive service with adverse action appeal rights to the Board, an individual must show that she is not serving a probationary period or has completed 1 year of current continuous service under an appointment other than a temporary one limited to 1 year or less. [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#); *McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1341-43 (Fed. Cir. 2002); *Baggan v. Department of State*, [109 M.S.P.R. 572](#), ¶ 5

(2008). A probationary employee in the competitive service can only bring an appeal of her termination to the Board in three very limited circumstances: (1) the employee was discriminated against on account of her marital status; (2) the employee was discriminated against based on partisan political affiliation; or (3) the agency action was based (in whole or part) on issues that arose preappointment and the required procedures were not followed. *Blount*, [109 M.S.P.R. 174](#), ¶ 5; [5 C.F.R. §§ 315.805](#), 315.806.

¶10 An appellant who has not served a full year under her appointment can show that she has completed the probationary period, and so is no longer a probationer, by tacking on prior service if: (1) the prior service was rendered immediately preceding the probationary 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. *Hurston*, [113 M.S.P.R. 34](#), ¶ 9; [5 C.F.R. § 315.802](#)(b). Alternatively, an employee can show that, while she may be a probationer, she is an “employee” with Chapter 75 appeal rights because, immediately preceding the adverse action, she had completed at least 1 year of current continuous service without a break in Federal civilian employment of a workday. *Hurston*, [113 M.S.P.R. 34](#), ¶ 9.

#### Jurisdictional Issue

¶11 The administrative judge concluded that there was no evidence in the record indicating that the appellant had any prior Federal service, so she could “not conceivably establish that she had one year of current continuous service prior to her termination.” IAF, Tab 5 at 5. This conclusion is problematic, however, given an anomaly in the record.

¶12 While the appellant has not described any prior Federal service in her initial appeal or petition for review, the SF-50s in the record on appeal nonetheless suggest that she did have prior Federal service. In particular, the SF-50 documenting the appellant’s hiring on March 16, 2009, shows a service computation date of March 25, 2008. IAF, Tab 4, Subtab 4d. This entry suggests

approximately a year of prior Federal civilian service. *Id.* In addition, the agency's documentation is internally inconsistent; the SF-50 documenting the appellant's termination shows a service computation date of December 6, 2008. *Id.*, Subtab 4a. Moreover, nothing in the appellant's presentation or the agency's materials explains this potential prior service or the inconsistency in service computation dates between the two SF-50s. Thus, the Board could not initially determine whether it had jurisdiction in this case because it was unclear whether the appellant had prior service with the agency or had otherwise completed 1 year of current continuous service.

¶13 To resolve this ambiguity in the record, the Clerk of the Board issued an order to show cause directing the parties to provide information about the appellant's Federal service, if any. PFR File, Tab 4. The order to show cause provided the appellant with specific information on how to establish the Board's jurisdiction. *Id.*

¶14 Both parties responded to the order. PFR File, Tabs 5, 7. The appellant's prior service consisted of two temporary positions at the agency. *Id.* Her first position was as a temporary Clerk, and lasted from May 29, 2007, to August 1, 2007. PFR File, Tab 7, Attachments 1, 2. The second position was as a temporary Cash Clerk, and it lasted from March 25, 2008, to May 1, 2008. *Id.*, Attachments 3, 4. The agency also suggests that the disparity between the two SF-50s was simply a matter of correcting the later form to properly account for her prior service. IAF, Tab 7 at 2, Attachment 5.

¶15 Because the record now contains evidence concerning the appellant's prior service, it is unnecessary to remand the case to the regional office. *See Hurston*, [113 M.S.P.R. 34](#), ¶ 7. Based upon the supplemental evidence, we conclude that the appellant was not an "employee" with adverse action appeal rights, given that her prior service did not immediately precede her instant appointment. *See McCrary v. Department of the Army*, [103 M.S.P.R. 266](#), ¶ 8 (2006); *see also Hurston*, [113 M.S.P.R. 34](#), ¶ 10 (a significant gap between prior service and

current appointment foreclosed a finding of continuous service). Therefore, the administrative judge correctly dismissed the appellant's appeal for lack of jurisdiction. *See Baggan*, [109 M.S.P.R. 572](#), ¶ 9.

#### ORDER

¶16 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 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](http://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:

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