UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 18

Docket No. PH-315H-10-0275-I-1

Stephen John Maibaum,

Appellant,

v.

Department of Veterans Affairs,

Agency.

February 9, 2011

Stephen John Maibaum, Buzzards Bay, Massachusetts, pro se.

Michael Potter, Bedford, Massachusetts, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his termination appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition 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, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 Effective July 19, 2009, the appellant, a preference eligible veteran, received an appointment under the Veterans' Recruitment Act (VRA) to the position of Veterans Service Representative, GS-0996-7, with a term not to exceed September 30, 2010. Initial Appeal File (IAF), Tab 4, Subtab 4m. On September 13, 2009, the agency converted the appellant to the excepted service, subject to a 1-year trial period beginning July 19, 2009. *Id.*, Subtab 4i. Effective March 13, 2010, the agency terminated the appellant's employment for inappropriate use of a credit card. *Id.*, Subtab 4d.

¶3 The appellant filed a timely appeal, in which he raised claims of disability discrimination, whistleblowing reprisal, and violation of his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[1] IAF, Tab 1. He indicated that he did not want a hearing. *Id.* The administrative judge informed the appellant of the requirements for establishing jurisdiction under 5 C.F.R. §§ 307.105 and 315.806, and further stated that he could establish jurisdiction by showing that he was not, or should not have been, serving a probationary period, or that he met the definition of "employee" despite his probationary status. IAF, Tab 2.

¶4 In response, the appellant presented evidence that he was previously employed by the U.S. Postal Service as a Part-time Flexible Sales Service Distribution Associate, i.e., Postal Service Clerk, beginning January 5, 2008, and transferred to the Department of Veterans Affairs on July 18, 2009, without any break in service. IAF, Tabs 3, 6. The appellant stated that in both positions he provided customer service, resolutions to disputed claims, and claims processing. IAF, Tab 6. He further asserted that both positions were at the same pay level,

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[1] The appellant also requested a stay under 5 C.F.R. § 1209.8(a), but to no avail. *Maibaum v. Department of Veterans Affairs*, MSPB Docket No. PH-315H-10-0275-S-1 (Order Dismissing Stay Request, Mar. 18, 2010).

with the same public trust responsibilities, and were customer service and performance based. *Id.* In addition, the appellant alleged that he was not informed that the Veterans Service Representative position was subject to a probationary period and in fact was told that he would not need to serve one because of his prior employment with the Postal Service. IAF, Tab 3.

¶5 The administrative judge issued a second jurisdictional order, this time stating that probationary employees are "specifically excluded" from the definition of "employee" at 5 U.S.C. § 7511(a)(1). IAF, Tab 8. She again set forth the requirements for establishing jurisdiction over a probationary termination under 5 C.F.R. § 315.806, and further explained that under certain conditions prior service in the same line of work could be credited toward completion of a probationary period in a new position but only within the same agency. *Id.* In response, the appellant provided job descriptions for the Postal Service Clerk and Veterans Service Representative positions and again argued that the positions were similar. IAF, Tab 9.

¶6 The administrative judge then dismissed the appeal for lack of jurisdiction. IAF, Tab 13 (Initial Decision, June 30, 2010). For the first time, the administrative judge considered whether the appellant satisfied the definition of "employee" at 5 U.S.C. § 7511(a)(1)(B), i.e., whether he had completed 1 year of current continuous service in the same or similar positions. She found that the Postal Clerk and Veterans Service Representative positions were not similar for purposes of the current continuous service criterion because they required different qualifications and would be placed in different competitive levels. *Id.* The administrative judge further noted that, in the absence of an otherwise appealable action, the Board lacked jurisdiction over his disability discrimination claim. *Id.*

¶7 On petition for review, the appellant claims he established "beyond a reasonable doubt" that the positions were similar under 5 U.S.C. § 7511(a)(1). Petition for Review File, Tab 1. He further suggests that he "should be entitled to

a hearing if necessary," although he concedes that he "did not bring this up" to the administrative judge. *Id*. The appellant's remaining arguments concern the merits of the termination decision. *Id*.

ANALYSIS

¶8 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 appellant has the burden of proving jurisdiction by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(i). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

¶9 Under 5 U.S.C. chapter 75, subchapter II, an individual who meets the definition of "employee" at 5 U.S.C. § 7511(a)(1) generally has the right to challenge his removal from the federal service by filing an appeal with the Board. *See* 5 U.S.C. §§ 7512(1), 7513(d). The definition of "employee" includes:

> a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—
>
> (i) in an Executive agency; or
>
> (ii) in the United States Postal Service . . . [.]

5 U.S.C. § 7511(a)(1)(B). Notably, for a preference eligible in the excepted service, the absence or completion of a probationary or trial period is not determinative of "employee" status. Rather, the dispositive issue is whether the appellant satisfied the 1-year current continuous service requirement at the time of his separation. *See Zambito v. Department of Homeland Security*, 100 M.S.P.R. 550, ¶ 9 (2005). We must therefore determine whether the appellant's prior employment as a Postal Service Clerk may be tacked on to his service with the agency to meet that requirement.

¶10 We find our decision in *Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447 (2005), to be instructive in this matter. In *Greene*, we held that the term "an Executive agency," as used in 5 U.S.C. § 7511(a)(1)(B), may refer to more than one agency, and that service in multiple agencies may be combined in order to satisfy the 1-year current continuous service requirement. *Id.*, ¶¶ 7-12. The Postal Service is not an "Executive agency" as defined at 5 U.S.C. § 105, *see Nigg v. U.S. Postal Service*, 91 M.S.P.R. 164, ¶ 9 (2002), *aff'd*, 321 F.3d 1381 (Fed. Cir. 2003), and the Board did not decide in *Greene* whether service in an Executive agency can be combined with employment in the Postal Service to satisfy the current continuous service requirement of 5 U.S.C. § 7511(a)(1)(B).[2] Nevertheless, our analysis in *Greene* applies equally well to this case.

¶11 In its original form, the Civil Service Reform Act of 1978 provided that an individual was entitled to appeal his separation if he was "a preference eligible in an Executive agency in the excepted service, [or] a preference eligible in the United States Postal Service or the Postal Rate Commission, who ha[d] completed 1 year of current continuous service in the same or similar positions . . . ." 5 U.S.C. § 7511(a)(1)(B) (1978); *see Greene*, 100 M.S.P.R. 447, ¶ 8. In this context, the references to "an Executive agency" and to the Postal Service pertain only to the type of position occupied by the preference eligible individual at the time of his separation. *Greene*, 100 M.S.P.R. 447, ¶ 8. Nothing in the language of the original statute requires that the 1 year of current continuous service be performed entirely in an Executive agency or entirely in the Postal Service. *See*

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[2] The language of the statute itself is ambiguous, since the word "or" has both an inclusive sense ("A or B [or both]") and an exclusive sense ("A or B [but not both]"). *See Shaw v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 605 F.3d 1250, 1254 n.8 (11th Cir. 2010) (citing Maurice B. Kirk, *Legal Drafting: The Ambiguity of "And" and "Or"*, 2 Tex. Tech L.Rev. 235, 237-38 (1971)). Thus, 5 U.S.C. § 7511(a)(1)(B) could be read either to permit or to disallow a combination of service in both the Postal Service and an Executive agency.

id. Thus, in *Shobe v. U.S. Postal Service*, 5 M.S.P.R. 466 (1981), the Board held that the appellant's previous service with the Department of Housing and Urban Development (HUD) should count toward completion of the year of current continuous service required under 5 U.S.C. § 7511(a)(1)(B), provided that his service in HUD was in a position the same as, or similar to, the Postal Service position from which he was separated. *Id*. at 470-71.

¶12 In 1990, the language of 5 U.S.C. § 7511(a)(1)(B) was changed to its current form as a result of the Civil Service Due Process Amendments, Pub. L. No. 101-376, § 2, 1990 U.S.C.C.A.N. (104 Stat.) 461. The stated purpose of this legislation was "to extend to certain employees in the excepted service who are not preference eligibles the same administrative notice and appeal procedures currently provided employees in the competitive service and preference eligible employees in the excepted service." H.R. Rep. No. 101-328, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 695. The bill that became the Civil Service Due Process Amendments excluded Postal Service employees who are not preference eligible; however, that exclusion was designed to "preserve[] the status quo," not to limit existing appeal rights. *Id*. at 1, 5. Thus, the intent of Congress was solely to broaden the appeal rights for certain non-preference eligibles in the excepted service, not to eliminate appeal rights for any other class of employee. *See Greene*, 100 M.S.P.R. 447, ¶ 9.

¶13 We further note that the Office of Personnel Management (OPM) has promulgated regulations that allow for service in an Executive agency or agencies and the U.S. Postal Service to be combined to meet the required 1 year of current continuous service. In particular, 5 C.F.R. § 752.401(c)(3) provides that adverse action appeal rights apply to "[a]n employee in the excepted service who is a preference eligible in an executive agency . . . the U.S. Postal Service, or the Postal Rate Commission and who has completed 1 year of current continuous service in the same or similar positions." Like the previous version of 5 U.S.C. § 7511(a)(1)(B), this regulation does not preclude an individual from acquiring

appeal rights through a combination of service in an Executive agency or agencies and the U.S. Postal Service. We further note that Congress has expressly delegated to OPM the authority to promulgate regulations on this subject. *See* 5 U.S.C. § 7514. Consequently, such regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Stearn v. Department of the Navy*, 280 F.3d 1376, 1382 (Fed. Cir. 2002) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). Far from being "arbitrary, capricious, or manifestly contrary to the statute," the regulations prescribed by OPM on this subject are consistent with the absence of any congressional intent to eliminate appeal rights that had previously been granted to preference eligible employees in the excepted service. *See Greene*, 100 M.S.P.R. 447, ¶ 10. In sum, we conclude *Shobe* remains good law, and that service in an Executive agency may be combined with service in the Postal Service for purposes of meeting the 1-year current continuous service criterion of 5 U.S.C. § 7511(a)(1)(B).

¶14 The term "current continuous service" means a period of employment or service, either in the competitive or excepted service that immediately precedes an adverse action without a break in federal civilian employment of a workday. *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 10 (2008); 5 C.F.R. § 752.402(b). For purposes of tacking on prior service to complete a probationary or trial period, a single break in service of less than 30 days is permissible, provided the prior service is in the same agency and in the same line of work. *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 12 (2006). Contrary to the initial decision, however, the 30-day rule does not apply when determining whether prior service may be counted toward the applicable current continuous service requirement under 5 U.S.C. § 7511(a)(1). *See id.*, ¶ 8. Regardless, the record reflects that the appellant transferred from the Postal Service to the Department of Veterans Affairs with no break in service. IAF, Tab 4, Subtab 4m; IAF, Tab 6 at 2.

¶15 The remaining question is whether the Postal Service Clerk and Veterans Service Representative positions are the "same or similar" for purposes of 5 U.S.C. § 7511(a)(1)(B). The regulations implementing 5 U.S.C. chapter 75, subchapter II, define "similar positions" as "positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work." 5 C.F.R. § 752.402. In addition, positions may be deemed "similar" if they are in the "same line of work," which has been interpreted as involving "related or comparable work that requires the same or similar skills." *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988). The Board has interpreted such language to mean that positions are similar "if experience in [one] position demonstrates the knowledge, skills, and abilities required to perform the work of the other job." *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1333 (Fed. Cir. 2006) (quoting *Shobe*, 5 M.S.P.R. at 471); *accord Mathis*, 865 F.2d at 234; *Spillers v. U.S. Postal Service*, 65 M.S.P.R. 22, 26 (1994). In conducting this analysis, the Board must consider the nature of the work actually performed. *Davis v. Merit Systems Protection Board*, 340 F. App'x 660, 663 (Fed. Cir. 2009);[3] *see also Coradeschi*, 439 F.3d at 1333-34; *Mathis*, 865 F.2d at 233-35.

¶16 In support of his claim that the positions are similar, the appellant submitted the following list of "job tasks" for the Postal Service Clerk position: answering questions regarding mail regulations and procedures, postal rates and post office boxes; checking mail in order to insure correct postages and that packages and letters are in proper condition for mailing; completing forms

[3] The Board may rely on non-precedential Federal Circuit decisions if it finds the court's reasoning persuasive. *See Agbaniyaka v. Department of the Treasury*, 115 M.S.P.R. 130, ¶ 19 n.6 (2010). We find the court's reasoning persuasive on this point.

regarding change of address, or theft or loss of mail, or for special services such as registered or priority mail; feeding mail into postage canceling devices or hand stamping mail to cancel postage; keeping money orders in order, and recording and balancing daily transactions; obtaining signatures from recipients of registered or special delivery mail; providing customers with assistance in filing claims for mail theft, or lost or damaged mail; gathering evidence to support customer claims for damaged insured mail; processing customer claims for refunds for overnight mail not making the committed time; putting undelivered parcels away, retrieving them when customers come to claim them, and completing any related documentation; receiving letters and parcels, and placing mail into bags; registering, certifying, and insuring letters and parcels; renting post office boxes to customers; responding to complaints regarding mail theft, delivery problems, and lost or damaged mail, and filling out forms and making appropriate referrals for investigation; selling and collecting payment for products such as stamps, prepaid mail envelopes, and money orders; setting postage meters, and calibrating them to ensure correct operation, sorting incoming and outgoing mail, according to type and destination, by hand or by operating electronic mail-sorting and scanning devices; transporting mail from one workstation to another; weighing letters and parcels, computing mailing costs based on type, weight, and destination, and affixing correct postage; cashing money orders; posting announcements or government information on public bulletin boards; and providing assistance to the public in complying with federal regulations of the Postal Service and other federal agencies. IAF, Tab 9. The appellant also submitted the following job description for the Veterans Service Representative position:

> Within a team environment, the Veterans Service Representative (VSR) functions as (1) a counselor or advocate for VA claimants providing information about a broad range of benefits and assisting with applications for VA benefits and services, (2) a legal technician gathering requisite evidence from medical, military, community, and

> other sources to support benefit determinations, (3) a decision maker weighing the evidence and applying the controlling laws and regulations, and (4) a computer systems user who enters appropriate data to generate accurate benefit payments, control pending issues or schedule future actions, and release complete, correct notifications of benefits determinations. The VSR must not only be competent in the interpretation and application of laws and procedures, but must be well-versed in medical principles and terminology and public relations skills.

Id. The appellant has not alleged that his actual duties differed from the job descriptions he provided.

¶17 We agree with the appellant that the positions are similar in that both involve customer service and claims processing. Nevertheless, it is evident from the job descriptions that processing veterans benefit claims requires specialized knowledge, both legal and medical, not required for processing claims concerning insured mail and late overnight delivery. Furthermore, although the fact is not dispositive, the Postal Service Clerk and Veterans Service Representative positions do not share the same classification. *See Amend v. Merit Systems Protection Board*, 221 F. App'x 983, 985 (Fed. Cir. 2007);[4] *cf. Coradeschi*, 439 F.3d at 1334. Finally, the appellant has not shown that the positions require the same or similar qualifications. The job description for the Veterans Service Representative position indicates that qualified applicants must have 1 year of specialized experience gained in such ways as: (a) a claims decision-making position in a federal or State agency, or in an insurance company, employee compensation board, or retirement and death compensation program; or (b) experience in Government or private industry in a disability retirement or disability pension program. IAF, Tab 9. Nothing in the appellant's evidence suggests that the Postal Service Clerk position had similar experience requirements. *Id*. In sum, we find that the appellant has not shown by

[4] Although *Amend* is a non-precedential decision, we find the court's reasoning persuasive. *See supra*, n.3.

preponderant evidence that the positions are similar for purposes of establishing appeal rights under 5 U.S.C. § 7511(a)(1)(B).

¶18 Moreover, the appellant has not established a regulatory right to appeal his termination. Because VRA appointments are in the excepted service, 5 C.F.R. part 315 does not apply directly to the appellant, as the initial decision seems to suggest. *See McCrary*, 103 M.S.P.R. 266, ¶ 6. However, individuals in VRA appointments have been granted the same appeal rights during the first year of their trial periods as competitive service employees. *Id.*, ¶ 11; 5 C.F.R. § 307.104. Under 5 C.F.R. § 315.806(b), a probationary employee may appeal a termination taken for reasons arising after appointment if he alleges that the termination was based on partisan political reasons or marital status. *Rivera v. Department of the Navy*, 114 M.S.P.R. 52, ¶ 4 (2010). The appellant has not made such an allegation, either below or on petition for review.

¶19 We note that the appellant received inconsistent and erroneous information concerning his burden of proof on jurisdiction. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). Nevertheless, we find that the initial decision was sufficient to place the appellant on notice of the dispositive jurisdictional issue in this case, i.e., whether the Postal Service Clerk and Veterans Service Representative positions are "similar" within the meaning of 5 U.S.C. § 7511(a)(1)(B). *See Caracciolo v. Department of the Treasury*, 105 M.S.P.R. 663, ¶ 11 (2007) (failure to provide proper *Burgess* notice in an acknowledgment order or show-cause order can be cured if the initial decision puts the appellant on notice of what he must do to establish jurisdiction so as to afford him the opportunity to meet his jurisdictional burden on petition for review). Because the undisputed documentary evidence is sufficient to resolve that issue, it is unnecessary to

remand for further development of the record.[5] *See Beets v. Department of Homeland Security*, 98 M.S.P.R. 451, ¶ 9 (2005).

¶20 With regard to the appellant's remaining claims, the administrative judge correctly found that, absent an otherwise appealable action, the Board cannot consider a claim of disability discrimination. *See Tardio v. Department of Justice*, 112 M.S.P.R. 371, ¶ 31 (2009). However, the administrative judge did not consider the appellant's allegations that the agency committed whistleblowing reprisal and violated his rights under USERRA. The failure to address the appellant's whistleblowing claim was harmless, because the appellant indicated on his appeal form that he had not pursued a remedy with the Office of Special Counsel, which is a prerequisite for filing a Board appeal under the individual right of action provisions of the Whistleblower Protection Act.[6] *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (an administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights). Because the Board may have jurisdiction over the appellant's USERRA claim, we forward it to the Northeastern Regional Office for processing as a separate appeal. *See Roberson v. U.S. Postal Service*, 77 M.S.P.R. 569, 571 (1998) (individuals who have not completed 1 year of

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[5] The appellant would not be entitled to a hearing in any case. In his March 9, 2010 acknowledgment order, the administrative judge specifically informed the appellant that he may have the right to a hearing, and that he must request a hearing within 10 days or he would be deemed to have waived that right. IAF, Tab 2. The appellant did not request a hearing within that time frame, and his failure to do so after being placed on notice that such a request was necessary constitutes a waiver of any right to a hearing. *See Uresti v. Office of Personnel Management*, 108 M.S.P.R. 262, ¶ 12 (2008); *Nugent v. U.S. Postal Service*, 59 M.S.P.R. 444, 446-47 (1993), *review dismissed*, 36 F.3d 1107 (Fed. Cir. 1994) (Table).

[6] The agency's statement on jurisdiction was sufficient to place the appellant on notice of that requirement. IAF, Tab 5; *see Yost v. Department of Health & Human Services*, 85 M.S.P.R. 273, ¶ 9 (2000), *aff'd*, 4 F. App'x 900 (Fed. Cir. 2001).

current continuous service in the same or similar positions qualify as "persons" under USERRA, and thus are not excluded from filing appeals under the provisions of that statute).

ORDER

¶21 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. 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.