

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

2012 MSPB 131

Docket No. DA-0752-12-0248-I-1

**Cruz P. Garza,
Appellant,**

v.

**Department of the Navy,
Agency.**

December 20, 2012

Stanley R. Smith, San Antonio, Texas, for the appellant.

Thomas J. Tangi, Jacksonville, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions the Board for review of an initial decision that dismissed his separation appeal for lack of jurisdiction. For the reasons set forth below, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still DISMISSING this appeal for lack of jurisdiction.*

* Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 Effective October 1, 2003, the appellant separated from federal service with the National Aeronautics & Space Administration. Initial Appeal File (IAF), Tab 5 at 14, Tab 11 at 15-18. There is no dispute that he has received an annuity under the Federal Employees' Retirement System (FERS) since that time. IAF, Tab 5 at 14, Tab 12 at 4-5. By letter dated September 15, 2010, the agency confirmed its selection of the appellant for the position of Engineering Technician. IAF, Tab 11 at 48, 52. Effective February 3, 2012, the agency rescinded the appointment, explaining that when the appellant was hired it had failed to comply with its own requirements and procedures for hiring reemployed annuitants. *Id.* at 54.

¶3 The appellant filed a Board appeal. IAF, Tab 1. Without holding the appellant's requested hearing, the administrative judge issued an initial decision finding that the appellant failed to make nonfrivolous allegations of fact which, if proven, would establish that the Board has jurisdiction over his appeal. IAF, Tab 14, Initial Decision (ID) at 2, 5. Specifically, the administrative judge found that the appellant was employed as a reemployed annuitant and, as such, served at the will of the appointing authority and possessed no Board appeal rights. ID at 5.

¶4 The appellant has timely petitioned the Board for review, and the agency has filed a response in opposition. Petition for Review (PFR) File, Tabs 1, 3.

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 appellant has the burden of proof on the issue of jurisdiction, and, when an appellant makes a nonfrivolous allegation of Board jurisdiction over an appeal, the appellant is entitled to a hearing on the jurisdictional questions. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1344 (Fed. Cir. 2006) (en banc).

Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994).

¶6 The appellant asserts in his petition for review that the administrative judge failed to consider his timely-filed response to the agency's motion to dismiss. PFR File, Tab 1 at 4-5; *see* IAF, Tabs 5, 11-12. We agree. We have therefore considered the arguments in the appellant's response and, for the reasons set forth below, find that he failed to make the requisite nonfrivolous allegations to merit a jurisdictional hearing.

¶7 Under [5 U.S.C. § 3323](#)(b)(1), an annuitant, as defined by section 8331 or 8401 of title 5, is not barred by reason of his retired status from employment in an appointive position for which the annuitant is qualified. An annuitant so reemployed, however, serves at the will of the appointing authority. *Vesser v. Office of Personnel Management*, [29 F.3d 600](#), 604 (Fed. Cir. 1994); *Bovay v. Small Business Administration*, [100 M.S.P.R. 175](#), ¶ 7 (2005). Generally, such an employee has no right to appeal an adverse action to the Board. *Vesser*, [29 F.3d at 604](#); *Bovay*, [100 M.S.P.R. 175](#), ¶ 7; *Hays v. Department of the Air Force*, [84 M.S.P.R. 443](#), ¶ 14 (1999); *Ochoa v. Department of the Navy*, [65 M.S.P.R. 39](#), 43 (1994).

¶8 The appellant alleges that he was receiving a discontinued service annuity at the time of his appointment and that he continued to receive it thereafter. IAF, Tab 12 at 4-5. In *Colbert v. Department of the Army*, [54 M.S.P.R. 492](#), 495 (1992), the Board considered whether an individual's reemployment after discontinued service retirement under the Civil Service Retirement System (CSRS) would be as a reemployed annuitant. It noted that, if the annuity is based on an involuntary separation, including discontinued service retirement, payment of the annuity terminates on reemployment in a position subject to 5 U.S.C. chapter 83, subchapter III. *Id.*; *see* [5 U.S.C. § 8344](#)(b); *see also* [5 C.F.R. § 837.202](#)(b)(ii); *Office of Personnel Management (OPM) CSRS and FERS*

Handbook, § 100A1.1-3. The Board held that such an individual's reemployment after discontinued service retirement would therefore not be as a reemployed annuitant. *Colbert*, 54 M.S.P.R. at 495; *see also Spiegel v. Department of Defense*, [33 M.S.P.R. 165](#), 168-69, *aff'd*, [828 F.2d 769](#) (Fed. Cir. 1987).

¶9 Here, however, the appellant alleges that he received a discontinued service annuity under the FERS, not the CSRS. IAF, Tab 12 at 4-5. When a FERS annuitant such as the appellant is reemployed, the annuity continues, and the amount of annuity that applies to the period of reemployment is offset from the reemployed annuitant's salary. [5 U.S.C. § 8468\(a\)](#); *see* [5 C.F.R. § 837.201](#); *OPM CSRS and FERS Handbook*, § 100B1.1-2. Under these circumstances, the appellant's reemployment after discontinued service retirement under FERS was as a reemployed annuitant. As such, he "serve[d] at the will of the appointing authority" and had no right to appeal his separation to the Board. [5 U.S.C. § 3323\(b\)\(1\)](#).

¶10 Accordingly, the Board lacks jurisdiction over this appeal.

ORDER

¶11 The appellant's appeal is DISMISSED for lack of jurisdiction. 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.