

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

**2013 MSPB 34**

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Docket No. SF-0752-12-0274-I-1

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**Yong S. Kim,  
Appellant,**

**v.**

**Department of the Army,  
Agency.**

May 3, 2013

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David K. Kim, California, for the appellant.

Kristin O'Grady, APO, APO/FPO Pacific, for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Opinion and Order.<sup>1</sup>

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<sup>1</sup> 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 The agency selected the appellant for promotion from his GS-13, Step 9 position as an Electrical Engineer in the competitive service to a National Security Personnel System (NSPS) YF-2 position as a Supervisory Electrical Engineer within the same unit. Initial Appeal File (IAF), Tab 6 at 97. The appellant accepted the position on or about January 6, 2009. IAF, Tab 1 at 16. The appellant alleged that he already had the required security clearance, and he completed the required medical certification for emergency essential positions on January 7, 2009. *Id.* at 29-32; Tab 3 at 6. On January 21, 2009, the appellant contacted the agency by email to expedite the agency's processing of the salary adjustment for his promotion before he deployed to Afghanistan on February 1, 2009.<sup>2</sup> IAF, Tab 1 at 17. On January 28, 2009, the agency's officials certified and approved the salary determination worksheet for the appellant's promotion. *Id.* at 20.

¶3 The appellant deployed to Afghanistan on February 1, 2009, and the agency subsequently issued an SF-50 documenting the appellant's promotion to the Supervisory Electrical Engineer position with a 5% pay increase, effective February 15, 2009. *Id.* at 21, 23. Over 8 months later, on November 1, 2009, the agency retroactively cancelled the appellant's promotion and reassigned him to his former position as a GS-13, Step 9 Electrical Engineer position. *Id.* at 25. In the remarks section of the SF-50, the agency stated: "This employee never occupied this Supervisory position. He was deployed in support of Operation Enduring Freedom to Afghanistan effective 01 Feb 2009 and has not returned to his previous position." *Id.* In a 2011 email, the agency's Workforce

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<sup>2</sup> The appellant stated that he was not a member of the uniformed services during his civilian deployment to Afghanistan. IAF, Tab 3 at 12-13. Further, although it appears that he had prior military service, IAF, Tab 1 at 1, 21, the appellant has not alleged that the agency's actions violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)), *see* IAF, Tab 1 at 4, Tab 3 at 12-13.

Management Office/Human Resources Chief stated that the agency cancelled the appellant's promotion because he was deployed to Afghanistan in a GS position and the action to reassign him to the NSPS position should have been processed before his deployment. *Id.* at 48.

¶4 After the appellant returned from his deployment in February 2010, he attempted to “resolve [his] pay issue” internally until he retired on August 31, 2011. IAF, Tab 1 at 6. On February 7, 2012, the appellant filed his appeal with the Board, alleging a reduction in grade or pay. He further claimed that the agency failed to or improperly restored, reemployed, and/or reinstated him. IAF, Tab 1 at 1, 3. The appellant claimed that the agency's action was “not in accordance with law.” *Id.* at 4. The appellant alleged that the agency demoted him to the GS-13 Electrical Engineer position and “denied him the right to a pre-deployment promotion,” in violation of a February 12, 2008 Department of Defense (DoD) policy guidance. *Id.* at 10. The appellant also alleged that the agency forced him to repay the \$7,050.00 pay increase he received in the YF-2 Supervisory Electrical Engineer position from February 15, 2009, until the agency retroactively cancelled his promotion on November 1, 2009. *Id.* In addition, the appellant claimed that his retirement annuity was not finalized because of this unresolved pay issue. *Id.* at 6. The appellant requested a hearing on his appeal. *Id.* at 2.

¶5 The administrative judge ordered the appellant to file evidence and argument to prove that his appeal was within the Board's jurisdiction and set forth his burden of proof on the timeliness issue. IAF, Tab 2 at 2-3. In the order, the administrative judge did not provide the appellant with explicit information on what was required to establish jurisdiction over his appeal. *Id.* The parties' responded to the order. IAF, Tabs 3, 6. Without holding the hearing requested by the appellant, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 11, Initial Decision (ID) at 2, 6. The administrative judge found that the appellant failed to make a nonfrivolous allegation of jurisdiction

over his appeal because it was undisputed that the agency cancelled the appellant's promotion before he served in the YF-2 Supervisory Electrical Engineer position. ID at 4. The administrative judge found the appellant's claim that the agency had violated its internal policy when it cancelled his promotion to be without merit because the evidence did not support finding such a violation. ID at 5. The administrative judge did not rule on the agency's claims that the appeal was untimely and that the appellant's May 27, 2011 grievance constituted an election of remedies, which barred his Board appeal. ID at 2 n.1, 5; *see* IAF, Tab 6 at 6. The appellant filed a petition for review, and the agency did not file a response. Petition for Review (PFR) File, Tab 1.

#### ANALYSIS

¶6 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). An appellant bears the burden of proving that the Board has jurisdiction over his appeal. [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#). If the appellant makes a nonfrivolous allegation of fact that, if proven, would establish the Board's jurisdiction, then he is entitled to a hearing at which he must prove jurisdiction. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1330 (Fed. Cir. 2006). In determining whether an appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, [60 M.S.P.R. 325](#), 329 (1994).

The cancellation of an effected promotion constitutes a reduction in grade or pay.

¶7 The Board has jurisdiction to review an appeal of a reduction in grade or pay. [5 U.S.C. § 7512](#). A cancellation of an effected promotion constitutes an appealable reduction in grade. *Levy v. Department of Labor*, [118 M.S.P.R. 619](#), ¶ 6 (2012). If a promotion to a higher grade was not effected, however, there was not an appealable reduction in grade or pay. *Id.* To establish jurisdiction in an appeal from the cancellation of a promotion as a reduction in grade, the appellant must show that: (1) the promotion actually occurred; that is, it was approved by an authorized appointing official aware that he or she was making the promotion; (2) the appellant took some action denoting acceptance of the promotion; and (3) the promotion was not revoked before it became effective. *Id.*, ¶ 10.

¶8 The administrative judge found that an authorized official appointed the appellant to the supervisory position, and the appellant took action denoting his acceptance of the position by delaying his deployment until February 1, 2009, in an attempt to complete the promotion paperwork. ID at 4. We agree with the administrative judge's findings on these issues. The administrative judge, however, further found that the appellant did not make a nonfrivolous allegation of jurisdiction over his appeal because it was undisputed that he never performed in the position before the agency cancelled his promotion. ID at 4.

¶9 The administrative judge issued her initial decision several months before the Board issued its decision in *Levy*, in which the Board eliminated the jurisdictional requirement that the appellant show that he actually performed in the higher graded position before the agency revoked his promotion. *Levy*, [118 M.S.P.R. 619](#), ¶ 7. The Board explained that, “[i]n most cases, if an appointment or promotion has gone into effect, the employee will have entered onto duty and performed some of the duties of the position.” *Id.*, ¶ 10. However, in cases like *Levy*, in which the appellant alleged that he was promoted and immediately went on annual leave, the Board held that the effective date of the action preceded the date on which the appellant technically entered onto duty in

the higher graded position. *Id.* In such cases, the Board found that the effective date of the action is the point at which the promotion is no longer revocable. *Id.*

¶10 Thus, we must consider whether the appellant made a nonfrivolous allegation that his promotion took effect before the agency cancelled it. *Levy*, [118 M.S.P.R. 619](#), ¶ 10. It is undisputed that the appellant's promotion became effective in February 2009, which is before the agency issued the November 1, 2009 SF-50 cancelling his promotion. In addition, the appellant alleged that the agency demoted him to the GS-13 Electrical Engineer position and forced him to repay the \$7,050.00 pay increase he received in the YF-2 Supervisory Electrical Engineer position from February 15, 2009, to November 1, 2009, when his promotion was cancelled. IAF, Tab 1 at 10.

¶11 We find those allegations, if true, typically would be sufficient to establish Board jurisdiction over the revocation of his promotion as an appealable reduction in grade, regardless of whether the appellant actually performed any duties in the higher-level position. There is, however, an exception if the appellant was required to serve a supervisory probationary period. *See Levy*, [118 M.S.P.R. 619](#), ¶¶ 11-12. In that case, the Board still may not have jurisdiction. *Id.*

Remand is necessary to adjudicate the remaining jurisdictional issues.

¶12 In some cases, such as this one, there will be an additional jurisdictional element.<sup>3</sup> *See Levy*, [118 M.S.P.R. 619](#), ¶ 11. An “initial appointment as a supervisor” in the competitive service does not “become[] final” until the appointee completes a period of supervisory probation. [5 U.S.C. § 3321\(a\)\(2\)](#); *Levy*, [118 M.S.P.R. 619](#), ¶ 11. The regulations implementing this statute provide that an employee “is required to serve a probationary period prescribed by the

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<sup>3</sup> On the SF-50 documenting the appellant's promotion, the agency stated that it was “[s]ubject to completion of one year probationary period for assignment to supervisory (or managerial) position beginning 15-FEB-2009.” IAF, Tab 1 at 23.

agency upon initial appointment to a supervisory . . . position.” *Levy*, [118 M.S.P.R. 619](#), ¶ 11; [5 C.F.R. § 315.904](#)(a). The regulations further provide:

The authority to determine the length of the probationary period is delegated to the head of each agency, provided that it be of reasonable fixed duration, appropriate to the position, and uniformly applied. An agency may establish different probationary periods for different occupations or a single one for all agency employees.

*Levy*, [118 M.S.P.R. 619](#), ¶ 11; [5 C.F.R. § 315.905](#). An employee who was promoted to a supervisory position and does not satisfactorily complete the supervisory probationary period “shall be returned to a position of no lower grade and pay than the position from which the individual was . . . promoted.” [5 U.S.C. § 3321](#)(b); *Levy*, [118 M.S.P.R. 619](#), ¶ 11. A return to a lower-graded position under such circumstances is not appealable as a reduction in grade under [5 U.S.C. §§ 7512](#)(3) and 7513(d). *Levy*, [118 M.S.P.R. 619](#), ¶ 11. Here, the facts suggest that the appellant may have been a probationary supervisor at the time of the alleged reduction in grade, and to establish jurisdiction the appellant must show that he was not required to serve a supervisory probationary period or that he completed such a probationary period before the reduction in grade.<sup>4</sup> *Id.*

¶13 The appellant has not made a nonfrivolous allegation that he was not a probationer when he allegedly returned to the GS-13 position, but he also has not been placed on notice, until now, that he must make a nonfrivolous allegation in this regard in order to get a jurisdictional hearing. Thus, on remand, the administrative judge should inform the appellant of the remaining elements required to establish the Board’s jurisdiction over his claim and give the parties the opportunity to present evidence and argument on the issue. The administrative judge shall hold a hearing, if appropriate, and issue a new initial decision. *See Levy*, [118 M.S.P.R. 619](#), ¶¶ 12, 14.

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<sup>4</sup> Although the agency has not raised the issue of supervisory probation, we are obligated to do so sua sponte because it relates to a potential jurisdictional defect. *See Levy*, [118 M.S.P.R. 619](#), ¶ 11 n.3.

On remand, the administrative judge shall issue a decision that identifies and resolves all of the material issues of fact and law raised by the parties.

¶14 The Board has held that an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980). If any of these items is missing or substantially incomplete, the Board will remand the appeal to the administrative judge for modification. *Miller v. U.S. Postal Service*, [117 M.S.P.R. 557](#), ¶ 14 (2012).

¶15 In his petition for review, the appellant alleges that the administrative judge erred by failing to address the additional claims he raised as a basis for establishing that the Board has jurisdiction over his appeal. PFR File, Tab 1 at 8. Specifically, he asserts that the administrative judge failed to address his claim that the Board has jurisdiction over his appeal because the agency subjected him to a reduction in pay when he was moved from the NSPS system to the GS system as the result of the cancellation of his promotion. PFR File, Tab 1 at 8; IAF, Tab 9 at 6; *see Arrington v. Department of the Navy*, [117 M.S.P.R. 301](#), ¶¶ 2-3, 10, 12-13 (2012) (finding that the cumulative effect of Arrington's conversion from a GS-14 Supervisory Management Analyst position to a YC-02 position within the NSPS system and back to a GS-13 position, when the NSPS was abolished, constituted a reduction in grade within the Board's jurisdiction). The appellant also claims that the administrative judge failed to address his claim that the Board has jurisdiction over his appeal because his rights or interests under the Federal Employees Retirement System (FERS) were affected by the agency's decision to cancel his promotion. PFR File, Tab 1 at 9; *see* IAF, Tab 3 at 8-9; *see also* [5 U.S.C. § 8461](#)(e)(1) (the Board has jurisdiction over an appeal from "an administrative action or order affecting the rights or interests of an individual or of the United States" under FERS); *Olszak v. Department of Homeland Security*,



[117 M.S.P.R. 75](#), ¶ 3 n.1 (2011). The administrative judge did not make any findings with respect to these claims in her initial decision. Accordingly, the administrative judge shall address them in her remand decision.

¶16 Although the administrative judge also found that she did not need to address the agency's argument that the appellant made an election of remedies by filing a grievance, which barred his Board appeal, the appellant has raised this issue on review. PFR File, Tab 1 at 12; ID at 5; IAF, Tab 6 at 6. Specifically, the appellant reasserts his argument that he did not make an election of remedies because he is a supervisor and not covered under the collective bargaining agreement. PFR File, Tab 1 at 12; IAF, Tab 9 at 18, n.1. The administrative judge shall address this issue on remand.

¶17 Moreover, in his petition for review, the appellant challenges the administrative judge's finding that the appellant's claim that cancelling his promotion violated DoD Directive 1041 had no merit.<sup>5</sup> PFR File, Tab 1 at 6. The appellant argues that the administrative judge's finding on this issue is contradicted by her finding that the Board has no jurisdiction over this appeal. *Id.* We agree with the appellant on this issue. Absent jurisdiction, the Board is without authority to decide the issues presented by the appellant. *See King v. Department of Veterans Affairs*, [105 M.S.P.R. 21](#), ¶ 8 (2007). If there is no

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<sup>5</sup> Paragraph B.1.d. of the February 12, 2008 deployment policy guidance states:

[C]ivilian employees who deploy to Iraq or Afghanistan will not be denied consideration for promotion or other career enhancing opportunities while deployed. Employees may be selected for new opportunities while deployed, but may have a delayed effective date and/or report date to complete their deployment. Effective dates and reporting dates will consider both the gaining mission requirements and the deployment requirements. There will be no retaliation because of either a DoD civilian's expression of interest in serving in a contingency operation or one's actual service. This includes threats or denial of rights to return to pre-deployment positions, promotions, training opportunities, developmental assignments, or other career enhancing opportunities.

IAF, Tab 1 at 36.

jurisdiction over this appeal, the administrative judge's finding on the merits of the appellant's claim that the agency violated the directive issued by DoD is a nullity. *Id.*; *see* ID at 5. However, on remand, the administrative judge should determine whether this allegation has any effect on the question of jurisdiction.

¶18 Because the administrative judge dismissed this appeal for lack of jurisdiction, she did not decide whether the appellant's appeal was untimely. ID at 2 n.1. On remand, the administrative judge shall resolve the timeliness issue if jurisdiction is established.

### **ORDER**

¶19 Accordingly, we REMAND this appeal to the Western Regional Office for further adjudication in accordance with this remand order.

FOR THE BOARD:

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