

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

2013 MSPB 98

Docket No. AT-3443-13-0240-I-1

**Kevin Cortez Bean,
Appellant,**

v.

**United States Postal Service,
Agency.**

December 16, 2013

John R. Macon, Memphis, Tennessee, for the appellant.

Arthur S. Kramer, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his constructive suspension appeal on the grounds of adjudicatory efficiency. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant is a preference eligible Mail Handler for the agency. Initial Appeal File (IAF), Tab 1 at 5. On November 30, 2011, the appellant filed a Board appeal challenging an alleged constructive suspension and raising

discrimination claims under [5 U.S.C. § 2302](#)(b)(1)(A) and (D). *Bean v. U.S. Postal Service*, MSPB Docket No. AT-3443-13-0159-I-1, Initial Appeal File, Tab 1. On November 26, 2012, the administrative judge dismissed that appeal for lack of jurisdiction. *Id.*, Tab 15. The appellant filed a timely petition for review, thus preventing the initial decision from becoming final. *Bean*, MSPB Docket No. AT-3443-13-0159-I-1, Petition for Review File, Tab 1; *see* [5 C.F.R. § 1201.113](#)(a).

¶3 Meanwhile, on December 4, 2012, the appellant filed the instant appeal, challenging the same alleged constructive suspension and raising the same discrimination claims. IAF, Tab 1. Without holding the appellant's requested hearing, the administrative judge dismissed the appeal on the grounds of adjudicatory efficiency. IAF, Tab 13, Initial Decision at 2-3. She explained that the appellant's prior appeal, which was still pending before the Board, concerned the same subject matter and that, if the appellant were to prevail in that appeal, he would receive all the relief that he could have received in the instant appeal. *Id.*

¶4 The appellant has filed a petition for review, arguing that the appeals do not concern the same subject matter because, unlike the previous appeal, he filed the instant appeal pursuant to the appeal rights notice in a final agency equal employment opportunity decision. Petition for Review (PFR) File, Tab 1 at 2. The appellant also appears to contest the initial decision in his prior appeal. *Id.* at 3-5. The agency has responded in opposition, and the appellant has filed a reply to the agency's response. PFR File, Tabs 3, 4.

ANALYSIS

The administrative judge properly dismissed this appeal on the grounds of adjudicatory efficiency.

¶5 When an appellant files an appeal that raises claims raised in an earlier appeal after the initial decision in the earlier appeal has been issued, but before the full Board has acted on the appellant's petition for review, it is appropriate to

dismiss the subsequent appeal on the grounds of adjudicatory efficiency. *Zgonc v. Department of Defense*, [103 M.S.P.R. 666](#), ¶ 6 (2006), *aff'd*, 230 F. App'x 967 (Fed. Cir. 2007). In other words, the Board will dismiss on the basis of adjudicatory efficiency where an identity of issues exists and the controlling issues in the appeal will be determined in a prior appeal. *Kinler v. General Services Administration*, [44 M.S.P.R. 262](#), 263 (1990).

¶6 We agree with the administrative judge that the instant appeal involves the same constructive suspension claim as the prior appeal, and the controlling issues in the instant appeal will be resolved when the Board issues its final decision in that appeal. We acknowledge that the appellant filed the instant appeal pursuant to the notice that he received in a final equal employment opportunity decision. However, this does not change the fact that both appeals concern the same alleged constructive suspension. The controlling issues are identical in both appeals, and the appellant could gain no relief by prevailing in the instant appeal that he could not gain by prevailing in his other appeal. As for the appellant's arguments regarding the initial decision in his prior appeal, they are better directed to that appeal than to this one.

The Board notifies the appellant of non-mixed case appeal rights.

¶7 To facilitate the appellate review process, the Board customarily notifies appellants of their appeal rights from a final Board decision. *Vaughn v. Department of Treasury*, [119 M.S.P.R. 605](#), ¶ 20 (2013). In affording that notice in the instant appeal, we have considered the effect of recent court and Board precedent.

¶8 Cases within the Board's jurisdiction that involve claims of discrimination under [5 U.S.C. § 7702](#)(a)(1)(B) are known as "mixed case appeals" and are governed by the procedures set forth at [5 U.S.C. § 7702](#). *Mills v. U.S. Postal Service*, [119 M.S.P.R. 482](#), ¶ 7 (2013). Judicial review of mixed case appeals lies exclusively in a federal district court of competent jurisdiction. [5 U.S.C.](#)

[§ 7703\(b\)\(2\)](#); *Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012). Alternatively, an appellant can seek administrative review of a mixed case before the Equal Employment Opportunity Commission. [5 U.S.C. § 7702\(b\)](#). For non-mixed case appeals governed by the procedures of [5 U.S.C. § 7701](#), the exclusive avenue of review is with the United States Court of Appeals for the Federal Circuit.¹ [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#).

¶9 Occasionally, as is the case here, the Board will issue a final order dismissing a case involving section 7702(a)(1)(B) claims of discrimination on procedural grounds without deciding the jurisdictional issue. *See, e.g., Persons v. U.S. Postal Service*, [75 M.S.P.R. 428](#), 431-33 (1997) (the Board dismissed an involuntary retirement appeal involving discrimination claims as untimely without reaching the jurisdictional issue). Because the jurisdictional issue is undecided, it is not clear whether the appeal is a mixed case. *See Cunningham v. Department of the Army*, [119 M.S.P.R. 147](#), ¶¶ 13-14 (2013) (appeals of matters outside the Board's jurisdiction do not qualify as mixed cases even if they involve covered discrimination claims); *see also Conforto v. Merit Systems Protection Board*, [713 F.3d 1111](#), 1117-19 (2013) (appeals dismissed for lack of jurisdiction are appealable only to the Federal Circuit regardless of whether they involve discrimination claims). The governing statute assigns review rights according to whether the appeal is a mixed case. *See* [5 U.S.C. §§ 7702\(b\)\(1\), 7703\(b\)](#). It does not explicitly address the situation in this appeal, where the mixed case status is an open question. For the following reasons, we find that, based on the plain language of the statute and the statutory scheme as a whole, the most reasonable interpretation is that non-mixed case appeal rights apply. *See Robinson v. Shell Oil Co.*, [519 U.S. 337](#), 341 (1997) (statutory interpretation focuses on the

¹ There is an exception, not applicable here, providing broader appeal rights in non-mixed cases that involve claims under the Whistleblower Protection Act as amended. [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#).

language itself, the specific context in which that language is used, and the broader context of the statute as a whole).

¶10 Section 7703(b)(1)(A) states that “[e]xcept as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals For the Federal Circuit.” Subparagraph (B) and paragraph (b)(2) set forth the review rights for whistleblower and mixed case appeals respectively.² Likewise, under [5 U.S.C. § 7702](#)(b)(1), administrative review by the Equal Employment Opportunity Commission is available only in mixed cases. The most natural reading of these provisions is that the Federal Circuit is the general reviewing tribunal for Board decisions, with the other avenues of review available as exceptions in particular circumstances. Because the statute affords mixed case appeal rights as an exception to a general rule, we find that they only apply once the exception has been established. Because the mixed case exception in this appeal has not been affirmatively established, we find that non-mixed case appeal rights apply.

¶11 This finding is consistent with the statutory scheme as a whole. In general, the statute provides the Board and the Federal Circuit with primary authority over issues of civil service law, and the Equal Employment Opportunity Commission and the federal district courts with primary authority over issues of discrimination. [5 U.S.C. §§ 7701-7703](#). Because the dispositive issue in the Board’s final decision is purely a matter of civil service law, absent clear direction to the contrary, the most appropriate avenue of review is with the Federal Circuit. If the Federal Circuit reverses the procedural dismissal, the appeal will return to the Board for adjudication of the jurisdictional issue, after

² As noted above, the special review rights for whistleblower appeals are not at issue in this case.

which it will become clear whether mixed or non-mixed case appeal rights apply.³ If the Federal Circuit affirms, it will be established that the dispositive issue was a matter of civil service law and that the Federal Circuit was indeed the most appropriate reviewing tribunal.

¶12 For these reasons, we find that, when jurisdiction is in doubt and an appeal has been dismissed on procedural grounds, non-mixed case appeal rights apply. We therefore provide the appellant with notice of non-mixed case appeal rights.

ORDER

¶13 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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

³ This will be so unless the Board dismisses the appeal again on different procedural grounds without deciding the jurisdictional issue. This will not prejudice the appellant's procedural rights because he will be in the same procedural situation as he was after the first dismissal.

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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.