

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

2008 MSPB 196

Docket No. DC-315H-08-0275-I-1

Robert M. Baggan,

Appellant,

v.

Department of State,

Agency.

August 6, 2008

Robert M. Baggan, Stafford, Virginia, pro se.

Charles Trumbull, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his appeal for lack of Board 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 insofar as it concluded that the Board lacked jurisdiction over the appellant's appeal of his termination, VACATE the initial decision insofar as it dismissed the appellant's individual right of action (IRA) appeal as prematurely filed, and REMAND the case to the Washington Regional Office for further review of the appellant's IRA appeal.

BACKGROUND

¶2 The agency appointed the appellant to the competitive service position of Program Analyst on April 15, 2007, and it terminated the appellant's appointment on January 30, 2008, due to unacceptable conduct. Initial Appeal File (IAF), Tab 12, Subtabs 4, 4L, 4O. The appellant appealed his termination to the Board, alleging reprisal for equal employment opportunity (EEO) activity and discrimination on the basis of race, color, religion, sex, disability, and age. IAF, Tab 1. He later amended his appeal to include an allegation of retaliation for whistleblowing. IAF, Tabs 4-6, 10. Without holding a hearing, the administrative judge (AJ) dismissed the appeal for lack of jurisdiction, finding that the appellant was a probationer at the time of separation and so he had no right to appeal that action to the Board, and that the Board also lacked jurisdiction to review his whistleblowing allegations because he failed to show that he had exhausted his remedies with the Office of Special Counsel (OSC). Initial Decision (ID) at 2-4, IAF, Tab 13.

¶3 The appellant has petitioned for review, arguing that the AJ erred in dismissing his appeal for lack of jurisdiction because he is not a probationer but an "employee" with Board appeal rights due to his prior federal service. Petition for Review File (RF), Tab 3 at 2-5.¹ The agency has responded in opposition to the appellant's petition. RF, Tab 6.

¹ In support of this argument, the appellant has resubmitted evidence from the record below that he asserts the AJ erroneously failed to consider. RF, Tab 3, Subtabs 1-6. The AJ's failure to mention all of the evidence of record does not mean that she did not consider it in reaching her decision. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986). Therefore, the appellant has not shown that the AJ failed to give proper consideration to this evidence.

ANALYSIS

The Board lacks jurisdiction over the appellant's termination.

¶4 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 existence of Board jurisdiction is a threshold issue in adjudicating an appeal, and the appellant bears the burden of establishing jurisdiction by a preponderance of the evidence. *Covington v. Department of the Army*, 85 M.S.P.R. 612, ¶ 9 (2000). The appellant was appointed on April 15, 2007, from a certificate of eligibles under the agency's delegated examining authority. IAF, Tab 12, Subtabs 4L, 4O. His appointment to the competitive service was therefore subject to a 1-year probationary period. *Id.*, Subtab 4L; 5 C.F.R. §§ 315.301, 315.801(a)(1). Employees terminated during a probationary period have only limited appeal rights to the Board. *See* 5 C.F.R. § 315.806. A probationary employee terminated for post-appointment reasons may appeal to the Board only on the grounds that the termination was based upon partisan political reasons or marital status. 5 C.F.R. § 315.806(a), (b). The appellant has not alleged that he was terminated for partisan political reasons or because of his marital status; however, he claims that he was not a probationary employee on account of his prior federal service and so has Board appeal rights. RF, Tab 3 at 2-4.

¶5 To qualify as an "employee" with appeal rights under 5 U.S.C. Chapter 75, the appellant, as a competitive service employee, must show that he either is not serving a probationary period or has completed one year of current continuous service under an appointment other than a temporary one limited to a year or less. 5 U.S.C. § 7511(a)(1)(A); *McCormick v. Department of the Air Force*, 307 F.3d 1339, 1341-44 (Fed. Cir. 2002). An appellant who has not served a full year under his appointment can show that he has completed the probationary period, and so is no longer a probationer, by tacking on prior service in the competitive 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. 5 C.F.R. § 315.802(b); *Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 16 (2005). Alternatively, an employee can show that, while he may be a probationer, he is an “employee” with Chapter 75 appeal rights because, immediately preceding the adverse action, he had completed at least one year of current continuous service in the competitive service without a break in federal civilian employment of a workday. *Ellefson*, 98 M.S.P.R. 191, ¶ 14.

¶6 The appellant argues that he was not a probationer at the time of his separation, noting that prior to his appointment as a Program Analyst, he received disability retirement, effective October 11, 1996, from the competitive service position of Procurement Analyst with the Department of Transportation. IAF, Tab 12, Subtab 4P. He asserts that he retired from that position due to a compensable injury and points to a regulation regarding completion of probationary periods, which states in part that “[a]bsence (whether on or off the rolls) due to compensable injury ... is creditable in full upon restoration to Federal service.” 5 C.F.R. § 315.802(c). The context of this provision, however, shows that it was intended to enable an employee who had begun a probationary period, and who subsequently was absent from his position for a reason addressed in 5 C.F.R. § 315.802(c), to have part or all of the period of absence counted towards the probationary period already begun at the time of the absence. 5 C.F.R. § 315.802(c) begins with a statement that “[p]eriods of absence while in a pay status count toward *completion* of probation” (emphasis added), and it then provides that other kinds of absences in a non-pay status, including those caused by compensable injury, also are creditable. Nothing in 5 C.F.R. § 315.802(c) indicates that any of the absences described therein may be credited toward a probationary period not yet begun. Therefore, the period during which the

appellant was receiving a disability retirement annuity is not creditable toward completion of the probationary period that he began on April 15, 2007.

¶7 Furthermore, the appellant's prior service as a Procurement Analyst with the Department of Transportation cannot be tacked on to fulfill his probationary period that began in April 2007 because it was not with same agency. *See* 5 C.F.R. § 315.802(b); *Ellefson*, 98 M.S.P.R. 191, ¶ 16. Therefore, for the foregoing reasons and because the appellant was separated from his Program Analyst position less than a year after his appointment, he was serving a probationary period at the time of separation and so is not an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i).

¶8 In the alternative, the appellant argues that as a disability retiree he remained in federal service for the duration of his retirement and so, at the time of the adverse action, he had more than a year of current continuous service without a break of a workday and, therefore, was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). RF, Tab 3 at 2-4. However, the appellant's disability retirement was not current continuous federal service because he was separated from federal service and removed from the rolls of the Department of Transportation when he retired in 1996. *Cf. Campbell v. U.S. Postal Service*, 88 M.S.P.R. 546, ¶¶ 7-9 (2001) (appellant completed a year of current continuous service even though she was in a non-duty, non-pay status because she was not formally separated); *Tom v. Department of the Interior*, 32 M.S.P.R. 126, 128-30 (1987) (seasonal employee, despite being placed in non-duty, non-pay status for 2 months during the year prior to his separation, completed a year of current continuous service because he remained on the agency's rolls). Moreover, the Board has held that 5 C.F.R. § 315.802(c), the provision permitting the crediting of absences due to compensable injuries, does not affect the computation of an employee's current continuous service. *See Gadsden v. Department of State*, 102 M.S.P.R. 79, ¶ 14 (2006). Therefore, the appellant did not have a year of

current continuous service at the time of the adverse action and so was not an “employee” with Board appeal rights under 5 U.S.C. § 7511(a)(1)(A)(ii).

¶9 Accordingly, the appellant has not shown that the Board has jurisdiction over his separation during his probationary period; he has not otherwise shown that he is an employee with Chapter 75 appeal rights; and so he has not shown any error in the AJ’s decision to dismiss his appeal for lack of jurisdiction.²

The appeal is remanded to the Washington Regional Office for further review of the appellant’s IRA appeal.

¶10 Even though the Board lacks direct jurisdiction over the termination action, the appellant may request review of such an agency action in an IRA appeal under the Whistleblower Protection Act (WPA). *See Becker v. Department of Veterans Affairs*, 107 M.S.P.R. 327, ¶ 5 (2007). The Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before OSC and makes non-frivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). The AJ dismissed the appellant’s IRA appeal for lack of jurisdiction because OSC had not issued notice that it was terminating its investigation and 120 days had not passed since the appellant filed his complaint with OSC. ID at 4.

² The appellant also submitted with his petition further evidence of his complaints that his termination was based upon discrimination and retaliation for EEO activity. RF, Tab 5. As the Board does not have jurisdiction over the appeal of this termination action, it also lacks jurisdiction to consider the allegations of discrimination and reprisal for EEO activity. *See Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1342-43 (Fed. Cir. 2006) (en banc). Additionally, the appellant has made three submissions after the closing of the record on review. RF, Tabs 7-9. The Board need not consider these submissions because the appellant has not shown that the evidence therein was not readily available to him before the record closed. 5 C.F.R. § 1201.114(i).

¶11 For any action that is not directly appealable to the Board, an appellant has not exhausted his OSC remedy unless he has filed a complaint with OSC and either OSC has notified him that it was terminating its investigation of his allegations or 120 calendar days have passed since he first sought corrective action. 5 U.S.C. § 1214(a)(3); 5 C.F.R. 1209.5(a). OSC acknowledged receipt of the appellant's whistleblower complaint on February 8, 2008. IAF, Tab 5, Attachment 1 at 1. When the initial decision was issued on March 7, 2008, 120 calendar days had not elapsed and the appellant had not shown that OSC had terminated its investigation into his allegations. Therefore, the AJ correctly dismissed the IRA appeal for lack of jurisdiction. *See Kochanoff v. Department of the Treasury*, 98 M.S.P.R. 405, ¶ 6 (2005). However, it is the Board's practice to adjudicate an appeal that was premature when it was filed but becomes ripe while pending with the Board. *Id.* ¶ 7. This is true even when, as here, the appellant had not sought corrective action from OSC when he first filed his Board appeal but has subsequently filed a complaint with OSC. *See id.*

¶12 The undisputed evidence in the record shows that the appellant filed his complaint with OSC no later than February 8, 2008. IAF, Tab 5. Thus, the appellant exhausted his administrative remedies by June 7, 2008, 120 calendar days later. *See* 5 U.S.C. § 1214(a)(3)(B). As the appellant's IRA appeal is now

ripe for adjudication, remand is appropriate. *Morales v. Social Security Administration*, 108 M.S.P.R. 583, ¶ 7 (2008).

ORDER

¶13 Because the appellant has now exhausted his OSC remedy, we REMAND this case to the regional office for review of the appellant's IRA appeal.

FOR THE BOARD:

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