UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[redacted]
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
NY-0752-11-0326-I-1

DATE: September 14, 2012

THIS ORDER IS NONPRECEDENTIAL[1]

Gerald L. Gilliard, Esquire, Washington, D.C., for the appellant.

David B. Suna, Esquire, New York, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate dissenting opinion.

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

When the appellant was terminated on July 15, 2010, he was serving a trial period in the excepted service pursuant to a Federal Career Intern Program (FCIP) appointment. Initial Appeal File (IAF), Tab 1 at 2, 4; Tab 13 at 18-22. Immediately preceding his February 1, 2009 FCIP appointment to an Immigration Enforcement Agent (IEA) position, the appellant was in a Transportation Security Officer (TSO) position. *Id.*, Tab 13 at 18.

The administrative judge dismissed the appeal for lack of jurisdiction. *Id.*, Tab 14 at 1. Specifically, he found that the TSO and IEA positions could not be combined to satisfy the 2 years current continuous service requirement. *Id.*, Tab 14 at 4-9.

In his petition for review, the appellant argues that the administrative judge erred in relying solely on a comparison of the TSO and IEA position descriptions to conclude that the positions were not sufficiently similar to establish that the appellant completed 2 years of current continuous service. Petition for Review (PFR) File, Tab 1 at 4-6. The appellant also argues that he should have been afforded a hearing. *Id.* at 5.

For the Board to have jurisdiction in this case, the appellant, as a non-preference eligible serving a trial period in an excepted service position when he was terminated, needs to demonstrate that he had 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less. 5 U.S.C. § 7511(a)(1)(C). An

FCIP appointment is not considered temporary. *Martinez v. Department of Homeland Security*, 118 M.S.P.R. 154, ¶ 7 (2012). For the purpose of establishing the 2 years of current continuous service in the same or similar position, the appellant must therefore show that the TSO position is the same or similar to the IEA position. *See id.*, ¶ 7. Thus, the issue in this case is whether a TSO position and an IEA position are the same or similar positions as the remaining jurisdictional elements are not in dispute.

For a position to be considered the same or similar, the duties performed in both must be 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. *Beets v. Department of Homeland Security*, 98 M.S.P.R. 451, ¶ 10 (2005). Further, positions may be deemed "similar" if they are in the "same line of work," meaning that they involve the same or similar knowledge, skills and abilities. *Id.*, ¶ 11.

The appellant argues that the administrative judge took too narrow of an approach in reaching his conclusion that the positions were not the same or similar. PFR File, Tab 1 at 4-5. We agree. The Board and the Federal Circuit have recognized that the focus should be on the skills and fundamental character of the positions in question, and not exclusively on the dissimilarities that may exist in position descriptions when assessing whether positions are in the same line of work. *See Sandoval v. Department of Agriculture*, 115 M.S.P.R. 71, ¶¶ 10, 13-14 (2010) (for the purposes of tacking prior service to satisfy the completion of the appellant's probationary period under section 7511(a)(1)(A)(i), the Board considered the appellant's prior duties sufficiently similar to those of the position from which he was terminated despite some dissimilarities in the position descriptions); *see also Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1333-34 (Fed. Cir. 2006) (the administrative judge placed too

much emphasis on job description dissimilarities in finding that the appellant failed to make a nonfrivolous allegation of Board jurisdiction).

The appellant is only entitled to a hearing if he makes a nonfrivolous allegation of jurisdiction, namely claims that, if proven, would establish the Board's jurisdiction. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc). The appellant has done so here. Specifically, the appellant alleged that both positions require the incumbent to gather pertinent security sensitive information from touching, observing and directing private individuals. IAF, Tab 11 at 9-10. He further claimed that both positions involve observation or investigation of persons relative to their potential threat to domestic internal security, require the incumbent to determine the physical security of persons (by pat downs) or airplanes (by searches), entail duties that are physically rigorous, and require that the incumbents be capable of making effective decisions and communicating analysis orally or in writing. *Id.* at 10-12. He also noted that while the two positions are in different pay systems, incumbents earn comparable pay under their respective pay schedules. *Id.* at 10-11. The appellant further contended that, beyond attending the Immigration and Customs Enforcement Academy, he did not require extensive retraining in order to perform duties as an IEA and that his secret clearance as a TSO met the clearance requirements of for the IEA position. *Id.* at 11. Moreover, the appellant explained why he believed that the distinctions between the two positions were minor. *Id.*

Based on the foregoing, we find that the appellant has made a nonfrivolous allegation that the TSO and IEA positions are the same or similar.[2] We conclude,

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[2] We note that the agency has identified differences in the position descriptions defining the duties of the TSO and IEA and that the positions are in different classification series. That evidence, however, is not dispositive at this stage of the proceedings. *See Martinez*, 118 M.S.P.R. 154, ¶ 13; *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

therefore, that the appellant is entitled to an evidentiary hearing at which he may attempt to prove by a preponderance of the evidence that the TSO and IEA positions are similar for the purposes of 5 U.S.C. § 7511. *See Martinez*, 118 M.S.P.R. 154, ¶ 13.

ORDER

For the reasons discussed above, we REMAND this case to the 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.

DISSENTING OPINION OF MEMBER MARK A. ROBBINS

in

[redacted] *v. Department of Homeland Security*

MSPB Docket No. NY-0752-11-0326-I-1

¶1 I agree with the administrative judge that the appellant failed to make a nonfrivolous allegation of Board jurisdiction, and therefore the administrative judge properly dismissed the appeal for lack of jurisdiction without holding a hearing. Because the appellant, a non-preference eligible, was serving a trial period in an excepted service position when he was terminated, he needed to demonstrate that he had 2 years of current continuous service in the same or similar position in an Executive agency in order to establish Board jurisdiction over his appeal. 5 U.S.C. § 7511(a)(1)(C). The issue in this case is whether a Transportation Security Officer (TSO) position and an Immigration Enforcement Agent (IEA) position are the same or similar positions, as the remaining jurisdictional elements are not in dispute. Here, the administrative judge correctly compared the positions and found they were not sufficiently similar to establish the Board's jurisdiction. Initial Appeal File, Tab 14 at 4-9.

¶2 The majority believes that the administrative judge took too narrow of an approach in reaching his conclusion that the positions were not the same or similar. Petition for Review (PFR) File, Tab 1 at 4-5. I disagree. The Board held in *Simonton v. Department of the Army*, 62 M.S.P.R. 30, 35 (1994) that the primary source for determining whether positions are in the same competitive level are the position descriptions[*] As the appellant asserts in his petition for

[*] Positions may be deemed "similar" within the meaning of section 7511(a)(1) when they are in "the same line of work" meaning that the work is so similar that it would place them in the same competitive level for reduction-in-force purposes. While not necessarily dispositive, it is a basis for comparing positions. *Beets v. Department of Homeland Security*, 98 M.S.P.R. 451, ¶ 11 (2005).

review, the Board in *Simonton* did recognize that other evidence, including testimony, may be admissible to establish whether positions are in the same competitive level. PFR File, Tab 1 at 4-5. The admission of other evidence, however, is permitted to the extent that such evidence is material and relevant to an understanding of the appropriate position descriptions, critical elements and performance standards. *See Simonton*, 62 M.S.P.R. at 36.

¶3 Here, the appellant's conclusory statement that the administrative judge should have considered other evidence is insufficient to merit further review. A petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record. *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 92 (1992). The appellant has not provided such specificity, and indeed has made no allegation that the position descriptions in the record are incomplete or otherwise do not accurately reflect the duties of both the IEA and TSO positions. Accordingly, there is no basis for looking beyond the position descriptions in this case. Because the administrative judge thoroughly and accurately compared the positions and provided a detailed explanation of his analysis, I do not believe further review is warranted.

¶4 Therefore, I respectfully dissent from the majority opinion.

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Mark A. Robbins
Member