

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

,
Appellant,

DOCKET NUMBER
DE-315H-13-0102-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: April 10, 2014

THIS ORDER IS NONPRECEDENTIAL*

Joel J. Kirkpatrick, Esquire, Plymouth, Michigan, for the appellant.

Chief Deputy, LELD, Washington, D.C., for the agency.

John B. Barkley, Esquire, Phoenix, Arizona, for the agency.

BEFORE

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

REMAND ORDER

The appellant has filed a petition for review of the initial decision, which dismissed the appeal for lack of jurisdiction. For the reasons discussed below, we

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

GRANT the appellant's petition for review and REMAND the case to the field office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

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, [5 C.F.R. § 1201.56\(a\)\(2\)\(i\)](#), and where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over the appeal, the appellant is entitled to a hearing on the jurisdictional question. *Kim v. Department of the Army*, [119 M.S.P.R. 429](#), ¶ 6 (2013). 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 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).

An individual who meets the definition of an "employee" in [5 U.S.C. § 7511\(a\)\(1\)](#) may challenge his removal from the federal service by filing an appeal with the Board. See [5 U.S.C. §§ 7512\(1\), 7513\(d\)](#). The definition of "employee" includes "a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions . . . in an Executive agency." [5 U.S.C. § 7511\(a\)\(1\)\(B\)\(i\)](#). The record confirms, and the agency does not dispute the administrative judge's finding that the appellant was a preference eligible and that he had current continuous service in an Executive agency. Initial Decision (ID) at 4-5; Initial Appeal File (IAF),

Tab 13, 15. Thus, the issue becomes whether the appellant “completed 1 year of current continuous service in the same or similar positions.”

The regulations implementing 5 U.S.C. chapter 75, subchapter II, define “similar positions” as “positions in which the duties performed are 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.” [5 C.F.R. § 752.402](#). In addition, positions may be deemed “similar” if they are in the same line of work, which has been interpreted as involving “related or comparable work that requires the same or similar skills.” *Mathis v. U.S. Postal Service*, [865 F.2d 232](#), 234 (Fed. Cir. 1988). The United States Court of Appeals for the Federal Circuit and the Board have interpreted such language to mean that positions are similar “if experience in [one] position demonstrates the knowledge, skills, and abilities required to perform the work of the other job.” *Coradeschi v. Department of Homeland Security*, [439 F.3d 1329](#), 1333 (Fed. Cir. 2006) (quoting *Shobe v. U.S. Postal Service*, [5 M.S.P.R. 466](#), 471 (1981)); *Maibaum v. Department of Veterans Affairs*, [116 M.S.P.R. 234](#), ¶ 15 (2011).

On review, the appellant asserts that the administrative judge erred in dismissing this appeal for lack of jurisdiction without holding a hearing. Petition for Review (PFR) File, Tab 1. Specifically, the appellant contends that he raised a nonfrivolous allegation below that he had completed at least 1 year of current continuous service in the same or similar positions in an Executive agency. Specifically, the appellant alleges that his former position of [REDACTED], is the same or similar position as his new position of Immigration Enforcement Agent, GL-1801-07, within the Department of Homeland Security.

The record reflects that, in response to the administrative judge’s show cause order on jurisdiction, the appellant submitted his declaration signed under penalty of perjury stating that both positions required him to carry a firearm and

make arrests and that the duties for both jobs include apprehension, processing, and detention of either criminal suspects or illegal or criminal aliens. IAF, Tab 12 at 23-27. The declaration also states that the training for both positions was “extremely similar,” that he had many of the same investigator courses and instructors for both trainings, and that there were only “minor differences” in the required training. *Id.* at 26. The appellant also submitted copies of the position descriptions for both positions. *Id.*, Tab 12 at 34-36. In response, the agency submitted argument and documentary evidence on this issue, including SF-50s from the appellant’s former position of Police Officer and the position description for his position of Immigration Enforcement Agent. IAF, Tab 13 at 58-80. In addition, the parties each submitted a second substantive brief addressing whether the appellant’s current position of Immigration Enforcement Agent was the same or similar to that of his prior Police Officer position. IAF, Tabs 15, 17. For instance, the appellant’s submission addressed the specific duties of the two positions as well as the law enforcement training he completed for each position, even to the extent of pointing out that the current position required a 5-week training course in Spanish. In this connection, the appellant specifically argued that, excluding the Spanish course, the training he received was virtually the same as the training he received for the Police Officer position. IAF, Tab 17 at 4-5. The agency disputed the appellant’s assertions regarding the required training and duties and submitted a class catalog identifying the classes required for the Immigration Enforcement Agent position. IAF, Tab 15 at 7, 23-25. Thus, the appellant and the agency have presented conflicting arguments concerning the duties and the training for the relevant positions.

Based on the written record, we conclude that the appellant has made a nonfrivolous allegation that the Police Officer and the Immigration Enforcement Agent positions are similar for purposes of [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#). While there are notable differences between the job descriptions, such as deportation of illegal aliens and Spanish speaking skills, our reviewing court has cautioned

against placing too much emphasis on job description dissimilarities. *See Coradaschi*, [439 F.3d 1334](#) (the appellant made a nonfrivolous allegation that Federal Air Marshal (FAM) position was similar to Immigration & Naturalization Service (INS) Agent position, notwithstanding the fact that FAMs enforce criminal laws primarily in the confines of planes while INS agents enforce immigration laws primarily within business establishments); *Martinez v. Department of Homeland Security*, [118 M.S.P.R. 154](#) (2012) (the appellant made a nonfrivolous allegation that positions of Border Patrol Agent and Customs and Border Protection Officer were the same or similar). Rather, the Board should look to the skills and fundamental character of the position, which the appellant has nonfrivolously alleged are closely related. *See Mueller v. Merit Systems Protection Board*, No. 90-3467, 1993 WL 84948, *2 (Fed. Cir. 1993) (unpublished) (noting that both FAM and INS Agent positions required firearm proficiency and the ability to enforce laws and apprehend criminals); *see also Mathis*, 865 F.2d at 235 (finding jobs of special delivery messenger and distribution clerk to be similar because the duties of both positions involved handling of mail). With regard to the agency's documentary evidence concerning the differing training requirements for the two positions, in light of the appellant's allegations, that evidence is not dispositive at this stage of the proceedings. *See Martinez*, [118 M.S.P.R. 154](#), ¶ 13; *Ferdon*, 60 M.S.P.R. at 329. We conclude, therefore, that the appellant is entitled to an evidentiary hearing at which he may attempt to prove by preponderant evidence that the Police Officer and the Immigration Enforcement Agent positions are similar for purposes of [5 U.S.C. § 7511](#). *See Coradaschi*, 439 F.3d at 1334.

ORDER

For the reasons discussed above, we REMAND this case to the field office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.