

United States Court of Appeals for the Federal Circuit

KEVIN D. JONES,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2022-1788

Petition for review of the Merit Systems Protection Board in No. DC-0752-21-0375-I-1.

Decided: April 19, 2024

STEPHEN B. PERSHING, Kalijarvi, Chuzi, Newman & Fitch, PC, Washington, DC, argued for petitioner. Also represented by AARON H. SZOT.

ELIZABETH W. FLETCHER, Office of General Counsel, United States Merit Systems Protection Board, Washington, DC, argued for respondent. Also represented by ALLISON JANE BOYLE, KATHERINE MICHELLE SMITH.

PARAS NARESH SHAH, Office of General Counsel, National Treasury Employees Union, for amicus curiae National Treasury Employees Union. Also represented by JULIE M. WILSON.

Before LOURIE, BRYSON, and STARK, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Kevin D. Jones appeals from a decision of the Merit Systems Protection Board (“the Board”) dismissing his administrative appeal for lack of jurisdiction. *Jones v. Dep’t. of Just.*, No. DC-0752-21-0375-I-1, 2022 WL 445118 (M.S.P.B. Feb. 10, 2022), J.A. 1–21 (“*Decision*”). For the following reasons, we affirm.

BACKGROUND

Jones began a term position as an Attorney, GS-0905-14, with the U.S. Department of Agriculture (“USDA”) on April 15, 2018. *Decision* at J.A. 2; J.A. 35. On August 4, 2019, he transferred without a break in service to the position of Attorney, GS-0905-14, with the Department of Justice’s (“DOJ”) Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). *Id.*

At USDA, Jones primarily provided advice and counsel to senior management regarding discrimination complaints filed against the agency. *Decision* at J.A. 8–10. He also litigated ensuing discrimination claims before the Equal Employment Opportunity Commission (“EEOC”), which included performing legal research, engaging in oral advocacy, and drafting pleadings, motions, discovery materials, and more. *Id.*

At ATF, Jones served as an advisor to the Professional Review Board (“PRB”) as part of a team of attorneys in the Management Division of the ATF Office of the General Counsel (“OGC”). *Id.* at J.A. 2. The Management Division handled legal issues in the areas of Employment, Contracts, Fiscal, and Ethics. *Id.* Jones’s primary duties were in the employment field. *Id.* He also served as the “alternate” contracts attorney, with another attorney in the

Management Division serving as the primary contracts attorney. *Id.*

After Jones had been at ATF for approximately three months, his supervisor learned that the Management Division's primary contracts attorney was leaving the agency and directed that attorney to prepare Jones to take over her contracts matters. *Id.* Prior to that time, Jones had not worked on any contracts matters at ATF. *Id.* at J.A. 7. It soon became evident that Jones did not have the contract law experience that his supervisors had thought that he had. *Id.* at J.A. 2–3. One of Jones's supervisors informed him that they intended to recommend termination of his appointment and gave him the opportunity to resign. *Id.* Jones resigned effective December 21, 2019. *Id.* at J.A. 3.

On March 19, 2020, Jones filed a complaint alleging that ATF had discriminated against him on the basis of his race, sex, age, disability, and reprisal when it forced him to resign. *Id.* He also alleged that he was effectively terminated without due process and that, if he was a probationary employee, ATF failed to follow the procedures set forth in 5 C.F.R. § 315.805. *Id.* at J.A. 4. On March 30, 2021, ATF issued a Final Decision finding no evidence of discrimination and provided Jones with notice of his right to appeal the decision to the Board. *Id.* at J.A. 3. On April 26, 2021, Jones timely appealed to the Board. *Id.*

It was Jones's burden to prove by a preponderance of the evidence that the Board had jurisdiction over his claim. 5 C.F.R. § 1201.56(b)(2)(i)(A); *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1344 (Fed. Cir. 2006). Jones alleged that his resignation was involuntary and was therefore an adverse action within the Board's jurisdiction. *Decision* at J.A. 4. The DOJ disputed that his resignation was

involuntary¹ and asserted that he was not an “employee” under 5 U.S.C. § 7511(a)(1)(B) for jurisdiction as required by 5 U.S.C. § 7513. Section 7511(a)(1)(B) defines an “employee” as a person “who has completed 1 year of current continuous service in the same or similar positions.” Jones responded that he was an “employee” under the statute because his two governmental positions had been similar. J.A. 28–31. An Administrative Judge of the Board disagreed with Jones, holding in an Initial Decision that the Board lacked jurisdiction to hear Jones’s appeal because he had not shown that he was an “employee” as required by § 7511(a)(1)(B). *Decision* at J.A. 1.

The AJ found that because Jones’s position at ATF “was not the same or similar to his prior position with USDA,” his four months of work at ATF did not qualify him as an “employee” for purposes of the statute. *Id.* at J.A. 6. The AJ noted that Jones had testified to “several distinctions between the actual tasks he performed for both agencies,” despite using the same “broad labels” of his responsibilities at each. *Id.* at J.A. 8. For example, the AJ found that Jones’s position at USDA required him to advocate before EEOC administrative judges, whereas, at ATF, he discussed matters with the PRB Chair. *Id.* at J.A. 9. The AJ also noted that although certain new trainings and reference materials were not “required” by ATF to perform Jones’s duties, Jones had not disputed that the training and materials “were either useful or necessary for his performance.” *Id.* The AJ found that, despite both positions falling “under the broad ‘employment law’ umbrella,” the

¹ The AJ did not make a finding on whether or not Jones’s resignation was voluntary or involuntary, and the Board does not argue that theory as an alternative basis to affirm on appeal. See Oral Arg. at 26:58–28:37 available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22-1788_03142024.mp3.

record showed that Jones’s “ATF position was different from his USDA position given the distinct nature of the tasks he performed.” *Id.*

Finding that Jones was not an “employee,” the AJ dismissed Jones’s appeal for lack of jurisdiction. *Id.* at J.A. 14. Jones did not appeal the Initial Decision to the full Board, which at the time did not have a quorum, so the AJ’s Initial Decision therefore became the Final Decision of the Board on March 17, 2022. Jones appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).²

DISCUSSION

We review the Board’s jurisdictional determinations *de novo* and its underlying factual findings for substantial evidence. *Parrott v. Merit Sys. Prot. Bd.*, 519 F.3d 1328, 1334 (Fed. Cir. 2008). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938). On appeal, “[t]he petitioner bears the burden of establishing error in the Board’s decision.” *Harris v. Dep’t of Veterans Affs.*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

The Board is a tribunal having limited appellate jurisdiction, only permitted to hear matters as granted by law, rule, or regulation. *Maddox v. Merit Sys. Prot. Bd.*, 759 F.2d 9, 10 (Fed. Cir. 1985); 5 U.S.C. § 7701(a). Pursuant to 5 U.S.C. § 7513(d), the statute enumerating various

² The Board initially challenged our appellate jurisdiction, arguing that the appeal was a mixed case and Jones had not explicitly waived his discrimination claims. Resp’t’s Br. at 15–17. But after Jones filed an updated Fed. Cir. R. 15(c) Statement Concerning Discrimination, *see* ECF 33, the Board agreed that his discrimination claims had been waived. Oral Arg. at 26:26–42. There is therefore no remaining dispute that we have appellate jurisdiction.

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