

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

65 M.S.P.R. 22

Docket Number AT-0752-94-0509-I-1

ROBERT K. SPILLERS, Appellant,

v.

UNITED STATES POSTAL SERVICE, Agency.

Date: October 11, 1994

John P. Gamlin, Esquire, John P. DiFalco & Associates, P.C., Fort Collins,
Colorado, for the appellant.

Carl J. Kelly, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

Vice Chairman Parks recused herself and did not participate in this adjudication.

OPINION AND ORDER

This case is before the Board on an interlocutory appeal from the administrative judge's Order dated June 3, 1994, denying the agency's motion to dismiss the appellant's appeal of his removal for lack of jurisdiction. The administrative judge certified his jurisdictional Order for review by the Board under 5 C.F.R. § 1201.93. For the reasons set forth below, we VACATE the administrative judge's jurisdictional ruling and RETURN the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

The appellant, a preference eligible employee of the Postal Service, petitioned the Board's regional office for appeal of agency's action removing him from his EAS-15 position of Postmaster, Starr, South Carolina, for conduct unbecoming a Postal Service employee. See Initial Appeal File (IAF), Tab 1. The agency selected the appellant for the Postmaster position effective May 15, 1993. *Id.*, Tab 7, Subtab 4. In that position, he functioned as a supervisor responsible for providing any combination of window, box, general delivery, rural route, highway contract route, or city delivery service for a small

community. *Id.*, Tab 7, Subtab 9. Prior to the agency's selection of the appellant for the Postmaster position, he served in the Supervisor, Customer Services position. See *Id.*, Tab 7, Subtab 8. In that position, he functioned as a supervisor of a group of employees in the delivery, collection, and distribution of mail, and in window service activities within a post office, station or branch, or detached unit. *Id.* He began service in that position effective March 6, 1993. *Id.*, Tab 6. The agency moved to dismiss the appeal for lack of jurisdiction. See *Id.*, Tab 7. It argued that the Board does not have jurisdiction over the appellant's appeal because he had not served in the same or similar positions for one continuous year. The appellant responded in opposition to the motion contending, among other things, that the EAS-15 position of Postmaster, and the EAS-16 position of Supervisor, Customer Services, are so similar under current case law as to entitle him to one year of current and continuous service in the same or similar positions. *Id.*, Tab 9. The appellant asserted that the administrative judge should deny the agency's motion or, because he had made a nonfrivolous allegation that the two positions were similar, the administrative judge should conduct an evidentiary hearing on the jurisdictional issue. *Id.*

In an Order dated June 3, 1994, the administrative judge denied the agency's motion to dismiss the appeal for lack of jurisdiction. See IAF, Tab 10. He found that, at the time of his removal, the appellant had not occupied the EAS-15 position of Postmaster for one year, having served in it only from May of 1993 to April of 1994. He found further that immediately prior to beginning his duties of Postmaster, the appellant held the EAS-16 position of Supervisor, Customer Service, a position he entered in March of 1993. He noted that for jurisdictional purposes the service must have been performed in the same or similar positions. Relying on *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed.Cir.1988), he found that to be similar, the positions must involve related or comparable work that required the same or similar skills and the two positions could not involve two distinctly different lines of work. See IAF, Tab 10 at 1-2.

To determine whether the service performed by the appellant was in the same or similar positions, the administrative judge examined the position descriptions for the jobs in question. He concluded from that examination that the core responsibilities of both positions were to supervise employees, to ensure the proper delivery of mail and to provide customer service. He noted that while the duties were performed in different settings, the skills required to accomplish the duties were closely related. He concluded that the positions were similar under 5 U.S.C. § 7511(a)(1)(B) and that, therefore, the appellant was entitled to appeal his removal to the Board.

The agency then filed a motion for certification of an interlocutory appeal. It argued, among other things, that the administrative judge erred in his review of the evidence before him on the jurisdictional issue because he based his jurisdictional finding on the position descriptions rather than on the actual duties performed by the appellant in each job.

In his July 1, 1994, Order certifying the interlocutory appeal, the administrative judge noted that the Board had not determined before specifically whether the actual duties performed should be controlling even if a determination could be made that the jobs were similar based solely on the position descriptions of record. See IAF, Tab 14. He certified the jurisdictional Order to the Board for further consideration.

ANALYSIS

Jurisdiction

Under 5 U.S.C. §§ 7511-7513, a preference eligible employee who has completed one year of current continuous service in the same or similar positions, is entitled to appeal a removal action to the Board. See, e.g., *McDonald v. U.S. Postal Service*, 42 M.S.P.R. 148, 151 (1989). The requirement that the year of service must be in positions that, if not the same, are similar, requires that employment in more than one position be in the same line of work without a break of a workday. *Mathis*, 865 F.2d at 234. Because it is uncontroverted that the appellant is a preference eligible employee who was employed by the agency for more than one year, whether the Board has jurisdiction over this appeal must be based on whether the two positions the appellant held during his last year of employment with the agency, Postmaster, EAS-15, and Supervisor, Customer Services, EAS-16, were similar positions under 5 U.S.C. § 7511(a)(1)(B).

Positions may be deemed similar if they involve related or comparable work requiring the same or similar skills. *Id.* The Board has interpreted the same line of work requirement for purposes of jurisdiction to mean that different positions are so similar that they require the same qualifications, they would have been in the same competitive level for reduction-in-force purposes, or they would allow an employee to interchange between the positions without significant training and without unduly interrupting the work program. See *Van Skiver v. U.S. Postal Service*, 6 MSPB 630, 7 M.S.P.R. 18, 20 (1981), *aff'd on reconsideration*, 9 MSPB 28, 9 M.S.P.R. 380 (1982). While the Board has not ruled that in order for two positions to be the same or similar, they must be in the same competitive level, whether or not they would be is one factor that may be considered in making the determination. See *Aizin v. Department of Defense*, 52 M.S.P.R. 146, 150 (1991); *McDonald*, 42 M.S.P.R. at 152. In a closely analogous situation, determining completion of a probationary period, the Board has held that positions are in the same line of work if the experience gained in one demonstrates the knowledge, skills, and abilities required to perform the work of the other. See *Shobe v. U.S. Postal Service*, 5 M.S.P.R. 466, 471 (1981). The agency argues essentially that the controlling factor in determining whether the jobs in question here were similar is the actual duties performed by the appellant in the two jobs rather than a comparison of the position descriptions of record.

The Evidentiary Issue

In determining whether jobs are similar, the Board generally does not probe behind the position descriptions of record, as that document is taken to be definitively reflective of the duties performed. See *Van Skiver*, 7 M.S.P.R. at 20 n. 1. Cf. *Simonton v. Department of the Army*, 62 M.S.P.R. 30, 35 (1994) (whether positions are in the same competitive level for reduction-in-force purposes is determined mainly by the official position description even though other evidence may also be relevant in light of the circumstances). Moreover, *Simonton* makes clear that the purpose for consideration of such other evidence is to "shed light on" the position descriptions rather than to be the controlling factor in making the determination. *Id.*

Where, as here, a question is raised regarding the nature and character of the duties performed, making reference to the position descriptions alone may be inadequate. See *Van Skiver*, 7 M.S.P.R. at 20 n. 1. Thus, under certain circumstances, the Board will consider all factors having bearing upon the totality of circumstances with respect to the duties performed. *Id.*

Here, the agency argued below that with regard to whether the jobs in question were the same or similar, questions existed concerning the actual duties performed by the appellant in the two positions. See IAF, Tab 7. For instance, the agency alleged that a customer service supervisor with no prior training on window duties and scheme distribution training and no prior financial training could not move into the postmaster position without undue disruption of the workplace and without significant training. As noted above, one consideration in making the determination of whether positions are in a similar line of work is whether an employee could interchange between the positions without significant training and without unduly interrupting the work program. See *Van Skiver*, 7 M.S.P.R. at 20. The agency alleged further that there was a difference in the degree of supervisory duties, that the duties of the two positions were different in nature, and that without consideration of the actual duties, the administrative judge could not properly conclude that the positions were the same or similar. In this regard, the Board has held that two positions are not similar if several specified managerial functions are entailed by one position but not the other. See *Baker v. U.S. Postal Service*, 56 M.S.P.R. 588, 591 (1993).

The appellant argued in opposition to and submitted a sworn statement contradicting the agency's allegations that the two positions were not similar. See IAF, Tab 9; *Id.*, Exhibit A.

In his jurisdictional Order, however, the administrative judge did not address the contradictions between the parties based on evidence regarding the actual duties of the positions but relied on the position descriptions to determine the jurisdictional issue. See IAF, Tab 10. Although, as noted above, the Board has relied mainly on a comparison of position descriptions to determine whether positions are the same or similar, it has not found that position descriptions should be considered to the exclusion of all other evidence that may shed light on the position descriptions for determining whether positions are the same or similar. See *Van Skiver*, 7 M.S.P.R. at 20 n. 1; *Simonton*, 62 M.S.P.R. at 35.

The parties' allegations raise factual issues that cannot be resolved based on consideration of only the position descriptions of record. The Board can make factual findings on the threshold issue of jurisdiction when such findings are based on undisputed documentary evidence. See *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). However, where, as here, the factual findings would have to be made on questions which are disputed by the parties and which are material to the jurisdictional issue, the appellant is entitled to jurisdictional hearing. *Id.*

Accordingly, we find that under the circumstances of this case the administrative judge should not have relied solely on the position descriptions of record to determine the jurisdictional issue. Thus, we return this appeal to the regional office for a jurisdictional hearing where the parties will be allowed to present evidence regarding the

actual duties performed by the appellant in the jobs in question to the extent that such evidence is material and relevant to a determination of whether the positions are in the same line of work. *Simonton*, 62 M.S.P.R. at 36.

ORDER

This is the final order of the Merit Systems Protection Board in this interlocutory appeal. See 5 C.F.R. § 1201.91.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.