

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3040

REX L. SMART,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Petition for review of the Merit Systems Protection Board in DE0752080232-I-1.

ON MOTION

Before MOORE, Circuit Judge.

ORDER

The Merit Systems Protection Board moves for leave to intervene for the purpose of moving to reform the official caption to designate the Board as respondent. The Department of the Interior and Rex L. Smart oppose. The Board replies.

Smart filed an appeal alleging that the Department of the Interior forced him to retire from his position as an office manager. The Board dismissed the appeal for lack of jurisdiction, concluding Smart had not established by a preponderance of the evidence that the Department of the Interior forced him to retire.

Pursuant to 5 U.S.C. § 7703(a)(2), the Board is designated as the respondent when the Board's decision concerns the procedure or jurisdiction of the Board. In this case, the Board dismissed the appeal for lack of jurisdiction without reaching the merits of

Smart's involuntary retirement claim. Where the Board determines it lacks jurisdiction over such a case, the Board does not and cannot decide the merits of the case. Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1340-41 (Fed. Cir. 2006). Because the Board determined that Smart did not establish that his decision to retire constituted an appealable involuntary retirement, the Board is the proper respondent in this petition for review.

Accordingly,

IT IS ORDERED THAT:

- (1) The Board's motions are granted. The revised official caption is reflected above.
- (2) The respondent should calculate its brief due date from the date of filing of this order.

FOR THE COURT

APR 2 2009

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

cc: Rex L. Smart
Leslie Cayer Ohta, Esq.
Jeffrey A. Gauger, Esq. (copy of petitioner's informal brief enclosed)

s20

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

APR 02 2009

**JAN HORBALY
CLERK**