

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3293

ANTONIO M. APODACA,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Petition for review of the Merit Systems Protection Board in
AT0752090223-I-1.

ON MOTION

ORDER

The Merit Systems Protection Board moves for leave to intervene for purposes of moving to reform the caption to designate the Board as respondent. The Department of Homeland Security opposes. The Board replies. Antonio M. Apodaca responds. Apodaca moves without opposition for leave to file an amended informal brief, with amended informal brief attached.

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. The employing agency is designated as the respondent when the Board reaches the merits of the underlying case.

Apodaca filed an appeal alleging that his resignation was involuntary. The Administrative Judge determined that Apodaca had not demonstrated that his resignation was involuntary and dismissed the appeal for lack of jurisdiction. Because the Board held

that it did not have jurisdiction, it did not address the merits of the case. See Garcia v. Department of Homeland Security, 437 F.3d 1322, 1341 (Fed. Cir. 2006) (en banc) ("In a constructive action case, the jurisdictional fact at issue is almost always whether the facially voluntary action was involuntary. Involuntariness is essential for jurisdiction and it must be proven by the claimant. But while jurisdiction is established under 5 U.S.C. § 7512, the merits of the case are determined by the agency's compliance with § 7513(a)-(b). In other words, the jurisdictional determination is not identical to the merits determination"). Thus, the Board is the proper respondent.

Accordingly,

IT IS ORDERED THAT:

(1) The Board's motion is granted. The revised official caption is reflected above.

(2) Apodaca's motion for leave to file an amended informal brief is granted. The submission attached to Apodaca's motion as Enclosure 1 shall be treated as Apodaca's informal brief.

(3) The Board should calculate the due date for its brief from the date of filing of this order.

FOR THE COURT

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

MAR 10 2010

MAR 10 2010

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

JAN HORBALY
CLERK

cc: Antonio M. Apodaca
Austin M. Fulk, Esq.
Jeffrey A. Gauger, Esq. (copy of Apodaca's amended informal brief enclosed)

s17