

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2010-3054

SELINDA B. COSTA,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

DEPARTMENT OF JUSTICE,

Intervenor.

Petition for review of the Merit Systems Protection Board in
case no. DE0752090075-I-2.

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 Justice has not responded to the motion, but in a footnote within its informal brief requests leave to intervene. Selinda B. Costa moves for leave to file her corrected brief out of time.

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.

Selinda B. Costa filed an appeal alleging that her resignation was involuntary. The Administrative Judge determined that Costa had not demonstrated that her

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 motions are granted. The Department of Justice is granted leave to intervene. The Department's brief, received on April 22, 2010, will be treated as its intervenor's brief. The revised official caption is reflected above.

(2) Costa's motion for leave to file her corrected brief out of time is granted.

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

FOR THE COURT

MAY 12 2010

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

cc: Selinda B. Costa
David M. Hibey, Esq.
Jeffrey A. Gauger, Esq. (copy of petitioner's informal brief enclosed)

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

MAY 12 2010