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Filed: 0212812020

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS  
for the Federal Circuit

ALVIN E. MEDINA, Petitioner v. FEDERAL  
AVIATION ADMINISTRATION, Respondent  
2020-1033

Petition for review of an arbitrator's decision in Nos.  
17-ESW-44,17-ESW-45,17-ESW-46,17-ESW-52,17-  
ESW55, 17-ESW-58, 17-ESW-60, 17-ESW-62, and 18-  
ESW-10 by Linda Byars.

ON MOTION

Before MOORE, CHEN, and STOLL, Circuit Judges.  
PER CURIAM.

ORDER

The Federal Aviation Administration ("FAA") moves to waive the requirements of Rule 27 of the Federal Rules of Appellate Procedure and Federal Circuit Rule 27(f) and dismiss the petition for review for lack of jurisdiction. Alvin E. Medina opposes.

Mr. Medina appealed his removal from his position at the FAA to an arbitrator. At the time, Mr. Medina was represented by his union counsel. On March 29, 2019, the arbitrator issued a decision denying all of Mr. Medina's grievances and emailed a copy to Mr. Medina's counsel. Mr. Medina received an email from his counsel notifying him that the arbitrator reached a decision on

April 9, 2019 and received via email a copy of the arbitrator's decision on April 10, 2019. On June 4, 2019, Mr. Medina, now unrepresented, filed a petition for review of the decision at the United States District Court for the Central District of California. After the district court transferred the case to this court, the FAA moved to dismiss as untimely.

A petition for review of an arbitrator's decision must be filed within sixty days after the arbitrator "issues notice" of that decision. 5 U.S.C. § 7703(b)(1)(A); see also 5 U.S.C. § 7121(f) ("[S]ection 7703 ... pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board."). An arbitrator "issues notice" on "the date on which" the arbitrator "sends the parties the final decision, whether electronically, by regular mail, or by other means." Fed. Educ. Ass'n-Stateside Region v. Dep't of Def., Domestic Dependents Elementary & Secondary Sch., 898 F.3d 1222, 1225 (Fed. Cir. 2018).

Measured by these standards, we must conclude that Mr. Medina's petition was untimely. The arbitrator emailed a copy of the decision to Mr. Medina's counsel on March 29, 2019. That email constituted the date the arbitrator issued notice of the decision because the time to appeal "is measured from the earlier date of receipt by the party or counsel." *Oja v. Dept of the Army*, 405 F.3d 1349, 1357 (Fed. Cir. 2005); c f. . *Irwin v. Dept of Veterans Affairs*, 498 U.S. 89, 92 (1990) ("[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." (internal quotation marks and citations omitted)). Here, even giving Mr.

Medina the benefit of the date he filed his petition at the district court, it would still be 67 days after the arbitrator emailed a copy of the decision to Mr. Medina's then counsel. We must therefore conclude that Mr. Medina's petition is untimely.

Mr. Medina argues that the time for filing should be tolled because the arbitrator did not send him a copy of the decision on March 29, 2019 and "[t]he arbitrator's decision letter was silent on the Petitioner appeal rights in this process," and "had no instructions, guidance, or any language on where, when, or how to file an appeal." But under this court's precedent, the "timeliness of the petition for review is a jurisdictional issue." Fed. Educ. Ass'n-Stateside Region, 898 F.3d at 1225. The deadline for filing a petition from the arbitrator's decision to this court is thus not subject to equitable tolling based on Mr. Medina's personal circumstances. Because the petition here was filed outside of the filing deadline, we grant the motion to dismiss.

Accordingly,

IT IS ORDERED THAT:

- (1) The stay is lifted.
- (2) The FAA's motion is granted. The petition is dismissed.
- (3) Each side shall bear its own costs.

FOR THE COURT

February 28, 2020 Isl Peter R. Marksteiner

Date Peter R. Marksteiner Clerk of Court

s28

ISSUED AS A MANDATE: February 28, 2020

## Footnote

\* Although Mr. Medina argues that the FAA's argument that the petition was untimely was considered and rejected by the district court, the district court transferred the case to this court without addressing timeliness.

Filed 09/27/19

UNITED STATES DISTRICT COURT CENTRAL  
DISTRICT OF CALIFORNIA CIVIL MINUTES-  
GENERAL

September 27, 2019  
EDCV 19-1019 JGB (KKx)

Alvin E. Medina v. Elaine L. Chao

JESUS G. BERNAL, UNITED STATES DISTRICT  
JUDGE  
MAYNOR GALVEZ  
Deputy Clerk

Order (1) DENYING Defendant's Motion to Dismiss (Dkt. No. 9); (2) TRANSFERRING the Action to the United States Court of Appeals for the Federal Circuit; and (3) VACATING the October 7, 2019 Hearing (IN CHAMBERS)

Before the Court is Defendant Secretary of the United States Department of Transportation Elaine Chao's ("Defendant") motion to dismiss Plaintiff Alvin Medina's ("Plaintiff") petition for review of arbitrator's decision. ("Motion," Dkt. No. 9.) The Court determines the Motion is appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of the Motion, the Court DENIES the Motion. The hearing scheduled for October 7, 2019 is VACATED.

I. BACKGROUND

On June 4, 2019, Plaintiff, proceeding pro se, filed a petition for review of an arbitrator's decision upholding

his removal from his position as a Drug and Alcohol Compliance and Enforcement Inspector for the Federal Aviation Administration ("FAA"). (" Compl.," Dkt. No. Pars. 5, 10-11.) On August 23, 2019, Defendant filed the Motion, seeking dismissal for lack of subject matter jurisdiction. On September 16, 2019, Plaintiff filed proof of service of his opposition on Defendant. (Dkt. No. 10.) However, Plaintiff did not file his opposition with the Court. Defendant filed a reply on September 23, 2019. ("Reply," Dkt. No. 11.)

Defendant provides the declaration of Victor Smith, Labor Relations Specialist for the Labor Litigation Division. ("Smith Decl.," Dkt. No. 9-1.) The Smith Declaration explains that the National Air Traffic Controllers Association (" NATCA" or "Union") "is the exclusive union for certain employees, including Drug Abatement Inspectors and Investigators" such as Plaintiff. (Id. Par. 4; see also Compl. Par. 11 (NATCA represented Plaintiff before arbitrator); Dkt. No. 1 at 21.1) NATCA has negotiated a collective bargaining agreement ("CBA") on behalf of the employees it represents. (Smith Decl. Par. 4; see also Compl. Par. 16 (referring to NATCA CBA); Dkt. No. 1 at 21.) The CBA lays out a procedure for addressing grievances. Under that procedure, an aggrieved employee must first submit his grievance to his immediate supervisor within twenty days of the event giving rise to the grievance. (Smith Decl. Par. 5(a).) If the employee or Union is not satisfied with the response, they may submit the grievance to the next appropriate level. (Id. Par. 5(b).) If the Union is not satisfied with that decision, the Union may notify the Director of the Office of Labor and Employee Relations that it wishes

for the matter to be submitted to arbitration. (Id. Par. 5(c).)

In accordance with the grievance procedure, Plaintiff and the Union submitted several grievances relating to Plaintiff's termination. (Dkt. No. 1 at 26-28.) Following the denial of the grievances, the Union requested arbitration. (Id. at 28.) On March 29, 2019, the arbitrator issued a decision denying the appealed grievances. (Id. at 54.) Plaintiff filed his petition for review without the assistance of the Union. (Compl. Par. 4.)

## II. LEGAL STANDARD

Defendant moves to dismiss under Federal Rule of Civil Procedure 12(b) (1) ("Rule 12(b)(1)"). Rule 12(b)(1) motions challenge the court's subject matter jurisdiction, without which a federal district court cannot adjudicate the case before it. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). The party asserting federal subject matter jurisdiction bears the burden of proving its existence. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "Because ... ripeness pertain[s] to federal courts' subject matter jurisdiction, [it is] properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

A party may seek dismissal of an action for lack of subject matter jurisdiction under Rule 12(b) (1) "either on the face of the pleadings or by presenting evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); see also *White v. Lee*, 227 F.3d

1214,1242 (9th Cir. 2000). Where the party asserts a facial challenge, the court limits its inquiry to the allegations set forth in the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

"In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* The court "need not presume the truthfulness of the plaintiff's allegations," *Lee*, 227 F.3d at 1242, and may generally "resolve factual disputes concerning the existence of jurisdiction," *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988). However, "[w]here jurisdiction is intertwined with the merits," the Court must "[a]ssume the truth of the allegations in a complaint ... unless controverted by undisputed facts in the record." *Warren*, 328 F.3d 1136, 1139 (9th Cir. 2003).

### III. DISCUSSION

Defendant argues that under the Civil Service Reform Act of 1978 ("Act"), only the Court of Appeals for the Federal Circuit has jurisdiction over Plaintiff's petition for review of the arbitrator's decision. (Motion at 1.) Petitions for review of a final decision of the Merit Systems Protection Board ("Board") "shall be filed in the United States Court of Appeals for the Federal Circuit." 5 U.S.C. § 7703(b)(1)(A); see also 28 U.S.C. § 1295(a) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction ... of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(4) of title 5[.] "). "[S]ection 7703 ... pertaining to judicial review shall apply to the award of



an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board" in certain matters covered by the Act. 5 U.S.C. § 7121(f). Those matters include actions related to removal, suspension for more than 14 days, and reduction in pay, among others. See *id.*; 5 U.S.C. § 7512. Because Plaintiff challenges his removal (see Compl. Par. 10), the present action is a matter covered under § 7512 such that the judicial review provisions of § 7703 apply. See 5 U.S.C. § 7121(f). Consequently, jurisdiction over Plaintiff's petition lies only with the Federal Circuit. Accord *Devine v. Pastore*, 732 F.2d 213, 215 n.2 (DC Cir.1984) ("The Court of Appeals for the Federal Circuit now has exclusive jurisdiction over ... appeals [of decisions of arbitrators pursuant to § 7121(f)]. "); cf. *Billops v. Dep't of Air Force, Little Rock Air Force Base*, 725 F.2d 1160, 1163 (8th Cir.1984) ("Congress intended the Federal Circuit to have exclusive jurisdiction over appeals from Merit Systems Protection Board decisions. ").

Pursuant to 28 U.S.C. § 1631, the Court "shall, if it is in the interest of justice, transfer [an] action or appeal [over which it lacks jurisdiction] to any other ... court ... in which the action or appeal could have been brought at the time it was filed or noticed[.] " The Court finds it is in the interest of justice to transfer Plaintiff's petition to the United States Court of Appeals for the Federal Circuit.

#### IV. CONCLUSION

For the foregoing reasons, Defendant's Motion is DENIED. Though the Court agrees it lacks subject matter jurisdiction over this action, it declines to

dismiss the action, and instead TRANSFERS it to the United States Court of Appeals for the Federal Circuit. The hearing set for October 7, 2019 is VACATED.

IT IS SO ORDERED.

Footnote

1 Along with his Complaint, Plaintiff includes an unlabeled document that appears to be the arbitrator's decision. (See Dkt. No. 1 at 20-54.)

11a

Filed: 04/30/2020

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UNITED STATES COURT OF APPEALS  
for the Federal Circuit

ALVIN E. MEDINA, Petitioner v. FEDERAL  
AVIATION ADMINISTRATION, Respondent  
2020-1033

Petition for review of an arbitrator's decision in Nos. 17-ESW-44, 17-ESW-45, 17-ESW-46, 17-ESW-52, 17-ESW-55, 17-ESW-58, 17-ESW-60, 17-ESW-62, 18 ESW 10 by Linda Byars.

ON PETITION FOR PANEL REHEARING AND  
REHEARING EN BANC

Before PROST, Chief Judge NEWMAN, LOURIE,  
DYK, MOORE, O'MALLEY, REYNA, WALLACH,  
TARANTO, CHEN, HUGHES, and STOLL, Circuit  
Judges.

PER CURIAM.

ORDER

Petitioner Alvin E. Medina filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof, IT IS ORDERED THAT:

12a

The petition for panel rehearing is denied. The petition for rehearing en banc is denied.

FOR THE COURT April 30, 2020

/s/ Peter R. Marksteiner  
Peter R. Marksteiner Clerk of Court