UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

IRVING L. FINSTON, Appellant, v. HEALTH CARE FINANCING ADMINISTRATION, Agency.	DOCKET NUMBER CH-3443-98-0562-I-1 DATE: MAR 17 1999

Irving L. Finston, Evanston, Illinois, pro se.

Cynthia Soltes, Chicago, Illinois, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the August 25, 1998 initial decision that dismissed his appeal for lack of jurisdiction. After full consideration, we DENY the appellant's petition for review because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. However, for the reasons set forth below, we REOPEN this case on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 In his appeal to the Board, the appellant alleged that the agency's personnel department disregarded his telephone calls and letters requesting materials to respond to job announcement No. HS-014-7, which sought applicants for a GS-14 Supervisory Health Insurance Specialist position. *See* Initial Appeal File (IAF), Tabs 1 and 3. In response to the administrative judge's show-cause order on jurisdiction, the appellant stated that he sent a February 3, 1998 letter to the Office of Special Counsel (OSC) disclosing that the agency had "refused to provide essential information relative to an advertised position despite [his] repeated requests," and that he "disclosed the mandate of the Merit Systems Protection Board to insure that there is free and open competition for positions in Government." *See id*., Tab 8.

¶3 The administrative judge found that the February 3, 1998 "disclosure date is after the dates on which the appellant alleged he requested and did not receive information and, indeed, is after the date the appellant asserted the job announcement closed (February 2, 1998)." Initial Decision at 2. She concluded, therefore, that "the agency's alleged failure to allow the appellant an opportunity to compete for the position could not have been in retaliation for the appellant's disclosure to [OSC]." *Id.* We reopen this appeal on our own motion to address the administrative judge's basis for her finding of no jurisdiction.

ANALYSIS

¶4 In *Geyer v. Department of Justice*, 63 M.S.P.R. 13 (1994), the Board set out the jurisdictional elements of an individual right of action (IRA) appeal, which are that an appellant must show by preponderant evidence that: He engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2); and he raised the issue before OSC, and proceedings before OSC were exhausted. 63 M.S.P.R. at

16-17. The Board stated in *Geyer* that if the appellant established Board jurisdiction over his appeal, "the administrative judge must then consider the merits of the appeal," namely, "whether the appellant has proven, by preponderant evidence, that a disclosure described in 5 U.S.C. § 2302(b)(8) was a contributing factor in the personnel action that was taken against him" and, if he makes such a showing, whether the agency could prove, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure. 63 M.S.P.R. at 17 (emphasis added).

¶5 There is nothing in 5 U.S.C. § 2302(b)(8) that requires an agency official to change a decision once he or she learns that a person has engaged in whistleblowing activity. *See Dean v. Department of the Army*, 57 M.S.P.R. 296, 303 (1993). Consequently, if an agency takes an action before the appellant makes a disclosure, the Board may find that the disclosure was not a contributing factor in the action. *See O'Shea v. Department of Transportation*, 65 M.S.P.R. 512, 515 (1994); *Washington v. Department of Veterans Affairs*, 49 M.S.P.R. 632, 638 (1991). The administrative judge's finding that the agency could not have retaliated against the appellant because the disclosure to OSC was made after the job announcement closed is therefore a finding on contributing factor, that is, she concluded that the alleged protected disclosure could not have been a contributing factor in the agency's action based on the timing of the disclosure and the alleged personnel action. The administrative judge therefore dismissed the appeal as outside the Board's jurisdiction based on a merits finding. In this regard, she erred. However, the appeal is outside the Board's jurisdiction for the following reason.

¶6 The administrative judge's show-cause order provided the appellant with explicit information on what is required to establish an appealable jurisdictional issue in an IRA appeal. *See* IAF, Tab 6; *see also Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). In determining whether

the appellant's submissions set forth a nonfrivolous allegation of jurisdiction entitling him to a hearing, the Board may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the Board may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶7 In his February 3, 1998 letter to OSC, the appellant stated that, before job announcement H2-014-97 closed on February 2, 1998, he contacted the agency four times to request information on applying for the GS-14 position, but had received no materials. *See* IAF, Tab 3. He further stated that he called an agency personnel official on February 3 and was told by her that she would check with her supervisor to see if he could submit a late application for consideration. *Id.*, Tab 1. In his February 3 letter to OSC, the appellant claimed that these alleged actions "inadvertently or deliberately denied [him] the opportunity to submit an application for the position." *Id.*

¶8 The appellant also submitted an April 7, 1998 letter to him from OSC informing him that it had investigated his complaint under 5 U.S.C. § 2302(b)(4). *Id.* Section 2302(b)(4) states that it is a prohibited personnel practice to "deceive or willfully obstruct any person with respect to such person's right to compete for employment." OSC notified the appellant in its April 7 letter that it had found no evidence to support his allegation that the agency personnel office willfully obstructed his right to compete for the Health Insurance Specialist position. *See* IAF, Tab 1. In response, the appellant sent an April 13, 1998 letter to OSC claiming that he submitted sufficient evidence to show that the agency "wilfully [sic] obstructed [his] right to compete for the position." *Id.* OSC responded by informing the appellant that his April 13 letter gave them no basis on which to reverse the April 7, 1998 finding. *See id.*

¶9 None of the arguments or evidence submitted by the appellant shows that he claimed before OSC that he made a protected disclosure under 5 U.S.C. § 2302(b)(8), and that the agency had taken, failed to take, or threatened to take the purported personnel action because of a protected disclosure made under section 2302(b)(8). The appellant's submissions to OSC never mention whistleblowing, protected disclosure, section 2302(b)(8), or retaliation for whistleblowing. Rather, the appellant's letters to OSC show that he filed a complaint with OSC under 5 U.S.C. § 2302(b)(9) asking OSC to investigate an alleged violation of 5 U.S.C. § 2302(b)(4). *See* IAF, Tabs 1 and 3. Moreover, OSC's report to the appellant states that OSC treated his complaint as an alleged violation of section 2302(b)(4); it does not state that OSC was investigating any allegation of retaliation for whistleblowing under section 2302(b)(8). *See id.*, Tab 1. Thus, we find that the appellant's February 3, 1998 complaint to OSC did not give OSC a sufficient basis on which to pursue an investigation into any whistleblowing claim he is making in this IRA appeal which might have led OSC to pursue corrective action on the appellant's behalf under section 2302(b)(8). *See Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 237-38 (1998).

¶10 Because the appellant has not shown that he raised a whistleblowing claim before OSC, he has not exhausted OSC proceedings with respect to any whistleblowing allegation he may have made in this appeal. For this reason, we find that the Board lacks jurisdiction over this appeal.[*] *See Geyer*, 63 M.S.P.R.

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[*] Based on this finding, we need not decide whether the agency's alleged actions in not sending the appellant application materials or not sending him complete materials constitute personnel actions under 5 U.S.C. § 2302(b)(a)(2)(A). Nor do we reach the issue of whether the appellant's complaint to OSC may rise to the level of a section 2302(b)(8) disclosure. *See generally Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1035 (Fed. Cir. 1993)**{** TA \l "Ellison v. Merit Systems Protection Board, 7 F.3d 1031, 1035 (Fed. Cir. 1993)" \c 1 **}{** TA \l "Ellison v. Merit Systems Protection Board, 7 F.3d 1031, 1035 (Fed. Cir. 1993)" \c 1 **}** ("The facts underlying a section 2302(b)(9) disclosure can serve as the basis for a section 2302(b)(8) disclosure only if they establish the type of fraud, waste, or abuse that the

at 16-17; *cf. Thomas*, 77 M.S.P.R. at 238 (the appellant had exhausted OSC proceedings because he "suppl[ied] OSC with sufficient information to enable the Special Counsel to conduct an investigation to determine whether the agency retaliated against him for disclosing an abuse of authority," even though he used a different label for his disclosures in his OSC complaint). Further, although the appellant asked the administrative judge to review this case under 5 U.S.C. § 2302(b)(4), *see* IAF, Tab 5, the Board has no authority to review alleged violations of section 2302(b)(4) absent an action that is appealable to us under another law, rule, or regulation. *See generally Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985).

ORDER

¶11 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

[Whistleblower Protection Act] was intended to reach." (citation omitted)); *Thomas*, 77 M.S.P.R. at 232-33 (relying on *Ellison*, the Board found that "an individual's challenge to an agency's selection process as 'unfair and inequitable to the employee because the agency considered nonmerit factors in denying him a promotion opportunity' is not the 'type of fraud, waste, or abuse that the WPA was intended to reach,'" and thus were not whistleblowing disclosures under section 2302(b)(8)).

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.