

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

RONALD A. FEIERTAG,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SF-1221-98-0107-W-1

DATE: NOV 13 1998

Ronald A. Feiertag, San Francisco, California, pro se.

Al Rosen, Oakland, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision, issued February 26, 1998, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed a timely individual right of action (IRA) appeal contending that a six-day suspension imposed by the agency in April 1997 was taken in retaliation for whistleblowing disclosures he had made.¹ Specifically, he claimed that his suspension was taken because of e-mail messages he had sent to Monty Montero, the Commanding General of the Military Traffic Management Command (MTMC), and to the Inspector General of MTMC, in which he complained that Captain Ensminger (the appellant's fourth level supervisor) had improperly blocked his access to General Montero in contravention of General Montero's Open Door Policy. Initial Appeal File (IAF), Tab 1.²

¶3 The administrative judge issued a show-cause order advising the appellant that his "disclosure . . . appears to be, generally, a grievance regarding his employment and/or working conditions," rather than a whistleblowing disclosure. IAF, Tab 11. She also stated that the e-mail did not appear to include disclosures of a violation of law, rule, or regulation. *Id.* In response, the appellant claimed that his e-mail messages disclosed a violation of regulation and an abuse of authority. IAF, Tab 12. In dismissing the appeal, the administrative judge found that they were neither. She found that the Open Door Policy was not a regulation but a policy, and that the appellant was merely expressing his disagreement with

¹ An IRA appeal is an appeal authorized by 5 U.S.C. § 1221(a) with respect to certain personnel actions, defined in 5 U.S.C. § 2302(a)(2)(A), that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. 5 C.F.R. § 1209.2(b)(1). "Whistleblowing" is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b).

² The e-mail messages are at Tab 3 of the Initial Appeal File.

how that policy was implemented in a particular situation, not disclosing an abuse of authority.

ANALYSIS

¶4 In his petition for review, the appellant points out that the “Open Door” Policy states on its face that it is a “regulation,” and contends that he had a reasonable belief that he had disclosed a violation of that regulation. Assuming *arguendo* that the appellant made a disclosure within the meaning of 5 U.S.C. § 2302(b)(8), we find in any case that this appeal is not within our jurisdiction. By electing to grieve his suspension using the negotiated grievance procedure under the applicable collective bargaining agreement, the appellant is precluded from pursuing an IRA appeal.

¶5 Under the 1994 amendments to the Whistleblower Protection Act, codified at 5 U.S.C. § 7121(g)(2), an individual who is covered by a collective bargaining agreement, and who believes he has suffered reprisal for making whistleblowing disclosures, may elect not more than one of three remedies: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance filed pursuant to the provisions of the negotiated grievance procedure; or (3) the procedures for seeking corrective action from the Office of Special Counsel (OSC). *See Thurman v. Department of Defense*, 77 M.S.P.R. 598, 600-01 (1998); *Brundin v. Smithsonian Institution*, 75 M.S.P.R. 332, 335-36 (1997); *Hinton-Morgan v. Department of the Army*, 75 M.S.P.R. 382, 397 (1997). An employee shall be considered to have elected the negotiated grievance procedure remedy if he has timely filed a grievance in writing, in accordance with the parties’ negotiated procedure. 5 U.S.C. § 7121(g)(4)(b). In the complaint he filed with OSC, the appellant reported that he was covered by a collective bargaining agreement, and stated that he had filed a grievance with his agency under the negotiated grievance procedure on April 21, 1997. IAF, Tab 3.

¶6 The appellant has the burden of proof on the issue of jurisdiction. *See* 5 C.F.R. § 1201.56(a)(2)(i). An appellant must be fully informed, however, of what is required to establish a prima facie case of Board jurisdiction. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). Although the administrative judge did apprise the appellant that the Board may lack jurisdiction because he did not make a whistleblowing disclosure, she did not apprise him that the Board may lack jurisdiction because of the election of remedies issue. Nevertheless, we find that the appeal need not be remanded on this point because OSC's letter of closure placed the appellant on notice of this issue, and the appellant addressed this issue in his appeal to the Board. *See IAF*, Tab 1 at 2-5, 25; *Thurman*, 77 M.S.P.R. at 601.

¶7 In his initial filing with the Board, and in a later filing regarding jurisdiction, the appellant argued that his filing a written grievance should not be considered to be a binding election because he did not know that filing a grievance would preclude him from pursuing other remedies.³ *IAF*, Tabs 1 and 3. We find nothing in the 1994 amendments to the WPA, however, nor in the legislative history of those amendments, that indicates that an election is binding only if the individual is aware of all of his options, and of the effect that pursuing a particular option will have on his ability to pursue other options.

³ The appellant further contended that information in a booklet provided to him by OSC was misleading on this point, stating that: “Most employees’ problems involving labor relations are resolved within the agency either through informal discussion with a supervisor or through established grievance procedures. Certain matters, such as adverse personnel actions, may also be resolved under an appeals procedure where an appeal right is granted by law or regulation. Employees are encouraged to use these channels whether or not they also complain to the OSC.” *IAF*, Tab 1 (emphasis added). The appellant did not claim, however, that he had seen the OSC booklet prior to filing his written grievance. There is thus no basis for concluding that any erroneous advice in the booklet misled the appellant into filing a grievance rather than pursuing corrective action from OSC.

¶8 Accordingly, because the appellant elected to grieve his suspension, he is precluded from pursuing an IRA appeal on the same personnel action. *See* 5 U.S.C. § 7121(g)(2); *Thurman*, 77 M.S.P.R. at 601-02.

ORDER

¶9 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

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.