UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

98 M.S.P.R. 64

KEVIN R. DOWNING, Appellant,	DOCKET NUMBER NY-1221-01-0328-M-1
v.	
DEPARTMENT OF LABOR, Agency.	DATE: November 23, 2004

Kenneth W. Richardson, Esquire, New York, New York, for the appellant.

Esther D. Curtwright, Esquire, New York, New York, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed for lack of Board jurisdiction his appeal of his termination during his trial period. For the reasons set forth below, we DENY the petition for review because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision AS MODIFIED herein, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed an individual right of action (IRA) appeal alleging that the agency's decision to terminate his term appointment to the position of Economist during his one-year trial period was based on his whistleblowing activities. Specifically, the appellant alleged that he was terminated for contacting members of Congress to inform them that the Bureau of Labor Statistics was closing its New York Regional Office without justification. He also alleged that he was terminated in retaliation for acting as a liaison to his New Jersey co-workers who signed a letter sent to their senators and congressional representatives asking them to intervene to prevent a reduction of service to the public and to save the expense of the reorganization. The appellant requested a hearing. Initial Appeal File (IAF), Tab 1.

¶3 The administrative judge (AJ) found that, although the appellant satisfied the Office of Special Counsel (OSC) exhaustion requirement and showed that he was subject to a personnel action, the alleged disclosure was not a "protected disclosure" under 5 U.S.C. § 2302(b)(8). Specifically, the AJ found that the appellant did not reveal any information that was not already widely known. Initial Decision (ID) at 6. The AJ found further that the appellant did not allege any facts which, if true, would show that his disclosure evidences gross mismanagement, a gross waste of funds, an abuse of authority, a violation of law, rule, or regulation, or a substantial and specific danger to public health or safety. ID at 7. Thus, the AJ found that the appellant failed to establish Board jurisdiction over his appeal and dismissed the appeal.

¶4 The full Board denied the appellant's petition for review by Final Order. *Downing v. Department of Labor*, 93 M.S.P.R. 301 (2002) (Table). The appellant then petitioned the Federal Circuit for review. In an unpublished opinion, the court noted that the initial decision "articulated the improper standard: 'To establish Board jurisdiction over an IRA appeal, an appellant must show by preponderant evidence …' the factors of an IRA appeal." *Downing v.*

Department of Labor, 89 Fed. Appx. 231 (Fed. Cir. 2004). The court found that the Board erred by not clearly articulating the standard it applied in evaluating whether the appellant had established jurisdiction over his case. The court stated further that, although the initial decision's "concluding language may indicate the Board applied the proper non-frivolous allegation standard, we are left with no clear indication of what 'aforementioned standards' the Board actually applied." *Id*. The court vacated the final Board decision and remanded the appeal to the Board so that the Board could determine whether the appellant has made a non-frivolous allegation on each of the elements of his claim to establish Board jurisdiction.

ANALYSIS

¶5 On remand, we have addressed the court's concerns, as well as the arguments raised in the appellant's initial petition for review, and have determined that under *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001), and *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (2002), which adopts the court's approach in *Yunus*, the AJ was correct to deny relief without a hearing.

¶6 Specifically, the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes non-frivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus*, 242 F.3d at 1371.

¶7 Here, the record shows that the appellant sought corrective action from and exhausted proceedings before OSC. IAF, Tab 1. It is also clear from the record that the appellant made a non-frivolous allegation that the agency took a covered personnel action against him when he was terminated from his position. IAF, Tab 1. Thus, the issues remaining are whether the appellant made a non-frivolous

allegation that he made a protected disclosure, and if so, whether the protected disclosure was a contributing factor in the agency's decision to remove him.

¶8 In order for a disclosure to be protected under section 2302(b)(8), the employee must have had a "reasonable belief" that it evidences a violation of law, rule, or regulation or one of the other conditions set out in the statute. 5 U.S.C. § 2302(b)(8). Specifically, section 2302(b)(8) protects an employee from retaliation for disclosures which an employee reasonably believes evidence "(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in section 2302(b)(8) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act (WPA). *White v. Department of the Air Force*, 95 M.S.P.R. 1, ¶¶ 27-28 (2003); *see also Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

¶9 In this case, the appellant asserts that he reasonably believed that his disclosure to Congress[*] about the reorganization evidenced gross mismanagement, a gross waste of funds, an abuse of authority, and a violation of law, rule, or regulation, and that the AJ erred in finding otherwise. Specifically, he asserts that the agency's closure of the New York office was unnecessary, expensive, and impacted the agency's ability to accomplish its mission. The appellant also asserts that the closure evidenced an abuse of authority because New York employees were disadvantaged with regard to promotions and reassignments.

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[*] We note that, although the appellant's OSC complaint summarizes his alleged disclosures, IAF, Tab 1, the record does not include the appellant's actual letter to Congress in which he made such disclosures.

¶10 The AJ found that the appellant failed to show, however, that he had a reasonable belief that he disclosed a condition described at section 2302(b)(8). We have reviewed the AJ's determinations in this regard and find no error with them. As the AJ correctly found, gross mismanagement is more than de minimis wrongdoing or negligence; it is a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Boughton v. Department of Agriculture*, 94 M.S.P.R. 347, ¶ 12 (2003). Here, the appellant essentially disclosed his displeasure and disagreement with the agency's decision to close its New York office. The appellant asserted that the agency closed the office without authority and without a cost-benefit analysis, and that closing the office would interfere with the employees' job of collecting data and would make it more difficult to perform the agency's overall mission. IAF, Tab 1. These assertions are not non-frivolous allegations of gross mismanagement because they do not demonstrate a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. Instead, they are no more than the appellant's subjective disagreement with the agency's decision.

¶11 With regard to the appellant's claim that he disclosed a gross waste of funds, the Board has defined "gross waste of funds" as a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 393 (1993). In this case, the record contains no evidence of agency expenditures. Rather, the appellant merely expressed his belief that the cost of the closure made the closure unwarranted. IAF, Tab 1. Thus, this disclosure does not meet the definition of a gross waste of funds.

¶12 Similarly, with regard to the appellant's claim that he disclosed an abuse of authority, the appellant has failed to make a non-frivolous allegation that his disclosure concerned such abuse, as defined in *D'Elia v. Department of the*

Treasury, 60 M.S.P.R. 226, 232-33 (1993). "Abuse of authority" is an arbitrary or capricious exercise of power by a federal official or employee that adversely affected the rights of any person or that resulted in personal gain or advantage to him or to preferred other persons. *Id*. Here, although the appellant disclosed that New York employees would be disadvantaged with regard to promotions and reassignments, there is no allegation that particular individuals' rights were affected or that the New York office closure was for personal gain. Further, the appellant's assertions on appeal, as well as to OSC, fail to provide any details to support his claims and are just general disagreement with the agency decision to close the New York office.

¶13 The appellant also claims that the agency terminated his appointment because he was associated with a group of employees who had objected to the office closure. *See DiPompo v. Department of Veterans Affairs*, 62 M.S.P.R. 44, 48-49 (1994) (an individual who is associated with a whistleblower is protected from retaliation for the whistleblower's disclosure). The appellant provides no specifics on this point that would allow us to conclude that the group of employees was itself made up of whistleblowers, IAF, Tab 1, and accordingly we conclude that he has not non-frivolously alleged that he deserves "associational" whistleblower protection as described in *DiPompo*.

¶14 In sum, the WPA "is not a weapon in arguments over policy … ." *LaChance v. White*, 174 F.3d at 1381. The agency's decision to close the New York office was the sort of classic discretionary management judgment over which there might be subjective differences of opinion. The appellant, however, did not non-frivolously allege that he disclosed anything objectively improper about the agency's decision in this case under any of the section 2302(b)(8) categories, as required by *White*, 95 M.S.P.R. 1, ¶ 27. Because we find that the appellant failed to make a non-frivolous allegation that he made a protected disclosure, we have not addressed whether the disclosure was a contributing factor in the agency's decision to remove him.

¶15 With regard to the court's concern that the appellant was denied a hearing, only after Board jurisdiction in an IRA case is established is an appellant entitled to a hearing, and that hearing is on the merits and not a jurisdictional hearing. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003). Here, the AJ denied relief without a hearing, so by implication the AJ concluded that the appellant did not make a non-frivolous allegation of a protected disclosure. ID at 7. However, the AJ should have clearly expressed the rationale behind her denial of a hearing, and by doing so she probably would have more clearly articulated the standards she applied in evaluating whether the appellant had established jurisdiction over his case.

¶16 The court was also concerned that the AJ's reliance upon *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 17 (1994), in her statement of law caused an ambiguity in determining the standard she applied in dismissing the appeal for lack of jurisdiction. In *Geyer*, the Board held that IRA jurisdiction is established upon proof, by preponderant evidence, that the appellant exhausted his OSC remedy, he made a protected disclosure, and he was subjected to a personnel action. The *Yunus* test, not the *Geyer* test, is now the law, *see Rusin*, 92 M.S.P.R. 298, ¶ 12, but *Geyer* and *Yunus* share the common element that, in order to receive a hearing, the appellant must non-frivolously allege that he made a protected disclosure; under either *Geyer* or *Yunus*, in the absence of such a non-frivolous allegation, an IRA appeal should be dismissed for lack of jurisdiction without a hearing.

¶17 We conclude that the appellant failed to make a non-frivolous allegation of jurisdiction over his IRA appeal. Thus, the appellant is not entitled to a hearing, and the AJ correctly dismissed the appeal for lack of jurisdiction.

ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.