UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

97 M.S.P.R. 35

	DOCKET NUMBERS
SUZANNE G. SCHOTT,	DC-1221-03-0807-W-1
KYLE JIGGETTS,	NY-0752-03-0378-I-1
JACOB L. YOUNGER,	NY-1221-04-0046-W-1
Appellants,	
v.	DATE: August 12, 2004
DEPARTMENT OF HOMELAND SECURITY,	
Agency.	

Suzanne Grace Schott, Norfolk, Virginia, pro se.

Kyle Jiggetts, Bronx, New York, pro se.

Jacob L. Younger, Tavernier, Florida, pro se.

Heather Sigrist Book, Esquire, Arlington, Virginia, for the agency.

Troy E. Leitzel, Esquire, Philadelphia, Pennsylvania, for the agency.

Steven M. Tapper, Esquire, Atlanta, Georgia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The initial decisions dismissed the appellants' individual right of action (IRA) appeals finding that the Board was divested of jurisdiction under

section 111(d) of the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001). Because these cases present similar issues, we CONSOLIDATE them pursuant to 5 C.F.R. § 1201.36(a)(1) to expedite processing. For the reasons discussed below, we find that the petitions for review filed by the appellants do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY them. We REOPEN these cases on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decisions as MODIFIED herein, still DISMISSING the appeals for lack of jurisdiction.

BACKGROUND

¶2 The appellants were employed in the positions of Security Screener and Lead Security Screener with the Transportation Security Agency (TSA) at Norfolk International Airport in Norfolk, Virginia (appellant Schott), LaGuardia International Airport in Flushing, New York (appellant Jiggetts), and Cyril E. King International Airport in St. Thomas, U.S. Virgin Islands (appellant Younger). Initial Appeal Files (IAF), Tab 1. The agency removed appellant Schott on June 24, 2003, appellant Jiggetts on or about July 13, 2003, and appellant Younger on August 22, 2003, during their service of probationary periods. *Id.*; Younger IAF, Tab 4. The appellants sought to file IRA appeals, alleging that the agency's actions were taken in reprisal for their having made protected disclosures. *Id.* Appellant Jiggetts further alleged that the agency's action was the result of discrimination on the basis of his race, religion, disability, and partisan political affiliation. *Id.*

¶3 The administrative judges dismissed the appeals for lack of jurisdiction, finding that the Board was divested of jurisdiction under section 111(d) of the ATSA. Schott Initial Decision (SID) at 3; Jiggetts Initial Decision at 2-3; Younger Initial Decision at 2-6. In Schott's appeal, the administrative judge also found that: A memorandum of understanding (MOU) between the TSA and the Office of Special Counsel (OSC) provided whistleblower reprisal protection to

TSA Security Screeners (Screeners), but that it never granted the Board jurisdiction to review the OSC's investigations, SID at 3; when the Homeland Security Act (HSA) transferred the TSA into the newly formed Department of Homeland Security (DHS), it did not grant the Board jurisdiction over Screeners' IRA appeals, SID at 4; and unless and until the DHS Secretary establishes a human resource management system for Screeners that grants Board IRA appeal jurisdiction, the DHS Secretary has the authority to discipline and terminate Screeners notwithstanding any other provision of the laws, SID at 4.

¶4 The appellants have now petitioned for review. Jiggetts Petition for Review File (PFRF), Tab 1; Schott PFRF, Tab 1; Younger PFRF, Tab 1. The agency has responded in opposition to the appellants' petitions. Jiggetts PFRF, Tab 5; Schott PFRF, Tab 5; Younger PFRF, Tabs 7-8. After the record on petition for review closed in the Jiggetts appeal, the agency moved to amend its response in opposition to the petition for review. Jiggetts PFRF, Tab 6. We GRANT that motion to consider the issue of the Board's jurisdiction over Screeners' IRA appeals. With the Board's permission, the OSC filed an amicus brief, in which it argued that the Board has jurisdiction over Screeners' IRA appeals. Jiggetts PFRF, Tab 8; Schott PFRF, Tab 9; Younger PFRF, Tab 9.

ANALYSIS

¶5 The appellants have not identified error in the initial decisions or presented new and material evidence on the jurisdictional issue. We therefore deny their petitions for review for failure to meet the criteria for review. *See* 5 C.F.R. § 1201.115. The Board, however, has discretion to reopen and reconsider a case on its own motion at any time. 5 U.S.C. § 7701(e)(1)(B); 5 C.F.R. § 1201.118. We reopen these cases to address this issue of first impression: Whether the Board has jurisdiction over IRA appeals filed by TSA Screeners. For the reasons discussed below, we find that the Board lacks such jurisdiction.

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *See* 5 U.S.C. § 7701(a)(1); *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The appellant has the burden of proof on the issue of jurisdiction. *See* 5 C.F.R. § 1201.56(a)(i); *Edwards v. Department of Veterans Affairs*, 82 M.S.P.R. 593, 596 (1999).

<u>The Board's jurisdiction over TSA Screeners' IRA appeals is precluded by ATSA § 111(d).</u>

¶7 The TSA was established by the ATSA. ATSA § 101(a) specifically provides the following regarding the establishment of Personnel Management System for TSA employees:

> (n) PERSONNEL MANAGEMENT SYSTEM.--The personnel management system established by the Administrator of the Federal Aviation Administration under section 40122 shall apply to employees of the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the personnel management system with respect to such employees as the Under Secretary considers appropriate, such as adopting aspects of other personnel systems of the Department of Transportation.

49 U.S.C. § 114(n).

¶8 The personnel management system established by the Federal Aviation Administration (FAA), which is incorporated by reference into the ATSA, provides as follows in pertinent part:

> (2) Applicability of title 5.--The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of—
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> > (A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5
> >
> > ….
> >
> > (H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

> (3) Appeals to Merit Systems Protection Board.--Under the new personnel management system developed and implemented under paragraph (1), an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.

49 U.S.C. § 40122(g).

¶9 In sum, the TSA is required to apply the FAA's personnel management system or to establish a personnel system of its own, subject to the provisions of 49 U.S.C. § 40122, and to apply that personnel system to TSA personnel. 49 U.S.C. § 114(n). Subsection (g) of § 40122 exempts the FAA, and thus the TSA, from provisions of Title 5 that govern the personnel management of federal agencies, except for specific delineated provisions, such as 5 U.S.C. § 2302(b), relating to whistleblower protection. 49 U.S.C. § 40122(g)(2)(A). This subsection specifically references 5 U.S.C. § 1221, which provides for the filing of IRA appeals with the Board. 49 U.S.C. § 40122(g)(2)(H). Thus, the plain language of ATSA § 101(a) would appear to accord TSA employees with IRA appeal rights to the Board. 49 U.S.C. § 40122(g)(2)(A) and (3).

¶10 However, in addition to the general personnel authority contained in ATSA § 101(a), the ATSA contains very specific personnel authority, applicable only to Screeners, that authorizes the TSA to hire, discipline, and terminate Screeners without regard to any other law. 49 U.S.C. § 44935 note. ATSA § 111(d) states in pertinent part:

> SCREENER PERSONNEL - Notwithstanding any other provision of law, the Under Secretary for Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms and conditions of employment of Federal service for such … individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code.

49 U.S.C. § 44935 note.

¶11 The "notwithstanding" clause of ATSA § 111(d) overrides the conflicting provision of ATSA § 101(a) with regard to IRA jurisdiction. In *Brooks v. Department of Homeland Security*, 95 M.S.P.R. 464, ¶ 13 (2004), the Board found that the "notwithstanding" clause of ATSA § 111(d) supercedes the conflicting provision found in ATSA § 101(a) with regard to jurisdiction over adverse action appeals filed by Screeners. The Board noted that the "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. *Brooks*, 95 M.S.P.R. 464, ¶ 13, citing *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (the courts of appeals generally interpret similar language to supersede all other laws, stating that "a clearer statement is difficult to imagine"); *see Liberty Maritime Corp. v. United States*, 928 F.2d 413, 415-18 (D.C. Cir. 1991) (the "notwithstanding" clause in the Merchant Marine Act (the Act), affords the Secretary of Transportation "broad discretion" in the disposition of vessels and preempts other provisions of law in the Act, such as the noncompetition requirement of section 508 and the minimum price requirement of section 705); *Colorado Nurses Assoc. v. Federal Labor Relations Authority*, 851 F.2d 1486, 1489 (D.C. Cir. 1988) (finding that the Department of Veterans Affairs was not required to engage in collective bargaining for employees appointed pursuant to the "notwithstanding" language found in 38 U.S.C. § 4108); *Coster v. United States*, 485 F.2d 649, 651-52 (Ct. Cl. 1973) ("language such as 'notwithstanding the provisions of this or any other law' covers the waterfront regarding the operational scope of the statute"). Thus, ATSA § 111(d) authorizes the Administrator (formerly known as the Under Secretary of Transportation for Security) to appoint and employ Screeners without regard to any other provision of law, which excludes not only the title 5 provisions excluded from the FAA personnel management system, but also the title 5 exceptions applicable to that system, e.g., the whistleblowing protection of 5 U.S.C. § 2302(b)(8) and the IRA appeal rights of 5 U.S.C. § 1221.

¶12 Moreover, it is a fundamental principle of statutory construction that the specific governs over the general. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). In *Brooks*, the Board found that the above interpretation of sections 101(a) and 111(d) of the ATSA (i.e., that section 111(d) supercedes section 101(a) with regard to Screeners) leaves neither provision inoperative, superfluous, redundant, or contradictory, and resolves any inconsistency in the two sections in favor of the more specific section addressing Screener personnel. *Brooks*, 95 M.S.P.R. 464, ¶ 14 (internal citations omitted). Thus, we find that the more specific section addressing Screeners, i.e., section 111(d) of the ATSA, governs over the whistleblower provisions of § 101(a) of the ATSA and 49 U.S.C. § 40122(g), which apply to TSA employees in general.

¶13 The ATSA's legislative history shows that Congress intended, through section 111(d), to give the Administrator broad discretion to set the terms and conditions of employment for Screeners. The House conference report on the ATSA noted that "the participants in this Federal security workforce ... can be fired *at the discretion* of the Secretary if they are not able to adequately perform their duties." H.R. Conf. Rep. No. 107-296, at 64 (2001) (emphasis added). The legislative history further provides that "the Conferees recognize that, in order to ensure that Federal Screeners are able to provide the best security possible, the Secretary must be given wide latitude to determine the terms of employment of screeners." *Id.* Thus, the legislative history shows that the final authority over Screeners' personnel actions rests solely with the Administrator and such authority is not subject to Board review.[1]

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[1] Additionally, the conference committee noted that it "believed that screening personnel must also be given whistleblower protections so that screeners may report security conditions without fear of reprisal." H.R. Conf. Rep. No. 107-296, at 64 (2001). As discussed below, consistent with this report, the TSA entered into an MOU with the OSC.

¶14 In addition, section 101(a) of the ATSA authorizes the Administrator to modify the currently used FAA personnel management system "with respect to such employees as the [Administrator] considers appropriate ... ." 49 U.S.C. § 114(n). Subsequent to the statutory establishment of the TSA, the Administrator made such a modification on May 28, 2002, when he executed an MOU with the OSC that addressed providing whistleblower reprisal protection to Screeners. Schott PFRF, Tab 5, Att. A.[2] The MOU did not provide for Board review of whistleblowing retaliation claims brought by Screeners. *Id.* The MOU will remain in effect unless terminated by either party. *Id.* The MOU was followed by a TSA Human Resources Policy Manual Letter, No. 1800-01, dated November 20, 2002, Subject: Interim Policy on Whistleblower Protection for TSA Security Screeners. Schott PFRF, Tab 5, Att. B. This letter likewise did not provide for Board review and, in fact, stated in the appendix that "TSA security screeners do not have the right to file appeals with the MSPB." Thus, the TSA and the OSC have established procedures for protecting whistleblowing Screeners which do not include IRA appeal rights.

¶15 Furthermore, Congress proposed, but never adopted, an amendment to ATSA § 111(d) to provide IRA appeal rights to Screeners. After the ATSA was enacted and after the TSA entered into the MOU with the OSC, Congress considered amending section 111(d) during the debate of the HSA. The proposed amendments to ATSA § 111(d) would have expressly granted Screeners IRA appeal rights by creating an exception to section 111(d). *See* 148 Cong. Rec. S7980 (daily ed. Aug. 1, 2002) (Sen. Lieberman's introduction of S.A. 4467); 148 Cong. Rec. S8114 (daily ed. Sept. 3, 2002) (Sen. Lieberman introduced S.A.

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[2] For ease of reference, we have cited to just the Schott PFRF because the agency's responses to the petitions for review in the Schott and Younger appeals and its amended response to the petition for review in the Jiggetts appeal are identical.

4471, which was similar to S.A. 4467). For example, Senator Lieberman introduced the following language as a proposed amendment to the HSA:

> Sec. 164 WHISTLEBLOWER PROTECTION FOR FEDERAL EMPLOYEES WHO ARE AIRPORT SECURITY SCREENERS.
>
> Section 111(d) of [ATSA] is amended –
>
> (1) by striking "(d) SCREENER PERSONNEL. – Notwithstanding any other provision of law," and inserting the following:
>
> "(d) SCREENER PERSONNEL. –
>
> "(1) IN GENERAL. Notwithstanding any other provision of law (except as provided in paragraph (2)),"; and
>
> (2) by adding at the end of the following:
>
> "(2) WHISTLEBLOWER PROTECTION. -
>
> ...
>
> "(B) IN GENERAL. – Notwithstanding paragraph (1) -
>
> "(i) section 2302(b)(8) of title 5, United States Code, shall apply with respect to any security screener; and
>
> "(ii) chapter 12, 23, 75 of that title shall apply with respect to security screeners to the extent necessary to implement clause (i).

148 Cong. Rec. S7980 (daily ed. Aug. 1, 2002) (Sen. Lieberman's introduction of S.A. 4467). Thus, this amendment would have applied whistleblower protections and Board IRA appeal rights to Screeners. However, Congress did not adopt this proposed amendment to ATSA § 111(d).

¶16 Accordingly, we find that the ATSA does not provide Board jurisdiction over IRA appeals filed by Screeners.

Board jurisdiction over Screeners' IRA appeals is not found in the HSA.

¶17 The HSA transferred control of the TSA from the Transportation Secretary and the Administrator to the DHS Secretary. 6 U.S.C. §§ 203(2), 233(c)(1). The DHS Secretary delegated this authority back to the Administrator via a delegation order. Schott PFRF, Tab 5, Att. E. Thus, the Administrator retains full authority over the TSA's functions and personnel, including the authority, under ATSA § 111(d), to "employ, appoint, discipline, terminate, and fix the compensation,

terms and conditions of employment of federal service" for Screeners, without regard for ("notwithstanding") any other provision of law, which includes IRA appeal rights. 49 U.S.C. § 44935 note.

¶18 Section 841 of the HSA allows the DHS Secretary to establish, at his discretion, a human resources management (HRM) system for some or all of the DHS's organizational units. 5 U.S.C. § 9701(a). In relevant part, section 841 provides:

> (a) In General. Notwithstanding any other provision of this part, the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security.
>
> (b) System Requirements.- Any system established under subsection (a) shall--
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> ...
>
> (3) not waive, modify, or otherwise affect –
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> ...
> (C) (i) any provision of law referred to in section 2302(b)(1), (8), and (9); or
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> (ii) any provision of law implementing any provision of law referred to in section 2302(b)(1), (8), and (9) by--
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> ...
>
> (II) providing any right or remedy available to any employee or applicant for employment in civil service.
>
> (D) any other provision of this part (as described in subsection (c)); or
>
> (E) any rule or regulation prescribed under any provision of law referred to in any of the preceding subparagraphs of this paragraph;

5 U.S.C. § 9701 (a),(b).

¶19 Thus, the plain language of section 841 authorizes the DHS Secretary to establish an HRM system for some or all of the DHS's organizational units and requires that the new HRM system retain whistleblower protections for those

employees who had such rights before transferring into the DHS. 5 U.S.C. § 9701(b)(3)(B),(C),(D). Appellant Schott argues that this section provides Board jurisdiction over his IRA appeal. Schott PFRF, Tab 1 at 6.

¶20 Pursuant to section 9701 authority, however, the DHS Secretary recently issued a proposed rule on the DHS HRM System for DHS personnel. *See* 69 Fed. Reg. 8030 (proposed Feb. 20, 2004) (to be codified at 5 C.F.R. § 9701). The preamble states that "'section 9701 authority' does not extend to ... Transportation Security Administration employees ... ." *Id.* The preamble further states that the TSA "generally must adopt the system established for Federal Aviation Administration (FAA) employees, but the Administrator of the TSA is authorized to modify that system consistent with 49 U.S.C. § 40122." *Id.* Thus, section 9701 of the HSA does not provide whistleblower protection, let alone IRA appeal rights, to Screeners.

¶21 A second provision in the HSA also refers to whistleblower rights. Section 883 of the HSA provides in pertinent part the following:

> Nothing in this chapter shall be construed as exempting the Department [of Homeland Security] from requirements applicable to executive agencies--
>
> ...
>
> (2) to provide whistleblower protections for employees of the Department (including pursuant to the provisions in section 2302(b)(8) and (9) of Title 5 and the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002).

6 U.S.C. § 463.

¶22 The language of section 883 of the HSA did not revoke nor amend the Administrator's exclusive personnel authority over Screeners found in ATSA § 111(d). Section 883 provides that "*[n]othing in this chapter* shall be construed as exempting the Department from requirements applicable with respect to executive agencies" including whistleblower laws applicable to other agencies. 6 U.S.C. § 463 (emphasis added). Section 463, however, only refers to "this chapter," i.e., ch. 1, "Homeland Security Organization," of title 6. In these

appeals, ch. 449, "Security," of title 49, i.e., ATSA § 111(d), exempts Screeners from IRA appeal rights.

¶23 Further, section 883 of the HSA does not repeal ATSA § 111(d) by implication. It is a cardinal principle of statutory construction that repeals by implication are strongly disfavored and will not be found unless the intention of the legislature to repeal is clear and manifest. *Rodriguez v. United States*, 480 U.S. 522, 524 (1987). Two exceptions to this principle exist: (1) Where provisions of the two statutes are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later statute covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate as a repeal of the earlier statute. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). It can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. *United States v. Fausto*, 484 U.S. 439, 453, *rehearing denied*, 485 U.S. 972 (1988). ATSA § 111(d) does not cover the whole subject of section 883 of the HSA. Also, section 883 of the HSA (6 U.S.C. § 463) does not mention 5 U.S.C. § 1221 (which provides IRA appeal rights) or otherwise refer to Board IRA jurisdiction. Thus, it does not irreconcilably conflict with section 111(d) of the ATSA, which authorizes the Administrator to "employ, appoint, discipline, terminate, and fix the compensation, terms and conditions of employment of federal service" for Screeners, without regard for ("notwithstanding") any other provision of law, e.g., 5 U.S.C. § 1221. 49 U.S.C. § 44935 note.

¶24 Moreover, as discussed above, the "notwithstanding" clause supercedes all other laws. *See Cisneros*, 508 U.S. at 18; *Colorado Nurses Assoc.*, 851 F.2d at 1489; *Coster*, 485 F.2d at 651-52. Thus, ATSA § 111(d), which authorizes the Administrator to appoint and employ Screeners without regard to any other provision of law, excludes, among other things, the IRA appeal rights of 5 U.S.C. § 1221.

¶25 In addition, as discussed above, a specific statute governs over a general one. *Morales*, 504 U.S. at 384. Here, ATSA § 111(d) applies specifically to Screeners, whereas section 883 of the HSA applies generally to DHS employees. Thus, on the question of IRA appeal rights, a statute with specific application to a particular class of employees, such as ATSA § 111(d), must prevail over a more general requirement of whistleblower protections for DHS employees, found in HSA § 883. *See*, *e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one," even if the general provision is enacted later).

¶26 The OSC argues that section 883 of the HSA must apply to Screeners because otherwise, section 883 would be superfluous since other sections of the HSA, i.e., sections 841 and 1512(e)(2), respectively, provide whistleblower protections for those employees who, unlike Screeners, had such rights before transferring into the DHS or who are covered by the DHS's new HRM system. Schott PFRF, Tab 8 at 11.[3] We agree that section 883 of the HSA applies to Screeners, as well as other employees who lacked whistleblower protections before transferring into the DHS. What we disagree with is the OSC's interpretation of "whistleblower protections" in section 883.

¶27 Section 883 provides that "[n]othing in this chapter shall be construed as exempting the Department from requirements applicable with respect to executive agencies to provide *whistleblower protections* for employees of the Department (including pursuant to the provisions in section 2302(b)(8) ... of Title 5 and the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Public Law 107-174))." 6 U.S.C. § 463 (emphasis added). The OSC interprets "whistleblower protections" as including IRA appeal rights. Schott

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[3] The OSC notes that approximately 800 employees of two former Federal Bureau of Investigation (FBI) entities that became part of the DHS also lacked full statutory whistleblower rights. Schott PFRF, Tab 8 at 7 n.10; *see* 5 U.S.C. § 2302(a)(2)(C)(ii) (excepting the FBI from section 2302).

PFRF, Tab 8 at 4 n.5. However, as discussed above, section 883 of the HSA (6 U.S.C. § 463) does not mention 5 U.S.C. § 1221 (which provides IRA appeal rights) or otherwise refer to Board IRA jurisdiction. The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, also known as the No FEAR Act or the Whistleblowers Act, which provides for notifying Federal employees of their rights under discrimination and whistleblower laws, annual reports to Congress on the number and severity of discrimination and whistleblower cases brought against Federal agencies, and agency payment for any discrimination or whistleblower judgment, award, or settlement, does not mention IRA appeal rights. 5 U.S.C. § 2301 note. Thus, the OSC's interpretation of section 883 is not supported by the plain language of the statute.

¶28 Moreover, after the passage of the ATSA, the TSA and the OSC, as discussed above, took the position that, for personnel actions occurring on or after March 1, 2003, the date the TSA transferred to the DHS, all TSA employees, including Screeners, could file whistleblowing complaints with the OSC under 5 U.S.C. § 2302(b)(8), but Screeners could not file an IRA appeal with the Board. Schott PFRF, Tab 5, Atts. A (TSA and OSC MOU), B (TSA HRM Letter No. 1800-01), F (TSA Security Screeners-How to File a Whistleblower Complaint). Thus, even without IRA appeal rights for Screeners, section 883's provision of "whistleblower protections" has meaning and is given effect.

¶29 Furthermore, section 883 of the HSA is not a right without a remedy. *See De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984) (the law abhors a right without a remedy, and courts are generally loathe to assume that Congress intended to create such a situation), *cert. denied*, 471 U.S. 1125 (1985); *Rowe v. Peyton*, 383 F.2d 709, 716 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968) (accord); *cf. Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997) (where the plaintiff's claims that his tribe violated his civil rights could be brought before

the Penobscot Nation Tribal Court under the Indian Civil Rights Act of 1968, but not a federal court, Congress did not create a right without a remedy).

¶30 Even if the OSC did not provide such a remedy, there are instances when Congress does intend to create a law without fashioning a remedy for a violation thereof. *See*, *e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-69 (1979) (section 17(a) of the Securities Exchange Act of 1934, which requires securities brokers and dealers to keep and preserve their records, does not create a private cause of action in favor of anyone which would permit the award of damages or any other remedy for a violation of that provision); *De Letelier*, 748 F.2d at 798-99 (in promulgating the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1982), Congress intended to lift execution immunity against the property of a foreign state only in part, and therefore created a right without a remedy in certain circumstances); *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98, ¶¶ 8-11 (2000) (although 5 U.S.C. § 3304(f) mandates that agencies give preference eligibles the opportunity to compete for vacant positions, it does not provide preference eligibles with a remedy should an agency violate this provision).

¶31 Accordingly, we find that the HSA does not provide Board jurisdiction over IRA appeals filed by TSA Screeners.

Conclusion

¶32 For the all of the reasons set forth above, we find that the Board lacks jurisdiction over an IRA appeal filed by a TSA Screener. Therefore, we dismiss these appeals for lack of jurisdiction.

ORDER

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

**NOTICE TO THE APPELLANTS 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: ______________________________
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.