

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

2008 MSPB 179

Docket No. DA-315H-08-0168-I-1

**Thomas Tubesing,
Appellant,**

v.

**Department of Health and Human Services,
Agency.**

August 1, 2008

Christopher D. Vaughn, Esquire, Atlanta, Georgia, for the appellant.

Philip J. Gurrera, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed his appeal as premature. For the reasons set forth below, we GRANT the appellant's petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and REMAND the appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On December 10, 2006, the appellant received a career-conditional appointment to the competitive service position of GS-0685-12 Public Health Analyst, which was subject to completion of a one-year initial probationary

period beginning that same day. Initial Appeal File (IAF), Tab 4, Subtab 4e. On April 15, 2007, while still serving the probationary period, the appellant was appointed to the competitive service position of GS-0685-13 Public Health Advisor, subject to completion of the one-year initial probationary period that began on December 10, 2006. *Id.*, Subtab 4d. On the morning of December 7, 2007, the agency issued to the appellant a notice that he would be terminated during his probationary period, effective 12:00 noon that same day. *Id.*, Subtab 4b.

¶3 The appellant, through his designated counsel, filed an appeal of his termination with the Board, and he requested a hearing in his appeal. IAF, Tab 1 at 2-3, 5, 17-18, 22. He asserted, inter alia, that: he has the right to appeal his termination to the Board because he had completed his probationary period at the time the agency effected his termination; and the agency failed to afford him the required procedures under 5 U.S.C. chapter 75 in effecting his removal. *Id.* at 5, 7-8. The appellant also asserted that his termination constituted reprisal for his whistleblowing activities in violation of 5 U.S.C. § 2302(b)(8). *Id.* at 20.

¶4 The administrative judge issued an acknowledgment order that informed the appellant of his burden to establish that the Board has jurisdiction over his termination as a probationary employee and instructed the appellant to file evidence and argument showing that the Board has jurisdiction over his appeal. IAF, Tab 2 at 2. After the appellant and the agency responded to the acknowledgment order, the administrative judge issued a jurisdictional show cause order that: found that the submissions of the parties were insufficient to determine whether the appellant had completed his probationary period; and instructed the parties to file evidence and argument as to whether the appellant had completed his probationary period prior to the time his employment was terminated. IAF, Tab 5. The parties responded to the jurisdictional show cause order. IAF, Tabs 6-10.

¶5 After holding a telephonic status conference, IAF, Tab 21, the administrative judge issued an initial decision, based on the written record, that found that: the appellant had established by preponderant evidence that he had finished his tour of duty prior to the anniversary date of his appointment and thus had completed his probationary period at the time the agency effected his termination; the appellant is an “employee” under 5 U.S.C. § 7511(a)(1)(A)(i); and the Board has jurisdiction over his appeal as a removal appeal pursuant to 5 U.S.C. §§ 7511-7513. IAF, Tab 24, Initial Decision (ID) at 1-6. The administrative judge dismissed the appeal as premature to allow the appellant the opportunity to seek corrective action from the Office of Special Counsel (OSC) based on her findings that: the appellant asserted, inter alia, that his removal was in reprisal for protected activity under 5 U.S.C. § 2302(b)(8); and the appellant’s representative asserted during the telephonic status conference that the appellant had filed a complaint with the OSC and that, if the Board has jurisdiction over this appeal, he wanted to seek corrective action from the OSC prior to proceeding with his Board appeal of his removal. ID at 6-7.

¶6 The appellant, through his designated counsel, has filed a petition for review, as timely supplemented, that asserts that the administrative judge erred in dismissing the appeal as premature. Petition for Review File (PFRF), Tabs 1, 3. The agency has not responded to the appellant’s petition for review.

ANALYSIS

¶7 In his petition for review, the appellant asserts that: his counsel below misspoke in stating that the appellant had filed a complaint with the OSC, when in fact, a complaint had only been drafted but not filed; and he seeks to proceed directly with his Board appeal of his removal and he does not seek to file a claim with the OSC or to pursue his affirmative defense before the Board that his removal was based on whistleblowing reprisal. PFRF, Tabs 1, 3. The appellant asserts that, because he had requested an adjudication of his removal on the

record during proceedings below, the administrative judge's dismissal of the appeal as premature was in error. PFRF, Tab 1 at 2, Tab 3 at 1-2.

¶8 The record shows that, after the administrative judge held a March 7, 2008 telephonic status conference, the appellant filed a March 7, 2008 Motion for Decision Without a Hearing that requested that the administrative judge find that: the appellant completed his probationary period and is a "career employee"; the Board has jurisdiction over his appeal as a removal appeal; and the agency failed to follow the proper procedures in terminating his employment. IAF, Tab 20 at 1-2. He requested that the administrative judge order his reinstatement and an award of back pay. *Id.* at 2. The appellant also requested that the administrative judge allow him to withdraw his affirmative defense that his termination was based on reprisal for whistleblowing and dismiss his reprisal claim without prejudice. *Id.*

¶9 On March 20, 2008, the administrative judge issued a summary of the March 7, 2008 telephonic status conference that stated that: based on the parties' submissions, it appeared that the appellant had completed his probationary period and that the Board has jurisdiction over his appeal as a removal appeal; and because the agency did not afford the appellant the procedures required under 5 U.S.C. § 7513, the removal action would have to be reversed. IAF, Tab 21 at 1-2. The summary also reflected that the appellant's counsel indicated during the status conference that the appellant had filed a complaint with the OSC, and that, if the Board has jurisdiction over the appeal, the appellant wanted to seek corrective action with the OSC before proceeding with his Board appeal. *Id.* at 2. Based on this representation of the appellant's counsel, the administrative judge stated in the summary of the telephonic status conference that she would issue an initial decision finding that the Board has jurisdiction over the appeal but that the appeal must be dismissed as premature because the appellant has chosen to first seek corrective action with the OSC. *Id.* at 2.

¶10 In response to the summary of the telephonic status conference, the agency reasserted that the appellant had not completed his probationary period at the time it effected his termination and it renewed its motion to dismiss the appeal for lack of jurisdiction. IAF, Tab 22. The appellant's response reasserted his request that the administrative judge issue a decision based on the written record, finding that: the Board has jurisdiction over his termination as a removal appeal; the agency did not follow the proper procedures in effecting his removal; and the agency must reinstate him to his position and award him back pay for the period from December 7, 2007, through his reinstatement. IAF, Tab 23 at 1-2.

¶11 When an employee raises a claim of reprisal based on whistleblowing and the personnel action giving rise to the claim is an otherwise appealable action, the employee may elect to seek corrective action from the OSC before appealing to the Board or he may file the appeal directly with the Board. 5 U.S.C. §§ 1214(a)(3), 1221(a), (b); *Hornby v. Department of the Navy*, 61 M.S.P.R. 246, 248 (1994); *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318, 322-23 (1993); 5 C.F.R. § 1209.2(b)(2). Thus, if an appellant files an appeal with the Board and indicates during the proceedings in that appeal that he filed a claim with the OSC on the same matter prior to filing his Board appeal, it is proper for the administrative judge to dismiss the appeal if the appellant has not yet exhausted his remedy before the OSC. *Hartfield v. Department of Defense*, 70 M.S.P.R. 20, 23 (1996); *Hornby*, 61 M.S.P.R. at 248. An appellant has exhausted his remedy before the OSC if he has received notice from the OSC that it has terminated its investigation into his complaint, or upon the expiration of 120 days after the complaint was filed if the OSC has not notified the appellant that it will seek corrective action on his behalf. 5 U.S.C. § 1214(a)(3); *Westmoreland v. Department of Veterans Affairs*, 77 M.S.P.R. 315, 317 (1998); 5 C.F.R. § 1209.5(a), (b).

¶12 In this case, however, the appellant's submissions below do not indicate that he filed a complaint with the OSC prior to filing his Board appeal or that he

requested that his Board appeal be dismissed in its entirety so that he could seek corrective action before the OSC. IAF, Tabs 1, 6, 10, 17, 20, 23. Instead, the record shows that, although the appellant requested that he be permitted to withdraw his affirmative defense of whistleblowing reprisal, he unambiguously requested that the administrative judge adjudicate on the record the issue of whether the Board has jurisdiction over his appeal as a removal appeal, and, if so, whether the agency failed to provide him with his procedural rights in effecting his removal. IAF, Tabs 20, 23. Moreover, on petition for review, the appellant asserts that he has not filed a claim with the OSC on the removal action at issue in this case. PFRF, Tab 1 at 2, Tab 3 at 2. Thus, because the record shows that the appellant unequivocally requested below that the administrative judge adjudicate his alleged removal appeal but allow him to withdraw his affirmative defense of whistleblowing reprisal, the initial decision that dismissed the appeal as premature is in error and must be reversed. IAF, Tabs 20, 23; ID at 1, 6-7.

¶13 Accordingly, we reverse the initial decision that dismissed the appeal as premature and remand the case for further adjudication. If the administrative judge finds again on remand that the Board has jurisdiction over the appeal as a removal appeal under 5 U.S.C. §§ 7511-7513, the administrative judge shall adjudicate the merits of the appeal. Additionally, if the administrative judge finds that the Board has jurisdiction over this appeal as a removal appeal, the administrative judge shall determine whether the appellant intends to pursue his affirmative defense that his removal was taken in reprisal for whistleblowing in violation of 5 U.S.C. § 2302(b)(8), and if so, the administrative judge shall adjudicate the merits of that affirmative defense.*

* We note that an appellant who appeals an otherwise appealable action directly to the Board and receives a final decision on the merits in the matter is barred from bringing, after later exhausting the OSC process, a second appeal challenging the same action under a new legal theory. *See Sabersky v. Department of Justice*, 91 M.S.P.R. 210, ¶¶ 7-8 (2002) (the appellant's individual right of action appeal that alleged that his removal constituted reprisal for whistleblowing was barred by res judicata because he

ORDER

¶14 Accordingly, we remand the appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

could have raised the reprisal claim in his prior unsuccessful appeal of his removal but failed to do so and the Board had issued a final order in that appeal), *aff'd*, 61 F. App'x 676 (Fed. Cir. 2003).