UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 221

Docket No. SF-1221-09-0069-W-1

Orville W. J. Layton,

Appellant,

v.

Department of the Army,

Agency.

October 30, 2009

Orville W. J. Layton, Eagle River, Alaska, pro se.

Carl F. Olson, Esquire, Elmendorf AFB, Alaska, for the agency.

Winston D.M. Ling, Esquire, Fort Shafter, Hawaii, 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, issued May 5, 2009, that dismissed his individual right of action (IRA) 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, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant serves as an Attorney for the U.S. Army Garrison Alaska, specializing in environmental law. Appeal File, Tab 1. He filed an IRA appeal alleging that the agency retaliated against him for making protected disclosures in a report he prepared regarding environmental problems encountered during the Taku construction project. *Id*., Attachment 1 at 2-9. The appellant stated that in 2005, the agency began construction on the Taku project, but soon discovered that hazardous substances had contaminated the soil throughout the construction site, causing construction delays. *Id*. at 2. The garrison commander directed the Pacific Region Chief of Staff to conduct an investigation into the Taku project delay, and he ultimately submitted a report regarding this matter. Appeal File, Tab 20, subtab 1-C.

¶3 The appellant further claimed that agency management was not convinced that this initial report accurately assessed the Taku situation, and appointed the appellant to ensure the accuracy of the initial findings and to review operating procedures to determine what changes were needed to prevent a future similar event. Appeal File, Tab 1, Attachment 1 at 3. Specifically, the agency tasked the appellant with conducting a comprehensive audit of the Taku site selection and waste management practices associated with the construction activities, and directed him to focus on verifying that all pre-construction environmental site assessment actions conformed to applicable regulations and requirements, verifying that all waste management practices during construction conformed to regulations and requirements, and determining whether the agency's oversight and management of construction contracting in regard to site assessment and waste management should be improved and, if so, to recommend management practices to achieve that purpose. Appeal File, Tab 8, subtab 10. The agency further directed the appellant to review records related to the environmental site assessment and waste management, and to interview agency and contractor personnel. *Id*.

¶4 During the course of the appellant's investigation and preparation of his report, he met with agency officials to discuss his progress and prepared short information papers. Appeal File, Tab 1, Attachment 1 at 5; Tab 8, subtab 18. Further, before submitting his final report, he submitted drafts and supporting documents to his two immediate superiors for review, and both of them offered recommendations and editorial corrections. Appeal File, Tab 1, Attachment 1 at 5. The appellant's report reiterated many of the concerns discussed in the initial report, in concluding that there were various errors and wrongdoing associated with the Taku construction. Appeal File, Tab 4, subtab 3. In the report, the appellant identified himself as an agency attorney who prepared the report for the purpose of providing legal advice to agency officials. *Id*. at 1, 8. In addition to preparing the report, the appellant also briefed agency officials regarding the report. Appeal File, Tab 1, Attachment 1 at 5-6.

¶5 The appellant later claimed that the agency retaliated against him because of the report, and he filed a complaint with the Office of Special Counsel (OSC) alleging whistleblower retaliation. After OSC terminated its investigation into his complaint, the appellant filed this IRA appeal. Appeal File, Tab 1. The agency, however, moved that the appeal be dismissed for lack of jurisdiction. Appeal File, Tabs 9, 23. It claimed that, under *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001), the appellant's disclosures in his report were not protected because he made them while performing in his official agency capacity and within the scope of his official duties. Appeal File, Tabs 9, 23.

¶6 The appellant argued, however, that his disclosures in the report were protected under *Kahn v. Department of Justice*, 528 F.3d 1336 (Fed. Cir. 2008). Appeal File, Tab 11 at 7-10; Tab 22 at 5-7. There, the appellant was a special agent who conducted an investigation that revealed improper activities with respect to a confidential source and disclosed that information to his superiors. 528 F.3d at 1337-39. He later claimed that the agency retaliated against him for

making the disclosure, and the agency argued that the Board lacked jurisdiction under *Huffman* because the appellant made the disclosures as part of the appellant's assigned duties to report the alleged violations of agency rules and regulations. *Id*. at 1342-43. The appellant, however, claimed that the particular misconduct that he reported was beyond the scope of his normal duties with the agency. *Id*. at 1342.

¶7 The court held that the appellant presented a nonfrivolous allegation that he made a protected disclosure entitling him to a hearing on the merits of his IRA appeal because a genuine issue of material fact existed regarding whether the appellant's disclosures were part of his normal duties. *Id*. at 1343-44. Specifically, the court noted that the appellant submitted an affidavit alleging that the reports were not part of his normal duties because he had no supervisory responsibility over the wrong-doing employee and no specific job duty to ferret out and report misconduct of co-employees. *Id*. at 1343. It further found that the agency presented evidence that it tasked the appellant with reporting on administrative matters and law enforcement operations at the office, and that such reports would have included the appellant's communications regarding the wrong-doing employee, thereby bringing those communications within the scope of the appellant's normal duties. *Id*. The court found that these positions and evidence constituted a genuine issue of material fact and that the appellant, therefore, presented a nonfrivolous allegation that the report was not part of his normal duties. *Id*.

¶8 Here, the appellant argued that performing investigations like the Taku project was not part of his normal attorney duties, and that he was assigned this task "by default" because of his knowledge of environmental matters. Appeal File, Tab 11 at 9; Tab 22 at 5-7. He, therefore, asserted that, under *Kahn*, he presented a nonfrivolous claim that he made his disclosures outside of his normal duties, thereby establishing jurisdiction and entitling him to a hearing on the merits. *Id*.

¶9 The administrative judge, however, disagreed and dismissed the appeal for lack of jurisdiction without holding a hearing, finding that the agency selected the appellant for the Taku assignment because of his expertise in environmental law and that the appellant conducted the investigation in the normal course of his duties. Appeal File, Tab 34 at 18-23. In reaching this conclusion the administrative judge first acknowledged that the appellant was not normally an investigator for the agency, and that his position description and the nature of his findings in his report appeared, on first impression, to be analogous to *Kahn*. *Id*. at 19-20. The administrative judge then determined, however, that the appellant did not present a nonfrivolous allegation that his disclosure was made while he performed outside of his normal duties because the agency's reason for selecting the appellant, his expertise as an environmental attorney, its formal assignment for the appellant to perform the investigation, the appellant's use of agency authority and resources to conduct his investigation, his routine meetings with his superiors to discuss the progress of his investigation, and his circulation of a preliminary version of the report to his immediate superiors for review, distinguished the appeal from *Kahn*. *Id*. at 19-20, 23

¶10 In his petition for review, the appellant reiterates his arguments that he presented a nonfrivolous allegation that he made a protected disclosure and otherwise satisfied the requirements for establishing jurisdiction. Petition for Review File, Tab 1. Essentially, the appellant asserts that the allegations of wrongdoing in his Taku report are protected under *Huffman* and *Kahn* because those allegations went beyond the scope of his assignment to audit the Taku project and were also outside the scope of his normal duties. *Id*., Petition for Review at 4-6. He further asserts that, to the extent the agency argues that all of the disclosure fell within the scope of assigned duties, the disagreement constitutes a dispute of fact warranting the conclusion that he presented a nonfrivolous allegation that establishes jurisdiction under *Kahn*. *Id*. at 6-8. The appellant also argues that, had the administrative judge afforded him a hearing,

he would have been able to show that his disclosures were not included within the audit's intended scope. *Id*. at 9-15. He further claims that a hearing would have also disclosed that the administrative judge made various fact-finding errors in analyzing the jurisdictional issue. *Id*. at 15-20.

ANALYSIS

¶11 As explained above, this case turns on whether the appellant's disclosures are excluded from the Whistleblower Protection Act's (WPA) coverage under *Huffman*, or whether the circumstances are more like *Kahn*, where the court found the appellant presented a nonfrivolous allegation that his work-related disclosures were protected and that he was entitled to a hearing on the merits. For the following reasons, we believe that the administrative judge correctly distinguished *Kahn* in concluding that the appellant did not present a nonfrivolous allegation of a protected disclosure and dismissing the appeal for lack of jurisdiction without holding a hearing.

¶12 In *Huffman*, the court described three categories into which a disclosure may fall, and explained that only the latter two categories describe disclosures that are protected under the WPA. 263 F.3d at 1353-54. These categories are disclosures made as part of normal duties through normal channels, disclosures as part of normal duties outside of normal channels, and disclosures outside of normal duties. *Id*.; *see also Kahn*, 528 F.3d at 1341. The court has explained that the third category, disclosures outside of normal duties, involves the situation "in which the employee is obligated to report the wrongdoing, but such report is not part of the employee's normal duties or the employee has not been assigned those duties." *Huffman*, 263 F.3d at 1354; *Kahn*, 528 F.3d at 1341-42. The court has further noted that a disclosure falls within the third category if, although the employee, like all agency employees, is generally required to report wrongdoing that he sees, the disclosure is not part of the employee's assigned duties. *Kahn*, 528 F.3d at 1342.

¶13 Here, there is no dispute that the agency assigned the appellant with the duty to investigate and report on the Taku construction project. Under a plain reading of *Huffman*, disclosures made while performing this assigned duty would not be protected. 263 F.3d at 1354; *Kahn*, 528 F.3d at 1341-42.

¶14 The appellant, however, argues that his disclosures of wrongdoing were not part of the Taku project. Specifically, he claims that the project had specific areas of inquiry and that his investigation pursuant to the original mandate led him to avenues beyond the scope of the assigned duty and that his disclosures of wrongdoing pertained to the areas beyond the project's assigned scope. Petition for Review File, Tab 1, Petition for Review at 5-6. He further asserts that his disagreement with the agency regarding whether his disclosures fall within the parameters of his assigned task constitutes a nonfrivolous allegation under *Kahn* that warrants a finding of jurisdiction and a hearing. *Id*. at 6-8.

¶15 As the administrative judge stated, however, it is undisputed that the appellant conducted his assigned investigation and prepared his report while keeping his supervisors abreast of his progress. Specifically, he exchanged ideas with them and received their input regarding the project, thereby distinguishing the appellant's circumstances from *Kahn*. Appeal File, Tab 34 at 19-20. Thus, to the extent that the appellant's ultimate final report differed from the scope of his initial assignment, that scope changed due to both his investigation and the feedback he received from his supervisors while performing the assigned duty. We, therefore, believe that the appellant has not presented a nonfrivolous allegation of jurisdiction under *Huffman* and *Kahn*.

¶16 Prior to the court's decisions in *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), and *Huffman*, disclosures made as part of an employee's duties, or that closely related to the employee's day-to-day responsibilities, could be deemed to be protected under the WPA. *See* 5 U.S.C. § 2302(b)(8)(A); *Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995); *Marano v. Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993); *see*

also Huffman, 263 F.3d at 1352 n.3. As the court recognized, however, *Willis* and *Huffman* changed the law with respect to these types of disclosures. *See Morgan v. Department of Energy*, 424 F.3d 1271, 1273-74 & n.1 (Fed. Cir. 2005). Because both the court and the Board have consistently applied *Huffman* to determine whether a disclosure is excluded from protection because the appellant made it while performing normal or assigned duties, we are constrained to follow that practice here. *See, e.g.*, *Kahn*, 528 F.3d at 1341-43; *Fields v. Department of Justice*, 452 F.3d 1297, 1304-05 (Fed. Cir. 2006); *Sinko v. Department of Agriculture*, 102 M.S.P.R. 116, ¶ 13 (2006); *Miller v. Department of Veterans Affairs*, 92 M.S.P.R. 610, ¶ 17 n.5 (2002); *Poster v. Department of Veterans Affairs*, 92 M.S.P.R. 501, ¶ 8 n.* (2002), *aff'd*, 71 F. App'x 851 (Fed. Cir. 2003); *Comito v. Department of the Army*, 90 M.S.P.R. 58, ¶¶ 10-11 (2001), *review dismissed*, 33 F. App'x 506 (Fed. Cir. 2002).

¶17 Finally, the appellant's claim that he would have produced additional evidence showing jurisdiction had the administrative judge afforded him a hearing is also unavailing. Petition for Review File, Tab 1 at 9-15. As the court explained in *Kahn*, the appellant must present a nonfrivolous allegation to establish jurisdiction. 528 F.3d at 1341. This requires the appellant to show the existence of a material fact issue, and the determination of whether the appellant has made this showing is based entirely on the written record. *Id*. Thus, the appellant's claim that he could have shown jurisdiction had he received his requested hearing is without merit. We, therefore, conclude that the appellant has failed to present a nonfrivolous allegation that he made a protected disclosure and must dismiss 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 website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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