UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 38

Docket No. NY-1221-09-0347-W-1

Rachel Simnitt,

Appellant,

v.

Department of Veterans Affairs,

Agency.

February 19, 2010

Rachel Simnitt, Bath, New York, pro se.

Sheila Q. Weimer, Esquire, Buffalo, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed her appeal for lack of Board jurisdiction. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115(d), AFFIRM the initial decision insofar as it concluded that the Board lacked jurisdiction over a direct appeal of the appellant's termination during her probationary period, VACATE the initial decision insofar as it found that the appellant's individual right of action (IRA) appeal had been prematurely filed because she had not exhausted her remedy

before the Office of Special Counsel (OSC), and REMAND the IRA appeal to the New York Field Office for further adjudication.

BACKGROUND

¶2 In her appeal, the appellant states that the agency terminated her from the GS-5 position of Medical Supply Technician two days before the end of her probationary period. Initial Appeal File (IAF), Tab 1. The appellant indicates that the position was subject to a probationary period and that the agency terminated her, effective August 31, 2009, during her probationary period for "conduct and performance" issues arising after her appointment. *Id*. The appellant asserts that the agency terminated her in retaliation for whistleblowing, disclosing "an issue of medical instruments not being properly reprocessed" and "unclean items coming from decontamination." *Id*. She alleges that she filed a complaint with OSC on September 1, 2009. *Id*.

¶3 The administrative judge issued a jurisdictional order providing the appellant information concerning the jurisdictional issue and the elements that she had to prove to establish Board jurisdiction over her IRA appeal. IAF, Tab 3. The appellant did not respond to the jurisdictional order. The agency filed a motion to dismiss the appeal based on its argument that the appellant "failed to proffer any evidence that a claim had been filed with [OSC] and that the procedures of [OSC] have been exhausted." IAF, Tab 4. The appellant did not respond to the agency's motion. The administrative judge dismissed the appeal, finding that the appellant failed to show that the matter she was appealing was an otherwise appealable action or that she had exhausted her remedies before OSC. IAF, Tab 5 (Initial Decision (ID)).

¶4 The appellant petitions for review. Petition for Review (PFR) File, Tabs 1, 3. The agency has responded in opposition to the petition. PFR File, Tab 4.

ANALYSIS

¶5 In her petition, the appellant states that she "has an ongoing investigation [with OSC], and the claim is not yet closed." PFR File, Tab 1. The appellant submits a number of documents for the first time, one of which appears to be a copy of a complaint e-filed with OSC. PFR File, Tab 3. Generally, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115. However, the issue of the Board's jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time during a Board proceeding. *See Edwards v. Department of State*, 98 M.S.P.R. 481, ¶ 4 (2005). The existence of Board jurisdiction is a threshold issue in adjudicating an appeal. *See Giove v. Department of Transportation*, 89 M.S.P.R. 560, ¶ 8 (2001), *aff'd*, 50 F. App'x 421 (Fed. Cir. 2002).

¶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. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The record shows that the appellant was appointed to the GS-5 position of Medical Supply Technician, effective September 2, 2008, and terminated on August 31, 2009. IAF, Tab 1; PFR File, Tab 3. Her appointment to the competitive service was subject to a 1-year probationary period, which she did not complete. *Id.*; 5 C.F.R. §§ 315.301, .801(a)(1). Employees terminated during a probationary period have only limited appeal rights to the Board. *See* 5 C.F.R. § 315.806. A probationary employee like the appellant terminated for post-appointment reasons may appeal to the Board directly only on the grounds that the termination was based upon partisan political reasons or marital status. 5 C.F.R. § 315.806(a)-(b). The appellant has not alleged that she was terminated for partisan political reasons or because of her marital status, nor has she claimed that she was not a probationary

employee at the time of her termination. Further, the evidence of record does not make a contrary showing. Thus, the administrative judge properly found that the Board does not have jurisdiction over this appeal as an otherwise appealable action. *See Wilson v. Department of the Army*, 111 M.S.P.R. 54, ¶¶ 5, 7 (2009).

¶7 Even though the Board lacks jurisdiction to review the termination as an otherwise appealable action, the appellant may request review of such an agency action in an IRA appeal under the Whistleblower Protection Act. *See Becker v. Department of Veterans Affairs*, 107 M.S.P.R. 327, ¶ 5 (2007); 5 U.S.C. § 1221. The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes non-frivolous allegations that: (1) She 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 v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

¶8 An appellant filing an IRA appeal from a probationary termination has not exhausted her OSC remedy unless she has filed a complaint with OSC and either OSC has notified her that it was terminating its investigation of her allegations or 120 calendar days have passed since she first sought corrective action. 5 U.S.C. § 1214(a)(3); *Garrison v. Department of Defense*, 101 M.S.P.R. 229, ¶ 6 (2006); 5 C.F.R. § 1209.5(a). The appellant's e-filed OSC complaint shows that the original entry date was September 1, 2009, and that the complaint was last modified on September 2, 2009. PFR File, Tab 3. When the initial decision was issued on September 22, 2009, 120 calendar days had not elapsed and the appellant had not shown that OSC had terminated its investigation into her allegations. Therefore, the administrative judge correctly dismissed the IRA appeal for lack of jurisdiction. *See Kochanoff v. Department of the Treasury*, 98 M.S.P.R. 405, ¶ 6 (2005).

¶9 Now, however, 120 days have elapsed since the date that the appellant filed her complaint with OSC. It is the Board's practice to adjudicate an appeal that

was premature when it was filed but becomes ripe while pending with the Board. *Id*. ¶ 7. The appellant's submissions on petition for review show that she filed her complaint with OSC no later than September 2, 2009. PFR File, Tab 3. Thus, the appellant exhausted her administrative remedies by January 1, 2010, 120 calendar days later. *See* 5 U.S.C. § 1214(a)(3)(B). As the appellant's IRA appeal is now ripe for adjudication, remand is appropriate. *See Morales v. Social Security Administration*, 108 M.S.P.R. 583, ¶ 7 (2008).

ORDER

¶10 Because the appellant's IRA appeal is now ripe for adjudication, we REMAND this case to the New York Field Office for further adjudication.

FOR THE BOARD:

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