

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

2010 MSPB 163

Docket No. PH-0752-09-0619-I-1

**Donald T. McDougall,
Appellant,**

v.

**Social Security Administration,
Agency.**

August 13, 2010

Donald T. McDougall, Esquire, Friendsville, Maryland, pro se.

Robert Drum, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the administrative judge's initial decision that dismissed his alleged constructive removal appeal for lack of jurisdiction. For the reasons set forth below, we DENY the appellant's petition for review, REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REASSIGN the appeal to an administrative law judge for adjudication.

BACKGROUND

¶2 The appellant served as an administrative law judge at the agency's Morgantown, West Virginia, office. Initial Appeal File (IAF), Tab 1 at 1; Tab 6, Subtab 3. The appellant alleged that between July 2006 and August 2008, he had a series of five or six conflicts with his supervisor, the Chief Administrative Law Judge, which led him to announce that he would retire as of January 3, 2009. IAF, Tab 5, Subtab 1 at 7-18; *see* IAF, Tab 6, Subtab 3. On December 2, 2008, the appellant filed a formal complaint of discrimination with his agency's Equal Employment Opportunity (EEO) office. IAF, Tab 6, Subtab 1 at 1, Subtab 2 at 2. In his complaint, the appellant alleged that the Chief Administrative Law Judge subjected him to a hostile work environment and discriminated against him based on his mental and physical disabilities, forcing him to retire. IAF, Tab 6, Subtab 2 at 1-3. The appellant retired as scheduled on January 3, 2009. IAF, Tab 6, Subtab 3. On July 24, 2009, the agency issued its final EEO decision, finding that the agency had not discriminated against the appellant. IAF, Tab 6, Subtab 2 at 1, 13.

¶3 The appellant filed a timely appeal with the Board's Northeastern Regional Office. IAF, Tab 1. The administrative judge assigned to the case provided explicit notice to the appellant regarding how to establish Board jurisdiction over an alleged constructive removal appeal and directed him to file evidence and argument proving that the action at issue was within the Board's jurisdiction. IAF, Tabs 2-3. The appellant and the agency filed responses. IAF, Tabs 5-6. In her initial decision, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to establish that his retirement was involuntary. IAF, Tab 9.

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

ANALYSIS

¶5 The Board will grant a petition for review only when significant new evidence is presented or the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, [108 M.S.P.R. 384](#), ¶ 16 (2008); [5 C.F.R. § 1201.115\(d\)](#). The appellant has not met this standard. Therefore, we deny the appellant’s petition for review. We reopen the appeal on our own motion under 5 C.F.R. § 1201.118, however, to address the issue of the administrative judge’s authority to adjudicate this case.

¶6 The Board has original jurisdiction to adjudicate adverse actions against administrative law judges under [5 U.S.C. § 7521](#). *Social Security Administration v. Long*, [113 M.S.P.R. 190](#), ¶ 12 (2010); *see Tunik v. Merit Systems Protection Board*, [407 F.3d 1326](#), 1332-33 (Fed. Cir. 2005). An agency may take an action against an administrative law judge “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.” 5 U.S.C. § 7521(a); *see Long*, [113 M.S.P.R. 190](#), ¶ 12.

¶7 Furthermore, the procedures in an action against an administrative law judge differ from those in adverse action appeals by other federal employees because an administrative law judge is entitled to have his appeal adjudicated under the Administrative Procedures Act (APA), [5 U.S.C. § 551](#), *et seq.* *See Social Security Administration v. Dantoni*, [77 M.S.P.R. 516](#), 521, *aff’d*, 173 F.3d 435 (Fed. Cir. 1998) (Table); *Social Security Administration v. Goodman*, [28 M.S.P.R. 120](#), 124 (1985). The provisions for adverse action appeals under Chapter 75, Subchapter II, *see* [5 U.S.C. §§ 7511-7514](#), do not apply to adverse actions taken against administrative law judges, *see* 5 U.S.C. § 7512(E).

¶8 Under the APA, the taking of evidence and any hearing in an action against an administrative law judge must be presided over by the full Board, one or more Board members, or an administrative law judge. *See* [5 U.S.C. § 556\(b\)](#). The Board’s regulations specifically designate that “[a]n administrative law judge will

hear an action brought by an employing agency under this subpart against a respondent administrative law judge.” [5 C.F.R. § 1201.140\(a\)\(1\)](#); *see also Dantoni*, 77 M.S.P.R. at 521. The assigned administrative law judge prepares the initial decision, pursuant to [5 U.S.C. § 557](#), that ultimately can be reviewed by the Board via a petition for review. [5 C.F.R. § 1201.140\(a\)\(2\)](#). This same procedure applies when an administrative law judge brings an action affirmatively alleging constructive removal by the agency. 5 C.F.R. § 1201.142.

¶9 The appellant’s appeal was adjudicated by the administrative judge as an adverse action appeal under Chapter 75, Subchapter II. IAF, Tab 9. This was error because those provisions do not apply to adverse actions taken against administrative law judges, *see* [5 U.S.C. § 7512\(E\)](#), and the administrative judge lacked authority to adjudicate the administrative law judge’s appeal, *see* [5 U.S.C. § 556\(b\)](#). Furthermore, given the special procedural rules which apply to actions against administrative law judges, a complaint should have been filed with the Clerk of the Board, rather than with a regional office, for special handling. *See* [5 C.F.R. §§ 1201.137\(b\)](#), 1201.142.

¶10 Thus, it was error to assign the appellant’s case to an administrative judge, and the appeal must be adjudicated anew by an administrative law judge under the APA. After the administrative law judge prepares an initial decision, the appellant can seek further review before the full Board. [5 C.F.R. § 1201.140\(a\)\(2\)](#).

ORDER

¶11 We therefore VACATE the initial decision and REASSIGN this appeal to one of the Board's administrative law judges for adjudication.

FOR THE BOARD:

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