

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

**2011 MSPB 69**

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Docket No. CB-1216-10-0009-T-1

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**Special Counsel,  
Petitioner,**

**v.**

**Jeffrey M. Smith,  
Respondent.**

July 12, 2011

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Phu D. Huynh, Esquire, and William J. Farah, Esquire, Washington, D.C.,  
for the respondent.

Erica S. Hamrick, Esquire, and Mary K. Larsen, Esquire, Washington,  
D.C., for the petitioner.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The Office of the Special Counsel (OSC) petitions for review of the initial decision issued December 9, 2010, that dismissed OSC's Hatch Act complaint against the respondent on the grounds that the complaint lacked the degree of particularity required by Board regulations and case law. For the reasons set forth below, the Board DENIES OSC's petition and AFFIRMS the initial decision as MODIFIED in this Opinion and Order.

## BACKGROUND

¶2 On December 10, 2009, OSC filed a complaint with the Board alleging that the respondent violated [5 U.S.C. §§ 7324\(a\)\(1\)-\(2\)](#) and [5 C.F.R. §§ 734.306\(a\)\(1\), \(3\)](#), commonly known as the Hatch Act, by engaging in political activity while on duty and while in a government building through the use of a government owned computer. *See* Initial Complaint File (ICF), Tab 1 at 1-4. OSC’s complaint described the time of the alleged offenses as “[t]hroughout 2008” and stated that the alleged offenses involved e-mails and the drafting of documents “directed toward the success of Barack Obama’s candidacy for President.” *Id.* at 2-3.

¶3 At the close of discovery, the respondent filed a motion to dismiss, alleging that the charging document was so vague and the discovery documents were so voluminous and “undifferentiated” that the respondent was left “to guess at the nature of the charges and the documents that were the factual basis for those charges.” *See* ICF, Tab 19 at 7. The administrative law judge granted the respondent’s motion, holding that OSC had failed to place the respondent “on notice that would enable him to draft responsive pleadings or prepare for trial.” *See* ICF, Tab 37, Initial Decision (ID) at 6. OSC filed a timely petition for review seeking reversal of the initial decision, or, in the alternative, leave to file an amended complaint, a copy of which it attached to its petition for review. Petition for Review (PFR) File, Tab 1. The respondent timely responded in opposition. PFR File, Tab 3.

## ANALYSIS

Because OSC’s complaint failed to comply with the Board’s regulations, as well as constitutional requirements, the administrative law judge properly dismissed OSC’s complaint.

¶4 The core of due process is the right to notice and a meaningful opportunity to be heard. *LaChance v. Erickson*, [522 U.S. 262](#), 266 (1998) (citing *Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 542 (1985)). In this regard, due

process mandates that notice be sufficiently detailed to make the reply opportunity meaningful. *Barresi v. U.S. Postal Service*, [65 M.S.P.R. 656](#), 666 (1994); *see Goldberg v. Kelly*, [397 U.S. 254](#), 267-68 (1970). In keeping with this principle, the Board's regulations mandate that when OSC files a written complaint alleging a violation, the complaint must state "with particularity any alleged violations of law or regulation, along with the supporting facts." [5 C.F.R. § 1201.123](#); *see also* [5 U.S.C. §§ 1215\(a\)\(1\)](#), 1216.

¶5 OSC's complaint lacked this necessary particularity and supporting facts. With respect to the alleged e-mails, OSC did not identify the dates the e-mails were sent, the recipients, or the content, other than to state that the content was purportedly intended to aid the Obama campaign. *See* ICF, Tab 1 at 2-3. The alleged documents drafted or edited by the respondent were "website materials and speech outlines" but, once again, the content of the documents was not described with any specificity. *See id.* Furthermore, the complaint also did not contain any attachments or copies of the documents to identify the specific e-mails or materials that constituted the basis for its charges. *See* ICF, Tab 1. Similarly, the location where the offenses occurred was not described other than a statement that the appellant engaged in the alleged conduct "while in a room or building occupied in the discharge of official duties." *See id.* at 3.

¶6 On petition for review, OSC asserts that its complaint met the Board's requirements for particularity. *See* PFR File, Tab 1 at 7. OSC asserts that "[n]othing in the Board's regulations or case law require [sic] that the complaint outline each specific instance of Respondent's political activity." *Id.* at 8-9. OSC is mistaken; outlining each specification is precisely what OSC is required to do. As the administrative law judge correctly noted, "[t]he Board has consistently held that a party must know of the claims with which he is being charged so that he may adequately prepare and present a defense." *Brown v. U.S. Postal Service*, [47 M.S.P.R. 50](#), 57 (1991); *see Special Counsel v. Nielson*, [71 M.S.P.R. 161](#), 179 (1996) (stating that, although the complaint in an OSC

disciplinary action need not state every one of OSC's legal theories, it must provide the respondent with sufficient notice of OSC's claims to allow him to prepare a defense); *Hartigan v. Veterans Administration*, [39 M.S.P.R. 613](#), 618 (1989); *Lockett v. U.S. Marine Corps*, [37 M.S.P.R. 427](#), 429 (1988); ID at 5. A respondent cannot be expected to prepare a defense to each specification of a charge unless each specification is listed with sufficient identifying information to permit the respondent to know what event is at issue in the case. Informing a respondent that he is charged with drafting and/or editing documents or sending e-mails in the year 2008 is not sufficient to provide a respondent with adequate knowledge of the alleged conduct that OSC believes violated the law. *See* ICF, Tab 1 at 2-3. He must be put on notice regarding which documents and which e-mails OSC believes violated the law. It is true that OSC need not always describe each event down to the very minute, as OSC has done in its amended complaint, but a precisely drafted complaint serves the parties and the adjudicator well as it reduces the potential for confusion as to the conduct at issue. In contrast, a poorly drafted, vague complaint that does not inform a respondent precisely how OSC believes that he has violated the law and that does not inform a judge as to what must be adjudicated, serves no one — including OSC, given the risk such a complaint may be dismissed.

¶7 OSC is correct that the Board does not require “that OSC attach all the documents supporting its charges” to its complaint. PFR File, Tab 1 at 8-9; *see* [5 C.F.R. § 1201.123](#). However, the administrative law judge did not hold that OSC *must* provide such attachments to its complaint; he merely noted that such documents might have provided the specificity that was lacking in OSC's written description of the alleged events in question. *See* ID at 6. In a case where creating and sending documents constitute the alleged misconduct, attaching the documents to the complaint as exhibits and citing the relevant exhibit when listing the specifications is one method by which OSC can prevent confusion as

to the conduct being charged and provide the requisite “supporting facts.” *See* [5 U.S.C. § 1215\(a\)](#); 5 C.F.R. § 1201.123.

¶8 OSC asserts that the respondent did not receive the complaint “in a vacuum” and that OSC had interviewed the respondent twice prior to filing its complaint. *See* PFR File, Tab 1 at 9-10. OSC contends that as a result, “Respondent knew full well what the charges in the Complaint referenced.” *Id.* at 10. OSC’s investigative interviews do not constitute a charging document, however. As OSC indicated on petition for review, during its interviews of the respondent, it presented him with “hundreds of pages . . . of documents,” including “a large number of the e-mails at issue.” PFR File, Tab 1 at 10. The volume of documents presented to the respondent during the investigative process indicates that the interviews were not sufficiently focused to place him on notice of the precise allegations against him. *See Brock v. Department of the Navy*, [49 M.S.P.R. 564](#), 569 (1991) (holding that, under the circumstances of the case, interviewing the appellant was not sufficient to make her aware of the exact nature of the charges against her). Further, OSC seems to concede that, during the interviews, it did not provide the respondent with all of the e-mails it considered problematic. Accordingly, we conclude that the administrative law judge correctly determined that OSC’s December 10, 2009 complaint should be dismissed.<sup>1</sup>

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<sup>1</sup> Both the petitioner and the respondent have cited the Federal Rules of Civil Procedure in support of their positions with respect to the dismissal of the complaint. *See* ICF, Tab 19; PFR File, Tab 1 at 1, 12-14. However, as the administrative law judge correctly noted, the Board is not bound by the Federal Rules of Civil Procedure but looks to them for guidance. *Social Security Administration v. Long*, [113 M.S.P.R. 190](#), ¶ 10 (2010), *aff’d*, [635 F.3d 526](#) (Fed. Cir. 2011); *see Stout v. Merit Systems Protection Board*, [389 F.3d 1233](#), 1241 (Fed. Cir. 2004); *see also* ID at 4, 9-10. We have considered the parties’ arguments concerning the applicability of the Federal Rules and find no error in the administrative law judge’s decision in this regard.

OSC is not permitted to amend the complaint, but a new complaint may be filed.

¶9 It is well-settled that double jeopardy does not apply to administrative proceedings, and “an agency can renew an adverse action based on charges brought in an earlier proceeding where the adverse action in that proceeding was invalidated on procedural grounds.” *Steele v. General Services Administration*, [6 M.S.P.R. 368](#), 372 (1981); see *Tezak v. Department of the Army*, 835 F.2d 871 (Fed. Cir. 1987) (Table)<sup>2</sup>; *Shamblen v. U.S. Postal Service*, [45 M.S.P.R. 620](#), 624 (1990). Because the administrative law judge dismissed OSC’s complaint without reviewing the merits, OSC is free to file a properly detailed complaint in this matter. However, when “an agency fails to comply with applicable termination procedures, its remedy is not to seek review of the reversal, but to correct the procedural failure by providing appellant [or respondent with] full procedural rights in a new termination action.” *Steele*, 6 M.S.P.R. at 372 n.5. We therefore deny OSC’s request to vacate the initial decision. However, we will consider OSC’s request to amend the complaint as a request to refile, and instruct the Clerk of the Board to accept the amended complaint as a new complaint for docketing.<sup>3</sup>

#### ORDER

¶10 The December 9, 2010 initial decision is affirmed as modified. This is the final decision of the Merit Systems Protection Board on this case. The Clerk of

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<sup>2</sup> Although *Tezak* is an unpublished decision, the Board may rely on unpublished Federal Circuit decisions if it finds the court's reasoning persuasive, as we do here. *Mauldin v. U.S. Postal Service*, [115 M.S.P.R. 513](#), ¶ 12 (2011).

<sup>3</sup> We take no position on whether OSC’s new complaint fully complies with the constitutional and regulatory requirements for such complaints. See [5 U.S.C. § 1204\(h\)](#) (the Board is prohibited from issuing advisory opinions).

the Board is instructed to assign OSC's new complaint to an administrative law judge for adjudication as a new case.

FOR THE BOARD:

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