UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALPHONSE J. AVILA v. DEFENSE LOGISTICS AGENCY	DOCKET NUMBER SF531D8410055

OPINION AND ORDER

This case comes before the Board on appellant's petition for review of the initial decision issued on December 22, 1983 which dismissed for lack of jurisdiction appellant's appeal of the agency reconsideration decision of September 16, 1983 denying his within-grade step increase. The presiding official held that the Board lacked jurisdiction over this appeal because appellant was covered by a collective bargaining agreement which provided for an exclusive negotiated grievance procedure. Although the petition for review does not reflect the correct reason for Board jurisdiction, it correctly contends that the presiding official erred in dismissing the appeal. Accordingly, review is hereby GRANTED pursuant to 5 C.F.R. § 1201.117.

There is no dispute that an appellant is entitled to appeal to the Board from an agency reconsideration decision denying a within-grade increase. 5 U.S.C. § 5335(c); 5 C.F.R. § 531.410(d). Section 531.410(d) further provides as follows:

> . . . However, for an employee covered by a collective bargaining agreement a reconsideration decision that sustains a negative determination is only reviewable in accordance with the terms of the agreement.

Further, there is no dispute that the collective bargaining agreement in the instant case provides that it "... is the exclusive procedure available to bargaining unit employee(s) for the resolution of grievances." See Agreement, Ag. appeal file, Sect. 1. Tab-A at Sec. 5. The agreement, however, also provides, that "[A]n employee alleging discrimination ... may at his/her option raise the matter under the appropriate statutory appellate procedure or under the provisions of this Article, but not both." Id. (emphasis added).

Such provision is in conformity with the applicable statute, 5 U.S.C. § 7121, which provides for two exceptions to the provision that a collective bargaining agreement may limit appeal rights to the Board. These exceptions are set forth at 5 U.S.C. § 7121(d) and (e). Section 7121(d) provides:

> An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) [discrimination] of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both.

The second exception found at section 7121(e)(1) pertains to matters arising under 5 U.S.C. § 4303 and 5 U.S.C. § 7512 and is not relevant to this case.

Thus, the Board is not divested of jurisdiction by the terms of a collective bargaining agreement providing for exclusivity of remedy where an appellant alleges discrimination in connection with an otherwise appealable matter. In the instant case, the appellant alleged

discrimination on the basis of both age and sex, and thus is entitled to appeal to the Board. See Greer and Jennings v. Department of Housing and Urban Development, MSPB Docket Nos. AT03518311180, AT3518410003 at 2-3 (January 19, 1984). We therefore find that the presiding official erred in dismissing the appeal for lack of jurisdiction. Accordingly, the initial decision is REVERSED and the case is REMANDED for adjudication on the merits.

FOR THE BOARD:

JUN 5 1984
(Date)

Washington, D.C.

for Robert E. Taylor
Secretary