

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

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DON EDGAR BURRIS, ) DOCKET NUMBER  
ADMINISTRATIVE LAW JUDGE, ) HQ75218710009  
Complainant, )  
v. )  
SOCIAL SECURITY ADMINISTRATION )  
DEPARTMENT OF HEALTH AND HUMAN )  
SERVICES, ) DATE: SEP 30 1987  
Respondent. )  
\_\_\_\_\_  
)

Honorable Don Edgar Burris, pro se.

Eileen M.J. Houghton, Esquire, for respondent.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman  
Dennis M. Devaney, Member

FINAL DECISION AND ORDER

INTRODUCTION

This case is before the Board on a Recommended Decision by Chief Administrative Law Judge Edward J. Reidy. Complainant filed a complaint February 10, 1987, alleging that respondent constructively suspended him by forcing him to vacate his office while he was on administrative leave pending the Board's resolution of respondent's proposal to remove him from federal service.

Noting that there was a question regarding the Board's jurisdiction over the case, Judge Reidy allowed complainant the opportunity to demonstrate that such jurisdiction lay with the Board. Upon review of complainant's subsequent submission, Judge Reidy found that complainant had failed to demonstrate that the Board has jurisdiction over the case and recommended its dismissal. Both parties were allowed to file exceptions to the Recommended Decision. Complainant filed exceptions on May 6, 1987. Respondent opposed those exceptions in a submission filed June 1, 1987.

The Board has carefully considered the Recommended Decision and the record in light of the exceptions and the response to the exceptions. The Board hereby ADOPTS the Recommended Decision and incorporates it into this Final Decision and Order.

#### BACKGROUND

Complainant's removal, based on a number of varied charges, was proposed by respondent in June 1986. A hearing was held in that case in the fall of 1986. Prior to the hearing, respondent, at complainant's request, placed complainant on administrative leave so that he could prepare his case. A Recommended Decision, currently pending before the Board, was issued. Shortly before its issuance, complainant requested that he be allowed to remain on administrative leave until the Board's final disposition of the agency's removal action. That leave was granted, but, as complainant had recused himself from all cases, fearing

bias against the agency, he was instructed to vacate his office while on leave.

The pleading on which the instant case is based was filed after the close of the record in the removal proceeding. In this pleading, complainant alleged that respondent had ordered him to vacate his office, and argued that this order amounted to a constructive suspension.

In an order issued March 31, 1987, Judge Reidy provided complainant the opportunity to explain in detail facts that would support his contention that he had been constructively suspended. Complainant responded on April 10, 1987. The agency filed a submission in reply, disputing complainant's assertions, and urging dismissal for lack of jurisdiction.<sup>1</sup>

#### ANALYSIS

The Board is an administrative tribunal created by Congress. As such, its jurisdiction is limited to those actions specifically made appealable to the Board by statute or regulation. 5 U.S.C. § 7701; 3 C.F.R. § 1201.3; *Cowan v. United States*, 710 F.2d 803, 805 (Fed. Cir. 1983). An employee seeking review of an agency action has the burden of establishing jurisdiction over the subject matter of the

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<sup>1</sup> Complainant raised several other issues, which Judge Reidy addressed in his Recommended Decision. Complainant moved (1) for Judge Reidy to disqualify himself, alleging that Judge Reidy unreasonably delayed action on the case; (2) for consolidation of this case with the proposed removal currently pending before the Board; and (3) for certification of an interlocutory appeal of matters relating to the previous motions. Judge Reidy denied these motions in his Recommended Decision, and we incorporate those denials in the Final Decision and Order.

appeal. 5 C.F.R. §1201.56(a)(2); *Stern v. Department of the Army*, 699 F.2d 1312, 1314 (Fed. Cir.), cert. denied, 462 U.S. 1122 (1983).

When given the opportunity to establish that the Board has jurisdiction over his case, complainant offered no support for the argument that respondent had constructively suspended him. Moreover, as Judge Reidy noted in his Recommended Decision, complainant was paid for the entire time he was on administrative leave. Suspension is defined at 5 U.S.C. § 7501(2) as "the placing of an employee . . . in a temporary status without duties and pay." (Emphasis added.) Therefore complainant cannot reasonably claim that he was suspended.

#### Complainant's Exceptions

Complainant's exceptions to the Recommended Decision, however numerous, are little more than disagreements with Judge Reidy's findings, and a repetition of charges made in his complaint, rather than allegations of factual error or legal misinterpretation. These disagreements include sweeping allegations of collusion and conspiracy among Judge Reidy, respondent, and the Special Counsel. We shall, however, address only those exceptions which address the issue of jurisdiction.<sup>2</sup>

Complainant argues that respondent's request that he vacate his office while he was on administrative leave was

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<sup>2</sup> In light of our conclusion that Judge Reidy correctly decided the jurisdictional issue, the remaining exceptions are rendered moot.

effectively a transfer or a reassignment and, as such, constitutes a personnel action for the purposes of 5 U.S.C. § 2302. Complainant argues further that because the reassignment was made in reprisal for whistleblowing and for recusing himself from hearing any additional cases after his proposed removal, it is a prohibited personnel practice within the Board's jurisdiction. Assuming, arguendo, that the respondent's request can be characterized as a reassignment, and that it was made in reprisal for a protected activity, and thus constituted a prohibited personnel practice under 5 U.S.C. §§ 2302(b)(8) and/or (9), it would nevertheless be outside the Board's jurisdiction because it has not been raised by the Special Counsel or in connection with an otherwise appealable action. *Meglio v. Merit Systems Protection Board*, 758 F.2d 1576, 1578 (Fed. Cir. 1984); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1979), aff'd sub nom. *Wren v. Merit Systems Protection Board*, 681 F.2d 867 (D.C. Cir. 1982).

Complainant also relies on *In The Matter of Chocallo*, 1 M.S.P.R. 605 (1980), to support his argument that the Board has jurisdiction in the instant case. In *Chocallo*, a case involving the removal of an administrative law judge, the Board held, *inter alia*, that the judge had failed to obey an order that she recuse herself from a specific case. *Chocallo* bears little relationship to the instant case. In *Chocallo* the judge's failure to recuse herself was a factor in the good cause for her removal. In this case,

complainant is attempting to establish that the agency took action against him because he voluntarily recused himself from cases which had been assigned to him. Complainant's citing of Chocallo, a removal proceeding over which the Board clearly had jurisdiction, fails to establish that the Board has jurisdiction over the instant case.

We hold, therefore, that complainant has failed to meet his burden of establishing that the Board has jurisdiction over the action of which he complains.

Conclusion

Accordingly, the Board AFFIRMS the findings of fact and conclusions of law of Judge Reidy, and ADOPTS and incorporates herein his Recommended Decision as the final decision of the Board. The complaint is DISMISSED for lack of jurisdiction. This is the final decision of the Merit Systems Protection Board in this case.

NOTICE TO COMPLAINANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The

address of the court is 717 Madison Place, N.W., Washington, DC 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board