

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID SANTILLAN,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DE122191W0331

DATE: APR - 6 1992

E. Justin Pennington, Esquire, Albuquerque, New Mexico,
for the appellant.

G. Patrick Elder, Kirtland Air Force Base, New Mexico,
for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the September 27, 1991 initial decision that "affirmed" the agency's action terminating him during the probationary period of his employment. For the reasons discussed below, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the

initial decision as MODIFIED by this Opinion and Order, DENYING the appellant's request for corrective action.

BACKGROUND

The appellant filed with the Board's Denver Regional Office a timely appeal of the agency's October 9, 1990 action terminating him from his Meatcutting Worker position during his probationary period. See Appeal File, Tab 1 and Tab 3, Subtabs 4c, 4f, 4g. The agency based its action on the appellant's alleged repeated failure to follow prescribed work procedures. See *id.*, Tab 3, Subtab 4g. The appellant contended on appeal, however, that the agency terminated him in reprisal for his whistleblowing activities,¹ which, he stated, comprised his disclosure of fraud, waste, and abuse at the Kirtland Air Force Base Commissary, as well as his filing of equal employment opportunity (EEO) complaints. See *id.*, Tab 1. He also alleged that his supervisor and terminating official, Donald Dunton, falsified his employment records, requiring him to file a Privacy Act request in an attempt to have his records corrected. See *id.* In his closing arguments below, the appellant summarized his whistleblower allegations, stating that his termination was motivated, at least in part, by his complaints of (a) unlawful discrimination, (b) fraud,

¹ The appellant had first sought, under the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, corrective action from the Special Counsel regarding his whistleblower allegations. See Appeal File, Tab 1. He filed the instant individual right of action appeal after the Special Counsel terminated an investigation into the matter and notified him of his right of appeal to the Board. See *id.*; see also 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.5(a).

waste, and abuse, (c) falsification of his personnel records, and (d) conspiracy between the agency's Commissary management, its Civilian Personnel Office, its Judge Advocates Office, and its EEO Office to terminate his employment because of his disclosures. See *id.*, Tab 9.

In a September 27, 1991 initial decision, the administrative judge "affirmed"² the agency's action, finding that the appellant did not prove that the agency terminated him in reprisal for his whistleblowing activities because: (1) Under *Williams v. Department of Defense*, 46 M.S.P.R. 549, 551-54 (1991), the appellant's complaints of retaliation for engaging in EEO activities did not constitute "whistleblowing" within the meaning of 5 U.S.C. § 2302(b)(8); (2) the appellant's disclosure of abuse of authority with respect to the pricing and selling of meat constituted whistleblowing activities, but he did not show that the protected disclosure was a contributing factor in the agency's decision to terminate him; and (3) the appellant did not prove his allegation that he disclosed a conspiracy between the agency's Commissary management, its Civilian Personnel Office, its Judge Advocates Office, and its EEO Office to terminate his employment based on his disclosures of gross mismanagement and abuse of authority. See Initial Decision at 2-8.

² Because the administrative judge adjudicated only the whistleblowing claims, finding that the appellant failed to prove them, he should, instead, have denied the appellant's request for corrective action. See *McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416, 417, 424 (1990); see also 5 U.S.C. § 1221; 5 C.F.R. § 1209.7.

In his petition for review, the appellant contends that the administrative judge erred by affirming the agency's termination action and finding that the appellant failed to show that he was terminated in reprisal for his whistleblowing activities. The agency has responded in opposition to the petition for review.³

ANALYSIS

The appellant's allegation of reprisal for his falsification disclosure, made in the context of his EEO activities and his Privacy Act clarification request, is covered under 5 U.S.C. § 2302(b)(9), and thus the Board lacks jurisdiction to consider that allegation under 5 U.S.C. § 2302(b)(8).

The appellant contends that the administrative judge erred by characterizing all of his complaints as EEO activities without analyzing the nature of those complaints. See Petition for Review (PFR) at 2-3. Specifically, he contends that the administrative judge mischaracterized his complaints of falsification of his personnel records by his supervisor, Dunton, as EEO activities. See *id.* at 3. He

³ In its response, the agency contends that the administrative judge erred by accepting the appellant's closing arguments and certain evidence, and in finding that the appellant's disclosures regarding the pricing, labeling, and selling of Commissary meat constituted whistleblowing activities. Because, however, the agency has not raised these matters within the context of a petition for review or cross petition for review, we will not consider them. See, e.g., *Lambert v. Department of the Army*, 44 M.S.P.R. 688, 699 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir.), cert. denied, 112 S. Ct. 180 (1991).

argues that, while he contended below that Dunton falsified his personnel records in retaliation for his filing of EEO complaints, he also contended that the agency subjected him to reprisal for his falsification disclosure. *See id.* at 3-5 & n.1.⁴

The administrative judge found that the appellant merely informed his EEO counsellor that "Dunton was developing a derogatory personnel file on him as a reprisal for his filing an EEO complaint" and concluded that the matter was raised in connection with the appellant's EEO activities. See Initial Decision at 3-4.

Under 5 U.S.C. § 2302(b)(9)(A), an agency may not, inter alia, take a personnel action against an employee for "the exercise of any appeal, complaint, or grievance right granted by law, rule, or regulation." In the instant appeal, the record supports the administrative judge's finding that the appellant raised the falsification issue under 5 U.S.C. § 2302(b)(9), in connection with his EEO activities. The appellant requested correction of the alleged false

⁴ While the appellant contends on review that Commissary Officer James Wynn, and not Dunton, had the authority to terminate him, he specifically referred to Dunton below in his petition for appeal as "the Foreman who terminated me...." Appeal File, Tab 1. Moreover, Dunton signed the notice that terminated him and asserted in his affidavit that he "decided to terminate" the appellant. *Id.*, Tab 3, Subtabs 4b, 4g. Wynn's role was essentially one of review, i.e., to review, upon the appellant's request, Dunton's decision, which Wynn affirmed. See *id.*, Subtab 4c.

information in his employment records in a complaint to the EEO counselor. See Petition for Appeal at 1, Appeal File, Tab 1. Also, in a September 21, 1990 letter, requesting correction of his employment records, the appellant indicated that one of the alleged false entries in his record "was deleted after [he] filed [an] EEO retaliation complaint." Appeal File, Tab 9, Subtab 6. As the administrative judge properly found, however, complaints of retaliation for engaging in EEO activities are covered under 5 U.S.C. § 2302(b)(9). See *Williams*, 46 M.S.P.R. at 551-54. Therefore, the Board has no jurisdiction under 5 U.S.C. § 2302(b)(8) to consider the merits of the appellant's allegations of reprisal made within the context of an EEO complaint. *Williams*, 46 M.S.P.R. at 551-54.

Also, we note that the appellant filed, under the Privacy Act, a request for the correction of his allegedly falsified records, as well as information on his appeal rights if the agency denied his request. See Appeal File, Tab 9, Subtab 6. The appellant contended below that his disclosure of the alleged falsification in his Privacy Act record clarification request was a contributing factor in the agency's decision to terminate him. See Petition for Appeal at 3, paragraphs E and H, Appeal File, Tab 1.

We find, however, that the appellant's disclosure of the alleged falsification in his Privacy Act record clarification request also does not constitute protected whistleblowing activity under 5 U.S.C. § 2302(b)(8). Rather, we find that

this disclosure, like the EEO-related disclosure, was made within the context of the exercise of a complaint right granted by law and is covered by 5 U.S.C. § 2302(b)(9).

As the Board has noted, if the employee filing a grievance, EEO complaint, or appeal were protected against reprisal under 5 U.S.C. § 2302(b)(8), there would be no need for 5 U.S.C. § 2302(b)(9). Moreover, the legislative history of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, does not indicate such broad protection. *Williams*, 46 M.S.P.R. at 551-54; see *Coffer v. Department of the Navy*, 50 M.S.P.R. 54, 56-57 (1991); *Fisher v. Department of Defense*, 47 M.S.P.R. 585, 587-88 (1991).

Likewise, in the instant appeal, the pertinent provision of the Privacy Act, codified at 5 U.S.C. § 552a(g), provides that, where an agency fails "to amend an individual's record in accordance with his request," that "individual may bring a civil action against the agency" in a United States district court. Thus, because the appellant has a civil remedy against the agency if it fails to correct the allegedly false information in his personnel records, his disclosure of the alleged falsification in his Privacy Act record clarification request is not a protected activity under 5 U.S.C. § 2302(b)(8). Accordingly, any reprisal based on such disclosure is also not covered under 5 U.S.C. § 2302(b)(8), and the Board has no jurisdiction to consider it under that provision. See generally *Coffer*, 50 M.S.P.R. at 56-57;

Fisher, 47 M.S.P.R. at 587-88; *Williams*, 46 M.S.P.R. at 551-54.⁶

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

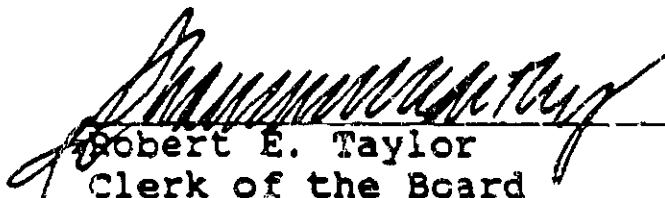
NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.

⁶ To the extent that the appellant is also contending that the alleged falsification was a separate agency action that was committed in reprisal for his disclosure of whistleblowing activities under 5 C.F.R. § 1209.4(b), we find that "falsification" in itself does not constitute a "personnel action" under 5 U.S.C. § 2302(a)(2) or 5 C.F.R. § 1209.4(a), and that, therefore, the Board has no jurisdiction over that contention. See 5 U.S.C. § 2302(a)(2); 5 C.F.R. § 1209.4(a).