UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

98 M.S.P.R. 31

JOYCE H. COUFAL,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
AT-1221-03-0762-W-1

DATE: November 4, 2004

Mary Sonnier, Pineville, Louisiana, for the appellant.

David R. Morrison, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her adverse action and individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED, still dismissing the IRA appeal for lack of jurisdiction. We REMAND the appellant's adverse action alleged involuntary retirement appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was employed as a GS-14 Associate Warden with the agency's Bureau of Prisons at the Federal Correctional Institution, Yazoo City, Mississippi. Initial Appeal File (IAF), Tab 6, subtab 4a. Beginning on January 26, 2001, the appellant was absent from work on sick leave with no anticipated date of return. *Id.*, subtabs 4d-4e, 4i, 4m, 4t-4x. On June 7, 2001, she requested a "lateral transfer" to an agency facility in Florida. *Id.*, subtab 4j. On June 25, 2001, the agency denied her request, stating that a position at the GS-14 level was not available at the requested facility. *Id.*, subtab 4h. The appellant retired, effective November 3, 2001. *Id.*, subtabs 4a, 4c.

¶3 In October 2002, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that she had made protected disclosures to various agency officials concerning misconduct committed by her supervisor, Warden Khurshid Yusuff (Warden). IAF, Tab 1 at 46-87. She further alleged in relevant part that, as a result of those disclosures, the Warden had forced her involuntary retirement. *Id.* On May 16, 2003, OSC issued a letter notifying the appellant that it had terminated its investigation into her allegations and that she had the right to seek corrective action with the Board. IAF, Tab 1 at 21. On July 22, 2003, the appellant filed an IRA appeal with the Board claiming, inter alia, that her retirement was involuntary and that the agency had discriminated against her based on age and disability. *Id.* at 2-20. The appellant further contended that the Warden had created a hostile work environment forcing her to retire in reprisal for her whistleblowing activities, i.e., her alleged disclosure to agency Assistant Regional Controller Gary Powers relating to the Warden's misuse of government funds and her disclosure to the Warden involving the Warden's failure to report an incident of workplace violence. *Id.* at 13-16, 19-20. She requested a hearing. *Id.* at 12.

¶4 The administrative judge docketed the appellant's appeal as an IRA appeal and issued an acknowledgment order that informed the appellant of her right to a

hearing in the event her appeal was timely filed and within the Board's jurisdiction. IAF, Tab 2. The order, however, did not inform the appellant of the Board's timeliness and jurisdictional requirements for an IRA appeal. *Id.*

¶5 The agency filed a motion to dismiss the appeal for lack of jurisdiction because the appellant had not raised a nonfrivolous allegation of involuntariness and she had not timely filed her IRA appeal. IAF, Tab 5. The agency also filed a response to the appeal. IAF, Tab 6. In response to the agency's motion, the appellant argued that her appeal was timely filed or, in the alternative, that good cause existed for any alleged untimeliness because she had been hospitalized during the 3 days preceding the filing deadline and was not released from the hospital until the day of the filing deadline. IAF, Tab 8 at 2-4. She provided medical documentation in support of her claim. *Id.* at 17-21. In addition, she reiterated her claim that her retirement was involuntary due to intolerable working conditions created by the Warden in reprisal for her whistleblowing. *Id.* at 4-13. She reasserted her entitlement to a jurisdictional hearing. *Id.* at 11.

¶6 In a subsequent September 3, 2003 order, the administrative judge advised the appellant of her specific burden of proving Board jurisdiction over an IRA appeal, including the requirement that an appellant must exhaust her administrative remedies before OSC. IAF, Tab 10. The order also notified the appellant of what she needed to show to establish Board jurisdiction over her involuntary retirement claim as an adverse action appeal. *Id.* The order did not, however, set forth notice of the timeliness requirements for filing an IRA appeal. *Id.*

¶7 In response to the order, the appellant provided additional allegations of the intolerable working conditions to which she was purportedly subjected. IAF, Tab 14 at 10-17. She also provided additional details regarding the circumstances surrounding the two disclosures that she claimed led to the Warden's reprisal against her. *Id.* at 2-10. Finally, the appellant contended for the first time that the Warden perceived her to be a whistleblower when the

Warden wrongly assumed that the appellant had written an anonymous letter to the agency's Office of Internal Affairs (OIA) disclosing the Warden's alleged failure to report the incident of workplace violence. *Id.* at 7.

¶8 Without conducting the requested hearing, the administrative judge dismissed the appeal for lack of jurisdiction upon finding that the appellant had failed to raise a nonfrivolous allegation that her retirement was involuntary. Initial Decision (ID) at 2-7. The administrative judge also found that the appellant failed to establish jurisdiction over her appeal as an IRA appeal because she had not raised a nonfrivolous allegation that she made protected disclosures pursuant to 5 U.S.C. § 2302(b)(8). ID at 7-8. Specifically, the administrative judge determined that (1) the appellant's disclosure to Mr. Powers was not protected because Mr. Powers already knew about the Warden's misconduct before the appellant's disclosure, and (2) the appellant's disclosure to the Warden was not protected since it involved a complaint to a supervisor about the supervisor's own alleged wrongdoing. *Id.* The initial decision did not address the timeliness of the appellant's IRA appeal.

¶9 On petition for review, the appellant challenges the dismissal of her appeal for lack of jurisdiction and argues that she is entitled to a jurisdictional hearing. Petition for Review File (PFRF), Tab 1. She reasserts that she raised nonfrivolous allegations that her retirement was involuntary and that she made protected disclosures entitling her to protection as a whistleblower. *Id.* at 2-12. She further asserts that the administrative judge failed to address her argument that the Warden perceived her as a whistleblower. *Id.* at 10-12. Finally, she claims that the administrative judge erred by staying discovery and exhibited bias against her. *Id.* at 2, 4-5. The agency has not filed a response to the appellant's petition for review.

ANALYSIS

The appellant has not established that the administrative judge was biased.

¶10 In her petition, the appellant alleges that the administrative judge was biased because he "subjectively" determined that the facts did not establish that the appellant was subjected to a hostile work environment. PFRF, Tab 1 at 4-5. A party, however, must make a substantial showing of personal bias to overcome the presumption of honesty and integrity that accompanies an administrative judge. *E.g., Matosian v. Department of the Air Force*, 56 M.S.P.R. 689, 695 (1993).

¶11 The fact that the administrative judge ruled against the appellant is not sufficient evidence to show bias. *See Rolon v. Department of Veterans Affairs*, 53 M.S.P.R. 362, 366-67 (1992). An administrative judge's rulings alone, even if erroneous, are insufficient to establish bias or incompetence mandating disqualification. *Wildberger v. Small Business Administration*, 63 M.S.P.R. 338, 347, *review dismissed*, 36 F.3d 1114 (Fed. Cir. 1994) (Table). Because the appellant's objection to the administrative judge's analysis stems from her disagreement with the administrative judge's evidentiary rulings, a finding of bias is not warranted. *See Matosian,* 56 M.S.P.R. at 695-96; *Lee v. U.S. Postal Service*, 48 M.S.P.R. 274, 281 (1991).

The appellant has not established Board jurisdiction over her IRA appeal.

¶12 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that: (1) She engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1371-72 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002). If an appellant establishes Board jurisdiction over an IRA appeal by exhausting her

administrative remedies before OSC and making the requisite nonfrivolous allegations, she has a right to a hearing on the merits of her claim. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003); *Rusin*, 92 M.S.P.R. 298, ¶ 20.

¶13 We reopen this case because we find that it is more appropriate to dismiss the appellant's IRA appeal for lack of jurisdiction on the ground that she failed to show that she exhausted her administrative remedies before OSC with regard to two of her alleged disclosures and failed to raise a nonfrivolous allegation that a third disclosure was a "protected disclosure."

¶14 Under 5 U.S.C. § 1214(a)(3), an individual wishing to file an IRA appeal with the Board is required to seek corrective action from OSC before seeking corrective action from the Board. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 22 (2001). The appellant bears the burden of showing that she sought corrective action from OSC and that she exhausted her remedies there, *Briley v. National Archives & Records Administration*, 236 F.3d 1373, 1377 (Fed. Cir. 2001), and the Board's jurisdiction is limited to issues raised before OSC, *id.; Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1037 (Fed. Cir. 1993). This statutory exhaustion requirement is met where the complaining individual provides OSC with a sufficient basis to pursue an investigation that might have led to corrective action. *Wheeler*, 88 M.S.P.R. 236, ¶ 22. The individual must articulate with reasonable clarity and precision before OSC the basis for her request for corrective action. *Briley*, 236 F.3d at 1377; *Ellison*, 7 F.3d at 1037; *Wheeler*, 88 M.S.P.R. 236, ¶ 22.

¶15 As discussed above, the appellant raised the following alleged disclosures before the Board in her IRA appeal: (1) The Warden's misuse of government funds to transport agency employees to and from a former agency employee's out-of-state funeral reported to Assistant Regional Controller Powers on October 2, 2000; and (2) the Warden's failure to report an incident of workplace violence reported to the Warden on October 12, 2000. IAF, Tab 1 at 19-20; Tabs 8, 14.

The appellant further contended before the Board that she is entitled to protection as a perceived whistleblower because the Warden believed that she wrote an anonymous letter to the OIA disclosing the Warden's alleged failure to report the incident of workplace violence. IAF, Tab 14 at 7. None of these disclosures, however, provides a basis for Board jurisdiction over the appellant's IRA appeal.

¶16 In her response to the administrative judge's September 3, 2003 order, the appellant claimed that, during the week of October 2, 2000, Mr. Powers "asked [her] if she knew of [the Warden's] misuse of government vehicle[s] and government funds" for the funeral of a former agency employee. IAF, Tab 14 at 2-3. She stated that she "verified with him" that the allegations of the Warden's misconduct were true. *Id.* at 3. On review, the appellant claims that "she advised [Mr. Powers] of pertinent facts regarding [the Warden's] misuse of a government vehicle, misuse of government funds, and abuse of authority." PFRF, Tab 1 at 10-11.

¶17 Our review of the appellant's complaint before OSC, however, reveals that she never informed OSC of any conversation that she ever had with Mr. Powers, let alone the conversation she described in her appeal. IAF, Tab 1 at 53-55, 59-64. Further, she did not even name Mr. Powers as an individual to whom she made any disclosures in the section of the OSC complaint form requesting that information. *Id.* at 65-67. On the contrary, in a letter submitted by the appellant to OSC in further support of her claims, the appellant explained that Mr. Powers had learned of the Warden's alleged misuse of government funds from other agency employees and stated that she "did not report the misuse of funds because [she] knew several staff members had reported it." *Id.* at 74. In light of these representations, the appellant clearly failed to exhaust her remedy before OSC with respect to this alleged disclosure. *See Ellison*, 7 F.3d at 1037.[1]

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[1] Because we find that the appellant did not raise her alleged disclosure to Mr. Powers before OSC, it is unnecessary to determine whether the administrative judge correctly

¶18 Similarly, we find that the Board lacks jurisdiction to consider the appellant's argument that she was perceived as a whistleblower. Again, our review of the record indicates that the appellant never raised this argument in her complaint before OSC. IAF, Tab 1; *see Ward v. Merit Systems Protection Board,* 981 F.2d 521, 526 (Fed. Cir. 1992) (in an IRA appeal, the Board may consider only those charges of whistleblowing that the appellant asserted before OSC); *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶¶ 95, 102-03 (2001) (the appellant failed to establish IRA jurisdiction over certain allegations concerning personnel actions the agency took against her where she failed to identify her whistleblowing disclosures in her complaint to OSC), *review dismissed,* 32 Fed. Appx. 543 (Fed. Cir. 2002).

¶19 Finally, with respect to the appellant's alleged protected disclosure regarding the Warden's failure to report workplace violence, we find that, while the appellant sufficiently identified this disclosure before OSC, IAF, Tab 1 at 53-55, 59-67, 74-77, the administrative judge correctly concluded that it did not constitute a nonfrivolous allegation of a "protected disclosure." ID at 8. Under the Whistleblower Protection Act, when an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a "protected disclosure" of misconduct. *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001); ID at 8.

¶20 Thus, we affirm as modified the initial decision dismissing the appellant's IRA appeal for lack of jurisdiction.

The appellant has raised a nonfrivolous allegation of an involuntary retirement that may constitute an otherwise appealable action.

¶21 Where an agency takes an action against an employee that is otherwise appealable to the Board, an employee who believes the action was in reprisal for

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found that the appellant did not make a nonfrivolous allegation of a "protected disclosure" under the WPA. ID at 7-8.

whistleblowing may choose either to seek corrective action from OSC before filing an IRA appeal with the Board or to appeal directly to the Board. 5 C.F.R. § 1209.5(b); *Chakravorty v. Department of the Air Force*, 90 M.S.P.R. 304, ¶ 17 (2001). Here, the appellant chose to file a complaint with OSC alleging that her retirement was involuntary and caused by the hostile work environment created by the agency in reprisal for her whistleblowing. IAF, Tab 1 at 46-87. An involuntary retirement, which is tantamount to a removal, is an "otherwise appealable action" and, as such, need not satisfy the jurisdictional requirements for an IRA appeal. *Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, ¶ 19 (2000). Accordingly, if the appellant establishes that her retirement was involuntary, the Board would have jurisdiction over her removal, regardless of whether she established that she made whistleblowing disclosures or whether she "exhausted" her OSC remedy. *See id.* Thus, notwithstanding our above finding that the administrative judge properly dismissed the appellant's IRA appeal for lack of jurisdiction, we must consider the appellant's claim that intolerable working conditions created by the agency resulted in her involuntary retirement. *See id.*

¶22 The touchstone of the "voluntariness" analysis and the common element in all Board cases involving alleged involuntary resignations or retirements "is that factors have operated on the employee's decision-making processes that deprived him or her of freedom of choice." *Heining v. General Services Administration*, 68 M.S.P.R. 513, 519 (1995). The totality of the circumstances is examined by an objective standard to determine voluntariness, not the employee's purely subjective evaluation. *Id.* at 520. Under that objective standard, the Board will find a retirement or resignation involuntary only if the employee demonstrates that "under all the circumstances working conditions were made so difficult by the agency that a reasonable person would have felt compelled to resign." *Id.*

¶23 An appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an alleged involuntary retirement if she makes a nonfrivolous

allegation casting doubt on the presumption of voluntariness. *Frison v. Department of the Army*, 94 M.S.P.R. 431, ¶ 4 (2003). A nonfrivolous allegation is an allegation of fact that, if proven, could establish a prima facie case that the Board has jurisdiction over the appeal. *Id.*; *Locke v. U.S. Postal Service*, 61 M.S.P.R. 283, 288 (1994). Thus, to establish entitlement to a jurisdictional hearing, an appellant need not allege facts that, if proven, definitely would establish that the retirement was involuntary; she need only allege facts that, if proven, could establish such a claim. *Frison*, 94 M.S.P.R. 431, ¶ 4; *McCray v. Department of the Navy*, 80 M.S.P.R. 154, ¶ 11 (1998).

¶24 In addition, where allegations of discrimination and reprisal for whistleblowing activity are alleged in connection with a determination of voluntariness, such evidence may only be addressed insofar as it relates to the issue of voluntariness and not whether the evidence would establish discrimination or reprisal as an affirmative defense. *Pickens v. Social Security Administration*, 88 M.S.P.R. 525, ¶ 6 (2001). Thus, evidence of discrimination and reprisal goes to the ultimate question of coercion. *Id.*

¶25 Here, the administrative judge found that the appellant failed to raise nonfrivolous allegations that her retirement was involuntary. ID at 2-7. In so finding, the administrative judge characterized the appellant's claims of intolerable working conditions as "general" and stated that "[t]he appellant's bare assertions of legal conclusions, such as a generalized claim that she was subjected to harassment, do not rise to the level of nonfrivolous allegations of facts which, if proven, could establish Board jurisdiction." ID at 4. The administrative judge further stated that the appellant did not "allege[] facts which would make any reasonable person feel compelled to retire" because "[r]easonable people do not feel compelled to resign or retire over the type of unpleasantness … identified by the appellant, even if they are embarrassing or demeaning." ID at 6. We disagree.

¶26 We find that the appellant's submissions below show that she raised nonfrivolous allegations that her retirement was involuntary, entitling her to a jurisdictional hearing in this appeal. *See Frison*, 94 M.S.P.R. 431, ¶ 4. The appellant argued below, and reasserts in her petition for review, that the Warden harassed and retaliated against her, creating a hostile work environment from the time she made alleged protected disclosures in October 2000, until she was forced to take sick leave on January 26, 2001, and ultimately to retire effective November 3, 2001. IAF, Tabs 1, 8, 14; PFRF, Tab 1.

¶27 The following examples of the appellant's claims that support our finding of a nonfrivolous allegation of a constructive discharge are not intended as a complete summary of all the evidence of record on this matter. In her appeal, the appellant asserted that the Warden took the following actions in reprisal for her alleged protected disclosures: (1) On October 11, 2000, she eliminated the appellant's key duties, including removing the Financial Management Department from her line of supervision; (2) on November 25, 2000, she changed the appellant's working conditions by requiring her to work, without compensation, every weekend and every holiday; (3) on December 13, 2000, after 25 years of "outstanding" and "exceeds" performance ratings, she issued her a performance improvement plan (PIP), which stated that her job performance was at "an unacceptable level" and threatened to remove, demote, or reassign her; (4) as part of the PIP, she required the appellant to meet with her 3 days per week and to "walk" with her 2 days per week for observation; (5) she isolated the appellant physically and socially from other department heads; (6) she excluded her from meetings, allegedly "crippling her ability to do her job"; (7) she made negative remarks about the appellant to other department heads; (8) she solicited negative letters about the appellant from other department heads; and (9) in January 2001, she stated to the appellant and to the appellant's colleagues that she wanted the appellant to retire. IAF, Tab 1 at 139; Tab 6, subtab 4y; Tabs 8, 14; *see, e.g., O'Brien v. Department of Agriculture*, 91 M.S.P.R. 139, ¶¶ 7-8 (2002).

¶28 In addition, the appellant contended that, as a result of the Warden's conduct, she suffered from (and was diagnosed with) severe depression. IAF, Tab 14 at 15. In support of this claim, the appellant submitted a copy of a July 10, 2001 medical report from her treating psychiatrist, Brenda Hines, M.D., reflecting that in January 2001 the appellant sought medical assistance at an Emergency Clinic and, at that time, was found to be acutely suicidal with "severe major depression." IAF, Tab 1 at 111-14; Tab 6, subtab 4e. Dr. Hines reported that an initial psychiatric evaluation, conducted in January 2001, revealed that the appellant was passively suicidal and was "so severely depressed" that it affected her cognition and resulted in impairments in memory, attention, concentration, and ability to make decisions. *Id.* The medical report further indicated that the appellant was diagnosed with Meniere's disease, "a unilateral perceptive hearing loss with fluctuations, progression, and frequency of attacks being correlated with increased stress or emotional disturbances." *Id.* According to Dr. Hines, the appellant's conditions "have been correlated with the work stress." IAF, Tab 1 at 112; Tab 6, subtab 4e at 2. She further opined that, should the appellant be placed at her previous level of functioning under the Warden's supervision, she likely would "have a relapse despite maintenance therapy." *Id.* Finally, the appellant claimed that her mental incapacitation, which was caused by the Warden's harassment, coupled with the agency's failure to reassign her to another agency facility and her doctor's orders not to return to work under the supervision of the Warden, gave her no choice but to retire. IAF, Tab 8 at 12-13; Tab 14 at 15-17.

¶29 In view of the foregoing, we find that the totality of the circumstances supports a finding that the appellant has made nonfrivolous allegations that her

retirement was involuntary, thereby entitling her to a hearing on the issue of adverse action jurisdiction over her appeal. *See Frison*, 94 M.S.P.R. 431, ¶ 4.[2]

The appellant's IRA appeal may have been untimely filed.

¶30 As discussed above, an employee against whom an agency has taken an otherwise appealable action who seeks redress for alleged whistleblowing activity may choose either to seek corrective action from OSC before appealing to the Board or to file the appeal directly with the Board. 5 C.F.R. § 1209.5(b); *Chakravorty*, 90 M.S.P.R. 304, ¶ 17. If the employee seeks corrective action from OSC, the time limit for appealing the otherwise appealable action is governed by the time limit for filing a timely IRA appeal. *Id.* Here, the appellant sought corrective action from OSC and the record on appeal shows that the appellant raised the issue of her involuntary retirement with OSC. IAF, Tab 1 at 46-87. Thus, if she timely filed her IRA appeal, that IRA appeal would also represent a timely appeal of her alleged involuntary retirement that was integral to the action. *See Chakravorty*, 90 M.S.P.R. 304, ¶ 17; *Koury v. Department of Defense*, 84 M.S.P.R. 219, ¶ 6 n.1 (1999) (finding that, because the appellant sought corrective action from OSC, the time limit for appealing his involuntary resignation was governed by 5 C.F.R. § 1209.5(a), rather than by 5 C.F.R. § 1201.22(b)).

¶31 Under 5 U.S.C. § 1214(a)(3), an IRA appeal must be filed "no more than 60 days" after "notification was provided" to the appellant by OSC that it had terminated its investigation. *Moss v. Department of the Army*, 85 M.S.P.R. 478, ¶ 4 (2000). The Board's implementing regulations provide that an IRA appeal

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[2] We note that the appellant claims on petition for review that the administrative judge erred by staying discovery pending his determination on jurisdiction. PFRF, Tab 1 at 2. In light of our decision remanding this case for a jurisdictional hearing, we need not address this claim. However, on remand, the appellant shall be entitled to discovery of relevant materials to help her meet her burden of establishing the Board's jurisdiction. *See Trotter v. U.S. Postal Service*, 91 M.S.P.R. 282, ¶ 14 (2002).

must be filed no later than 65 days after the date of issuance of OSC's written notification to the appellant that it was terminating its investigation. 5 C.F.R. § 1209.5(a)(1). However, if an appellant shows that OSC's notification was received more than 5 days after the date of issuance, the IRA appeal must be filed within 60 days after the date the appellant received OSC's notification. *Id.*; *Moss*, 85 M.S.P.R. 478, ¶ 4. The Board has no authority to waive the statutory time limit for filing an IRA appeal for good cause shown under 5 C.F.R. § 1201.22(c). *Koury*, 84 M.S.P.R. 219, ¶ 6.

¶32 In this case, OSC issued its termination letter on May 16, 2003. IAF, Tab 1 at 21. OSC's letter advised the appellant that she could seek corrective action with the Board within 65 days after the date of the letter. *Id.* The 65th day after OSC's May 16, 2003 letter was Sunday, July 20, 2003. However, the appellant did not file her IRA appeal until Tuesday, July 22, 2003, the date that she faxed her appeal to the Board. IAF, Tab 1. In its motion to dismiss for lack of jurisdiction, the agency also argued that the appellant's IRA appeal should be dismissed as untimely filed. IAF, Tab 5 at 3. In response to the agency's argument, the appellant contended that her appeal was, at most, one day late. IAF, Tab 8 at 2-4. She also provided evidence and argument that she had been hospitalized at the time the appeal was due and, therefore, that good cause existed for any alleged untimeliness. *Id.* at 2-4, 17-21. The agency did not respond to the appellant's evidence or argument on this point, and the record indicates that the administrative judge never resolved this timeliness issue.

¶33 While it appears that the appellant's appeal was, at least, one day late, *see Pry v. Department of the Navy*, 59 M.S.P.R. 440, 442-43 (1993) (holding that the filing deadline for an IRA appeal is extended to the following business day for deadlines that fall on the weekend or a Federal holiday), the record reveals that the appellant never received sufficient notice, from the administrative judge or the agency, regarding the timeliness requirements for an IRA appeal set forth in 5 C.F.R. § 1209.5(a)(1). The administrative judge's orders in this case never

informed the appellant regarding the timeliness requirements for an IRA appeal, IAF, Tabs 2, 10, and the agency's motion to dismiss only referenced the first prong of 5 C.F.R. § 1209.5(a)(1) and failed to inform the appellant that, if she showed that she received OSC's termination letter more than 5 days after its issuance date, her appeal would be timely if filed within 60 days after she received notification from OSC. IAF, Tab 5.

¶34 Therefore, on remand, the administrative judge shall provide the appellant with notice that an IRA appeal must be filed within 65 days after the date of issuance of OSC's notification or within 60 days after the date the appellant actually received the notification if she shows that she received the notification more than 5 days after its issuance. He shall further explain that the time limit for filing an IRA appeal cannot be waived for good cause shown. After affording the parties an opportunity to develop the record further on the timeliness issue, the administrative judge shall dismiss the alleged involuntary retirement appeal if he finds that it was untimely filed under 5 C.F.R. § 1209.5(a)(1). If the administrative judge finds that the appellant's IRA appeal was timely filed, he shall hold a hearing on the appellant's claim that her retirement constituted a constructive discharge within the Board's adverse action jurisdiction and adjudicate the claim.

ORDER

¶35 Accordingly, we remand this appeal for further proceedings in accordance with this Opinion and Order.

FOR THE BOARD: ______________________________
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.