UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 218

Docket No. DC-1221-09-0356-W-1

Matthew J. Nasuti,

Appellant,

v.

Department of State,

Agency.

October 29, 2009

Matthew J. Nasuti, Deerfield, Massachusetts, pro se.

Jason A. Biros, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned the Board for review of the initial decision (ID) dismissing his 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 VACATE the ID, but STILL DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant was appointed effective March 13, 2008, to the position of Senior City Management Advisor, AD-0301-05, in the agency's Iraq Transition Assistance Office, an excepted service position not to exceed March 13, 2009. Initial Appeal File (IAF), Tab 14, Subtabs 4m, 4n. He was terminated "for operational reasons" effective March 28, 2008, pursuant to a notice issued on March 31, 2008. *Id.*, Subtab 4e. On April 24, 2008, the agency issued a Standard Form 50 (SF-50) documenting the termination action effective March 28, 2008, and stating in the Remarks section that the action had been taken for "disruptive behavior during training." *Id.*, Subtab 4f. The appellant appealed his termination to the Board pursuant to 5 U.S.C. chapter 75.[1] The administrative judge (AJ) dismissed the appeal for lack of adverse action or reduction in force jurisdiction, and the appellant did not file a petition for review (PFR), so the decision became final on October 9, 2008. *Nasuti v. Department of State*, MSPB Docket No. DC-0752-08-0644-I-1 (Initial Decision, Sept. 4, 2008); IAF, Tab 14, Subtab 3c.

¶3 This appeal originates from a complaint that the appellant filed with the Office of Special Counsel (OSC) on or about October 28, 2008. IAF, Tab 1, Att. 7. In this complaint, the appellant alleged that his termination resulted from reprisal for disclosures protected under 5 U.S.C. § 2302(b)(8). *Id.* The appellant supplemented his OSC complaint in writing. IAF, Tab 6, Subtab 1 at 2-6. OSC issued a preliminary decision to close its investigation on February 4, 2009. IAF, Tab 1, Att. 6 at 2-3. After the appellant filed written responses to OSC's preliminary decision, IAF, Tab 6, Subtab 1 at 2-6, OSC terminated its investigation on February 23, 2009, *id.* at 1. OSC advised the appellant of his appeal rights, *id.*, and this IRA appeal ensued, IAF, Tab 1.

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[1] The appellant also brought suit for wrongful termination and breach of contract in the United States District Court for the District of Massachusetts. The court dismissed the action for lack of jurisdiction. IAF, Tab 14, Subtabs 3a, 3b.

¶4 The AJ issued a specific adverse action and IRA jurisdictional show-cause order after it became apparent that the Board might not have jurisdiction over this appeal. IAF, Tab 3. The appellant filed three responses to that order, IAF, Tabs 6, 9, 19, but the AJ granted the agency's motion to dismiss the appeal for lack of a nonfrivolous allegation of jurisdiction, IAF, Tabs 15, 55. The AJ dismissed the appeal without a hearing. ID at 1, 19. Specifically, the AJ found that the appellant was subject to a single personnel action covered under the Whistleblower Protection Act (WPA), his termination, ID at 5, and the agency's subsequent issuance of an SF-50 cannot be considered a separate personnel action, ID at 5-6. The AJ found that the appellant failed to present a nonfrivolous allegation that he had a reasonable belief that Martin P. Burk, the defensive driving instructor at the agency's Iraq Orientation/Foreign Affairs Counter-Terrorism (FACT) course, committed acts on March 28, 2008, that violated any law, rule or regulation, or constituted gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. ID at 7-15. The appellant's OSC complaint regarded his alleged protected disclosure of exposure to excessive noise levels during Burk's section of the FACT course on March 28, 2008. IAF, Tab 1, Att. 7 at 2. The AJ also found that the appellant's allegation that he made an April 11, 2008 protected disclosure to agency management regarding the agency's poor firearms safety practices and its instructions to employees in the event of a terrorist attack could not have constituted a contributing factor to his March 28, 2008 termination. ID at 13-14. Additionally, the AJ rejected the appellant's effort to amend and supplement his IRA appeal with his allegations regarding Iran's nuclear capabilities and the inferior and potentially ineffective body armor worn by U.S. Embassy personnel that were not raised before the OSC. ID at 17-18; IAF, Tabs 51, 54.

¶5 The appellant has filed a PFR, PFR File (PFRF), Tab 1, to which the agency has filed a response, PFRF, Tab 4. The appellant also filed a submission

captioned "Petition for Review (Reply Brief)" before the record on PFR closed, PFRF, Tab 3, as well as other pleadings that are discussed below, PFRF, Tabs 5-8.

ANALYSIS

¶6 We first address the appellant's submissions that were filed in addition to the PFR while the case has been under Board review. First, the appellant filed with his PFR a motion for expedited consideration. PFRF, Tab 1, Motion. There is, however, no provision in the Board's rules for an accelerated PFR process, and we deny this motion. *See Vesser v. Office of Personnel Management*, 57 M.S.P.R. 648, 650 n.1 (1993), *rev'd on other grounds*, 29 F.3d 600 (Fed. Cir. 1994).

¶7 Second, after the record closed on review, the appellant filed two Motions to Amend the Record. PFRF, Tabs 5-6. In one motion, he sought to introduce portions of an agency Inspector General (IG) report regarding conditions at the U.S. Embassy in Baghdad. PFRF, Tab 5. In the other, he sought to submit a report from the Occupational Safety and Health Administration (OSHA) regarding violations of occupational health and safety standards at the FACT course. PFRF, Tab 6. The appellant obtained this report under the Freedom of Information Act. *Id.* We need not address the matter raised in these motions. As for the former, the IG report appears to post-date the closing date for the record on review, PFRF, Tab 2, Tab 5, Att. at 1; *see* 5 C.F.R. § 1201.114(i), and certainly the closing date below, but the appellant has not shown that the report is of sufficient weight to warrant an outcome different from that of the ID, *see Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980), given the basis for our findings below. As for the latter, the appellant has not shown that he was unable to obtain the OSHA report despite due diligence before the record closed below, *see* 5 C.F.R. § 1201.115(d)(1), or that the evidence was not readily available before the record closed on review, *see* 5 C.F.R. § 1201.114(i).

¶8 Third, after the record on review closed, PFRF, Tab 2, the appellant filed a pleading captioned "Appellant Objects to the Reckless Accusations Contained in the Agency's August 21, 2009 Brief." PFRF, Tab 8. The brief to which the appellant refers in this pleading is the agency's response to the appellant's Motions to Amend the Record. *See* PFRF, Tab 7; *see also* PFRF, Tabs 5-6. As the agency's response addresses motions that we have not considered, we need not consider the appellant's objections to the agency's response to his motions.

¶9 After fully considering the filings in this appeal, we conclude that the appellant has not shown that new and material evidence is available that, despite due diligence, was not available when the record closed, or that the ID is based on an erroneous interpretation of statute or regulation that affects the outcome. *See* 5 C.F.R. § 1201.115(d). Therefore, we deny the PFR. For the reasons discussed below, however, we reopen this case on our own motion and vacate the ID, but still dismiss the appeal for lack of jurisdiction. Although the ID reached the correct result, it made findings of fact and conclusions of law that went beyond those that are needed to dismiss the appeal for lack of IRA jurisdiction. Therefore, we have made our own findings of fact and conclusions of law that resolve the IRA jurisdictional issue in this appeal.

¶10 It is undisputed that the appellant was appointed to a position in the excepted service. IAF, Tab 1 at 4-5, Tab 14, Subtab 4n. The Board has jurisdiction over an appeal of a removal or termination from an excepted service position only if, at the time of the action, the appellant was (1) a preference eligible employee who has completed one year of current continuous service in the same or similar position, or (2) an employee who was not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, or who had completed two years of current continuous service in the same or similar positions under other than a temporary appointment limited to two years of less. 5 U.S.C. § 7511(a)(1)(B), (C); *Baker v. Department of Homeland Security*, 99 M.S.P.R. 92, ¶ 4 (2005). The appellant does not claim

to be a preference eligible, *see* 5 U.S.C. § 7511(a)(1)(B), and the agency's undisputed evidence shows that he was not serving under an initial appointment pending conversion to the competitive service, IAF, Tab 14, Subtab 4n, *see* 5 U.S.C. § 7511(a)(1)(C)(i). The undisputed evidence also shows that the appellant did not have sufficient service to meet the two-year threshold under 5 U.S.C. § 7511(a)(1)(C)(ii), and indeed, he had only served for two weeks at the time of his termination, IAF, Tab 14, Subtab 4f. The appellant would thus not meet the definition of an "employee" for an adverse action appeal, *see Baker*, 99 M.S.P.R. 92, ¶ 4, and only possible basis for the Board's jurisdiction in this case would be an IRA appeal under the WPA.

¶11 To establish jurisdiction over an IRA appeal, an appellant must exhaust his administrative remedies before OSC and make nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8), 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 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶¶ 8-11 (2002). A disclosure is protected under 5 U.S.C. § 2302(b)(8) if the alleged whistleblower reasonably believed that the information disclosed evidenced a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(B).

Exhaustion before OSC

¶12 To satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3), an appellant must first present his charges of whistleblowing before OSC before he seeks to present those charges to the Board. An appellant must inform OSC of the precise grounds underlying his charge of whistleblowing, giving that agency a sufficient basis to pursue an investigation that might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). The WPA requires that the Board consider *only* those charges of whistleblowing

that the appellant asserted before OSC, and it will not consider any subsequent recharacterization of the charges put forth by the appellant in his appeal. *Id.*; *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 9 (1999).

¶13 We find that the appellant alleged to OSC that he made two protected disclosures. IAF, Tab 1, Att. 7; IAF, Tab 6, Subtab 1 at 2-6. As for the first disclosure, the appellant began his employment as a trainee in the FACT course, which involves instruction in the use of firearms and defensive driving. He alleged the following in his OSC complaint regarding his course experience:

> At approximately 10:30 a.m. [on March 28, 2008, driving instructor] Martin Burk discharges his 38 cal. pistol multiple times while inside a vehicle with Complainant and two other State Department employees. He does so without notice and without providing the trainees with hearing protection. The noise levels are dangerous. At approximately 11:00 a.m. Complainant asks Burk, in front of the whole class, if there is going to be a repeat of the dangerous noise in the next segment of training. If so, Complainant wants to wear his own hearing protection. Burk ejects Complainant from the classroom and proceeds to yell at him in the parking lot. Complainant explains to Burk that the noise levels are above 130 decibels and are unsafe. Burk emphatically denies this. Complainant is notified three hours later by NEA/EX that his employment is being terminated. The State Department refuses to explain why, only stating that it is for "operational reasons." It refuses to explain what the term "operational reasons" means.

IAF, Tab 1, Att. 7 at 2.

¶14 The appellant's second alleged protected disclosure asserted to the OSC concerns a letter that he sent to Gregory B. Starr, Assistant Secretary for Diplomatic Security, after his March 28, 2008 termination. In a letter dated April 11, 2008, the appellant asserted, he detailed the health and safety problems at the training course and with the safety practices employees were taught and urged the Assistant Secretary to direct the trainers to change their instructions to employees regarding safety practices in the event of a terrorist attack. IAF, Tab 1, Att. 7 at 1; *see* IAF, Tab 6, Subtab 4 at 1-3. The appellant's letter included an allegation that the agency's firearms training practices were substandard

compared to the practices used by the military services. IAF, Tab 1, Att. 7 at 1-2; *see* IAF, Tab 6, Subtab 4 at 2, Subtab 21. These two alleged protected disclosures are the only disclosures that were exhausted before OSC.

¶15 When the appellant amended his initial IRA appeal, he claimed to have made more disclosures. *See* IAF, Tabs 51, 54. He argued that, while still employed with the agency in March 2008, he had attended an unclassified briefing on Iran's nuclear capabilities wherein he was given information that differed from public statements being made by the Secretary of State. IAF, Tab 51 at 1-2. He stated that he had conveyed the briefing information to several high-ranking officials. *Id.* at 1. However, the appellant never presented this alleged disclosure to OSC, *see* IAF, Tab 1, Att. 7; IAF, Tab 6, Subtab 1 at 2-6, and for that reason, we cannot consider it, *see Ward*, 981 F.2d at 526; *Roach*, 82 M.S.P.R. 464, ¶¶ 8-9. He likewise never presented his alleged disclosure regarding the poor quality of body armor provided to Embassy personnel to the OSC, *see* IAF, Tab 51 at 2; IAF, Tab 1, Att. 7; IAF, Tab 6, Subtab 1 at 2-6, and we thus cannot consider it.

¶16 In his PFR, the appellant claims to have given information to an OSC complaints examiner by telephone "on all aspects of this case" in order to show exhaustion of his OSC remedies regarding all of the disclosures he is alleging to have made. PFRF, Tab 1, PFR at 3. There is no documentation in the record of any telephone contact between the appellant and OSC. Any claim of exhaustion of his OSC remedies regarding additional alleged protected disclosures that the appellant might intend to make as a result of the alleged telephone contact with OSC would be a new argument on PFR. To the extent that his PFR arguments rely upon his assertion of telephone contact with OSC, we reject these arguments, because he has not shown they are based on new and material evidence not previously available below despite his due diligence. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

¶17 Beyond his allegation of several protected disclosures in his Board appeal, the appellant alleged that the agency took five separate personnel actions in reprisal for his protected disclosures. IAF, Tab 1, Brief at 5-6. The appellant's termination is clearly a "personnel action" under the WPA. 5 U.S.C. § 2302(a)(2)(A)(iii); 5 C.F.R. § 1209.4(a)(3); *see, e.g.*, *O'Brien v. Office of Independent Counsel*, 79 M.S.P.R. 406, 412-13 (1998). The remaining four actions pertained to the SF-50 documenting his termination, and the appellant alleged that issuance of the SF-50 was a "personnel action" separate from his termination. IAF, Tab 1, Brief at 5. The SF-50 was issued on April 24, 2008, IAF, Tab 14, Subtab 4f, after the appellant submitted his April 11, 2008 letter to Starr, IAF, Tab 6, Subtab 4 at 1.

¶18 The approval of an SF-50 by an agency is a clerical documentation task which customarily occurs after the effective date of a personnel action. *Vandewall v. Department of Transportation*, 52 M.S.P.R. 150, 155 (1991); *Scott v. Department of the Navy*, 8 M.S.P.R. 282, 287 (1981); *see Grigsby v. Department of Commerce*, 729 F.2d 772, 775 (Fed. Cir. 1984) ("the SF-50 is not a legally operative document controlling on its face an employee's status and rights"). Even if we were to assume that issuance of an SF-50 documenting a termination otherwise meets the definition of a "personnel action" under the WPA, the appellant has failed to show that he exhausted his remedies before OSC regarding this alleged personnel action. The appellant's initial OSC complaint stated, in part, that "[w]ithin two weeks of [his April 11, 2008 letter to Starr], the State Department seemingly retaliate[d]," because on the newly-issued SF-50, "**it change[d] the stated reason for termination to a termination for cause for 'disruptive behavior.'**" IAF, Tab 1, Att. 7 at 1; *see also id.* at 3, 4. However, OSC's letter preliminarily closing its investigation of the appellant's complaint that "management terminated [his] employment for [his] whistleblowing activities," which the appellant submitted with his Board appeal, does not address or identify the SF-50 as a separate "personnel action" alleged by the appellant,

but instead explains that OSC "cannot conclude that [the appellant was] terminated because of [his] report to Mr. Starr," because he was "terminated on March 28, 2008, prior to [his] report to Mr. Starr." *Id.*, Att. 6 at 1, 3. In one of his responses to OSC's preliminary closure letter, the appellant argued that it was "illegal under [Office of Personnel Management] rules" for the agency to place the remarks on an SF-50, and that such action constituted "retaliation." IAF, Tab 6, Subtab 1 at 6. There is no showing in the record, however, that the appellant supplied OSC with the SF-50 or that he even alleged to OSC that the SF-50 was a separate "personnel action" and thus gave OSC sufficient information to pursue an investigation that might lead to corrective action of that alleged "personnel action." The appellant's claim that the SF-50 is a separate "personnel action" did not take its current explained form until he filed his appeal with the Board. IAF, Tab 1, Brief at 5, Tab 6, the appellant's Response to Order to Show Cause at 28-32. This claim is nothing more than a recharacterization of the appellant's allegations before OSC. The Board may not consider such a recharacterization of the charges in the OSC complaint. *See Ward*, 981 F.2d at 526; *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 94 (2001), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002); *Roach*, 82 M.S.P.R. 464, ¶ 9.

Alleged protected disclosure of March 28, 2008

¶19 As for the first alleged protected disclosure made on March 28, 2008, the appellant's OSC complaint stated that he "ask[ed] Burk, in front of the whole class, if there [was] going to be a repeat of the dangerous noise in the next segment of training" and if so, he "want[ed] to wear his own hearing protection." IAF, Tab 1, Att. 7 at 2. In response, the appellant asserted, Burk "eject[ed him] from the classroom and proceed[ed] to yell at him in the parking lot," where he explained to Burk "that the noise levels are above 130 decibels and are unsafe." *Id.* Burk, in turn, denied the appellant's assertion, and the appellant was notified three hours later that his employment was being terminated. *Id.*

¶20 We find that the appellant has failed to make a nonfrivolous allegation of a protected disclosure. Because he made his alleged disclosure to the wrongdoer, Burk, about Burk's own conduct, it cannot be considered to be a protected disclosure. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001); *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998), *clarified in Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001); *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996), *clarified in Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001).

¶21 The appellant also contended that, at the same time he made his disclosure to Burk, he had also made a protected disclosure to the other trainees in the class about the dangerous noise levels. IAF, Tab 1, Brief at 9. The record does not show, however, that the appellant ever met the exhaustion requirement regarding any disclosure he now alleges to have made to his fellow trainees. In his OSC complaint, the appellant simply stated that he asked Burk in the presence of his classmates if the "dangerous noise" would be repeated in the next phase of the training, and, if so, he wanted to "wear his own hearing protection." IAF, Tab 1, Att. 7 at 2; *see also id.* at 1. The appellant argued on appeal that some of the other trainees were persons in a position to correct the alleged wrongdoing. IAF, Tab 6 at 8; *see Huffman*, 263 F.3d at 1351 ("Any government employee, in a supervisory position, other than the wrongdoer himself, is in a position to 'correct' or 'remedy' the abuse by bringing the matter to the attention of a higher authority."). There is nothing in the record, however, to suggest that the appellant asserted in his OSC complaint that he considered the other trainees to be anything other than witnesses to his complaint to Burk or that he identified the trainees to OSC as supervisors or agency officials to whom he was making a protected disclosure. IAF, Tab 1, Att. 7; IAF, Tab 6, Subtab 1 at 2-6. The Board may not consider the appellant's recharacterization of the charges in his OSC complaint.

See Ward, 981 F.2d at 526; *Redschlag*, 89 M.S.P.R. 589, ¶ 94; *Roach*, 82 M.S.P.R. 464, ¶ 9.

Alleged protected disclosure of April 11, 2008

¶22 The appellant's second alleged protected disclosure made on April 11, 2008, fails based on its timing. Because the appellant was terminated effective March 28, 2008, IAF, Tab 14, Subtabs 4e, 4f, he is unable to nonfrivolously allege that the April 11, 2008 letter was a contributing factor in his termination. Disclosures made after the agency has already taken the personnel actions at issue cannot have been contributing factors in the personnel actions and do not support a nonfrivolous allegation that the disclosures were contributing factors in the personnel actions. *Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 11 (2009).

¶23 For all of these reasons, we find that the appellant failed to establish the Board's jurisdiction regarding the appellant's alleged protected disclosures.

Motion to Recuse and Discipline the AJ

¶24 The appellant argues on PFR that the AJ should have recused herself from this case and that she should be disciplined for having shown bias.[2] PFRF, Tab 1, PFR at 25-28. He argues that her admonition, set forth in a March 27, 2009 order denying the agency's motion for sanctions, to "refrain from personal or argumentative statements against agency counsel or other persons" shows her bias, and he labels that order as "an ex parte 'gag order.'" *Id.* at 26-27; IAF, Tab 10 at 3. He claims that the admonition was ex parte because the AJ denied the agency's motion to sanction him before he was able to file any opposition to that motion. PFRF, Tab 1, PFR at 26-27.

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[2] It is unclear whether the appellant is making a new motion or requesting Board review of motions that the AJ denied. Because the appellant made similar motions before the AJ, we are treating this claim as an additional PFR argument rather than as a new and separate motion.

¶25 The appellant sought below to have the AJ disqualified on the basis of the "gag order" and her discovery rulings, as well as for condoning the agency's alleged destruction of evidence and "vile 'mental illness' whisper campaign" against him. IAF, Tab 41. The appellant also served the Clerk of the Board with a motion to discipline the AJ. IAF, Tab 45. The Clerk forwarded this motion to the AJ, and she issued an order denying the appellant's motion for disqualification. IAF, Tab 47. The appellant responded by filing a motion to certify the issue to the full Board as an interlocutory appeal. IAF, Tab 49. The AJ denied that motion. IAF, Tab 50.

¶26 We find no reason to disturb the outcome of this appeal based upon the AJ's rulings on these motions or the way in which she conducted the case. In making a claim of bias or prejudice against an AJ, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). The appellant has not overcome that presumption. Instead, the record shows that the AJ simply declined the agency's request to impose sanctions *against the appellant* for attacking the conduct of the agency's representatives, because the appellant, though an attorney, is pro se. The AJ explained that she was unable to find any evidence that the Board sanctioned pro se appellants as the agency had requested. IAF, Tab 10 at 3-4. In doing so, however, she also admonished the appellant to refrain from such conduct. *Id.* In no way was the AJ's admonition an ex parte communication or evidence of bias. Further, it is well within the AJ's discretion to maintain decorum during the proceedings. *See* 5 C.F.R. § 1201.41(b).

¶27 Finally, the appellant asserts that the AJ should have granted his discovery motions, and that by denying those motions, she blocked his access to "exculpatory evidence." PFRF, Tab 1, PFR at 27-28. The appellant elaborated on this argument in a "reply brief" filed before the record closed. PFRF, Tab 3. In the absence of nonfrivolous IRA jurisdictional allegations, however, the AJ

was not required to grant the discovery motions. *See Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 122 (1994).

¶28 Accordingly, we dismiss this appeal for lack of jurisdiction.

ORDER

¶29 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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