

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 101

Docket No. DA-1221-10-0108-W-1

**Sandra L. Mock Jundt,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

June 3, 2010

Sandra L. Mock Jundt, Oklahoma City, Oklahoma, pro se.

Joan M. Green, Esquire, Oklahoma City, Oklahoma, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed her appeal. 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, AFFIRM the initial decision insofar as it found that the Board lacks jurisdiction over a direct appeal of the appellant's termination during her probationary period, AFFIRM the initial decision insofar as it found that the appellant had prematurely filed her individual right of action (IRA) appeal, and

FORWARD¹ the appellant's now ripe IRA appeal to the regional office for further adjudication.

BACKGROUND

¶2 On November 21, 2009, the appellant filed an appeal in which she alleged, inter alia, that the agency improperly terminated her from her position as a GS-0644-09 Medical Technologist during her probationary period and violated the Whistleblower Protection Act. Initial Appeal File (IAF), Tab 1; *see also* Tab 9, subtabs 4b-4d. The administrative judge issued an Acknowledgment Order informing the appellant that, if she was alleging that the termination was reprisal for whistleblowing, she must first seek corrective action from the Office of Special Counsel (OSC); it did not appear that she had done so; and, if she had not, the Board must dismiss her appeal. The administrative judge ordered her to show that she had sought corrective action from OSC and that either OSC had terminated its investigation or 120 days had expired since she filed her OSC complaint.² *Id.*, Tab 2. The administrative judge issued additional show-cause

¹ We note that several previous cases have used the terms “vacate” and “remand” in describing the Board’s actions on review when the Board determined that an initial decision correctly dismissed an IRA appeal as premature, but returned the case to the regional office after it became ripe for adjudication while pending on review. *See e.g.*, *Simnitt v. Department of Veterans Affairs*, [113 M.S.P.R. 313](#), ¶¶ 1, 9-10 (2010); *Morales v. Social Security Administration*, [108 M.S.P.R. 583](#), ¶¶ 1, 7-8 (2008). We believe, however, that using the terms “affirm” and “forward” is the better practice under these circumstances.

² The administrative judge also informed the appellant of the standard for proving jurisdiction under [5 C.F.R. § 315.806](#) over a termination during a probationary period. IAF, Tab 2. The administrative judge later correctly noted, however, that the Board lacks jurisdiction under that regulation because the undisputed evidence shows that the appellant was an excepted-service employee appointed under [38 U.S.C. § 7401\(3\)](#). IAF, Tab 10 at 3 n.; *see* IAF, Tab 9, subtab 4d; *Barrand v. Department of Veterans Affairs*, [112 M.S.P.R. 210](#), ¶¶ 4, 13 (2009), *review dismissed*, No. 2009-3298 (Fed. Cir. Nov. 10, 2009). In that regard, we note that the agency’s error in notifying the appellant of a right of Board appeal, IAF, Tab 9, subtab 4c, does not serve to confer jurisdiction on the Board, *see Scott v. Department of the Air Force*, [113 M.S.P.R. 434](#), ¶ 9 (2010).

orders in which she also informed the appellant, inter alia, that it did not appear that she was an “employee” under [5 U.S.C. § 7511\(a\)\(1\)](#) who could file an appeal directly with the Board because she was an excepted service employee, she lacked veterans’ preference, she was serving a probationary period, and she had not completed 2 years of current continuous service in the same or similar positions. *Id.*, Tabs 4, 10. Both the appellant and the agency responded to the orders, the agency moving to dismiss the appeal for lack of jurisdiction. IAF, Tabs 3, 6-7, 9, 12.

¶3 On February 2, 2010, the administrative judge issued an initial decision in which she dismissed the appellant’s IRA appeal as premature. IAF, Tab 13 at 1, 4. The administrative judge also found that the appellant failed to show that she was an employee under [5 U.S.C. § 7511\(a\)\(1\)](#) with appeal rights to the Board because she was an excepted service employee without veterans’ preference and without prior Federal service. *Id.* at 3-4.

¶4 The appellant has filed a petition for review. Petition For Review File, Tab 1. The agency has filed a response opposing the petition for review. *Id.*, Tab 4.

ANALYSIS

The appellant’s petition for review does not provide a basis for Board review.

¶5 We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review.

¶6 In that regard, the appellant has shown no error in the initial decision’s findings that the Board lacks jurisdiction over her appeal as an otherwise appealable action because the undisputed evidence showed that she was appointed to a position in the excepted service, lacked preference eligibility, and had less than 2 years of current continuous service. IAF, Tab 9, subtabs 4b-4d; [5 U.S.C. §§ 7511\(a\)\(1\)\(C\)](#), 7513(d).³ In addition, she has shown no error in the initial decision’s finding that the Board lacked jurisdiction when she filed her appeal because she had not received notice from OSC that it had terminated its investigation into her complaint and 120 days had not expired since she filed her complaint. [5 U.S.C. § 1214\(a\)\(3\)](#); *Simnitt v. Department of Veterans Affairs*, [113 M.S.P.R. 313](#), ¶ 8 (2010); *Morales v. Social Security Administration*, [108 M.S.P.R. 583](#), ¶ 6 (2008).

We forward the appellant’s now-ripe IRA appeal to the regional office for adjudication.

¶7 The Board’s practice is to adjudicate an appeal that was premature when it was filed but becomes ripe while pending with the Board. *See, e.g., Simnitt*, [113 M.S.P.R. 313](#), ¶ 9; *Morales*, [108 M.S.P.R. 583](#), ¶ 7. The undisputed evidence shows that the appellant filed a complaint with OSC that was received by December 11, 2009, and assigned file number MA-10-0682. IAF, Tab 6 at 4, Tab 7 at 15. Because 120 days have passed since that date, we find that the appellant has exhausted her administrative remedies before OSC, and that the Board now has jurisdiction to adjudicate her IRA appeal. We therefore forward the case to the regional office for adjudication. *See Simnitt*, [113 M.S.P.R. 313](#), ¶ 9; *Morales*, [108 M.S.P.R. 583](#), ¶ 7.

³ The administrative judge also noted that the appellant was serving a “probationary” period when she was separated. The appellant was not serving “probation” under government-wide rules, however, because those rules only apply to individuals in the competitive service, [5 C.F.R. § 315.801\(a\)](#), and whether the appellant was serving “probation” under agency rules has no bearing on whether she has a right of appeal under [5 U.S.C. § 7511\(a\)\(1\)\(C\)](#).

ORDER

¶8 Because the appellant's IRA appeal is now ripe for adjudication, we FORWARD this case to the regional office for further adjudication.

FOR THE BOARD:

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