UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 83

Docket No. AT-1221-11-0037-W-1

Diane King,

Appellant,

v.

Department of the Army,

Agency.

September 14, 2011

Diane King, Deatsville, Alabama, pro se.

Anne M. Norfolk, Esquire, Fort Benning, Georgia, 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 the initial decision dismissing her individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed job applications with the agency pursuant to several vacancy announcements. Initial Appeal File (IAF), Tab 5, Subtab 1 at 1, Tab 8 at

52. According to the appellant, in October 2009, she appeared for a job interview before a four-person panel, during which the conversation turned to the circumstances of her previous separation from federal service with another agency. IAF, Tab 8 at 52. The appellant alleged that she informed the interview panel that she had been "fired for whistleblowing" and that one of the panel members responded that "whistleblowers [at the agency] were immediately reassigned to the library." *Id*. The agency eventually selected other individuals for the vacancies at issue. IAF, Tab 5, Subtab 1 at 2.

¶3 The appellant filed a Board appeal and requested a hearing, alleging, among other things, that her nonselection was in retaliation for whistleblowing.[1] IAF, Tab 1 at 3, 6. The administrative judge issued a jurisdictional order, directing the appellant to submit evidence and argument that (1) she engaged in whistleblowing by making a protected disclosure, (2) the disclosure was a contributing factor in her nonselection for appointment, and (3) she exhausted her administrative remedies with the Office of Special Counsel (OSC). IAF, Tab 6. The appellant responded by filing copies of her correspondence with OSC and explaining why she believed that her nonselection was based on her status as a whistleblower. IAF, Tab 8 at 44-57. Rather than identifying a protected disclosure as the administrative judge had directed, the appellant alleged that her status as a whistleblower had already been confirmed in previous Board appeals. *Id*. at 2-3.

---

[1] The appellant also claimed that she is a preference eligible veteran and alleged that the agency's selection process violated her veterans' preference rights. IAF, Tab 1 at 1, 3, 6. However, there is no indication in the record that the appellant filed a complaint with the Department of Labor on the matter, and it does not appear that the instant appeal constitutes an attempt by the appellant to exercise her rights under the Veterans Employment Opportunities Act of 1998 (VEOA). If the appellant is attempting to seek corrective action under VEOA, she should raise the issue with the administrative judge on remand.

¶4 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction on the basis that the appellant failed to identify any particular disclosure that she made and hence failed to draw a connection between a protected disclosure and the personnel action at issue. IAF, Tab 12 (ID) at 1, 3-4. The administrative judge explained that the identification of a particular disclosure is essential to the prosecution of an IRA appeal, and that the Board cannot accept jurisdiction over the appeal merely on the basis that the appellant had been found to be a whistleblower in the past. ID at 3-4.

¶5 The appellant has filed a brief petition for review, arguing that the administrative judge erred in failing to consider the connection between her prior whistleblowing activity and the personnel action at issue. Petition for Review File (PFR File), Tab 1 at 2. The agency has filed a response, addressing the issues raised in the petition for review and arguing that the petition should be denied for failure to meet the Board's review criteria. PFR File, Tab 3 at 5-9.

ANALYSIS

¶6 Generally, in order to establish jurisdiction over an IRA appeal, an appellant must prove that she exhausted her administrative remedies before OSC and make nonfrivolous allegations that (1) she engaged in whistleblowing activity by making a protected disclosure 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 as defined by 5 U.S.C. § 2302(a).[2] *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, ¶ 12 (2002). Under certain circumstances, however, an appellant can establish jurisdiction over an IRA appeal without

[2] The jurisdictional order and initial decision are misleading to the extent that they suggest that the appellant is required to prove all of the jurisdictional elements by preponderant evidence. IAF, Tab 6 at 1-2; ID at 3. The administrative judge should take care to accurately apprise the appellant of her jurisdictional burden and to apply the proper standards on remand.

making a nonfrivolous allegation that she made a protected disclosure. Specifically, an individual who is perceived as a whistleblower is still entitled to the protections of the Whistleblower Protection Act (WPA), even if she has not made protected disclosures. *Jensen v. Department of Agriculture*, 104 M.S.P.R. 379, ¶ 11 n.3 (2007); *Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 12 (1998); *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 278-80 (1990).

¶7 The Board has found that a variety of fact patterns can support a finding that an individual was perceived as a whistleblower. For example, in *Special Counsel v. Department of the Navy*, 46 M.S.P.R. at 276-80, the Board found that an employee's supervisors perceived him as a whistleblower because they believed that he made a hotline complaint concerning alleged violations of law, rule, or regulation even though the employee denied that he was the one who made the complaint. In other words, the employee's perception as a whistleblower arose from a case of mistaken identity. In *Mausser v. Department of the Army*, 63 M.S.P.R. 41, 44 (1994), the appellant compiled a list of "waste, fraud, and abuse," "safety issues," and violations of "government regulations" that he observed at the agency, with the intention of disclosing the list to the Inspector General after he completed his probationary period. Although the appellant never actually disclosed the list and was therefore not a whistleblower when the agency terminated him, the Board found that the agency may have perceived the appellant as a whistleblower to the extent that the agency knew about the list and the appellant's intention to disclose it. *Mausser*, 63 M.S.P.R. at 44. In *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 581 (1991), the appellant disagreed with the agency Chairman's public position on the agency's financial condition, and he expressed his disagreement to various agency officials, including the Chairman himself. Although the appellant did not actually disclose his disagreement or the bases thereof to anyone outside the agency, and although he did not intend for the expression of his disagreement to

constitute a whistleblowing disclosure, the Chairman still perceived the appellant as a whistleblower because he believed the appellant to be "a dangerous proponent of a view that could prove embarrassing – possibly evidencing mismanagement and abuse of discretion." *Thompson*, 51 M.S.P.R. at 581-82. In *Holloway v. Department of the Interior*, 82 M.S.P.R. 435, ¶ 15 (1999), a local newspaper reported that the appellant had disclosed "fraud, waste and abuse" at his employing agency but did not discuss the particulars of the disclosures. The appellant alleged that his supervisor was aware of the newspaper article and took personnel actions against him because of it. *Holloway*, 82 M.S.P.R. 435, ¶ 15. Therefore, even in the absence of a showing that he actually made any protected disclosures, the appellant made a nonfrivolous allegation that his supervisor perceived him as a whistleblower because the supervisor was aware of the newspaper article labeling him as such. *Id.*

¶8 Although the cases discussed above arose from widely different factual circumstances, they share a common element, i.e., that agency officials appeared to believe that the appellants engaged or intended to engage in whistleblowing activity. Thus, the analysis of whether an appellant was actually a whistleblower is different than the analysis of whether an appellant was perceived as a whistleblower. In cases falling under the former category, the Board will focus its analysis on the appellant's perceptions and the disclosures themselves, i.e., whether the appellant reasonably believed that her disclosures evidenced the type of wrongdoing listed under 5 U.S.C. § 2302(b)(8). *See, e.g., Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶¶ 15-18, 22-23 (2011); *Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶¶ 17-18 (2006). In cases falling under the latter category, the Board will focus its analysis on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302(b)(8). *See, e.g., Mausser*, 63 M.S.P.R. at 44; *Thompson*, 51 M.S.P.R. at 581-82. In those cases,

the issue of whether the appellant actually made protected disclosures is immaterial; the issue of whether the agency perceived the appellant as a whistleblower will essentially stand in for that portion of the Board's analysis in both the jurisdictional and merits stages of the appeal.

¶9 The issues in an IRA appeal where the appellant was alleged to have been perceived as a whistleblower will otherwise remain the same. In particular, the appellant must establish that she exhausted her remedies with OSC on the issue of whether the agency perceived her as a whistleblower. *Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶ 18 (2004). The appellant must also show that the agency's perception of her as a whistleblower was a contributing factor in its decision to take or not take the personnel action at issue, which she may do through the knowledge/timing test. *See Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 13 (2006). If the appellant meets her burdens on the merits of the appeal, the agency may still prevail if it can show by clear and convincing evidence that it would have taken the personnel action at issue absent its perception of the appellant as a whistleblower. *Juffer*, 80 M.S.P.R. 81, ¶ 18.

¶10 In this case, we find that the appellant raised the issue of her perception as a whistleblower in her complaint to the Office of Special Counsel, thereby satisfying the statutory exhaustion requirement. IAF, Tab 8 at 52. We further find that the cancellations of the vacancy announcements and nonselection for appointment were personnel actions under the WPA. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶¶ 15-17 (2010). However, we find that the appellant has not yet made a nonfrivolous allegation that the agency perceived her as a whistleblower or that her perception as a whistleblower was a contributing factor to her nonselection.

¶11 Nevertheless, the appellant did not receive explicit notice of how to establish jurisdiction over an IRA appeal as a perceived whistleblower, and the defect was not corrected by the agency's submissions or by the initial decision.

See Burgess v. Merit Systems Protection Board, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue); *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 9 (2011). Although it is not necessary for an administrative judge to provide notice in every IRA appeal of how to establish jurisdiction as a perceived whistleblower, we find that administrative judge in this case should have afforded the appellant such notice in light of the appellant's particular allegations. IAF, Tab 7 at 2, Tab 8 at 1-2; *cf. Washington v. Department of the Navy*, 75 M.S.P.R. 150, 153-54 (1997) (although the jurisdictional notice was adequate at the time it was issued, the administrative judge should have afforded the appellant further jurisdictional notice when the parties filed evidence and argument implicating further jurisdictional issues). On remand, the administrative judge shall notify the appellant of how to establish jurisdiction over an IRA appeal as a perceived whistleblower and afford her the opportunity to file evidence and argument on the issue.

ORDER

¶12 Accordingly, we remand the appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____

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