UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

87 M.S.P.R. 297

ROLAND E. LUECHT, JR.,
Appellant,

DOCKET NUMBER
AT-1221-00-0156-W-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: November 15, 2000

Roland E. Luecht, Jr., Pensacola, Florida, pro se.

David P. Knight, Pensacola, Florida, for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has submitted a timely petition for review of an initial decision that dismissed his 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.

BACKGROUND

¶2 According to the appellant's statements and submissions, which the agency does not refute, he was demoted from his GS-11 Supervisory Health Systems Specialist position to a GS-6 Contact Representative position in 1998. Subsequently, he attempted to return to his GS-11 position or a similar one, but

the agency did not promote him. He also received certain discipline, filed equal employment opportunity (EEO) complaints, and applied for Office of Workers' Compensation Programs (OWCP) benefits. More recently, he received an October 25, 1999 notice of proposed suspension and a January 13, 2000 decision to remove him. Initial Appeal File (IAF), Tab 9. According to the agency, the proposed suspension was never effected because the appellant was on leave since its issuance. IAF, Tab 6. The appellant states that he resigned effective January 13, 2000, to accept discontinued service retirement. IAF, Tab 9. Apparently, the removal was never effected.

¶3 On November 23, 1999, the appellant filed an IRA appeal. On his appeal form, he identified the agency actions as "Constructive Suspension, Removal, Change to lower grade, et al." He also stated that the agency failed to retrain him, retain his grade, and promote him. The appellant submitted a letter from the Office of Special Counsel (OSC) informing him that it had terminated its investigation of his complaint. IAF, Tab 1. The administrative judge informed him of the burden of proof to establish Board jurisdiction in an IRA appeal and ordered him to submit evidence and argument in a specific form to establish such jurisdiction. IAF, Tab 4. On January 11, 2000, the administrative judge rejected the appellant's submission for failure to follow his instructions and afforded him until January 18 to comply with the November 30 order. IAF, Tab 8. The appellant responded on January 18. IAF, Tab 9. The administrative judge issued another show cause order informing the appellant that his submission was still not in compliance with the November 30 order, and provided him with another opportunity to respond. IAF, Tab 10. The appellant responded again. IAF, Tab 12. The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without affording the appellant his requested hearing. IAF, Tab 13.

¶4 On petition for review, the appellant asserts that he complied with the administrative judge's order, that any failure to comply is a result of his mental

incapacity, and that the administrative judge did not address his stay request.[1] The appellant has also submitted numerous documents with his petition for review, some of which are a part of the record below. Petition For Review (PFR) File, Tab 1. To the extent that they are newly submitted, the appellant has not shown that they were previously unavailable despite his due diligence and that they are material. For these reasons, we have not considered his newly submitted evidence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The agency has timely responded in opposition to the petition for review. PFR File, Tab 3.

ANALYSIS

¶5 To establish Board jurisdiction over an IRA appeal, an appellant must show by preponderant evidence that: He engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2); and he raised the issue before the OSC, and proceedings before the OSC were exhausted. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). In order to be entitled to a jurisdictional hearing, an appellant need not prove the facts alleged but must make a nonfrivolous allegation of facts that, if proven, would establish that the matter is within the Board's jurisdiction. *Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, 86-87 (1998). Conclusory,

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[1] The appellant indicated in the portion of his appeal form pertaining specifically to claims of whistleblowing that he had previously requested a stay, which had been denied. He did not identify any particular action that he sought to stay or follow the instructions given on the appeal form. IAF, Tab 1. The administrative judge acknowledged the statement in his November 30, 1999 order, explaining that the appellant had requested and been denied a stay of his demotion and that no provision for a second stay request exists. IAF, Tab 4. Because the appellant did not further pursue a stay, we find no error in the administrative judge's disposition of the stay request.

vague, or unsupported allegations are insufficient to meet this standard. *DiGiorgio v. Department of the Navy*, 84 M.S.P.R. 6, 12 (1999).

¶6 The administrative judge ordered the appellant to submit a list of his disclosures; identify the type of wrongdoing, i.e., violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety; state why he believed that the disclosure fell into that category; and attach copies of his written communications. He also ordered him to submit a similar list of the personnel actions at issue and a statement describing when and how he brought the alleged disclosures and personnel actions to the OSC. He further instructed the appellant to attach copies of all documents provided to the OSC. IAF, Tab 4. At the January 11, 2000 prehearing conference and in his subsequent January 19 order, the administrative judge suggested that the appellant attach the relevant supporting documents to the appropriate list of allegations under each jurisdictional element. IAF, Tab 10.

¶7 Our review of the record shows that with the appellant's January 18, 2000 submission, he included lists entitled as follows: "Summary of Events;" "Communications;" "Personnel Actions;" and "OSC Correspondence." The list of disclosures ("Communications") did not characterize the type of wrongdoing disclosed or state why he believed the disclosure to be protected. IAF, Tab 9. Likewise, his second attempt still did not completely comply with the administrative judge's instructions. IAF, Tab 12. The appellant submitted numerous documents on January 18 but did not separate them according to the jurisdictional element they were intended to support or otherwise indicate what they were in support of. The administrative judge failed to address these lists or the accompanying documents, other than to describe them as “woefully inadequate” to show jurisdiction. Initial Decision (ID) at 2.

¶8 We note with approval that the administrative judge’s show cause order was extremely informative, explaining the necessary jurisdictional elements of an IRA

appeal. IAF, Tab 4. IRA appeals, with multiple interrelated issues frequently supported by numerous documents, are often more complicated than the typical adverse action appeal before the Board. The appellant would have been wise to follow the administrative judge's instructions because one whose submissions lack clarity risks being found to have failed to meet his burden of proof. We find, however, that dismissal of an IRA appeal without attempting to discern whether the appellant's submissions constitute a nonfrivolous allegation of jurisdiction is not appropriate. *See, e.g., Lee v. Department of Labor*, 76 M.S.P.R. 142, 145 (1997) (the administrative judge failed to give proper consideration to the appellant's response to the jurisdictional issue).

The appellant has made a nonfrivolous allegation that he made disclosures protected under 5 U.S.C. § 2302(b)(8).

¶9 Among his list of disclosures, the appellant has included EEO complaints, Board appeals, and a grievance. IAF, Tab 9, Communications list. The filing of an EEO complaint in which an employee alleged discriminatory treatment by an agency in violation of Title VII of the Civil Rights Act of 1964 does not constitute a whistleblowing disclosure within the meaning of 5 U.S.C. § 2302(b)(8), but instead, is a non-whistleblowing disclosure under section 2302(b)(9)(A). *Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1574-75 (Fed. Cir. 1996). Likewise, filing appeals with the Board and grievances are activities protected under (b)(9) and not as whistleblowing under (b)(8). *See Orr v. Department of the Treasury*, 83 M.S.P.R. 117, 122 (1999), *aff'd*, No. 99-3457, slip op. (Fed. Cir. Apr. 10, 2000) (NP). Thus, we will not consider any further the appellant's allegations that the agency retaliated against him for engaging in (b)(9) activity.

¶10 Nonetheless, the fact that an individual has engaged in an activity protected under (b)(9) does not in and of itself disqualify the individual from seeking corrective action under 5 U.S.C. § 2302(b)(8), if he made disclosures based upon

the same operative facts outside of his (b)(9) activity. *See Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1035 (Fed. Cir. 1993). The essential difference between the protections of sections 2302(b)(8) and 2302(b)(9) is the difference between reprisal based on disclosure of information and reprisal based on the exercise of a right to complain. *Serrao*, 95 F.3d at 1575.

¶11 The appellant lists as an example of his whistleblowing a False Claims Act *qui tam* questionnaire form that he completed and submitted to several attorneys.[2] IAF, Tab 9, Communications list. The form contains allegations that Navy personnel, including Commander J. H. Groden, Lieutenant J. H. Hagerty, and a Dr. Westbrook, entered into a fraudulent "Resource Sharing" agreement. IAF, Tab 9. This *qui tam* form may contain an allegation of wrongdoing, but the appellant has not alleged that he disclosed it to anyone with any authority to act on it. Sending it to "several attorneys," presumably the individuals named at the top of the document, is not a disclosure under 5 U.S.C. § 2302(b)(8) because they had no authority to investigate or correct the wrongdoing and there is no evidence that they or anyone else filed a *qui tam* action in court. *See Price v. National Aeronautics & Space Administration*, 83 M.S.P.R. 661, 663 (1999) (an employee does not make a protected disclosure when his alleged protected disclosure is made to persons without authority to remedy the alleged wrongdoing).

¶12 The appellant states that on April 12 and 13, 1999, he met with the Navy Inspector General (IG) regarding "on-going fraud in R/S contracts at NAVHOSPNCLA." IAF, Tab 9, Communications list. This statement is not supported by any accompanying documents and on its own is lacking the detail necessary to constitute even a nonfrivolous allegation of a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or

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[2] A *qui tam* action is one "brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." Black's Law Dictionary 1262 (7th ed. 1999).

danger to public health or safety. *See DiGiorgio,* 84 M.S.P.R. at 12. However, we find that it is appropriate to read this statement in light of the appellant's other allegations in his *qui tam* form, given that the April 20, 1999 date of the *qui tam* form and his contact with the IG were very close in time. On remand, however, in order to prove that he made a protected disclosure to the IG regarding fraudulent resource sharing agreements, the appellant will be required to produce preponderant evidence that he made such a disclosure and that it is the kind of disclosure protected under 5 U.S.C. § 2302(b) (8).

¶13 The appellant also contends that he informed Command Evaluation Officer Don McCluskey about fraudulent training forms that the appellant certified as accurate. IAF, Tab 9, Communications list. In an August 27, 1999 chronology of adverse actions/events apparently submitted to the OSC, he states that he reported to McCluskey that "things [were] amiss" and that the "Director for Admin" called him into his office to demand an explanation. IAF, Tab 9. The appellant related that Groden and Hagerty lied about certain training that he was to have given them. The document that he purportedly sent to McCluskey is not in the record. In an August 28, 1999 "response to questions posed by OSC" and a September 17, 1999 Disclosure of Information form to the OSC, the appellant makes a similar statement. While he did not identify the law, rule, or regulation that he believes was violated, such behavior on its face may be such a violation. *See* 18 U.S.C. § 1001 (prohibition against making false statements in any matter within the jurisdiction of a federal agency). Thus, we find that these documents constitute a nonfrivolous allegation that he made a protected disclosure.

¶14 The appellant contends that he informed various individuals about hiring and selection improprieties involving the replacement for him in his GS-11 Supervisory Health Systems Specialist position by either Liz Meriweather or Rex Cason or both. IAF, Tab 9, Communications list. The appellant claimed in a September 15, 1998 letter to Captain Hufstader that Meriweather received preferential treatment in training and promotion to qualify her to take the

appellant's position, which she eventually did while the appellant was detailed to another position. The appellant sent an August 25, 1999 e-mail message to Admiral Hinkel asserting that "the local mtf (sic) administration" was engaged in "shenanigans" regarding manipulation of the recruitment, hiring, and advancement of civilians and that veterans preference laws were being broken. In a September 15 e-mail message addressed to "BUMED," he claims that Groden selected "his old service buddy Rex Cason ... AS SOON AS HIS 18 MONTH OUT-OF-SERVICE PERIOD EXPIRED." (Emphasis in the original). The record contains a September 23, 1999 e-mail message from the appellant to Senator Bob Graham in which the appellant alleges that Cason is a friend of the person responsible for making the selection, that Cason claims to be a 30% disabled veteran but participates in triathlon training, and that the job description for the position was written by Cason's wife in 1997 with him in mind. Under 5 U.S.C. § 2302(b)(6), an employee may not "grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment for the purpose of improving or injuring the prospects of any particular person for employment." Also, an employee may not "take or fail to take any other personnel action if the taking or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 ...." 5 U.S.C. § 2302(b)(11). The merit system principles at 5 U.S.C. § 2301 include "selection and advancement ... determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." 5 U.S.C. § 2301 (b)(1). The appellant's assertions regarding the selections of Meriweather and Cason constitute a nonfrivolous allegation of a disclosure of a violation of these statutory provisions. *See Becker v. Department of Veterans Affairs*, 76 M.S.P.R. 292, 296-97 (1997).

¶15 The appellant alleges that he has complained to numerous individuals and entities about harassment on the job and filed claims for OWCP benefits based on

the alleged mistreatment. IAF, Tab 9, Communications list. The record contains a copy of an application for OWCP benefits in which the appellant alleges that he suffers from major depression brought on by the conflicts with his supervisor. In *Heining v. General Services Administration*, 61 M.S.P.R. 539 (1994), the Board found that harassing and intimidating behavior could constitute an abuse of authority, and in *Special Counsel v. Costello*, 75 M.S.P.R. 562, 586-87 (1997), *rev'd on other grounds*, 182 F.3d 1372 (Fed. Cir. 1999), the Board found that disclosures made in an OWCP claim of harassing and intimidating behavior were at least in part protected disclosures. Thus, these also constitute nonfrivolous allegations that he made protected disclosures sufficient to afford him an opportunity to prove these allegations at a hearing.

The appellant has made nonfrivolous allegations that personnel actions were taken.

¶16 The appellant submitted a list of personnel actions, some of which predate his first purported whistleblowing, as described in his list of disclosures. IAF, Tab 9, Personnel Actions list. Others do not appear to meet the definition of "personnel action" at 5 U.S.C. § 2302(a)(2) because they do not fall within one of the eleven categories of actions described therein. Also, he asserts that his demotion in 1998 to the GS-6 Contact Representative position was the result of retaliation for whistleblowing. He previously filed an appeal with the Board alleging that he involuntarily accepted the demotion, and raised a whistleblowing claim in that appeal. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant voluntarily accepted the GS-6 position. *Luecht v. Department of the Navy*, MSPB Docket No. AT-0752-99-0382-I-1, Initial Decision, (June 16, 1999). The Board denied the appellant's petition for review for failure to meet the review criteria, and the initial decision became the Board's final decision. *Luecht v. Department of the Navy*, 86 M.S.P.R. 41 (2000) (Table). Thus, the appellant is collaterally estopped from asserting in this action

that the demotion is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iii), an action under chapter 75 of Title V or other disciplinary or corrective action. *See Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988) (collateral estoppel, or issue preclusion, is appropriate when (1) an issue is identical to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party precluded was fully represented in the prior action).

¶17 The appellant filed several other appeals which were within the Board's jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 1994 U.S.C.C.A.N. (108 Stat.) 3149 (USERRA). The decisions in those appeals have no preclusive effect on this IRA appeal because the only issue before the Board was whether the action taken was the result of discrimination based on the appellant's prior military service. *See Bodus v. Department of the Air Force*, 82 M.S.P.R. 508, 514-17 (1999) (the Board's jurisdiction under USERRA does not include claims outside the USERRA complaint); *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995) (res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases).

¶18 As stated above, the appellant listed the following personnel actions on his initial appeal form: Constructive suspension, removal, and failure to retrain, to retain his grade, and to promote him. His list of personnel actions included also a letter of caution, a reprimand, placement on leave without pay, a proposed suspension, and a removal decision. IAF, Tab 9. Thus, he has made a nonfrivolous allegation that personnel actions were taken.

The appellant has made a nonfrivolous allegation that he exhausted his remedy with the OSC.

¶19 The third jurisdictional element of an IRA appeal is exhaustion of the remedy with the OSC by showing that the appellant informed it of the particular disclosures and personnel actions raised in his IRA appeal with enough specificity to allow the OSC to investigate. *See Coons v. Department of the Treasury*, 85 M.S.P.R. 631, ¶ 17 (2000). The appellant's initial IRA appeal was accompanied by a termination letter from the OSC showing that he had filed a request for corrective action. Along with his list of correspondence with the OSC, the appellant has submitted supporting documents, including the August 27, 1999 chronology, the August 28 responses to questions posed by the OSC, his September 17 disclosure of information form, and a September 22, 1999 letter to the OSC, which contain descriptions of disclosures and personnel actions raised in this appeal. IAF, Tab 9. We find that the appellant has made a nonfrivolous allegation that he exhausted his remedy with the OSC in regard to the matters addressed in those documents. According to his list of correspondence with the OSC, the last such communication occurred on September 27, 1999. That date and the dates of the documents referenced above predate the October 25, 1999 proposed suspension and the January 13, 2000 decision to remove him because of his physical inability to perform the duties of his job. Because the appellant has not alleged that he informed the OSC of these personnel actions, the Board lacks jurisdiction over them in this IRA appeal.[3]

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[3] The Board may have jurisdiction over the removal as an otherwise appealable action, even if it never became effective because the appellant resigned to accept discontinued service retirement before the effective date. *See Lewis v. Environmental Protection Agency*, 82 M.S.P.R. 269, ¶ 11 (1999) (the Board has jurisdiction over a removal appeal of an employee who retires when faced with a removal decision regardless of whether he retires on or before the effective date of the removal). The administrative judge shall docket another appeal, and afford the parties an opportunity to address the Board's jurisdiction over that action, and determine whether such appeals should be joined..

¶20 In conclusion, we find that the appellant has made nonfrivolous allegations of fact that, if proven, would establish jurisdiction over this appeal, and he is entitled to a hearing. We emphasize to him, however, that this decision does not find jurisdiction. Rather, on remand he must prove by a preponderance of the evidence that he made protected disclosures; that such disclosures were ones that a reasonable person would believe informed the recipient of a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety; that personnel actions were taken; and that he informed the OSC of the specific disclosures and personnel actions that are the subject of this IRA appeal with enough specificity to allow the OSC to investigate. *See Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, 692-94 (1999). If he meets this burden of proof on jurisdiction, he must further prove that his whistleblowing was a contributing factor in the agency's decisions in regard to the personnel actions. At that time, the burden will shift to provide the agency opportunity to prove by clear and convincing evidence that it would have taken the same actions in the absence of whistleblowing.

ORDER

¶21 Accordingly, we REMAND this IRA appeal for further adjudication, including a hearing, after which the administrative judge shall determine whether the Board has jurisdiction over the appeal. If he finds jurisdiction, then he shall adjudicate the merits of the appeal.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.