

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

87 M.S.P.R. 245

JANET G. GAUGH,

Appellant,

DOCKET NUMBER

CH-3443-00-0280-I-1

v.

SOCIAL SECURITY
ADMINISTRATION,

Agency.

DATE: November 3, 2000

Charles E. Clark, American Federation of Government Employees, Kansas City, Missouri, for the appellant.

Lisa A. Thomas, Kansas City, Missouri, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued on February 15, 2000, that dismissed her 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 by this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-9 Benefits Authorizer, filed a petition for appeal of the agency's failure to select her for the GS-7/9/11 position of Claims Authorizer. Initial Appeal File (IAF), Tab 1. The administrative judge issued an acknowledgment order that informed the appellant that, because her appeal raised a question regarding the Board's jurisdiction over the agency's failure to select her for a position, the Board may not have jurisdiction over her appeal, and provided her with the opportunity to file evidence and argument to prove Board jurisdiction. IAF, Tab 2. The appellant responded to the acknowledgment order. IAF, Tab 4. She stated that she had sought corrective action from the Office of Special Counsel (OSC) contending that the agency committed prohibited personnel practices in violation of 5 U.S.C. § 2302(b)(4), (5), and (6). *Id.* She also stated that, in her OSC complaint, she "cited waste and mismanagement of funds due to the time and effort expended by the hundreds of employees who applied [for the Claims Authorizer position]." *Id.*

¶3 The administrative judge found that the appellant did not allege facts, which, if true, would establish the Board's jurisdiction over her appeal, and did not hold a hearing. IAF, Tab 6 (Initial Decision (ID) at 1). He found that the appellant's "complaint" of nonselection does not come within the Board's jurisdiction, and that the appellant failed to prove Board jurisdiction by preponderant evidence. *Id.* (ID at 2). He also found that because the Board lacked jurisdiction over the matter appealed, it did not have jurisdiction over the appellant's allegations of prohibited personnel practice raised in the appeal. *Id.* (ID at 3).

¶4 The appellant has now petitioned for review. Petition for Review File (RF), Tab 3. The agency has responded in opposition to the petition. RF, Tab 4.

ANALYSIS

¶5 In her petition, the appellant reiterates that she filed a "Report of Possible Prohibited Personnel Practice or Other Prohibited Activity" with OSC, alleging

that the agency did not consider current agency employees for the Claims Authorizer position, and that she filed her Board appeal after OSC had closed its inquiry into the matter. She alleges that the Board has jurisdiction over her appeal as an individual right of action (IRA) appeal under the Whistleblower Protection Act (WPA).

¶6 To establish Board jurisdiction over an IRA appeal under the WPA, 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 OSC, and proceedings before OSC were exhausted. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). Thus, the Board's jurisdiction in IRA appeals is limited to whistleblower allegations under § 2302(b)(8), and does not include any of the other prohibited personnel practices enumerated in § 2302(b). Further, the Board has jurisdiction over an IRA appeal only when the appeal has been preceded by a complaint alleging whistleblowing filed with OSC.

¶7 The complaint that the appellant filed with OSC alleged that the agency committed a number of prohibited personnel practices, other than retaliation for whistleblowing, as follows: section 2302(b)(4), deceived or willfully obstructed any person with respect to such person's right to compete for employment; section 2302(b)(5), influenced any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment; section 2302(b)(6), granted any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for the purpose of improving or injuring the prospects of any particular person for employment; and section 2302(b)(9), take or fail to take a personnel action against an employee or applicant because of the exercise of any grievance right. IAF, Tab 1. The appellant's allegation that the agency committed prohibited

personnel practices in violation of 5 U.S.C. § 2302(b)(4), (5), (6), and (9) is not within the Board's jurisdiction as an IRA appeal. *Cf. Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 686-92 (Fed. Cir. 1992) (IRA appeal properly dismissed for lack of subject-matter jurisdiction where appellant alleges a disclosure that does not fall under section 2302(b)(8)).

¶8 As noted above, the appellant characterizes the complaint that she filed with OSC as also "cit[ing] waste and mismanagement of funds due to the time and effort expended by the hundreds of employees who applied [for the Claims Authorizer position]." IAF, Tab 4. Disclosure of waste of funds is protected under § 2302(b)(8). Gross waste of funds constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994). Contrary to the appellant's characterization of the content of her OSC complaint, a reading of the complaint does not allow the inference that it alleges that she disclosed a gross waste of funds or that the agency retaliated against her for such. IAF, Tab 1. The appellant stated only that "[a]pproximately 250 other employees of the Mid America Program Service Center also applied for these positions." *Id.* OSC properly did not infer an allegation of "waste and mismanagement of funds" or an allegation of retaliation for such from the appellant's complaint. *See Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 236 (1998) (as the agency responsible for investigating and prosecuting cases involving retaliation for whistleblowing disclosures under the Whistleblower Protection Act, OSC can be expected to know what section (b)(8) wrongdoing might be implicated by a particular set of factual allegations), *overruled on other grounds by Ganski v. Department of the Interior*, 86 M.S.P.R. 32, 37 (2000). The appellant's complaint simply did not give OSC sufficient basis to pursue an investigation into whistleblowing. *See Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623, 626 (Fed. Cir. 1992). Thus, the appellant did not raise the issue of

whistleblowing before OSC, and proceedings before OSC were not exhausted. Therefore, the appellant has not established that the Board has jurisdiction over her appeal as an IRA, and the administrative judge correctly dismissed the appeal for lack of jurisdiction.

ORDER

¶9 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 other related material at our web site,
<http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.