UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 359

Docket No. AT-1221-06-0189-W-1

Jessie Donald Hudson,

Appellant,

v.

Department of Veterans Affairs,

Agency.

December 15, 2006

Jessie Donald Hudson, Stone Mountain, Georgia, pro se.

Neil S. Deol, Esquire, Decatur, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed for lack of jurisdiction his individual right of action (IRA) appeal and his claims under the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). For the reasons set forth below, we DENY the appellant's petition for review, REOPEN the appeal on our own motion pursuant to 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-7 Health Technician in the audiology department at one of the agency's medical centers, sought corrective action from the Office of Special Counsel (OSC), and OSC ultimately informed him that it would not take any action with regard to his whistleblower complaint. Initial Appeal File (IAF), Tab 1 at 11-13, 15. The appellant then timely filed an IRA appeal with the Board. *Id.* at 2-10. Specifically, the appellant asserted that the agency subjected him to a performance improvement plan (PIP) and a performance assessment plan (PAP), and gave him a counseling letter regarding sick leave usage in retaliation "for complaining of [his supervisor's] son working in [the audiology] department." *Id.* at 7, 40-41, 58-59. The appellant also asserted that he is a veteran and he indicated on his appeal form that he was raising claims under VEOA and USERRA. *Id.* at 2, 3, 9.

¶3 The administrative judge (AJ) informed the appellant that his appeal would be dismissed unless he "allege[d] facts that, if true, would show a personnel action was taken, proposed, threatened, or not taken because of [his] whistleblowing activities." IAF, Tab 2 at 2. The AJ ordered the appellant to submit evidence and argument "to prove that this action is within the Board's jurisdiction." *Id.* After receiving the appellant's response, as well as additional submissions from both parties, IAF, Tabs 3-6, the AJ dismissed the appeal for lack of jurisdiction without conducting the requested hearing, *id.*, Tab 7. The AJ further found that the appellant failed to raise a USERRA claim and failed to allege that he was denied veteran's preference rights in violation of VEOA. *Id.* at 4-5.

¶4 The appellant timely petitions for review, which the agency opposes. Petition for Review File (PFRF), Tabs 1, 4.

ANALYSIS

¶5 The appellant's petition for review, which consists of a one-page submission in which he generally disagrees with the initial decision, PFRF, Tab 1, does not offer a basis on which to disturb the initial decision and we therefore DENY it. Pursuant to 5 C.F.R. § 1201.118, however, we REOPEN the appeal on our own motion for further consideration.

The appellant was not provided with the appropriate jurisdictional notice regarding his IRA appeal and his appeal must therefore be remanded.

¶6 The Whistleblower Protection Act (WPA) is a remedial statute and, as such, should be broadly construed in favor of those whom it was intended to protect. *Harris v. Department of Transportation*, 96 M.S.P.R. 487, ¶ 9 (2004). The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure; 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); *see also Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002).

¶7 The AJ failed to provide the appellant with proper notice of his jurisdictional burden under *Yunus*. IAF, Tab 2 at 2. Although the agency's subsequent motion to dismiss the appeal for lack of jurisdiction correctly articulated the nonfrivolous allegations that the appellant must make under *Yunus* in order to establish Board jurisdiction over his IRA appeal, IAF, Tab 5 at 3, the agency's motion to dismiss did not mention the exhaustion requirement of the appellant's jurisdictional burden, *id.* In addition, the agency's motion did not specifically address how the appellant may make a nonfrivolous allegation that his alleged disclosures were a contributing factor in the agency's decision to take or fail to take a personnel action against him. *Id.*

¶8 Further, the AJ did not address the exhaustion requirement or the issue of contributing factor in the initial decision, and these matters were not mentioned elsewhere in the record below. Given that the AJ never advised the appellant of either his burden of satisfying the exhaustion requirement or the means by which he may make a nonfrivolous allegation of contributing factor, and because the AJ's errors were not cured by either the initial decision or any agency pleading, the appellant's appeal must be remanded to allow the parties to submit evidence and argument regarding both the exhaustion requirement and the contributing factor issue. *Johnson v. Department of Health & Human Services*, 87 M.S.P.R. 204, ¶ 4 (2000); *see Tatsch v. Department of the Army*, 100 M.S.P.R. 460, ¶ 14 (2005) (an employee may make a nonfrivolous allegation that a disclosure was a contributing factor in a personnel action by, inter alia, alleging that the official taking the action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action). If the AJ determines on remand that the appellant has met the exhaustion requirement and has made a nonfrivolous allegation that his alleged protected disclosures were a contributing factor in the alleged personnel actions purportedly taken against him, the AJ must adjudicate the IRA appeal on the merits, given that, as discussed below, we find that the appellant has met the remaining jurisdictional requirements for an IRA appeal.

<u>The appellant has made a nonfrivolous allegation that he made protected disclosures</u>.

¶9 The appellant contended below that he complained to Senator Saxby Chambliss's office that the son of his supervisor, Dr. Sushma Chandon, was working under Dr. Chandon's direction in the audiology department. IAF, Tab 3 at 3. In another submission, the appellant similarly claimed that he complained to Senator Chambliss's office and to Representative Cynthia McKinney's office that his supervisor's son was working under her direction in the audiology department

and that this constituted nepotism. IAF, Tab 6 at 2. Furthermore, in a letter from OSC to the appellant, OSC stated that the appellant alleged nepotism, i.e., that Dr. Chandon's son received training that was not provided to the appellant. *Id.*, Tab 1 at 12-13.

¶10 The WPA provides that it is a prohibited personnel practice to take a personnel action against an employee for any disclosure of information which the employee reasonably believes evidences any of the behavior described under the statute. *Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, ¶ 13 (1999). The test for determining whether a putative whistleblower had a reasonable belief is an objective one: Whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced wrongdoing as defined by the WPA. *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999); *Tatsch*, 100 M.S.P.R. 460, ¶ 10.

¶11 In making a disclosure involving a violation of law, rule, or regulation, the inquiry as to whether a disclosure is protected ends upon a determination that the appellant disclosed a violation of law, rule, or regulation; there is no further inquiry into the type of "fraud, waste, or abuse" involved. *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 11 (2000). There is no exception to that rule for a disclosure of a trivial or de minimis violation of a law, rule, or regulation. *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 26 (2004); *see Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 14 (2004).

¶12 It is a violation of 5 U.S.C. §§ 2302(b)(7) and 3110 to appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement in a civilian position any person who is a relative of an employee if such position is in the agency in which the employee is serving as a public official or over which the employee exercises jurisdiction or control as such an official. A "public official" is defined as, among others, an employee in whom is vested the authority to appoint, employ, promote, or advance individuals, or to

recommend individuals for appointment, employment, promotion, or advancement in connection with employment in an agency. 5 U.S.C. § 3110(a)(2).

¶13 A reasonable person in the appellant's position could believe that Dr. Chandon was violating 5 U.S.C. §§ 2302(b)(7) and 3110 by employing her son and/or assisting in the advancement of her son by giving him preferential treatment in training, assuming that those allegations are true. Therefore, the appellant has made a nonfrivolous allegation that he made a protected disclosure. *See Becker v. Department of Veterans Affairs*, 76 M.S.P.R. 292, 296-97 (1997) (the appellant made a nonfrivolous allegation that he made protected disclosures under the WPA where he made disclosures of nepotism to the agency's Inspector General and General Counsel, and to OSC).

The PIP and PAP are prohibited personnel actions pursuant to 5 U.S.C. § 2302(b)(8).

¶14 The appellant was placed on a 90-day PIP on June 22, 2005. IAF, Tab 4, Subtab 4C. On June 30, 2005, the agency informed the appellant that the PIP was no longer in effect. IAF, Tab 4, Subtab 4D. On July 14, 2005, the agency placed the appellant on a PAP. *Id.*, Subtab 4E.

¶15 A PIP is considered a personnel action for purposes of an IRA appeal. *See, e.g.*, *Harris*, 96 M.S.P.R. 487, ¶ 7. Even though the agency rescinded the PIP, there is no evidence regarding whether any references to the PIP remain in the appellant's personnel file. As relief, the appellant asked that negative materials, which would include information regarding the PIP and PAP, be removed from his personnel records. IAF, Tab 1 at 7. The Board has held that, if it were to find that an appellant was placed on a PIP in retaliation for whistleblowing, the appellant's successful completion of the PIP would not render an IRA appeal moot because the Board could order references to the PIP expunged from the appellant's personnel file. *Newcastle v. Department of the Treasury*, 94 M.S.P.R. 242, ¶ 11 (2003). The Board has also found that an IRA

appeal was not rendered moot when the agency terminated the equivalent of a PIP where further relief, such as monetary damages for harm to the appellant's career, could be ordered if the Board found the PIP-like action to have been in retaliation for whistleblowing. *Harris*, 96 M.S.P.R. 487, ¶¶ 7-13. Thus, in the present case, the PIP was a personnel action within the meaning of the WPA and this appeal was not rendered moot when the agency terminated the PIP.

¶16 We find that the PAP is also a personnel action. The Board has held that agency memoranda that merely informed an appellant of his performance deficiencies and instructed him as to what corrective actions were required, but did not threaten to take any disciplinary action against him, did not provide a basis for determining that the appellant had made a nonfrivolous allegation that the memoranda constituted personnel actions. *Reeves v. Department of the Army*, 101 M.S.P.R. 337, ¶ 11 n.* (2005). However, the Board has also held that a PIP, even if it does not expressly threaten a personnel action, by definition, involves a threatened personnel action. *Czarkowski v. Department of the Navy*, 87 M.S.P.R. 107, ¶ 18 (2000). Moreover, even though the agency did not call this action a PIP, that does not mean that it is not a personnel action under the WPA. It is the nature of the action, not the agency's characterization of it, that determines Board jurisdiction. *Id.*, ¶ 20. For example, where an agency memorandum characterized as a "Temporary Realignment of Work" could be interpreted as suggesting that the appellant's performance in a critical element was unacceptable, and provided her an opportunity to improve (including an offer of assistance to help her improve), the Board found that the appellant made a nonfrivolous allegation that the agency's action was really a PIP and, therefore, a threatened personnel action. *Id.*, ¶¶ 20-21; *see also Harris*, 96 M.S.P.R. 487, ¶ 7 (the Board held that an Opportunity to Demonstrate Acceptable Performance was equivalent to a PIP and was therefore a personnel action).

¶17 Here, the PAP does not <u>expressly</u> threaten a personnel action. Nevertheless, the PAP could be read to suggest that the appellant's performance

in a critical element was unacceptable, it provides the appellant with 30 days to show improvement, and it offers assistance in the form of weekly meetings with his supervisor, Dr. Chandon. IAF, Tab 4, Subtab 4E. The PAP and the rescinded PIP both contain several of the same "expectations" for the appellant to fulfill. *Compare id. with* IAF, Tab 4, Subtab 4C. Furthermore, the PAP states that, "[a]t the end of this 30-day time period, [Dr. Chandon] will reassess [the appellant's] performance and make a determination as to [his] current status." *Id.*, Subtab 4E at 2. Thus, there was an implied threatened personnel action if the appellant did not meet the performance expectations of the PAP and the PAP therefore constituted a personnel action within the meaning of the WPA.[*]

The appellant's VEOA and USERRA claims must also be remanded.

¶18 It appears that the appellant intended to raise claims under both VEOA and USERRA. IAF, Tab 1 at 3, 9; Tab 6 at 3. Thus, it was error for the AJ to dismiss these claims without first apprising the appellant of his rights and burdens under VEOA and USERRA. *See Brasch v. Department of Transportation*, 101 M.S.P.R. 145, ¶ 14 (2006) (USERRA claim); *Easter v. Department of the Army*, 99 M.S.P.R. 288, ¶¶ 6-9 (2005) (VEOA claim); *see also Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985).

¶19 In order to establish Board jurisdiction over an appeal brought under VEOA, an appellant must: (1) Show that he exhausted his remedy with the

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[*] With regard to the counseling letter, IAF, Tab 4, Subtab 4B, the AJ determined that it concerned the appellant's past sick leave usage, was not disciplinary in nature, and merely indicated that the appellant might need to submit medical documentation for future usage of sick leave, IAF, Tab 7 at 3-4. The counseling letter did not threaten disciplinary action or propose to restrict the appellant's leave usage; rather, it merely set forth the agency's existing rules regarding leave usage. *Cf. Mitchell v. Department of the Treasury*, 68 M.S.P.R. 504, 511 (1995) (agency proposal to restrict appellant's leave demonstrated that she was subject to or threatened with a personnel action). Under the circumstances, we agree with the AJ that the counseling letter did not constitute a personnel action under the WPA. *See Johnson*, 87 M.S.P.R. 204, ¶ 11 (a memorandum of oral counseling is not a formal disciplinary action under 5 U.S.C. § 2302(a)(2)(A), and, thus, it does not constitute a personnel action).

Department of Labor, and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of VEOA, (ii) the actions at issue took place on or after the October 30, 1998 enactment date of VEOA, and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Easter,* 99 M.S.P.R. 288, ¶ 7.

¶20 In order to establish Board jurisdiction over a USERRA appeal, the appellant must: (1) Show that he performed duty in a uniformed service of the United States; (2) nonfrivolously allege that he lost a benefit of employment; and (3) nonfrivolously allege that the benefit was lost due to the performance of duty in the uniformed service. *Hammond v. Department of Veterans Affairs*, 98 M.S.P.R. 359, ¶ 7 (2005); *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶ 10 (2004).

¶21 Given that the appellant did not receive proper jurisdictional notice regarding his VEOA and USERRA claims, it is necessary to remand these claims to afford the appellant the opportunity to establish that the Board has jurisdiction to consider them. *See Burgess*, 758 F.2d at 643-44.

ORDER

¶22 Accordingly, we REMAND the appellant's IRA appeal in order to allow the parties to submit evidence and argument regarding whether the appellant exhausted his administrative remedies before OSC. Also, the AJ must provide the appellant with specific notice regarding how to establish a nonfrivolous allegation that his alleged protected disclosures were a contributing factor to the PIP and the PAP. If the AJ finds that the appellant has exhausted his administrative remedies and has made a nonfrivolous allegation of contributing factor, the AJ should then adjudicate the appellant's IRA appeal on the merits, including conducting a hearing if requested. In addition, we REMAND the appellant's VEOA and USERRA claims in order for the AJ to provide the appellant with specific notice of his rights and burdens under VEOA and

USERRA, and to provide both parties an opportunity to present evidence and argument regarding the Board's jurisdiction over both claims. The AJ shall then issue a new initial decision consistent with this Opinion and Order.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.