UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

MARK ABERNATHY,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DC-1221-14-0364-W-1

DATE: January 23, 2015

Mark Abernathy, Germany, pro se.

Tracy A. Allred, Esquire, Europe, for the agency.

BEFORE
Michelle M. Hudson
Administrative Judge

INITIAL DECISION

On January 17, 2014, the appellant filed an individual right of action (IRA) appeal in which he alleged that the agency failed to refer him for selection for a GS-12, Health Systems Specialist position (Vacancy Announcement EUHM1203697739652), in retaliation for his protected activities.[1] Appeal File (AF), Tab 1. For the reasons that follow, the IRA appeal is DISMISSED.

[1] Although the OSC noted in its December 18, 2013 "preliminary decision" (a copy of which was submitted with the appellant's appeal) that the appellant also had not been selected for three other Health Services Specialist positions (EUHM12037033728464, EUHM12036977728668 and WTEW12966016714906D), and that no selections had been made for those positions, it did not appear from the statements made in his appeal and/or subsequent submissions that he was appealing his non-selection for the other positions. *See* AF, Tab 1, 6 and 8. Thus, the appellant's failure to be referred for the

BACKGROUND

On January 29, 2014, I issued an "Order on Jurisdiction and Proof Requirements." AF, Tab 3. In that order, the appellant was required to submit certain information concerning jurisdictional issues in his appeal by February 10, 2014 (Since February 8, 2014 was a Saturday), and the agency was required to file its response by February 18, 2014. *Id*.

The appellant failed to file his response by February 10, 2014, as ordered, but he filed a response on February 18, 2014, before the record closed on the jurisdictional issue. AF, Tab 6. In his February 18, 2014 response, the appellant claimed that the agency took reprisal against him because of a disclosure that he made in August of 2012, concerning waste, fraud and abuse. *Id*. Specifically, the appellant alleged that he filed a complaint with the Office of Inspector General, LTC Linda L. Guthrie, against the contracted Telehealth Project Manager, Eduardo Salvador. *Id*. The appellant also stated that he believed the matter complained of was "an illegal act governed by and contrary to Federal Acquisition Regulations," although as it turned out, the act was not illegal, but in his belief it was "unethical by reasonable standards."[2] *Id*.

On February 18, 2014, the agency filed its response to the January 29, 2014 jurisdictional order, noting that the appellant failed to file a timely response to

---

GS-12 Health Systems Specialist position (Vacancy Announcement EUHM1203697739652) is the only personnel action that will be adjudicated herein.

[2] The appellant explained that the ERMC allocated $99,000.00 in unfunded money to procure VTC equipment justified for the mandated Behavioral Health Screening of USAR soldiers returning from Iraq and Afghanistan. AF, Tab 6. He stated that Mr. Salvador and Major Lyons believed that the equipment could be given to Primary Care Providers at the Lundstuhl Medical Center in an effort to increase their monthly Telehealth Program production statistics. *Id*. The appellant also stated that he argued that, because the equipment had been purchased with Congressionally appropriated Overseas Contingency Operations Money, it would be illegal to use it for another purpose that that which it had been approved. *Id*.

that order. AF, Tab 5. The agency, however, did not address the issues raised in the appellant's appeal and the January 29, 2014 order

In an "Order to Show Cause" dated November 21, 2014, the agency was ordered to respond to the jurisdictional issues raised in the January 29, 2014 order, the arguments raised in the appellant's appeal, and the appellant's February 18, 2014 response to the jurisdictional order.[3] AF, Tab 7.

In its response dated December 2, 2014, the agency argued that the appellant's appeal should be dismissed for lack of Board jurisdiction. AF, Tab 10. Specifically, the appellant argued that: (1) the appellant did not make a protected disclosure, because at the time of his disclosure, he was neither an "employee" or "applicant," but rather a Federal Contractor, citing to 5 U.S.C. § 2302(b)(8)(A); (2) although the appeal does not specify the date of the disclosure, available evidence shows that it was made prior to the appellant submitting an application for the GS-12 Health Systems Specialist position (Vacancy Announcement EUHM12036977739652); (3) the appellant stated in his February 18, 2014 response to the jurisdictional issue that he spoke to the ERMC IG in August of 2012, (4) the open period for applying for the Health Systems Specialist position was from September 4-14, 2014; (5) the personnel action appealed (the non-referral of the appellant by the CPAC to the selecting official) was not a covered "personnel action" under 5 U.S.C. § 2302(b)(8); (5) the appellant has not explained why his belief that he disclosed an illegal act was reasonable; and (6) the appellant failed explain how his disclosure was a contributing factor in the agency's decision not to include him on the referral list for the GS-12 Health Systems Specialist position. *Id*.

---

[3] The agency had not received the appellant's February 18, 2014 response to the jurisdictional issues when it filed its February 18, 2014 response because the appellant had filed his February 18, 2014 response 8 days late. *See* AF, Tabs 3 and 6.

ANALYSIS AND FINDINGS

The law applicable to this IRA appeal

The Board's appellate jurisdiction is not plenary, but rather is limited to those matters specifically conferred on it by statute or regulation. 5 U.S.C. § 7701(a). *See Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, 1147 (Fed. Cir. 1999); *Saunders v. Merit Systems Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985). The Board does not have jurisdiction over all actions that are alleged to be incorrect but only those actions in which jurisdiction is provided by pertinent statutes and regulations. *See Noble v. Tennessee Valley Authority*, 892 F.2d 1013, 1014 (Fed. Cir. 1989) (en banc); *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985); *Lemon v. Department of Labor*, 44 M.S.P.R. 43, 45-46 (1990). The appellant bears the burden of proving by a preponderance of the evidence that his IRA appeal is within the Board's jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i). *See Rice v. Merit Systems Protection Board*, 522 F.3d 1311, 1314 (Fed. Cir. 2000). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

To establish jurisdiction over an IRA appeal, the appellant must show he exhausted his administrative remedies before the OSC and made the following non-frivolous allegations: (1) that he engaged in whistleblowing activity by making a protected disclosure; and (2) that 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).

A protected disclosure under the Whistleblower Protection Act ('WPA') is defined as:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; . . ..

5 U.S.C. § 2302(b)(8). The appellant need not prove he made protected disclosures to establish jurisdiction, but must non-frivolously allege that at least one of his disclosures was protected under 5 U.S.C. § 2302(b)(8). *Greenspan v. Department of Veterans Affairs*, 94 M.S.P.R. 247, 251 (2003). Whether the appellant has made a non-frivolous allegation is a question resolved on the written record. *Iyer v. Department of the Treasury*, 95 M.S.P.R. 239, 241 (2003), *aff'd*, 104 F. App'x 159 (Fed. Cir. 2004).

On November 27, 2012, the Whistleblower Protection Enhancement Act of 2012, Pub.L. No. 112–19, 126 Stat. 1465 (WPEA), was signed into law with an effective date of December 27, 2012. *See King v. Department of the Air Force*, 119 M.S.P.R. 663, ¶¶ 1, 3 (2013). Under 5 U.S.C. § 1221(a), as amended by WPEA § 101(b)(1)(A), "an employee, former employee, or applicant for employment" may, with respect to any personnel action taken, or proposed to be taken against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8) or § 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Board. The Board recently held that section 101(b)(1)(A) of the WPEA, as it pertains to the prohibited personnel practice set forth at 5 U.S.C. § 2302(b)(9)(B), is not retroactive to cases pending at the time of the WPEA's enactment. *See Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629 (2014).

The Board lacks jurisdiction over the appellant IRA appeal.

As noted previously, the agency argued that the Board lacks jurisdiction over the appellant's appeal, in part, because the "personnel action" at issue (the agency's failed to refer him for selection for a GS-12 Health Systems Specialist position (Vacancy Announcement EUHM1203697739652) is not a covered personnel action. However, contrary to the agency's argument, I find that the

agency's alleged failure to refer him for the GS-12 Health Systems Specialist position was in essence an allegation that the agency failed to "appoint" him for the position, as described at 5 C.F.R. § 1209.4(a)(1), and I find that it is a covered "personnel action" under 5 U.S.C. § 2302(b)(8).

The agency correctly argues, however, that the appellant's disclosure in August of 2012 was not a "protected disclosure," because he was not "an employee, former employee, or applicant for employment," at the time he made his disclosure, but rather, he was a Federal contractor. The appellant clearly stated in his February 18, 2014 response to the jurisdictional issue that he made his disclosure to the "ERMC-IG (MEDCOM)" in August 2012," and the agency submitted evidence which shows that the open period for applying for the Health Systems Specialist position at issue was from September 4-14, 2012. AF, Tab 6 and Tab 10, Agency Exhibit A, Job Announcement for the Health Systems Specialist position, GS-0671-12, position (Number EUHM12036977739652). The appellant also did not dispute the agency's argument made in its December 9, 2010 "Response to Order to Show Cause," that because he was not "an employee, former employee, or applicant for employment," at the time he made his disclosure.

Conclusion

For the reasons set forth above, I find that the appellant has failed to demonstrate that IRA jurisdiction exists and I therefore must dismiss this appeal for lack of Board jurisdiction.

DECISION

The appellant's IRA appeal is DISMISSED.

FOR THE BOARD: _____/S/_____
Michelle M. Hudson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **February 27, 2015** , unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with

supporting evidence and argument, must be filed with Clerk of the Board at the address below.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge’s credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review

must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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 want to request review of this decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this decision only after it becomes final by filing in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is

contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for an appeal to the United States Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.