UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 16

Docket No. DC-1221-05-0024-W-1

Sheila A. Bloom,

Appellant,

v.

Department of the Army,

Agency.

February 9, 2006

Michael D. Kohn, Esquire, Washington, D.C., for the appellant.

Steven J. Weiss, Alexandria, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision finding that the Board lacks jurisdiction over her individual right of action (IRA) appeal. For the reasons stated below, the Board GRANTS the petition for review, VACATES the initial decision, and REMANDS the case to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-13 Facilitator with the agency's Corps of Engineers, filed the instant IRA appeal on October 15, 2004. Initial Appeal File (IAF),

Tab 1. The appellant's IRA appeal alleged that, in response to a series of disclosures she made between November 1998 and October 2004, primarily regarding the agency's cleanup of a formerly used defense site in the Spring Valley neighborhood of Washington, D.C., the appellant was subjected to ongoing and continual harassment, retaliation, and reprisal from 1997 until the present. *Id*.

¶3 The AJ issued a show-cause order setting forth the proper standard for establishing Board jurisdiction over IRA appeals and ordering the appellant to file evidence and argument to prove the Board's jurisdiction over her appeal. IAF, Tab 3. The order also stated that the appellant's response "must include a copy of her [Office of Special Counsel (OSC)] complaint and the OSC decision discussing the allegations raised in the complaint if these documents have not already been submitted." *Id*. The appellant's response to the show-cause order first requested a 30-day continuance to enable the appellant to secure representation and then attempted to respond on the question of jurisdiction, in large part repeating the allegations made in her appeal form. IAF, Tab 5. In requesting the 30-day extension, the appellant wrote as follows:

> This extension is requested to secure competent representation to ensure the most critical issues related to the Spring Valley Project and the appellant's attempts to bring critical issues and ramifications of potential deliberate concealment of key project matters into the proper forum for correction, analysis and remedy to ensure the safety and health of the residents within and surrounding the Nation's Capital, the Drinking Water source and in the interest of National Security. The appellant's intention is to ensure that the Whistleblowing activities and disclosures and subsequent retaliation suffered by the appellant results in finding a corrective remedy . . . .

Id. at 1-2. The AJ interpreted the appellant's request, at least in part, as a request for an investigation into the Spring Valley Project rather than a request for time to secure representation. IAF, Tab 14, Initial Decision (ID) at 2 n.1.

¶4 The agency responded that the appellant had since the January 2004 date of her OSC complaint to prepare her case and argued that the AJ therefore should

deny her request for a continuance. IAF, Tab 6. The agency also replied that the appellant's submissions did not establish OSC exhaustion of her claim and were missing the required specific allegations regarding what was disclosed, why it was protected, and what personnel action was taken or not taken in reprisal for the appellant's disclosures. *Id*.

¶5 The AJ dismissed the appellant's request for corrective action for lack of jurisdiction, finding that the appellant's characterization of her disclosures was "little more than conclusory statements about the alleged 'flaws' and 'concerns' she reported," and that the appellant failed to make the required nonfrivolous allegation that a protected disclosure was a contributing factor in the three covered personnel actions for which the AJ found that the appellant had exhausted her remedies before OSC. ID at 6-9. The AJ denied the appellant's request for a continuance in the initial decision. *Id*. at 2 n.1.

¶6 The appellant filed a timely petition for review (PFR), arguing that the AJ abused her discretion both when she denied the appellant's request for a continuance to secure representation and when she ordered the appellant to produce the OSC decision on her complaint. Petition for Review File (PFRF), Tab 6. The appellant also argued that the AJ should not have required the appellant to allege that her disclosures were a contributing factor in the agency's decision to take or fail to take a personnel action in order to establish Board jurisdiction over her IRA appeal because the appellant "should have first been afforded an opportunity to conduct discovery." *Id*. at 19. The agency responded that the AJ had correctly found that the appellant failed to establish Board jurisdiction over her IRA appeal, that the AJ's denial of the appellant's request for a continuance was not an abuse of discretion, and that the AJ was correct to direct the appellant to provide a copy of the OSC decision. *Id*., Tab 7.

ANALYSIS

¶7 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that: (1) She 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). Although the appellant does not argue that the AJ erred in finding that the current record is insufficient to establish the nonfrivolous allegations necessary to support Board jurisdiction over this IRA appeal, the appellant's petition for review focuses on procedural errors the AJ allegedly made prior to issuing the initial decision, PFRF, Tab 6. The appellant first argues that the AJ abused her discretion by denying the appellant's request for a continuance. *Id.* at 9.

¶8 "When a request for a continuance presents good cause and relates to a matter clearly material to the appeal, the request should be granted in the absence of a showing that it would be unduly burdensome, harassing, or cause unwarranted delay." *Pecina v. Department of the Army*, 65 M.S.P.R. 100, 103 (1994). Asserting that her lack of "the legal skills necessary to permit her to adequately respond to the 'complexity' of the issues that had to be addressed in the show cause order" constituted "good cause for seeking this request," the appellant maintains that the poor quality of her response indicates that she "clearly required counsel to adequately respond to the Show Cause Order." PFRF, Tab 6 at 11. As described earlier, the AJ interpreted the appellant's request primarily as a request for an investigation into the Spring Valley Project. ID at 2 n.1. We find, however, that the AJ read the appellant's statements out of context because, when viewed as a whole, it is clear that she was requesting an extension for the purposes of securing legal representation to adequately respond to the show-cause order regarding jurisdiction. IAF, Tab 5.

¶9 The Board has noted that "IRA appeals, with multiple interrelated issues frequently supported by numerous documents, are often more complicated than the typical adverse action appeal before the Board." *Luecht v. Department of the Navy,* 87 M.S.P.R. 297, 302, ¶ 8 (2000). The appellant, albeit less directly, expressed the same thought in the preface of her response to the show-cause order when she remarked on the complexity of her involvement with the Spring Valley project and her need for legal representation to adequately respond to the show-cause order. IAF, Tab 5 at 1. Further, the appellant did not just request a continuance assuming that it would be granted, but also attempted to respond to the show-cause order in good faith, however inadequate her response may have been. Moreover, this was the first continuance requested by the appellant and it related to establishing Board jurisdiction, a matter material to the appeal. The agency did not allege that the continuance requested was unduly burdensome or harassing, or would cause unwarranted delay. In light of the good cause stated by the appellant and the absence of any evidence of undue burden, harassment, or unwarranted delay in the record, it was an abuse of discretion for the AJ to deny the appellant's request for a 30-day continuance under the circumstances.

¶10 The AJ also erred in ordering the appellant to produce a copy of the OSC decision discussing the allegations raised in her complaint to the OSC. Pursuant to 5 U.S.C. § 1214(a)(2)(B), OSC's written statement containing its summary of relevant facts, including the facts that support, and those that do not support, the appellant's allegations, "may not be admissible as evidence in any judicial or administrative proceeding, without consent of the person who received such statement," namely, the appellant. This section of the statute would be rendered meaningless if the AJ could order the production of the appellant's OSC complaint over the appellant's objection. Although the AJ has a legitimate need to know, and the appellant must prove, what disclosures and personnel actions were raised and therefore exhausted before OSC, *see Yunus*, 242 F.3d at 1371, this issue may usually be resolved by the appellant's submission of the complaint

submitted to OSC. Further, pursuant to 5 U.S.C. § 1221(f)(2), OSC's decision to terminate its investigation may not be considered in an IRA action. "The purpose of this evidentiary rule . . . is to ensure that a whistleblower is not 'penalized' or 'prejudiced' in any way by OSC's decision not to pursue a case." *Costin v. Department of Health & Human Services*, 64 M.S.P.R. 517, 531 (1994). Finally, an IRA appeal is a de novo action, and the Board must therefore rely on its independent analysis of the parties' evidence, and not on OSC's characterizations of the appellant's allegations, which are not binding on the Board. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 22 (2001). An AJ should not ordinarily order a party to submit a copy of the OSC letter referred to in 5 U.S.C. § 1214(a)(2)(B), and if such an order is issued, the AJ must explain, on the record, why the letter is necessary and explicitly advise the appellant that the letter is inadmissible without the appellant's consent.

¶11 The appellant's remaining contention regarding the show-cause order is without merit.[*] The appellant was not required to respond to the contributing factor test before she was given an opportunity to conduct discovery as she contends. PFRF, Tab 6 at 19. Her opportunity to conduct discovery began upon the issuance of the acknowledgment order. IAF, Tab 2; *see* 5 C.F.R. § 1201.73(3)(d). The acknowledgment order was issued on the same day as the show-cause order, IAF, Tab 3, and the acknowledgment order not only notified the appellant of the availability of discovery, but also instructed her regarding

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[*] The appellant also alleged that her IRA appeal should have been dismissed without prejudice in favor of a previously filed agency EEO complaint on the same personnel actions. However, IRA appeals under the WPA are not subject to the provisions of 5 U.S.C. § 7701 or § 7702; thus, the Board lacks jurisdiction to adjudicate the merits of the personnel action at issue in an IRA appeal and lacks the authority to decide, in conjunction with an IRA appeal, the merits of an appellant's allegation of prohibited discrimination. *Marren v. Department of Justice*, 51 M.S.P.R. 632, 638-39 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table). Thus, we discern no error in the AJ's denial of the appellant's motion to dismiss this appeal without prejudice pending the resolution of the appellant's EEO complaint by the agency.

how to obtain a waiver of the time limits for discovery if necessary "in order to accommodate the particular circumstances of [her] appeal." IAF, Tab 2 at 3. Nothing in the record reflects that the appellant took advantage of her opportunity to conduct discovery, and the appellant has established no basis to reopen the discovery process on remand.

¶12 We note that the appellant has now secured representation in this appeal. On remand, the AJ shall allow the appellant a reasonable time to submit an additional response to the show-cause order before making a new jurisdictional determination.

ORDER

¶13 Accordingly, the Board GRANTS the petition for review, VACATES the initial decision, and REMANDS the case to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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