UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 96

Docket No. DC-1221-04-0762-W-1

Jonathan M. Fishbein,

Appellant,

v.

Department of Health and Human Services,

Agency.

April 21, 2006

Stephen M. Kohn, Esquire, and C. Jason Perkey, Esquire, Washington, D.C., for the appellant.

William A. Biglow, Esquire, Washington, D.C., 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 and the agency has filed a cross petition for review asking the Board to reverse the initial decision of the administrative judge dismissing this appeal for lack of jurisdiction. For the reasons set forth in this Opinion and Order, we GRANT the parties' petitions under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND this appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On or about July 13, 2003, the appellant entered on duty as Associate Director, Office for Policy in Clinical Research Operations, Division of Acquired Immunodeficiency Syndrome (AIDS), National Institute of Allergy and Infectious Diseases, National Institutes of Health (NIH), Department of Health and Human Services. Initial Appeal File (IAF), Tab 1 at 2-3, Attachment 1 at 1. He received an indefinite appointment under 42 U.S.C. § 209(f), subject to the completion of a two-year trial period. *Id.* Section 209(f) states that:

> In accordance with regulations, special consultants may be employed to assist and advise in the operations of the [Public Health] Service.[1] Such consultants may be appointed without regard to the civil-service laws.

42 U.S.C. § 209(f). By memorandum dated April 7, 2004, the Director of the Division of AIDS informed the appellant that he would be terminated effective May 29, 2004, for unsatisfactory performance. IAF, Tab 1 at 3, Attachment 1. The agency has apparently delayed implementation of the termination pending the outcome of this appeal. IAF, Tab 1 at 1-2; Petition for Review File (PFRF), Tab 5 at 3.

¶3 The appellant subsequently filed a complaint with the Office of Special Counsel (OSC), claiming that he was terminated in reprisal for whistleblowing. IAF, Tab 1 at 6, Attachment 2. After OSC notified him that it had terminated its investigation, he filed this individual right of action (IRA) appeal. *Id.*, Attachment 3. In his appeal, the appellant also claimed that his termination violated the agency's Performance Manual by failing to provide him with an opportunity to improve his performance, constituted discrimination based on his sex and age, and was taken in retaliation for his prior equal employment opportunity (EEO) activities. IAF, Tab 1 at 5-6.

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[1] NIH is a component of the Public Health Service in the Department of Health and Human Services. 42 U.S.C. §§ 201(a), 202, 203.

¶4 The administrative judge advised the appellant that the Board might not have jurisdiction over his IRA appeal because special consultants under 42 U.S.C. § 209(f) are appointed "without regard to the civil-service laws" and he did not appear to be an "employee" under 5 U.S.C. § 2105 entitled to file an IRA appeal under 5 U.S.C. § 1221. IAF, Tab 3 at 1-2. The administrative judge ordered the appellant to file evidence and argument to prove that he is an individual entitled to file an IRA appeal with the Board. *Id.* at 2. The appellant filed a response arguing that the Board has jurisdiction over this appeal because Congress had not explicitly excluded section 209(f) appointees from filing an IRA appeal, and he is an excepted service employee in a "covered position" in an "agency" under 5 U.S.C. § 2302(a)(2)(B) and (C). IAF, Tab 5. The agency did not brief its position on the jurisdictional issue below, but indicated that it believed that the Board lacks jurisdiction over this IRA appeal. IAF, Tab 4 at 7-8.

¶5 After consideration of the appellant's response on the jurisdictional issue, the administrative judge, without a hearing, issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 7, Initial Decision (ID). The administrative judge found that the appellant's appointment, made "without regard to the civil-service laws" under 42 U.S.C. § 209(f), "was, by definition, not an appointment to a civil service position." ID at 5. The administrative judge reasoned that, because the appellant was not "appointed in the civil service," he was not an "employee" under 5 U.S.C. § 2105(a)(1) entitled to file an IRA appeal pursuant to 5 U.S.C. § 1221(a). ID at 5-6. Absent an otherwise appealable action, the AJ found that the Board also lacks jurisdiction over the appellant's claims of discrimination and retaliation for his prior EEO activities. ID at 5.

¶6 On petition for review, the appellant asserts that he is entitled to file an IRA appeal under 5 U.S.C. § 1221 because he is an excepted service employee in a "covered position" within an "agency" as those terms are defined by 5 U.S.C. § 2302(a)(2)(B) and (C). PFRF, Tab 1 at 10-14. He claims that the fact that *appointments* under 42 U.S.C. § 209(f) may be made "without regard to the civil-

service laws" does not preclude him from filing an IRA appeal concerning his *termination*. *Id*. at 14-16.

¶7 The agency has filed a cross petition for review, urging the Board to reverse the initial decision and conclude that appointees under 42 U.S.C. § 209(f) have a right to file an IRA appeal under 5 U.S.C. § 1221. PFRF, Tab 5. The agency argues that 42 U.S.C. § 209(f) gives it "the discretion to apply various provisions of the civil service laws under Title 5" and that it "at no time has declared that section 209(f) appointees are not protected by the [Whistleblower Protection Act (WPA)]." *Id*. at 4-5. The agency further argues that the reference to "the civil-service laws" in section 209(f) should be "narrowly construed" as meaning laws related to "hiring and compensation." *Id*. at 5.[2] The appellant has filed a response to the cross petition for review expressing his agreement with the arguments raised therein. PFRF, Tab 7.

ANALYSIS

¶8 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Because the WPA is remedial legislation, the Board will construe its provisions liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act. *Glover v. Department of the Army*, 94 M.S.P.R. 534, ¶ 8 (2003); *see* Whistleblower Protection Act of 1989 § 2, 5 U.S.C. § 1201 note (stating that the purpose of the WPA "is to strengthen and improve protection for the rights of Federal

[2] The agency did not raise these arguments below, and, in fact, indicated that it believed that the Board lacks jurisdiction over this appeal. IAF, Tab 4 at 8. Generally, the Board will not consider new arguments on petition for review absent a showing that they are based on new and material evidence not previously available despite the party's due diligence. *See Lovoy v. Department of Health & Human Services*, 94 M.S.P.R. 571, ¶ 30 (2003). However, we will consider the agency's new arguments on the issue of jurisdiction because that issue is always before the Board and may be raised by any party or sua sponte by the Board at any time during Board proceedings. *See id.*

employees, to prevent reprisals, and to help eliminate wrongdoing within the Government"). The parties have asked the Board to reverse the initial decision and find that the Board has jurisdiction over the appellant's IRA appeal notwithstanding his appointment under 42 U.S.C. § 209(f). PFRF, Tabs 1, 5, 7. The parties' agreement on this jurisdictional issue does not, in itself, confer jurisdiction on the Board. *See, e.g.*, *Bielomaz v. Department of the Navy*, 86 M.S.P.R. 276, ¶ 10 (2000) (the agency's concession that the appellant was an "employee" as defined by 5 U.S.C. § 7511(a)(1) could not confer adverse action jurisdiction on the Board where it does not otherwise exist). Resolution of the jurisdictional question presented requires an analysis of the statutory provisions governing IRA jurisdiction, i.e., 5 U.S.C. §§ 1221 and 2302. For the following reasons, we find that the appellant is not necessarily precluded from bringing an IRA appeal regarding his termination because he was appointed under 42 U.S.C. § 209(f), and he may be covered by the WPA if he meets the applicable statutory definitions at 5 U.S.C. §§ 1221 and 2302.

42 U.S.C. § 209(f) does not preclude the appellant's IRA appeal.

¶9 The exemption from the application of the civil-service laws under 42 U.S.C. § 209(f) specifically applies to the "appoint[ment]" of special consultants. Section 409(f) clearly distinguishes between "employ[ment]" and "appoint[ment]." 42 U.S.C. § 209(f) ("[S]pecial consultants may be *employed* to assist and advise in [the Public Health Service's] operations .... Such consultants may be *appointed* without regard to the civil-service laws.") (emphasis added). Thus, we find that section 209(f) does not bring every aspect of special consultants' employment outside the coverage of title 5.[3] Rather, we agree with

[3] The administrative judge relied on *Schott v. Department of Homeland Security*, 97 M.S.P.R. 35 (2004), in which the Board found that it lacks jurisdiction over IRA appeals by Transportation Security Agency (TSA) Security Screeners and Lead Security Screeners. ID at 3-4. *Schott* is distinguishable because the statute applicable to TSA Screeners authorized TSA to "employ, appoint, discipline, terminate, and fix the

the parties that this statute appears intended to provide the agency with flexible hiring authority to meet its specialized needs free from the appointing procedures and requirements of title 5. PFRF, Tab 1 at 15-16, Tab 5 at 5-6; *see* H.R. Rep. No. 78-1364 (1944), *reprinted in* 1944 U.S.C.C.A.N. 1211, 1218 (stating that the exemption in 42 U.S.C. § 209(f) was enacted "merely [to] confirm[] the present situation" with regard to the "exemption from the civil service and classification laws"); *In re Masse*, 2001 WL 1478431 (G.S.B.C.A. Nov. 15, 2001) (holding that "the civil-service laws" referenced in 42 U.S.C. § 209(f) did not include 5 U.S.C. §§ 5722, 5723, concerning a new appointee's entitlement to travel and transportation expenses when she moves to her duty station from her place of residence at the time of appointment). In this regard, we note that the agency's regulation concerning the appointment of special consultants refers to the use of this hiring authority "[w]hen the Public Health Service requires the services of consultants who cannot be obtained when needed through regular Civil Service appointment or under the compensation provisions of the Classification Act of 1949." 42 C.F.R. § 22.3(a).

¶10 Nothing in section 209(f) expressly exempts appointees under that section from coverage under the WPA. Consistent with the liberal construction that the Board employs when deciding questions of WPA coverage, we do not construe the provision of section 209(f) providing that "consultants may be *appointed* without regard to the civil-service laws" as implicitly precluding a section 209(f) appointee, such as the appellant, from bringing an IRA appeal based on his termination from employment if he otherwise meets the statutory requirements for doing so. *See* 42 U.S.C. § 209(f) (emphasis added); *Glover*, 94 M.S.P.R. 534, ¶ 8.

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compensation, terms and conditions of employment" for TSA screener personnel notwithstanding any other law. *See Schott*, 97 M.S.P.R. 35, ¶ 10. In contrast, 42 U.S.C. § 209(f) only provides that special consultants may be *appointed* without regard to the civil-service laws.

¶11 Under the WPA, an agency[4] may not, inter alia, take or threaten to take certain personnel actions against "an employee" in a "covered position" because of a protected whistleblowing disclosure. 5 U.S.C. § 2302(a)(2), (b)(8); *Simmons v. Department of Agriculture*, 80 M.S.P.R. 380, ¶ 5 (1998). The right to appeal to the Board alleging a violation of 5 U.S.C. § 2302(b)(8) derives from 5 U.S.C. § 1221(a). *Clark v. Army & Air Force Exchange Service*, 57 M.S.P.R. 43, 46 (1993). Section 1221(a) provides a right to seek corrective action from the Board to "an employee, former employee, or applicant for employment" against whom a personnel action is taken, or proposed to be taken, as a result of a prohibited personnel practice described in section 2302(b)(8). 5 U.S.C. § 1221(a); *Glover*, 94 M.S.P.R. 534, ¶ 9.

¶12 To be an "employee" under 5 U.S.C. § 1221(a), an individual must meet the definition of "employee" under 5 U.S.C. § 2105. *See Simmons*, 80 M.S.P.R. 380, ¶ 6 ("Unless otherwise clearly indicated, the definition of 'employee' at 5 U.S.C. § 2105(a) applies for all purposes of Title 5."); *Clark*, 57 M.S.P.R. at 45-46 (the provisions of the WPA authorizing an "employee" to bring an IRA appeal to the Board, i.e., 5 U.S.C. §§ 1214(a)(3), 1221(a), 2302(b)(8), do not modify the 5 U.S.C. § 2105 definition of "employee"). Section 2105 provides, in pertinent part, as follows:

> (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is –
>
> (1) *appointed in the civil service* by one of the following acting in an official capacity –
>
> (A) the President;
>
> (B) a Member or Members of Congress, or the Congress;
>
> (C) a member of a uniformed service;

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[4] The agency is covered under the WPA. *See* 5 U.S.C. §§ 101, 105, 2302(a)(2)(C); *Lovoy*, 94 M.S.P.R. 571, ¶ 2 n.1.

> (D) an individual who is an employee under this section;
>
> (E) the head of a Government controlled corporation; or
>
> (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 2105(a) (emphasis added). The administrative judge found that, because the appellant was appointed under 42 U.S.C. § 209(f) "without regard to the civil-service laws," he was not "appointed in the civil service" and thus was not an "employee" under 5 U.S.C. § 2105(a). ID at 5-6. We disagree.

¶13 The "civil service," as that term is used in title 5, "consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." 5 U.S.C. § 2101(1). The appellant appears to meet this broad definition as an appointee in the executive branch. *See id.* The federal civil service is broadly divided into three main classifications: (1) the "Senior Executive Service" generally consisting of employees occupying high-level positions in an executive agency, but for whom appointment by the President and confirmation by the Senate is not required; (2) the "competitive service" generally consisting of all other employees for whom nomination by the President and confirmation by the Senate is not required, and who are not specifically excepted from the competitive service by statute or by statutorily authorized regulation; and (3) the "excepted service" consisting of the remaining civil service employees who are in neither the competitive service nor the Senior Executive Service. *See* 5 U.S.C. §§ 2101a, 2102, 2103, 3132(a)(2); *Hamlett v. Department of Justice*, 90 M.S.P.R. 674, ¶ 2 n.1 (2002). We find that, for the purposes of 5 U.S.C. § 2302(a)(2)(B), the appellant's appointment under 42 U.S.C. § 209(f) would place him in the

excepted service. *See* 5 U.S.C. § 2103(a); *see also Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985) (employees appointed without regard to the civil service laws pursuant to 16 U.S.C. § 831b are clearly "in the excepted service, not the competitive service"); *Lovoy v. Department of Health & Human Services*, 94 M.S.P.R. 571, ¶ 32 (2003) (positions filled in accordance with 5 U.S.C. § 3109 "without regard to … the provisions of [title 5] governing appointment in the competitive service" are in the excepted service). Thus, the appellant may have been "appointed in the civil service" under 5 U.S.C. § 2105(a)(1), notwithstanding his appointment under 42 U.S.C. § 209(f).

¶14 However, we cannot determine based on the existing record whether the appellant meets all parts of the definition of "employee" under 5 U.S.C. § 2105(a). To be an "employee" under 5 U.S.C. § 2105, an individual must have been (1) appointed in the civil service by a named federal official acting in his official capacity, (2) engaged in the performance of a federal function under authority of law or executive act, and (3) under the supervision of a named federal official while engaged in the performance of the duties of his position. *Simmons*, 80 M.S.P.R. 380, ¶ 6. Although the parties agree that the appellant was appointed under 42 U.S.C. § 209(f) and claim he is an employee under 5 U.S.C. § 2105, there is no further information in the record regarding the appellant's appointment. In particular, the parties have not specifically alleged, and there is no record evidence establishing, that the appellant was appointed by or subject to the supervision of an individual named under section 2105(a)(1) and was engaged in the performance of a federal function under authority of law or executive act. Thus, on remand, the administrative judge shall, after affording the parties the opportunity to submit evidence and argument on this issue, determine whether the appellant meets the definition of "employee" under 5 U.S.C. § 2105.

¶15 Assuming that the appellant has been properly appointed to his excepted service position, we agree with the parties that the appellant is in a "covered

position" under the WPA. *See* 5 U.S.C. § 2302(a)(2)(A) & (B). A "covered position" is:

> any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—
>
> (i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
>
> (ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration….

5 U.S.C. § 2302(a)(2)(B). The parties have not argued, and we do not find any indication in 42 U.S.C. § 209(f) and its legislative history, that Congress excepted the appellant's position from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. *See O'Brien v. Office of Independent Counsel*, 74 M.S.P.R. 192, 203-04 (1997). Rather, as discussed above, 42 U.S.C. § 209(f) appears intended to provide the agency with flexible hiring authority. Further, the parties have not identified and we are not aware of any act of the President excluding the appellant's position from coverage of the WPA. *See* 5 U.S.C. § 2302(a)(2)(B)(ii). Thus, the appellant's position appears to be a "covered position" under 5 U.S.C. § 2302(a)(2)(B).

¶16 Therefore, we find that the appellant may be entitled to bring an IRA appeal regarding his termination notwithstanding his appointment under 42 U.S.C. § 209(f). On remand, the administrative judge shall afford the parties the opportunity to address whether the appellant meets the definition of "employee" under 5 U.S.C. § 2105(a) and has satisfied the other IRA jurisdictional requirements set forth in *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes

nonfrivolous allegations that he engaged in whistleblowing activity by making a protected disclosure and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action).

The Board lacks jurisdiction over the appellant's other claims.

¶17 The administrative judge properly determined that the Board lacks jurisdiction over the appellant's claims that his termination violated the agency's Performance Manual, was based on sex and age discrimination, and was effected in retaliation for his prior EEO activities. IAF, Tab 1 at 5-6; ID at 5-6. The plain language of 42 U.S.C. § 209(f) provides that the appellant's position is not subject to the appointing provisions of title 5. Thus, he lacks the right to bring an adverse action appeal concerning the termination of his appointment. *See* 5 C.F.R. § 752.401(d)(12) (adverse action appeal rights are not afforded to an employee whose "position has been excluded from the appointing provisions of title 5, United States Code, by separate authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code"); *Chavez v. Department of Veterans Affairs*, 65 M.S.P.R. 590, 593-94 (1994) (the Board lacked jurisdiction over removal appeal where the appellant's position had been excluded from the appointing provisions of title 5 by separate statutory authority in the absence of any provision placing the appellant within the coverage of 5 U.S.C. ch. 75); *Cummings v. General Services Administration*, 5 M.S.P.R. 47, 48-49 (1981) (the Board lacked jurisdiction over appeal challenging the alleged abolishment of the appellant's position under a reduction-in-force and alleging race discrimination, as the appellant was appointed "without regard to the civil-service laws").

¶18 Further, 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. *See Marren v. Department of Justice*, 51 M.S.P.R.

632, 638-39 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table); *see also Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867 (D.C. Cir. 1982).

ORDER

¶19 Accordingly, we VACATE the initial decision and REMAND this appeal to the Washington Regional Office for further jurisdictional proceedings and 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.