

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the matter of:
CELIA A. WREN
v.
DEPARTMENT OF THE ARMY

} Docket No.
DC315H99007

OPINION AND ORDER

The above-named appellant, a preference eligible, was terminated by the Department of the Army from an indefinite excepted appointment during her trial period. On appeal to the Board's Washington, D.C. Field Office, she contended that the termination was in reprisal for her having disclosed "violations of regulations, mismanagement, waste of Government funds, abuse of authority and . . . health hazards." The presiding official's initial decision found that the appeal was not within the Board's appellate jurisdiction.

In her petition for review, petitioner contends that the initial decision, if allowed to stand, would establish a precedent permitting agencies to terminate employees during their trial periods for their lawful disclosure of information, and would contravene the Congressional intent to protect such "whistleblowers," as set forth in U.S.C. § 2302(b)(8).

Title 5, U.S.C. Section 7511(a)(1)(B) excludes preference eligibles in the excepted service from the category of employees who are granted a statutory appeal right if they have not completed 1 year of current continuous service in the same or similar positions. Therefore, the appellant has no independent statutory right of appeal to the Board. Nor does appellant allege any regulatory right of appeal.*

The Civil Service Reform Act provides three routes by which allegations of prohibited personnel practices may be brought within the Board's adjudicative jurisdiction: (1) by petition of the Special Counsel under §§ 1206 and 1208; (2) by petition of "any interested person" for review under § 1205(3) of an allegedly invalid OPM regulation; or (3) as an affirmative defense under § 7701(c)(2)(B) to any action which "is appealable to the Board

* 5 C.F.R. § 315.806 (1979) which grants certain appeal rights to probationary employees in the competitive service is inapplicable here because the appellant was in the excepted service.

under any law, rule, or regulation," as provided in § 7701(a). With respect to the latter route, § 2302(b) is not an independent source of appellate jurisdiction for the Board; that provision itself authorizes no appeals. Therefore, the personnel action which is the subject of the appeal must first be brought within the Board's appellate jurisdiction under some other "law, rule, or regulation," § 7701(a), before the Board may consider a § 7701(c)(2)(B) affirmative defense. Not only is this plain from the language of § 7701, Congress also expressly recognized that not all prohibited personnel practices are appealable to the Board in authorizing the Special Counsel to seek corrective action for patterns of prohibited personnel practices which involve "matters not otherwise appealable to the Board," § 1206(h).

Since appellant as a probationer has no independent right of appeal to the Board, the presiding official properly found that he lacked jurisdiction to adjudicate appellant's "whistleblower" allegations. We note, however, as did the presiding official, that procedures do exist whereby such an allegation may be investigated by the Special Counsel in the absence of an otherwise appealable action. See 5 U.S.C. 1206(a)(1); 5 C.F.R. 1251.101 et seq. Consequently, in this case as in other non-appealable cases involving such allegations, we are herewith referring petitioner's allegations to the Acting Special Counsel for such action as she may find appropriate.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

April 17, 1980.

MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. Region

APPEAL OF CELIA A. WREN

Under Section 7701, Title 5, U.S. Code

Decision Number: DC315H99007

Decided On: May 16, 1979

INTRODUCTION

By letter dated March 9, 1979, Mrs. Wren submitted a petition asking the Merit Systems Protection Board (MSPB) to review the action of the Department of the Army (DA), U.S. Military Community, Wuerzburg, Germany terminating her employment as a Guidance Counselor, GS-1710-09, Wertheim Sub-Community, Germany, during her trial period, effective March 9, 1979.

JURISDICTION

Appellant received an indefinite excepted appointment, subject to completion of a one year trial period, as a Guidance Counselor, GS-9, effective August 21, 1978. She was terminated from this position on March 7, 1979 before she completed one year of current continuous employment. Mrs. Wren has veteran's preference.

The Civil Service Reform Act (CSRA), PL 95-454, 95th Congress, became effective on January 11, 1979. Since appellant was terminated after that date, her appeal is not being adjudicated under the provisions of the Civil Service regulations as they existed prior to January 11, 1979; instead, it is being adjudicated under the provisions of the CSRA and regulations published by MSPB and the Office of Personnel Management (OPM) pursuant to that act.

Section 303, Title III, CSRA, concerns the probationary period required of employees who enter on duty in the competitive service. It amends section 3321, Title 5, U.S. Code (5 USC 3321), but in doing so provides no rights for excepted service employees, including a right of an appeal of a termination during probation to the MSPB. Additionally, part 315, subpart H, of the regulations of OPM, published pursuant to the CSRA, does not provide a right of appeal to MSPB for excepted service employees who are terminated during a trial period. Consequently, the Board has no authority to adjudicate Mrs. Wren's petition for review of her termination during her trial period.

We will also consider whether Mrs. Wren's termination was an adverse action covered under section 204, Title II, CSRA. This section sets forth under section 7512, Title 5, U.S. Code (5 USC 7502)

the following adverse actions taken by the agencies which are appealable to MSPB: (1) removal; (2) suspension for more than 14 days; (3) reduction in grade; (4) reduction in pay; and (5) furlough for 30 days or less. Termination during probation is not one of the actions covered.

Additionally, under section 7511, Title 5, U.S. Code (5 USC 7511) it defines the following as covered employees having a right to submit a petition of appeal from the adverse actions defined in 5 USC 7512: (1) competitive service employees not serving a trial or probationary period under an initial appointment; (2) competitive service employees who have completed 1 year of current continuous employment under other than a temporary appointment of less than one year's duration; and (3) excepted service employees who are preference eligibles and have completed one year of current continuous employment in the excepted service. Both 5 USC 7511 and 5 USC 7512 are incorporated into section 752.301, Part 752, Subpart C, of the OPM regulations. Mrs. Wren is a preference eligible, but has not completed one year of current continuous employment in the excepted service. As a result, the Board is without jurisdiction to entertain her appeal as an adverse action under the CSRA or the OPM regulations.

Appellant alleged that her termination was in reprisal for her having disclosed "violations of regulations, mismanagement, waste of Government funds, abuse of authority and disclosure of health hazards", and that the termination should be reviewed because Congress "intended to protect probationary employee/whistle blowers as well as career employee/whistle blowers." This implies that, notwithstanding any lack of MSPB jurisdiction to review the termination action itself, she believes she has a right to have her reprisal allegation reviewed on appeal because it concerns a personnel practice prohibited by section 2302(b)(8), Title 5, U.S. Code (5 USC 2302(b)(8)), which is set forth in section 101, Title I, CSRA, and which reads in pertinent part:

"(b) Any employee who has authority to take, direct others to take, or approve any personnel action, shall not, with respect to such authority

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a 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) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information

is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs"

Employee appeal rights are set forth in section 7701, Title 5, U.S. Code (5 USC 7701), which is incorporated into section 205, Title II, CSRA, and which reads in pertinent part:

"(a) An employee or applicant for employment may submit an appeal to the Merit Systems Protection Board from any action appealable to the Board under any law, rule, or regulation."

The CSRA and Title 5, U.S. Code, spell out the statutory appeal rights to the MSPB to which covered employees are entitled, while the regulations of the OPM define all other appeal rights to the MSPB which are not statutory in origin. Nowhere in these laws and regulations is an employee provided a right of appeal solely on the basis that a reprisal action was taken against her because she made disclosures of the type she alleges she made. In order to have such an allegation reviewed an appeal, it must be made in connection with a personnel action which gives the employee a right of appeal to the MSPB. If appellant had such a right, we might have considered her reprisal allegation as an affirmative defense. However, as pointed out above, we have no jurisdiction to review the action terminating Mrs. Wren's employment. Consequently, we also have no authority to review appellant's allegation of reprisal in connection with that action. Finally, appellant is not entitled to the hearing she requested in her petition since her appeal is not within our purview to adjudicate.

We note that under section 1206(a)(1) Title 5, U.S. Code, (5 USC 1206(a)(1) as set forth in section 202, Title II, CSRA, the Special Counsel "shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred. . . ." This section does provide an avenue for the investigation of an alleged prohibited personnel practice where the action taken by the agency is not itself appealable to the MSPB.

DECISION

For the reasons stated above, the Board must decline to accept Mrs. Wren's appeal for adjudication.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 20, 1979 unless a petition for review is filed with the Board within thirty (30) calendar days after the petitioner's receipt of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the

Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be received by the Secretary to the Merit Systems Protection Board, Washington, D.C., 20419 no later than thirty calendar (30) days after receipt of this decision. A copy of the petition must be served on all other parties and intervenors to this appeal.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the decision of the presiding official was issued; or

(2) The decision of the presiding official is based upon an erroneous interpretation of law, rule, or regulation, or a misapplication of established policy; or

(3) The decision of the presiding official is of a precedential nature involving new or unreviewed policy considerations that may have a substantial impact on a civil service law, rule, regulation, or a more Government-wide policy directive.

Under 5 U.S.C. 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

ARTHUR J. BURGESS,
Presiding Official.