

OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS

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Eve Ferguson,)
 Appellant)
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Case Number: 19-LC-53 (AG, DA, DV, FM, RP)

Before the Board of Directors: Barbara Childs Wallace, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara L. Camens, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition filed by the appellant, Eve Ferguson (“Ferguson”), seeking review of the January 13, 2020 Order of the Hearing Officer that dismissed this case without prejudice to refile as a new claim. Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings, and the record in these proceedings, the Board AFFIRMS the Order AS MODIFIED herein. We REMAND Ferguson’s December 26, 2019 pleading in this case to the Clerk of the Office of Congressional Workplace Rights (“OCWR”) for docketing as a new claim, with an effective filing date of December 26, 2019.

I. Background

The operative facts in this case are not in dispute. They occurred, however, during a period of transition in which the administrative dispute resolution (“ADR”) procedures set forth in the Congressional Accountability Act (“CAA”), 2 U.S.C. §§ 1301 et seq., were significantly amended by the CAA of 1995 Reform Act of 2018 (“Reform Act”), Pub. L. No. 115–397.

Under pre-Reform Act ADR procedures, the CAA required that an employee satisfy two jurisdictional prerequisites in order to file a formal administrative complaint with the OCWR.¹ Specifically, before bringing a claim for violation of the CAA, an employee first had to complete mandatory counseling and mandatory mediation with the OCWR. 2 U.S.C. § 1408(a) (2006). Failure to complete counseling and mediation in the manner then prescribed by the CAA deprived the Board of jurisdiction over the ensuing administrative complaint. *See Blackmon–Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 705 (D.C. Cir. 2009); *Gordon v. Office of the*

¹ The OCWR was then known as the Office of Compliance.

Architect of the Capitol, 928 F. Supp. 2d 196, 204 (D.D.C. 2013); *Ross v. U.S. Capitol Police*, 195 F. Supp. 3d 180, 195 (D.D.C. 2016); *Torres-Velez v. Office of the Architect of the Capitol*, Case No. 17-AC-36 (FL, RP, CV), slip op. at 4 n.1 (OCWR Sep. 23, 2019). These pre-Reform Act jurisdictional prerequisites applied to all cases initiated with the OCWR before the effective date of the Reform Act, i.e., before June 19, 2019.

The Reform Act substantially modified the OCWR ADR process under the CAA, including eliminating counseling and mediation as jurisdictional prerequisites to filing an administrative claim. *See generally*, 2 U.S.C. § 1401. The post-Reform Act ADR procedures apply to all cases filed with the OCWR on or after June 19, 2019. *Torres-Velez*, slip op. at 4 n.1.

Ferguson is a Reference Librarian in the African and Middle East Division of the Library of Congress (“Library”). On May 16, 2019, she submitted a request for counseling with the OCWR under the pre-Reform Act ADR procedures. Ferguson’s counseling period ended on June 17, 2019. On July 9, 2019—after the effective date of the Reform Act—she filed a request for mediation with the OCWR. The mediation period ended on August 30, 2019, without a resolution of Ferguson’s allegations.²

On December 2, 2019, Ferguson emailed the OCWR requesting a hearing in this matter. In response, Ferguson was instructed by the OCWR to complete a complaint form pursuant to pre-Reform Act procedures. Ferguson did so on December 2. The Library thereafter filed a motion to compel, contending that Ferguson had failed to set forth a clear and concise statement of the conduct being challenged.

On December 26, 2019, Ferguson filed a response to the Library’s motion that detailed allegations of harassment and a violation of the Family Medical Leave Act (“FMLA”) provisions of the CAA, all of which allegedly occurred between September 30, 2019 and December 23, 2019—after the conclusion of mediation in this case, and after the effective date of the Reform Act. The Hearing Officer thereafter issued an Order finding that the allegations in Ferguson’s response would be considered an amendment to her December 2, 2019 Complaint. The Library subsequently filed a motion to dismiss Ferguson’s Amended Complaint on the grounds that, *inter alia*, she had failed to satisfy the jurisdictional prerequisite of exhausting mediation prior to filing her complaint with the OCWR.

² On July 30, 2019, Ferguson filed a separate claim against the Library, which was docketed as Case No. 19-LC-69. The claim form in that case, as supplemented by Ferguson’s submission of August 14, 2019, alleged acts of discrimination and FMLA violations occurring between July and August 2019. Ferguson later requested to withdraw this claim, and it was dismissed with prejudice by Order dated October 23, 2019. Ferguson did not seek review of this Order of dismissal and it is not before the Board in this appeal.

On January 13, 2020, the Hearing Officer issued an Order dismissing this case, finding that Ferguson had failed to exhaust her administrative remedies through mediation as was required by pre-Reform Act ADR procedures. In determining that pre-Reform Act ADR procedures applied to Ferguson's allegations, the Hearing Officer noted that the Reform Act's effective date was June 19, 2019, and concluded that any case that was subject to any of the proceedings under the pre-Reform Act procedures as of June 19, 2019 would be completed pursuant to those procedures. Because Ferguson had "initiated her Claim by requesting counseling prior to the effective date of the Reform Act," the Hearing Officer determined that this case was subject to pre-Reform Act exhaustion requirements. Because the dates on which the alleged violations occurred post-dated the close of the counseling and mediation periods in this case, the Hearing Officer concluded that it was "self-evident that the events of September through November of 2019 could not have been subject to mediation before they occurred," and that Ferguson therefore had failed to satisfy the exhaustion requirement.

The Hearing Officer, "in fairness to the Complainant," and after noting that the Library appeared to recognize that the allegations described in the Amended Complaint might be the subject of a new claim under post-Reform Act ADR procedures, determined to dismiss this case without prejudice to refiling. Rather than filing a new claim, however, on February 10, 2020, Ferguson filed the instant Petition for Review of the Hearing Officer's Order of dismissal without prejudice.

II. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c); *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

III. Analysis

Ferguson contends, in essence, that the Hearing Officer's dismissal without prejudice constituted an abuse of discretion. We disagree. Ferguson has raised no allegations in this case that are cognizable under pre-Reform Act ADR procedures. The events of September through November of 2019 that she seeks to adjudicate not only post-date the close of the counseling and mediation periods in this case—they also post-date June 19, 2019, the effective date of the Reform Act. Therefore, Ferguson's allegations in her December 26, 2019 pleading could not have been adjudicated under pre-Reform Act ADR procedures, and the Hearing Officer correctly dismissed this case, which was filed pursuant to those procedures. Moreover, Ferguson has not otherwise asserted, much less shown, that the Hearing Officer otherwise abused her broad discretion in dismissing the appeal without prejudice. *Cf. Toquero v. Merit Sys. Prot. Bd.*, 982 F.2d 520, 522 (Fed. Cir. 1993) (reviewing an administrative judge's dismissal without prejudice for abuse of discretion).

The Library contends, however, that Ferguson initiated a proceeding prior to the effective date of the Reform Act when she filed her request for counseling in May 2019, and that in doing so, she tied future proceedings to the pre-Reform Act ADR procedures. We disagree. Section 401(b) of the Reform Act concerns matters that were pending before the OCWR on the effective date of the Reform Act. It provides:

Nothing in this Act or the amendments made by this Act may be construed to affect any proceeding . . . relating to a claim under title IV of the Congressional Accountability Act of 1995 (2 U.S.C. § 1401 et seq.) which is pending as of the date after that 180-day period. If, as of that date, an employee has begun any of the proceedings under that title that were available to the employee prior to that date, the employee may complete, or initiate and complete, all such proceedings, and such proceedings shall remain in effect with respect to, and provide the exclusive proceedings for, the claim involved until the completion of all such proceedings.

As stated above, although Ferguson had initiated counseling and mediation in this case, these proceedings could not have concerned the allegations outlined in her December 26, 2019 pleading because those allegations all postdated the mediation period. Accordingly, when Ferguson filed her Complaint on December 2, 2019, she did not have any pending OCWR “proceeding relating to” her allegations in that Complaint. Moreover, Ferguson could not have “begun any of the [pre-Reform Act ADR] proceedings” *as to the allegations in the December 26 pleading*, because those allegations all postdated June 19, 2019. Accordingly, we find that section 401(b) is inapplicable, and Ferguson was not required to use pre-Reform Act procedures in connection with the allegations in her December 26 pleading.

We also reject the Library’s contention that Ferguson was “on notice” that the parties were adhering to pre-Reform Act ADR procedures regarding the December 26 pleading. Accepting this contention would re-impose the very jurisdictional prerequisites to adjudication of claims under the CAA that Congress removed when it passed the Reform Act. The Board has no authority to do so, and the parties cannot stipulate to jurisdiction. *Cf. National Presto Industries, Inc. v. Dazey Corp.*, 107 F.3d 1576, 1583 (Fed. Cir. 1997) (“Federal courts simply may not presume to create jurisdiction where Congress declines to do so.”); *Transpac Drilling Venture v. United States*, 16 F.3d 383 (Fed. Cir. 1994) (“Jurisdiction is never a matter of discretion.”); *Cruz v. Department of Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) (“[A] petitioner’s mere assertion cannot create jurisdiction.”).

Although we find that the Hearing Officer correctly dismissed this pre-Reform Act case, we also find that her decision to construe Ferguson’s December 26, 2019 pleading as an amendment to her December 2 Complaint was error. Because all of the allegations in the December 26 pleading post-dated the effective date of the Reform Act, that pleading should not have been regarded as an amended Complaint in this case, but instead should have been forwarded to the

Clerk of the Board for docketing as a new claim under post-Reform Act ADR procedures. Under these circumstances, we remand the pleading to the Clerk to be filed as a new claim under post-Reform Act ADR procedures with a filing date of December 26, 2019.

Several considerations underlie our determination. First, as stated above, when Ferguson, who was proceeding pro se at the time, indicated on December 2, 2019 that she wished to pursue her contentions to an OCWR administrative hearing, she was directed to file a complaint form under pre-Reform Act ADR procedures. The OCWR's direction was not incorrect insofar as administration of the instant case is concerned, as this case was initiated under pre-Reform Act procedures and the OCWR had no way of knowing on December 2, 2019, that Ferguson was attempting to pursue allegations that occurred after the effective date of the Reform Act. Second, Ferguson was clearly and understandably confused by the changing ADR procedures under the CAA, and she does not appear to have been aware that she simply could have filed a claim form concerning her allegations under the new post-Reform Act ADR procedures, under which counseling and mediation were no longer jurisdictional prerequisites. The Board will not construe the Reform Act as a procedural trap for unwary appellants who are merely attempting in good faith to secure adjudication of their claims pursuant to the CAA.

Finally, although the Hearing Officer made clear in her Order that she was dismissing this case without prejudice to refile, Ferguson also appears to have been confused about the significance of the "without prejudice" designation, which left her free to file a new claim on the same grounds. However, Ferguson has not abandoned her allegations. In fact, she has acted at each juncture to pursue her appeal, and under the unique circumstances of this case, we construe her petition for review of the Hearing Officer's Order of Dismissal as an indication that she desires to continue doing so.

The Library was clearly on notice of Ferguson's allegations when she filed her December 26, 2019 pleading, just as it would have been had Ferguson filed a claim form under the post-Reform Act ADR procedures on that date. Accordingly, fundamental fairness requires that Ferguson's pleading should be docketed as a new claim under post-Reform Act ADR procedures. The effective date of the filing shall be December 26, 2019. Per Procedural Rule § 4.08(a), the Executive Director of the OCWR will have 7 days after the issuance of this Opinion to appoint a Hearing Officer to conduct a preliminary review of Ferguson's claim. Under Procedural Rule § 4.08(d), Ferguson may amend her claim once as a matter of right within 15 calendar days from the date the OCWR Clerk docketed the new case.³

³ The OCWR offers Confidential Advising services, including assisting or consulting with covered employees regarding the drafting or amending of claim forms. See Procedural Rule §4.08(a).

ORDER

The Hearing Officer's January 13, 2020 Order is AFFIRMED AS MODIFIED herein. We REMAND Ferguson's December 26, 2019 pleading in this case to the OCWR Clerk for docketing as a new claim, with an effective filing date of December 26, 2019.

It is so ORDERED.

Issued, Washington, DC, **May 29, 2020**