UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD WASHINGTON REGIONAL OFFICE

MARTIN AKERMAN,

DOCKET NUMBER

Appellant,

DC-1221-22-0257-S-1

v.

DEPARTMENT OF THE ARMY,

DATE: March 7, 2022

Agency.

Martin Akerman, Arlington, Virginia, pro se.

Bernard E. Doyle, Arlington, Virginia, for the agency.

BEFORE

Melissa Mehring Administrative Judge

ORDER DISMISSING STAY REQUEST

The appellant filed a request asking the Merit Systems Protection Board (Board) to stay the agency's proposal to indefinitely suspend him from Federal Service.* Appeal File (AF), S-1, Tab 1. For the following reasons, the appellant's stay request is DISMISSED.

Background

The appellant filed a Board appeal seeking a stay of the agency's proposal to indefinitely suspend him. AF, Tab 1. In his stay request, the appellant

^{*} The Board has separately docketed the appellant's individual right of action (IRA) appeal. See MSPB Docket No. DC-1221-22-0257-W-1 (W-1). The current stay appeal will be cited as S-1.

indicated that he filed a complaint regarding his proposed suspension with the Office of Special Counsel (OSC), but has yet to exhaust his administrative remedies with OSC. *Id.* at 3-4.

Applicable Law and Analysis

OSC or an individual appellant may seek a stay of a personnel action with the Board. 5 U.S.C. §§ 1214(b)(1)(A)(i), 1221(c). The applicable statutes and regulations are dependent on which party seeks the stay. Stay requests, such as the one filed in this case by the appellant, are adjudicated pursuant to 5 U.S.C. § 1221, 5 C.F.R. §§ 1209.8 - .11.

An appellant may request a stay of a personnel action that he claimed was based on whistleblowing at any time **after** the appellant becomes eligible to file a Board appeal under <u>5 C.F.R. § 1209.5</u>. <u>5 C.F.R. § 1209.8(a)</u>; *See* <u>5 U.S.C. §§ 1221(a)</u>, (c)(1). If the appealed action is not otherwise appealable to the Board, an appellant must exhaust his remedies with OSC before coming to the Board. 5 U.S.C. §§ 1214(a)(3), 1221; 5 C.F.R. §§ 1209.1, .5. An appellant exhausts with OSC once OSC has notified an appellant that it is terminating its investigation into his complaint or 120 days have passed since the appellant filed his claim with OSC and he has not received a termination notice. 5 U.S.C. § 1214(a)(3).

In the instant case, the agency proposal notice was dated February 14, 2022. AF, Tab 1 at 8. The appellant stated that he filed his OSC complaint thereafter, but is still in the process of exhausting his remedies with that agency. AF, Tab 1 at 3. Therefore, I find the appellant's stay request is premature because he has not exhausted his administrative remedies with OSC. 5 U.S.C. §§ 1214(a)(3), 1221; 5 C.F.R. §§ 1209.1, .5., .8(a).

If the appellant's asserted personnel action was directly appealable to the Board (see <u>5 U.S.C.</u> §§ 7511-13, C.F.R. § 1201.3), he could choose either to seek corrective action with OSC before appealing to the Board or file his appeal

directly with the Board. <u>5 C.F.R. § 1209.5(b)</u>. Here the appellant is seeking redress for a proposed indefinite suspension. AF, Tab 1 at 8. A proposed action, however, is not an action directly appealable to the Board. *See* <u>5 U.S.C. §§ 7511-13, C.F.R. § 1201.3</u>.

Therefore, I find the Board lacks jurisdiction to consider this claim because the appellant has failed to establish Board jurisdiction under 5 U.S.C. chapter 75 or 5 U.S.C. § 1221. 5 U.S.C. §§ 7511-7513, 5 U.S.C. § 1221(a), (c)(1) and 5 C.F.R. § 1209.8(a). Specifically, the record does not support a finding that the Board has jurisdiction over the personnel action as an otherwise appealable action or in the context of an IRA appeal because the appellant has failed to demonstrate that he has exhausted his administrative remedies. Thus, the Board has no authority to grant the appellant's requested stay of his proposed indefinite suspension. See Weber v. Department of the Army, 47 M.S.P.R. 130, 133 (1991).

Accordingly, for all of these reasons, the appellant's request that the Board stay the agency's proposed indefinite suspension must be DISMISSED.

FOR THE BOARD:	/S/
	Melissa Mehring
	Administrative Judge