UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 39

Docket No. AT-1221-09-0728-W-1

David R. Mason,

Appellant,

v.

Department of Homeland Security,

Agency.

March 21, 2011

David R. Mason, Gallatin, Tennessee, pro se.

Steven M. Tapper, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a Financial Specialist with the Transportation Security Administration (TSA) in the Department of Homeland Security. Initial Appeal

File (IAF), Tab 6 at 23. After seeking corrective action from the Office of Special Counsel (OSC), he timely filed an IRA appeal seeking corrective action under the Whistleblower Protection Act (WPA). IAF, Tab 1, Tab 10 at 297-98. In it, he alleged that he made protected disclosures concerning an allegedly improper taxi fare receipt; a $251.87 purchase made on a government purchase card that exceeded the available balance of the agency's allocation for the quarter, and therefore possibly constituted an Anti-Deficiency Act (ADA) violation; an allegedly improper purchase without prior approval and in excess of available funds for the quarter, constituting a possible ADA violation; allegedly fraudulent travel vouchers; and an allegedly improper change in the scope of a contract. IAF, Tab 1 at 6-10.

¶3 The appellant further asserted the agency took the following personnel actions in retaliation for his disclosures: (1) a Letter of Reprimand, IAF, Tab 1 at 4, 11; (2) a Letter of Guidance and Direction, *Id.* at 11; *see* IAF, Tab 10 at 132-33; (3) denial of trainings or education, IAF, Tab 1 at 11; (4) denial of compensatory time, awards, and overtime, *id.*; (5) significant changes in his job duties, including asking the appellant to switch to a Program Analyst position, IAF, Tab 7 at 5-6; (6) a non-compliant and prejudicial Performance Evaluation Review (PER) and Supplemental Work Plan (SWP), IAF, Tab 1 at 11, Tab 7 at 6-7; (7) denial of a grievance [1] remedy and failure to provide a second step

[1] During 2008, the appellant filed five internal grievances, some of which appear to have been related to the disclosures set forth above. These were internal grievances governed by TSA Management Directive § 1100.77-2. *See* IAF, Tab 7 at 14. Through this grievance process, an employee files a written grievance with the First Step Official, who is usually the employee's first-line supervisor, and may file a second-step grievance with the Second Step Official, who is usually the employee's second-line supervisor. *See* IAF, Tab 7 at 14-15. This internal grievance process is separate and distinct from a negotiated grievance procedure, which is governed by 5 U.S.C. § 7121. It is undisputed that the appellant is not covered by a collective bargaining agreement. *See* IAF, Tab 6 at 21. Thus, by filing the grievances, the appellant made no election of remedies pursuant to 5 U.S.C. § 7121(g) that would preclude Board jurisdiction over this appeal. *See Devera v. Smithsonian Institution*, 100 M.S.P.R. 653, ¶ 12 n.6 (2005).

grievance response, IAF, Tab 7 at 5-6; and (8) defamatory statements, threats, and humiliation, *id*. at 5.

¶4 The appellant also requested a stay, which the agency and administrative judge construed as a request to stay the Letter of Reprimand. Stay Request (SR) File, Tab 1 at 11-12, Tab 4 at 4, Tab 5. The administrative judge denied the stay request. SR File, Tab 5.

¶5 The administrative judge issued an order apprising the appellant of the jurisdictional requirements in an IRA appeal[2] and ordering the parties to submit evidence and argument on the jurisdictional issue. IAF, Tab 9. After receiving the parties' responses, but without holding the requested hearing, the administrative judge issued an initial decision that dismissed the IRA appeal for lack of jurisdiction and denied the appellant's request for corrective action.[3] Initial Decision (ID) at 2, 8. She determined that the appellant's taxi fare disclosure was not protected. ID at 4. With regard to the appellant's remaining disclosures, the administrative judge determined that disclosures made to the agency's Office of the Inspector General (OIG) or to OSC could not have contributed to any personnel actions in this matter because they all occurred prior to the OIG and OSC disclosures. ID at 4-5, 7-8. She further concluded that the latter four disclosures to management were not protected because they were part of the appellant's normal duties. ID at 5-6. Further, the administrative judge

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[2] We note that the administrative judge incorrectly indicated that the appellant need only make a nonfrivolous allegation that he exhausted his OSC administrative remedies as part of his jurisdictional burden. IAF, Tab 9 at 2. This issue is discussed in detail below.

[3] An appellant's entitlement to corrective action under the WPA concerns the merits of his IRA appeal. *See Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 18 (2010). The Board may only address the merits after it has found jurisdiction over the appeal. *See Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000). Thus, the administrative judge's determination that the appellant failed to establish Board jurisdiction over his appeal is at odds with her denial of corrective action.

determined that the purchase card disclosure was not protected because the appellant stated only that there was a "possible" ADA violation. ID at 7.

¶6 The appellant filed a petition for review of this decision alleging, among other things, that the administrative judge erred in finding that his disclosures were not protected, and that new evidence will be available when OIG responds to his Freedom of Information Act (FOIA) request and when the agency complies with his previous discovery requests for which he filed a motion to compel. *See* Petition for Review (PFR) File, Tab 1. The agency responded in opposition. PFR File, Tab 3.

ANALYSIS

¶7 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before OSC and makes nonfrivolous allegations that: (1) He 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). Conclusory, vague, or unsupported allegations are insufficient to qualify as nonfrivolous allegations of IRA jurisdiction. *McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶ 7 (2008). In cases involving multiple alleged protected disclosures and personnel actions, an appellant establishes Board jurisdiction over his IRA appeal when he makes a nonfrivolous allegation that at least one alleged personnel action was taken in reprisal for at least one alleged protected disclosure. *Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 6 (2010). If the appellant establishes Board jurisdiction over his IRA appeal by exhausting his remedies before OSC and making the requisite nonfrivolous allegations, he has the right to a hearing on the merits of his claim. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 20 (2002).

Exhaustion

¶8 Under 5 U.S.C. § 1214(a)(3), an employee is required to seek corrective action from OSC before seeking corrective action from the Board. *Baldwin*, 113 M.S.P.R. 469, ¶ 8. The Board may only consider those disclosures of information and personnel actions that the appellant raised before OSC. *Id.* To satisfy the exhaustion requirement, the appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 13 (2009). An appellant may demonstrate exhaustion through his initial OSC complaint, evidence that he amended the original complaint, including but not limited to OSC's determination letter and other letters from OSC referencing any amended allegations, and the appellant's written responses to OSC referencing the amended allegations. *Id.*

¶9 The administrative judge incorrectly informed the appellant that he only needed to make a nonfrivolous allegation that he exhausted his OSC administrative remedies as part of his jurisdictional burden. IAF, Tab 9 at 2. However, the appellant must prove exhaustion. *Yunus*, 242 F.3d at 1371; *Rusin*, 92 M.S.P.R. 298, ¶ 12. In the initial decision, the administrative judge wrote that to establish jurisdiction over an IRA appeal, "the appellant must show that: (1) he raised the same issue(s) before OSC, and proceedings before OSC were exhausted," ID at 3, but she gave no further explanation and made no findings on exhaustion. *See* ID. Further, the administrative judge failed to advise the pro se appellant of the means by which he may show that he has satisfied the exhaustion requirement, informing him only that he "must specifically identify what disclosures and what personnel actions he brought to OSC and provide evidence of such." IAF, Tab 9 at 2-3. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). Because the administrative judge did not clearly advise the appellant of the proper

jurisdictional burden for satisfying the exhaustion requirement or explain how he could show that he satisfied that burden, the deficiencies were not cured by either the initial decision or any agency pleading, and she made no findings regarding exhaustion, the appeal must be remanded to allow the parties an opportunity to submit evidence and argument regarding the exhaustion issue. *Kukoyi*, 111 M.S.P.R. 404, ¶¶ 14, 17; *Hudson v. Department of Veterans Affairs*, 104 M.S.P.R. 283, ¶¶ 7-8 (2006).

¶10 As set forth below, we find based on the current record that the appellant exhausted his OSC remedies with respect to some of the disclosures and personnel actions that he alleged before the Board. The exhaustion issue for the remainder must be adjudicated on remand.

¶11 The appellant filed Form OSC-12 Disclosures of Information with OSC's Disclosure Unit, alleging each of the five above-referenced disclosures. IAF, Tab 10 at 40-48, 167-174, 183-191, 215-223, 256-264. Additionally, on December 10, 2008, he filed two Form OSC-11 Complaints of Possible Prohibited Personnel Practices ("OSC complaints") with OSC's Complaints Examining Unit seeking corrective action under the WPA.[4] IAF, Tab 10 at 51-64, 113-126.

¶12 In one OSC complaint, the appellant alleged that on April 24, 2008, he disclosed a possible ADA violation concerning an unapproved expenditure on a government purchase card to Federal Security Director (FSD) W. Paul Armes, filed a grievance on June 27, 2008, and reported the alleged wrongdoing to OIG on October 10, 2008. IAF, Tab 10 at 116, 120, 122. He alleged that in reprisal for making this disclosure, the agency took or failed to take the following actions: (1) issued the Letter of Guidance and Direction; (2) denied him training or education; (3) denied him awards; (4) significantly altered his duties and moved him "outside the Operations group"; (5) issued an inaccurate PER; and (6)

[4] In this Opinion and Order, "OSC" refers to OSC's Complaints Examining Unit unless otherwise noted.

denied his grievance and failed to issue a second-step grievance decision. *Id.* at 119, 122.

¶13 In the other OSC complaint, the appellant alleged that on March 9, 2007, he disclosed to Assistant FSD (AFSD) Ken Meyer that "[a] potentially fraudulent receipt was submitted for a $160 taxi fare. It was a single receipt presented to cover 2 $80 taxi rides that constituted a round trip. The rides occurred on two different days (2/26/2007 and 3/1/2007). The transaction was apparently cash." IAF, Tab 10 at 58. He alleged that he filed a grievance on April 15, 2008, and reported the alleged wrongdoing to OIG on July 9, 2008. *Id.* at 54. The appellant contended that in reprisal for making this disclosure, the agency allegedly took or failed to take the following actions: (1) FSD Armes made comments about the appellant's "customer service" during their April 2008 meeting about the taxi fare receipt; (2) the agency significantly changed his duties on December 13, 2007; (3) the agency denied his December 5, 2007, May 20, and July 14, 2008 requests for training or education; (4) the agency overloaded him with new duties and denied his requests for compensatory time on May 23, 27, and 30, and July 16, 2008; and (5) the agency issued PERs on December 12, 2007, and June 24, 2008, which contained inaccuracies and did not comply with management directives. *Id.* at 58, 60.

¶14 OSC apprised the appellant of its preliminary determination to close its inquiry into his claims, specifically referencing the taxi fare and purchase card disclosures,[5] and the alleged personnel actions of the inaccurate PER process, significant changes to his duties, the Letter of Guidance and Direction, and the Letter of Reprimand. IAF, Tab 10 at 282-284. OSC then closed its investigation into the appellant's claims, and apprised him of his right to seek corrective action with the Board. *Id.* at 297-298.

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[5] Additionally, OSC referred to the appellant's June 19, 2008 disclosure of a potential breach concerning the failure of a vendor to inspect meter facilities. IAF, Tab 10 at 282. The appellant did not raise this claim before the Board. *See* IAF, Tabs 1, 7, 10.

¶15 The current record indicates that the appellant exhausted his OSC remedies with respect to the taxi fare disclosure and his allegations that, in retaliation for that disclosure, the agency made comments about his "customer service" during an April 2008 meeting; significantly changed his duties on December 13, 2007; denied his December 5, 2007, May 20, and July 14, 2008 requests for training or education; overloaded him with new duties and denied his requests for compensatory time on May 23, 27, and 30, and July 16, 2008; and issued inaccurate PERs on December 12, 2007, and June 24, 2008. *Id.* at 58, 60. He further exhausted with OSC his allegations that, in retaliation for his purchase card disclosure, the agency issued the Letter of Guidance and Direction; denied him trainings or education; denied him awards; significantly altered his duties and moved him "outside the Operations group"; issued an inaccurate PER; and denied his grievance and failed to issue a second-step grievance decision. *Id.* at 119, 122. He also raised before OSC the Letter of Reprimand, but it is unclear with which disclosure this personnel action was associated. *Id.* at 282.

¶16 With respect to the travel voucher, work order, and change-in-scope disclosures, the current record indicates that the appellant raised them solely before OSC's Disclosure Unit in Form OSC-12s. IAF, Tab 10 at 167-174, 215-223, 256-264. Unlike OSC's Complaints Examining Unit, the Disclosure Unit does not review allegations of prohibited personnel practices. *See id.* at 161. Thus, making disclosures to OSC's Disclosure Unit does not satisfy the exhaustion requirement under 5 U.S.C. § 1214(a)(3). *See Sabbagh v. Department of the Army*, 110 M.S.P.R. 13, ¶¶ 10-15 (2008); *Clemente v. Department of Homeland Security*, 101 M.S.P.R. 519, ¶¶ 7-13 (2006). On remand, the appellant will have a further opportunity to show that he exhausted his administrative remedies with respect to these and any other remaining allegations.

Disclosures

¶17 Protected whistleblowing occurs when an appellant makes a disclosure that he reasonably believes evidences a violation of law, rule, or regulation, gross

mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *See* 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b); *Baldwin*, 113 M.S.P.R. 469, ¶ 12. The appellant is not required to identify the particular statutory or regulatory provision that the agency allegedly violated when his statements and circumstances of those statements clearly implicate an identifiable law, rule, or regulation. Rather, at the jurisdictional stage, he is only burdened with nonfrivolously alleging that he reasonably believed that his disclosure evidenced a violation of one of the circumstances described in 5 U.S.C. § 2302(b)(8). *Baldwin*, 113 M.S.P.R. 469, ¶ 12. The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Id.*

Purchase Card Disclosure

¶18 On April 24, 2008, the appellant informed FSD Armes that an employee purchased $251.87 in administrative supplies, which exceeded the $13.20 available balance of the agency's allocation for the second quarter, and therefore possibly constituted an ADA violation. IAF, Tab 10 at 192; *see* IAF, Tab 6 at 15. The appellant made similar disclosures to OIG on October 10 and 14, 2008, and to OSC on December 29, 2008. IAF, Tab 10 at 12, 20-21, 116, 183-91; *see* IAF, Tab 6 at 15.

¶19 The ADA, 31 U.S.C. § 1341(a)(1), provides that an "officer or employee of the United States Government . . . may not – (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." A disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could have reasonably believed that the purchase card charge that exceeded the

remaining budget allocation for administrative supplies was a violation of law, rule, or regulation. *See Schmittling v. Department of the Army*, 92 M.S.P.R. 572, ¶ 12 (2002) (finding the disclosure of an alleged ADA violation protected). Contrary to the initial decision, the appellant's use of qualifying terms like "potential" and "possible" to describe the alleged wrongdoing do not preclude a finding that he nonfrivolously alleged that he made a protected disclosure. *See, e.g.*, *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202, ¶ 9 (2007) ("possible illegal acts"); *Conrad v. Department of Justice*, 99 M.S.P.R. 636, ¶¶ 6, 14 (2005) ("aiding or abetting in a potentially criminal act").

¶20 The administrative judge found that the appellant made the purchase card disclosure to Armes as part of his normal job duties and that the disclosures to OIG and OSC post-dated all the alleged personnel actions taken in reprisal for this disclosure. *See* ID at 5-8. The United States Court of Appeals for the Federal Circuit ("Federal Circuit") has held that disclosures made by employees in the normal performance of their duties cannot constitute protected disclosures. *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001). However, in the following two situations, the Federal Circuit has held that a disclosure of wrongdoing is protected: (1) when an employee is obligated to report wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties; and (2) when an employee with investigatory responsibilities reports wrongdoing uncovered during an investigation outside of the "normal channels." *Id.* at 1354.

¶21 The appellant's duties included monitoring, analyzing, and providing expert advice and recommendations regarding the airport's budget and expenditures. IAF, Tab 6 at 72. On April 9, 2008, Armes instructed the appellant, among others, that "[a]ny anomalies outside the realm of routine business will be provided to me for consideration and decision." IAF, Tab 6 at 52. The appellant's April 24, 2008 purchase card disclosure to Armes appears to have been in direct response to Armes's April 9, 2008 instruction. IAF, Tab 7 at

35. Thus, the disclosure was within the normal performance of the appellant's duties and in accordance with management's instructions. As such, it was not protected under the WPA.

¶22 The appellant also made the purchase card disclosure to OIG on October 10 and 14, 2008, and to OSC on December 29, 2008, IAF, Tab 10 at 12, 20-21, 116, 183-91; *see* IAF, Tab 6 at 15, all of which were outside of his normal job duties.[6] These disclosures are therefore protected.

Taxi Fare Disclosure

¶23 On March 9, 2007, the appellant e-mailed AFSD Meyer, his second-line supervisor, "to call attention to" a handwritten taxi fare receipt in the amount of $160.00; the single receipt covered two taxi rides taken by an employee on February 26, and March 1, 2007. IAF, Tab 10 at 65-66; *see* IAF, Tab 6 at 15. On July 9, 2008, the appellant claims to have reported the potentially fraudulent receipt to OIG, and on December 10, 2008, he reported it to OSC. *See* IAF, Tab 6 at 15, Tab 10 at 4, 7, 40-50, 54. The Board has held that the disclosure of a fraudulent claim on a travel voucher or excessive travel expenditures is a protected disclosure of a violation of law, rule, or regulation. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 237-38 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table**);** *Ward v. Department of the Army*, 67 M.S.P.R. 482, 486-87 (1995). The appellant had experience reviewing travel documents. *See* IAF, Tab 7 at 20-21. Based upon the foregoing, we find that the appellant nonfrivolously alleged that he reasonably believed that he was disclosing a violation of law, rule, or regulation.

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[6] We note that the appellant also filed internal grievances, which involved the purchase card matter and other disclosures alleged in this appeal. However, internal grievances and matters disclosed therein do not constitute protected disclosures under the WPA, but are instead covered by 5 U.S.C. § 2302(b)(9). *Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1575-76 (Fed. Cir. 1996); *Boechler v. Department of the Interior*, 109 M.S.P.R. 542, ¶ 9 (2008), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009); *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 154 (1995).

¶24 However, the record reflects that the appellant's duties include monitoring financial expenditures, serving as the Organization Administrator for the agency's travel card program, approving travel documents, and raising questions about travel vouchers "when red flags arise." *See* IAF, Tab 6 at 72, Tab 7 at 20-22, 52-53, 78. Consequently, we find that the appellant's disclosure of the potentially fraudulent taxi fare receipt to AFSD Meyer fell within his normal job duties, and therefore that disclosure is not protected. *See Huffman*, 263 F.3d at 1353.

¶25 The appellant's December 10, 2008 disclosure of the taxi fare issue to OSC is protected, as it was outside of his normal job duties. It is unclear from the current record, however, whether the appellant made the same disclosure in his July 9, 2008 report of alleged wrongdoing to OIG, as he has claimed. *See* IAF, Tab 10 at 7, 45, 54. If so, that would also have been outside of his normal job duties, and therefore would be protected. *See Huffman*, 263 F.3d at 1354. On remand, the administrative judge shall afford the parties an opportunity to submit any evidence and argument that she deems necessary to resolve this issue. To the extent the appellant alleges that he is waiting to receive documents relevant to this issue from OIG through his FOIA request, the administrative judge shall afford him a reasonable opportunity to obtain such information. *See* PFR File, Tab 1 at 8. In the new initial decision, the administrative judge shall set forth her findings on whether the appellant nonfrivolously alleged that his July 9, 2008 OIG report of alleged wrongdoing is a protected disclosure of the taxi fare matter.

Contributing Factor

¶26 To satisfy the contributing factor criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Baldwin*, 113 M.S.P.R. 469, ¶ 22. One way to establish this criterion is the knowledge-timing test, under which an employee may nonfrivolously allege that the disclosure was a contributing factor in a personnel action through circumstantial

evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.* Once an appellant has made a nonfrivolous allegation that the knowledge-timing test has been met, he has established the contributing factor jurisdictional element.[7] *Santos v. Department of Energy*, 102 M.S.P.R. 370, ¶ 11 (2006); *Wood v. Department of Defense*, 100 M.S.P.R. 133, ¶ 13 (2005).

Purchase Card Disclosure

¶27 As set forth above, the appellant made the purchase card disclosure to OIG on October 10 and 14, 2008, and to OSC on December 29, 2008, IAF, Tab 10 at 12, 20-21, 116, 183-91; *see* IAF, Tab 6 at 15. However, the agency had issued the Letter of Guidance and Direction on June 12, 2008, and the Letter of Reprimand on September 17, 2008 – well before those disclosures occurred. IAF, Tab 10 at 132-33, 188-90. Similarly, the first step grievance official denied the appellant's grievance related to this matter on July 11, 2008. IAF, Tab 7 at 42. Accordingly, the protected purchase card disclosures could not have been a contributing factor in these personnel actions. *See Kukoyi*, 111 M.S.P.R. 404, ¶ 11 (disclosures made after the agency has taken the personnel actions at issue

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[7] Some Board cases have incorrectly stated that once an appellant nonfrivolously alleges that the knowledge/timing test has been met, the administrative judge must find that the appellant's whistleblowing was a contributing factor in the personnel action. *E.g.*, *Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 9 (2011); *Kukoyi*, 111 M.S.P.R. 404, ¶ 15. At the jurisdictional stage, a nonfrivolous allegation that the knowledge/timing test has been met only establishes that the contributing factor jurisdictional element has been met. To the extent that *Herman* and *Kukoyi* apply this standard to the merits, they are overruled. Instead, at the merits stage, once an appellant's evidence establishes by preponderant evidence that the knowledge/timing test has been met, the administrative judge must find that the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue. *Schnell*, 114 M.S.P.R. 83, ¶ 21; *Wadhwa v. Department of the Army*, 100 M.S.P.R. 615, ¶ 13 (2009).

cannot have been contributing factors in those personnel actions and do not meet the nonfrivolous allegation requirement).

¶28 It is unclear when the remaining alleged personnel actions associated with this disclosure and exhausted before OSC occurred, i.e., denial of trainings or education, denial of awards, significant alteration of his duties, and the issuance of an inaccurate PER.[8] *See* IAF, Tab 10 at 119, 122. Further, while denial of awards, significant alteration of duties, and a performance evaluation under 5 U.S.C. chapter 43 constitute personnel actions within the meaning of the WPA, a decision concerning education or training only qualifies as a "personnel action" if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in 5 U.S.C. § 2302(a)(2)(A). 5 U.S.C. § 2302(a)(2)(A)(viii), (ix), (xi). The record is insufficient to determine whether the education and training at issue meets this standard. On remand, the administrative judge shall determine whether the timing of these personnel actions was such that the purchase card disclosure could have been a contributing factor for any of them and whether the denied education and training meets the requirements of 5 U.S.C. § 2302(a)(2)(A)(ix). The new initial decision shall contain findings on all of the contributing factor issues.

Taxi Fare Disclosure

¶29 The appellant made the taxi fare disclosure to OSC on December 10, 2008. As explained previously, it is unclear whether he made that disclosure in his July 9, 2008 report of alleged wrongdoing to OIG. All of the personnel actions the appellant exhausted before OSC and claims were in retaliation for this disclosure occurred before his OSC disclosure. Additionally, even if he made the taxi fare

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[8] The current record contains some indication that the allegedly inaccurate PER was issued on April 30, 2008. IAF, Tab 7 at 121-133. If that is correct, the appellant's subsequent disclosures to OIG and OSC could not have contributed to this personnel action. *See Kukoyi*, 111 M.S.P.R. 404, ¶ 11.

disclosure to OIG on July 9, 2008, the following exhausted personnel actions pre-dated that disclosure as well: comments about his "customer service" during an April 2008 meeting; significant changes to his duties on December 13, 2007; denial of his December 5, 2007 and May 20, 2008 requests for training and education; overloading him with new duties and denial of his requests for compensatory time on May 23, 27, and 30, 2008; and issuance of inaccurate PERs on December 12, 2007, and June 24, 2008. *Id.* at 58, 60. Accordingly, the appellant has failed to nonfrivolously allege that the taxi fare disclosure contributed to these alleged personnel actions. *See Kukoyi*, 111 M.S.P.R. 404, ¶ 11. If the appellant made the taxi fare disclosure to OIG on July 9, 2008, that disclosure could potentially have contributed to the September 17, 2008 Letter of Reprimand, the July 14, 2008 request for training or education, and the July 16, 2008 denial of his request for compensatory time and overloading him with duties. Each of these matters could be considered personnel actions within the meaning of the WPA. 5 U.S.C. § 2302(a)(2)(A)(iii) (a disciplinary or corrective action), (ix) (decisions concerning pay, benefits, or awards, or training and education if the education and training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in 5 U.S.C. § 2302(a)(2)(A)), (xi) (any other significant change in duties, responsibilities, or working conditions); *Horton v. Department of Veterans Affairs*, 106 M.S.P.R. 234, ¶ 18 (2007) (a letter of reprimand is a personnel action within the meaning of the WPA). After determining whether the appellant made the taxi fare disclosure to OIG on July 9, 2008, the administrative judge shall make findings concerning the remaining issues relevant to the contributing factor jurisdictional criterion in the new initial decision.

Stay Request

¶30 On review, the appellant alleges that the administrative judge erred in denying his stay request. PFR File, Tab 1 at 9. However, an appellant may not challenge an administrative judge's order on a stay request under the WPA

through the petition for review process; a request for an interlocutory appeal is the only option. *Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 24 (2004). Here, the appellant did not seek an interlocutory appeal. Thus, on review, the Board will not consider the appellant's challenge to the administrative judge's denial of his stay request.

ORDER

¶31 On remand, the administrative judge shall afford the parties an opportunity to submit additional evidence and argument sufficient to resolve the remaining jurisdictional questions in this appeal in accordance with the instructions above. In doing so, she shall rule on the appellant's motion to compel discovery. If jurisdiction exists, the administrative judge will adjudicate this appeal on the merits. She shall then issue a new initial decision incorporating the Board's findings in this Opinion and Order, explaining her remaining jurisdictional findings, and, if appropriate, her findings regarding the merits.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.