UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 62

Docket No. AT-1221-09-0670-W-1

Delvin L. Baldwin,

Appellant,

v.

Department of Veterans Affairs,

Agency.

April 12, 2010

Delvin L. Baldwin, North Charleston, South Carolina, pro se.

Edith W. Lewis, Esquire, Columbia, South Carolina, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the PFR; AFFIRM the initial decision in part; REVERSE the initial decision in part; and REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On October 12, 2008, the agency appointed the appellant to a career-conditional, competitive service position as a Materials Handler with the Veterans Affairs Consolidated Mail Outpatient Pharmacy (CMOP) in North Charleston, South Carolina, subject to a 1-year probationary period. Initial Appeal File (IAF), Tab 12, subtab 4s at 1. Effective April 21, 2009, the agency terminated the appellant for performance and conduct issues. *Id.*, subtab 4f.

¶3 The appellant filed a Board appeal seeking corrective action, alleging that the agency terminated him during his probationary period in reprisal for making the following disclosures protected by the Whistleblower Protection Act (WPA): (1) two co-workers repeatedly threatened to physically harm him (physical violence disclosure); (2) Cindy Spicer, the Production Supervisor, violated his First Amendment rights when he challenged her instructions (First Amendment disclosure); and (3) Ms. Spicer undermined instructions that the appellant received from Ronald Boneberg, the Director of CMOP, and Deputy Director Dena Wolforth regarding his receiving duties (undermining or thwarting instructions disclosure). IAF, Tab 1 at 9-28. He requested a hearing. *Id.* at 2, Tab 4 at 4.

¶4 The administrative judge issued a jurisdictional show cause order that apprised the appellant of his burden to establish jurisdiction over his IRA appeal, and ordered him to present evidence and argument on the jurisdictional issue. IAF, Tab 5. The appellant responded, asserting two additional disclosures that he allegedly made to Ms. Wolforth about Ms. Spicer: that Ms. Spicer violated 5 U.S.C. § 2302(b)(1)-(b)(12) when she made employment recommendations based on factors other than her personal knowledge or records of job-related abilities or characteristics (employment recommendations disclosure); and that her directives destabilized CMOP's objectives (destabilization disclosure). IAF, Tab 6 at 7-9. He further alleged that he exhausted his administrative remedies before the Office of Special Counsel (OSC), and that his protected disclosures were a contributing

factor in his termination. *Id.* at 4-30. The agency later submitted its file. IAF, Tab 12.

¶5 Without holding the requested hearing, the administrative judge issued an initial decision dismissing the IRA appeal for lack of jurisdiction based on the following findings: (1) the appellant did not exhaust his OSC remedies with respect to his employment recommendations, destabilization, and undermining or thwarting instructions disclosures; and (2) although the appellant exhausted his OSC remedies regarding his First Amendment and physical violence disclosures, neither disclosure is protected under 5 U.S.C. § 2302(b)(8); the physical violence disclosure is protected under 5 U.S.C. § 2302(b)(9). *See* ID at 1-5. The appellant has filed a PFR of this decision. PFR File, Tab 1. The agency has responded in opposition. PFR File, Tab 3.

ANALYSIS

The administrative judge erred in dismissing the IRA appeal for lack of jurisdiction.

¶6 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his 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); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002). In cases involving multiple alleged protected disclosures and multiple alleged personnel actions, an appellant establishes the Board's 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. *Groseclose v. Department of the Navy*, 111 M.S.P.R. 194, ¶ 15 (2009). If the appellant successfully establishes jurisdiction, the Board then conducts a hearing on the merits. *Kahn v.*

Department of Justice, 528 F.3d 1336, 1341 (Fed. Cir. 2008); *Iyer v. Department of the Treasury*, 95 M.S.P.R. 239, ¶ 6 (2003), *aff'd*, 104 F. App'x 159 (Fed. Cir. 2004).

¶7 On review, the appellant challenges the administrative judge's findings and alleges that: (1) he nonfrivolously alleged jurisdiction over his IRA appeal; (2) the administrative judge erroneously analyzed the appellant's physical violence disclosure under 5 U.S.C. § 2302(b)(9) instead of under subsection (b)(8); and (3) he is entitled to a hearing. PFR File, Tab 1 at 5-7.

1. The appellant exhausted his OSC remedies as to all his alleged disclosures.

¶8 Under 5 U.S.C. § 1214(a)(3), an employee is required to seek corrective action from the OSC before seeking corrective action from the Board. *Briley v. National Archives & Records Administration*, 236 F.3d 1373, 1377 (Fed. Cir. 2001); *Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶ 14 (2004). The Board may only consider charges of whistleblowing that the appellant raised before OSC. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993); *Coufal*, 98 M.S.P.R. 31, ¶¶ 14, 18. 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. *Ellison*, 7 F.3d at 1036; *Coufal*, 98 M.S.P.R. 31, ¶ 14. An appellant may demonstrate exhaustion of his OSC remedies through his initial OSC complaint, and evidence that he amended or supplemented his initial OSC complaint, including but not limited to, OSC's determination letter and other letters from OSC referencing the appellant's amended allegations, and the appellant's written responses to OSC referencing OSC's discussion of the amended allegations. *See Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶¶ 12-15 (2008); *Kinsey v. Department of the Navy*, 107 M.S.P.R. 426, ¶ 15 (2007).

¶9 Here, the administrative judge determined that the appellant exhausted his OSC remedies regarding his First Amendment and physical violence disclosures.

See ID at 4. Based on our review of the record, we discern no reason to disturb these findings, and therefore AFFIRM them. *See* IAF, Tab 1 at 5-7, Tab 6 at 15, 20-25, 29.

¶10 The administrative judge also determined that, because there was no mention of any of the other 3 alleged disclosures in OSC's 2009 termination letter, the appellant failed to exhaust his OSC remedies with respect to these alleged disclosures. The administrative judge determined that as a result these disclosures could not be considered. ID at 2-4. On review, the appellant argues that OSC considered his December 8, 2008 letter, which set forth the 3 above-referenced disclosures and, thus, the administrative judge erred in finding that he failed to exhaust his OSC remedies. PFR File, Tab 1 at 5, 10-12. We agree.

¶11 The May 12, 2009 OSC determination letter does not enumerate these 3 disclosures; however, it plainly states that among other things, OSC considered the appellant's December 8, 2008 letter to Ms. Wolforth, reporting Ms. Spicer's alleged violations of the law, gross mismanagement and/or abuse of authority.[1] IAF, Tab 1 at 6; *see Pasley*, 109 M.S.P.R. 105, ¶¶ 13-15. In the December 8, 2008 letter, the appellant alleged in part that: (1) Ms. Spicer "went to great lengths to thwart" his orders from Mr. Boneberg and Ms. Wolforth; (2) Ms. Spicer violated 5 U.S.C. § 2302(b)(1)-(b)(12) when she "[s]olicit[ed] or consider[ed] employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics"; and (3) Ms. Spicer's directives "destabilize[d] [the] National overall objective of instituting Material Handlers to its CMOP locations." IAF, Tab 6 at 14, 16, 19, Tab 12, subtab 4p at 1, 3, 6. Thus, the appellant raised the undermining or thwarting

[1] We note that OSC characterized the appellant's disclosures as allegations of violations of law, gross mismanagement and abuse of authority. IAF, Tab 1 at 6. Other than Ms. Spicer's alleged violation of 5 U.S.C. § 2302(b)(1)-(b)(12), the appellant's December 8 letter did not characterize the nature of his allegations of wrongdoing. *See* IAF, Tab 12, subtab 4p.

instructions, destabilization, and employment recommendations disclosures before OSC, and ultimately, OSC closed its investigation and notified the appellant of his right to seek corrective action with the Board. IAF, Tab 6 at 20-21. Based on the foregoing, we find that the appellant proved he exhausted his OSC remedies concerning his undermining or thwarting instructions, employment recommendations, and destabilization disclosures. We therefore REVERSE the part of the initial decision finding that the appellant failed to exhaust his OSC remedies concerning these three disclosures.

2. The appellant failed to nonfrivolously allege that his First Amendment, thwarting orders, destabilization, and employment recommendations disclosures were protected.

¶12 Once the appellant has proven that he exhausted his OSC remedies, the next jurisdictional inquiry in an IRA appeal is whether he has nonfrivolously alleged that he made one or more protected disclosures. *See Groseclose*, 111 M.S.P.R. 194, ¶ 22 (citing *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 11 (2004)). Protected whistleblowing takes place where an appellant made disclosures that he reasonably believed evidenced 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 or safety. 5 U.S.C. § 2302(b)(8); *Groseclose*, 111 M.S.P.R. 194, ¶ 22 (citing *Grubb*, 96 M.S.P.R. 377, ¶ 11). Under the WPA, the employee is not required to identify the particular statutory or regulatory provision that the agency allegedly violated where his statements and circumstances of those statements clearly implicate an identifiable law, rule or regulation; he is only burdened with making a nonfrivolous allegation that he reasonably believed that his disclosure evidenced one of the circumstances described at 5 U.S.C. § 2302(b)(8). *Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 13 (2005). The question 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 out in 5 U.S.C. § 2302(b)(8). *Groseclose*, 111 M.S.P.R. 194, ¶ 22 (citing *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

a. First Amendment disclosure

¶13 The appellant does not challenge the administrative judge's findings that he failed to nonfrivolously allege that he reasonably believed Ms. Spicer's telling him, "[w]atch your tone young man," evidenced 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 or safety, and therefore the disclosure is not protected. *See* PFR File, Tab 1; ID at 4; 5 U.S.C. § 2302(b)(8); *Groseclose*, 111 M.S.P.R. 194, ¶ 22; IAF, Tab 1 at 7. We discern no reason to disturb these findings, and therefore AFFIRM them.

b. thwarting orders, destabilization, and employment recommendations disclosures

¶14 On review, the appellant argues that he reasonably believed that his thwarting orders, destabilization, and employment recommendations disclosures are protected by the WPA. PFR File, Tab 1 at 7. We disagree. With respect to the employment recommendations disclosure, the appellant vaguely alleged that upon recommendations by other personnel staff, Ms. Spicer held a meeting with him and other co-workers to discuss handling duties, and recited almost verbatim the statutory language at 5 U.S.C. § 2302(b)(2), i.e., that it is a prohibited personnel practice to "[s]olicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics." IAF, Tab 6 at 15-16. The Board has held that allegations of violations of 5 U.S.C. § 2302(b)(2) and related provisions of law can sometimes constitute whistleblowing. *See McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶¶ 9-13 (2008) (subsections (b)(2), (b)(6), and (b)(10)); *Luecht v. Department of the Navy*, 87 M.S.P.R. 297, ¶ 14 ((2000) (subsections (b)(1), (b)(6), and (b)(11)). Here, however, while citing the language of § 2302(b)(2),

the appellant has failed to adduce any facts that would constitute a nonfrivolous allegation of a violation of this provision. Thus, the appellant has not made a nonfrivolous allegation of a whistleblowing disclosure in this regard.

¶15 With respect to the thwarting orders and destabilization disclosures, the appellant has failed to make a nonfrivolous allegation that he reasonably believed that Ms. Spicer's alleged attempts to thwart the appellant's orders from the Director and Deputy Director of CMOP, and the alleged destabilizing effect of Ms. Spicer's actions and orders on the agency's objectives, evidenced a violation of law, rule, or regulation, or one of the other conditions enumerated in 5 U.S.C. § 2302(b)(8). *See* IAF, Tab 6 at 14, 19. The appellant has not identified any law, rule or regulation that was violated, and none is apparent. Further, these alleged protected disclosures fail to evidence an abuse of authority or gross mismanagement. *See Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001) (an abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons); *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994) (gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission). Consequently, the appellant has not nonfrivolously alleged that either of these disclosures is protected by the WPA.

3. The appellant nonfrivolously alleged whistleblower reprisal with respect to his physical violence disclosure.

a. protected disclosure

¶16 The appellant disclosed three separate incidents where his co-workers threatened to physically harm him, two involving blatant verbal threats, and one where his co-worker waved a box cutter at him in a threatening manner. IAF, Tab 6 at 22-29, Tab 12, subtabs 4b, 4l, 4m. He alleged that in reprisal for reporting these threats of physical violence, the agency decided to terminate him.

IAF, Tab 1 at 5-6, 17-18, Tab 12, subtab 4(b) at 1-3, subtab 4(f). The administrative judge determined that this allegation merely represented reprisal "'based upon exercising his right to complain' rather than upon 'reprisal based on disclosure of information.' . . . Accordingly, [he found] that these allegations are protected under 5 U.S.C. § 2302(b)(9), not 5 U.S.C. § 2302(b)(8)." ID at 4. On review, the appellant argues that the administrative judge erroneously analyzed this disclosure under 5 U.S.C. § 2302(b)(9) instead of under subsection (b)(8), and that he made a protected disclosure, as these threats of physical violence violated law, rule and regulation. PFR File, Tab 1 at 5-6; *see* ID at 4-5.

¶17 We find that the administrative judge erred in finding, based upon the current record, that these allegations were protected under 5 U.S.C. § 2302(b)(9)(A), and not under section 2302(b)(8). The appellant alleged below that he immediately reported threats of physical violence by 2 co-workers to agency management and an investigation followed in which he provided written statements. IAF, Tab 7 at 4-5. In its jurisdictional response, the agency asserted that the appellant "documented two unpleasant co-worker interactions," but did not state that the appellant's disclosures were made in the course of the negotiated grievance procedure. IAF, Tab 12 at Subtab 1. While the record also reflects that a union representative became involved in discussing workplace conditions in the appellant's duty section, the union's role did not convert the appellant's alleged disclosures into a formal grievance or other complaint covered by section 2302(b)(9). Thus, under the above circumstances, we conclude that the appellant made a non-frivolous allegation that his complaints were disclosures of information outside the grievance procedure that he could reasonably believe constituted violations of the law within section 2302(b)(8).

¶18 The appellant's disclosure clearly implies that he feared his co-worker was trying to physically injure or attack him when his co-worker waved a box cutter at him. Because the inquiry 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 law, *Groseclose*, 111 M.S.P.R. 194, ¶ 22, we consider concepts of criminal law from a layman's perspective as well as in a legal sense.

¶19 The lay definition of an "assault" is "a threat or attempt to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger of or in apprehension of such harm or contact." *See* http://www.merriam-webster.com/dictionary/assault. A legal dictionary similarly defines an "assault" as:

> 1. Criminal & tort law. The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harm or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.
>
> 2. Criminal law. An attempt to commit battery, requiring the specific intent to cause physical injury. — Also termed (in senses 1 and 2) simple assault.
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> . . .

Black's Law Dictionary 109 (7th deluxe ed. 1999). The definition of an "aggravated assault" is a "[c]riminal assault accompanied by circumstances that make it more severe, such as the use of a deadly weapon, the intent to commit another crime, or the intent to cause serious bodily harm." *Id.*

¶20 In South Carolina,[2] common law assault constitutes "'an attempted battery' or an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery." *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283, 285 (2000). The court observed that the "intentional creation of apprehension of immediate bodily harm type of assault has been specifically adopted as a definition of criminal assault by most jurisdictions." *Id.* at 286.

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[2] The appellant alleged that his co-worker threatened him with a box cutter while he was working at CMOP, which is located in North Charleston, South Carolina. IAF, Tab 6 at 22, 24. Therefore, South Carolina law should be applied in this appeal.

¶21 A box cutter, by its very nature, is a knife with a sharp blade used to cut, and therefore may reasonably be construed as a deadly weapon depending upon the circumstances. Waving a box cutter at another person implies a threat of immediate force with a deadly weapon against that person; therefore, a disinterested observer could reasonably believe that the act of waving a box cutter at another person could be a violation of law. *See* IAF, Tab 6 at 22-29, Tab 12, subtabs 4b, 4l, 4m. Based on the foregoing, we find that the appellant has nonfrivolously alleged that he reasonably believed he disclosed a violation of law, and, therefore, the disclosure is protected by the WPA.

b. contributing factor

¶22 In order 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. *Atkinson v. Department of State*, 107 M.S.P.R. 136, ¶ 15 (2007) (citing *Santos v. Department of Energy*, 102 M.S.P.R. 370, ¶ 10 (2006)) (emphasis in original). Under the knowledge/timing test of 5 U.S.C. § 1221(e)(1), an employee may demonstrate 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. *Carey v. Department of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 11 (2003); *see Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 12 (2009), *aff'd*, 353 F. App'x 435 (Fed. Cir. 2009). While the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard, it is "one of the many possible ways" to satisfy the standard. *Carey*, 93 M.S.P.R. 676, ¶ 11.

¶23 The appellant asserted in his Affidavit and Response to Jurisdictional Order that Mr. Boneberg received recommendations from Ms. Wolforth and Mr. Benson regarding his termination. IAF, Tab 6 at 10; *see* IAF, Tab 12, subtab 4f at 3.

However, it was Human Resources Officer Joyce Deters who issued the termination decision upon a recommendation from Mr. Boneberg. IAF, Tab 12, subtab 4f. Although the appellant has not specifically alleged that Ms. Deters knew of the physical violence disclosure when terminating him, he can show that his protected disclosure was a contributing factor by proving that Ms. Deters was influenced by an individual with actual knowledge of the disclosure. *See Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108 (1994).

¶24 Ms. Deters ultimately decided to terminate the appellant in part for conduct issues concerning his confrontational and hostile behavior towards co-workers and supervisors. IAF, Tab 12, subtab 1 at 2, subtab 4f. This charge allegedly arose from the appellant's alleged arguments with and acts of hostility towards his co-workers, as documented by Mr. Benson; this includes the box cutter incident that the appellant directly reported to Mr. Benson. IAF, Tab 6 at 25, Tab 12, subtabs 4b, 4j, 4l, 4m. Based on these incidents, Ms. Wolforth held a meeting with the appellant, Mr. Benson, and Union Representative Tom Sherer, warning the appellant that his inappropriate conduct "put his employment in jeopardy" and "could result in his termination." IAF, Tab 6 at 25, subtab 4a. Mr. Benson and Mr. Sherer both documented the meeting. IAF, Tab 12, subtabs 4a, 4g. A reasonable person could find that Mr. Boneberg considered all of the documents concerning confrontations, arguments, and acts of hostility between the appellant and his co-workers, including Mr. Benson's write-up and the appellant's sworn statement regarding the box cutter incident, IAF, Tab 12, 4l-4m, in recommending the appellant's termination, and therefore knew of the physical violence disclosure. Thus, the appellant has nonfrivolously alleged that Mr. Boneberg had knowledge of the physical violence disclosure, and that based on Mr. Boneberg's recommendation to Ms. Deters to terminate the appellant, Ms. Deters had imputed knowledge of the physical violence disclosure.

¶25 Alternatively, if Mr. Boneberg, the Director, based his recommendation upon oral reports by Ms. Wolforth, the Deputy Director, and/or Mr. Benson, the

second-line supervisor who documented the incidents underlying the appellant's alleged conduct issues, a reasonable person could find that they informed Mr. Boneberg of the box cutter incident, as it was one of the underlying incidents that demonstrated the appellant's conduct issues, and led Ms. Wolforth to warn the appellant that it could result in his termination. Thus, the appellant has alleged facts to support a nonfrivolous allegation that the agency decision makers had imputed knowledge of the physical violence disclosure, in deciding to terminate his employment. Thus, the appellant has met the knowledge part of the knowledge/timing test.

¶26 With respect to the timing test, the record shows that the appellant made the physical violence disclosure sometime in December 2008, IAF, Tab 12, subtab 4b at 2-3, subtab 4d at 12, subtab 4m at 1, and he was terminated approximately 4 months later on April 21, 2009, *id.*, subtab 4f. Thus, 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. *See Wadhwa*, 110 M.S.P.R. 615 ¶ 13 (6 months is well within the range of time between a disclosure and a personnel action from which an inference of causation arises). Consequently, we find that the appellant has nonfrivolously alleged that his physical violence disclosure is protected, and was a contributing factor in his termination. Thus, the appellant is entitled to a hearing. *See Kahn*, 528 F.3d at 1341; *Iyer*, 95 M.S.P.R. 239, ¶ 6.

¶27 We therefore REMAND the IRA appeal to the Atlanta Regional Office and instruct the administrative judge to hold a hearing to determine whether the appellant is entitled to corrective action based upon his reprisal claim concerning the physical violence disclosure.

The administrative judge failed to provide the appellant with proper jurisdictional notice.

¶28 On the initial appeal form, the appellant checked the box for "[t]ermination during probationary or initial service period." IAF, Tab 1 at 2. The appellant

also attached a memorandum from Mr. Boneberg that responded to the appellant's request for a Step 3 meeting, and stated that the appellant's separation during his probationary period was excluded from the grievance procedure, and therefore did not deprive the appellant of his appeal rights. *Id.* at 8. Based on the foregoing, it appears that the appellant raised a probationary termination claim before the Board separate from his IRA appeal.

¶29 The appellant had the burden of proof by preponderant evidence on the issue of jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i). Where an appellant makes a nonfrivolous allegation of Board jurisdiction over an appeal, he is entitled to a hearing on the jurisdictional question. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc). 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). Here, the administrative judge merely apprised the appellant of the requirements to establish jurisdiction over his IRA appeal, and the initial decision did not cure the defective *Burgess* notice by apprising the appellant of what he must do to establish that he is an "employee" with Board appeal rights under 5 U.S.C. Chapter 75 or that he was terminated during his probationary period based on partisan political reasons or marital status. *Stokes v. Federal Aviation Administration*, 761 F.2d 682, 684-85 (Fed. Cir. 1985); *see Baggan v. Department of State*, 109 M.S.P.R. 572, ¶ 4 (2008); 5 C.F.R. § 315.806(b); ID; IAF, Tab 5. Thus, the administrative judge did not afford the appellant the opportunity to meet his jurisdictional burden. *See Easterling v. U.S. Postal Service*, 110 M.S.P.R. 41, ¶ 11 (2008).

¶30 We therefore REMAND the appellant's probationary termination claim to the Atlanta Regional Office and instruct the administrative judge to apprise the appellant of the requirements to establish that he is an "employee" with Board appeal rights under 5 U.S.C. Chapter 75, or that the Board has jurisdiction over

his probationary termination claim, and to afford the parties an opportunity to file evidence and argument on this jurisdictional issue.

ORDER

¶31 Based on the foregoing, we AFFIRM the initial decision in part; REVERSE the initial decision in part; and REMAND the appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order. After such adjudication, the administrative judge shall issue a new ID setting forth his decision regarding the appellant's reprisal claim based upon his physical violence disclosure and his probationary termination claim.

FOR THE BOARD:

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