

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

63 M.S.P.R. 13

Docket Number BN-1221-92-0310-W-1

PHILLIP A. GEYER, Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date: May 24, 1994

Kevin G. Powers, Esquire, Boston, Massachusetts, for the appellant.

Brian E. Meyers, South Burlington, Vermont, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the initial decision issued on November 6, 1992, that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review, REVERSE the initial decision, and REMAND the appeal to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

The appellant was employed in the position of Immigration Inspector, GS-9, at Logan International Airport, Boston, Massachusetts. See Initial Appeal File (IAF) at Tab 1. On April 23, 1990, he sent a memorandum to the agency's District Director, Charles T. Cobb, *which* was also signed by eleven other Immigration Inspectors, expressing the opinion that the agency's new scheduling practices for Immigration Inspectors assigned to Logan International Airport conflicted with certain legislation. See IAF at Tab 3, Subtab 4y. On May 2, 1990, the appellant met with Cobb and other agency officials to discuss possible adjustments of the agency's scheduling policy. See IAF at Tab 3, Subtab 4x. The appellant subsequently reduced the

Immigration Inspectors' proposals to writing, and sent them to Cobb in a May 1990 memorandum. *See id.*

In October 1990, the agency initiated an Inspector General's investigation of allegations of misconduct by the appellant. *See* IAF at Tab 3, Subtabs 4r, 4s and 4t. As a result of the investigation, the agency removed the appellant, effective September 6, 1991, based on charges of: (1) Conduct unbecoming an officer and (2) unauthorized absence. *See* IAF at Tab 3, Subtab 4f. After the appellant had filed a complaint with the Office of Special Counsel (OSC), and after that office had notified him that it had terminated its investigation into his complaint, *see* IAF at Tab 1, the appellant appealed to the Board's regional office,¹ alleging that he was the victim of reprisal for whistleblowing. *See* Petition for Appeal, IAF at Tab 1. The administrative judge dismissed the appeal for lack of jurisdiction, finding that: (1) The appellant failed to present any nonfrivolous claim entitling him to a hearing on the issue of Board jurisdiction under the Whistleblower Protection Act (WPA) of 1989, 5 U.S.C. § 1221(a); and (2) the appellant's communications to Cobb did not constitute whistleblowing. *See* Initial Decision at 5-7, IAF at Tab 12. The appellant has now filed a petition for review. *See* Petition for Review (PFR), PFR File at Tab 1. The agency has responded in opposition to the appellant's petition for review. *See* PFR File at Tab 3.²

ANALYSIS

To establish the Board's jurisdiction over an IRA appeal, an appellant must show, by a preponderance of the evidence, that: (1) He engaged in

¹ As the administrative judge found, *see* Initial Decision at 2, IAF at Tab 12, the appellant's removal was appealable to the Board initially because he was an employee as defined in 5 U.S.C. § 7511(a)(1)(A) and his removal was an action covered under 5 U.S.C. § 7512. *See* 5 U.S.C. §§ 7513(d), 7701(a). The appellant relinquished this statutory right to appeal, however, by electing to challenge his removal under the applicable grievance procedure. *see* 5 U.S.C. § 7121(d). The grievance was denied and the agency's removal action was subsequently upheld following an arbitration proceeding. Despite the adverse arbitral award, the appellant nonetheless is not precluded from filing an IRA appeal from his removal alleging reprisal for whistleblowing. *See* *Augustine v. Department of Justice*, 50 M.S.P.R. 648, 653-54 (1991).

² After the record on petition for review had closed, the appellant submitted a reply to the agency's response to his petition. *See* PFR File at Tab 4. We have not considered this submission because the appellant has not shown that it consists of or is based on evidence not readily available before the record closed. *See* 5 C.F.R. § 1201.114(i).

whistleblower activity by making a disclosure protected under 5 U.S.C. 2302(b)(8), i.e., he disclosed information he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety; (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2) after the July 9, 1989, effective date of the WPA; and (3) he raised the whistleblower issue before OSC, and proceedings before OSC have been exhausted. See *Wuchinich v. Department of Labor*, 53 M.S.P.R. 220, 223 (1992); *Fisher v. Department of Defense*, 47 M.S.P.R. 585, 588 (1991); *Lozada v. Equal Employment Opportunity Commission*, 45 M.S.P.R. 310, 312-13 (1990).

To establish that he had a reasonable belief that his disclosure met the criteria of 5 U.S.C. § 2302(b)(8), an appellant need not prove that the condition reported established gross mismanagement or any of the other situations detailed under 5 U.S.C. § 2302(b)(8)(A)(ii). Rather, the employee must show that the matter reported was one which a reasonable person in his position would believe evidenced mismanagement or any of the other situations specified in 5 U.S.C. § 2302(b)(8). See *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 397 (1993).

If the appellant establishes that the Board has jurisdiction over his appeal, the administrative judge must then consider the merits of the appeal. That is, the administrative judge must determine whether the appellant has proven, by preponderant evidence, that a disclosure described in 5 U.S.C. § 2302(b)(8) was a contributing factor in the personnel action that was taken against him. If the employee is successful in making such a showing, corrective action must be ordered unless the agency demonstrates, by clear and convincing evidence, that it would have taken the same action absent the protected disclosure. See *McDaid v. Department of Housing & Urban Development*, 46 M.S.P.R. 416, 420 (1990).³

Here, the agency's action -- removing the appellant -- clearly constitutes a personnel action under 5 U.S.C. § 2302(a)(2), and it was effective September 6, 1991, subsequent to the effective date of the WPA. See IAF at Tab 3, Subtab 4d. Further, as noted above, the appellant raised this matter before OSC, and that office has terminated its investigation. See IAF at Tab 1.

³ The U.S. Court of Appeals for the Federal Circuit has indicated that it does not concur in some of the reasoning in *McDaid* that is related to the "contributing factor" test. See *Clark v. Department of the Army*, 997 F.2d 1466, 1471-72 (Fed. Cir. 1993), *cert denied*, 114 S. Ct. 920 (1994). The court's criticism of that decision concerns only the manner in which that test may be met, however, and not the effect of a finding that an employee has met the test. See *id.*

Moreover, we find that the subject matter of appellant's disclosures falls within the purview of 5 U.S.C. § 2302(b)(8). In his May 1990 memorandum, the appellant alleged, *inter alia*, that: (1) Most of the Immigration Inspectors at Logan International Airport were scheduled outside the period of greatest passenger traffic, and (2) although the scheduling system required the hiring of additional personnel and the payment of additional overtime, and although the volume of air traffic had gone up, interceptions of aliens were down. See IAF at Tab 3, Subtab 4x. Because the interception of illegal aliens is one of the agency's prime functions, the appellant's communication concerned practices that could possibly evidence "gross mismanagement," i.e., a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. See *Nafus*, 57 M.S.P.R. at 395.⁴

Further, we find that the appellant reasonably believed that the agency practices which he disclosed constituted gross mismanagement. As an Immigration Inspector, the appellant was familiar with the agency's day-to-day operations, and he was therefore in a position to form such a belief. Moreover, the record indicates that the appellant's belief was shared by other, similarly situated Immigration Inspectors. See IAF at Tab 3, Subtab 4y. This evidence further supports a finding that the belief was reasonable. As noted above, the actual accuracy of the appellant's belief that he was disclosing gross mismanagement does not affect whether the disclosure is protected. See *Nafus*, 57 M.S.P.R. at 397.

We also find that the administrative judge relied upon inappropriate factors in determining that the appellant's disclosures were not protected. He first found that the appellant's communications were merely proposals for policy adjustments, that neither the appellant nor agency management officials viewed them as disclosures of the kind described in 5 U.S.C. § 2302(b)(8), and thus that they did not constitute protected disclosures. See Initial Decision at 6, IAF at Tab 12. However, communications may be protected even if they are only meant to be helpful or to provide guidance. See, e.g., *McDaid*, 46 M.S.P.R. at 421-22 (employee's communications to agency's Inspector General that supervisor was ignoring staff recommendations intended to ensure agency conformity with Federal regulations constituted protected disclosure); see also *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 581 (1991) (a communication may be protected, even where it was not intended as a disclosure of waste, fraud, or abuse, if the record as a whole reflects that the agency viewed the

⁴ In light of this finding, we need not determine whether the appellant reasonably believed, as he contends in his petition for review, that the same disclosures evidenced a gross waste of funds or a substantial and specific danger to public safety.

employee as a whistleblower). Furthermore, as we have indicated above, the record shows that the appellant reasonably believed the practices he was disclosing constituted gross mismanagement. In addition, even if agency management officials did not regard the disclosures as protected under 5 U.S.C. i 2302(b)(8), we see no basis for concluding that their failure to recognize the protected nature of the disclosures would affect the disclosures' coverage under that section. Such a conclusion would be inconsistent with the reference, in that provision, to "any' disclosure of information that the employee believes evidences gross mismanagement.

Finally, we note that the administrative judge found that the appellant's disclosures were not protected because he did not include any facts that were unknown to the agency. See Initial Decision at 6, IAF at Tab 12. The Board has found, however, that a communication may be protected even if the disclosure discusses information known throughout the agency. See *Oliver v. Department. of Health & Human Services*, 34 M.S.P.R. 465, 469-70 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table).

For the reasons stated above, we find that the appellant has met the jurisdictional elements of his claim.

ORDER

Accordingly, we REMAND this appeal for a hearing and adjudication on the merits. On remand, if the appellant establishes, by preponderant evidence, that retaliation for his whistleblowing was a contributing factor in the action taken against him, the administrative judge shall provide the agency with an opportunity to show, by clear and convincing evidence, that it would have taken the action in the absence of the retaliatory factor. See *McDaid*, 46 M.S.P.R. at 420-21.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.