

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

87 M.S.P.R. 107

CAROL CZARKOWSKI,
Appellant,

DOCKET NUMBER
DC-1221-99-0547-W-2

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: October 16, 2000

Sarah L. Levitt, Esquire, Project LAW, Washington, D.C., for the appellant.

Christopher Gentile, Esquire, Arlington, Virginia, for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed her individual right of action (IRA) appeal for lack of jurisdiction. For the following reasons, we GRANT the petition, VACATE the initial decision, and REMAND the appeal for further adjudication, including a jurisdictional hearing.

BACKGROUND

¶2 The appellant, a GS-14 Supervisory Contract Specialist, filed a timely IRA appeal alleging that the agency had removed her supervisory responsibilities for Branch 1 contracts, placed her on a performance improvement plan (PIP), provided her with a "fully successful" performance appraisal, provided her with a

"fully successful" closeout rating for her former position, and threatened her with a downgrade through a desk audit based on her reduced responsibilities, all in reprisal for whistleblowing activity. Initial Appeal File (IAF), Tab 1 at 6-10. The appellant asserted that, while carrying out her job duties, she disclosed, in a July 18, 1997 electronic mail (e-mail) message sent to her immediate supervisor and other program managers, information she reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, and a gross waste of funds. *Id.* at 4. She claimed, among other things, that a contract's statement of work, required by Federal Acquisition Regulations, was wholly insufficient because it contained no specifics on how the contracted-for system was to be installed. *Id.* at 4-5.

¶3 The administrative judge (AJ) informed the appellant of what she needed to show to establish Board jurisdiction over her appeal and entitlement to a jurisdictional hearing. Refiled Appeal File (RAF), Tab 5. The AJ also ordered her to file a copy of the submissions she sent to the Office of Special Counsel (OSC), and to address why her disclosure, made in the routine performance of her duties, constituted protected whistleblowing. *Id.* The appellant filed responses to the AJ's order. RAF, Tabs 6 and 7.

¶4 Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction. The AJ found that the appellant had exhausted her remedies with OSC and had identified covered personnel actions, i.e., the removal of job responsibilities relating to Branch 1, her performance appraisal, and her closeout rating. The AJ also found that the appellant was not placed on a PIP, and that the desk audit was not a covered personnel action and did not constitute a threatened change in duties or pay. Citing *Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998), the AJ found that even if all the actions were subject to Board review, the appellant's e-mail message was not a protected disclosure because she was merely carrying out her job duties when she reported her concerns.

¶5 The appellant has filed a timely petition for review, and the agency has filed a timely response to the petition for review.

ANALYSIS

¶6 To establish Board jurisdiction over an IRA appeal an appellant must show by preponderant evidence that: He engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); 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); and he raised the issue before the OSC, and proceedings before the OSC were exhausted. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). Disclosures protected by section 2302(b)(8) include any disclosure that the employee reasonably believes evidences a violation of any 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. *Christensen v. Department of Justice*, 82 M.S.P.R. 430, ¶ 10 (1999). An appellant who makes a nonfrivolous allegation of Board jurisdiction is entitled to a jurisdictional hearing. *Burns v. Department of the Navy*, 67 M.S.P.R. 285, 288 (1995).

Protected Disclosure

¶7 The appellant contends that the AJ misapplied the law in ruling that her disclosure was not protected activity, and made an unsupported finding of fact (that the disclosure was made within her required job duties) that is contrary to the record evidence. The record supports this latter contention. The appellant specifically alleged, in a declaration made under penalty of perjury, that she made her disclosures to the Chief of the Contracting Office, the Project Manager and the Financial Manager, and that informing these officials was not part of her regular or required job duties, but that she did so because she wanted to alert these individuals who also had responsibility for regulatory compliance. RAF, Tab 7. We do not rest our decision on the AJ's factual error, however. We find, in addition, that the AJ erred as a matter of law in concluding that the appellant's

disclosure is not protected if it is not made outside the employee's required job duties.

¶8 The appellant wrote in her July 18, 1997 e-mail message that she issued a stop work order to the contractor, noting that the statement of work for the contract at issue "is only one short paragraph which lists no specific size or ways to deliver and install the EE [Electronic Equipment]."¹ IAF, Tab 1, Attach. 1. She wrote that she tried to determine whether there were any approved studies or lists of materials that would more clearly define the government's requirements, but that "[s]o far I've only gotten that there are none and everything has been done verbally." *Id.* She also asserted that the contractor told her that there were no written progress reports from the subcontractor; rather, all such reports were verbal. *Id.* The appellant further indicated that although the electronic equipment effort had begun at least as early as 1995, the contractor wanted to continue it into 1998, even though March 31, 1997, was the original delivery date, and August 31, 1997, was a revised delivery date. *Id.* Although she did not know how much had been spent on the development of the electronic equipment, one person told her that an amount (omitted from the e-mail submitted to the Board) had been spent and that nothing had been delivered. *Id.* She concluded the e-mail by stating that she could not, in good faith, add more money to a contract or extend a delivery date when she did not have a comfortable feeling that the government would end up with deliverables for the money already spent on the contract. *Id.*

¶9 In a declaration submitted in response to the AJ's jurisdictional order, the appellant indicated that her job was to oversee, draft, approve, and assure the proper administration of contracts in accordance with the Federal Acquisition Regulations (FAR), the Defense Federal Acquisition Regulations, the Navy

¹ The technology involved in the contract at issue was omitted from the e-mail submitted to the Board because that information is classified. IAF, Tab 1 at 4 n.2.

Acquisition Procedures, and other federal codes and regulations. RAF, Tab 7, Appellant's Declaration at 1. She indicated that she was also responsible for managing all pre/post-award functions on high visibility, extremely large-dollar, classified contracts of a complex nature and long-term application. *Id.*

¶10 Although the appellant did not identify a putative wrongdoer in her e-mail, she alleged on appeal that the circumstances surrounding the disclosure would pinpoint the putative wrongdoer as the Contracting Officer's Representative (COR) because this individual, as someone from the project staff who had technical expertise, directly oversaw the contract, and was responsible for assuring that the contractor was fulfilling the contract as written and verifying that the contractor would complete the system in an affordable, timely, and operationally suitable manner. *Id.* at 2; RAF, Tab 7 at 2. She also averred that she informed the COR that until a statement of work setting forth the agency's requirements could be provided in accordance with 10 U.S.C. § 2305(a)(1), 10 U.S.C. § 2377, 41 U.S.C. § 253a, 41 U.S.C. § 264b,² and the parallel sections of the FAR, she would not approve adding dollars to the contract. RAF, Tab 7, Appellant's Declaration at 3-4. She further asserted that under FAR §32.1007 and FAR §42.11, payments from the government to a contractor, and from a contractor to a subcontractor, should only be made when there is proof the contractor and subcontractor are making progress on the work. *Id.* at 4. The individuals to whom she sent her e-mail either had supervisory authority over the COR or had the authority to approve a stop work order, stop or realign the program work, or withhold funding on the contract. *Id.* at 4-5.

¶11 In her e-mail message the appellant identified problems with a contract that posed potential violations of law, rule, or regulation. We surmise, given the redacted information submitted to the Board, that she also disclosed that a

² These sections generally provide, among other things, that an agency's requirements in contract solicitations are to be stated in terms of function, performance, or design.

contract involving an extremely large dollar amount was resulting in nothing being delivered to the government. Based on the evidence of record, we find that the appellant has made a nonfrivolous allegation that her e-mail disclosed information she reasonably believed evidenced a violation of law, rule, or regulation, and a gross waste of funds. *See Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996) (a gross waste of funds is a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government); *e.g.*, *Smith v. Department of the Army*, 80 M.S.P.R. 311, ¶ 10 (1998) (nonfrivolous allegation of a gross waste of funds involving the agency's purchase of a \$15,000 fuel management system); *Special Counsel v. Spears*, 75 M.S.P.R. 639, 659-60 (1997) (nonfrivolous allegation of a gross waste of funds involving a \$2,000 training trip). Whether the appellant actually reasonably believed that her disclosure constituted protected whistleblowing is a matter to be determined after she has been afforded a jurisdictional hearing. *Christensen*, 82 M.S.P.R. 434, ¶ 11.

¶12 "Gross mismanagement" is a decision that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Coons v. Department of the Navy*, 63 M.S.P.R. 485, 488 (1994). A disclosure questioning management decisions that are merely debatable or just simple negligence or wrongdoing, with no element of blatancy, is not protected as a disclosure of gross mismanagement. *Sazinski v. Department of Housing & Urban Development*, 73 M.S.P.R. 682, 686-87 (1997). Here, the appellant has not alleged facts sufficient to establish a nonfrivolous allegation that she disclosed gross mismanagement. There is no indication, for example, as to how significant an impact the contractual problems in question would have on the agency's ability to accomplish its mission, nor is there any indication that there was an element of blatancy, as opposed to simple negligence or wrongdoing.

¶13 Although the AJ found that the appellant's disclosure was not protected because she was merely carrying out her job duties when she reported her

concerns, the Board has long held that the definition of a "protected disclosure" includes disclosures made by employees as part of the performance of their duties. *See Garrett v. Department of Defense*, 62 M.S.P.R. 666, 671 (1994); *see also Bump v. Department of the Interior*, 69 M.S.P.R. 354, 362 (1996) (the AJ's reliance on the fact that the appellant raised the alleged disclosure in the course of his job was improper); *Connelly v. Nuclear Regulatory Commission*, 64 M.S.P.R. 28, 32 (1994) (an employee is protected from retaliation for disclosures made in the performance of his or her job). The court in *Willis* did not overrule or even question these decisions, nor does the *Willis* decision stand for the broad proposition set forth in the initial decision.

¶14 *Willis* involved a District Conservationist who claimed that his determination, that seven farms were out of compliance with conservation plans approved by the Department of Agriculture, constituted a protected disclosure. In response to *Willis*' reliance on *Marano v. Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993), the court held that *Marano* did not "announce a blanket rule entitling employees to assert that the required performance of their day-to-day responsibilities could in any way constitute a protected disclosure." *Willis*, 141 F.3d at 1144. The court noted that "Willis would have this court hold that nearly every report by a government employee concerning the possible breach of law or regulation *by a private party* is a protected disclosure." *Id.* (emphasis added). The court found that this was not the goal of the Whistleblower Protection Act (WPA). Instead, it held that "the WPA is intended to protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuse *by government personnel*." *Id.* (emphasis added). In dicta, the court stated that *Willis* did no more than carry out his required everyday job responsibilities, and could not be said to have risked his personal job security merely by performing his required duties. *Id.* Because *Willis* involved an employee who made disclosures of wrongdoing by private parties, as opposed to wrongdoing by government personnel, it is a

fundamentally different case from this appeal and from the Board precedent cited above.

¶15 In fact, our reviewing court has recognized that protected disclosures may be made as part of an employee's duties. In *Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995), the court held that "[t]he fact that a protected disclosure may be made as part of an employee's duties, but that an employee may nevertheless be disciplined for violating agency policy if his disclosure is untimely, strikes a balance between the intent of the WPA and the agency's interest in prompt disclosure of wrongdoing." (emphasis added). In support of this finding, the court quoted with approval the statement of Representative McCloskey with respect to H.R. 2970, reauthorizing and reforming the OSC and the Board, that "[a] protected disclosure may be made as part of an employee's job duties" *Id.*; 140 Cong. Rec. H11419, H11421 (daily ed. Oct. 7, 1994).

¶16 Our determination in this case is consistent with court and Board precedent, as well as the statute's plain language and legislative history. It is a prohibited personnel practice to take or fail to take a personnel action because of "any disclosure of information by an employee ... which the employee ... reasonably believes evidences [certain specified conditions]." 5 U.S.C. § 2302(b)(8)(A)(i) (emphasis added). The unambiguous language of the statute does not say that a disclosure is protected only if it is made outside the performance of an employee's duties. See *Marano*, 2 F.3d at 1142 ("[h]ow a protected disclosure is made ... matters not to the achievement of the WPA's goal."); *Garrett*, 62 M.S.P.R. at 671. The amendments to section 2302(b)(8) and their legislative history make plain that there are no requirements for whistleblower status beyond those set out in the statute itself. See generally *Huffman v. Office of Personnel Management*, 84 M.S.P.R. 569, 574 (1999) (concurring opinion of Vice Chair Slavet).

¶17 Thus, as set forth above, we hold that the appellant has made a nonfrivolous allegation that she engaged in whistleblowing by making a protected disclosure under 5 U.S.C. § 2302(b)(8).

Exhaustion and Covered Personnel Actions

¶18 The AJ correctly found that the appellant exhausted her remedy before OSC and was affected by covered personnel actions, namely, the removal of job responsibilities relating to Branch 1, a performance appraisal, and a closeout rating. We find that the AJ erred, however, when he determined, without holding a jurisdictional hearing, that the August 21, 1997 memorandum was not a PIP, and therefore was not a covered personnel action.³ Citing *Gonzales v. Department of Housing & Urban Development*, 64 M.S.P.R. 314, 319 (1994), the AJ found that the memorandum was not a PIP because the agency did not expressly threaten a reduction in pay or grade. *Gonzales*, however, does not require any explicit mention of a threatened action where a PIP is implemented. A PIP “by definition *involves a threatened personnel action*, such as a reduction in grade or a removal.” *Gonzales*, 64 M.S.P.R. at 319 (emphasis added).

¶19 The AJ further based his finding that the August 21, 1997 memorandum was not a PIP on his determination that it did not address the appellant’s overall level of performance and specifically provided that it was not an adverse action.

¶20 Although the subject line of the August 21, 1997 memorandum reads “Temporary Realignment of Work,” it is the nature of the action, and not the agency’s characterization of the action, that determines the Board’s jurisdiction. *See Russell v. Department of the Navy*, 6 M.S.P.R. 698, 704 (1981) (the Board is not obligated to accept the assertion of a party as to the nature of a personnel

³ In her petition the appellant does not challenge the AJ’s determination that the alleged threatened downgrade by means of a desk audit was not a covered personnel action, we accordingly need not address that determination further. *See* PFRF, Tab 1 at 6, n.3; 5 C.F.R. § 1201.114(b).

action, but may make its own independent determination regarding that matter); *Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 313-325 (1994) (the employees' assignments constituted RIF demotions within the Board's jurisdiction, despite the agency's characterization of them as reassignments). The memorandum indicates that it was written to bring to the appellant's attention concerns regarding her ability to work with others. RAF, Tab 3, Subtab 4b. The memorandum informs the appellant that her work relationship with the Program Office is unacceptable, that her work is being realigned, that she is being given an opportunity to improve her performance, that the realignment is not expected to extend beyond six months, and that her performance appraisal is being deferred during this period. *Id.* The memorandum's author outlined other areas where the appellant's performance was deficient or unacceptable, and offered assistance in helping the appellant improve in those areas, including meeting with her on a regular basis. We note that the appellant's performance appraisal indicates that one of her critical elements is "Personal Contacts." *Id.*, Subtab 4c.⁴ The fully successful level of this critical element requires that "[i]ndividual contribution to team performance is considered effective and responsive by supervisor based on assessments of individual's efforts by customers, peers, and other cognizant managers." *Id.*

¶21 Because the August 21, 1997 memorandum can be read as suggesting that the appellant's performance in a critical element was unacceptable, and provides her with an opportunity to improve and offers her assistance in improving unacceptable performance, we find that the appellant has made a nonfrivolous

⁴ Although the appellant eventually received a fully successful rating for each of her critical elements for the rating period March 3, 1997, to February 21, 1998, she has sought relief in the form of consequential damages, attorney fees and costs, and "removal" of the PIP. IAF, Tab 1 at 10-11. Her IRA appeal as it pertains to this alleged personnel action is not, therefore, moot. *See, e.g., Walton v. Department of Agriculture*, 78 M.S.P.R. 401, 403-04 (1998).

allegation that the agency placed her on a PIP, and therefore threatened to take a personnel action against her. *See* 5 C.F.R. § 432.104 (the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position; the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance and offer assistance to the employee).

ORDER

¶22 Accordingly, we REMAND this appeal for a jurisdictional hearing. If the AJ finds that the Board has jurisdiction over this appeal, he shall adjudicate the appeal on its merits, affording the appellant a full hearing as she has requested.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.