UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

92 M.S.P.R. 572

GREGORY A. SCHMITTLING, Appellant,	DOCKET NUMBER CH-1221-96-0362-M-1
v.	
DEPARTMENT OF THE ARMY, Agency.	DATE: September 20, 2002

Kenneth W. Zatkoff, Esquire, Troy, Michigan, for the appellant.

Michael J. Walby, Esquire, Warren, Michigan, for the agency.

Mary K. Monahan, Esquire, Washington, D.C., for the Office of Special Counsel, amicus curiae.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board upon the decision of the U.S. Court of Appeals for the Federal Circuit vacating the Board's final decision, which denied the appellant's individual right of action (IRA) appeal, and remanding the appeal. *Schmittling v. Department of the Army*, 219 F.3d 1332 (Fed. Cir. 2000). For the following reasons, we FIND that the Board has jurisdiction over this appeal, GRANT the agency's petition for review, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-15 Chief of the Automated Systems and Management Accounting Division at the agency's Tank-Automotive and Armaments Command (TACOM), timely filed an IRA appeal alleging that, in reprisal for whistleblowing, the agency reassigned Silvio P. LaMarra to a vacant GS-15 Budget Officer (Budget) position, thereby blocking the appellant's assignment to that position during a reduction in force (RIF) and clearing the way for his ultimate "Reassignment Outside of Competitive Level" to the GS-15 Customer Order Program Officer (Customer) position previously held by LaMarra. Initial Appeal File (IAF), Tab 1; Refiled Appeal File (RAF), Tab 1, Ex. 1. After a hearing, the administrative judge (AJ) found that the Board had jurisdiction over the appeal and that the appellant's protected disclosures were a contributing factor in the decision to reassign LaMarra, so that the appellant would not be placed in that position, but would instead be reassigned to the Customer position. RAF, Tab 49, Initial Decision (ID). The AJ ordered corrective action upon finding that the agency did not prove by clear and convincing evidence that it would have blocked the appellant's assignment to the Budget position in the absence of the protected disclosures. *Id*.

¶3 The agency filed a petition for review asserting, among other things, that the Board lacked jurisdiction over the appeal because the appellant was attempting to appeal a personnel action taken against LaMarra and not against him. In an Opinion and Order, the Board majority assumed that the Board had jurisdiction over the appeal. *Schmittling v. Department of the Army*, 81 M.S.P.R. 225, ¶ 8 (1999). The majority then found, contrary to the AJ, that the agency had proven by clear and convincing evidence that it would have reassigned LaMarra to the Budget position, thereby blocking the appellant from being reassigned to that position by RIF, absent the appellant's protected disclosures. *Id*., ¶¶ 8-32. The majority therefore reversed the initial decision and denied the appellant's request for corrective action. *Id*., ¶¶ 1, 32. In a dissenting opinion, then-Vice

Chair Slavet argued that the Board should decide the jurisdictional question before proceeding to the merits, that the AJ's analysis of the witnesses' credibility under the factors set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), was deficient, and that if the Board had jurisdiction over the appeal, the case should be remanded to allow the AJ to make *Hillen* findings in accordance with Board and court precedent. *Id*. at 240-41.

¶4 On review, the court has determined that the Board improperly assumed it had jurisdiction over this appeal. *Schmittling*, 219 F.3d at 1336-37. Upon finding that the Board is not empowered to decide the merits of a case without a finding of jurisdiction, the court vacated the Board's decision and remanded the case for further proceedings consistent with the court's opinion. *Id*.

ANALYSIS

The Board has jurisdiction over this appeal.

¶5 In *Schmittling*, 219 F.3d at 1336, the court held that in an IRA appeal, "a petitioner must first establish Board jurisdiction by making nonfrivolous allegations that: (1) The petitioner engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8); and (2) based on the protected disclosure, the agency took or failed to take a personnel action as defined by 5 U.S.C. § 2302(a)." The court held that a petitioner also must establish that "(3) he sought corrective action from OSC [Office of Special Counsel]; and (4) he exhausted corrective action proceedings before OSC." *Id*. Similarly, in *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001), the court stated that an individual who has exhausted his OSC remedy can establish IRA jurisdiction by making nonfrivolous allegations that he made a whistleblowing disclosure and that his whistleblowing was a contributing factor in the agency's decision to take or fail to take a personnel action. *See also Rusin v. Department of the Treasury*, MSPB Docket No. CH-1221-00-0028-W-1, ¶ 12

(Sept. 4, 2002). As set forth below, we find that the appellant met these jurisdictional elements.

Protected Disclosures

¶6 The AJ found that the parties stipulated that the appellant made whistleblower disclosures protected under 5 U.S.C. § 2302(b)(8) on March 8, May 2, and June 7, 1995. ID at 10; RAF, Tab 40 at 2. The AJ also found that the appellant had a reasonable belief that his agency's practice of charging its customers for its reimbursable overhead costs could have led to a potential violation of the Anti-Deficiency Act (ADA). ID at 10.

¶7 Under *Yunus-Rusin*, we find that the appellant made nonfrivolous allegations of at least two protected disclosures, i.e., his disclosures to the Chief of Staff to the Commanding General of TACOM, and the Department of Defense (DOD) Inspector General (IG). As set forth below, a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably believe that the agency's practice of charging its customers for reimbursable overhead costs was a violation of law, rule, or regulation. *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). An appellant need not prove that the matter disclosed actually established any of the situations detailed under 5 U.S.C. § 2302(b)(8). *Wojcicki v. Air Force*, 72 M.S.P.R. 628, 633 1996).

¶8 In his disclosures, which he made to the Chief of Staff, the DOD IG, and his supervisors, the appellant asserted, among other things, that the Operations and Maintenance Army (OMA) and Research, Development, Test and Evaluation (RDT&E) appropriations were tainted by ADA violations. RAF, Tab 1, Subtabs 27, 28, and 30. Specifically, the appellant claimed that, as a result of his command's failure to follow DOD and Army guidance prohibiting the billing of overhead charges to certain reimbursable orders, the agency's billing of such charges to its OMA reimbursable orders resulted in an unauthorized augmentation of the OMA and RDT&E appropriations. *Id.*, Subtabs 27 and 28.

¶9 The potential ADA violations first came to the appellant's attention upon his review of a June 7, 1994 memorandum from the Army Materiel Command (AMC) Headquarters regarding rules governing the acceptance and retention of reimbursement for services performed. RAF, Tab 43, Ex. Q; Hearing Transcript (HT) (Dec. 13, 1996) at 485-88. This document noted that the General Accounting Office's publication, "Principles of Federal Appropriations Law," provided that "as a general proposition an agency may not augment its appropriations from outside sources without specific statutory authority." RAF, Tab 43, Ex. Q. It also noted that, as indicated in the DOD Accounting Manual, "except where explicitly authorized, such as in the Defense Business Operations Fund … and other revolving funds, activities authorized to receive reimbursement for their services may not distribute overhead costs to the reimbursable customers." *Id*. The document's proposed guidelines on the acceptance of reimbursable orders provided that "[a]ctivities that have not been given specific legal or regulatory authority to distribute overhead costs (i.e. costs not directly identifiable to an order) to customer orders may not do so," and that "[c]urrently, we know of no such authority for AMC OMA commands or agencies." *Id*. Between September 1994 and February 1995, the appellant researched regulations and fiscal law, studied the agency's methods of billing overhead charges, and sought advice from the Defense Finance and Accounting Service and the DOD IG, which he claimed both indicated that TACOM's practice of billing overhead to its reimbursable orders was "incorrect." RAF, Tab 1, Subtab 28 at 3-4.

¶10 As Chief, Automated Systems and Management Accounting Division, the appellant was responsible for, among other things, providing technical supervision over accounting and maintaining fund control. His office had responsibility over the entire range of accounting activities at TACOM, and the appellant was responsible for assuring that all automated systems, applications, and/or programs met internal controls and the financial system requirements of the Federal Managers' Financial Integrity Act. RAF, Tab 1, Subtab 3; HT

(Dec. 13, 1996) at 466-68. In his position the appellant also served as TACOM's Chief Financial Officer, which involved incorporating more effective financial management practices at TACOM, improving accounting systems, integrating functional and financial management and internal controls, and providing complete, reliable, timely, and consistent financial information. *Id*. The appellant had close to twenty years of accounting experience and had attended for one and one-half years the Army Comptrollership Program at Syracuse University, which is the Army's elite school for their Comptroller career personnel. RAF, Tab 1, Subtab 28; HT (Dec. 13, 1996) at 456.

¶11 The appellant's disclosures caused his second-level supervisor, Douglas Newberry, to acknowledge that this was a "gray" area. RAF, Tab 1, Subtab 17. The appellant's March 8, 1995 disclosure caused the Chief of Staff to direct the Internal Review Staff to conduct an in-depth review as the appellant suggested. IAF, Tab 1, Subtab 11. The report from the Internal Review Staff concluded that "current guidance does not authorize the reimbursement … for base operations costs," and recommended that a specific reply on this issue be obtained from AMC. IAF, Tab 1, Subtabs 9 and 14; *see White*, 174 F.3d at 1381 (evidence that the employee was familiar with the alleged improper activities and that his belief was shared by similarly situated employees may be of some relevance to the question of whether the employee's belief was reasonable).

¶12 The ADA provides, in pertinent part, that "an officer or employee of the United States Government … may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In light of the above considerations, a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably have believed that the agency's practice of charging its customers for reimbursable overhead costs, and then expending those funds, was a violation of law, rule, or

regulation. Thus, we find that the appellant has made a nonfrivolous allegation of at least two protected disclosures.[1]

Personnel Actions

¶13 Having found that the appellant made protected disclosures, we turn to the question of whether the agency took a "personnel action" as defined at 5 U.S.C. § 2302(a)(2). The AJ found that the agency took a personnel action when it reassigned the appellant from his GS-15 position of Chief, Automated Systems and Management Accounting Division, to the GS-15 position of Chief, Customer Management Division. ID at 2, 10. We agree. *See Paul v. Department of Agriculture*, 66 M.S.P.R. 643, 650 (1995) (a reassignment is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iv)); 5 C.F.R. § 210.102(b)(12) (a reassignment is a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion).

¶14 The agency asserts that the appellant's reassignment was voluntary because he recommended that the agency abolish his position in the RIF, and that the Board lacks jurisdiction over voluntary actions. Petition for Review File (PFRF), Tab 1 at 7-8. This argument is without merit. The agency ignores the context of the appellant's proposal that his position be abolished. In response to the agency's directive that office managers identify positions to be abolished, the appellant identified his own position and several others in his office for elimination. RAF, Tab 8, Ex. 6. He explained that he proposed that his own GS-15 position be abolished because the pending RIF would reduce his supervisory

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[1] As set forth above, *supra* ¶ 11, the appellant made one of his disclosures to his supervisors. RAF, Tab 1, Subtab 30. It is unclear, on the face of the disclosure, whether the document identifies potential wrongdoing by the supervisors themselves or by someone else. *Id*. They AJ shall determine on remand whether that disclosure was protected under 5 U.S.C. § 2302(b)(8) in light of the court's decision in *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001). *See Whaley v. U.S. Postal Service*, 61 M.S.P.R. 340, 344 (1994) (the Board generally applies court decisions to appeals that are pending before it at the time the decision is issued).

responsibilities and it was highly unlikely that his position "would classify out at the GS 15 grade level." *Id*.

¶15 Under 5 U.S.C. § 2302(b)(8), an agency's failure to take a personnel action because of any protected disclosure is also a violation of that statute. The Board has taken jurisdiction over IRA appeals challenging an agency's failure to take a personnel action. *See, e.g., Slake v. Department of the Treasury*, 53 M.S.P.R. 207, 210-11 (1992). Nonselection cases, like this appeal, often involve an allegation that the agency retaliated against the appellant by selecting another employee for the position. *Id*. Here, the appellant has made a nonfrivolous allegation that LaMarra's reassignment to the Budget position is within the Board's jurisdiction as a failure to take a personnel action with respect to the appellant. By reassigning LaMarra to the Budget position, the agency blocked the appellant's assignment to that position and failed to reassign him to it. This is a reasonable construction of the appellant's allegations. In his post-hearing brief, the appellant alleged that his protected disclosures were "the real reason why the Agency decided to block the Appellant's re-assignment to the vacant Budget Officer position …." IAF, Tab 46 at 16. Thus, the record supports interpreting the appellant's appeal as an allegation that the agency's reassignment of LaMarra to the Budget position constituted a failure to reassign the appellant to that position.

¶16 The agency argues that the Board's jurisdiction in IRA cases is governed by 5 U.S.C. § 1221(a) which, unlike section 2302(b)(8), does not refer to an agency's failure to take a personnel action with respect to an employee. Section 1221(a) does provide that "[s]ubject to the provisions of subsection (b) of this section and subsection [sic] 1214(a)(3)," employees may seek corrective action from the Board with respect to "any personnel action taken, or proposed to be taken, against such employee … as a result of a prohibited personnel practice described in section 2302(b)(8)." As set forth below, sections 1221(a) and

2302(b)(8) should be read together to comport with the findings and primary purposes of the Whistleblower Protection Act of 1989 (WPA).

¶17 Congress stated that the purpose of the WPA was to "strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within Government by mandating that employees should not suffer *adverse consequences* as a result of prohibited personnel practices …." Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b), 103 Stat. 16; 5 U.S.C.A. § 1201 note (West 1996) (emphasis added). Thus, the "purpose" language of the WPA suggests that Congress sought to broadly protect whistleblowers from "adverse consequences" as a result of prohibited personnel practices, whether those "adverse consequences" result from personnel actions that are taken or personnel actions that are not taken.

¶18 The legislative history of the WPA also suggests that personnel actions not taken by an agency can be appealed directly to the Board. The House Report provides that the WPA "creates an individual right of action, so that employees who are the victims of *prohibited personnel practices* can seek stays and corrective action directly from the MSPB, without involvement of the OSC." H.R. Rep. No. 100-274, at 16 (1987) (emphasis added). *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1347-48 (Fed. Cir. 2001). (it is proper to consider, for guidance in interpreting the WPA, the legislative history of the version of the WPA that President Reagan pocket-vetoed after the 100th Congress adjourned, where the language did not change). The Senate Report provides that "[e]mployees … may appeal directly to the MSPB if they allege a prohibited personnel practice as defined under 2303(b)(8) [sic] USC 5 (reprisal for whistleblowing), if they appeal first to the OSC, and if the OSC subsequently terminates the investigation of their case or if they have not been notified within 90 days of filing an allegation that the OSC shall seek corrective action on their behalf. … [T]his provision is intended to allow whistleblowers *who suffer reprisal* the further right of appeal to the MSPB once the OSC route is

exhausted." S. Rep. No. 100-413, at 32 (1988) (emphasis added). The term "prohibited personnel action" is defined, in part, as a failure to take a personnel action. 5 U.S.C. § 2302(a)(1), 2302(b)(8). No distinction, therefore, is made in the legislative history between protecting whistleblowers from personnel actions taken, as opposed to personnel actions not taken.

¶19 We further find that the circumstances and reasoning of the Board in *Gergick v. General Services Administration*, 49 M.S.P.R. 384 (1991), support this interpretation. In *Gergick*, 49 M.S.P.R. at 386, the AJ dismissed, for lack of jurisdiction, the appellant's IRA appeal alleging that the agency had threatened to take a personnel action against him in retaliation for whistleblowing. The agency argued that under 5 U.S.C. § 1221(a), threatened actions could not be appealed to the Board because only actions that have been taken or proposed to be taken are mentioned in that provision. *Gergick*, 49 M.S.P.R. at 390. The Board disagreed, reversed the initial decision, and found that although section 1221(a), when read in isolation, appeared to provide that threatened actions could not be the subject of an IRA appeal, section 1214(a)(3),[2] which also was enacted as part of the WPA, and to which section 1221(a) specifically referred, indicated that threatened actions may be appealed under section 1221. *Id*. The Board therefore found that because a threat to discipline an employee in retaliation for making protected disclosures was covered by 5 U.S.C. § 2302(b)(8), his appeal of that

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[2] Section 1214(a)(3) provides:

> Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel ….

threatened personnel action was covered by 5 U.S.C. § 1221. *Id*. at 391. Similarly, we find that because a failure to take a personnel action is covered by section 2302(b)(8), it may be appealed to the Board under section 1221. This conclusion is consistent with court and Board cases finding that a failure to take a personnel action, such as a nonselection for a vacancy or a promotion, are appealable in IRA cases. *See, e.g., Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623, 625 (Fed. Cir. 1992); *Johnson v. Department of Health & Human Services*, 87 M.S.P.R. 204, ¶ 9 (2000).

¶20 A finding by the Board that section 1221(a) must be read as excluding an agency's failure to take a personnel action for retaliatory reasons from the Board's IRA jurisdiction would effectively repeal part of the language in section 2302(b)(8), which is incorporated by reference in section 1221(a), and which provides that such failure-to-take actions are a prohibited personnel practice if based on any protected disclosure. Repeals by implication are disfavored and are only justified when the earlier and later statutes are irreconcilable. *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974). Further, such a narrow interpretation of section 1221(a) would be contrary to the findings and purposes of the WPA because, by effectively repealing part of section 2302(b)(8), employees bringing IRA cases would have less protection from retaliation than was provided to employees under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (CSRA). These factors strongly support interpreting section 1221(a) in a manner that construes this WPA provision, together with the CSRA provision at section 2302(b)(8), in a manner that effectuates the purposes of both statutes. *See Auker v. Department of Defense*, 86 M.S.P.R. 468, ¶ 12 (2000) (the CSRA attorney fee provision at section 7701(g)(1) applied to IRA appeals that were settled because, among other things, a contrary finding would make it more difficult for prevailing IRA appellants to obtain fees than appellants who prevailed under the CSRA, contrary to Congressional intent). The WPA is remedial legislation, intended to improve protections for Federal employees, and

should be construed to effectuate that purpose. *King v. Department of Health & Human Services*, 71 M.S.P.R. 22, 32 (1996); *see Singleton v. Ohio National Guard*, 77 M.S.P.R. 583, 587 (1998) (the definition of "personnel action" must be interpreted broadly as part of the WPA, a remedial statute). Thus, under the circumstances of this appeal, we find that the appellant has made a nonfrivolous allegation that LaMarra's reassignment to the Budget position, which had the purpose and effect of preventing the appellant from being assigned to that position, is a personnel action within the Board's jurisdiction.

Contributing Factor

¶21 The Board shall order corrective action if the employee demonstrates that a disclosure described under section 2302(b)(8) was a "contributing factor" in the personnel action that was taken against the employee; corrective action may not, however, be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. § 1221(e)(1), (2). The employee may demonstrate that such a protected disclosure was a contributing factor in the 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. 5 U.S.C. § 1221(e)(1).

¶22 The AJ correctly found that the parties stipulated that LaMarra, Newberry, and Anthony Gianfermi, the appellant's acting second-level supervisor, were aware of the appellant's disclosures before LaMarra's reassignment to the Budget position. HT (Nov. 6, 1996) at 4; ID at 11. The AJ also correctly found that on August 25, 1995, these agency officials decided to reassign LaMarra to the vacant Budget position, thereby preparing the way for the appellant's eventual reassignment to the Customer position. RAF, Tab 1, Ex. 24; HT (Nov. 7, 1996) at 320-21 (testimony of Gianfermi that in August 1995, he told the appellant that he planned to reassign LaMarra to the Budget position and "let the RIF action

execute where Mr. Schmittling would end up out of the RIF," i.e., placed in the position vacated by LaMarra), 340-41 (testimony of Gianfermi that LaMarra, Newberry, and Gianfermi were involved in the decision to reassign LaMarra); ID at 11. The AJ concluded that "[b]ecause these actions took place less than three months after the appellant's last protected disclosure, I find the 'per se' knowledge/timing test applies here and the appellant demonstrated that his protected disclosures were a contributing factor in the agency's decision to reassign Mr. LaMarra to the Program and Budget position so that the appellant would not be placed in that position, and would instead be reassigned to the Customer Management Division." ID at 11.

¶23 We find that the appellant made a nonfrivolous allegation that his disclosures were a contributing factor in the personnel actions at issue in this case. Although the AJ did not make separate findings on the two reassignments at issue, i.e., LaMarra's reassignment and the appellant's reassignment, the most reasonable explanation is that the AJ viewed those reassignments as inextricably intertwined. By deciding to reassign LaMarra to the Budget position while at the same time accepting the appellant's recommendation that his position be abolished, RAF, Tab 1, Ex. 24; HT (Dec. 13, 1996) at 748 (the appellant first learned that Gianfermi and LaMarra had decided to accept his proposal to abolish his position on August 25, 1995), those who were aware of the appellant's disclosures, made only months before, laid the groundwork upon which the appellant would be reassigned in the upcoming RIF to the Customer position. In fact, the parties stipulated that one of the reasons the agency reassigned LaMarra prior to the RIF to the vacant budget position was to prevent the appellant from being moved into that position. RAF, Tab 45. While it may have been more appropriate to consider the two reassignments separately for jurisdictional

purposes, we find that treating them as strictly independent is not essential for the causation analysis in this case.[3]

Exhaustion

¶24 The agency does not dispute the AJ's determination that the appellant raised the matters at issue in this appeal with OSC, and that the proceedings before OSC have been exhausted. Petition for Review at 1-10; *see* 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review). In any event, as set forth below, we discern no error in the AJ's ultimate finding on this issue. RAF, Tab 49 at 10, and Tab 1, Subtabs 8 and 9.

¶25 In his initial appeal to the Board, filed March 13, 1996, the appellant challenged his March 12, 1996 proposed notice of reassignment to be effective on July 20, 1996. IAF, Tab 1, Enclosure A. The AJ dismissed the appeal as premature. *Id*., Tab 4. The AJ found that although the appellant had raised before OSC a claim that the agency had threatened to reassign him to the Customer position, he had yet to raise before OSC any challenge to the March 12, 1996 RIF notice. *Id*. The appellant then sent OSC a copy of the March 12, 1996 RIF notice, alleging that his supervisors had reassigned LaMarra to the vacant position that he would have been assigned to in the RIF. RAF, Tab 1, Subtab 8. On April 30, 1996, OSC issued a closure letter that informed the appellant that "[t]he personnel actions you alleged were taken in reprisal for your whistleblowing activities and which were dealt with in this complaint were a proposal to reassign you to an allegedly overgraded GS-15 position prior to a

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[3] The appellant's reassignment to the Customer position was officially effected by James H. Long. RAF, Tab 1, Ex. 1. Long did not testify at the hearing, and there is no indication in the record that he was aware of the appellant's protected disclosures. Nevertheless, there is no indication that Long had a decision-making role in the appellant's reassignment, and his signature on the appellant's RIF notice appears to have been a mere ministerial act pursuant to his role as Chief of the Recruitment, Placement and Classification Division.

tentatively scheduled Reduction in Force (RIF) which was later rescinded and the offer of reassignment made by RIF notice issued on March 12, 1996." *Id*., Subtab 11. Thus, OSC's closure letter predates the appellant's July 20, 1996 reassignment to the Customer position, and does not specify that the appellant's actual reassignment was one of the personnel actions OSC considered. Without further explanation, the AJ in the refiled case found that "the record shows the appellant raised the matters at issue in this appeal before the OSC, and the proceedings before the OSC have been exhausted." ID at 10.

¶26 In general, an appellant has not exhausted his remedy with OSC when he has not raised before OSC the personnel action that he is appealing to the Board. *E.g.*, *Roach v. Department of Army*, 82 M.S.P.R. 464, ¶¶ 9-10 (1999) (no exhaustion with respect to a proposed 14-day suspension); *Onasch v. Department of Transportation*, 63 M.S.P.R. 158, 164 (1994) (when OSC issued its termination letter before a performance appraisal was issued, OSC could not have considered it, and the appellant did not exhaust her remedy with regard to it).

¶27 The agency, however, does not dispute the AJ's determination that the appellant raised the matters at issue in this appeal with OSC, and that proceedings before OSC have been exhausted. We agree with the AJ's ultimate conclusion. The purpose of the exhaustion requirement is to give OSC a sufficient basis to pursue an investigation that might lead to corrective action. *O'Brien v. Office of Independent Counsel*, 79 M.S.P.R. 406, 412 (1998). Here, OSC was aware that the appellant was challenging LaMarra's reassignment, and had a sufficient basis to pursue an investigation that might have led to corrective action on the appellant's reassignment. There is no indication, for example, that the appellant had any additional information that he wished to bring to OSC's attention between the issuance of the RIF notice on March 12, 1996, and his reassignment in July 1996. More importantly, in an April 4, 1996 preliminary determination to close its investigation, OSC characterized the appellant's complaint as an allegation that "management officials at TACOM *have reassigned you* to a

position during a reduction in force (RIF) that you contend will not hold the GS-15 grade level which you now occupy because of your continued whistleblowing activities. You also alleged that management failed to place you in a vacant position under RIF procedures which would hold the GS-15 grade level ….” RAF, Tab 1, Subtab 9 (emphasis added). In essence, OSC issued its closure letter in this case before the effective date of the appellant’s reassignment, even though it was aware of the pending effective date of the reassignment. The appellant should not be harmed by the decision OSC made regarding when to close its investigation when OSC was aware of the pending action.

¶28 Thus, as detailed above, the appellant has made nonfrivolous allegations that he made protected whistleblowing disclosures, that he was affected by personnel actions, and that his disclosures were a contributing factor in those personnel actions. Further, he exhausted his OSC remedy. Accordingly, we find that the appeal is within the Board’s jurisdiction. *See Yunus*, 242 F.3d at 1371.

This appeal is remanded for the making of credibility determinations in accordance with *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

¶29 Because the court has vacated the Board’s prior decision in this case, the agency’s petition for review of the AJ’s initial decision is once again before the Board. In its petition for review, the agency argues that the AJ’s credibility determinations are incorrect, and that it would have reassigned LaMarra in the absence of the appellant’s protected disclosures. PFRF, Tab 1 at 14-40, 44-49. We find in this case that it is premature to address the agency’s arguments on these issues in the absence of more complete credibility findings by the AJ.

¶30 In deciding that the agency did not prove by clear and convincing evidence that it would have taken the personnel actions at issue in this case absent the protected disclosures, the AJ did not find the testimony of *any* of the agency’s witnesses credible, ID at 13-14. He did not, however, make any findings regarding the demeanor of those witnesses. Instead, the AJ based his findings solely on the witnesses’ alleged prior inconsistent statements and a determination

that their testimony was contradicted by other evidence. *Id*. Thus, of the seven factors which *Hillen* states "must be considered" in making and explaining credibility findings, 35 M.S.P.R. at 458, the AJ cited to only two in his initial decision. In addition to not discussing the witnesses' demeanor, the AJ did not discuss their opportunity and capacity to observe the events at issue, their character, their bias, and the inherent improbability of their version of the events. ID at 13-14; *Hillen*, 35 M.S.P.R. at 458.

¶31 In our view, the AJ's determination that the agency's witnesses were not credible does not meet the requirements of *Hillen*, *id*. (to resolve credibility issues, an AJ must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible), and *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). This case, which involves ascertaining the intent and motivation of the agency officials who were involved in alleged retaliatory personnel actions, is a case where the Board particularly needs the benefit of a well-reasoned *Hillen* analysis to perform its review function. *See Hillen*, 35 M.S.P.R. at 462 ("The instant case is one in which the credibility determinations made by the administrative judge are crucial to its outcome.").

ORDER

¶32 Accordingly, we FIND that the Board has jurisdiction over this appeal, VACATE the initial decision's findings on the merits of this appeal, and REMAND the appeal for adjudication consistent with this Opinion and Order. We note that before ordering any corrective action, the AJ must find that the appellant has proven by preponderant evidence that a disclosure described under

5 U.S.C. § 2302(b)(8) was a contributing factor in a personnel action. *See* 5 U.S.C. § 1221(e)(1); *cf. Yunus*, 242 F.3d at 1372 (where the Board had jurisdiction over the appeal, the Board did not commit legal error in deciding the case based on the agency's affirmative defense rather than first deciding whether the appellant had proved by a preponderance of the evidence that his disclosures were protected under the Whistleblower Protection Act). The AJ may incorporate his prior findings on these elements, to the extent that they are not inconsistent with the finding in this Opinion and Order that the appellant made nonfrivolous allegations with respect to those elements, into his new initial decision.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.