

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

88 M.S.P.R. 674

LINDA R. ASKEW,
Appellant,

DOCKET NUMBERS
CH-1221-99-0555-W-1
CH-1221-99-0717-W-1

v.

DATE: June 28, 2001

DEPARTMENT OF THE ARMY,
Agency.

Linda R. Askew, Lenox, Michigan, pro se.

Betty J. Baxter, Esquire, Warren, Michigan, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that dismissed this individual right of action (IRA) appeal for lack of jurisdiction. For the reasons given below, we GRANT the petition for review, REVERSE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant is a GS-5 Supply Technician at the Army Tank Automotive Command (TACOM). TACOM participates in a supply purchasing system known as Direct Vendor Delivery (DVD), which is an alternative to the traditional

process of centralized buying of supplies to be warehoused at depots for later shipment to Army field activities. Under DVD, field activities order goods and take delivery straight from suppliers, with TACOM making payment. Later, TACOM adjusts the Army's books to reflect reimbursement to TACOM from field activity accounts.

¶3 The appellant submitted a letter to the Department of Defense Inspector General (IG) alleging that DVD had several problems which caused a loss of funds. According to the letter, often a field activity does not make an entry into the TACOM computer system to indicate receipt of supplies, thus leaving what should be a closed transaction open indefinitely; in such situations TACOM managers sometimes delete old open transactions without ever determining if the field activity has received the supplies, with the consequence that TACOM is never reimbursed. Further, according to the letter, a field activity sometimes cancels an order after shipment but fails to return the supplies to the vendor. The IG conducted an investigation and concluded that the situation was well-known to agency management, that planned improvements to the system had been delayed because of computer and staffing problems, and that no violations of agency rules had been substantiated. *See Consolidated Appeal File (CAF), Tab 47, Ex. III.*

¶4 The appellant later filed a complaint with the Office of Special Counsel (OSC) claiming that the agency took actions against her in retaliation for her letter to the IG. While OSC was investigating she supplemented her complaint with additional alleged acts of retaliation. OSC closed out the appellant's complaint, and later the supplement thereto, without taking action, and the appellant timely filed these appeals, which the administrative judge joined. *See Initial Appeal File (IAF) (-0555), Tabs 1 & 4; IAF (-0717), Tab 1.* After a hearing, the administrative judge (AJ) issued an initial decision dismissing the appeals for lack of jurisdiction, holding that the appellant's letter to the IG was not a whistleblowing disclosure. The AJ emphasized that the appellant failed to identify even one specific instance in which a DVD item was delivered to a field

activity without reimbursement to TACOM, or in which an order was canceled without return of the supplies to the contractor. In further support of his holding that the appellant did not make a whistleblowing disclosure, the AJ noted that the appellant's letter to the IG described things that she learned as part of her assigned duties. In light of his holding that the appellant did not make a protected disclosure, the AJ did not make definitive findings on whether the appellant was affected by a personnel action upon which an IRA appeal may be based or whether she exhausted her OSC remedy. CAF, Tab 52.

¶5 The appellant argues in her timely petition for review that: Her assigned duties did not include detection of waste, fraud, and abuse; the AJ did not put her on notice prior to the hearing of the degree of specificity required to establish that she made a protected disclosure; in any event, the record as currently developed shows that she made a protected disclosure; and the AJ abused his discretion in not granting a continuance to allow the appellant to secure the testimony of a witness who is not a federal employee. The appellant has submitted documents with her petition for review that were not submitted below. Petition for Review File, Tab 1. The agency opposes the petition for review. *Id.*, Tab 3.¹

ANALYSIS

¶6 To establish Board jurisdiction over an IRA appeal, an appellant must show by preponderant evidence that: She 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 she raised the issue before OSC, and proceedings

¹ The appellant also argues on petition for review that the AJ erred in ruling at the prehearing conference that the issues of violation of her veterans' preference rights, retaliation for equal employment opportunity activity, and the agency's failure to pay for her training are beyond the scope of these appeals. We find no error in the AJ's analysis of these issues. *See* CAF, Tab 44.

before OSC were exhausted. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994).²

The appellant disclosed two violations of accounting rules in her letter to the IG.

¶7 “[A]ny disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences ... a violation of any law, rule, or regulation” is protected whistleblowing. 5 U.S.C. § 2302(b)(8)(A)(i). Here, the appellant alleged in her letter to the IG that on occasion old open transactions were deleted without TACOM ever determining whether the field activity had received the supplies ordered. According to the letter, “[m]ethods are not in place to ensure or acknowledge receipt.” See CAF, Tab 47, Ex. III. TACOM Operating Instruction 725-03, § 2.2(g), submitted by the appellant below, requires as part of the reconciliation process that receipt of shipments be verified before DVD transactions are closed out. See CAF, Tab 6, Subtab 9 at 6.

¶8 On February 10, 1995, the IG issued a report entitled “Controls over Materiel Procured for Direct Vendor Delivery.” The report found that field activities routinely failed to report receipt of supplies to payment centers. The report noted that in four prior reports, issued from 1984 to 1988 by the General Accounting Office and the IG, it was found that field activities frequently failed

² 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 non-frivolous 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. Without deciding whether *Yunus* effectively overrules or otherwise modifies *Geyer*, cf. *Cruz v. Department of the Navy*, 934 F.2d 1240, 1242, 1244, 1247 (Fed. Cir. 1991) (*en banc*) (the Board should make a jurisdictional determination based on the weight of the evidence, not on the sufficiency of the allegations); *Geyer*, 63 M.S.P.R. at 17 (whether a whistleblowing disclosure contributed to a personnel action is a merits issue in an IRA appeal), in this case the appellant satisfies both the *Geyer* and the *Yunus* tests for IRA jurisdiction. In ¶¶ 7 - 26 of this opinion, we analyze the evidence and argument under *Geyer*, since that test is in most respects harder to meet. In ¶ 27, we explain how the *Yunus* test is also satisfied.

to record receipt of supplies. *See* CAF, Tab 48, Ex. P. On April 9, 1996, a memorandum to the Commander, Army Materiel Command, described then-ongoing TACOM efforts "to achieve better accuracy for correctly posting receipts." *Id.*, Ex. S at 3. Finally, the IG report that resulted from the appellant's letter noted that in 1995, TACOM management had detected a problem with old open transactions being deleted from the computer without ensuring receipt; TACOM had attempted to change its system to correct the problem but as of the IG report it had not gotten approval from higher-ups in the Army Materiel Command. CAF, Tab 47, Ex. III (report at 5).

¶9 Based on the foregoing, we conclude that the appellant disclosed a violation of rule, TACOM Operating Instruction 725-03, § 2.2(g), when she reported to the IG that DVD transactions were being closed out with no verification that field activities had received the supplies ordered. Contrary to the initial decision, the fact that the appellant could not present a specific example showing a particular dollar loss to the government is not fatal. The question is whether the appellant reasonably believed that receipt of the supplies was not being recorded properly. 5 U.S.C. § 2302(b)(8). Considering that TACOM management itself found that this was occurring, and considering that the appellant's working knowledge of the DVD system developed while performing reconciliation functions, she did have a reasonable belief that transactions were being closed out in the absence of verification of receipt. *See Perry v. Department of Veterans Affairs*, 81 M.S.P.R. 298, ¶ 9 (1999) (a disclosure based not on scanty or unreliable information, but rather, on a reasonable interpretation of events considering information available to the appellant when he made his disclosure, is protected). The appellant's disclosure was not based on a "purely subjective" belief so as to fall outside the coverage of 5 U.S.C. § 2302(b)(8). *See LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1157 (2000). Rather, as stated in the IG report, TACOM management itself had detected the very problem identified by the appellant.

¶10 We also find that the appellant disclosed a violation of the Department of Defense rule against cancellation of orders after shipment by the supplier. The appellant expressly stated in her letter to the IG that this was occurring. Upon investigation, the IG verified that section 2.Q.5(a) of “MILSTRIP [a segment of the Department of Defense procurement manual] prohibits customer cancellations when shipment has already occurred, but DVD contract cancellations have become a problem because the automated system was not programmed to [prevent] the cancellation transaction due to prior shipment.” CAF, Tab 47, Ex. III (report at 8-10).

Notwithstanding the precedent relied upon in the initial decision, the appellant’s letter to the IG was protected whistleblowing.

¶11 In concluding that the appellant’s disclosure was not protected, the AJ relied on *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), which he interpreted as having held that a disclosure of information in the course of an employee’s performance of her regular duties is not protected whistleblowing. The appellant contends on review that her disclosure was protected, notwithstanding *Willis*. As explained below, we agree.

¶12 We begin by cautioning, as we did in *Czarkowski v. Department of the Navy*, 87 M.S.P.R. 107, ¶ 13 (2000), that *Willis* should not be cited for broad propositions, nor should isolated statements from *Willis* be posited as general rules. Rather, the unique facts of *Willis* limit its usefulness in determining whether a disclosure was protected whistleblowing.

¶13 Mr. Willis, a District Conservationist, was responsible for monitoring farms’ compliance with Department of Agriculture conservation plans. After inspecting 77 farms, he found 16 farms to be out of compliance. Six farmers successfully appealed Mr. Willis’s determination to higher-level agency officials. 141 F.3d at 1141. Mr. Willis complained to his supervisors about having his findings overturned. *Id.* at 1143. He later sought corrective action for

subsequent personnel actions that he claimed were taken in retaliation for his complaints.

¶14 The court held that Mr. Willis's objections to having his findings overturned was not protected whistleblowing, emphasizing that "[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations." *Id.* The court characterized Mr. Willis's complaints as nothing more than "voic[ing] his dissatisfaction with his superiors' decision," and noted that it was not until he retired that Mr. Willis brought his concerns to "higher authorit[ies]" who could have taken action to correct any impropriety in the ultimate finding by agency officials that the six farms in question were in compliance. *Id.* The court stressed that these post-retirement disclosures did not put Mr. Willis's job security at risk, whereas the purpose of the whistleblower protection statute is to provide a remedy for those who risk their jobs by disclosing wrongdoing. *Id.*

¶15 Turning to the question of whether Mr. Willis's original determination that 16 farms were out of compliance was protected whistleblowing, the court found that Mr. Willis had done "no more than carry out his everyday job responsibilities." *Id.* at 1144. Here too, the court found that the findings of non-compliance did not put Mr. Willis's job security at risk. *Id.*

¶16 The present case is very different from *Willis*. The appellant did not merely complain to or express disagreement with her supervisors; she reported violations of accounting rules to the IG. Unlike Mr. Willis, the appellant did not wait until after she left the agency to bring her concerns to the IG. Furthermore, it would be grossly inaccurate to say that the appellant, a Supply Technician whose duties included reconciling DVD books, was doing "no more than carry[ing] out [her] everyday job responsibilities" when she reported violations of accounting rules to the IG. Moreover, and in any event, *Willis* did not hold that a disclosure of information in the course of an employee's performance of her normal duties cannot be protected whistleblowing. *Czarkowski*, 87 M.S.P.R. 107, ¶ 13; *see also*

Watson v. Department of Justice, 64 F.3d 1524, 1530 (Fed. Cir. 1995) (a protected disclosure may be made as part of an employee's duties). There is also no basis for concluding that the appellant took no risk in going to the IG. In sum, when the entire factual picture of *Willis* is considered alongside the facts of this case, we are persuaded that the AJ erred in relying on *Willis* to find that the appellant's disclosure to the IG was not protected whistleblowing.

Recent precedent does not bring the appellant's letter to the IG outside of the protections of 5 U.S.C. § 2302(b)(8).

¶17 After the appellant filed her petition for review, the Court of Appeals for the Federal Circuit decided *Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000). *Meuwissen* has a bearing on our jurisdiction, so we address it *sua sponte*. See *Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996) (the Board must satisfy itself that it has authority to adjudicate the matter before it, and may raise the question of its own jurisdiction *sua sponte* at any time).

¶18 Mr. Meuwissen was an administrative law judge whose duties included rendering decisions on heirship claims under the White Earth Reservation Land Settlement Act (WELSA), which provides for compensation to the descendants of certain native Americans whose lands were taken by the federal government 95 years ago. Mr. Meuwissen came to believe that published administrative and judicial decisions which had held that illegitimate children were not "heirs" for purposes of WELSA had been incorrectly decided. 234 F.3d at 11. He issued a decision that expressly declined to follow precedent on the ground that it was "an erroneous interpretation of the WELSA." *Id.* The Board of Indian Appeals reversed this decision, and Mr. Meuwissen's employing agency later terminated his appointment, in part because of the decision. *Id.* After exhausting his remedy with OSC, Mr. Meuwissen filed an IRA appeal claiming, insofar as is relevant here, that his decision was a whistleblowing disclosure, and that termination of his appointment therefore constituted prohibited retaliation. The Board denied

Mr. Meuwissen's request for corrective action in a non-precedential final decision. *Meuwissen v. Department of the Interior*, MSPB Docket No. CH-1221-98-0870-W-1 (Initial Decision, Dec. 1, 1998), *petition for review denied*, 84 M.S.P.R. 621 (1999) (Table).

¶19 On judicial review, the court issued a precedential decision affirming the Board. The court concluded that Mr. Meuwissen's decision disagreeing with published interpretations of WELSA was not protected activity under 5 U.S.C. § 2302(b)(8) because he did not disclose anything "that was not already known." 234 F.3d at 12. According to the court, a "disclosure of information that is publicly known is not a disclosure under the WPA [Whistleblower Protection Act of 1989]." *Id.* at 13. Relying on the legislative history of the Civil Service Reform Act (CSRA) of 1978, Pub. L. No. 95-454, 92 Stat. 1111, although referring to it as the "legislative history of the WPA [of 1989]," the court concluded that the appellant's decision on heirship related to matters that "w[ere] not concealed and w[ere] already known." 234 F.3d at 13. In further support of its conclusion, the court cited the Black's Law Dictionary definition of "disclose," as meaning "[t]o bring into view by uncovering; to expose; to make known." *Id.*

¶20 The *Meuwissen* case does bear some resemblance to the appeals currently before the Board. The accounting irregularities that the appellant described in her letter to the IG were longstanding and well-known to TACOM managers, to the IG, and to GAO. Accordingly, she did not "reveal" anything, insofar as her letter dealt with matters that were "not concealed" and "already known"; put differently, she did not "uncover" or "expose" anything. One could argue, on this basis, that in light of *Meuwissen* the appellant's letter to the IG was not protected whistleblowing.

¶21 We hold otherwise, however, for two reasons. First, a key aspect of the *Meuwissen* holding was the public nature of the information described in

Mr. Meuwissen’s heirship decision that disagreed with precedent. As noted by the court, the –

policy of excluding illegitimate children from WELSA heirship determinations was publicly known, having been disclosed in [published] decisions. A disclosure of information that is publicly known is not a disclosure under the WPA. The purpose of the WPA is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information.

234 F.3d at 13 (emphases supplied). In these appeals, by contrast, the accounting matters discussed in the appellant’s letter to the IG were not publicly known. TACOM practices under the DVD system were internal to TACOM, and were nothing like the official, published interpretations of WELSA at issue in *Meuwissen*. Accordingly, *Meuwissen* is distinguishable on its facts.

¶22 Second, we decline to give a broad reading to selected passages from *Meuwissen* – specifically, the statements that a matter that is “not concealed” or “already known” cannot be the subject of a protected disclosure, and that “disclose” means to “uncover[],” “to expose; to make known” – to find that the appellant’s letter to the IG was not protected, because the passages conflict with the legislative history of the WPA. The court stated that its holding was consistent with “the legislative history of the WPA [of 1989],” but as support for this statement it cited “S. Rep. No. 95-969, 95th Cong., 2d Sess. 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2730.” 234 F.3d at 13. The report relied upon is from the legislative history of the CSRA of 1978, a comprehensive law that contained an early definition of a protected whistleblowing disclosure. *See* 5 U.S.C. § 2302(b)(8). Eleven years after the passage of the CSRA, Congress passed the WPA of 1989 in an effort to strengthen the CSRA’s protections for whistleblowers. The Senate Report on the bill that later became the WPA firmly rejected the notion that an individual who communicates wrongdoing that is “not concealed” or “already known” should not be protected from retaliation. S. Rep. No. 100-413, 100th Cong., 2d Sess., at 13 (1988) (“OSC, the Board and the courts

should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected ... only if the employee is the first to raise the issue”).³

¶23 Based on the above, we conclude that unlike the alleged disclosures in *Meuwissen*, the appellant’s letter to the IG disclosing violations of accounting rules was protected under 5 U.S.C. § 2302(b)(8).

The appellant was subjected to two personnel actions and exhausted her OSC remedy.

¶24 It is undisputed that the agency removed significant duties from the appellant, which is a personnel action upon which an IRA may be based. CAF, Tab 51 at 11-12; *see* 5 U.S.C. § 2302(a)(2)(A)(xi). The appellant raised this matter before OSC. IAF (-0555), Tab 1 at 2. Accordingly, the allegation that that action was taken in reprisal for the letter to the IG, which the appellant raised in MSPB Docket No. CH-1221-99-0555-W-1, is within the Board’s jurisdiction. However, the alleged denial of a “desk audit” is not a personnel action, as the agency argued below. CAF, Tab 51 at 9; *see* 5 U.S.C. § 2302(a)(2)(A). Thus, that matter is not within the scope of the appeal.

¶25 As to MSPB Docket No. CH-1221-99-0717-W-1, we find, contrary to the agency’s argument (which the AJ did not need to reach given his conclusion on the protected disclosure issue), that the appellant raised her non-selection for a promotion to a GS-9 position with OSC. *See* IAF (-0717), Tab 1 at 12, 18. Non-selection for a promotion is a personnel action upon which an IRA appeal may be based. *See* 5 U.S.C. § 2302(a)(2)(A)(ii); *Ellison v. Merit Systems Protection*

³ Although the report cited above relates to a version of the WPA that President Reagan “pocket-vetoed” after the 100th Congress adjourned in 1988, the report nonetheless may be relied on as authoritative legislative history of the WPA of 1989 where, as here, the relevant language of the bill did not change before it was ultimately enacted. *See Smith v. Department of Agriculture*, 64 M.S.P.R. 46, 55 n.3 (1994).

Board, 7 F.3d 1031, 1035-36 (Fed. Cir. 1993). Accordingly, MSPB Docket No. CH-1221-99-0717-W-1 is also within the Board's jurisdiction. We do agree with the agency, though, CAF, Tab 51 at 12, that the appellant has failed to show that she raised her reassignment, which was proposed on March 31, 1999, and which took effect June 6, 1999, with OSC. CAF, Tab 48, Ex. 1 (notice of reassignment); IAF (-0717), Tab 1 at 11-12 (OSC initial determination not to take action, dated February 9, 1999, before the notice of reassignment); *id.* at 18-19 (OSC letter closing out additional matters raised, but not mentioning reassignment). Therefore, that personnel action is not within the scope of the appeal.

The *Geyer* test for establishing IRA jurisdiction has been satisfied.

¶26 As detailed above, the appellant has shown by a preponderance of the evidence that she made a whistleblowing disclosure,⁴ that she was affected by a personnel action, and that she exhausted her OSC remedy. Accordingly, the appeals are within the Board's jurisdiction. *Geyer*, 63 M.S.P.R. at 16-17.

⁴ The appellant argues that the AJ abused his discretion in not granting a continuance to allow her to secure the testimony of a witness, Raymond Farr, who is not a federal employee. Having found on this record that the appellant made a protected disclosure, we need not resolve this argument, since according to the appellant's own account Farr would have testified only about the nature of her disclosure. Petition for Review File, Tab 1 at 1-2; *see also* CAF, Tab 41 at 7 (appellant's pre-hearing submission describing Farr's proposed testimony). Second, for a similar reason we need not decide whether we should consider the documents appended to the petition for review either because they are new and material, or because, as the appellant claims, she was not given a fair chance below to develop the record on the protected disclosure issue. *See Briones v. Department of the Treasury*, 74 M.S.P.R. 8, 10 (1997) (normally the Board will not consider evidence submitted for the first time on review unless it is new and material); *Jackson v. U.S. Postal Service*, 74 M.S.P.R. 20, 23 (1997) (the Board considered evidence submitted for the first time on review going to jurisdiction because the appellant should have been given a chance below to clarify his jurisdictional submission). Here too, the evidence appended to the petition for review relates exclusively to the nature of the appellant's disclosure to the IG and, as explained above, we have found that the disclosure was protected whistleblowing.

The test set forth in *Yunus* for establishing IRA jurisdiction has also been satisfied.

¶27 Assuming without deciding that *Yunus*, not *Geyer*, should apply in this case to establish IRA jurisdiction, *see* note 2 above, we find the *Yunus* has been test met. As explained above, the appellant exhausted her OSC remedy. Furthermore, since she showed by preponderant evidence that she made a whistleblowing disclosure and that she was subjected to a personnel action, she satisfies two of the *Yunus* requirements. The remaining jurisdictional element under *Yunus* is a requirement that the appellant make a non-frivolous allegation that the whistleblowing contributed to the personnel actions being challenged, namely, a significant change in duties and a non-selection for promotion. The appellant has made detailed factual allegations that the agency officials responsible for those personnel actions were aware of her whistleblowing and acted within such time that a reasonable person could find that the disclosure contributed to the actions. CAF, Tab 51 at 11-12, 14-19. Accordingly, she has made non-frivolous allegations that her whistleblowing contributed to the personnel actions. 5 U.S.C. § 1221(e)(1); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

ORDER

¶28 The initial decision, which held that the appeals are beyond the Board's jurisdiction, is REVERSED. The appeals are REMANDED to the regional office for findings and conclusions on the remaining issues.

FOR THE BOARD:

Washington, D.C.

Robert E. Taylor
Clerk of the Board