



## U.S. Merit Systems Protection Board

CASE REPORT

DATE: December 12, 2008

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### BOARD DECISIONS

- **Appellant: Tommy L. Swanson, Sr.**  
**Agency: General Services Administration**  
**Decision Number: [2008 MSPB 246](#)**  
Docket Number: DA-1221-08-0182-W-1  
Issuance Date: December 4, 2008  
Appeal Type: Individual Right of Action (IRA)

#### **Whistleblower Protection Act**

- **Exhaustion of Remedy**
- **Jurisdiction**
- **Protected Disclosure**
- **Gross Mismanagement**
- **Contributing Factor**

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The appellant served as Director of the agency's Small Business Office (SBO) in Fort Worth Texas. In June 2002, he alleged that he reported to his second-level supervisor that his first-level supervisor had "undermined both the integrity and ability of [the SBO] to perform its mission effectively by eliminating all but two positions for the entire region," and was using "bullying tactics" in an attempt to force him to develop a "virtual office," which would further reduce the SBO's effectiveness. Subsequently, the appellant was detailed and reassigned to various positions within the agency's Public Buildings Services. After filing a complaint with the Office of Special Counsel in which he alleged two other whistleblowing disclosures, the appellant filed an IRA appeal with the Board. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant failed to exhaust his administrative remedies with OSC as required by [5 U.S.C. § 1214\(a\)\(3\)](#).

**Holdings: The Board granted the appellant's PFR, vacated the initial decision, and remanded the case for further adjudication:**

1. Under [5 U.S.C. § 1214\(a\)\(3\)](#), an IRA appellant is required to seek corrective action from OSC before seeking corrective action from the Board. To meet this exhaustion requirement, the appellant must provide OSC a sufficient basis to pursue an investigation which might have led to corrective action. The appellant satisfied this requirement as to the disclosure described above, as he specified with reasonable clarity and precision the content of the disclosure, the individual to whom it was made, the nature of the personnel actions that were allegedly taken in retaliation, and the individuals responsible for taking those actions.

2. The appellant made a nonfrivolous allegation of facts that he reasonably believed evidenced gross mismanagement, which means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. Contrary to the initial decision, gross mismanagement does not require an "element of blatancy." If, as the appellant alleges, his first-level supervisor undermined the ability of the SBO to perform its mission by drastically cutting the number of employees, a reasonable person could conclude that the supervisor committed an act of gross mismanagement.

3. Under the knowledge/timing test, the appellant made a nonfrivolous allegation that his disclosure was a contributing factor in his reassignment, as the reassignment occurred within 2-3 months of the disclosure.

- **Appellant: Christopher D. Roche**  
**Agency: Department of Transportation (FAA)**  
**Decision Number: [2008 MSPB 247](#)**  
Docket Number: NY-0752-07-0359-I-1  
Issuance Date: December 8, 2008  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

**Jurisdiction**  
- "Employee"

The appellant petitioned for review of an initial decision that dismissed his removal appeal for lack of jurisdiction. The appellant was an air traffic control specialist at the FAA. The issue was whether he was an "employee" entitled to appeal his removal to the Board. Both the appellant and the agency argued that he was an employee under the FAA's personnel management system (PMS) and [49 U.S.C. § 40122\(g\)](#). The AJ found, however, that the appellant must be an employee as defined under [5 U.S.C. § 7511](#) to be entitled to appeal his removal, and determined that the appellant did not meet this requirement.

**Holdings: The Board affirmed the initial decision as modified, still dismissing the appeal for lack of jurisdiction:**

1. Under [5 U.S.C. §§ 7512\(1\)](#) and [7513\(d\)](#), an individual who meets the definition of an "employee" under [5 U.S.C. § 7511\(a\)\(1\)](#) generally is entitled to appeal his removal to the Board.

2. Effective April 1, 1996, the Board was divested of jurisdiction over appeals filed by FAA employees, and the FAA was required to develop and implement a personnel management system for its own workforce. In 2000, the Ford Act amended the law to provide that an FAA employee may submit an appeal to the Board “from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.”

3. In ordinary usage, the word “employee” would appear to mean any person who works for another. Such a meaning is clearly too broad in this context, as it would apply to political appointees and probationers, and nothing in the Ford Act or its legislative history suggests that Congress intended to confer Board appeal rights on such a broad range of individuals. Accordingly, a narrower definition is required, which could be provided by either the FAA’s PMS or by [5 U.S.C. § 7511\(a\)\(1\)](#).

4. Both the Board and its reviewing court, the U.S. Court of Appeals for the Federal Circuit, have ruled in similar cases that an individual claiming a right to appeal to the Board under [49 U.S.C. § 40122](#) could file such an appeal only if he met the definition of an “employee” under [5 U.S.C. § 7511](#). The appellant’s contrary argument relies on an MSPB initial decision. Initial decisions of the Board have no precedential value, however.

5. The appellant argues, in effect, that, although Congress restored FAA employees’ right to appeal certain actions, it did not restore the statutory provisions defining the categories of individuals who could appeal those actions. There is no support in the legislative history for such an interpretation, which is belied by the language of [§ 40122\(g\)\(3\)](#), which provides for the right to appeal “any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.”

6. The appellant is not an “employee” under [5 U.S.C. § 7511\(a\)\(1\)](#).

- **Appellant: Anil N. Parikh**
- Agency: Department of Veterans Affairs**
- Decision Number: [2008 MSPB 248](#)**
- Docket Number: CH-1221-08-0352-W-1
- Issuance Date: December 10, 2008
- Appeal Type: Individual Right of Action (IRA)
- Whistleblower Protection Act**
- **Jurisdiction**
- **Protected Disclosure**
- Defenses and Miscellaneous Claims**
- **Collateral Estoppel**

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The agency proposed to remove him from his position as a Physician based upon the charge of unauthorized release and disclosure of private and protected information. The appellant contended that the letters in question were protected whistleblowing disclosures. In dismissing the appeal, the AJ made the following rulings with regard to the appellant’s 9 alleged disclosures: (1) The appellant

was collaterally estopped from raising the first disclosure because he had raised that claim in a previous IRA appeal and the judge had found, on the merits, that the disclosure was not protected under the WPA; (2) in six of the disclosures, which alleged various violations of professional or clinical standards that potentially endangered patients, the appellant violated the Health Insurance Portability and Accountability Act (HIPAA) by disclosing confidential health information to unauthorized persons; and (3) two of the disclosures pertained to conduct that might violate discrimination laws protected under [5 U.S.C. § 2302\(b\)\(9\)](#), but were not whistleblowing disclosures protected under [5 U.S.C. § 2302\(b\)\(8\)](#).

**Holdings: The Board granted the appellant’s PFR, vacated the initial decision, and remanded the case for further adjudication:**

- 1. One of the requirements for collateral estoppel (issue preclusion) is that the issue be identical to that involved in the prior action. That requirement was not satisfied here. The issue in this appeal is whether, on the written record, the appellant made a nonfrivolous allegation that his disclosure was protected. The issue in the prior appeal was whether, after a hearing, the appellant proved by preponderant evidence that the disclosure was protected.**
- 2. Regarding the disclosures alleged to have violated HIPAA, that law generally prohibits the disclosure of individually identifiable health information. Even if a disclosure would otherwise be protected under [5 U.S.C. § 2302\(b\)\(8\)](#), it is not protected if the disclosure is specifically prohibited by law. The HIPAA implementing regulation at [45 C.F.R. § 164.502\(j\)](#) specifically allows disclosures by whistleblowers when the individual believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards or potentially endangers patients, when the disclosure is made to a health oversight agency or public health authority authorized to investigate such matters, or to an attorney retained by the whistleblower. The appellant’s disclosures fell within this exception, notwithstanding the fact that copies of the disclosures were sent to persons who would not have satisfied the regulation (e.g., the appellant’s Senator and other Members of Congress), as well as to authorized agencies and his attorney.**
- 3. The Board concurred with the AJ’s determination that two of the disclosures, which reported an inappropriate comment by an agency physician that the appellant claimed evidenced a violation of EEO policies, were covered under [5 U.S.C. § 2302\(b\)\(1\)](#) and (b), not under [5 U.S.C. § 2302\(b\)\(8\)](#).**