

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

**2009 MSPB 103**

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Docket No. DA-0752-08-0571-I-1

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**Tramell Kukoyi,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

June 8, 2009

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Tramell Kukoyi, Houston, Texas, pro se.

Kenneth S. Carroll, Esquire, Dallas, Texas, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed for lack of jurisdiction her individual right of action (IRA) appeal from the agency's termination of her appointment during her probationary period. For the reasons set forth below, we DENY the PFR for failure to meet the criteria for review under [5 C.F.R. § 1201.115](#). We REOPEN the appeal on the Board's motion pursuant to [5 C.F.R. § 1201.118](#), AFFIRM the ID in PART, VACATE the ID in PART, and REMAND the appeal for further adjudication consistent with this Opinion and Order (O&O).

## BACKGROUND

¶2 The agency appointed the appellant, a non-preference eligible, to a Social Worker position with the Veterans Health Administration, Forth Worth Homeless Veterans Program, Mental Health Service, North Texas Health Care System at Fort Worth, Texas. Initial Appeal File (IAF), Tab 1, subtab 0 at 1, subtab 1 at 1, subtab 2. This career-conditional, excepted service appointment under [38 U.S.C. § 7401\(3\)](#) was subject to the appellant's completion of a one-year probationary period commencing on October 14, 2007. *Id.*, subtab 2 at 1. On June 27, 2008, the agency notified the appellant of its decision to terminate her appointment effective July 13, 2008, for conduct that did not reflect the necessary level required for successful government service. *Id.*, subtab 18.

¶3 The appellant sought corrective action from the Office of Special Counsel (OSC). IAF, Tab 1, subtabs 21-22. In an August 12, 2008 initial determination letter, the OSC informed the appellant of its decision not to take any action regarding her whistleblowing complaint, and on August 26, 2008, the OSC closed its investigation and advised the appellant of her right to seek corrective action from the Board. *Id.*, subtabs 23-24.

¶4 The appellant timely filed an IRA appeal with the Board. IAF, Tab 1 at 1-6, subtab 0. She alleged that she made three protected disclosures. On March 10, 2008 she allegedly disclosed to a higher-level management official that Linda Saucedo, Supervisor, Forth Worth Homeless Veterans Program, and the appellant's first-line supervisor, failed to document veterans in the Grant and Per Diem Program, which resulted in overbilling of the agency by the affiliated homeless shelter. ID at 10-11. Also on March 10, 2008, she allegedly disclosed to her second-line supervisor, Teresa House-Hatfield, that Ms. Saucedo's had permitted a non-veteran Truck Driver to act as a Case Manager. On July 7, 2008, she allegedly disclosed to higher-level agency officials her concerns regarding Ms. Saucedo's management of the Grant and Per Diem Program. She further alleged that in reprisal for these three disclosures, the agency failed to submit her

May 1, 2008 maternity leave requests to the proper authorities for approval, failed to issue her a performance appraisal prior to her termination, and ultimately terminated her appointment. *Id.* at 1-6, subtab 0, Tab 5. The appellant also raised affirmative defenses of discrimination and harmful error. IAF, Tab 1 at 5, subtab 0 at 3-6. She requested a hearing, and designated a representative. *Id.* at 2, Tab 3.

¶5 The administrative judge (AJ) issued an acknowledgment order informing the appellant that the Board may not have jurisdiction over her appeal from the agency's termination of her appointment during her probationary period. IAF, Tab 2 at 2-4. She therefore advised the appellant of her burden to establish that she has a right to a direct appeal to the Board. *Id.* The AJ further apprised the appellant that, even if she is a probationary employee, the Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before the OSC, and makes nonfrivolous allegations that she made a protected disclosure, and that the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Id.* at 4-5. Specifically, the AJ set forth the standard to establish a nonfrivolous allegation of a protected disclosure. *Id.* The AJ ordered the appellant to submit evidence and argument to establish Board jurisdiction over her appeal. *Id.* at 5. Both the appellant and the agency responded. IAF, Tabs 5-6.

¶6 Without holding the requested hearing, the AJ issued an ID dismissing the appeal for lack of jurisdiction. ID at 1, 11. The AJ found that it was undisputed that the appellant was an excepted service, non-preference eligible, probationary employee at the time of her termination for post-appointment reasons, and therefore, she was not an "employee" under [5 U.S.C. § 7511\(a\)\(1\)](#). ID at 2, 6-7. Thus, the appellant has no direct right to appeal the agency's termination of her appointment during her probationary period to the Board. ID at 7.

¶7 The AJ also determined that the appellant failed to establish jurisdiction over her IRA appeal. With respect to her July 7, 2008 disclosures, the AJ found

that she failed to make a nonfrivolous allegation that they were a contributing factor in the agency's purported personnel actions because the disclosures were made following the agency's June 27, 2008 decision to terminate her appointment, ID at 2, 9. The AJ also concluded that the appellant had failed to exhaust her OSC administrative remedies with respect to her March 10, 2008 disclosure regarding the Grant and Per Diem Program. ID at 10-11. Finally, the AJ found that the appellant's allegations concerning her March 10, 2008 disclosure regarding the Truck Driver/Case Manager were inadequate because (1) they did not evidence a violation of a law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety; and (2) she did not make a nonfrivolous allegation that Ms. Saucedo knew of the disclosure, or that it was a contributing factor in the agency's decision to terminate the appellant's employment, failure to submit her maternity leave requests for approval, or failure to issue her a performance appraisal prior to her termination. ID at 10.

¶8 The appellant has filed a pro se PFR. Petition for Review File (PFRF), Tab 1 at 2-3. The agency has responded in opposition. PFRF, Tab 4.

#### ANALYSIS

¶9 On review, the appellant does not challenge the AJ's finding that she has no statutory or regulatory direct right to appeal her termination to the Board. PFRF, Tab 1; ID at 7. At the time of the appellant's termination from her career-conditional, excepted service appointment, she was a non-preference eligible serving her one-year probationary period, and thus, was not an "employee" under [5 U.S.C. § 7511\(a\)\(1\)\(c\)](#) with a statutory right of direct appeal to the Board. ID at 7; *see Allen v. Department of the Navy*, [102 M.S.P.R. 302](#), ¶ 10 (2006); *Swango v. Department of Veterans Affairs*, [59 M.S.P.R. 235](#), 240 (1993). We therefore affirm these findings in the ID.

¶10 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before the OSC, and makes nonfrivolous allegations that she: (1) engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, [92 M.S.P.R. 298](#), ¶ 12 (2002); ID at 7. If the appellant satisfies each of these jurisdictional requirements, she has the right to a hearing on the merits of her claim. *Spencer v. Department of the Navy*, [327 F.3d 1354](#), 1356 (Fed. Cir. 2003); *Rusin*, [92 M.S.P.R. 298](#), ¶ 20.

¶11 We affirm the AJ's conclusion that the appellant failed to make a nonfrivolous allegation that her July 7, 2008 disclosures were a contributing factor in the agency's failure to submit the appellant's May 1, 2008 maternity leave requests to the proper authorities for approval, the agency's failure to issue her a performance appraisal prior to reaching its June 27, 2008 termination decision, and its June 27, 2008 decision to terminate the appellant's appointment. In order to satisfy the contributing factor IRA jurisdictional criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *E.g.*, *Atkinson v. Department of State*, [107 M.S.P.R. 136](#), ¶ 15 (2007); *Santos v. Department of Energy*, [102 M.S.P.R. 370](#), ¶ 10 (2006). Disclosures made after the agency has already taken the personnel actions at issue cannot have been contributing factors in the personnel actions and do not support a nonfrivolous allegation that the disclosures were contributing factors in the personnel actions. *Johnson v. Department of Justice*, [104 M.S.P.R. 624](#), ¶ 26 (2007); *see also Ward v. Federal Communications Commission*, 58 F. App'x 517, 520 (Fed. Cir. 2003) (NP) (the Board correctly dismissed the appellant's IRA appeal for lack of a nonfrivolous allegation of jurisdiction because his alleged protected disclosures could not have been a contributing factor in the agency's

employment decision taken over five years before the disclosures were made). Here, the undisputed facts establish that the agency's purported personnel actions pre-date the appellant's July 7, 2008 disclosures by up to two months, and therefore her disclosures were not a factor in any way in the agency's decision to take or fail to take a personnel action. ID at 9; IAF, Tab 1, subtab 0 at 6-7, subtabs 8, 18; *see Johnson*, [104 M.S.P.R. 624](#), ¶ 26. Thus, we uphold the AJ's finding that the Board has no jurisdiction over the appellant's claim of reprisal for making disclosures on July 7, 2008, due to the appellant's failure to make a nonfrivolous allegation of a contributing factor. ID at 9; *see Yunus*, 242 F.3d at 1371; *Rusin*, 92 M.S.P.R. 298, ¶ 12.

¶12 We find that the AJ's failure to adequately instruct the appellant regarding her burden to establish Board jurisdiction over her IRA appeal requires that the case be remanded for further proceedings relating to the appellant's alleged March 10, 2008 protected disclosures. Specifically, the AJ failed to adequately instruct the appellant regarding both her burden to show exhaustion of her administrative remedies before the OSC, and her burden to make a nonfrivolous allegation that her alleged disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.

¶13 Under [5 U.S.C. § 1214\(a\)\(3\)](#), an employee is required to seek corrective action from the OSC before seeking corrective action from the Board. *Briley v. National Archives & Records Administration*, [236 F.3d 1373](#), 1377 (Fed. Cir. 2001); *Coufal v. Department of Justice*, [98 M.S.P.R. 31](#), ¶ 14 (2004). The Board may only consider charges of whistleblowing that the appellant raised before the OSC. *Ellison v. Merit Systems Protection Board*, [7 F.3d 1031](#), 1036 (Fed. Cir. 1993); *Coufal*, [98 M.S.P.R. 31](#), ¶¶ 14, 18. To satisfy the exhaustion requirement, the appellant must inform the OSC of the precise ground of her charge of whistleblowing, giving the OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Ellison*, 7 F.3d at 1036; *Coufal*, [98 M.S.P.R. 31](#), ¶ 14. An appellant may demonstrate exhaustion of her OSC remedies through her

initial OSC complaint, and evidence that she amended her initial OSC complaint, including but not limited to, the OSC's determination letter and other letters from the OSC referencing the appellant's amended allegations, and the appellant's written responses to the OSC referencing OSC's discussion of the amended allegations. *See Pasley v. Department of the Treasury*, [109 M.S.P.R. 105](#), ¶¶ 12-15 (2008); *Kinsey v. Department of the Navy*, [107 M.S.P.R. 426](#), ¶ 15 (2007).

¶14 The AJ should have apprised the appellant of the means by which she may show that she has satisfied the exhaustion requirement. *See, e.g., Hudson v. Department of Veterans Affairs*, [104 M.S.P.R. 283](#), ¶¶ 7-8 (2006). Instead, the AJ merely apprised the appellant that she has the burden to prove exhaustion of her OSC remedies under *Rusin*. IAF, Tab 2 at 4; *see Yunus*, 242 F.3d at 1371; *Rusin*, [92 M.S.P.R. 298](#), ¶ 12. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985). The AJ's error was not cured by either the ID or any agency pleading. ID; IAF, Tab 6; *see Hudson*, [104 M.S.P.R. 283](#), ¶¶ 7-8 (an AJ's failure to properly inform an appellant of the Board's IRA jurisdictional requirements and the means by which they may be met may be cured by either the ID or any agency pleading). Thus, the AJ failed to provide the appellant with adequate notice of these requirements to establish exhaustion of the appellant's OSC remedies.\*

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\* The AJ found that the appellant did not allege before the OSC that she made a March 10, 2008 disclosure regarding Ms. Saucedo's failure to document veterans in the Grant and Per Diem Program, which resulted in overbilling. ID at 10-11. It appears that the appellant did allege in her initial OSC complaint that Ms. Saucedo failed to document veterans, but it is unclear from the appellant's submissions in the record below whether she informed the OSC that she made this alleged protected disclosure on March 10, 2008, to her second-line supervisor, Ms. House-Hatfield, or that Ms. Saucedo's alleged misconduct resulted in overbilling, in order to provide the OSC with a sufficient basis to pursue its investigation that might lead to corrective action. IAF, Tab 1, subtab 0 at 2-3, subtab 21 at 1, subtab 23 at 2. Based on our review of the record, it is also unclear whether some or all of the disclosures raised before the OSC were presented in the appellant's IRA appeal to the Board. It appears that in her appeal, the appellant solely

¶15 In order to satisfy the contributing factor IRA jurisdictional criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *E.g.*, *Atkinson*, [107 M.S.P.R. 136](#), ¶ 15; *Santos*, [102 M.S.P.R. 370](#), ¶ 10. In an amendment to the Whistleblower Protection Act in 1994, Congress established a knowledge/timing test that allows an employee to demonstrate that the disclosure was a contributing factor in a 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); *Wadhwa v. Department of Veterans Affairs*, [110 M.S.P.R. 615](#), ¶ 12 (2009); *Carey v. Department of Veterans Affairs*, [93 M.S.P.R. 676](#), ¶ 11 (2003). While the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard, it is “one of the many possible ways” to satisfy the standard. *Carey*, [93 M.S.P.R. 676](#), ¶ 11. Once an appellant has made a nonfrivolous allegation that the knowledge-timing test has been met, the AJ must find that the appellant’s whistleblowing was a contributing factor in the personnel

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asserted that in reprisal for making a protected disclosure on March 10, 2008, regarding Ms. Saucedo’s documentation of veterans, the agency decided to terminate her appointment, failed to submit her maternity leave requests to the appropriate authorities for approval, and failed to provide her with a performance appraisal prior to deciding to terminate her. IAF, Tab 1 at 5-6, subtab 0 at 2-3, subtab 21 at 1, Tab 5. On review, the appellant reasserts that the agency’s reprisal took place after March 10, 2008. Petition for Review File, Tab 1 at 4. After providing the parties with appropriate notice of the means to establish exhaustion of the appellant’s OSC remedies, and a further opportunity to address the jurisdictional issues on remand consistent with this O&O, the AJ shall make new determinations regarding (1) the appellant’s exhaustion of her OSC remedies with respect to the March 10, 2008 overbilling disclosure; and (2) which claimed protected disclosures that the appellant raised before the OSC are at issue in this IRA appeal.

action. *Wadhwa*, [110 M.S.P.R. 615](#), ¶ 12; *Wood v. Department of Defense*, 100 M.S.P.R. 133, ¶ 13 (2005).

¶16 In the acknowledgment order, the AJ apprised the appellant of her burden to make a nonfrivolous allegation that her disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action, and ordered her to “explain how each identified disclosure was a contributing factor in the agency’s decision to take or fail to take each of the identified personnel actions.” IAF, Tab 2 at 5-6. However, nowhere in the appeal below was the appellant ever apprised of the means to establish a nonfrivolous allegation of a contributing factor. ID; IAF, Tabs, 2, 6; *see Hudson*, [104 M.S.P.R. 283](#), ¶¶ 7-8.

¶17 Given that the AJ never advised the appellant of the means to satisfy the OSC exhaustion requirement, or how to make a nonfrivolous allegation of contributing factor, and because these errors were not cured below, ID at 8; IAF, Tabs 2, 6, the appellant was not provided with adequate notice of these jurisdictional requirements. *See Burgess*, 758 F.2d at 643-44; *Hudson*, [104 M.S.P.R. 283](#), ¶¶ 7-8. Thus, the appellant’s IRA appeal must be remanded to provide adequate jurisdictional notice, and to allow the parties to submit evidence and argument on these jurisdictional issues. *See Johnson v. Department of Health & Human Services*, [87 M.S.P.R. 204](#), ¶ 5 (2000).

¶18 For the first time on review, the appellant alleges that the AJ demonstrated bias against her based on the AJ’s purported distortion of the facts, failure to consider the entire record in issuing the ID, and failure to specifically address each of the appellant’s factual allegations “in chronological [sic] order like [she] submitted it.” PFRF, Tab 1 at 2-4. This argument is without merit as an AJ’s failure to address all of the appellant’s allegations is neither evidence of bias nor evidence that the AJ did not consider them in her ID. *See Howard v. Department of the Navy*, [43 M.S.P.R. 539](#), 546 (1990). Further, we find this bare assertion fails to establish a deep-seated antagonism towards the appellant that would make fair judgment impossible, in order to overcome the presumption of the AJ’s

honesty and integrity. *See Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir.), *cert. denied*, 537 U.S. 1020 (2002); *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980).

ORDER

¶19 Accordingly, we REMAND the appellant's IRA appeal for further jurisdictional proceedings and adjudication. The AJ shall provide the appellant with specific notice regarding how to establish exhaustion of her OSC remedies, and allow the parties to submit evidence and argument regarding whether the appellant has exhausted her OSC remedies. Also, the AJ shall provide the appellant with specific notice regarding how to establish a nonfrivolous allegation that her alleged protected disclosure(s) was a contributing factor in the agency's decision to take or fail to take personnel actions. If the AJ finds that the appellant has exhausted her OSC remedies, and has satisfied the other jurisdictional requirements, the AJ should then adjudicate the appellant's IRA appeal on the merits.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.