

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

2010 MSPB 90

Docket Nos. SF-1221-09-0133-W-1
SF-0752-09-0842-I-1

JoAnna Covarrubias,

Appellant,

v.

Social Security Administration,

Agency.

May 19, 2010

JoAnna Covarrubias, Salinas, California, pro se.

Brenda Higdon, Richmond, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that denied her request for corrective action in her individual right of action (IRA) appeal and dismissed her constructive removal appeal for lack of jurisdiction. We find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. However, for the reasons set forth below, we REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), AFFIRM the portion of the initial decision that dismissed the constructive removal appeal for lack of jurisdiction, and VACATE the portion of the initial decision relating to

the IRA appeal. We REMAND the IRA appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was formerly employed as a Teleservice Representative (TSR), GS-0962-08, with the agency's Salinas Teleservice Center (TSC). Initial Appeal File (IAF), Tab 13, Subtab 4b. Prior to January 2005, she was assigned to the Hearing Impaired (TDD) unit. On July 30, 2004, the appellant e-mailed the agency's Office of Personnel (OP) Awards Division, inquiring as to why her TDD calls were not counted toward the telephone time required for Recognition of Contribution (ROC) and Quality Step Increase (QSI) awards. The e-mail stated, in relevant part:

I AM ASKING FOR SOME DETAILS, IF POSSIBLE, PLEASE, ABOUT THE AWARDS. I HAVE BEEN TOLD OVER THE YEARS THAT I AM NOT GIVEN A ROC AWARD OR QSI, BECAUSE THE TDD CALLS DO NOT COUNT TOWARD THESE AWARDS, AND TDD CALLS ARE NOT VIEWED AS THE SAME AS SPEAKING CALLS. THE CALLERS ALL HAVE THE SAME ISSUES, RECEIVE SSI SSA ETC. AND I ALSO ANSWER TDD AND SPEAKING CALLS AT THE SAME TIME, SO BASICALLY AM ON 2 CALLS AT THE SAME TIME DURING THE DAY. I VOLUNTEERED TO DO THIS AND AS I SAID, I DO ENJOY THE TDD CALLS. I WANTED TO UNDERSTAND AND SEE IF POSSIBLE, SOME WRITTEN VERIFICATION OF WHY TDD CALLS DO NOT COUNT? . . . I JUST WOULD APPRECIATE HAVING SOME DETAILS ON WHY TDD CALLS ARE NOT COUNTED AS PHONE TIME FOR ROC'S AND QSI'S.

IAF, Tab 1, Ex. F at 1.

¶3 On August 6, 2004, the appellant again e-mailed the OP Awards Division, stating as follows:

Hello, I am asking again for some information about the criteria used for TSR's when figuring out their hours for a ROC or QSI. I wanted to see proof of this in writing, and where it is written that a TSR must have 7 hours a day on the phones, AND THAT THESE 7 HOURS HAVE TO BE SPEAKING CALLS ONLY, AND THAT THE SSA TTY CALLS ARE NOT CONSIDERED IN THIS

CRITERIA, OR NOT COUNTED TOWARD RECEIVING THE QSI OR ROC. . . . IF I NEED TO ASK SOMEONE ELSE I WILL DO SO, I WOULD APPRECIATE AN ANSWER SOON.

IAF, Tab 1, Ex. F at 2. Mitch Limbeson, then Acting Manager of Salinas TSC, subsequently addressed the appellant's concerns in an e-mail to TDD staff. *Id.*, Ex. I. He indicated that although TDD time does not count toward the minimum logon requirement for ROC awards, TDD operators spend at most 4-5 days per month doing TDD and the rest of the time on the telephones, and that all full-time permanent TDD operators met the minimum logon requirement. *Id.*

¶4 On November 1, 2004, the appellant prepared a statement for the benefit of the Federal Labor Relations Authority (FLRA), concerning the security cameras that were installed at Salinas TSC in August 2004. IAF, Tab 1, Ex. G1-3. The appellant related that in a recent unit meeting, her supervisor, Liz Valdez, stated that although the cameras were installed for security reasons, they "could be used to keep track of employees, if needed, you never know!" *Id.* The appellant also speculated that the cameras were being used to monitor employee conversations and smoke breaks. *Id.* On November 12, 2004, the American Federation of Government Employees (AFGE) Local 2003 filed an unfair labor practice (ULP) complaint with the FLRA, alleging that Salinas TSC management had refused to bargain over implementation of the security cameras. IAF, Tab 13, Subtab 4h. On January 27, 2005, the appellant provided FLRA with an affidavit, in connection with the ULP complaint, reiterating the claims in her November 2004 statement. IAF, Tab 1, Ex. G4-6.

¶5 Meanwhile, on December 6, 2004, the appellant was randomly selected for an unannounced service observation review by Management Analyst Shirley Vuksic. During the review, the appellant received a call concerning Medicare benefits. Vuksic observed that the appellant improperly transferred the call to a field office administrative line and neglected to remain on the line to introduce the caller to the field office representative. IAF, Tab 1, Ex. A1. On December

10, 2004, Valdez issued the appellant a formal reprimand concerning the incident. *Id.*, Ex. A2. The reprimand noted that “any further incidents of misconduct may result in additional discipline, including removal from your position,” and that a copy of the reprimand letter would be kept in the appellant’s personnel file “for up to one year.” *Id.* The appellant subsequently requested a transfer out of the TDD unit, and on January 18, 2005, the agency approved her request. IAF, Tab 13, Subtab 4c.

¶6 On January 31, 2005, the appellant grieved the reprimand pursuant to the National Agreement between the agency and AFGE. IAF, Tab 1, Ex. H at 10-12. The following month, Valdez issued a step 1 decision denying the grievance. IAF, Tab 13, Subtab 4l. The grievance proceeded to step 2, with Limbeson serving as the second step official. *Id.*, Subtab 4m. On March 28, 2005, the parties settled the grievance, and management agreed to expunge the reprimand from the appellant’s official personnel file (OPF) effective June 10, 2005, based on the appellant’s recognition that calls should not be transferred to field office administration lines. *Id.*, Subtab 4n. The e-mail memorializing the agreement made no reference to the appellant’s possible retirement. *Id.*

¶7 In May 2005, the agency informed all employees of a Voluntary Early Retirement Authority (VERA) opportunity, available from May through September 2005. IAF, Tab 13, Subtab 4o. On June 24, 2005, the Regional Human Resources Center received the appellant’s application for VERA retirement. *Id.*, Subtab 4q. Her request for early retirement became effective September 3, 2005. *Id.*, Subtab 4b.

¶8 On August 16, 2008, the appellant filed a complaint with the Office of Special Counsel (OSC), alleging that the December 2004 reprimand, which she characterized as a threat to remove her, was issued in retaliation for her July and August 2004 e-mails to the OP Awards Division and her November 2004 statement to the FLRA. She alleged that after she made her disclosures, the supervisors at Salinas TSC, especially Limbeson, were upset, and that Valdez and

Vuksic began harassing her about personal phone calls and closely monitoring her whereabouts, even following her to the restroom. The appellant also stated that since 1998 or 1999 Vuksic had “tried her best” to deny her accommodation for her spina bifida, which required her to self-catheterize. She further claimed that Limbeson had offered to expunge the reprimand in exchange for early retirement, and that she felt compelled to accept the offer because of the threat of further discipline, even though she had wanted to retire with 30 years of employment. IAF, Tab 1. The record does not indicate whether the appellant supplemented her initial complaint before OSC with any additional allegations.

¶9 By letter dated September 5, 2008, OSC informed the appellant of its preliminary decision to close its investigation into her complaint. IAF, Tab 1. The appellant then filed an appeal with the Board, alleging that she was harassed and forced into early retirement in retaliation for protected disclosures. *Id.* She included with her appeal copies of her initial complaint before OSC as well as the letters from OSC notifying her of its preliminary determination and final decision to close her complaint. *Id.* The appellant also indicated that she was not seeking relief with respect to the December 10, 2004 reprimand.¹ IAF, Tab 10. The administrative judge (AJ) processed the appeal as both an IRA appeal and an involuntary retirement appeal,² and informed the appellant of the jurisdictional

¹ Because the appellant elected to grieve the reprimand, the Board lacks authority to provide relief with respect to that action in any event. See [5 U.S.C. § 7121\(g\)\(2\)](#).

² An involuntary retirement is equivalent to a removal over which the Board has jurisdiction under 5 U.S.C. chapter 75. *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1328 (Fed. Cir. 2006) (en banc). Thus, the appellant’s alleged involuntary retirement would, if proven, constitute an “otherwise appealable action” under [5 C.F.R. § 1209.5\(b\)](#). As such, it lies outside the scope of her IRA appeal, which is limited to the alleged personnel actions that are not otherwise appealable to the Board. See *Massimino v. Department of Veterans Affairs*, [58 M.S.P.R. 318](#), 322-23 (1993). We note that in *Schaeffer v. Department of the Navy*, [86 M.S.P.R. 606](#) (2000), we erroneously implied that an IRA appeal would cover an alleged involuntary retirement. See *id.*, ¶ 18. That holding is hereby overruled.

standard for her involuntary retirement claim. IAF, Tab 8. The AJ did not inform the appellant of the jurisdictional requirements for an IRA appeal.

¶10 The appellant withdrew her request for a hearing, and the AJ provided the parties an opportunity to submit additional evidence. IAF, Tab 19. Based on the written record, the AJ found that the appellant had established jurisdiction over her IRA appeal but was not entitled to corrective action because she had failed to show by preponderant evidence that her disclosures were protected. *Id.*, Tab 22 (Initial Decision, July 31, 2009). The AJ dismissed the constructive removal appeal for lack of jurisdiction, finding that the appellant had failed to show by preponderant evidence that her retirement was involuntary. *Id.*

ANALYSIS

The existing record does not establish Board jurisdiction over the appellant's IRA appeal.

¶11 We discern no error in the AJ's determination that the appellant failed to establish jurisdiction over her involuntary retirement claim. Furthermore, we find that the evidence submitted with the appellant's petition for review, even if new, is not material, i.e., of sufficient weight to warrant an outcome different from that of the initial decision, and therefore provides no basis for further review. *See Russo v. Veterans Administration*, [3 M.S.P.R. 345](#), 349 (1980). We reopen this case, however, for the sole purpose of addressing the issue of our jurisdiction over the appellant's IRA appeal.

¶12 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#); and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action. *See 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).

¶13 To meet the exhaustion requirement, the appellant must provide OSC a sufficient basis to pursue an investigation which might have led to corrective action. *Briley v. National Archives & Records Administration*, [236 F.3d 1373](#), 1377 (Fed. Cir. 2001). That is, the appellant must articulate with reasonable clarity and precision before OSC the basis for her complaint of whistleblowing reprisal. *Id.*; *Coufal v. Department of Justice*, [98 M.S.P.R. 31](#), ¶ 14 (2004). The Board’s jurisdiction in an IRA appeal is limited to issues raised before OSC. *Ellison v. Merit Systems Protection Board*, [7 F.3d 1031](#), 1036 (Fed. Cir. 1993). However, an appellant who has informed OSC of the basis for her retaliation claims may add further detail to those claims before the Board. *Briley*, 236 F.3d at 1378.

¶14 A “protected disclosure” is a disclosure of information an employee reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement,³ a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. [5 U.S.C. § 2302\(b\)\(8\)](#). An appellant need not correctly label a category of wrongdoing that might be implicated by a particular set of circumstances. *Tatsch v. Department of the Army*, [100 M.S.P.R. 460](#), ¶ 12 (2005). In determining whether the employee’s belief is reasonable, the test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the information disclosed evidences one of these categories of wrongdoing. *See Lachance v. White*, [174 F.3d 1378](#), 1380-81 (Fed. Cir. 1999).

³ Contrary to the initial decision, gross mismanagement does not require an “element of blatancy.” *White v. Department of the Air Force*, [391 F.3d 1377](#), 1383 (Fed. Cir. 2004) (abolishing “blatancy” requirement); *Tatsch v. Department of the Army*, [100 M.S.P.R. 460](#), ¶ 12 (2005).

¶15 The term “contributing factor” means any disclosure that affects an agency’s decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.⁴ [5 C.F.R. § 1209.4\(c\)](#). In a 1994 amendment to the WPA, Congress established a knowledge/timing test that allows an employee to demonstrate that the 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. [5 U.S.C. § 1221\(e\)\(1\)](#); *Rubendall v. Department of Health & Human Services*, [101 M.S.P.R. 599](#), ¶ 12 (2006). To satisfy the test, the appellant need only demonstrate that the fact of, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Rubendall*, [101 M.S.P.R. 599](#), ¶ 11.

¶16 In finding jurisdiction over the IRA appeal, the AJ determined that the appellant had exhausted her remedies with OSC and also non-frivolously alleged that she had made disclosures protected under [5 U.S.C. § 2302\(b\)\(8\)](#). He did not,

⁴ The statute defines “personnel action” as an appointment; a promotion; an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation under 5 U.S.C. chapter 43; a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in [5 U.S.C. § 2302\(a\)\(2\)\(A\)](#); a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions. [5 U.S.C. § 23012\(a\)\(2\)\(A\)](#). The legislative history of the 1994 amendment to the WPA indicates that the term “any other significant change in duties, responsibilities, or working conditions” should be interpreted broadly, to include “any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system.” 140 Cong. Rec. H11,421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey); see *Roach v. Department of the Army*, [82 M.S.P.R. 464](#), ¶ 24 (1999). We find that the appellant’s claims of harassment and disability discrimination constitute a non-frivolous allegation that she was subjected to a personnel action within the meaning of the WPA.

however, complete the analysis by making a finding as to whether the appellant made a non-frivolous allegation that one or more of her disclosures was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action. This omission was error. *See 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).

¶17 We need not decide the contributing factor issue at present, however, because we find that, contrary to the initial decision, the appellant has not made a non-frivolous allegation that she made protected disclosures. Although an appellant in an IRA appeal need not correctly label a category of wrongdoing that might be implicated by a particular set of circumstances, *see Tatsch*, [100 M.S.P.R. 460](#), ¶ 12, the appellant indicated on her OSC complaint form that her e-mails to the OP Awards Division did not disclose *any* of the categories of wrongdoing listed under [5 U.S.C. § 2302\(b\)\(8\)](#). IAF, Tab 1. In any case, the e-mails amount to nothing more than requests for information, and do not constitute disclosures of any kind, protected or otherwise. *See Black's Law Dictionary* 477 (7th ed. 1999) (defining "disclosure" as "[t]he act or process of making known something that was previously unknown; a revelation of facts"). Nor did the appellant allege facts that, if proven, could show that her statement before the FLRA constitutes a protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#). The WPA does not extend to reprisal for participation in grievances or FLRA ULP procedures; rather, such activity is protected under § 2302(b)(9). *Marren v. Department of Justice*, [51 M.S.P.R. 632](#), 635 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table). The fact that an individual has engaged in activity protected under (b)(9) does not in and of itself disqualify the individual from seeking corrective action under [5 U.S.C. § 2302\(b\)\(8\)](#), if she made disclosures based upon the same operative facts outside of her (b)(9) activity. *Luecht v.*

Department of the Navy, [87 M.S.P.R. 297](#), ¶ 10 (2000). However, the appellant did not allege in her initial complaint before OSC that she made disclosures regarding the security cameras to any party other than AFGE or the FLRA. Thus, the appellant has not made a non-frivolous allegation that her disclosures regarding the security cameras constitute protected activity under [5 U.S.C. § 2302\(b\)\(8\)](#). See *Chakravorty v. Department of the Air Force*, [90 M.S.P.R. 304](#), ¶ 13 (2001). We therefore find that the existing record does not support a finding that the Board has jurisdiction over the appellant's IRA appeal.

The appellant did not receive proper notice of her burden of proof on jurisdiction over her IRA appeal.

¶18 Although the record before us is insufficient to establish jurisdiction over the appellant's IRA appeal, it appears that the AJ did not provide the appellant proper notice of her burden of proof on IRA jurisdiction. See *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). We note that an appellant may receive notice of jurisdictional requirements from an agency's pleadings, even if the AJ fails to provide such notice. See *Yost v. Department of Health & Human Services*, [85 M.S.P.R. 273](#), ¶ 3 (2000), *aff'd*, 4 F. App'x 900 (Fed. Cir. 2001). However, in its motion to dismiss, the agency erroneously cited the jurisdictional standard for IRA appeals set out in *Geyer v. Department of Justice*, [63 M.S.P.R. 13](#) (1994). IAF, Tab 7. The *Geyer* test has long been obsolete. See *Rusin*, [92 M.S.P.R. 298](#), ¶ 12 (overruling *Geyer* and adopting *Yunus*). Thus, the appellant did not receive notice of the correct jurisdictional standard for her IRA appeal prior to the close of the record below.⁵

⁵ The AJ did set out the *Yunus* standard in the initial decision; however, the appellant had no occasion to address the issue of IRA jurisdiction in her petition for review, as the AJ had decided that issue in her favor.

¶19 Moreover, the appellant may have been harmed by the lack of proper notice. As noted above, the Board’s jurisdiction over an IRA appeal is limited to the issues raised before OSC. However, in showing that the exhaustion requirement has been met, the appellant is not limited by the statements in her initial complaint, but may also rely on subsequent correspondence with OSC. *See Pasley v. Department of the Treasury*, [109 M.S.P.R. 105](#), ¶¶ 12-15 (2008). Based on the existing record, we cannot rule out the possibility that the appellant made additional allegations before OSC that she did not raise in her initial complaint, and that those allegations are sufficient to establish jurisdiction over her IRA appeal. The appellant must therefore be provided the opportunity on remand to submit copies of any additional correspondence she may have had with OSC.

ORDER

¶20 On remand in the IRA appeal, the AJ shall provide the parties notice of the jurisdictional requirements for an IRA appeal and an opportunity to introduce additional evidence and argument on the issue. The AJ shall then make a new finding as to whether the Board has jurisdiction over the appellant’s IRA appeal. Should the AJ find that the Board has jurisdiction over the IRA appeal, he shall proceed to make a new finding on the merits of the appellant’s request for corrective action.

¶21 In the constructive removal appeal, the initial decision of the administrative judge is final. This is the Board’s final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS IN THE CONSTRUCTIVE REMOVAL APPEAL

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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