

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

2012 MSPB 3

Docket No. DC-1221-10-0614-W-1

**Philip Ware Tullis,
Appellant,**

v.

**Department of the Navy,
Agency.**

January 18, 2012

Richard S. Zachary, Esquire, Chicago, Illinois, for the appellant.

Amelia H. Stuteville, Gulfport, Mississippi, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision dismissing his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On October 1, 2009, the appellant, a YA-02 Financial Management Analyst in charge of travel, filed a complaint with the Office of Special Counsel (OSC)

alleging that the agency retaliated against him in violation of the Whistleblower Protection Act (WPA) by changing his job duties and working conditions after he had questioned, through his management, the travel practices of his command as being in violation of the agency's travel regulations and cooperated with a Command Inspector General (IG) investigation regarding the command's travel program by responding to the IG's questions. Initial Appeal File (IAF), Tab 3. On November 15, 2009, the appellant resigned. IAF, Tab 1. On April 30, 2010, OSC issued a letter informing the appellant that it had closed his complaint file and that he could file a request for corrective action with the Board within 65 days. IAF, Tab 1. The appellant filed a timely IRA appeal and alleged that his resignation was involuntary. *Id.*

¶3 Based on the parties' written submissions, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tab 17 (Initial Decision). He found that the appellant failed to show that he engaged in protected whistleblowing. Initial Decision at 4-5. He found also that the appellant made the alleged disclosures regarding the agency's failure to follow travel regulations to his supervisors, the alleged wrongdoers, and disclosures to alleged wrongdoers are not protected. Initial Decision at 6. He further found that the appellant's statements to the IG did not constitute disclosures because the appellant did not disclose the statements on his own initiative and alternatively because the appellant responded to the IG's inquiries as part of the normal performance of his duties through normal channels. *Id.*

¶4 Additionally, the administrative judge found that the appellant did not establish that his resignation was involuntary. *Id.* at 7-9. The administrative judge found that the appellant failed to identify an event occurring relatively close in time to his resignation that would have compelled a reasonable person in his position to resign, did not show that there was a relatively short period of time between the alleged coercion and the appellant's resignation, and failed to reveal

any circumstance that might reflect that misinformation deprived him of free choice. *Id.* at 8-9.

¶5 The appellant petitions for review. Petition for Review File (PFR File), Tabs 1, 2, 5, 6, 10. The agency has responded in opposition to the petition. PFR File, Tab 11.

ANALYSIS

¶6 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He 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). The jurisdictional threshold is met if the appellant presents nonfrivolous allegations that he made a protected disclosure that was a contributing factor to a personnel action. *See, e.g., Ingram v. Department of the Army*, [114 M.S.P.R. 43](#), ¶ 10 (2010). Whether allegations are nonfrivolous is determined on the basis of the written record. *Spencer v. Department of the Navy*, [327 F.3d 1354](#), 1356 (Fed. Cir. 2003). Any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *E.g., Ingram*, [114 M.S.P.R. 43](#), ¶ 10. In cases involving multiple alleged protected disclosures, the Board has jurisdiction where the appellant has exhausted his administrative remedies before OSC and makes a nonfrivolous allegation that at least one alleged personnel action was taken for at least one alleged protected disclosure. *E.g., Lane v. Department of Homeland Security*, [115 M.S.P.R. 342](#), ¶ 12 (2010).

¶7 The record shows the appellant exhausted his remedy before OSC and made a nonfrivolous allegation that he was the subject of a covered personnel action, a significant change in his duties and responsibilities. IAF, Tabs 1, 3. We note in that regard that our analysis of the appellant's allegations of protected

whistleblowing is not limited to or governed by the particular categories of wrongdoing cited by the appellant. The purpose of the exhaustion requirement is to give OSC a sufficient basis to pursue an investigation that might lead to corrective action. The Board does not require an appellant to correctly label the category of wrongdoing under [5 U.S.C. § 2302\(b\)\(8\)](#) because OSC can be expected to know which categories of wrongdoing might be implicated by a particular set of factual allegations. *Lane*, [115 M.S.P.R. 342](#), ¶ 13.

¶8 A protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#) is any disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Ingram*, [114 M.S.P.R. 43](#), ¶ 9. The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct prohibited under the WPA is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Lachance v. White*, [174 F.3d 1378](#), 1381 (Fed. Cir. 1999).

¶9 The first basis for the administrative judge's finding that the appellant failed to make a protected disclosure is that the appellant did not make disclosures; rather than coming forward on his own initiative, the appellant merely cooperated with an investigation when the IG came to question him about information pertaining to possible falsification of travel orders by David Miller, the comptroller of the region to which the appellant was assigned. IAF, Tab 3 (OSC complaint). The text of the WPA speaks in terms of "any disclosure." [5 U.S.C. § 2302\(b\)\(8\)\(A\)](#). The statute makes no distinction based on who initiated the conversation that led to the disclosures. Indeed, the U.S. Court of Appeals for the Federal Circuit has stated that "the plain language of the Whistleblower Protection Act extends to retaliation for 'any disclosure', regardless of the setting of the disclosure, the form of the disclosure, or the

person to whom the disclosure is made.” *Huffman v. Office of Personnel Management*, [263 F.3d 1341](#), 1348 (Fed. Cir. 2001). Further, the Board has held that an appellant is entitled to protection under [5 U.S.C. § 2302\(b\)\(8\)](#) as well as § 2302(b)(9) for his participation in an IG interview, and that “[t]he difference between sections 2302(b)(8) and 2302(b)(9) . . . is not whether the employee or the IG makes the initial contact but whether the disclosures made to the [O]IG rise to the level of whistleblowing.” *Schlosser v. Department of the Interior*, [75 M.S.P.R. 15](#), 21 (1997) (quoting *Williams v. National Labor Relations Board*, [59 M.S.P.R. 640](#), 646 (1993)). Thus, the fact that the appellant did not come forward of his own initiative to the IG is not dispositive, or even relevant, in determining whether his disclosure was protected.

¶10 The administrative judge’s second basis for finding that the appellant failed to make a nonfrivolous allegation that his disclosures were protected is that the appellant made his disclosures in the course of performing his normal job duties. In *Huffman*, [263 F.3d 1341](#), 1351–54, our reviewing court clarified whether reports of misconduct are covered by the WPA if the disclosures are part of the employee's normal duties. In doing so, the court distinguished between three different situations. The first is where the employee, as part of his normal duties, has been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels. *Id.* at 1352. The court found that such activity is not protected by the WPA. *Id.* at 1353–54. The second situation is where an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels, *id.* at 1354, and the third is where the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties. *Id.* The court found that these latter two types of activities are protected by the WPA. *Id.*

¶11 *Huffman* recognizes that all employees are required to report wrongdoing and cooperate with proper investigations. The appellant was obligated to

cooperate with the IG and report wrongdoing to the same extent as any other employee. However, he did not occupy a position with any particular investigatory responsibilities. The record shows that the appellant's position did not require reporting wrongdoing as one of his regular job duties. In particular, the position description's delineation of the appellant's job duties does not indicate that performing investigations was one of his ordinary functions. Thus, the circumstances of this case fit squarely within the *Huffman* exception that the employee is obligated to report wrongdoing, but such a report is not part of the employee's normal duties. *Huffman*, 263 F.3d at 1353-54. The fact that information an employee disclosed is closely related to the employee's day-to-day responsibilities does not remove the disclosure of that information from protection under section 2302(b)(8). *See Marano v. Department of Justice*, [2 F.3d 1137](#), 1142 (Fed. Cir. 1993). We find that, under these circumstances, the appellant established that in cooperating with the IG to report violations of travel rules and regulations, he made a nonfrivolous allegation that he made a protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#).

¶12 The administrative judge did not reach the issue of whether the appellant made a nonfrivolous allegation that his whistleblowing was a contributing factor to his reassignment. One way to establish contributing factor is through the knowledge/timing test. *See* [5 U.S.C. § 1221\(e\)\(1\)\(A\)](#), (B). 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 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. *Carey v. Department of Veterans Affairs*, [93 M.S.P.R. 676](#), ¶ 11 (2003); *see* [5 U.S.C. § 1221\(e\)\(1\)](#); *Wadhwa v. Department of Veterans Affairs*, [110 M.S.P.R. 615](#), ¶ 12, *aff'd*, 353 F. App'x 435 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 2084

(2010). Once the appellant has made a nonfrivolous allegation that the knowledge/timing test has been met, he has met his jurisdictional burden with regard to contributing factor. *See Mason v. Department of Homeland Security*, [116 M.S.P.R. 135](#), ¶ 26 (2011).

¶13 Here, the appellant alleged that he began cooperating with the IG sometime between September 19 and September 25, 2009. IAF, Tab 3. Shortly after the appellant began cooperating with the IG, Robert Hurley began to significantly change the appellant's duties and responsibilities, and ultimately reassigned him. *Id.* The appellant indicates that Hurley knew about the disclosures that the appellant made during the course of his cooperation with the IG, although he states on his OSC complaint that he did not know precisely how Hurley knew of the disclosures. When asked what specific information he had to support his belief that the agency took the complained of actions because of his disclosures, he responded to OSC that "Robert [H]urley was one of the subjects of my disclosures." *Id.* Under these circumstances, we find that the appellant, who was proceeding pro se until some time after he filed his petition for review, has made a nonfrivolous allegation that the alleged retaliating official, Hurley, knew of his alleged disclosures and that the alleged retaliation occurred within a short time after he made the alleged protected disclosures. Thus, under the knowledge/timing test, the appellant has made a nonfrivolous allegation that the alleged protected disclosure was a contributing factor in his change of duties and responsibilities and his reassignment. *See Iyer v. Department of the Treasury*, [95 M.S.P.R. 239](#), ¶ 5 (2003), *aff'd*, 104 F. App'x 159 (Fed. Cir. 2004). Further, because the appellant has made a nonfrivolous allegation that he made a protected disclosure and a nonfrivolous allegation that the protected disclosure was a contributing factor in his change of duties, he has established jurisdiction over his IRA appeal. *See, e.g., Ingram*, [114 M.S.P.R. 43](#), ¶ 20.

¶14 It is undisputed that the appellant resigned after filing his OSC complaint. We find that the administrative judge properly found that the appellant failed to

show that his resignation was involuntary and affirm the administrative judge's dismissal of that claim. As a result, since the appellant is no longer a federal employee, the Board is unable to return him to the status quo ante with regard to the agency's action of changing his duties and responsibilities and reassigning him. Thus, the issue arises as to whether the appeal may be dismissed as moot. However, although the administrative judge issued an order to show cause on jurisdiction, IAF, Tab 5, he did not inform the appellant that he could claim an entitlement to any non-status quo ante relief, even though the appellant specifically requested in his complaint to OSC that the agency's Comptroller Department be audited and that Hurley be sanctioned for his actions, IAF, Tab 3. Under similar circumstances, we have found that before dismissing an IRA appeal as moot, the administrative judge should afford the appellant a specific opportunity to raise a claim for consequential damages. *Roach v. Department of the Army*, [82 M.S.P.R. 464](#), ¶ 56 (1999). We need not address the appellant's claims for an audit or for the alleged retaliating official to be sanctioned here because we have not ordered corrective action. *See Mangano v. Department of Veterans Affairs*, [104 M.S.P.R. 316](#), ¶ 16 (2006). In any event, where the Board finds that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board is required to refer the matter to OSC for appropriate action. [5 U.S.C. § 1221\(f\)\(3\)](#); *Armstrong v. Department of Justice*, [107 M.S.P.R. 375](#), ¶ 36 (2007).

¶15 Therefore, because the appellant's resignation did not foreclose all of the possible relief to which he may be entitled if he prevails on his WPA claim, we cannot determine whether the appeal is moot based on the current record. *See* [5 U.S.C. § 1221\(g\)\(1\)\(A\)\(ii\)](#); *Walton v. Department of Agriculture*, [78 M.S.P.R. 401](#), 403 (1998) (under the 1994 amendments to the WPA, an appellant who prevails on an allegation of reprisal for protected whistleblowing is entitled to additional relief, including medical costs incurred, travel expenses, and any other reasonably foreseeable consequential damages; the Board may also order

corrective action in the form of attorney fees and costs); *Hudson v. Department of Veterans Affairs*, [104 M.S.P.R. 283](#), ¶ 15 (2006) (an IRA appeal is not rendered moot when the agency rescinds the performance improvement plan when further relief could be ordered); *Harris v. Department of Transportation*, [96 M.S.P.R. 487](#), ¶¶ 7-13 (2004) (an IRA appeal was not rendered moot when the agency rescinded the equivalent of a performance improvement plan where further relief, such as monetary damages for harm to the appellant's career, could be ordered if the Board found the action to have been in retaliation for whistleblowing).

¶16 Finally, the appellant submitted a number of documents for the first time with his petition. Under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). We have carefully examined these submissions and find that they are not new. Thus, we have not considered these submissions in adjudicating the petition for review. However, if this case should proceed to the merits and the administrative judge should reopen the record and accept additional evidence, there would be no reason to exclude this newly-submitted evidence and the administrative judge shall consider the submissions part of the appellate record.

ORDER

¶17 Accordingly, we remand this appeal for further adjudication consistent with this Opinion and Order. The administrative judge shall afford the appellant the opportunity to raise a claim for consequential damages or other additional relief to which he may be entitled under the WPA. Assuming the appellant raises such claims, the administrative judge shall adjudicate the appeal on its merits. If the

appellant prevails, the administrative judge shall adjudicate the appellant's claims for consequential damages and any other relief to which he may be entitled.

FOR THE BOARD:

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