

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

2012 MSPB 45

Docket No. AT-1221-11-0597-W-1

**Diane Ontivero,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

March 28, 2012

Alberto R. Ontivero, Brunswick, Georgia, for the appellant.

Kimberly K. Hartwell, Esquire, East Point, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed her individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we REVERSE the initial decision's jurisdictional findings and REMAND the appeal to the Atlanta Regional Office for further adjudication.

BACKGROUND

¶2 During the time frame relevant in this appeal, the appellant was a GS-0303-07 Mission Support Assistant at the agency's Immigration and Customs Enforcement Agency (ICE) Training Academy in Glynco, Georgia. *See* Initial

Appeal File (IAF), Tab 1. Among other duties, the agency tasked the appellant with the responsibility for making credit card purchases on behalf of the agency. *See id.*, Subtab 20.

¶3 In a June 14, 2010 e-mail, Colette S. Volkmer, a Purchase Card Program Manager with the agency's Office of Acquisition Management in Dallas, Texas, notified the appellant the agency had suspended her government-issued credit card (GCC) as the result of an agency audit showing she had made "split purchases." *See* IAF, Tab 1, Subtab 1. Ms. Volkmer stated the audit indicated the appellant had used her GCC in four transactions on the same day with Thomson West publishers. *Id.* In this connection, Ms. Volkmer asserted these transactions were a "direct violation of policies and law." *Id.* Further, she stated that because an earlier audit on October 1, 2009, had resulted in a warning to the appellant for the same type of split purchase violation, the current violation constituted a repeat offense that required the agency to suspend her GCC. *Id.* Ms. Volkmer stated the suspension of the appellant's GCC required her to complete a Corrective Action Plan (CAP), which included re-training in proper GCC use. *Id.*

¶4 On or about July 7, 2010, Dwight McDaniel, the ICE Academy's Unit Chief, requested that the appellant pay the registration fees for two agency Senior Special Agents to attend a "Gang Training Conference" conducted by the Georgia Gang Investigations Association (GGIA). *See* IAF, Tab 1, Subtab 2. After the appellant contacted the GGIA, she was advised she could pay for the registration through the GGIA website by using PayPal or by check. *Id.* Because the appellant had concerns about this request, she sent an e-mail requesting guidance from Ms. Volkmer. *Id.* In a July 7, 2010 e-mail, the appellant informed Ms. Volkmer of Mr. McDaniel's request, and stated the agency's PCard Manual "strongly discourages" the use of PayPal to make on-line purchases. *Id.* The appellant, however, received an "out of office" AutoReply from Ms. Volkmer.

¶5 In a second e-mail to Ms. Volkmer dated July 9, 2010, the appellant repeated the concerns she had stated two days earlier. *See* IAF, Tab 1, Subtab 2. Further, she stated she had received a voice-mail message the previous day, July 8, from a caller who identified herself as “Barbara”¹ from the agency’s National Purchase Card Program. *Id.* The appellant asserted that Barbara told the appellant she could use PayPal to pay the GGIA registration fees for the two Senior Special Agents who were scheduled to attend the training. *Id.*

¶6 Nevertheless, the appellant expressed concern regarding Barbara’s advice stating:

Two weeks ago, my ICE Purchase Card was suspended because your office indicated that a violation was committed through the splitting of purchase orders. If you recall, during our telephone conversation pertaining [to] the split purchase orders, I informed you that your office previously informed [me] over the telephone that I could conduct such purchases, known as split purchases. At that time, you immediately informed me that your office does not provide guidance over the telephone, especially if the matter involves a violation of the rules or regulations. Unfortunately, I did not document the previous misleading guidance which resulted in the suspension of the ICE Purchase Card. Then, I was instructed to take the multiple training and signed a statement of acknowledgement. Any future violation can lead to my removal. Therefore, **absent a written approval from your office on this instant matter and future transactions**, I would be unable to complete them. If anyone disagreed [sic], please provide me with a written disagreement; or let me know the office and address where I can mail the ICE Purchase Card assigned to me.

Unlike the previous undocumented misleading guidance, I am herein documenting the new development to avoid misunderstanding, especially when your office previously denied of providing me with similar telephonically [sic] guidance, especially in violation of the

¹ In the initial decision, the administrative judge stated the appellant alleged someone named “Diane” left her a voice-mail message. *See* IAF, Tab 12, Initial Decision (ID) at 3. “Diane” is the appellant’s first name. The record shows the appellant stated “Barbara” left her a voice-mail message that began, “Hi Diane . . . [t]his is Barbara” *See* IAF, Tab 1, Subtab 2.

rules and regulations. Here, the payment of Pay Pal is prohibited and it is not the only method of payment; however, your office is instructing me over the telephone to violate the existing rules and regulations. I find it very unprofessional of responding to my written inquiries and clarification over the telephone. Such unofficial method of responding to my written inquiries can be seen as avoidance of record keeping. I previously became a victim of such method. Remember, your office previously denied the use of such method.

See IAF, Tab 1, Subtab 2 (emphasis in the original). In a July 16, 2010 e-mail, Mr. McDaniel informed the appellant that Ms. Volkmer and Section Chiefs Clifton Lollard, Wanda L. Delgado, and Hector B. Bencomo had resolved the “the audit issue stemming from the law book purchases.” *See id.*, Subtab 4. He instructed the appellant, therefore, to pay the GGIA course registration fees by the close of business, or her “failure to follow supervisory instructions may result in disciplinary action.” *Id.*

¶7 Subsequently, the appellant’s husband, Alberto R. Ontivero, who also worked for the agency at the ICE Training Academy, sent e-mails addressed to numerous agency employees and managers. *See* IAF, Tab 1, Subtabs 3, 5, 6 and 10. These e-mails primarily addressed the agency’s GCC policies and the audit of his wife’s purchases. *Id.*

¶8 On July 18, 2010, the appellant sent an e-mail to various agency employees and managers, as well as to Ms. Volkmer. *See* IAF, Tab 1, Subtab 7. The appellant asserted agency managers had requested she make purchases that would violate GCC policy. *Id.* She characterized her e-mail as a “protected disclosure” regarding “MISUSE OR SUSPECTED MISUSE OF THE GOVERNMENT PURCHASE CARD.” In this regard, she alleged specific instances of GCC misuse, including the purchase of 6 items from a local commercial vendor. *Id.*

¶9 On July 20, 2010, the appellant sent another e-mail to various agency employees and managers, as well as to Ms. Volkmer. *See* IAF, Tab 1, Subtab 9. In this e-mail, she alleged the agency had requested she improperly use her GCC

to purchase \$3,000 worth of books in violation of existing regulations. *Id.* In this regard, she argued the ICE Training Academy managers had asked her to make this purchase improperly through PayPal from a private vendor.

¶10 On July 29, 2010, the appellant sent her final e-mail regarding the GCC matters at issue in this appeal. *See* IAF, Tab 1, Subtab 11. She asserted the agency had improperly requested she use her GCC to pay for the purchase of two Branding DHS Plaques without receiving the signature of Mr. McDaniel, the official authorizing the purchase. In all of the e-mails she sent, she cited GCC rules and regulations.

¶11 At the end of the 2009-2010 performance evaluation period, the agency rated the appellant's performance as meeting the "achieved expectations" standard. *See* IAF, Tab 1, Subtab 17. In an October 29, 2010 e-mail, she requested that the agency provide her with information to support the "achieved expectations" rating. *See* IAF, Tab 1, Subtab 18.

¶12 On December 13, 2010, the appellant filed a complaint with the Office of Special Counsel (OSC). *See* IAF, Tab 1. In her complaint, she alleged the agency had taken an action against her that constituted whistleblower retaliation. In this connection, she asserted Mr. McDaniel lowered her 2010 performance evaluation because of the e-mails she had sent to agency managers in July 2010. She argued Mr. McDaniel gave her a rating of only "achieved expectations" in retaliation for her protected disclosures that the agency had violated GCC laws, rules, and regulations. *Id.*

¶13 By letter dated March 16, 2011, OSC notified the appellant that it had terminated its investigation of her complaint. *See* IAF, Tab 1. OSC also notified her of her right to seek corrective action from the Board. She then filed the instant IRA appeal.

¶14 In the initial decision, the administrative judge dismissed the IRA appeal for lack of jurisdiction. *See* IAF, Tab 12. She found the appellant had not made any protected disclosures under the Whistleblower Protection Act (WPA). In this

regard, the administrative judge found the appellant's alleged disclosures were reports made as part of her "normal duties" within "normal channels." Further, the administrative judge found that, even if the appellant had made her disclosures outside of "normal channels," her disclosures would not be protected because she could not have had a reasonable belief that her disclosures concerned violations of 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. *Id.*

ANALYSIS

The appellant has shown she made sufficient nonfrivolous allegations to establish jurisdiction over her IRA appeal.

¶15 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, 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). Conclusory, vague, or unsupported allegations are insufficient to qualify as nonfrivolous allegations of IRA jurisdiction. *McDonnell v. Department of Agriculture*, [108 M.S.P.R. 443](#), ¶ 7 (2008). In cases involving multiple alleged protected disclosures and personnel actions, an appellant establishes Board jurisdiction over her IRA appeal when she makes a nonfrivolous allegation that at least one alleged personnel action was taken in reprisal for at least one alleged protected disclosure. *Baldwin v. Department of Veterans Affairs*, [113 M.S.P.R. 469](#), ¶ 6 (2010). If the appellant establishes Board jurisdiction over her IRA appeal by exhausting her remedies before OSC and making the requisite nonfrivolous allegations, she has the right to a hearing on the merits of her claim. *Rusin v. Department of the Treasury*, [92 M.S.P.R. 298](#), ¶ 20 (2002). In this case, it is undisputed that the appellant

exhausted her administrative remedies with OSC, and that the agency subjected her to a covered personnel action when Mr. McDaniel issued her 2009-2010 performance evaluation. [5 U.S.C. § 2302](#)(a)(2)(viii). Therefore, the only issue before us is whether the appellant made a protected disclosure under the WPA, and whether that disclosure was a contributing factor in her 2009-2010 rating.

¶16 In the appellant’s petition for review, she argues the administrative judge erred when she dismissed the appeal for lack of jurisdiction without granting the appellant the hearing she had requested. *See* Petition for Review (PFR) File, Tab 1. She further argues she provided sufficient nonfrivolous allegations to establish jurisdiction over her appeal. Specifically, she contends the administrative judge erred when she found the appellant had made her disclosures within “normal channels” as part of her “normal duties.” *Id.*

¶17 We agree. Regardless of the scope of the appellant’s normal duties, the record shows she did not make her disclosures within “normal channels.”² For example, the appellant sent her July 18, 20, and 29 e-mails to, among others, William Randolph, ICE’s Director of Budgeting and Accounting; Bill Weinberg, Deputy Director for Budgeting, Accounting and Contracting for ICE; and Dan Peavler, Director of the Office of Acquisitions for the agency and ICE. IAF, Tab 1, Subtabs 7, 10 and 11. We find that she made these disclosures to agency officials in upper management and that these disclosures cannot, therefore, be considered within “normal channels.”³ *See Huffman v. Office of Personnel Management*, [263 F.3d 1341](#), 1351 (Fed. Cir. 2001). Consequently, the administrative judge’s reliance on *Huffman* to dismiss the appeal for lack of

² In reaching this conclusion, we have not considered Mr. Ontivero’s e-mails.

³ Indeed, Mr. McDaniel implicitly recognized the appellant had sent her e-mails outside of “normal channels” when he advised her to keep her GCC queries within her “management chain.” *See* IAF, Tab 1, Subtab 12.

jurisdiction was misplaced. *See Tullis v. Department of the Navy*, [117 M.S.P.R. 236](#), ¶¶ 10-11 (2012).

¶18 The appellant also argues she had a reasonable belief that she disclosed improprieties regarding agency GCC purchases, or GCC purchases that her managers had recommended she make. *See* PFR File, Tab 1. This issue is a closer question than whether the appellant made her disclosures outside “normal channels.” Nevertheless, we find the appellant had a reasonable belief that the information she had disclosed showed a violation of the agency’s GCC rules and policy. In this regard, we note that any doubt or ambiguity as to whether the appellant made a nonfrivolous allegation of reasonable belief should be resolved in favor of finding jurisdiction. *Swinford v. Department of Transportation*, [107 M.S.P.R. 433](#), ¶ 8 (2007).

¶19 In evaluating this matter, we look to the context in which the appellant made her disclosures. As stated above, after conducting an audit the agency suspended the appellant’s GCC on June 14, 2010. *See* IAF, Tab 1, Subtab 1. This suspension required the appellant to undergo retraining with respect to agency GCC policy and procedures, which she needed to complete by June 28, 2010. Shortly thereafter, the appellant and her husband sent several e-mails to various agency employees and managers regarding purchases, or recommended purchases, that they alleged would involve violations of GCC purchasing policy. *See* IAF, Tab 1, Subtabs 2, 3, 5-7, and 9-11.

¶20 As noted above, the administrative judge found the appellant could not have had a reasonable belief that she had disclosed information concerning potential violations of law, rule or regulation with regard to the agency’s GCC policy. ID at 6-8. Instead, the administrative judge indicated the appellant could have avoided these alleged conflicts between agency policy and the purchases requested by her managers if she had only “utilized the channels identified to her by her supervisors.” *Id.* at 7. Nevertheless, in an August 2, 2010 e-mail, Ms. Volkmer agreed, in essence, with the appellant’s concerns. Ms. Volkmer stated

several of the requested transactions identified by the appellant as problematic constituted “potential split purchases.” IAF, Tab 1, Subtab 14. We find, therefore, the appellant had a reasonable belief she had disclosed potential violations of agency rules and policy with respect to GCC purchases.

¶21 Having found the appellant made disclosures protected under the WPA, the sole jurisdictional element now before us is whether the appellant has raised a nonfrivolous allegation that her disclosures were a contributing factor to her 2009-2010 performance evaluation. To satisfy the contributing factor 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. *Baldwin*, [113 M.S.P.R. 469](#), ¶ 22. One way to establish this criterion is the knowledge-timing test, under which an employee may nonfrivolously allege 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. *Id.* Once an appellant has made a nonfrivolous allegation that the knowledge-timing test has been met, she has established the contributing factor jurisdictional element. *Santos v. Department of Energy*, [102 M.S.P.R. 370](#), ¶ 11 (2006); *Wood v. Department of Defense*, [100 M.S.P.R. 133](#), ¶ 13 (2005).

¶22 The administrative judge did not address the contributing factor issue in the initial decision because she dismissed the appeal solely on the basis that the appellant had not made a protected disclosure. Nevertheless, the agency argues in its response to the petition for review that the appellant cannot make a nonfrivolous allegation with regard to this jurisdictional element because 4 months had elapsed between the time of her disclosures, and Mr. McDaniel’s issuance of her performance evaluation. *See* PFR File, Tab 4.

¶23 We disagree. The Board has held that a personnel action taken within approximately 1 to 2 years of the appellant's disclosures satisfies the knowledge-timing test. *Peterson v. Department of Veterans Affairs*, [116 M.S.P.R. 113](#), ¶ 16 (2011). Therefore, because it is undisputed Mr. McDaniel had knowledge of the appellant's disclosures and her disclosures occurred sufficiently close in time to the personnel action at issue, the appellant has satisfied the knowledge/timing test and made a sufficient nonfrivolous allegation to show her disclosures were a contributing factor in the agency's personnel action.

¶24 Consequently, we find the appellant has established Board jurisdiction over her IRA appeal by exhausting her remedies before OSC and making the requisite nonfrivolous allegations, and that she now has the right to a hearing on the merits of her claim. *Rusin*, [92 M.S.P.R. 298](#), ¶ 20.

ORDER

¶25 Accordingly, we remand this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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