

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

DAVID WAYNE CARSON,  
Appellant,

DOCKET NUMBER  
AT-1221-11-0062-W-1

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: July 27, 2012

**THIS ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Christopher Todd Dong, Esquire, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**REMAND ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

### **DISCUSSION OF ARGUMENTS ON REVIEW**

After exhausting his remedies with the Office of Special Counsel (OSC), the appellant, a Criminal Investigator with the agency's Office of Inspector General, filed an individual right of action (IRA) appeal alleging that the agency retaliated against him for whistleblowing activity. The administrative judge dismissed this appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation of a protected disclosure.

We agree with the administrative judge that the appellant failed to make a nonfrivolous allegation that his first disclosure, relating to arrest warrants, was protected. Taking the appellant's allegations as true, there is no indication that the appellant had a reasonable belief that the matter he actually disclosed—i.e., a statement made to him by a Resident Agent in Charge—was itself a violation of law, rule, or regulation or created a real and immediate danger of such a violation. *See Reid v. Merit Systems Protection Board*, [508 F.3d 674](#), 678 (Fed. Cir. 2007).

However, the administrative judge did not address the second alleged disclosure, which related to the search and seizure of certain property. *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 administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). Regarding this disclosure, which the appellant raised in

response to the jurisdictional order, we note that the reasonable belief test relates to the content of the disclosure, not the manner in which it is expressed. The question to be decided is whether a disinterested person in the appellant's position could have reasonably concluded that the actions of the agency, i.e., the search of an office and seizure of certain property, evidenced a violation of law, rule, or regulation. *See Lachance v. White*, [174 F.3d 1378](#), 1381 (Fed. Cir. 1999). If so, then his belief was reasonable, regardless of how confidently he expressed it. It is no surprise that a cautious whistleblower might refrain from reporting possible agency wrongdoing in direct terms, but instead couch the disclosure as an inquiry or statement of doubt as to the propriety of the agency's actions.

Moreover, at this jurisdictional stage, it is not necessary for the appellant to establish that his disclosure actually passes the reasonable belief test; rather, he need only make a nonfrivolous allegation that his disclosure was protected. *See Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001). Any doubt or ambiguity as to whether an appellant has made a nonfrivolous allegation of a reasonable belief of wrongdoing should be resolved in favor of a finding that jurisdiction exists. *Swanson v. General Services Administration*, [110 M.S.P.R. 278](#), ¶ 11 (2008). In light of that principle, we find that the appellant nonfrivolously alleged that his second disclosure was protected. Because the appellant has exhausted his remedy with OSC and has also nonfrivolously alleged that, among other things, an agency official threatened to take disciplinary action against him on May 1, 2008, and May 20, 2008, in retaliation for his April 23, 2008 disclosure to that official, Initial Appeal File (IAF), Tab 4 at 31-38, he has succeeded in establishing jurisdiction over his IRA appeal; *see Gergick v. General Services Administration*, [49 M.S.P.R. 384](#), 391 (1991) (a threat to discipline an employee in retaliation for making protected disclosures is appealable under [5 U.S.C. § 1221](#)); *see also Scott v. Department of Justice*, [69 M.S.P.R. 211](#), 238 (1995) (an employee may demonstrate that a 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), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

### ORDER

Accordingly, we REMAND this case to the regional office for further adjudication on the merits in accordance with this Remand Order.<sup>2</sup>

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.

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<sup>2</sup> The agency has filed a conditional cross-petition for review asserting, as it did below, that the Board should dismiss the appeal for lack of jurisdiction because the appellant voluntarily retired on November 30, 2009, approximately 6 months before he filed his whistleblower complaint with OSC. The appellant, however, requested corrective action that would include, among other things, disciplinary action against the officials involved and consequential damages. IAF, Tab 4 at 8. Under these circumstances, we find that this appeal is not moot at this time despite the appellant's retirement. See *Tullis v. Department of the Navy*, [117 M.S.P.R. 236](#), ¶¶ 14-15 (2012); *Hagen v. Department of Transportation*, [103 M.S.P.R. 595](#), ¶¶ 14-15 (2006); *Gilbert v. Department of the Interior*, [101 M.S.P.R. 238](#), ¶¶ 5-6 (2006).