UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KATHERINE L. FLEMING, Appellant,	DOCKET NUMBER AT-1221-11-0460-W-1
v.	
DEPARTMENT OF THE INTERIOR, Agency.	DATE: August 3, 2012

THIS ORDER IS NONPRECEDENTIAL[1]

Katherine L. Fleming, Homestead, Florida, pro se.

Vicki V. Mott, Esquire, Atlanta, Georgia, 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 of the initial decision that dismissed her individual right of action (IRA) appeal for lack of jurisdiction. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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).

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 set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication.

The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before the Office of Special Counsel (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). 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. *Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 6 (2008).

At the outset, we find that the administrative judge erred in dismissing the appeal for lack of jurisdiction based on his finding that the appellant's alleged disclosures either were not protected or could not have been a contributing factor to the personnel action. Initial Appeal File (IAF), Tab 16, Initial Decision (ID) at 2. At the jurisdictional stage, the appellant is only burdened with nonfrivolously alleging that she reasonably believed that her disclosure evidenced a violation of one of the circumstances described in 5 U.S.C. § 2302(b)(8). *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 17 (2011). The appellant is not required to prove that her disclosure is protected under 5 U.S.C. § 2302(b)(8) to establish jurisdiction over an IRA appeal. *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 16 (2008).

On review, the appellant generally asserts that she nonfrivolously alleged that she engaged in whistleblowing by showing that she made protected disclosures to various individuals and that these disclosures were a contributing

factor to her dismissal. Petition for Review (PFR) File, Tab 1 at 2-3. Many of the appellant's 15 alleged protected disclosures involve complaints about her treatment by Nancy Russell, the appellant's supervisor, and Brien Culhane, Chief of Planning and Environmental Compliance. *See* IAF, Tab 13. Among other things, the appellant alleged in these disclosures that Ms. Russell had been "verbally abusive" to her (disclosure 1), harassed her (disclosure 2), created a hostile work environment (disclosures 2 and 4), and engaged in "continuing bullying and threats" (disclosure 9). IAF, Tab 13 at 3-7; Tab 15, Subtab 4O. The appellant also alleged that Mr. Culhane had "mocked and berated" her (disclosure 5). IAF, Tab 13 at 5.

The Board has held that a supervisor's use of his or her influence to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he or she disagrees represents an abuse of authority. *Herman v. Department of Justice*, 115 M.S.P.R. 386, ¶ 11 (2011). It is well settled, however, that vague and imprecise allegations of agency wrongdoing, lacking in specificity, do not constitute nonfrivolous allegations of a protected disclosure sufficient to establish Board jurisdiction. *See, e.g.*, *McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶ 21 (2005) (bare allegation that the agency engaged in "[i]ncidents of harassment and discrimination . . . too numerous to list on three pages," without more, did not constitute a nonfrivolous allegation of a specific and detailed disclosure protected under the Whistleblower Protection Act (WPA)); *Carr v. Department of Defense*, 61 M.S.P.R. 172, 181 (1994) (appellant's broad and imprecise allegations that he was being harassed and subjected to a stressful work environment failed to set forth allegations of a protected disclosure).

We find that the appellant's allegations of mistreatment by Ms. Russell and Mr. Culhane are vague and conclusory. For example, the appellant alleges that Ms. Russell verbally abused her and harassed her, and that Mr. Culhane mocked and berated her; however, she does not explain what was said to her. Thus, we

find that the appellant failed to make a nonfrivolous allegation that her disclosures regarding her alleged mistreatment by Ms. Russell and Mr. Culhane were protected. Furthermore, to the extent these disclosures relate to the appellant's allegations of age and sex discrimination, they are protected under 5 U.S.C. §§ 2302(b)(1) and (b)(9), not § 2302(b)(8). *See McCorcle*, 98 M.S.P.R. 363, ¶ 21.

On review, the appellant claims that some of her disclosures concern a violation of a law, rule, or regulation related to archives and records management. PFR File, Tab 1 at 4-7. The appellant appears to be referring to the following disclosures: (1) Her statement to archivist Paul Rogers during an April 7, 2006 conference call that Ms. Russell wanted to destroy budget records (disclosure 8), IAF, Tab 13 at 6; (2) her allegations in her April 14, 2006 response to her quarterly progress review that Ms. Russell had misinterpreted the National Park Service's (NPS) Records Disposition Schedule (RDS) and that Ms. Russell's plan for organizing records would cause irreparable harm to the collection (disclosure 10), IAF, Tab 1, Attachment 6; Tab 13 at 7; and (3) her April 20, 2006 telephone conversation with former NPS Senior Archivist Diane Vogt-O'Connor, in which the appellant discussed her plans for processing a collection and Ms. Vogt-O'Connor allegedly approved the appellant's plans (disclosure 11), IAF, Tab 13 at 7-8.

With respect to disclosure 8, the administrative judge found that, because the appellant sought to discourage Ms. Russell from destroying certain records, their discussion was clearly pre-decisional and, thus, no reasonable person would conclude that Ms. Russell's intent to destroy these unspecified budget records constituted a violation of law, rule, or regulation, gross mismanagement, or abuse of authority. ID at 10. The Board has found, however, that an appellant may make a protected disclosure concerning a planned agency action that she reasonably believed would constitute a violation of a law, rule, or regulation, even if the agency ultimately does not follow through on the action. *Ingram v.*

Department of the Army, 116 M.S.P.R. 525, ¶ 7 (2011). Thus, even though Ms. Russell decided not to destroy the records in question, the fact that a violation of the RDS did not occur does not invalidate the appellant's potential WPA claim. *See Ingram v. Department of the Army*, 114 M.S.P.R. 43, ¶ 15 n.6 (2010) (citing *Reid v. Merit Systems Protection Board*, 508 F.3d 674, 678 (Fed. Cir. 2007) (that a potential violation was avoided because a presentation that allegedly violated agency ethics regulations was cancelled does not invalidate the appellant's potential WPA claim because the public is best served by disclosures being made in time to prevent the wrongful conduct)).

Nonetheless, based on our review of the record, we believe that the appellant was simply engaged in a dispute with Ms. Russell over the proper interpretation of the RDS and that her conversation with Mr. Rogers did not constitute a WPA protected disclosure. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001) (discussions and disagreements over job-related duties is a normal part of most positions, and not every complaint about the employee's disagreement with the supervisor's conduct is protected by the WPA); *Lachance v. White*, 174 F.3d 1378, 1381 (Fed Cir. 1999) (the WPA is not a weapon in arguments over policy or a shield for insubordinate conduct). In complaining to Mr. Rogers about Ms. Russell's alleged intent to destroy budget records, the appellant was simply voicing her dissatisfaction with Ms. Russell's interpretation of the RDS. She was not making a nonfrivolous allegation of a protected disclosure of a violation of law, rule, or regulation.

In disclosure 10, the appellant expressed her disagreement with Ms. Russell's plan for organizing records, asserting that Ms. Russell's plan was inconsistent with the RDS, that the appellant's interpretation of the RDS was correct, and that Ms. Russell had unfairly criticized the appellant for archiving records that Ms. Russell believed did not need to be archived. *See* IAF, Tab 1, Attachment 6. The essence of the appellant's argument amounts to a

disagreement with her supervisor's interpretation of the RDS and her assessment of the appellant's work. We do not believe that disclosures about such disagreements are the types of matters covered by the WPA. *See Huffman*, 263 F.3d at 1350. Thus, we find that the allegations in disclosure 10 do not constitute nonfrivolous allegations of a violation of a law, rule, or regulation.

We also find that the appellant's allegations in disclosure 10 do not constitute nonfrivolous allegations of gross mismanagement. Gross mismanagement means more than de minimis wrongdoing or negligence and does not include management decisions that are debatable among reasonable people. *Wood v. Department of Defense*, 100 M.S.P.R. 133, ¶ 11 (2005). Rather, it means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. *Shriver v. Department of Veterans Affairs*, 89 M.S.P.R. 239, ¶ 7 (2001). The appellant's disclosure simply reflected a difference of opinion between Ms. Russell and the appellant as to the proper interpretation of the RDS. As the administrative properly found, even if the appellant's interpretation of the RDS was correct, Ms. Russell's mistake would constitute mere negligence rather than a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. ID at 12 (citing *Shriver*, 89 M.S.P.R. 239, ¶ 7).

We also find that the appellant failed to nonfrivolously allege that a reasonable person could believe that Ms. Russell's interpretation of the records retention policy constitutes an abuse of authority. An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or to preferred other persons. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001). As the administrative judge noted in the initial decision, in the appellant's quarterly progress review, Ms. Russell explained that the RDS states that "the disposition

instructions for resource management records that have been approved as temporary have been suspended until new disposition instructions can be submitted and approved by NARA [National Archives and Records Administration]." ID at 12; IAF, Tab 15, Subtab 4Q at 3. Ms. Russell interpreted this language to mean that the disposition schedule was suspended only for resource management records "approved as temporary," and not for permanent resource management records. ID at 12. We agree with the administrative judge's finding that Ms. Russell's interpretation of the RDS was reasonable, and not arbitrary or capricious. *Id.*

As for disclosure 11, the administrative judge correctly found that the fact that Ms. Vogt-O'Connor approved of the appellant's work plans is not a protected disclosure as a matter of law, as it does not involve 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. ID at 13.

The appellant also argues on review that she nonfrivolously alleged that she made protected disclosures concerning health and safety violations. PFR File, Tab 1 at 7. The appellant appears to be referring to the following disclosures: (1) Her February 6, 2006 memorandum to Mr. Culhane in response to her proposed suspension in which she claimed that she and a coworker had been exposed to hazardous zinc paint and toluene while conserving cannons at the Dry Tortugas National Park (Dry Tortugas) (disclosure 2), IAF, Tab 13 at 4; Tab 15, Subtab 4O; and (2) her May 9, 2006 letter[2] to Patricia Hooks, Regional Director of the Southeast Region of the NPS, in which she reiterated her allegation concerning exposure to toxic chemicals at the Dry Tortugas and claimed that the agency violated health and safety regulations, as well as NPS

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[2] This letter is also a grievance of the appellant's two-day suspension on May 2-3, 2006. IAF, Tab 15, Subtab 4T at 1.

rules, with respect to the work detail at the Dry Tortugas (disclosure 14), IAF, Tab 13 at 8-9; Tab 15, Subtab 4T.

We agree with the administrative judge that the allegations in disclosure 2 regarding the exposure of employees to toxic chemicals at the Dry Tortugas do not constitute a nonfrivolous allegation of a violation of law, rule, or regulation. *See* ID at 2-3. As the administrative judge noted, the appellant did not identify any law, rule, or regulation prohibiting the use of either toluene or zinc paint primer for outdoor painting. *Id.* at 2. We agree that the appellant did not reasonably believe that her disclosure, that she and a co-worker were exposed to these substances while painting cannons at the Dry Tortugas, evidenced a violation of law, rule, or regulation. *Id.*

However, we have also considered whether the appellant's statements in disclosure 2 concerning exposure to toxic chemicals at the Dry Tortugas constitute nonfrivolous allegations of a protected disclosure of a substantial and specific danger to public health and safety. IAF, Tab 13 at 4, Tab 15, Subtab 4O. The Board has held that revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing is not a protected disclosure of a substantial and specific danger to public health or safety. *See Sazinski v. Department of Housing & Urban Development*, 73 M.S.P.R. 682, 686 (1997) (an appellant's expression of a fear that someday the agency's field engineering program might not have the resources needed was not a protected disclosure of a substantial and specific danger to public health or safety). However, a danger may be substantial and specific even though the perceived danger was to a limited number of government personnel and not to the general public at large. *See Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996) (an appellant's report that employees were coughing up blood as a result of improper sandblasting procedures was a disclosure of a substantial and specific danger). To establish IRA jurisdiction, the appellant only needs to show

that the matter reported was one that a reasonable person in her position would believe evidenced a substantial and specific danger to public health and safety.

In disclosure 2, the appellant asserted that, as a result of the sun exposure and concentrated fumes she encountered while working underneath cannons at the Dry Tortugas, her head throbbed, her eyes burned, and her skin became dry and blotchy. IAF, Tab 15, Subtab 4O at 2. She also stated that her coworker suffered a severe allergic reaction and was incapacitated. *Id.* We find that, under these facts, the appellant has made a nonfrivolous allegation that she made a protected disclosure of a substantial and specific danger to public health and safety in disclosure 2.

With regard to the appellant's disclosure 14, in her letter to Ms. Hooks, however, the appellant did not merely reiterate her statement in disclosure 2 that she and a coworker were exposed to toxic chemicals during their work detail at the Dry Tortugas. IAF, Tab 15, Subtab 4T. Rather, the appellant also alleged violations of agency rules and regulations. *Id.* at 5-6. Specifically, the appellant alleged that Ms. Russell violated an Everglades and Dry Tortugas National Parks Policy Memorandum requiring supervisors to insure that, for jobs requiring the use of hazardous materials, employees receive a Material Safety Data Sheet for each hazardous material used. *Id.* at 5. She also asserted that Ms. Russell failed to complete a job hazard analysis as required by the NPS Museum Handbook for jobs that involve exposure to toxic chemicals, such as solvents. *Id.* In addition, the appellant alleged that Ms. Russell failed to comply with provisions of the Handbook that recommend limiting the use of hazardous materials, wearing appropriate personal protective equipment, and, where possible, using a less hazardous material or a different method and limiting the time of exposure to hazardous substances. *Id.* The appellant further contended that, although her co-worker was incapacitated as a result of exposure to paint fumes, Ms. Russell failed to report this incident as required by a memorandum issued by Mr. Kimball, in which he stated that all employee on-the-job injuries must be

immediately reported to the employee's supervisor and a Visitor Protection Park Ranger. *Id.* at 6. Based on these allegations, we find that the appellant nonfrivolously alleged that she reasonably believed that she disclosed a violation of law, rule, or regulation in her letter to Ms. Hooks.

Having determined that the appellant nonfrivolously alleged that disclosures 2 and 14 were protected, we next turn to the issue of whether the appellant nonfrivolously alleged that either of these disclosures was a contributing factor in the agency's decision to terminate her. Under the knowledge/timing test of 5 U.S.C. § 1221(e),[3] an appellant may establish, for jurisdictional purposes, that a disclosure was a contributing factor in a personnel action if she nonfrivolously alleges that: the official taking the personnel action knew of the disclosure; and 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. *See Horton v. Department of Veterans Affairs*, 106 M.S.P.R. 234, ¶ 19 (2007).

As to the timing prong, disclosure 2 predated the appellant's termination letter by more than four months and disclosure 14 predated her termination letter by slightly more than one month. *See* IAF, Tab 5, Subtab 4B; Tab 15, Subtabs 4O, 4T. The Board has found that a period of more than 1 year between a protected disclosure and a personnel action can satisfy the knowledge/timing test. *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (the appellant's disclosures were a contributing factor in her removal when they were made approximately 21 months and then slightly over a year before the agency removed her). Therefore, we find that the appellant has nonfrivolously alleged facts to satisfy the timing prong with respect to her termination.

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[3] We note that the knowledge/timing test is not the only way to establish that a disclosure was a contributing factor in a personnel action. *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 14 (2012).

Turning to the knowledge prong of the knowledge/timing test, we believe that the appellant has failed to nonfrivolously allege facts that satisfy this prong of the test with respect to disclosure 14. While the appellant generally asserts that Mr. Culhane, who issued the termination letter, "was well aware of [her] disclosures, *see* PFR File, Tab 1 at 9, this vague statement apparently refers to an allegedly retaliatory investigation conducted by Mr. Culhane in February through April 2006, before the appellant's May 9, 2009 letter to Ms. Hooks. The appellant did not make any nonfrivolous allegations that, if proven, would show that Mr. Culhane received a copy of the letter to Ms. Hooks, or that he was otherwise aware of the appellant's disclosures to Ms. Hooks with respect to the agency's alleged violations of the safety rules and regulations cited in that letter.

With respect to disclosure 2, we believe that the appellant has nonfrivolously alleged facts that satisfy the knowledge prong of the knowledge/timing test. Mr. Culhane was clearly aware of the disclosures in her February 6, 2006 memorandum as he was the recipient of the memorandum. Therefore, we believe that the appellant has satisfied her burden of making a nonfrivolous allegation to support a claim of jurisdiction under the WPA and she is entitled to a hearing on her IRA appeal. *See Tullis v. Department of the Navy*, 117 M.S.P.R. 236, ¶ 6 (2012) (in cases involving multiple protected disclosures, the Board has jurisdiction where the appellant has exhausted her remedies before OSC and makes a nonfrivolous allegation that at least one personnel action was taken for at least one alleged protected disclosure).

ORDER

Accordingly, because we have found that the appellant has met her burden to show that the Board has jurisdiction over this IRA appeal, we VACATE the

initial decision and REMAND the appeal to the Atlanta Regional Office for a hearing and adjudication on the merits.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.