UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DWIGHT J. HASKINS,
Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Agency.

DOCKET NUMBER
DC-1221-11-0416-W-1

DATE: September 28, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Dwight J. Haskins, Mclean, Virginia, pro se.

David G. Eisenstein, Esquire, Kelly W. Shugert, and Scott David Cooper, Arlington, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate concurring opinion.

FINAL 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

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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).

The Board has jurisdiction over an individual right of action (IRA) appeal if the appellant has exhausted his administrative remedies before the Office of Special Counsel (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). To satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). The test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he makes in the complaint requesting corrective action, not his post hoc characterization of those statements. *Id.*; *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993).

The appellant is barred from raising personnel actions in this IRA appeal that were previously the subject of a grievance.

The appellant acknowledges that he filed grievances challenging eight of the nine nonselections he raises in this appeal. Initial Appeal File (IAF), Tab 18 at 6. Because he grieved those nonselections, the administrative judge correctly found that the appellant is barred from raising them in his IRA appeal. IAF, Tab 19, Initial Decision (ID) at 10; 5 U.S.C. § 7121(g); *Calvetti v. Department of the Air Force*, 107 M.S.P.R. 480, ¶ 7 (2007).

The appellant has established exhaustion before OSC.

Because the appellant failed to file an actual copy of the complaint he filed with OSC, the administrative judge determined that OSC's February 2, 2011 letter was the only evidence in the record by which the appellant could establish OSC exhaustion. ID at 8-9; *see* IAF, Tab 18 at 4-9. The administrative judge therefore restricted his analysis of that issue to the information in OSC's February 2, 2011 letter. ID at 8. The administrative judge also declined to examine a number of documents because he did not accept the appellant's assertions, made under oath, that he had submitted the same information to OSC in support of his complaint. ID at 7-9; *see*, *e.g.*, IAF, Tabs 11, 13-14. In his submission after the record on review closed, the appellant seeks to clarify that because he was unable to access the OSC database, he instead cut-and-pasted what he asserts are his electronically saved OSC complaint and supplementary materials into his submissions to the Board. Petition for Review (PFR) File, Tab 6 at 4; *see*, *e.g.*, IAF, Tab 14 at 12-24, 34-44.

In *Nasuti v. Merit Systems Protection Board*, 376 F. App'x 29, 32 (Fed. Cir. 2010), our reviewing court remanded an IRA appeal in order for the Board to consider evidence that the appellant in that matter claimed to have sent to OSC while OSC was considering his complaint, commenting that "it is not necessary for a claimant to include all of his allegations in his OSC complaint in order to exhaust his administrative remedies, as long as those allegations are placed before the OSC while the OSC is conducting its investigation" (citing *Ward*, 981 F.2d at 526). With regard to this appellant's petition for review, we take a similar approach and consider both the evidence that the administrative judge declined to consider, as well as the evidence submitted with the appellant's petition for review, to the extent that it meets the Board's evidentiary criteria, in order to determine whether the appellant established jurisdiction over his IRA appeal. *See Nasuti*, 376 F. App'x at 32; *see also Nasuti v. Department of State*, 112 M.S.P.R. 587, ¶ 7 (2009); 5 C.F.R. §§ 1201.114(i), 1201.115(d)(1).

Upon consideration of that evidence, we find that the appellant has established exhaustion before OSC.

The appellant failed to nonfrivolously allege that he made protected disclosures.

The administrative judge found that the appellant's alleged disclosures to his supervisors in the Complex Financial Institutions Branch were made to the alleged wrongdoers and therefore not protected. ID at 10; IAF, Tab 18 at 5-6. The administrative judge also found that those disclosures were not protected because the appellant made them in the normal performance of his duties. ID at 10; IAF, Tab 18 at 6. The appellant does not challenge either of these findings in his petition for review,[2] and we see no reason to disturb them. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001) (under the Whistleblower Protection Act (WPA), when an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a protected disclosure of misconduct); *id.* at 1352-54 (to make a protected disclosure under the WPA, an employee must communicate information either outside the scope of his normal duties or outside of normal channels).

The administrative judge also found that the disclosures the appellant alleged that he made in or around 2008 to the Office of the Chairman, the Ombudsman, and the Office of Inspector General (OIG) may be protected under 5 U.S.C. § 2302(b)(8). ID at 10-11. Nevertheless, the appellant did not identify the specific disclosures at issue, and, rather than represent protected whistleblowing disclosures, the appellant's generally conclusory descriptions of his alleged disclosures instead indicate disagreements with his superiors on matters of banking policy and are therefore unprotected under the WPA. *E.g.*,

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[2] In a pleading submitted long after the record on review closed, the appellant argues for the first time that he made the disclosures in question outside normal channels. PFR File, Tab 13. However, we are not considering that argument because the appellant has not shown that it is based on evidence that was not readily available before the close of the record on review. *See* 5 C.F.R. § 1201.115(i).

Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (the WPA is not a weapon in arguments over policy). For example, in an email message that he allegedly sent to the Chairman's Ombudsman, the appellant asserted that he had "prepared more than 350 analyses" in which he warned of risks in the derivative securities markets but that he "continued to be ignored" by his supervisors, who instead retaliated against him for bringing these lapses to light. IAF, Tab 14 at 37. He likewise asserts in his petition for review that "I reported the gross waste of funds; abuse of authority; and a substantial and specific danger to the safety of consumer[s] and the public (negligence by supervisors that led to the insurance fund to become insolvent) leading to [the] government bailout and to TARP."[3] PFR File, Tab 4 at 7. In support of this statement, the appellant cites "the evidence I provided to the OSC," without identifying that evidence in the record, and then concludes that the evidence in question meets his burden of proof. *Id.*; IAF, Tab 14 at 6-7. The appellant essentially argues that if the agency had heeded his warnings, the recent financial crisis would not have occurred and the resulting bailout would not have been necessary. *E.g.*, IAF, Tab 14 at 7. Such conclusory, vague, and unsupported allegations are insufficient to qualify as nonfrivolous allegations of the Board's IRA jurisdiction. *E.g.*, *McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶ 7 (2008).

The appellant failed to nonfrivolously allege that his disclosures were a contributing factor in the challenged personnel actions.

The administrative judge found that the appellant failed to nonfrivolously allege that the agency took any of the identified, but not grieved, personnel actions in reprisal for his alleged protected whistleblowing activity. ID at 10-11; IAF, Tab 18 at 6-8. An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as

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[3] TARP refers to the Troubled Asset Relief Program of the Department of the Treasury. *See, e.g.*, http://www.fdic.gov/news/news/financial/2008/fil08109.html.

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. *E.g.*, *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). To prove that a disclosure was a contributing factor in a personnel action, the appellant need only demonstrate that the protected disclosure was one of the factors that tended to affect the personnel action in any way. *E.g.*, *Rubendall*, 101 M.S.P.R. 599, ¶ 11.

The administrative judge found that the appellant's alleged 2008 disclosures could not have been a contributing factor to his alleged 2006 change of duties. ID at 11. We agree. *See, e.g.*, *Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995) (a protected disclosure cannot be a contributing factor to a personnel action if the personnel action is taken before the disclosure is made). Consequently, we may only consider the appellant's nonselection for Vacancy Announcement 2010-HQ-B1891, which the appellant applied for on May 20, 2010, and did not subsequently grieve, IAF, Tab 18 at 6, as well as the October 2010 denial of training and October 25, 2010 letter of reprimand, *see* IAF, Tab 18 at 4; ID at 9.

The administrative judge also found that a reasonable person could not conclude that the appellant's 2008 disclosures were made within such a time that they were contributing factors in his May 20, 2010 nonselection for promotion, October 25, 2010 letter of reprimand, or October 2010 denial of training. *Id.* Based on his finding that the appellant failed to meet the knowledge/timing test set forth above, the administrative judge found that the appellant failed to nonfrivolously allege that he made a protected disclosure that was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Id.* at 11-12.

The appellant's failure to specifically identify the dates on which he made the disclosures that both OSC and the administrative judge found may be protected under 5 U.S.C. § 2302(b)(8) complicates the contributing factor analysis. *See* ID at 10-11; IAF, Tab 18 at 8. In this case, there is a potential range of approximately 1½ to 2½ years between the allegedly protected disclosures that the appellant made "in or around 2008" and his May 20, 2010 nonselection, and even longer in the case of the denial of training and letter of reprimand which both occurred in October 2010. The Board has found that a range of 1 to 2 years between the occurrence of a disclosure and a personnel action may satisfy the knowledge/timing test such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *E.g.*, *Peterson v. Department of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 16 (2011). Thus, contrary to the administrative judge's implicit finding, the period of time between the appellant's allegedly protected 2008 disclosures and his May 20, 2010 nonselection is not dispositive on the contributing factor issue. *See id.*; *see also Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 16 (2012) (the length of time between a disclosure and a personnel action, while pertinent, is not solely dispositive of the contributing factor question). Because he found that the appellant failed to meet the timing part of the knowledge/timing test, the administrative judge did not analyze the appellant's evidence regarding whether the officials taking the personnel actions at issue were aware of the appellant's alleged protected disclosures. ID at 11.

Nevertheless, if the Board determines that an appellant has failed to satisfy the knowledge/timing test, it must then consider other evidence on the contributing factor issue. *E.g.*, *Dorney*, 117 M.S.P.R. 480, ¶ 15. Such evidence includes the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant. *Id.* Again, however, the vagueness of the

appellant's allegations regarding his alleged protected disclosures makes this analysis difficult. For example, there is virtually no information regarding the first *Dorney* factor set forth above, the strength or weakness of the agency's reasons for the appellant's nonselection, save for the appellant's conclusory assertion that he was more qualified than the individual selected for the position in question. *E.g.*, IAF, Tab 14 at 23, 38. With respect to the second *Dorney* factor, even though the appellant directed his allegedly protected disclosures at his supervisors, we find for the reasons set forth below that the appellant failed to nonfrivolously allege that his supervisors were even aware of his disclosures.

In his January 10, 2011 response to questions from an attorney in the Complaints Examining Unit at the OSC, the appellant asserted that the supervisors he holds responsible for his nonselection "knew I made the complaints because they had informed me to 'go ahead and complain if I thought I had been grieved.'" IAF, Tab 14 at 40; *see* IAF, Tab 18 at 7-8. However, the appellant does not explain how the alleged invitation to "go ahead and complain" demonstrates that his supervisors were aware of his disclosures. Indeed, it arguably makes no sense for the appellant's supervisors to encourage him to file a complaint against them if they knew he already had done so.

The appellant also describes his supervisors as "smug" and sure that there would be no consequences for them if the appellant complained or filed a grievance regarding their actions. IAF, Tab 14 at 40. However, that description of his supervisors suggests that they had little motive to retaliate against him for his alleged protected activity. Moreover, it does not appear that the appellant's supervisors, or any other agency official, suffered any adverse actions or had any reason to retaliate against him and there is no information to suggest that the agency took or threatened a personnel action against those individuals as a consequence of the appellant's alleged disclosures. Indeed, rather than providing impetus for his supervisors to retaliate against him, the evidence is more consistent with the appellant's assertion to OSC that his complaints to the

agency's Chairman, Ombudsman, Human Resources department, and OIG were simply ignored. *Id.*

In an August 27, 2010 email message to the Chairman's Ombudsman, the appellant noted a rumor that the Chairman's assistant, Jason Cave, would lead a newly formed Complex and Large Bank Group. IAF, Tab 14 at 37-38. He also indicated that Mr. Cave was "very familiar with my supervisors." *Id.* However, any implication that Mr. Cave informed the appellant's supervisors of the appellant's allegedly protected disclosures is undercut by the appellant's acknowledgement in the same message that he had "no idea whether or how this information makes its way to the chairman, or how it is cycled back to my supervisors." *Id.* at 38.

Ultimately, the appellant identifies no evidence that, if true, would show that anyone who took or failed to take a personnel action against him had any knowledge of his alleged protected disclosures. Additionally, we note that there is no information in the record to indicate that anyone aware of the appellant's alleged protected disclosures influenced the individuals who took the personnel actions involved. *Cf.*, *Cassidy v. Department of Justice*, 118 M.S.P.R. 74, ¶ 14 (2012) (an appellant may establish constructive knowledge of his alleged disclosures by showing that someone with actual knowledge influenced the officials who took the allegedly retaliatory personnel action at issue). The appellant therefore failed to make a nonfrivolous allegation that his alleged protected disclosures were a contributing factor in the challenged personnel actions. Accordingly, he has failed to establish jurisdiction over his IRA appeal.

The appellant's remaining argument on review does not provide a basis for reversing the initial decision.

In his petition for review, the appellant cites a 1979 Board case that he claims shows a "third relevant prong for grounds for review," i.e., when the decision is of a precedential nature involving new or unreviewed policy

considerations with potential government-wide impact. PFR File, Tab 4 at 4 (citing *In re Hunger*, 2 M.S.P.R. 110, 115 (1979)). First of all, the appellant is citing a proposed regulation that the Board did not adopt in its initial final rule on adjudicatory procedures. *Compare* 44 Fed. Reg. 17968, 17975 *with* 44 Fed. Reg. 38342, 38356. Further, the appellant makes this argument for the first time in his petition for review. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). The appellant makes no such showing.

Moreover, the appellant's argument is without merit. The appellant asserts that the administrative judge should not have decided the appeal without considering the new whistleblowing provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010). PFR File, Tab 4 at 4-7. However, in his petition for review, the appellant cites whistleblower regulations promulgated under the Dodd-Frank Act by the Securities & Exchange Commission, not by his employing agency. *See id.* The appellant provides no support for his implicit assertion that those regulations should somehow apply to him or to this appeal. Thus, the appellant's argument that the administrative judge failed to consider certain evidence "in light of the changes made to whistleblowing laws and regulations" under the Dodd-Frank Act is without merit. *Id.* at 7.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF MEMBER MARK A. ROBBINS

in

Dwight J. Haskins v. Federal Deposit Insurance Corporation

MSPB Docket No. DC-1221-11-0416-W-1

¶1 I concur in my colleagues' conclusion that the appellant has not established jurisdiction over this IRA appeal. I write separately because I am concerned about the lengths to which the Board has had to go in reaching this conclusion.

¶2 A party "whose submissions lack clarity risks being found to have failed to meet his burden of proof." *Luecht v. Department of the Navy*, 87 M.S.P.R. 297, ¶ 8 (2000). This principle is equally applicable at this stage of the case, where the question is whether the appellant has made a nonfrivolous allegation of jurisdiction. "[I]t is not the Board's obligation to 'pore through the record' . . . or to construe and make sense of allegations" based on "various parts" of a file. *Keefer v. Department of Agriculture*, 92 M.S.P.R. 476, ¶ 18 n.2 (2002) (citation omitted). Yet, the Board's decision in this case comes close to doing just that. The Board's resources are limited, and its process is adversarial. This means that it is up to litigants to present their allegations and evidence in an organized way.

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Mark A. Robbins
Member