

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

RICHARD HAGE,
Appellant,

DOCKET NUMBER
SF-1221-10-0414-W-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: December 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Andrew M. Schwartz, Esquire, Los Angeles, California, for the appellant.

Arnulfo Urias, Esquire, Los Angeles, California, for the agency.

BEFORE

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

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, which dismissed his individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

We find that the appellant demonstrated that he exhausted his administrative remedy with the Office of Special Counsel (OSC) concerning his allegations that he made disclosures to OSC, the Office of Inspector General (OIG), the College of American Pathologists (CAP), and the agency's Employee and Labor Relations department (HR) in May and June of 2009 and his allegation that he suffered retaliation as a result of these disclosures when his supervisor, Dr. Farhad Moatamed, significantly changed his job duties on June 30, 2009, by removing certain responsibilities, reassigning his assistant, and placing another employee in his office in order to train him.

We agree with the administrative judge, however, that the appellant failed to make a nonfrivolous allegation of a protected disclosure. The appellant's submissions below failed to detail any of the allegations that the appellant made to OSC, OIG, or CAP. The Board requires an appellant to provide more than vague and conclusory allegations of wrongdoing by others. *See Mc Corcle v.*

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

Department of Agriculture, [98 M.S.P.R. 363](#), ¶ 21 (2005). Furthermore, although we have considered the appellant's documents submitted for the first time on review, *see Atkinson v. Department of State*, [107 M.S.P.R. 136](#), ¶ 12 (2007), we find that his "original" complaints to OSC and OIG, which are excerpted and undated, do not provide specific allegations of a reasonable belief of gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health or safety;³ *see Lane v. Department of Homeland Security*, [115 M.S.P.R. 342](#), ¶¶ 19, 31 (2010); *see also Peterson v. Department of Veterans Affairs*, [116 M.S.P.R. 113](#), ¶ 11 (2011).⁴

Finally, with respect to his alleged disclosure to HR concerning a counseling letter that Dr. Moatamed improperly issued to an employee, the appellant communicated to HR concerning this improper counseling after the employee approached him about it, and he stated that it was his responsibility as a supervisor to address the matter with HR. Initial Appeal File (IAF), Tab 1 at 33-39. Indeed, his position description indicated that one of his major responsibilities was to supervise administrative staff, including "coordinat[ing] all HR activities such as hiring, promotions, performance appraisals, resolving

³ We find the appellant's allegations of a threat to public safety did not constitute a protected disclosure because it was not sufficiently substantial and specific to warrant protection under the Whistleblower Protection Act. *See Chambers v. Department of the Interior*, [116 M.S.P.R. 17](#), ¶¶ 16-21 (2011). The factors to be considered in making this determination are: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm – the potential consequences. *Id.*, ¶ 19 (citing to *Chambers v. Department of the Interior*, [515 F.3d 1362](#), 1365 (Fed. Cir. 2008)). Here, the appellant alleges that a Secretary had been promised a Point of Care Coordinator position at some time in future without providing any details of the specific consequences that such reassignment would have on patient safety. Such vague and conclusory allegations alone are unprotected.

⁴ Further, the additional submission to OIG, which is also undated, appears to have been submitted after June 30, 2009, because it references events that occurred in July 2009. *Compare* Petition for Review File, Tab 1 at 6 (discussing the hiring of 2 new pathologists) *with* Initial Appeal File, Tab 1 at 46 (discussing the hiring of 2 new pathologists in July 2009). Thus, even if protected, this disclosure occurred after June 30, 2009, and could not have contributed to Dr. Moatamed's decision to change the appellant's duties or working conditions. *See Kukoyi v. Department of Veterans Affairs*, [111 M.S.P.R. 404](#), ¶ 11 (2009).

disputes, and disciplinary actions.” IAF, Tab 6, Subtab 4H at 5-6. Consequently, because this communication with HR was within the scope of his job duties, the appellant has not made a nonfrivolous allegation of a protected disclosure. *See Huffman v. Office of Personnel Management*, [263 F.3d 1341](#), 1353 (Fed. Cir. 2001) (under the Whistleblower Protection Act, disclosures made by employees in the normal performance of their duties cannot constitute “protected disclosures”).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes 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:

William D. Spencer
Clerk of the Board

Washington, D.C.