UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL K. EVANS,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
CH-1221-11-0513-W-1

DATE: April 19, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Michael K. Evans, Escanaba, Michigan, pro se.

Benjamin E. Wick, Esquire, and Zachary Wright, Esquire, Silver Spring, Maryland, for the agency.

BEFORE

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

FINAL ORDER

The appellant has filed a petition for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction.[2] We

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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).

On review the appellant disagrees with the administrative judge's finding that he failed to nonfrivolously allege that he made a protected disclosure.[3] Petition for Review File, Tab 1. He asserts that he alleged specific facts to support a nonfrivolous allegation that he disclosed a significant and substantial

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[2] Although the appellant does not raise this issue on review, we note that the April 29, 2011 order on jurisdiction and the initial decision state that an appellant must make nonfrivolous allegations that he engaged in whistleblowing activity by making a disclosure he reasonably believed to be protected, the agency took or failed to take a personnel action, and he raised and exhausted the issue before the Office of Special Counsel (OSC). Initial Appeal File (IAF), Tab 4, Tab 20 at 2-3; Initial Decision at 2-3. The order and the initial decision incorrectly set forth the standard for establishing jurisdiction in an IRA appeal. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (an appellant must prove that he exhausted his administrative remedies before the OSC and nonfrivolously allege that he engaged in whistleblowing activity by making a protected disclosure, which was a contributing factor in the agency's decision to take or fail to take a personnel action); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002) (same). Further, the administrative judge erred in citing *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994) for the IRA jurisdictional standard, IAF, Tab 22 at 3, as that case has been overruled. *See Rusin*, 92 M.S.P.R. 298, ¶¶ 8-12. Notwithstanding, the appellant received proper IRA jurisdictional notice in the April 27, 2011 acknowledgment order and the agency's June 8, 2011 submission, and the acknowledgment order and the initial decision set forth the means for making a nonfrivolous allegation of a protected disclosure. *See* IAF, Tab 2, Tab 18 at 8; *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). Consequently, it is unnecessary to remand the appeal to the Central Regional Office for proper jurisdictional notice to be given. *See Hurston v. Department of the Army*, 113 M.S.P.R. 34, ¶ 7 (2010).

[3] In his petition for review, the appellant makes a bare assertion that he was denied discovery by the government. Petition for Review, Tab 1 at 3. However, he did not raise any discovery issues on appeal below. Consequently, the appellant is precluded from raising this issue on review. *See Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988).

danger to public health and safety, among other things, in addition to his belief that Special Agent in Charge Richard Glodowski's inaction evidenced negligence, apathy, nonfeasance and dereliction. *Id.* at 3-4. However, he has not shown any error in the administrative judge's findings.

Upon our review of the appellant's submissions before the Office of Special Counsel (OSC), we agree with the administrative judge that the appellant's summary of his statements to the Forest Service during the June 13, 2010 meeting are vague, unclear and bare in comparison to the list of disclosures enumerated in his Board pleadings. Other than summarily stating that he met with the Forest Service officials, that "it became clear" that Glodowski's neglect created a substantial danger, and that he "blew the whistle" by disclosing Glodowski's apathy, negligence, dereliction and nonfeasance, the appellant did not elaborate upon his statements to the Forest Service officials in his OSC submissions. IAF, Tab 5 at 9, 11. The Board may only consider those disclosures of information raised before the OSC. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 8 (2011). Consequently, we agree with the administrative judge that the appellant's vague assertions regarding Glodowski's negligence, dereliction of duty, nonfeasance and apathy fail to constitute protected disclosures under the Whistleblower Protection Act. *See* IAF, Tab 22 at 4-5.

Even if we liberally construe the appellant's pleadings and find that he disclosed to the Forest Service officials that Glodowski denied the appellant's repeated requests for additional resources and training, despite the increasing safety issues arising from the Drug Trafficking Organizations' (DTOs) presence in the national forests, the appellant has failed to nonfrivolously allege that he made a protected disclosure. *See* IAF, Tab 16 at 8-17. To the extent the appellant disclosed his disagreement with Glodowski's hiring and staffing decisions and denial of trainings, the Federal Circuit has held that a disagreement concerning funding and the need for hands-on training does not amount to a

protected disclosure. *See Langer v. Department of the Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001); IAF, Tab 16 at 5. Further, the appellant has not adequately alleged facts that, if proven, would lead a disinterested observer to reasonably believe that Glodowski's decisions regarding hiring and educating the public about the DTO problems evidences gross mismanagement or an abuse of authority. *See Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 19 (2010) (defining gross mismanagement as a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission); *Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300, ¶ 11 (2003) (defining "abuse of authority" as "an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons"); IAF, Tab 16 at 5.

Further, the appellant has not alleged facts that, if proven, would lead a disinterested observer to reasonably believe that violence against law enforcement officers and civilians by armed DTOs is an imminent and likely harm resulting from Glodowski's alleged inaction. *See Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (determining whether a disclosed danger to public health or safety is sufficiently substantial and specific to warrant protection under the WPA requires consideration of the likelihood and imminence of the alleged harm resulting from the danger); IAF, Tab 1 at 7, Tab 3 at 5, Tab 5 at 8-9, 18, Tab 16 at 10; *cf. Tatsch v. Department of the Army*, 100 M.S.P.R. 460, ¶¶ 11-13 (2005) (employee disclosed a likely and imminent harm to public health and safety in reporting two incidents involving triage of on-scene late term, unstable pregnant females in labor who were advised to "seek care at SMC" without the benefit of stabilization or monitoring via ambulance, one of which resulted in a disastrous outcome); *Poster v. Department of Veterans Affairs*, 92 M.S.P.R. 501, ¶¶ 3, 8 (2002) (employee disclosed a likely and imminent harm to public health and safety in reporting that patients receiving

inadequate and substandard medical care, and practices in violation of established policies).

Accordingly, we find that the appellant failed to nonfrivolously allege that he made a protected disclosure, that the Board lacks jurisdiction over his IRA appeal, and that he is not entitled to a hearing on the merits of his claim. *See Mason*, 116 M.S.P.R. 135, ¶ 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.