UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JESSICA WAILANI GIBBS,
Appellant,

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
DC-1221-11-0794-W-1

DATE: March 7, 2012

THIS ORDER IS NONPRECEDENTIAL[1]

Jessica Wailani Gibbs, Haymarket, Virginia, pro se.

Kerry E. Creighton, Esquire, Washington, D.C., for the agency.

BEFORE

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

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 that was not available for consideration earlier or when the administrative judge

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant, a Program Analyst with the agency's U.S. Geological Survey (USGS), first filed an Individual Right of Action (IRA) appeal against the agency on April 22, 2011. *See Gibbs v. Department of the Interior*, MSPB Docket No. DC-1221-11-0565-W-1 (Initial Decision, June 15, 2011) (hereinafter IRA-1). IRA-1, Tab 1. The administrative judge dismissed the appeal as premature because the appellant failed to prove she exhausted her administrative remedy with the Office of Special Counsel (OSC). *Id*., Initial Decision (ID). The appellant alleged that she filed her request for corrective action with OSC sometime in February 2011. *Id*., Tab 1, MSPB Form 185-5 at 3. She did not produce a copy of the OSC letter notifying the appellant that she may seek corrective action from the Board and it appeared 120 days had not elapsed since the date the appellant requested corrective action (the appellant never clarified the exact date of her request). *Id*., ID.

The appellant filed a second IRA appeal (hereinafter IRA-2) on July 15, 2011.[2] IRA-2, Tab 1. The appellant alleged the following:

> February 2011 - an employee in my management chain tried to get me to get their Niece more college money from their supervisor. I told that employee that I felt it was a conflict of interest, however they stood there while I made the call. I complained to my supervisor.
>
> The same employee conducted an unlawful audit of all the credit cards in the office - not to find Fraud, Waste, and/or Abuse, but to tally up what others have had awarded for College so she could ask for that amount for her Niece (also a USGS employee). I complained.

[2] The appellant resigned from the agency on July 16, 2011, and accepted a position with another federal agency. IRA-2, Tab 8, Subtab 4a.

> My boss attempted to present me with a Continuation of Service Agreement backdated four years! I refused and sought help from Dale Roy in Human Resources, Mary Smith in Human Resources, EEO, OIG, and Office of Special Counsel. I also had my Congressman contact the Agency.
>
> Since then, the Agency reduced my duties; alleged that I misused my purchase card and suspended and Defamated my character; confiscated my school books (even those they did not pay for); issued me a bill to repay for my school, including charges that were unlawful and classes that were credits to be taken later; and created an impossibly hostile work environment. I got injured at work in May 2011, and my boss denied me CA-16 Injury Forms and forced me to incur a debt by going to my own doctor. She feigned that she did not know the process for Workman's Comp, when in February she actually gave me the procedures for a different injury.
>
> I gave Office of Special Counsel much more than 120-days as mandated by law. Now is the time for a FEDERAL JUDGE to see all of my evidence and weigh in on it.

Id., MSPB Form 185-5 Continuation Sheet at 1.

The administrative judge sent an order notifying the appellant that she must show that she exhausted her administrative remedies before OSC and make nonfrivolous allegations that she engaged in whistleblowing activity by making a protected disclosure and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Id.*, Tab 3 at 2. The administrative judge's order accurately and fully informed the appellant of what she must show for the Board to have jurisdiction over her IRA appeal. *See Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 6 (2010); 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.5(a).

The administrative judge construed the appellant's IRA appeal as raising the following agency actions: (1) reduced her duties; (2) asserted that she misused her government credit card by improperly making the government pay tuition for college courses she was not approved to take; (3) told her to reimburse her tuition; (4) confiscated her school books; (5) defamed her; (6) denied her

injury forms after she was injured at work in May 2011; and (7) created a hostile work environment. *Id*., ID at 3. However, he concluded the appellant's IRA appeal only generally included details about what she disclosed, when she disclosed it, to whom she disclosed it, and why she believed that her disclosure might have been a contributing factor in the various listed actions. *Id*., ID at 7. Accordingly, he found she failed to show that she provided OSC with sufficient information to pursue an investigation that might have led to corrective action. *Id*.

The administrative judge found the appellant failed to respond to his order on jurisdiction or to the agency's two motions to dismiss, which also addressed jurisdiction. IRA-2, ID at 6. We note the appellant did file a response to the agency's first motion to dismiss (titled "Response to Agency's Narrative Response Dated 08/16/11"). *Id*., Tabs 5, 6. She asserts the agency's information is erroneous or fictitious, that her supervisor, Ms. Jones, approved the credit card statements, that the audit of the credit cards occurred when Ms. Cardellichio attempted to gauge how much tuition employees were receiving and caused the appellant to contact Ms. Cardellichio's niece's supervisor [to get more tuition]. *Id*., Tab 6 at 3.[3]

The remaining submissions in the record from the appellant concern discovery - either her request for discovery (admissions, interrogatories), her request to compel discovery, or her responses to the agency's discovery requests. *Id*., Tabs 7, 9-13. Located in her responses to the agency's interrogatories is a copy of the OSC letter, dated August 24, 2011, signed by Martha V. Sheth, an

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[3] The agency argues it was the appellant and not Ms. Cardellichio who wanted to get more tuition assistance for Ms. Cardellichio's niece and that it was Ms. Jones who asked Ms. Cardellichio to conduct an audit of the credit card statements to determine the level of funding that should be provided under a new tuition assistance policy. IRA-2, Tab 8, Subtab 1 at 13-14. We cannot weigh the evidence at this stage but are including the discrepancy to show what the agency understood the protected disclosure to be from the appeal form. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 19 (2010)

attorney with the Complaints Examining Unit, notifying the appellant she may seek corrective action from the Board. *Id*., Tab 11 at 13. The letter provides no detail on the appellant's allegations other than she alleged she was the victim of a prohibited personnel practice under 5 U.S.C. § 2302(b)(8). *Id*. There is no record evidence the appellant submitted a copy of her OSC complaint to the administrative judge.

The administrative judge found from the IRA appeal and her responses to the interrogatories that the appellant did not directly state she made any protected disclosures in her complaint to OSC; she failed to state which personnel actions she brought to OSC; and she never stated specifically that she raised those matters in her complaint to OSC. *Id*., ID at 7. Therefore, he concluded the appellant failed to exhaust her remedies and the Board presently lacks jurisdiction over her IRA appeal. *Id*.

The appellant claims in her petition for review that the agency removed all documents associated with her claims from her office at USGS, including a decision letter signed by Ms. Sheth from OSC. Petition for Review File (PFR File), Tab 1 at 3. This may have been at or around the time the appellant resigned in July 2011 but she does not make this assertion. She further states that on August 21 she sent Ms. Sheth a certified letter asking for a replacement copy of the final decision memo and any other documentation pertaining to the decision made on her case, but Ms. Sheth did not send the final decision letter. *Id*. Instead, Ms. Sheth sent a letter advising the appellant of her rights to seek corrective action from the Board. *Id*. She mentions she sent emails and left voicemails for OSC, and raised her concerns to one of the Division Chiefs at OSC. *Id*.

The appellant wrote in her petition for review that OSC "was not motivated to re-issue their decision letter; therefore, it caused Ms. Gibbs to fail to present it to [the administrative judge] in this case." *Id*. at 3-4. The appellant attached a copy of an unsigned letter dated August 21, 2011, and addressed to OSC's Complaints Examining Unit in Washington, DC, in which she requests a copy of

the final decision and all other correspondence regarding her case, MA-11-1916. *Id*. at 7. She also included a return receipt showing a delivery date of August 22, 2011. *Id*. The August 21 letter and the return receipt were not provided to the administrative judge but appear for the first time on petition for review.

The appellant exhausted her administrative remedies before OSC.

As the administrative judge correctly advised the appellant in his order on jurisdiction, she may show exhaustion of her OSC remedy through means other than her OSC complaint. *Id*.; IRA-2, Tab 3 at 6. Specifically, the administrative judge stated that unless the appellant submitted a copy of the complaint she submitted to OSC, along with any amendments she filed there, and a copy of the OSC letter notifying her of her right to appeal to the Board, her response must be in the form of an affidavit, sworn statement, or declaration under penalty of perjury, 28 U.S.C. § 1746, a form for which is found in the Board's regulations at 5 C.F.R. Part 1201, Appendix IV. IRA-2, Tab 3 at 6.

Both the appellant's response to the agency's first motion to dismiss and her response to the agency's interrogatories were made under penalty of perjury. *Id*., Tab 6 at 4; Tab 11 at 5. In response to the first interrogatory, ("Identify all individuals with knowledge of the allegations made in your appeal and state in detail the knowledge each possesses"), the appellant listed "Marie Sheth, Counsel, US Office of Special Counsel." *Id*., Tab 11 at 6. In response to the third interrogatory, ("Identify each and every protected disclosure you made, including the date of the disclosure, the substance of the disclosure, and the person to whom you made the disclosure"), the appellant wrote "I made a protected disclosure to the US Office of Special Counsel" and "The Counsel, Marie Sheth, is who worked on my filing." *Id*. In response to the fourth interrogatory ("For each disclosure listed in your response to Interrogatory 3, state each and every fact supporting your claim that you had a reasonable basis and/or belief that your disclosure was an example of fraud, waste, gross mismanagement, abuse of authority and/or violation of law, rule or regulation"), the appellant responded:

> "The facts are – Ms. Cardellichio's request for me to contact her niece's boss was a conflict of interest and abuse of authority. Ms. Jones' disregard to my notifying her is gross mismanagement. Ms. Jones attacking me is retaliation. Its clear that less than 6-months prior to this I was a highly-rated employee receiving cash awards."

Id. at 6.

To satisfy this IRA exhaustion requirement, an appellant must inform OSC of the precise ground of her charge of whistleblowing, so OSC has a sufficient basis to pursue an investigation which might lead to corrective action. *Briley v. National Archives and Records Administration*, 236 F.3d 1373, 1377 (Fed. Cir. 2001); *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 12 (2008). Further, once OSC has terminated its investigation and the appellant has filed her Board IRA appeal, the Board will consider only those matters that the appellant asserted before OSC, and it will not consider any subsequent recharacterization of those charges put forth by the appellant in her appeal to the Board. *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 9 (1999).

The administrative judge found the appellant's responses to Interrogatories ## 3 and 4 lacking in specificity. IRA-2, ID at 6, 7. The Whistleblower Protection Act (WPA) is remedial legislation and the Board will construe its provisions liberally, to embrace all cases fairly within its scope so as to effectuate the purpose of the Act. The appellant's answers to Interrogatory #1 indicate Marie Sheth from OSC had knowledge of the allegations made in the appellant's appeal. For the Board, the appellant need only provide OSC with a sufficient basis to pursue an investigation which might lead to corrective action. *See Briley*, 236 F.3d at 1378 (exhaustion requirement satisfied where appellant's letters to OSC contained the "core" of her retaliation claim).

We find the "core" of the appellant's retaliation claim is that (1) the appellant informed her supervisor in February 2011 that another employee in her management chain caused her to contact the employee's niece's boss about more tuition for her niece and that she complained the same employee conducted an unlawful audit of credit cards in the office not to find fraud, waste and/or abuse

but to find out what others were awarded for college so the employee could ask for that for her niece, also a USGS employee; and (2) the agency took the following actions in response to her disclosure: reduced her duties, alleged she misused her purchase card and suspended and defamed her character, confiscated her school books, issued her a bill to repay her schooling, created a hostile work environment, and denied her CA-16 injury forms for an injury at work in May 2011. IRA-2, Tab 1, MSPB Form 185-5 Continuation Sheet at 1. As the core of the appellant's retaliation claim appeared in her appeal, and Marie Sheth from OSC had knowledge of the allegations made in the appellant's appeal, we find the appellant provided OSC with a sufficient basis to pursue an investigation that might lead to corrective action.

The appellant made a nonfrivolous allegation that she engaged in whistleblowing activity by making a protected disclosure and that her protected disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.

A protected disclosure under the WPA is a disclosure of information that the individual reasonably believes evidence a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b). The proper test for determining whether an employee has a reasonable belief that his disclosures revealed misconduct prohibited under the WPA, is stated as follows: Could a disinterested observer with knowledge of the essential facts known to and reasonably ascertainable by the employee reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA? *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). Any doubt or ambiguity as to whether the appellant has made a nonfrivolous allegation of a reasonable belief should be resolved in favor of finding jurisdiction. *E.g., Swinford v. Department of Transportation*, 107 M.S.P.R. 433, ¶ 8 (2007).

Ms. Chardellichio is an administrative assistant working in the same office as the appellant, the Office of Communications and Publishing (OCP). IRA-2, Tab 6 at 3; Tab 8 at 2, 4; Tab 11 at 6. The appellant's supervisor is Leslie Jones, the Deputy Director of OCP. *Id*., Tab 6 at 3-4; Tab 13 at 6, 7.

The appellant states in her responses to Interrogatories ## 5 and 11 that Ms. Cardellichio was "very transparent in her attempts to compare all USGS employees with her Niece in the amount of tuition USGS was paying for their college classes" and "I advised Leslie [Jones] that Ms. Cardellichio was asking for credit card information for Office of Communications, and that she asked me to contact 'VIC' to discuss her niece's tuition." *Id*., Tab 11 at 7, 8. She also writes:

> Ms. Cardellichio asked me for my credit cards statements; went through the files for others; and conducted an audit of credit card statements. Thereafter, Ms. Cardellichio came to me and advised me that other employees were getting more tuition reimbursement that her niece. Ms. Cardellichio asked me to contact her niece's boss and discuss the matter with him. Ms. Cardellichio stood in my office during the conversation and thanked me after it the phone call was concluded.

Id. at 9 (Interrogatory #12).

We find the appellant reasonably believed that Ms. Cardellichio's conduct constituted an abuse of authority within the meaning of the WPA, because her audit of the credit card statements and the call to her niece's boss was an effort to gain an advantage for a preferred other person (her niece, another USGS employee). *Pasley*, 109 M.S.P.R. 105, ¶ 18.

In cases involving multiple alleged personnel actions, where an appellant makes a nonfrivolous allegation that at least one alleged personnel action was taken in reprisal for at least one alleged protected disclosure, she establishes Board jurisdiction over her IRA appeal. *Groseclose v. Department of the Navy*, 111 M.S.P.R. 194, ¶ 15 (2009). We find the appellant alleged (1) at least one personnel action (significantly changing her duties and responsibilities by removing her purchasing responsibilities and adding travel duties) taken by the

appellant's supervisor, Ms. Jones, as reprisal for (2) at least one protected disclosure (Ms. Cardellichio conducting an unlawful audit of all credit cards in the office to tally up what others have been awarded for college and asking the appellant to contact her niece's boss about more tuition for her niece), and that (3) the personnel action occurred within 4 months of the disclosure (February 2011 disclosure and May 2011 change of duties). IRA-2, Tab 1, MSPB Form 185-5 Continuation Sheet at 1; Tab 12 at 12, 25; 5 U.S.C. § 2302(a)(2)(xi).

The appellant may demonstrate the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence 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 the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 11 (2009). The Board has held that a personnel action within approximately 1-2 years of the appellant's disclosures satisfies the knowledge-timing test. *See Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 22 (2010). Based on the foregoing, we find the appellant has nonfrivolously alleged 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 the disclosure was a contributing factor in the personnel action. *See Kukoyi*, 111 M.S.P.R. 404, ¶ 11.

Because we find that the appellant has established jurisdiction over her IRA appeal, the appeal must be remanded to the regional office for a hearing on the merits.[4]

[4] The appellant requested a hearing. IRA-2, Tab 1, MSPB Form 185-1 at 2.

ORDER

For the reasons discussed above, we VACATE the initial decision and REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board

Washington, D.C.