UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 73

Docket No. AT-1221-11-0472-W-1

Annamarie R. Francis,

Appellant,

v.

Department of the Air Force,

Agency.

September 17, 2013

Annamarie R. Francis, Wildwood, Missouri, pro se.

William David Vernon, Esquire, JB Andrews, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that denied corrective action under the Whistleblower Protection Act (WPA)[1] on the ground that the appellant failed to prove that she made a protected disclosure. For the reasons set forth below, we DENY the petition for review and AFFIRM

[1] The Whistleblower Protection Enhancement Act of 2012 (WPEA), which amended the WPA, became effective on December 27, 2012, after the record on review closed in this appeal. We have considered the WPEA and find that it makes no difference to the outcome.

the initial decision AS MODIFIED BY this Opinion and Order by DISMISSING the appellant's individual right of action (IRA) appeal for lack of jurisdiction and FORWARDING the file for docketing of a chapter 75 appeal consistent with this decision.

BACKGROUND

¶2 Effective September 14, 2009, the appellant received an excepted service appointment in the Federal Career Intern Program (FCIP) as a Contract Specialist.[2] Initial Appeal File (IAF), Tab 4 at 17, 23. The FCIP appointment was intended to continue for two years unless extended for an additional year. *Id.* at 23. Fourteen months later on November 19, 2010, the agency terminated the appellant for failure to make satisfactory progress in the training program. *Id.* at 11, 13-14.

¶3 The appellant filed a chapter 75 appeal with the Board,[3] but later requested that her appeal be treated as an IRA appeal. IAF, Tabs 1, 6, 7. She alleged that the agency terminated her in reprisal for disclosing to the Director of Business Operations (Director) that the agency violated 5 U.S.C. §§ 4103 and 4118, Executive Order 11,348, and Department of Defense (DOD) policies in failing to properly update and maintain training records and in not training interns in

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[2] The SF-50 of appointment reflects that the agency appointed the appellant to her Contract Specialist position pursuant to Executive Order 13,162, which established the FCIP. Initial Appeal File, Tab 13, SF-50 of Appointment. We note that, on December 27, 2010, President Obama signed Executive Order 13,562, which revoked Executive Order 13,162 effective March 1, 2011.

[3] As the appellant filed a direct appeal of the agency's November 19, 2010 termination decision, we herein refer to the adverse action as a "termination" action. However, whether this appeal involves the termination of a non-tenured federal employee or the removal action of a statutory employee is an issue for the administrative judge to resolve, as we discuss later in this decision.

accordance with the agency's Intern Training Plan (ITP)/template.[4] IAF, Tab 21. The appellant withdrew her request for a hearing. IAF, Tab 22.

¶4 Based on the written record, the administrative judge denied corrective action under the WPA. IAF, Tab 23, Initial Decision (ID) at 2, 5-6. He found that the appellant established jurisdiction over her IRA appeal. ID at 2-4. However, the administrative judge determined that none of the regulations, statutes or policies cited by the appellant require that the agency follow a prescribed methodology of maintaining training records, and that the appellant's complaint of improper and untimely documentation of training records merely constitutes disagreement with management regarding how training should be conducted – not a protected disclosure under the WPA. ID at 4-5. He further found that, to the extent the appellant was alleging gross mismanagement, she failed to show that the agency's failure to maintain training records created a substantial risk of significant adverse impact on the agency mission. ID at 5.

¶5 The appellant has filed a petition for review, disagreeing with the administrative judge's finding that she failed to prove that she made a protected disclosure.[5] PFR File, Tab 1. The agency has responded in opposition. PFR File, Tab 3.

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[4] The appellant also alleged that she made disclosures to the Director and the Lieutenant Colonel regarding a gas leak that created an alleged substantial and specific danger to public health and safety and regarding allegations of nepotism. IAF, Tab 13. We have reviewed the appellant's submissions on appeal and the administrative judge's summary of the appellant's oral explanation of her alleged protected disclosure, to which the appellant did not object or correct; the appellant only proceeded with her training disclosure to the Director. *See* Petition for Review (PFR) File, Tab 1 at 4; IAF, Tabs 21, 22. Thus, we find that the only alleged protected disclosure before the Board is the appellant's training disclosure.

[5] We note that the appellant alleges that the Director and her first-line supervisor provided false, fictitious, and fraudulent statements to the Board in their sworn declarations. PFR File, Tab 1 at 6. For example she reasserts that, contrary to the Director's statement, it is implausible that she discussed training with him in May 2009 when her internship did not commence until September 2009, and that her supervisor

ANALYSIS

We adjudicate the appellant's appeal as both an IRA appeal and as a chapter 75 appeal.

¶6 Under 5 U.S.C. § 7121(g), an employee who has been subjected to an action that is appealable to the Board and alleges that she has been affected by a prohibited personnel practice other than a claim of discrimination under § 2302(b)(1), may elect to pursue a remedy through one, and only one, of the following remedial processes: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance filed pursuant to the provisions of the negotiated grievance procedure; or (3) a complaint following the procedures for seeking corrective action from the Office of Special Counsel (OSC) under 5 U.S.C. §§ 1211-1222. The Board recently held that, for adverse actions appealable to the Board under chapters 43 and 75, an employee's election of remedies under 5 U.S.C. § 7121(g) must be knowing and informed and, if it is not, it will not be binding upon the employee. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 16 (2013). In *Agoranos*, the Board found that Mr. Agoranos' filing an OSC complaint did not constitute a valid, informed election under 5 U.S.C. § 7121(g) and, because Mr. Agoranos had not made a knowing and informed waiver of his chapter 43 rights, the Board adjudicated the IRA appeal and remanded the chapter 43

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falsely stated that he lacked knowledge about guidelines outlining training requirements. *Id.* at 6-7; IAF, Tab 20 at 4-5. In a later submission, she characterizes the agency's alleged fraud or "perjury" as a basis for reopening the appeal on the Board's own motion. PFR File, Tab 4. However, because the Board has not yet issued a final decision in this appeal, we consider the appellant's submission as a supplement to her request for the Board to grant her petition for review. *See* 5 U.S.C. § 7701(e)(1)(B); 5 C.F.R. § 1201.118. Even if the Director and the appellant's first-line supervisor made false statements in their sworn declarations, this does not change the outcome of this appeal where the appellant failed to nonfrivolously allege that she disclosed a violation of law, rule or regulation, gross mismanagement, abuse of authority or gross waste of funds.

removal appeal to the regional office for adjudication on the merits. *Id.*, ¶¶ 17-18.

¶7 Here, the appellant filed a chapter 75 appeal, but later requested that the Board treat her appeal as an IRA appeal. IAF, Tabs 1, 6, 7. Under *Agoranos*, we find that the appellant's filing an OSC complaint did not constitute a valid, informed election of remedies. *See Agoranos*, 119 M.S.P.R. 498, ¶ 17. Because nothing in the record reflects that the appellant made a knowing and informed waiver of her chapter 75 appeal rights, we shall adjudicate the appellant's appeal as both an IRA appeal and as a chapter 75 appeal of her "termination." *See id.*, ¶ 18.

The Board lacks jurisdiction over the appellant's IRA appeal.

¶8 The administrative judge denied corrective action under the WPA, finding that the appellant failed to prove by preponderant evidence that she made a protected disclosure. ID at 4-5. However, for the reasons set forth below, we find that the appellant failed to establish that the Board has jurisdiction over her IRA appeal. Although the agency has not raised this issue on review, the issue of the Board's jurisdiction is always before the Board and may be raised sua sponte by the Board at any time during a Board proceeding. *Bambl v. Department of the Treasury*, 113 M.S.P.R. 55, ¶ 8 (2010).

¶9 To establish Board jurisdiction over an IRA appeal, the appellant must prove that she exhausted her administrative remedies before OSC and nonfrivolously allege that she made a protected disclosure that was a contributing factor in the agency's decision to take or failure to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). The dispositive issue in this appeal is whether the appellant nonfrivolously alleged

that she made a protected disclosure.[6] A nonfrivolous allegation is an allegation of fact that, if proven, could establish a prima facie case that the Board has jurisdiction over the appeal. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶10 Protected whistleblowing occurs when an appellant makes a disclosure that she reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *See* 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b); *Mason*, 116 M.S.P.R. 135, ¶ 17. The proper test for determining whether an employee had a reasonable belief that her disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Mason*, 116 M.S.P.R. 135, ¶ 17.

¶11 Contrary to the administrative judge's findings, the appellant failed to nonfrivolously allege that she reasonably believed that she made a protected disclosure. Her claims regarding the agency's alleged violation of pertinent training rules and/or gross mismanagement of the FCIP's training component are non-specific and poorly explained. Further, none of the laws, rules, and regulations that the appellant cited prescribes a methodology of maintaining

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[6] Because it was unclear from the record whether the appellant raised her training disclosure before OSC, the Clerk of the Board ordered the appellant to provide evidence of exhaustion. PFR File, Tab 5; *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 8 (2011) (the Board may only consider those disclosures of information and personnel actions that the appellant raised before OSC). Based on the appellant's response, we find that the appellant alleged before OSC that, in reprisal for disclosing to the Director the agency's alleged failure to maintain and update training records and to provide proper training in accordance with the ITP/template, the agency terminated her. *See* PFR File, Tab 6 at 26-28. Thus, the appellant exhausted her OSC administrative remedies.

training records. Because the administrative judge's "merits" determination was based on a facial reading of the cited provisions, we find that the appellant failed even to make a nonfrivolous allegation that this disclosure was protected.

¶12 The appellant also alleged that she disclosed the agency's gross mismanagement regarding training deficiencies. Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.[7] *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994). We find that the appellant merely expressed her disagreement over job-related issues, which the Board has not deemed sufficient for finding a protected disclosure under the WPA. *See McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶ 22 (2005).

¶13 As the appellant failed to nonfrivolously allege that she made a disclosure that she reasonably believed evidenced a violation of 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, we MODIFY the initial decision and DISMISS the IRA appeal for lack of jurisdiction.

We forward the file to the regional office for docketing of a chapter 75 appeal.

¶14 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The appellant bears the burden of proving that the Board has jurisdiction over her appeal. 5 C.F.R.

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[7] In the initial decision, the administrative judge incorrectly stated that gross mismanagement requires an "element of blatancy." ID at 5; *cf. White v. Department of the Air Force*, 391 F.3d 1377, 1383 (Fed. Cir. 2004). However, the record reflects that the administrative judge provided correct notice in his May 24, 2011 order. IAF, Tab 10 at 4. As the appellant was provided with correct notice on appeal, the administrative judge's error does not prejudice the appellant's substantive rights. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

§ 1201.56(a)(2). To be entitled to a jurisdictional hearing, the appellant must first make a nonfrivolous allegation of jurisdiction, i.e., an allegation of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter in issue. *Ferdon*, 60 M.S.P.R. at 329.

¶15 Under 5 U.S.C. § 7511(a)(1)(C), a non-preference eligible appellant has the right to appeal her separation from the excepted service if, at the time of her separation, she: (i) was not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (ii) had completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less. Here, the appellant does not allege that, at the time of her separation, she had completed two years of current continuous service. However, she has alleged that she was separated from service on November 19, 2010, approximately two months after she completed her 1-year probationary period. IAF, Tab 13 at 2, 11. Taking the appellant's allegations as true, we find that she has nonfrivolously alleged that she is an "employee" under 5 U.S.C. § 7511(a)(1)(C)(i) with Board appeal rights as she was separated from the excepted service after she completed her 1-year probationary period.

¶16 In order to establish that the Board has jurisdiction over her "termination," the appellant must prove that her separation occurred after her completion of her probationary or trial period,[8] and therefore she is an "employee" under 5 U.S.C. § 7511(a)(1)(C)(i). On appeal, the appellant submitted a copy of the SF-50 documenting her appointment, which expressly provided that the appellant's FCIP appointment was subject to her completion of a 1-year probationary period beginning September 14, 2009. IAF, Tab 13, SF-50 of Appointment. The

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[8] FCIP appointments, by their very nature, are initial appointments pending conversion to the competitive service. *See* SF-50 of Appointment; Executive Order 13,162, Section 4(b)(4).

appellant's separation was effected on November 19, 2010. IAF, Tab 13, Notification of Termination. Although the agency has alleged that the appellant's FCIP appointment was subject to a two-year probationary period under federal law, it has not specifically identified any law, rule, or regulation to support its position. *See* IAF, Tab 4 at 8.

¶17 The Board has described the FCIP as providing for an excepted appointment pending conversion to the competitive service after successful completion of "a two-year trial period," *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 9 (2006), but the authorities cited for this statement, 5 C.F.R. §§ 213.3202(o)(6) and 315.712, do not support it. Furthermore, the preface to the Federal Register notice announcing the government-wide rules concerning the FCIP says nothing about a probationary or trial period, and the rules themselves are silent on the matter. 70 Fed. Reg. 44219 (2005); 5 C.F.R. § 213.3202(o). Likewise, Executive Order No. 13,162, which authorized the FCIP, does not mention a probationary or trial period.

¶18 The statement in *McCrary* that an FCIP appointment comes with a two-year "trial period" may have been intended to mean that the entire internship is a "trial period." The problem with this approach is that it renders part of 5 U.S.C. § 7511(a)(1)(C)(i) superfluous, contrary to accepted canons of statutory construction. *See Holley v. United States*, 124 F.3d 1462, 1468 (Fed. Cir. 1997) (a statute should not be interpreted so as to render part of it meaningless). If an appointment pending conversion to the competitive service is a "trial period," then the statute should simply state that appeal rights attach if an individual "is not serving under an initial appointment pending conversion to the competitive service." The complete language -- "not serving *a probationary or trial period* under an initial appointment pending conversion to the competitive service" -- strongly suggests that whether an individual had the type of appointment covered by subsection (C)(i) and whether he completed the requisite probationary or trial period under such an appointment are separate inquiries.

¶19 Indeed, treating an appointment pending conversion to the competitive service as a "trial period" would make all of subsection (C)(i) meaningless, since upon conversion the individual's rights would be governed by the competitive-service appeal rights provision, 5 U.S.C. § 7511(a)(1)(A). There could never be a scenario under which an individual would have appeal rights under subsection (C)(i) because any individual with the type of appointment described therein -- excepted, pending conversion to the competitive service -- would *always* be serving a trial period. The statute, which on its face sets out "alternative" ways for a non-preference eligible in the excepted service to attain tenure and appeal rights, *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1148, 1151 (Fed. Cir. 1999), should not be interpreted as foreclosing satisfaction of the first alternative in every conceivable situation. We therefore hold that an excepted appointment pending conversion to the competitive service should not be viewed as a probationary or trial period per se; instead, whether an individual holding such an appointment is serving a probationary or trial period must be determined under some authority outside of 5 U.S.C. § 7511(a)(1)(C)(i) that establishes the probationary or trial period.[9]

¶20 Again, the agency does not cite any authority for its assertion that the appellant in the present case was required to serve a two-year probationary period. However, our research indicates that the Department of Defense (DOD) issued DOD-1400.25-M on April 28, 2006. Section SC1950 pertains to DOD's

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[9] Our analysis is consistent with *Nelson v. Department of Health & Human Services*, 119 M.S.P.R. 276, ¶¶ 7-12 (2013), where we held that an individual who held a Schedule A appointment under the Indian Preference Act and implementing regulations, *see* 25 U.S.C. §§ 450i(m) & 472; 5 C.F.R. § 213.3101, could not be deemed to have been serving a probationary or trial period merely because her appointment was in the excepted service pending conversion to the competitive service. Instead, in determining whether that individual was an "employee" with appeal rights under 5 U.S.C. § 7511(a)(1)(C)(1), we looked to the agency's rule, which established a two-year probationary period for that type of appointment. 119 M.S.P.R. 276, ¶ 13.

staffing and employment policies.[10] *See* DOD-1400.25-M, www.lejeune.usmc.mil/hroeast/1950_StaffingAndEmployment.pdf. SC1950.2 provides that the policy applies to "the Military Departments," among other agencies. *Id.* at 2. SC1950.5.2.1.1.2. provides as follows:

> Employees appointed under excepted service appointment types in Table SC1950-1 shall serve a probationary period commensurate with the period of time expected for conversion to the competitive service. Prior to conversion to competitive status, employees must meet the applicable probationary period requirements specified for the type of appointment.

Id. at 3. This subsection includes Table SC1950-1, Probationary Period Requirements for Excepted Service Positions, which provides that an FCIP appointment is subject to 2-year probationary period. *Id.*

¶21 Based on DOD-1400.25-M, SC1950.5.2.1.1.2, Table SC1950-1, which appears to be an agency-specific rule regarding the length of FCIP probationary periods, we question whether the SF-50 documenting the appellant's appointment is correct in stating that the appellant's appointment was subject to a 1-year probationary period, and therefore whether the agency terminated the appellant during her probationary period. *See Grigsby v. Department of Commerce*, 729 F.2d 772 (Fed. Cir. 1984) (an SF-50 containing incorrect information will not control an individual's legal status). However, we have no way of knowing whether DOD issued a more recent staffing and employment policy after April 28, 2006, whether the agency supplemented this policy, or whether the agency is exempt from the requirements under SC1950. As the record is not sufficiently developed for us to decide the jurisdictional issue, we FORWARD the file to the Atlanta Regional Office for docketing of a chapter 75 appeal and adjudication of the jurisdictional issue in accordance with this decision.

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[10] We take judicial notice of the April 28, 2006 version of DOD-1400.25-M, which is readily available to the public. *See* 5 C.F.R. § 1201.64.

ORDER REGARDING THE CHAPTER 75 APPEAL

¶22 After docketing, the administrative judge shall afford both parties an opportunity to submit evidence and argument regarding the jurisdictional issue. The administrative judge shall order the agency to identify the law, rule, or regulation upon which it relies in arguing that the appellant's FCIP appointment was subject to a two-year probationary period. Further, the administrative judge shall order the agency to specifically address whether the April 28, 2006 version of DOD-1400.25-M is binding upon the agency regarding the length of FCIP probationary periods; if the agency responds in the negative, then it must explain why by way of an affidavit or sworn declaration. Additionally, the administrative judge shall order the agency to identify any government-wide and agency-specific rules or policies that potentially apply regarding the length of FCIP probationary periods, the date the rule(s) or policies went into effect, and explain why the rules or policies do or do not apply by way of an affidavit or sworn declaration, in addition to submitting a copy of said rules or policies. As the appellant made a nonfrivolous allegation of a jurisdiction, she is entitled to a jurisdictional hearing if she wants one. *See Ferdon*, 60 M.S.P.R. at 329.

¶23 If the administrative judge finds that the appellant fails to prove that the appellant is an "employee" under 5 U.S.C. § 7511(a)(1)(C)(i) with Board appeal rights, then he shall dismiss the chapter 75 appeal for lack of jurisdiction. Alternatively, if the administrative judge finds that the appellant proves jurisdiction over her chapter 75 appeal, the administrative judge must reverse the agency action, finding that the undisputed record demonstrates that the appellant was not afforded advance notice of the removal action and an opportunity to respond. The administrative judge shall issue a new initial decision that identifies all material issues of fact and law, summarizes the evidence, resolves any credibility issues, and includes the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

ORDER REGARDING THE IRA APPEAL

This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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 want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit 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. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.