UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KENNETH D. HUFFMAN, Appellant,	DOCKET NUMBER DC-1221-99-0178-W-1
v.	
OFFICE OF PERSONNEL MANAGEMENT, Agency.	DATE: December 14, 1999

James M. Eisenmann, Washington, D.C., for the appellant.

Timothy C. Watkins, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a 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 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).

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. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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 other related material at our web site, http:\\www.mspb.gov.

FOR THE BOARD: ______________________________
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

Kenneth D. Huffman v. Office of Personnel Management,
Docket No. DC-1221-99-0178-W-1

I agree with the majority that the petition for review should be denied for failure to meet the criteria for review. I write separately to express my view that the Federal Circuit precedent relied on in the initial decision, which I am required to follow, does not faithfully carry out Congressional intent, in that it erroneously requires a putative whistleblower who suspects his supervisor of wrongdoing to take his concerns outside the chain of command in order to be protected against retaliation. *See Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998); *Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995). As explained below, the applicable statute was intended to protect an employee who goes outside his chain of command, and an employee who confronts his supervisor directly; Congress did not require that an employee go over his supervisor's head or outside his organization to gain protection from retaliation. However, this case can also be disposed of without relying on troublesome Federal Circuit precedent, because, as also explained below, the appellant did not disclose any of the situations described in the whistleblowing statute.

Background

The appellant was the Assistant Inspector General for Evaluation and Inspections in the agency's Office of the Inspector General. Patrick McFarland was the agency's Inspector General (IG) and the appellant's second-level supervisor. From 1995 through mid-1998 the appellant and McFarland exchanged memoranda on a wide variety of topics, including: (1) The propriety of hiring auditors as program analysts under direct hire authority, without competition, and later reclassifying their jobs as auditor positions; (2) whether the auditors deliberately

omitted work experience in their applications; (3) alleged verbal abuse of subordinates by a manager in the IG office; (4) another manager's alleged habit of peering into nearby apartments from his office; (5) the wisdom of continuing a contract with a consultant for a study of the management of the IG office; and (6) the possibility of converting some GM-15 positions in the IG office to the Senior Executive Service (SES). *See generally* Initial Appeal File (IAF), Tab 6 (memoranda of June 22, 1995, June 23, 1995, July 24, 1996, July 22, 1997, May 21, 1998, May 22, 1998, May 29, 1998, June 18, 1998). The appellant later filed a complaint with the Office of Special Counsel (OSC) claiming that McFarland reassigned him to another position, and rated his performance as only fully successful, in retaliation for alleged whistleblowing disclosures he made in the memoranda. *See* IAF, Tab 6 (July 3, 1998 complaint and attachment). OSC terminated its investigation, and the appellant timely filed this appeal. *Id.* (October 16, 1998 close-out letter).

The administrative judge (AJ) dismissed the appeal for lack of jurisdiction, without a hearing. He found that the appellant had been subjected to personnel actions which were not directly appealable to the Board, but which could serve as the basis for an individual right of action appeal. The AJ further found that the appellant had exhausted his remedy before OSC. The AJ concluded, however, citing *Willis* and *Horton*, that the appellant's memoranda to McFarland were not protected whistleblowing because the memoranda were directed to the alleged wrongdoer himself, McFarland. The AJ also briefly noted, evidently in the alternative, that the memoranda did not describe any of the conditions specified at 5 U.S.C. § 2302(b)(8), which prohibits retaliation for any disclosure of a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific public danger. IAF, Tab 11.

Discussion

I. While bound by the Federal Circuit precedent cited in the initial decision, which holds that the appellant's disclosures were not protected whistleblowing because he disclosed alleged wrongdoing to the wrongdoer himself, I respectfully disagree with it.

The AJ's primary holding was that the appellant's disclosures were not protected because they were made to McFarland, the alleged wrongdoer. Specifically, the AJ held that --

> [C]riticism directed to the wrongdoers themselves is not normally viewable as whistleblowing. *See* [*Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998),] (citing *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995)). The appellant's reports to McFarland, his supervisor, are not disclosures of the type the [Whistleblower Protection Act] was designed to encourage and protect. *See id.* ... The appellant took no action to bring an issue to the attention of authorities in a position to correct fraudulent or illegal activity. *See Willis*, 141 F.3d at 1143. Further, there is no evidence that the appellant made disclosures that would lead McFarland to rationally believe that he might be subjected to discipline. *See id.*

IAF, Tab 11 at 5-6.

A. The *Willis* and *Horton* decisions are not distinguishable from the present case on the ground that here the appellant made disclosures to the IG.

The appellant argues in his petition for review that *Willis* and *Horton* are distinguishable on the ground that McFarland, unlike the managers to whom the disclosures were made in *Willis* and *Horton*, was in a position to correct the alleged wrongdoing because McFarland is the agency IG, and by law is charged with rooting out government fraud, corruption, and malfeasance. It is true that the essential function of an IG is to provide an "independent and objective" assessment of agency programs and operations to the agency head and Congress, so as to increase government efficiency and eliminate fraud and abuse. *See*

5 U.S.C. App. 3, § 2. However, the appellant's disclosures pertained to the management of the IG office itself. Accepting the rationale of *Willis* and *Horton*, as the AJ did, the IG was in no better position to remedy wrongdoing in the IG office than any other manager would be in with regard to his or her own office. If a disclosure to the alleged wrongdoer is not protected whistleblowing (a notion with which I disagree, as detailed below), then a disclosure to the IG accusing the IG of wrongdoing also is not whistleblowing. I would deny the petition for review, because *Willis* and *Horton* cannot be distinguished on the ground that here the disclosures were made to the IG.

B. The *Willis* and *Horton* decisions are not consistent with the plain text of 5 U.S.C. § 2302(b)(8) and the legislative history of the amendments to that provision; Congress did not intend that a would-be whistleblower who suspects his supervisor of wrongdoing must take his concerns outside his chain of command in order to gain protection from retaliation.

Apart from whether *Willis* and *Horton* can be distinguished, the larger question is whether the rationale of those decisions is supportable in light of the plain language of 5 U.S.C. § 2302(b)(8) and legislative intent in amending that provision. I have serious reservations about *Willis* and *Horton*, which I detail below. Of course, I would follow *Willis* and *Horton* in an appropriate case, because the Board is bound by those decisions. *See Swentek v. Office of Personnel Management*, 76 M.S.P.R. 605, 615 (1997) (the Board must follow precedent of the Federal Circuit).[1]

It is a prohibited personnel practice to take or fail to take a personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences [certain specified

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[1] As explained in the section that follows, the appellant did not disclose any of the matters described at 5 U.S.C. § 2302(b)(8). Accordingly, this case can be disposed of without relying on *Willis* and *Horton*.

conditions]." 5 U.S.C. § 2302(b)(8)(A)(i). Contrary to *Willis* and *Horton*, the unambiguous language of the statute does not say that a disclosure is protected only if it is made to someone other than the alleged wrongdoer, nor does the statute say that a disclosure is protected only if the wrongdoer fears discipline might result from the disclosure. Simply put, *Willis* and *Horton* add requirements for whistleblower protection that Congress did not enact.

The amendments to section 2302(b)(8) and their legislative history make plain that there are no requirements for whistleblower status beyond those set out in the statute itself. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, made it a prohibited personnel practice to take or fail to take a personnel action because of "a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences [certain specified conditions]." 5 U.S.C. § 2302(b)(8)(A)(i) (1988) (emphasis supplied). The Whistleblower Protection Act (WPA) of 1989 amended this language, making it a prohibited personnel practice to take or fail to take a personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences [certain specified conditions]." 5 U.S.C. § 2302(b)(8)(A)(i) (1994) (emphasis supplied). The Senate Committee on Governmental Affairs, which considered the bill that became the WPA,[2] explained the change as follows:

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[2] The quoted legislative history relates to a version of the WPA that President Reagan "pocket-vetoed" after the 100th Congress adjourned. *See* Memorandum of Disapproval for the Whistleblower Protection Act of 1988, 1988 Pub. Papers, Vol. II, at 1391-92 (Oct. 26, 1988). In the 101st Congress, Senator Levin reintroduced the WPA as S. Res. 20. *See* 135 Cong. Rec. S278-79 (Jan. 25, 1989). S. Res. 20 passed in the Senate on March 16, 1989, and passed in the House on March 21, 1989. *See* 135 Cong. Rec. S2805 (Mar. 16, 1989); 135 Cong. Rec. H740 (Mar. 21, 1989). When President Bush signed the WPA into law on April 17, 1989, Congress did not release committee reports. 25 Weekly Comp. Pres. Doc. 516. Still, the Board may rely on legislative history from the 100th Congress as an aid in interpreting the WPA, where, as here, the materials relate to language of bills that did not change before passage in the 101st Congress. *See*

> The Committee intends that disclosures be encouraged. The [OSC], the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. [The Senate bill] emphasizes this point by changing the phrase "a disclosure" to "any disclosure" in the statutory definition. This is simply to stress that any disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential).

S. Rep. No. 100-413, 100th Cong., 2d Sess., at 13 (1988) (initial emphasis supplied). In essence, Congress criticized OSC, the Board, and the courts for limiting whistleblower protection, and insisted that a disclosure need not be made to a particular person to come within the coverage of section 2302(b)(8). Notwithstanding this clear statement of legislative intent, *Willis* and *Horton* make whistleblower protection depend upon the person to whom a disclosure is made.

Congress amended section 2302(b)(8) a second time in 1994, and in so doing chastised the Board for continuing to take a restrictive view of what constitutes a protected disclosure. The House report[3] stated:

> Perhaps the most troubling precedents involve the Board's inability to understand that "any" means "any." The WPA protects "any" disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

Smith v. Department of Agriculture, 64 M.S.P.R. 46, 55 n.3 (1994); *see also Amin v. Merit Systems Protection Board*, 951 F.2d 1247, 1251 (Fed. Cir. 1991) (relying on Sen. Report 100-413 as an aid in interpreting the WPA).

[3] The Senate bill was ultimately enacted.

H. Rep. 103-769, at 18 (Sept. 30, 1994) (emphasis supplied). While the statements of legislators in 1994 are not authoritative guidance on what Congress intended in 1989, the 1994 House report does read the clear language of the 1989 amendment to section 2302(b)(8) exactly as it is written, and in a way consistent with the express intention of the drafters indicated in the 1988 Senate report.[4]

I see little danger that agencies will be hobbled in their ability to manage their personnel if section 2302(b)(8) is interpreted as it is written, and as it is reinforced by the legislative history of the 1989 and 1994 amendments. The conclusion that an employee made a disclosure protected under the statute merely means that the employee has a chance to show that his whistleblowing was a contributing factor in the personnel action at issue. Upon such a showing, the agency may avoid corrective action if it establishes by clear and convincing evidence that it would have taken the same action in the absence of the employee's whistleblowing. *See* 5 U.S.C. § 1221(e); *McCabe v. Department of the Air Force*, 62 M.S.P.R. 641, 645 (1994), *aff'd*, 62 F.3d 1433 (Fed. Cir. 1995) (Table). Finding that an employee was a whistleblower does not, standing alone, entitle the employee to relief or require a finding that the agency committed illegal retaliation. It merely means that the whistleblower will have the opportunity to have the merits of his retaliation claim adjudicated.

Willis and *Horton* effectively require an employee who suspects his superiors of wrongdoing to go outside his chain of command in order to gain statutory protection from retaliation. Notwithstanding the lack of any Congressional

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[4] Both *Willis* and *Horton* were decided after the 1989 and 1994 amendments to section 2302(b)(8). *Willis* makes no mention of the amendments or their legislative history, and *Horton* states only that the 1989 amendment prohibits an inquiry into a whistleblower's motivation in making a disclosure. *Willis* and *Horton*, then, are unconvincing in their statutory interpretation, inasmuch as they make whistleblower status depend on the person to whom a disclosure is made while ignoring, or at least not acknowledging, the fact that Congress rejected this very notion in amending section 2302(b)(8).

mandate or intent that an employee confront his supervisor before contacting others, in many circumstances the likelihood of damage to the agency and the likelihood of retaliation against the whistleblower will actually be increased when a government employee goes outside of his chain of command with allegations of wrongdoing within his organization. *See, e.g., Bartlett v. Fisher*, 972 F.2d 911, 917 (8th Cir. 1992) (in a state trooper's suit alleging retaliation for disclosing to the governor that a new state police program was actually an improper speeding ticket quota system, the court found that the trooper's supervisors were "angry that he had taken his criticism ... outside the ... normal chain of command," and that the communication to the governor "damaged the ... reputation" of the state police and "created political problems"). Indeed, for this very reason, the Court of Appeals for the Eighth Circuit rejected a retaliatory demotion claim brought by a city police officer who had disclosed to the county sheriff that the sheriff's department and the city police were endangering the public by not enforcing a standing policy regarding drunk drivers. The court ruled against the police officer, who had claimed First Amendment protection for his communication with the governor, precisely because he had gone "outside the chain of command" in raising his concerns, thereby damaging the relationship between the city police and the sheriff's department and "potentially impair[ing]" the city police chief's ability to maintain discipline. *Tyler v. City of Mountain Home*, 72 F.3d 568, 570 (8th Cir. 1995).[5]

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[5] *See also Martin v. Baugh*, 141 F.3d 1417, 1419 (11th Cir. 1998) (in a suit by a municipal employee alleging that retaliatory personnel actions were taken against him for disclosing to a city council member and the police alleged improprieties in the award of a city contract, the court found that the employee's immediate supervisor disciplined him for "insubordinat[ion]" in "going outside the chain of command"); *Maynard v. City of San Jose*, 37 F.3d 1396, 1400 (9th Cir. 1994) (in a suit by a municipal employee alleging that retaliatory personnel actions were taken against him for disclosing alleged violation of personnel rules to the head of his department and to a police officer, the court found that the employee was reprimanded for "disclosing the irregularities in the hiring process outside the chain of command" instead of to his immediate supervisor).

There is no reason to believe that Congress, in enacting and twice amending 5 U.S.C. § 2302(b)(8), intended to impose the arguably undesirable policy that a federal employee who suspects his supervisor of wrongdoing must either remain silent, or go over his supervisor's head or outside of his organization. Except for matters specifically required by law or executive order to be kept confidential,[6] nothing in section 2302(b)(8) prevents an employee from making a disclosure of wrongdoing outside his chain of command, but nothing in the statute requires it either. There is no indication that Congress meant to protect a federal employee from retaliation for going outside his chain of command in reporting wrongdoing by his supervisor, but was content to let retaliation go unremedied if the very same disclosure was made to the supervisor alone.[7]

I recognize that there are significant differences between the First Amendment and 5 U.S.C. § 2302(b)(8). The First Amendment applies to statements of fact and statements of opinion, and with either kind of statement a public employee's right to speak is sometimes outweighed by the government's interest in maintaining efficiency and public confidence. *See generally Waters v. Churchill*, 511 U.S. 661 (1994). Section 2302(b)(8) applies to disclosures that a federal employee reasonably believes have a basis in fact, and once it is triggered the employee is protected from retaliation; an agency avoids corrective action for retaliation not by showing that its interests outweigh those of the whistleblower, but instead by showing that it would have taken the same action in the absence of the employee's whistleblowing. *See* 5 U.S.C. §§ 1221(e), 7701(c)(2)(B). I have cited *Bartlett*, *Tyler*, *Maynard*, and *Martin*, all of which involved First Amendment claims, simply to illustrate that in some circumstances the likelihood of damage to an organization and the likelihood of retaliation may actually increase when an employee goes outside his chain of command to disclose wrongdoing within his organization.

[6] The only instances in which a federal employee who publicly discloses one of the situations specified in section 2302(b)(8) is not entitled to whistleblower protection is if public revelation is "specifically prohibited by law" or relates to a matter "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A).

[7] State legislatures have taken varying approaches. For example:

In sum, unlike *Willis* and *Horton*, I would not make whistleblower status hinge on any assumptions about whether a government official is likely or unlikely to correct his own wrongdoing when it is pointed out to him, nor would I read into 5 U.S.C. § 2302(b)(8) any requirement that a would-be whistleblower

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- New York law protects state and local employees from retaliation for disclosing "improper governmental action" to "a governmental body," but such an employee must first make a "good faith effort" to provide the information to his supervisor and give him "a reasonable time to take appropriate action." *See* McKinney's Civil Service Law § 75-b(2). The employee gains whistleblower status and its attendant protection as soon as he raises the matter with his supervisor. *Id.*

- New Jersey law (which appears to cover private-sector employees) prohibits retaliation against an employee who discloses "to a supervisor" or to "a public body" the employer's violation of law. N.J. Stat. Ann. § 34:19-3. If the employee intends to make a disclosure to a public body, he must first bring the matter "to the attention of [his] supervisor" and give the supervisor a reasonable opportunity to correct the situation. N.J. Stat. Ann. § 34:19-4.

- District of Columbia law provides that a public employee who reports "waste, fraud, abuse of authority, [a] violation of law, or [a] threat to public safety" through "appropriate channels within the agency," to the City Council, to law enforcement officials, or to the public, shall be "free from" "fear of retaliation or reprisal." D.C. Code § 1-616.11.

- Texas prohibits retaliation against public employees who report wrongdoing by a state government "entity" or another employee to "an appropriate law enforcement authority." Vernon's Tex. Stat. Gov. Code § 554.002.

- Michigan law (which appears to cover private-sector employees) prohibits retaliation against an employee who discloses his employer's wrongdoing "to a public body." Mich. Con. Laws Ann. sec. 15.362, § 2.

In all of the above examples, the legislatures have explicitly provided in the statutes themselves the persons and/or entities to whom a disclosure of wrongdoing should be made in order for whistleblower protection to attach. The version of 5 U.S.C. § 2302(b)(8) enacted by Congress in 1978 did not specify the persons and/or entities to whom a disclosure should be made, but the 1989 and 1994 amendments and their legislative history make crystal clear that a federal employee is protected from retaliation for alleging to his supervisor that the supervisor is engaged in wrongdoing.

who suspects his supervisor of wrongdoing must go outside of his organization or over his supervisor's head in order to gain protection from retaliation. Instead, I would evaluate a disclosure according to the plain text of 5 U.S.C. § 2302(b)(8), as written and as reinforced by its legislative history, which does not exclude from whistleblower protection an employee who discloses wrongdoing to the wrongdoer himself.

II. The appellant did not disclose matters described at 5 U.S.C. § 2302(b)(8).

I would affirm the initial decision on the basis of the AJ's alternative holding that the appellant did not make a whistleblowing disclosure because he did not divulge any of the conditions described at 5 U.S.C. § 2302(b)(8). Even interpreting the appellant's allegations liberally, what the appellant claims in his pleadings was whistleblowing was merely part of a long-running, increasingly acrimonious exchange between himself and McFarland over various management matters. As explained below, the appellant was not imparting evidence of wrongdoing that he reasonably believed to be true so much as he was expressing his own opinions about how to run the IG office or reporting incomplete information and rumors.

With regard to the disclosure of supposed misuse of direct hiring authority (disclosure (1) above), the appellant stated in his memorandum to McFarland that he did not personally have "substantiated knowledge of wrongdoing" because he "did not have a clear understanding" of what had happened, and that he was not sure that the complaints of others went beyond "conjecture." *See* IAF, Tab 6 (May 22, 1998 memorandum); *Special Counsel v. Spears*, 75 M.S.P.R. 639, 656 (1997) (a disclosure is not protected whistleblowing if it is based on unreliable or scanty information, or if the person making the disclosure did not reasonably believe that his disclosure had a factual basis). With regard to the supposed deliberate omission of work experience by auditors on their SF-171s (disclosure (2) above), the appellant expressly stated that there should be an inquiry to determine "what actually occurred," that a problem "might exist," and that he was

hoping that the information he had turned out to be "false." IAF, Tab 6 (June 18, 1998 memorandum). Accordingly, here too, the appellant did not have a factual basis for his disclosure.

Whether McFarland dealt appropriately with a manager's alleged verbal abuse of a subordinate, or another manager's alleged habit of looking into nearby apartments from his office (disclosures (3) and (4) above), did not, as the appellant now says, involve "gross mismanagement" by McFarland. A disclosure questioning management decisions that are "merely debatable" or are just "simple negligence or wrongdoing," with no "element of blatancy," is not protected as a disclosure of "gross mismanagement." *See Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996); *see also Coons v. Department of the Navy*, 63 M.S.P.R. 485, 488 (1994) ("gross mismanagement" means a decision that creates a "substantial risk of significant adverse impact upon the agency's ability to accomplish its mission"). It is also worth noting that in both of these matters, the managers involved were dealt with and the problems were ultimately corrected; the appellant simply believed that action should have been taken sooner. *See* IAF, Tab 6 (June 18, 1998 memorandum).

With regard to the consulting contract that the appellant thought was not beneficial to the agency (disclosure (5) above), the gravamen of the appellant's disclosure was that he was insulted by the statements of one of the contractor's employees. The appellant also disagreed with the contractor's research methods and questioned the contractor's expertise. *See* IAF, Tab 6 (May 29, 1998 memorandum). This disclosure, which did not even mention the cost of the contract, was not protected because it did not describe a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994). Finally, although the appellant called the contemplated conversion of certain positions to the SES "prearranged," and

although he personally believed that some candidates were not sufficiently qualified (disclosure (6) above), the appellant did not allege in his disclosure that the agency actually violated any law or regulation governing SES positions. *See* IAF, Tab 6 (June 18, 1998 memorandum). The appellant's mere disagreement with McFarland's management decision, without more, does not amount to a disclosure protected under 5 U.S.C. § 2302(b)(8).

I concur in the result.

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Date

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Beth S. Slavet
Vice Chair