

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

88 M.S.P.R. 214

NEELAM SOOD,
Appellant,

DOCKET NUMBER
SF-1221-99-0497-W-2

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: April 12, 2001

David G. Spivak, Esquire, Ross, Rose & Hammill, LLP, Beverly Hills,
California, for the appellant.

Cathy Lewitt, Esquire, San Diego, California, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed her individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further adjudication, including a jurisdictional hearing.

BACKGROUND

¶2 The appellant, a GS-12 Supervisory Medical Technologist (day-shift supervisor) in the agency's Blood Bank and Hematology Departments, Veterans Administration Medical Center, La Jolla, California, timely refiled this IRA appeal. Initial Appeal File (IAF), Tab 2; Refiled Appeal File (RAF), Tab 1. She alleged that her immediate supervisor, Laboratory Manager Mary Gruber, retaliated against her for whistleblowing by taking various personnel actions. IAF, Tab 2, Ex. B, appellant's 1/14/99 Office of Special Counsel (OSC) complaint; Tab 13, Ex. H, appellant's 3/17/99 letter to OSC; RAF, Tab 1, Tab 8 at 21-27. She added that her second-line supervisor, Dr. Stephen Baird, retaliated against her for her whistleblowing by threatening to remove her. IAF, Tab 13, Ex. H, appellant's 3/17/99 letter to OSC; RAF, Tab 8 at 21-22. The appellant requested a hearing. IAF, Tab 4.

¶3 In her submissions below, addressing the Board's IRA jurisdiction over the appeal, the appellant asserted that she had engaged in whistleblowing in or about September and October 1996. IAF, Tab 2, Ex. B, appellant's 1/14/99 OSC complaint. The appellant asserted that she reported to another second-line supervisor, Dr. Paul Wolf, Baird, Gruber, and others that a Sysmex SE9000 hematology analyzer (Sysmex), had a design defect and was a substantial and specific danger to public health and safety, in violation of Occupational Safety & Health Administration (OSHA) regulations. IAF, Tab 2, Ex. B, appellant's 1/14/99 OSC complaint, Tab 13, appellant's jurisdictional brief at 3-4, 6; RAF, Tab 8 at 4. The appellant asserted that she reported to Wolf, Baird, and others that Gruber purchased the Sysmex without authorization from the agency's Contract Department and traded in a Coulter, another medical device, for the Sysmex in violation of agency regulations. IAF, Tab 2, Ex. B, appellant's 1/14/99 OSC complaint, Tab 13, appellant's jurisdictional brief at 7; RAF, Tab 8 at 4-6.

¶4 The administrative judge found that the appellant failed to make a nonfrivolous allegation that she engaged in whistleblowing because her negative reports about the Sysmex fell within her job duties, and that she could not have reasonably believed that the Sysmex was illegally purchased. Initial Decision (ID) at 3-7. Accordingly, without holding a jurisdictional hearing, the administrative judge dismissed the appeal for lack of jurisdiction. ID at 1, 7.

¶5 The appellant has timely filed a petition for review, reasserting her same claims and arguing that the administrative judge erred in dismissing her appeal. PFRF File (PFRF), Tab 3. The appellant has also submitted several documents with her petition for review, all of which are a part of the record below. *Id.*, Exs. 1-8. The agency has timely responded in opposition. *Id.*, Tab 4.¹ After the record closed on review, the appellant filed a reply to the agency's response. *Id.*, Tabs 2, 5. We do not consider the appellant's reply. The Board's regulations do not provide for a submission of pleadings beyond the response to the petition. 5 C.F.R. § 1201.114(i); *Krzewinski v. U.S. Postal Service*, 72 M.S.P.R. 353, 356 (1996). Further, as noted earlier, because we have decided to remand this appeal for a jurisdictional hearing, we need not and do not address whether the appellant's reply presents new and material evidence.

ANALYSIS

¶6 To establish Board jurisdiction over an IRA appeal, an appellant must show, by preponderant evidence, that: (1) He engaged in whistleblowing activity

¹ In its response, the agency renews its earlier "Motion To Exclude Counsel From Representing Appellant And For Monetary Sanctions." PFRF, Tab 4 at 3-7; RAF, Tab 4 at 21-24. As grounds for its motion, the agency asserts that the appellant's representative misrepresented facts to deceive the Board into granting the appellant a hearing. *See* 5 C.F.R. § 1201.31(d)(1); PFRF, Tab 4 at 3-7. We do not consider this motion, as the agency has not filed a petition for review nor a cross petition for review to challenge the initial decision in this regard. *See* 5 C.F.R. § 1201.114(a),(b); *Hernandez v. U.S. Postal Service*, 74 M.S.P.R. 412, 415 (1997).

by making a disclosure protected under 5 U.S.C. § 2302(b)(8); (2) the agency took or failed to take, or threatened to take or fail to take, a “personnel action” as defined in 5 U.S.C. § 2302(a)(2) after the effective date of the Whistleblower Protection Act (WPA); and (3) the appellant has exhausted his remedies before OSC. *See White v. Department of the Air Force*, 63 M.S.P.R. 90, 94 (1994); *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). In order to be entitled to a jurisdictional hearing, an appellant need not prove the facts alleged but must make a nonfrivolous allegation of facts that, if proven, would establish that the matter is within the Board’s jurisdiction. *Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 13 (1998). As discussed below, we find that the record demonstrates that the appellant raised nonfrivolous allegations that she has met all three jurisdictional requirements and is entitled to a jurisdictional hearing. The appellant made a nonfrivolous allegation that she made disclosures protected under 5 U.S.C. § 2302(b)(8).

1. The appellant’s report about problems with the Sysmex.

¶7 Disclosures protected by section 2302(b)(8) include any disclosure that the employee reasonably believes evidences a violation of any 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. *Christensen v. Department of Justice*, 82 M.S.P.R. 430, ¶ 10 (1999). The Board will not require, as a basis for its jurisdiction, that an appellant in an IRA appeal correctly label a category of wrongdoing under section 2302(b)(8) that might be implicated by a particular set of circumstances. *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 236 (1998), *overruled in part on other grounds*, *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶¶ 10-11 (2000).

¶8 Applying this law here, we find that the appellant asserted before OSC and in this appeal that she reported to, among others, second-line supervisors Wolf

and Baird, that the Sysmex had a design defect and was a substantial and specific danger to public health and safety, in violation of OSHA regulations. IAF, Tab 2, Ex. B, appellant's 1/14/99 OSC complaint, Tab 13, appellant's jurisdictional brief at 3-4, 6; RAF, Tab 8 at 4. We find that this assertion constitutes a nonfrivolous allegation of a disclosure of a violation of a regulation within the meaning of section 2302(b)(8).

¶9 The appellant reasserts that her reports about the Sysmex amounted to whistleblowing because her everyday job duties as a day-shift supervisor, did not include reporting operational problems and design defects with the Sysmex. PFRF, Tab 3 at 2, 6; RAF, Tab 8 at 19. The administrative judge found otherwise, stating “[i]t is glaringly apparent in this case that [the] appellant was merely carrying out her day-to-day responsibilities when she made various reports to agency supervisors ... concerning the malfunctions of the Sysmex. As a supervisor in charge of the Hematology and Blood Bank Departments, it was [the] appellant's fundamental responsibility to report problems, however serious, to agency officials.” ID at 3. In reaching this finding, the administrative judge appears to have relied only on the appellant's performance appraisal without making specific references to the language in the appraisal that supports his finding. ID at 2; IAF, Tab 8, Subtab 4d.

¶10 Nonetheless, this omission is of no consequence here. The administrative judge erred in concluding that the appellant's disclosure is not protected if not made outside of her required job duties. Specifically, the administrative judge relied upon *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), to find that the appellant's negative reports to agency officials about the Sysmex were not protected disclosures under the WPA inasmuch as such reporting was the appellant's “fundamental responsibility.” ID at 3. To the contrary, *Willis* does not stand for the broad proposition set forth in the initial decision. We recently clarified this misinterpretation of *Willis* in *Johnson v. Department of Health and Human Services*, 87 M.S.P.R. 204, ¶¶ 12-15 (2000), and *Czarkowski*

v. Department of the Navy, 87 M.S.P.R. 107, ¶¶ 13-16 (2000), noting there that the Board has long held that the definition of a "protected disclosure" includes disclosures made by employees as part of the performance of their duties. Further, we emphasized that *Willis* did not overrule or even question this Board precedent and that even our reviewing court has recognized that protected disclosures may be made as part of an employee's duties. *Johnson*, 87 M.S.P.R. 204, ¶ 14; *Czarkowski*, 87 M.S.P.R. 107, ¶ 15. Thus, as set forth above, we hold that the appellant has made a nonfrivolous allegation that she engaged in whistleblowing by making a protected disclosure under 5 U.S.C. § 2302(b)(8), when she reported problems with the Sysmex to second-line supervisors Wolf and Baird.²

2. *The appellant's report about Gruber's alleged illegal purchase of the Sysmex.*

¶11 As noted earlier, disclosures protected by section 2302(b)(8) include any disclosure that the employee *reasonably believes* evidences a violation of any 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. *Christensen*, 82 M.S.P.R. 430, ¶ 10. The test for whether an appellant reasonably believes that he has made a protected disclosure, is whether a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the [appellant] reasonably could conclude that the actions of the government evidence," inter alia, a violation of law, rule, or regulation, and a gross waste of funds. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

² While criticism directed to the wrongdoers themselves is not normally reviewable as whistleblowing (*Willis*, 141 F.3d *supra*, and *Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995)), the appellant here also made disclosures to second-level supervisor Wolf. See, *Murphy v. Department of the Treasury*, 86 M.S.P.R. 137 ¶ 9 (2000).

¶12 The appellant reasserts that she set forth a nonfrivolous allegation as to her reasonable belief that Gruber illegally purchased the Sysmex in violation of agency regulations, based on her knowledge that: (1) Only Contract Department employees had authority to purchase expensive equipment such as a Sysmex; and (2) Contract Department Supervisor Lori Duran told Gruber during an October or November 1996 meeting, with the appellant and other Contract Department employees present, that Duran did not know about the contract for the Sysmex and disapproved of its apparent improper purchase. PFRF, Tab 3 at 6-7; RAF, Tab 8 at 9-11. The appellant asserted that she inferred that Gruber illegally purchased the Sysmex based on Gruber's mere shrug of her shoulders in response to Duran's statement and expression of disapproval about the apparent improper purchase of the Sysmex. RAF, Tab 8 at 9-10. Further, the appellant asserted that, while agency regulations required that trade-offs for equipment purchases be written and approved by the Contract Department, Gruber and Baird later admitted that the Coulter had been traded-off by a person, whom they did not identify, to satisfy, in part, the purchase of the Sysmex. IAF, Tab 2, Ex. B, appellant's 1/14/99 OSC complaint; RAF, Tab 8 at 11. The appellant asserted that Duran told her that there was no documentation for the trade-off of the Coulter device for the Sysmex. RAF, Tab 8 at 11. The appellant asserted that she believed that "Gruber and Baird received a kick back from the Sysmex company for their purchase of the device and trade of the old Coulter machine." *Id.* at 12.

¶13 We agree with the appellant's contention. Although she did not assert so with the detail that she asserted before the Board, the appellant sufficiently asserted before OSC a basis for her belief that Gruber illegally purchased the Sysmex. In her March 17, 1999 response to OSC's questions, the appellant referred to, inter alia, the October or November 1996 meeting, wherein, according to her, Duran became upset with Gruber about the improper Sysmex purchase

contract. IAF, Tab 13, Ex. H at 2. The appellant also submitted a copy of the agency's acquisition regulations on which she relies. *Id.*, Ex. I.

¶14 Based on this evidence of record, we find that the appellant has made a nonfrivolous allegation that, in reporting to Wolf and Baird that Gruber illegally purchased the Sysmex, she disclosed information that she reasonably believed evidenced a violation of law, rule, or regulation, and a gross waste of funds. *See Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996) (a gross waste of funds is a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government); *see also Smith v. Department of the Army*, 80 M.S.P.R. 311, ¶ 10 (1998) (the employee made a nonfrivolous allegation of a gross waste of funds involving the agency's purchase of a \$15,000 fuel management system). Whether the appellant actually reasonably believed that her disclosure constituted protected whistleblowing is a matter to be determined after she has been afforded a jurisdictional hearing.³ *Christensen*, 82 M.S.P.R. 430, ¶ 11.

The appellant made nonfrivolous allegations that she was the subject of personnel actions under the WPA.

³ We note that the administrative judge reached premature or irrelevant findings that the Sysmex was apparently leased rather than purchased, that the Sysmex was acquired before the appellant's employment with the agency, and that the appellant presented "no credible evidence to support [her] conclusion" that the Sysmex was illegally purchased. ID at 6. Additionally, he erred in opining that "there is ample evidence indicating that [the] appellant was disposed to reach such a conclusion ... [due to alleged] mistreat[ment] by the agency for reasons having nothing to do with any alleged whistleblowing." ID at 6. Such a characterization of the appellant was premature, unnecessary, and improper for the purpose of determining whether her disclosures were protected. The Board has held that where the employee has met the reasonable belief test, the motivation for his disclosures is irrelevant. *See, e.g., Johnson v. Department of Defense*, MSPB Docket No. DE-1221-00-0105-W-1, slip op. ¶ 10 (Dec. 28, 2000); *Carter v. Department of the Army*, 62 M.S.P.R. 393, 402 (1994), *aff'd*, 45 F.3d 444 (Fed. Cir. 1995) (Table). Thus, we reject the administrative judge's characterization of the appellant and her allegations. *See Johnson*, slip op. ¶ 10.

- ¶15 Personnel actions covered in an IRA appeal include the following:
 (iii) an action under chapter 75 of this title or other disciplinary or corrective action;

 (viii) a performance evaluation under chapter 43 of this title;

 (xi) any other significant change in duties, responsibilities, or working conditions

5 U.S.C. § 2302(a)(2)(A).

- ¶16 The appellant asserted before OSC and in this appeal that she was subject to such actions when Gruber: Changed her tour of duty three times over a year and a half period; denied her request for compensatory time and a compressed work schedule in February 1997; initially issued her only a “fully successful” performance rating in April 1997; falsely accused her of being late for work and required her, in October 1997, to punch a time clock upon her arrival at work; and denied her request to attend essential conferences held by the American Association of Blood Bankers and the Food and Drug Administration. IAF, Tab 2, Ex. B, appellant’s 1/14/99 OSC complaint; Tab 13, Ex. H, appellant’s 3/17/99 letter to OSC; RAF, Tab 1, Tab 8 at 21-27. The appellant also asserted that Baird threatened to remove her. IAF, Tab 13, Ex. H, appellant’s 3/17/99 letter to OSC; RAF, Tab 8 at 21-22. All of these actions which the appellant cites, constitute covered personnel actions in an IRA appeal. Thus, on remand, the administrative judge will accept additional evidence and argument regarding these alleged covered personnel actions.

The appellant has made a nonfrivolous allegation the she exhausted her remedy before OSC.

- ¶17 As explained above, the third jurisdictional prerequisite to an IRA appeal is exhaustion of the remedy with OSC by showing that the appellant informed OSC of the particular disclosures and personnel actions raised in his IRA appeal with

enough specificity to allow OSC to investigate. *See Coons v. Department of the Treasury*, 85 M.S.P.R. 631, ¶ 17 (2000). The appellant has submitted her January 14, 1999 initial complaint to OSC and her March 17, 1999 response to questions posed by OSC -- all of which contain descriptions of the disclosures and personnel actions raised in this appeal. IAF, Tab 2, Ex. B, Tab 13, Ex. H. Additionally, she has submitted OSC's April 26, 1999 notice of her right to seek corrective action from the Board and reiterating that OSC had closed its inquiry into her complaint. IAF, Tab 13, Ex. G. Thus, we find that the appellant has made a nonfrivolous allegation that she exhausted her remedy with OSC in regard to the matters addressed in those documents.

ORDER

¶18 Accordingly, we REMAND this appeal to the regional office for a jurisdictional hearing. If the administrative judge finds that the Board has jurisdiction over this appeal, he shall adjudicate the appeal on its merits, after affording the appellant a full hearing as she requested.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.