UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

94 MSPR 4

LORI A. SUTTON,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBERS
DE-1221-00-0213-W-1
DE-1221-00-0276-W-1

DATE: August 1, 2003

Lori A. Sutton, Reynoldsburg, Ohio, pro se.

Paul V. Ross, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision[1] that dismissed for lack of jurisdiction her individual-right-of-action (IRA) appeal from a letter of reprimand, a proposed removal, and an effected removal, and affirmed on the merits her non-IRA appeal from the removal. We JOIN these appeals for adjudication because they involve related issues of fact and law, and doing so will expedite their processing without adversely affecting the parties' interests. *See* 5 C.F.R. § 1201.36(a)(2). For the reasons discussed below, we find that the

[1] The administrative judge "informally joined" these appeals, and issued a joint initial decision. Initial Decision & at 4.

petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however; REVERSE the jurisdictional dismissal of the IRA appeal and DENY corrective action on the merits; and AFFIRM the removal action on the merits.

BACKGROUND

¶2 On September 15, 1998, the agency issued the appellant, a GS-11 Administrative Services Specialist, a letter of reprimand for her delay in carrying out supervisory orders. Initial Appeal File in MSPB Docket No. DE-1221-00-0276-W-1 (IAF-276), Tab 11, Subtab 4j. On August 12, 1999, the agency issued the appellant a notice proposing to remove her for misuse of government property, unprofessional behavior, and making misrepresentations during an official investigation. Initial Appeal File in MSPB Docket No. DE-1221-00-0213-W-1 (IAF-213), Tab 8, Subtab 4h. On January 31, 2000, the agency issued its decision to remove her, *id.*, Subtab 4b, and removed her effective February 7, 2000, *id.*, Subtab 4a.

¶3 The appellant timely filed an appeal from her removal, IAF-213, Tab 1, and, after exhausting the Office of Special Counsel (OSC) process regarding the letter of reprimand, the proposed removal, and the effected removal, timely initiated an IRA appeal, IAF-276, Tab 1, and Tab 11, Subtab 4a.

¶4 The administrative judge (AJ) "informally joined" the two appeals and held a joint telephonic prehearing conference; the appellant then withdrew her hearing request. IAF-276, Tabs 28, 29; IAF-213, Tabs 41, 42. The AJ thereafter issued a joint initial decision based on the written record. Initial Decision (ID), IAF-276, Tab 33; IAF-213, Tab 46. The AJ found that the Board lacked IRA jurisdiction because the appellant failed to prove by preponderant evidence that she engaged in protected whistleblowing activity. ID at 6-7. Regarding the non-IRA removal appeal, the AJ found that the agency proved all three charges, the existence of a

nexus between the sustained charges and the efficiency of the service, and the reasonableness of the penalty. ID at 5-6, 8-10. The AJ further found that, since the appellant failed to show that she engaged in whistleblowing activity, she failed to establish that she was removed in reprisal for her whistleblower activity. ID at 6-7. Finally, the AJ noted "the appellant expressly stated that she was not claiming that the agency had removed her based on discrimination or in reprisal for discrimination complaints that she had previously filed." ID at 7 n.4.

¶5 The appellant has timely filed a petition for review. Petition for Review (PR), Petition for Review File (PRF), Tab 1.[2] The agency has timely responded in opposition to her petition. PRF, Tab 3.

ANALYSIS

The Board has IRA jurisdiction over the actions appealed.

¶6 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that (1) she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action under 5 U.S.C. § 2302(a)(2)(A). *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 11 (2002). For the reasons discussed below, we conclude that the Board has IRA jurisdiction over the actions appealed.

---

[2] After the record on review closed, the appellant filed supplemental filings. PRF, Tabs 4, 5. Because she has not shown that these filings were based on information that was not readily available before the record on review closed, we have not considered them. *See* 5 C.F.R. § 1201.114(i).

a. The appellant has exhausted her administrative remedies before OSC regarding the actions appealed--the letter of reprimand,[3] the proposed removal, and the effected removal.

¶7 The record supports the AJ's finding that the appellant exhausted her administrative remedies before OSC regarding the letter of reprimand, the proposed removal, and the effected removal, and neither party has disputed on review the AJ's finding. IAF-213, Tab 1, Appeal Form Items 12, 41.a; IAF-276, Tab 11, Subtab 4a at 3-4; ID at 1. We therefore find that the appellant has exhausted her administrative remedies before OSC regarding the actions appealed.

b. The appellant has raised a nonfrivolous allegation that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8).

¶8 The AJ dismissed the IRA appeal for lack of jurisdiction, finding that the appellant failed to prove by preponderant evidence[4] that she made a protected disclosure under section 2302(b)(8). ID at 6-7. For the reasons discussed below, we find that the appellant has raised a nonfrivolous allegation that she engaged in whistleblowing activity.

¶9 The AJ found, and the parties do not dispute on review, that the appellant alleged two whistleblowing disclosures. ID at 6-7. The appellant alleged that

---

[3] The record shows that the appellant filed a grievance regarding the letter of reprimand. IAF-276, Tab 11, Subtabs 4c-4h. The prior filing of the grievance does not deprive the Board of jurisdiction under 5 U.S.C. § 7121(g), however, because the undisputed record shows that the appellant is not covered by a collective bargaining agreement. *Id.*, Subtab 2; *see Stauner v. Department of the Interior*, 86 M.S.P.R. 179, ¶ 6 n.6 (2000).

[4] After the AJ issued his initial decision, the Board issued *Rusin*, 92 M.S.P.R. 298, ¶ 11, in which it adopted the jurisdictional standard set forth in *Yunus*, 242 F.3d at 1371. Under *Yunus*, as discussed in the text above, an appellant may establish IRA jurisdiction without proving all of the jurisdictional elements by preponderant evidence.

U.S. Attorney Jack Williams, her second-level supervisor, "tried to convince me to drop my EEO [equal employment opportunity] complaints," IAF-213, Tab 1 at 5; *see* IAF-276, Tab 25 at 2; ID at 6, and that she disclosed Williams' actions to an EEO investigator, IAF-276, Tab 24, Appellant's Witness List at 2. The AJ found that this alleged disclosure was not protected under section 2302(b)(8) because it constituted an allegation of retaliation for EEO activity, covered by section 2302(b)(9). ID at 6-7. We need not decide whether such a disclosure would be covered by section 2302(b)(8),[5] however, because there is no record evidence that the appellant exhausted the OSC process regarding this alleged disclosure. IAF-213, Tab 1 at 29-31 (attachment to the appellant's OSC complaint); IAF-276, Tab 1 (OSC's termination letters), and Tab 11, Subtab 4a (same). The Board therefore lacks jurisdiction to consider this alleged protected disclosure as it relates to the appellant's letter of reprimand and proposed removal. *See* 5 U.S.C. § 1214(a)(3); *Mintzmyer v. Department of the Interior*, 84 F.3d 419, 422 (Fed. Cir. 1996) (except when there is an independent right to appeal an adverse personnel action directly to the Board, an employee or former employee must first seek corrective action from OSC); *Campo v. Department of the Army*, 93 M.S.P.R. 1, ¶ 9 (2002) (in an IRA appeal, the Board's jurisdiction is limited to the issues the appellant raised before OSC). With regard to this disclosure as it relates to the appellant's removal, we find that the appellant provided insufficient factual details to support her conclusory assertion that Williams attempted to intimidate her. She merely stated that Williams called her

---

[5] That an individual has engaged in an activity protected under 5 U.S.C. § 2302(b)(9) does not in and of itself disqualify the individual from seeking corrective action under 5 U.S.C. § 2302(b)(8), if he made disclosures based on the same operative facts outside of his (b)(9) activity. *See Luecht v. Department of the Navy*, 87 M.S.P.R. 297, ¶ 10 (2000); *cf. Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 233-35 (1998) (the appellant's disclosures alleging that the agency improperly handled his first grievance and discriminated against a particular class of individuals constituted disclosures of an abuse of authority under 5 U.S.C. § 2302(b)(8)), *overruled in part on other grounds, Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 13 (2000).

into his office stating he wanted to "resolve the complaint informally" and then "tried to 'convince'" her to drop her complaints, noting that an EEO investigation would be disruptive to his office. IAF-276, Tab 24 at 1-2; IAF-213, Tabs 36-38. PR at 6. The appellant does not explain, and it is not apparent, how her disclosure of such alleged statements and actions by Williams, even if true, amounted to a protected disclosure under 5 U.S.C. § 2302(b)(8). *See, e.g., Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, ¶ 11 (1999) (vague and nonspecific allegations do not constitute protected disclosures under section 2302(b)(8)).

¶10 The appellant also alleged that she disclosed "forgery/misuse of [her] initials" on an employee's timesheet. The most detailed description of this alleged disclosure is that contained in the appellant's June 12, 1997 memorandum, addressed to Williams. IAF-213, Tab 37, Exhibit E at 5. In this memorandum, the appellant states:

> I would like to request a full investigation into the forgery/misuse of my initials on Mr. Randall Harrison's timesheet for pay-period 10 (May 11-May 24, 1997) and the timesheet for pay-period 24 (dated 01/18/96). … RE: Timesheet for PP.24, … Virginia Ruedebusch [the appellant's former immediate supervisor] verbally approved of the Administrative Leave that was taken in PP. 24. As I understand it, you [Jack Williams] also gave your approval verbally to administer Administrative Leave in PP. 24 to everyone who had attended this [unspecified] event. Virginia Ruedebusch never reported back to me on any action she took per this incident or any discussion she may have had with any individuals in our office. … Also, regarding the timesheet for pay-period 10, I spoke to Gail Kirmer the week of June 2, 1997 … to discuss the reason why I would not initial this timesheet …. I had questions regarding both timesheets and was not going to initial either timesheet until I received the appropriate approvals. Such as, for PP. 24, I wanted documentation to show that the 6 hours of Administrative Leave had been approved by a supervisor. RE: PP. 10, I needed and was requesting from Virginia Ruedebusch the form that all students fill out. This form was not attached to Mr. Harrison's timesheet and still to this day is not attached to his timesheet for PP. 10. I checked all

> previous timesheets for Mr. Harrison and this is the only pay-period (Pay-period 10) where this form is not attached.

¶11 This pro se appellant thus raised a nonfrivolous allegation that, as a timekeeper responsible for certifying Harrison's timesheets, she reasonably believed government money was improperly dispensed on two occasions to Harrison when someone bypassed her authority as timekeeper by forging her initials on Harrison's timesheets to improperly certify them for payment. We find that the appellant thus raised a nonfrivolous allegation that she disclosed information which she reasonably believed evidenced either an abuse of authority or a violation of law, rule, or regulations pertaining to the disbursement of federal funds to pay employees for work performed.[6] *See generally Office of Personnel Management v. Richmond*, 496 U.S. 414, 430, 431 (1990) ("[i]t is a federal crime … for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress," and "[a] law that identifies the source of funds is not to be confused with the conditions prescribed for their payment"); *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001) (an abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons);

---

[6] In *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1353 (Fed. Cir. 2001), the court held that disclosures made as part of an employee's normal work assignment, through normal channels, are not protected disclosures. Here, however, although the appellant became aware of the alleged improprieties while performing timekeeper duties, requesting investigations of timesheet improprieties is not among the appellant's normal duties as an Administrative Services Specialist. IAF-0215, Tab 8, Subtab 4j (position description); *see Comito v. Department of the Army*, 90 M.S.P.R. 58, ¶¶ 10-11 (2001) (the Board, applying *Huffman*, found that the appellant, a Supervisory Financial Administrator, made protected disclosures when she disclosed to her supervisor cost overruns and billing irregularities in patient care because, although she became aware of those matters while performing her responsibilities, the reporting of such problems and irregularities was not part of her normal duties), *review dismissed*, 33 Fed. Appx. 506 (Fed. Cir. 2002).

Thomas v. Department of the Treasury, 77 M.S.P.R. 224, 233-35 (1998) (the appellant's disclosures alleging that the agency improperly handled his first grievance and discriminated against a particular class of individuals constituted disclosures of an abuse of authority under 5 U.S.C. § 2302(b)(8)), *overruled in part on other grounds, Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 13 (2000).

c. The appellant has raised a nonfrivolous allegation that her whistleblowing activity was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action under 5 U.S.C. § 2302(a)(2)(A).

¶12 The letter of reprimand, the proposed removal, and the effected removal were threatened or taken "personnel actions" as defined by 5 U.S.C. § 2302(a)(2)(A)(iii) (defining "personnel action" to include "an action under chapter 75 of this title or other disciplinary or corrective action"); *see Lachenmyer v. Federal Election Commission*, 92 M.S.P.R. 80, ¶ 6 (2002). In addition, we find, for the reasons discussed below, that the appellant has raised a nonfrivolous allegation that her alleged whistleblowing activity was a contributing factor in these personnel actions.

¶13 "The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that--(A) the official taking the personnel action knew of the disclosure; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1).

¶14 The appellant initially made her alleged protected disclosure regarding the timesheets through her June 1997 memorandum, as noted above. IAF-213, Tab 37, Exhibit E at 5. She later alleged in an October 1998 e-mail message to Naomi Miske, of the agency's Office of Legal Counsel, that Rick Easter, her immediate

supervisor, was assigned in June or July 1997 to conduct an investigation regarding the substance of her alleged disclosure and that in September 1997 she asked Easter about the investigation and was told he had been "advised by Legal Counsel not to share anything with [her]." *Id.*, Response to Request #3 at 1. According to her OSC complaint, she "informed OIG [Office of the Inspector General] of the initial incidents [of alleged forgery] on March 31, 1999." IAF-213, Tab 8, Subtab 4c, Appellant's OSC Complaint at 8. She further alleged that various agency officials, including the individuals who took the personnel actions appealed (i.e., Easter, who issued the letter of reprimand, IAF-276, Tab 11, Subtab 4j, Emily Metzger, who issued the notice of proposed removal, IAF-213, Tab 8, Subtab 4h, and Jack Williams, who issued the removal decision, *id.*, Subtab 4b) were "aware of this" (presumably referring to her alleged protected disclosure). IAF-213, Tab 8, Subtab 4c, Appellant's OSC Complaint at 8.

¶15 We find that these allegations as a whole constitute a nonfrivolous allegation by this pro se appellant that her alleged whistleblowing disclosure, initially made in June 1997 and repeated later in September 1997, October 1998, and March 1999, to various individuals, was a contributing factor in the agency's September 1998 letter of reprimand, the August 1999 notice of proposed removal, and the January 2000 decision to remove her, all of which were issued by individuals who were aware of her whistleblowing disclosures. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (where, inter alia, the proposed suspension was issued 18 months after the appellant's initial disclosures to OIG and slightly more than a year after her disclosure to an agency employee, and the removal decision notice was issued 3 ½ months thereafter, the appellant showed that her protected disclosures were a contributing factor in the personnel actions), *review dismissed*, 32 Fed. Appx. 543 (Fed. Cir. 2002).

We deny corrective action on the appellant's IRA claims because the agency established by clear and convincing evidence that it would have taken the same actions absent the appellant's alleged whistleblowing activity.

¶16 Because the appellant thus established the Board's jurisdiction over her IRA claims, we now turn to the merits of those claims. Although the AJ, based on his jurisdictional dismissal of the IRA claims, did not resolve the merits of the claims, we find it appropriate to adjudicate on review the merits of the claims because the appellant was notified of the requirements for establishing them, IAF-276, Tab 11, Subtab 1, Agency's Response at 10; she was afforded a full opportunity to submit evidence and argument to establish her IRA claims, before and after she withdrew her hearing request, *id.*, Tab 29; and her withdrawal of her hearing request obviates any demeanor-based credibility determinations by the Board, *see Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985) (special deference must be given to an AJ's credibility findings that are based on the demeanor of witnesses).

¶17 In determining the merits of an IRA claim, the Board must examine whether the appellant established by *preponderant evidence* that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) and that such whistleblowing activity was a contributing factor in the personnel action; if so, the Board must order corrective action unless the agency established by *clear and convincing evidence* that it would have taken the same personnel action in the absence of the disclosure. 5 U.S.C. §§ 1221(e), 2302(b)(8); *see Spencer v. Department of the Navy*, 327 F.3d 1354, 1356-57 (Fed. Cir. 2003); *Clark v. Department of the Army*, 997 F.2d 1466, 1470 (Fed. Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994), *overruled on other grounds by statute as recognized in Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995). The Board may resolve these merits issues in any order it deems most efficient. *See Dick v. Department of Veterans Affairs*, 290 F.3d 1356, 1363-64 (Fed. Cir. 2002); *Rusin*, 92 M.S.P.R. 298, ¶ 20 n.9. We find it most efficient here

to bypass the issues of whether the appellant established by preponderant evidence that she engaged in whistleblowing activity and that such activity was a contributing factor in the personnel actions appealed, and to proceed to the issue of whether the agency showed by clear and convincing evidence that it would have taken the same personnel actions absent the whistleblowing activity.

¶18 Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than the "preponderance of the evidence" standard. 5 C.F.R. § 1209.4(d). In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *E.g., Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). For the reasons discussed below, we conclude that the agency has established by clear and convincing evidence that it would have taken the same personnel actions absent the alleged whistleblowing activity, so that corrective action must be denied.

The letter of reprimand

¶19 In issuing the September 15, 1998 letter of reprimand, Easter charged that the appellant delayed carrying out his supervisory instruction to send an e-mail message asking for volunteers to bring punch and cake for breaks at an upcoming conference. IAF-276, Tab 11, Subtab 4j. Easter had substantial evidence before him, at the time he issued the reprimand, showing that the appellant initially refused, and then delayed for seven days, complying with Easter's supervisory order to send out the simple e-mail. IAF-276, Tab 11, Subtabs 4j-4n. In

addition, nothing in the appellant's alleged whistleblowing disclosure regarding the timesheets directly implicated Easter; nor is there any allegation or evidence that Easter was held accountable for any impropriety regarding the timesheets. Further, the appellant has not identified any nonwhistleblowers who were similarly situated but more favorably treated. Given the strength of the agency's evidence in support of the reprimand, Easter's lack of any motive to retaliate against the appellant, and the absence of any similarly situated nonwhistleblowers, we find that the agency established by clear and convincing evidence that it would have issued the letter of reprimand absent her alleged whistleblowing disclosure. *See Yunus*, 242 F.3d at 1372-73; *Easterbrook v. Department of Justice*, 85 M.S.P.R. 60, ¶¶ 14-21 (2000).

The proposed and effected removal

¶20 The agency proposed the appellant's removal for misuse of government property, unprofessional behavior, and making misrepresentations during an official investigation. IAF-213, Tab 8, Subtab 4h. The record supports the AJ's finding, and the appellant has not disputed below or on review, that these charges stemmed from her actions of altering a personal letter that Easter had prepared, reproducing this letter, and sending it in franked government envelopes to individuals in the judicial community, the Federal Public Defender's Office, and a law school dean, without Easter's knowledge or consent. ID at 2-3. Easter had prepared the letter in his personal capacity and had sent copies in nongovernment envelopes with postage at his personal expense to individuals in the law enforcement community (but not judicial community) expressing his disagreement with judicial actions to free the individual charged with shooting and killing his son. After Easter issued the September 15, 1998 letter of reprimand, the appellant altered Easter's letter by, inter alia, noting Easter's position as an employee of the U.S. Attorney's Office; she then cut, pasted, and copied Easter's signature to the altered letter; and sent the altered letters in

franked government envelopes to various individuals. During an initial investigative interview, the appellant denied having taken such actions under oath but later admitted she had. As a result of the appellant's actions, the agency received concerned inquiries from several recipients, including federal judges. IAF-213, Tab 8, Subtab 4i (agency's April 5, 1999 Report of Investigation with supporting exhibits).

¶21 The appellant's misconduct was egregious and possibly even criminal, given her use of franked government envelopes for such unauthorized purposes. In addition, the record does not show that Metzger, the proposing official, or Williams, the deciding official, was implicated by the appellant's alleged whistleblowing disclosure regarding the timesheets, or otherwise had a strong motive to retaliate against her. Further, although the appellant vaguely alleged, with little or no evidentiary support, that certain agency employees individually committed various acts of misconduct such as "mail fraud," giving "false statements to management," and "pull[ing] her own credit report using Government equipment and Government funds," IAF-276, Tab 28, Appellant's Response to Order Summarizing Prehearing Conference at 4; IAF-213, Tab 1 at 29-31, the appellant did not allege or show that any such individual committed the type of egregious misconduct she did and then made false statements to investigators. We therefore find that the agency established by clear and convincing evidence that it would have proposed and effected the appellant's removal absent her alleged whistleblowing disclosure. *See Yunus*, 242 F.3d at 1372-73; *Easterbrook*, 85 M.S.P.R. 60, ¶¶ 14-21.

The appellant has failed to show material error in the AJ's findings on the merits of her non-IRA removal appeal, including the AJ's finding that the appellant failed to raise, or abandoned, any claims of discrimination and retaliation for EEO activity.

¶22 We have carefully reviewed the appellant's arguments on review and find that they do not establish material error in the AJ's findings that the agency established the charges, a nexus between the charges and the efficiency of the service, and the reasonableness of the penalty. ID at 5-6, 8-10. Regarding the appellant's allegations on review of discrimination and retaliation, we find, for the reasons discussed below, that the AJ did not err by finding, in effect, that the appellant failed to raise, or abandoned, such claims.

¶23 The petition for appeal form filed by the appellant instructed her as follows regarding any discrimination claims: "If you believe you were discriminated against by the agency … because of your race, color, religion, sex, national origin, marital status, political affiliation, disability, or age, indicate so and explain why you believe it to be true." IAF-213, Tab 1, Appeal Form, Item 32a. In response, the appellant simply alleged "discrimination" and "retaliation," and noted that the agency issued the letter of reprimand within 48 hours after she filed an EEO complaint. *Id.* at 2, 5. She did not then, or anytime before the prehearing conference, specify the type of discrimination or allege that the agency retaliated against her with regard to her removal (as opposed to the letter of reprimand). In fact, a submission by her then-attorney,[7] describing "an outline of [the appellant's] position and chronology relative to [her] appeal," did not raise allegations of discrimination or retaliation. IAF-213, Tab 15. The AJ issued an Order Summarizing Prehearing Conference, stating: "As to affirmative

[7] After filing her appeal pro se, the appellant was briefly represented by an attorney, but the attorney withdrew by the time the AJ held her prehearing conference. IAF-213, Tab 20.

defenses, the appellant is not alleging that she was removed on the basis of any type of discrimination or in reprisal for filing discrimination complaints." IAF-213, Tab 35 at 2. In response to the Order, the appellant again alleged "discrimination," but did not identify the type of discrimination. IAF-213, Tab 41 at 6. She further alleged, for the first time, that she "received discriminative [sic] and unnecessarily harsh treatment in the issuance of my reprimand, proposed removal and subsequent removal because I filed EEO complaints …." IAF-213, Tab 41 at 10 (emphasis added). Although she submitted voluminous documents pertaining to an EEO complaint filed in 1997, IAF-213, Tab 36, Exhibit A, she did not describe, and it is not apparent from the documents, how the complaint related to her removal.

¶24 In his initial decision, the AJ found that "the appellant *expressly stated* that she was not claiming that the agency had removed her based on discrimination or in reprisal for discrimination complaints that she had previously filed."[8] ID at 7 n.4 (emphasis added). On review, the appellant does not deny that she "expressly stated" below that she was not claiming discrimination or retaliation regarding her removal. She simply complains again of "discrimination" and "reprisal" related to an EEO complaint. PR at 2. Although the appellant has been pro se for the most part in pursuing this appeal below and on review,[9] even a pro se appellant bears some responsibility for providing specificity regarding the bases for her claims, particularly where, as here, she was capable of submitting voluminous documents containing detailed and lengthy allegations in support of her appeals. Under the totality of the circumstances, we find that the appellant

---

[8] The AJ also noted that "the appellant is apparently pursuing discrimination complaints within the agency's discrimination complaint process." ID at 7 n.4. The record shows, however, that the appellant did not file an EEO complaint regarding her removal. IAF-276, Tab 11, Subtab 3.

[9] *See supra* n.7.

failed to timely raise specific allegations of discrimination and retaliation below, or abandoned any discrimination and retaliation claims she could have raised. *See* 5 C.F.R. § 1201.24(b); *see Yovan v. Department of the Treasury*, 86 M.S.P.R. 264, ¶ 7 (2000) (in general, an appellant is deemed to have abandoned a discrimination claim if it is not included in the list of issues in a prehearing conference summary, and the appellant was afforded an opportunity to object to the summary); *Tannehill v. Department of the Air Force*, 58 M.S.P.R. 219, 221 n.1 (1993).

ORDER

¶25 This is the final decision of the Merit Systems Protection Board in these appeals. 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 the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

_____
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.