UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 65

Docket No. DE-1221-07-0427-W-1

Susan K. McDonnell,

Appellant,

v.

Department of Agriculture,

Agency.

March 17, 2008

Susan K. McDonnell, Albuquerque, New Mexico, pro se.

Jack Neuman, Albuquerque, New Mexico, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision dated October 30, 2007, that dismissed her individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition, REVERSE the initial decision, and REMAND this appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is employed by the agency as a GS-13 Grants and Agreements (G&A) Specialist. Initial Appeal File (IAF), Tab 4, Subtab 4 at 42. In March 2007, she filed a whistleblower complaint with the Office of Special

Counsel (OSC) in which she alleged that her supervisor, Acquisition Management Director Richard Salazar, violated various statutes and a regulation, and committed gross mismanagement, a gross waste of funds, and abuse of authority by improperly filling vacancies in the G&A department only with Hispanics with whom he was friendly, and by creating a hostile work environment for employees who were not in "his clique of friends." *Id.* at 17-19, 22. She contended that, after she complained of Salazar's actions to Salazar and Deputy Regional Forester Lucia Turner, Salazar retaliated against her by verbally reprimanding her, undermining her supervisory authority, and removing certain of her supervisory duties, which the appellant asserted constituted a reassignment, a constructive demotion, and a significant change in duties, responsibilities, or working conditions. *Id.* at 17-19, 22-23. In subsequent correspondence with OSC, the appellant alleged that Salazar had violated merit system principles, that she was only allowed limited travel, and that she was not given career-enhancing assignments in retaliation for her disclosures and because she was not Hispanic. *Id.* at 3-4.

¶3 After OSC terminated its investigation of her complaint, the appellant filed the instant appeal. IAF, Tab 1; Tab 4, Subtab 4 at 1-2. Before the Board, the appellant added that she did not receive a performance award for fiscal year 2006 and has not attended any training since 2002. IAF, Tab 4, Subtab 2 at 16.

¶4 The administrative judge issued two show-cause orders setting forth the jurisdictional requirements for an IRA appeal and ordering the appellant to file a statement, accompanied by evidence, listing: (1) her alleged protected disclosures; (2) the dates she made the protected disclosures; (3) the individuals to whom the disclosures were made; (4) an explanation of why her belief in the truth of the disclosures was reasonable; (5) the actions the agency took, failed to take, or threatened to take or fail to take as a result of her disclosures; and (6) an explanation of why she believes the disclosures were contributing factors in the

actions taken or not taken. IAF, Tabs 3, 10. While the appellant submitted a response to the first order, she did not respond to the second. IAF, Tabs 4, 5.

¶5 Without holding the hearing the appellant requested, the administrative judge dismissed the appeal for lack of jurisdiction, finding that general allegations of unfair treatment and discrimination and harassment based on ethnicity are not protected under the Whistleblower Protection Act (WPA). Initial Decision (ID) at 6-7. She also found that the appellant failed to make nonfrivolous allegations that her remaining disclosures were protected. ID at 7-8. Nevertheless, the administrative judge went on to conclude that the appellant had nonfrivolously alleged that her disclosures were a contributing factor in the agency's decision to take the personnel actions of not allowing the appellant to supervise her subordinate and not giving the appellant a performance award in 2006. ID at 9-12. The appellant has filed a petition for review of that decision[*] and the agency has responded in opposition thereto. Petition for Review File (PFRF), Tabs 1, 3.

ANALYSIS

¶6 On petition for review, the appellant asserts that her disclosures revealed misconduct and abuse of authority such that a reasonable person could conclude that merit principles had been violated. PFRF, Tab 1 at 4-5. We agree.

¶7 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, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department*

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[*] The appellant made an additional submission after the petition for review record closed. PFRF, Tabs 2, 4. Because the appellant made no showing that the information contained therein was not readily available before the record closed, the Board has not considered it. *See* 5 C.F.R. § 1201.114(i).

of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001). Conclusory, vague, or unsupported allegations are insufficient to qualify as nonfrivolous allegations of IRA jurisdiction. *Luecht v. Department of the Navy*, 87 M.S.P.R. 297, ¶ 5 (2000). The WPA provides that it is a prohibited personnel practice to take a personnel action against an employee for any disclosure of information which the employee reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); *Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, ¶ 13 (1999).

¶8 To satisfy the exhaustion requirement in an IRA appeal, an appellant must inform OSC of the precise ground of her charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). In an IRA appeal, the Board may consider only those charges of whistleblowing that the appellant asserted before OSC, and it may not consider any subsequent recharacterization of those charges put forth by the appellant in her appeal to the Board. *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 231 (1993), *overruled on other grounds by Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998), *overruled on other grounds by Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000); *see Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993) (the test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he makes in the complaint requesting corrective action, not his post hoc characterization of those statements).

The appellant has nonfrivolously alleged that she made a protected disclosure.

¶9 In her OSC complaint, the appellant described four matters as her alleged protected disclosures. IAF, Tab 4, Subtab 4 at 17-18. As set forth below, one of

these descriptions constitutes a nonfrivolous allegation that the appellant made a disclosure protected by the WPA. It is undisputed that the appellant exhausted her OSC remedies with respect to these four alleged protected disclosures.

¶10 The appellant complained to OSC that in 2002, Salazar canceled a vacancy announcement he had previously approved and agreed to laterally reassign Diane Garcia from the Human Resources Department to G&A. IAF, Tab 4, Subtab 4 at 17. She contended that Garcia was unqualified for the position and was transferred at the request of the Director of Human Resources, with whom Garcia had an ongoing conflict, and as a favor to Garcia's friend, Dolores Rottach, Deputy Director of Acquisition Management. *Id.* She also claimed that she was not permitted to supervise Garcia or to direct her work. The appellant contended that she was verbally reprimanded for her "challenging" behavior when she asserted the right to supervise Garcia and objected to Garcia's constantly being assigned other duties by Rottach. *Id.*

¶11 The appellant asserted that she objected to Garcia's reassignment because she was unqualified and that she "took the issue" to Turner. *Id.* at 17, 29. According to the appellant, Salazar then verbally reprimanded her for taking the problem to his supervisor, Turner. *Id.* at 17. In her OSC complaint, she claimed that Garcia's reassignment violated 5 C.F.R. § 7.1 and 5 U.S.C. § 2302(b)(2), (6), and (10). *Id.*

¶12 Under 5 U.S.C. § 2302(b)(6), an agency employee with the authority to take, recommend, or approve a personnel action is prohibited from granting any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for the purpose of improving or harming the prospects of any particular individual for employment. Although the appellant did not list this subsection, we note that 5 U.S.C. § 2302(b)(12) provides that it is prohibited to take or fail to take a personnel action if doing so violates any law, rule, or regulation implementing or directly concerning merit system principles. Pursuant to 5 U.S.C. § 2301, the merit system principles mandate protection against

personal favoritism and provide that recruitment should be from qualified individuals. Among the "personnel actions" covered by § 2302 are reassignments. 5 U.S.C. § 2302(a)(2)(A)(iv); *see Villamarzo v. Environmental Protection Agency*, 92 M.S.P.R. 159, ¶ 7 (2002) (indicating that the definition of "personnel actions" in 5 U.S.C. § 2302(a)(2)(A) are to be used to determine if a prohibited personnel practice has occurred with regard to "personnel actions," as used in 5 U.S.C. § 2302(b)).

¶13 The lateral reassignment of Garcia to the G&A position is therefore a personnel action within the meaning of 5 U.S.C. § 2302(b). Further, the appellant's contention that Salazar reassigned an unqualified employee to a position as a favor to others could constitute a violation of 5 U.S.C. § 2302(b)(6) and (12) because Garcia apparently was not entitled to any preference or advantage authorized by law, rule, or regulation. The Board has previously held that claims concerning disclosures about hiring and selection improprieties, including giving preferential treatment to friends, may constitute nonfrivolous allegations of protected disclosures that statutory provisions have been violated. *Luecht*, 87 M.S.P.R. 297, ¶ 14; *Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, ¶¶ 9-10 (2000) (finding the appellant made a nonfrivolous allegation that he disclosed a violation of law and an abuse of authority regarding personnel selections being made without regard to merit); *Ganski*, 86 M.S.P.R. 32, ¶¶ 6-7. Accordingly, we find that the appellant has nonfrivolously alleged that she made a protected disclosure to Turner regarding an alleged violation of law by Salazar when he reassigned Garcia.

The appellant's remaining disclosures either were not protected or could not have contributed to any personnel action about which the appellant complains.

The lateral transfer of Dennis Rino

¶14 This allegedly protected disclosure concerned Salazar's arranging for the lateral reassignment of his friend, Dennis Rino, from Oregon to Santa Fe, New

Mexico, to fill a vacant G&A position. IAF, Tab 4, Subtab 4 at 17. The appellant asserted that Salazar gave the position to Rino because he "needed to get back" to New Mexico and that Rino never intended to stay in the position, as he accepted a different position in Santa Fe a few months after his lateral reassignment. *Id.* The appellant contended that she complained about this to Salazar. *Id.* In her OSC complaint, she claimed that Rino's reassignment violated 5 U.S.C. § 2302(b)(2), (8)(A)(ii), and (10). *Id.*

¶15 The appellant indicated in her OSC complaint that the individuals responsible for the violations she was reporting were Salazar and Turner. IAF, Tab 4, Subtab 4 at 17. She did not specifically allege that Turner was involved in this alleged violation, however. While she listed Turner and Richard Lucero as individuals to whom she made disclosures generally, she did not indicate that she made this particular disclosure to anyone but Salazar. *Id.* at 17, 22. Because she reported this purported violation to the individual allegedly responsible for it, the disclosure was not protected. It is well-settled that the WPA does not apply when an employee complains to her supervisor about the supervisor's own conduct. *E.g.*, *Reid v. Merit Systems Protection Board*, 508 F.3d 674, 678 (Fed. Cir. 2007); *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001).

Salazar's behavior toward the appellant and Carmen Melendez

¶16 After Garcia left G&A and her former position was advertised, agency employee Carmen Melendez was selected for it. IAF, Tab 4, Subtab 4 at 17-18. The appellant was involved in her selection. *Id.*, Subtab 2 at 3. The appellant asserted that she was supposed to supervise Melendez, but that Salazar told Melendez the appellant was difficult and to go to him directly for supervision. *Id.*, Subtab 4 at 17-18. Salazar located Melendez in a cubicle next to his office, instead of in the G&A area. *Id.* at 18. The appellant claimed that Salazar refused to support her supervision of Melendez, which resulted in Melendez's refusing to account for her time, submit her time sheets to the appellant, notify the appellant

of absences, or take direction from or speak to the appellant. *Id.* The appellant contended that Salazar treated Melendez much more favorably than he treated the appellant. *Id.* at 3-4.

¶17 Unlike her prior allegations, this disclosure did not concern Salazar's vacancy-filling practices. Instead, it focused on Salazar's perceived favoritism toward Melendez and his undermining of the appellant's supervisory authority.

¶18 Under the circumstances presented in this case, the alteration of the appellant's supervisory authority is more appropriately categorized as a personnel action under the WPA, as the administrative judge found. Nevertheless, we have considered whether the actions described could be considered gross mismanagement or an abuse of authority.

¶19 "Gross mismanagement" is a decision that creates a "substantial risk of significant adverse impact on the agency's ability to accomplish its mission." *McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶ 22 (2005). While Salazar's alleged actions undoubtedly would have adversely impacted the appellant, it does not appear that they would have created a substantial risk of significant adverse impact on the agency's ability to accomplish its mission.

¶20 "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." *McCorcle*, 98 M.S.P.R. 363, ¶ 24. Although the appellant's allegations regarding Salazar's treatment of her with respect to Melendez could conceivably be considered an abuse of authority, the appellant did not assert in her OSC complaint that she disclosed this particular matter to any individual at her agency. *See* IAF, Tab 4, Subtab 4. She generally alleged that she made disclosures to Turner and Lucero, but she did not specify that she made this disclosure to anyone. *Id.* at 17-18, 22. Before the Board, the appellant claimed that she had reported this information to Turner. IAF, Tab 5 at 6-7. The Board may consider only those charges of whistleblowing that the appellant

asserted before OSC, however; it may not consider any subsequent factual recharacterization of those charges put forth by the appellant in her appeal to the Board. *See Ellison*, 7 F.3d at 1036. While her communication of this information to OSC could constitute a protected disclosure under 5 U.S.C. § 2302(b)(8)(B), she did not file her OSC complaint until after all of the personnel actions allegedly taken against her had already occurred. *See* IAF, Tab 4, Subtab 4 at 22-23. Thus, even if this disclosure were protected, it could not have contributed to a personnel action taken against the appellant.

Hostile work environment

¶21 The appellant asserted that Salazar has created a hostile work environment for employees "not included in his clique of friends" and has engaged in disparate treatment of employees who are not Hispanic. IAF, Tab 4, Subtab 4 at 3-4, 18. She claimed that Salazar arranged for the non-competitive hire of Ron Bratton, the husband of his wife's best friend, as a FOIA Officer. *Id.* at 18. After Bratton was later appointed as counsel in the Employee Relations Department, his replacement, Ray Montano, was announced on March 12, 2007, before anyone on staff had an opportunity to express an interest in the position. *Id.* The appellant contended that Montano is currently employed in Employee Relations and has advised Salazar on employee issues and complaints in the past. *Id.*

¶22 Alleged disclosures that an agency engaged in discrimination and created a hostile work environment in violation of title VII are covered under 5 U.S.C. § 2302(b)(1) and (b)(9), and are excluded from coverage under § 2302(b)(8). *McCorcle*, 98 M.S.P.R. 363, ¶ 21; *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 84 (2001), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002). Moreover, the appellant did not assert in her OSC complaint that she disclosed this series of events to anyone within the agency. She generally alleged that she made disclosures to Turner and Lucero, but she did not specify that she made this disclosure to anyone. IAF, Tab 4, Subtab 4 at 18, 22. Before the Board, the appellant claimed that she raised Salazar's preference for Hispanic employees

with Turner, but we cannot accept her recharacterization of the charges she made before OSC. IAF, Tab 5 at 7; *see Ellison*, 7 F.3d at 1036. As was the case with her prior alleged disclosure, the fact that she raised the matter with OSC could make this disclosure protected. 5 U.S.C. § 2302(b)(8)(B). The appellant filed her OSC complaint after all of the alleged personnel actions occurred, however. IAF, Tab 4, Subtab 4 at 22-23. This disclosure, even if protected, therefore could not have contributed to any personnel action that had already been taken against her.

The appellant has made a nonfrivolous allegation that her disclosure contributed to the agency's decision to take a personnel action against her.

¶23 Neither party disputes the administrative judge's finding that the appellant made a nonfrivolous allegation that her disclosures were a contributing factor in the agency's decision to take the personnel actions of not allowing the appellant to supervise her subordinate, Melendez, and not giving the appellant a performance award in 2006. *See* ID at 9-12; PFRF, Tab 1 at 5, Tab 3. We agree that the appellant has nonfrivolously alleged that Salazar's actions in undermining her supervisory authority constituted a significant change in duties, responsibilities, or working conditions, which is a "personnel action" within the meaning of the WPA. *See* 5 U.S.C. § 2302(a)(2)(A)(xi). However, the record does not indicate that the appellant exhausted her OSC remedies with respect to her allegation that she was denied a performance award for fiscal year 2006. *See* IAF, Tab 4, Subtab 4. Accordingly, on remand, the only personnel action within the scope of the appeal is Salazar's action to prevent the appellant from supervising her subordinate. *See Ellison*, 7 F.3d at 1036; *D'Elia*, 60 M.S.P.R. at 231.

ORDER

¶24 For the foregoing reasons, we find that the appellant has exhausted her OSC remedies and has made nonfrivolous allegations that she made a protected

disclosure and that, as a result, she was subjected to a personnel action covered by the WPA. Accordingly, we conclude that the Board has jurisdiction over this appeal and we REMAND it to the Denver Field Office for adjudication on the merits.

FOR THE BOARD:

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