UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 245

Docket No. DC-1221-10-0231-W-1

Christopher Lane,

Appellant,

v.

Department of Homeland Security,

Agency.

December 17, 2010

Erich C. Ferrari, Esquire, Washington, D.C., for the appellant.

Nicole M. Heiser, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115(d), REVERSE the initial decision, FIND jurisdiction, and REMAND the appeal for adjudication on the merits.

BACKGROUND

¶2 On April 28, 2008, the agency appointed the appellant to the position of GS-15 Information Technology Specialist, Headquarters Services Division

(HSD), Office of the Chief Information Officer (OCIO)/Information Technology Security Office (ITSO), subject to a 1-year probationary period. On April 2, 2009, the agency terminated him during his probationary period on the basis of unsatisfactory performance.[1] Initial Appeal File (IAF), Tab 1, IRA Appeal and Hearing Request at 2, 12; Tab 14 at 6-7, 129-33.

¶3 The appellant filed a complaint with the Office of Special Counsel (OSC) on June 19, 2009, alleging that the agency terminated him in reprisal for whistleblowing. IAF, Tab 12 at 25-37.[2] On October 30, 2009, OSC notified the appellant that it had terminated its investigation into his allegations and that he had the right to seek corrective action from the Board. *Id.* at 49-52. The appellant filed a timely IRA appeal on December 29, 2009. IAF, Tab 1.

¶4 In her initial decision, the administrative judge described the appellant's allegations in his OSC complaint and Board appeal as follows:[3] Before his agency appointment, the appellant had worked for Science Applications International Corporation (SAIC), a federal contractor.[4] During orientation, he

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[1] In an initial decision that became the Board's final decision, an administrative judge dismissed the appellant's appeal of his termination for lack of jurisdiction, finding that he was not an "employee" with adverse action appeal rights, and had not established jurisdiction under the regulations governing probationary employees. *Lane v. Department of Homeland Security*, MSPB Docket No. DC-315H-09-0508-I-1 (Initial Decision, July 15, 2009).

[2] On January 27, 2010, the appellant filed two separate pleadings via e-Appeal Online, both of which were placed under a single Tab 12, which is entitled "Appellant Response File." One pleading is 79 pages in length, the other 41 pages in length. All citations to Tab 12 refer to the sequential numbering in the footer of the 79 page pleading.

[3] The administrative judge correctly stated that the appellant specifically identified only two disclosures of information on his OSC complaint form. Initial Decision (ID) at 3; IAF, Tab 12 at 33-35. She further stated, however, that she had "analyzed all of the information he provided elsewhere on the form to determine whether he has made a nonfrivolous allegation that he engaged in protected whistleblowing activity." ID at 4 n.1.

[4] In that capacity, he worked as a contractor with ITSO. IAF, Tab 12 at 29.

learned that, as a former contract employee, he should not engage in any relationship with his former employer for 1 year. He was appointed to serve as a Contracting Officer's Technical Representative (COTR). In the summer or fall of 2008, he reported to HSD Deputy Director Kyle Boyles, his first-level supervisor, and HSD Director Ben Harvey, his second-level supervisor,[5] that Creative Computing Solutions, Inc. (CCSI), a vendor, was not providing satisfactory Integrated Master Schedule information. He requested additional information from the vendor but the response was still inadequate. Initial Decision (ID) at 4-5. He reported this to Boyles and Harvey as a "gross [mis]management of funds." *Id.* at 5. In the summer of 2008, he sent Lockheed Martin and Harvey an e-mail[6] reporting that Lockheed Martin was "not living up to its contractual obligations of maintaining staffing levels at 95% at all times." *Id.* Harvey did not follow up on his report. Next he reported the matter to Boyles but Boyles did not follow up either. He also reported to Harvey that neither Lockheed Martin nor CCSI was sending invoices, but Harvey did not respond. *Id.*

¶5 The administrative judge further described the appellant's allegations as follows: In November of 2008, Boyles sent the appellant an e-mail directing him to sign off on an October 2007 invoice from Govplace, a vendor. The appellant responded that he could not sign off on the invoice because he had been employed by SAIC during the time the services were performed. He believed there was a conflict of interest because as a contractor he had supervised Govplace employees. He also could not confirm that the services had been performed. He sought advice from the Procurement Office and was advised that

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[5] Boyles did not become the appellant's first-level supervisor until the agency hired him in October 2008. Until then, Harvey acted as the appellant's first-level supervisor. ID at 4; IAF, Tab 12 at 29.

[6] The appellant stated in his OSC complaint that he also sent the e-mail to the Contracting Officer (CO) and the COTR. IAF, Tab 12 at 30.

Harvey should sign off on the invoice.[7] He informed employees of the Procurement Office that Boyles had directed him to violate regulations by signing the invoice. ID at 3, 5. After this, his relationship with Boyles and Harvey "deteriorated quickly." *Id.* at 5. On November 21, 2008, he met with OCIO Chief of Staff Maria Roat and "described [for her] the most egregious examples of Harvey's and Boyles' behavior, as well as their systematic harassment and unfair distribution of work." *Id.*

¶6 The administrative judge further described the appellant's allegations as follows: In January 2009, the appellant refused another request from Harvey to act as COTR for a contract that had been run by Harvey.[8] The appellant was concerned that he would be responsible for invoices dated before he accepted the assignment. ID at 3, 5-6. He also pointed out to Harvey that some of the contracts Harvey had approved were a "gross waste of funds" and that Harvey "had failed to properly oversee the acquisition process." *Id.* at 6. Moreover, Boyles treated a contract employee as if he were a federal employee and allowed him to provide direction to other contractors and federal employees, and Harvey allowed a contract employee to provide services that another contractor had been paid to perform. In addition, while on temporary duty in Mississippi, the appellant discovered seven boxes of antiquated Unisys servers that had been shipped in the last few days of the Unisys contract. When he brought this to Harvey's attention as a "gross waste of funds," Harvey "responded angrily and did nothing." *Id.*

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[7] The appellant stated in his OSC complaint that the invoice had been left incomplete by his predecessor, Nitin Thaker; and CO Bill Thoreen and Holly Donowa from the Procurement Office recommended that Harvey, as Thaker's manager, should sign off on the invoice. IAF, Tab 12 at 30.

[8] The appellant stated in his OSC complaint that this was a contract with Planet Associates, Inc. IAF, Tab 12 at 32.

¶7 The administrative judge found that the appellant did not make a nonfrivolous allegation that he disclosed an abuse of authority because he did not allege facts that would show an abuse of power that adversely affected anyone's rights or resulted in personal gain or advantage. She found that he did not make a nonfrivolous allegation that he disclosed gross mismanagement because he did not allege facts that would show a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. She acknowledged the appellant's allegations that both CCSI's failure to provide requested information and contracts approved by Harvey were a gross waste of funds, but she concluded that the appellant did not make a nonfrivolous allegation that he disclosed a gross waste of funds. She found that he alleged no facts from which a disinterested observer reasonably could conclude that an expenditure had been made that was significantly out of proportion to the benefit expected to accrue to the government because he failed to provide information about the amount of the alleged waste compared to the expected benefit. ID at 6-7. She found that the appellant did not make a nonfrivolous allegation that he disclosed a violation of any law, rule, or regulation because his disclosures "appear to be based on his subjective judgment (e.g., it would be a conflict of interest and a violation of unspecified regulations for him to sign off on a Govplace invoice because he had supervised Govplace employees when he was a contractor) and not on any objection information." *Id.* at 7-8.

¶8 The administrative judge also found that the appellant did not make a nonfrivolous allegation that he disclosed wrongdoing "when he informed Boyles and/or Harvey he would not sign off on one contract because he could not confirm that the services were performed and refused to serve as COTR on another contract apparently because it preceded his agency employment" and concluded that he merely disagreed with an agency decision to assign him responsibility for those contracts. ID at 8. She similarly found that he did not make a nonfrivolous allegation that he disclosed wrongdoing when he met with

Roat and described "egregious examples" of Boyles and Harvey's behavior, their harassment of him, and their unfair distribution of work because his assertions were fundamentally his own complaints and grievances about how he was treated by Boyles and Harvey. *Id.* at 8-9.

¶9 The administrative judge further found that the appellant's disclosures made in the normal performance of his duties were not protected. She found that the appellant admitted that it was within his job duties or responsibilities, as a COTR, to make "the disclosures." ID at 9. She acknowledged his claim that he disclosed to Boyles and/or Harvey that CCSI was not providing requested information, that Lockheed Martin was not living up to its contractual obligations, and that Unisys had shipped antiquated servers. She found, though, that because the appellant was responsible for providing this type of information about contracts he was assigned to monitor, he "appears to have been acting within his normal duties when he made these disclosures." *Id.* at 10. The administrative judge also found that the appellant's claim to have disclosed to Harvey that Harvey had approved contracts that were a "gross waste of funds" and "had failed to properly oversee the acquisition process," was not a nonfrivolous allegation of protected whistleblowing activity because Harvey was the alleged wrongdoer. *Id*.

¶10 The administrative judge concluded that the Board lacks jurisdiction over the appellant's IRA appeal because he failed to make a nonfrivolous allegation that he engaged in protected whistleblowing activity. ID at 10. Accordingly, she dismissed his appeal. *Id.* at 1, 11.

¶11 In his petition for review, the appellant challenges the administrative judge's findings that he failed to make nonfrivolous allegations that he disclosed matters that he reasonably believed evidenced violations of law, rule, or regulation, gross mismanagement, gross waste of funds, and abuse of authority. Petition for Review (PFR) File, Tab 1. In addition to the matters discussed in the initial decision, the appellant alleges that he disclosed an abuse of authority

regarding an incident in which Harvey allegedly denigrated and threatened him. *Id.* at 14-16. The agency has filed a response opposing the petition for review. *Id.*, Tab 3.

ANALYSIS

The standard for establishing jurisdiction

¶12 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations as follows: (1) He 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 of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). To meet the nonfrivolous standard for proving jurisdiction, an appellant need only plead allegations of fact, which, if proven, could show that he made a protected disclosure and that the disclosure was a contributing factor in a personnel action. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 18 (2010). Whether the appellant's allegations can be proven on the merits is not part of the jurisdictional inquiry. Any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *Ingram v. Department of the Army*, 114 M.S.P.R. 43, ¶ 10 (2010). In cases involving multiple alleged protected disclosures and multiple alleged personnel actions, the Board has jurisdiction where the appellant has exhausted his administrative remedies before OSC and makes a nonfrivolous allegation that at least one alleged personnel action was taken for at least one alleged protected disclosure. *Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 9 (2008).

Exhaustion of remedy before OSC; personnel action

¶13 There is no dispute regarding the administrative judge's conclusions that the appellant exhausted his remedy before OSC and made a nonfrivolous

allegation that he was the subject of a covered personnel action, and the record supports those conclusions.[9] IAF, Tab 12 at 29-37, Tab 14 at 130-32; *see, e.g.*, *Scalera v. Department of the Navy*, 102 M.S.P.R. 43, ¶ 15 (2006) (a probationary termination constitutes a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iii)). We note in this regard that our analysis of the appellant's allegations of protected whistleblowing is not limited to or governed by the particular categories of wrongdoing, e.g., violation of law, rule, or regulation, gross waste of funds, etc., cited by the appellant. The purpose of the exhaustion requirement is to give OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). The Board does not require an appellant to correctly label the category of wrongdoing under 5 U.S.C. § 2302(b)(8) because OSC can be expected to know which categories of wrongdoing might be implicated by a particular set of factual allegations. *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 12 (2008).

Nonfrivolous allegation of a protected disclosure

¶14 A protected disclosure under 5 U.S.C. § 2302(b)(8) is any disclosure of information by an employee which 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. *Ingram*, 114 M.S.P.R. 43, ¶ 9. The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence

[9] The agency has not filed a petition for review or cross-petition for review disputing the administrative judge's findings on these issues. Therefore, the Board will not reconsider the administrative judge's findings. *See, e.g.*, *Ingram*, 114 M.S.P.R. 43, ¶ 11 n.4.

wrongdoing as defined by the Whistleblower Protection Act. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

¶15 We find it helpful to group the appellant's disclosures into the following categories for purposes of analyzing whether he has made nonfrivolous allegations of protected whistleblowing: (1) disclosures that contractors were not meeting their contractual obligations; (2) disclosures that the appellant's supervisors failed to respond appropriately to his reports that contractors were not meeting their contractual obligations; (3) disclosures that the appellant's supervisors directed him to violate ethical obligations; (4) disclosure of Harvey's denigration of and alleged threats against the appellant; (5) disclosures of gross waste of funds; and (6) disclosures that Harvey and Boyles prevented the appellant from successfully performing the duties of his job.

¶16 Where applicable, we consider not only whether the nature of the matters disclosed fits one or more of the legal categories of whistleblowing, we consider whether disclosures that would otherwise be protected are not protected because they were part of the appellant's normal job duties. Our reviewing court has distinguished three different situations: (1) The employee has, as part of his normal duties, the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels; (2) an employee with assigned investigatory responsibilities reports the wrongdoing outside of normal channels; and (3) the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties. *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001). The court concluded that both of the latter two situations would constitute protected whistleblowing, but not the first. *Id.*

Disclosures that contractors were not meeting their contractual obligations

¶17 The appellant alleged that he reported to Boyles and Harvey that two contractors, CCSI and Lockheed Martin, were not meeting their contractual

obligations. He says he reported to Boyles and Harvey on four separate occasions that CCSI was not providing satisfactory Integrated Master Schedule information. IAF, Tab 12 at 6-7. He also says he reported to Harvey that Lockheed Martin was not living up to its contractual obligation to maintain staffing levels at 95% at all times. *Id.* at 6. He said that Lockheed Martin's failure to comply with contractual requirements left the agency's engineering department "severely understaffed for the project." *Id.* at 19. The appellant said he further reported that neither contractor had sent invoices regarding their respective contracts, making it impossible for him or another COTR to assess the contractors' work and performance under their contracts. *Id.* at 7.

¶18 We see no basis for concluding that the appellant could have a reasonable belief that he was disclosing a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, or an abuse of authority by reporting that government contractors were not meeting their contractual obligations. We additionally note that reporting contractual failures to Boyles and Harvey would be part of the appellant's normal job duties reported through normal channels.

Disclosures that the appellant's supervisors failed to respond appropriately to his reports that contractors were not meeting their contractual obligations

¶19 In addition to reporting that contractors were not meeting their contractual obligations, the appellant alleged that Boyles and Harvey failed to respond appropriately to these disclosures.[10] Assuming that Boyles and Harvey were indeed failing to do their jobs properly with respect to the CCSI and Lockheed

[10] *See, e.g.*, IAF, Tab 12 at 6 ("neither Mr. Harvey, nor Mr. Boyles responded or followed up on Lane's concerns [regarding CCSI's failure to provide satisfactory Integrated Master Schedule information]"; *id.* at 6-7 ("Appellant reiterated his concerns with [Lockheed Martin's] continued deviation from its contractual obligations a third time, . . . inform[ing] Mr. Boyles that the issues with LM's performance now rested with Mr. Boyles, but Mr. Boyles did not follow up on Appellant's reports").

Martin contracts, the question becomes whether disclosing this failure to others[11] would constitute a protected disclosure. Such a disclosure would not appear to implicate a violation of law, rule, or regulation, and we find that the appellant failed to allege facts that would evidence a reasonable belief that he was disclosing gross mismanagement. Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994). If Boyles and Harvey failed to assist the appellant in ensuring that CCSI and Lockheed Martin were meeting their contractual duties, the appellant could reasonably believe that such failure constituted mismanagement, i.e., that it would have an adverse impact upon the agency's ability to accomplish its mission. The appellant has not, however, alleged facts sufficient to sustain an inference that any such mismanagement was "gross," i.e., that it created a "substantial risk" of "significant" adverse impact upon the agency's ability to accomplish its mission.[12]

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[11] The appellant reported that he disclosed Boyles' and Harvey's failures in this regard to officials in the human relations office. *See* IAF, Tab 12 at 9-11. Such reporting could not be characterized as part of the appellant's normal job duties reported through normal channels.

[12] We note that the appellant alleged that Boyles treated a particular CCSI employee as a federal employee, allowing that individual to direct the efforts of other contractors and federal employees alike. IAF, Tab 12 at 12. The appellant also alleged that Harvey tasked another CCSI contractor to provide project management services that another contractor had been paid to provide under its contract. *Id.* We find no indication in the record that the appellant reported these concerns to anyone other than Harvey prior to his OSC complaint, and the OSC complaint followed the challenged personnel action. Under these circumstances, the "disclosure" could not have been a contributing factor in the termination, and, thus, does not provide a basis for Board jurisdiction as a protected disclosure. *See, e.g., Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 11 (2009). In any event, we find that such irregularities would not support a reasonable belief of gross mismanagement, a gross waste of funds, or an abuse of authority.

Disclosures that the appellant's supervisors directed him to violate ethical obligations

¶20 The appellant reported that he raised two ethical concerns regarding Boyles' November 2008 directive that he sign off on a contractor invoice from Govplace. IAF, Tab 12 at 7. The appellant related that, prior to his appointment, he had worked for federal contractor SAIC, and that, during his orientation training, he was advised that he should not engage in any relationship with that former contractor for one year. *Id.* at 5. The appellant told Boyles that he could not sign off on the invoice because he had been employed as a contractor for SAIC, where he had supervised Govplace employees. *Id.* at 7-8. The appellant said he also felt, and communicated to Boyles, that it would be improper for him to sign off on the invoice because the invoice was dated October 2007, prior to his appointment, and had been left incomplete by the appellant's predecessor, Nitin Thaker, and he (the appellant) therefore could not conclude on behalf of the government that the work reflected on the invoice had been fulfilled. *Id.* at 7-8. He stated that Boyles was adamant that he sign the invoice, and that he sought advice from the Procurement Office, including the Contracting Officer, and was advised that Harvey should sign off on the invoice, as Harvey had been Thaker's manager. *Id.* at 8. The appellant reported that his relationship with both Harvey and Boyles deteriorated rapidly when he continued to refuse to sign off on the Govplace invoice. *Id.*

¶21 The appellant reported that a similar concern arose in connection with a request by Harvey in January 2009 that he act as COTR for a contract with Planet Associates, Inc., that had been previously run by Harvey. The appellant was concerned that, by acting as COTR for a contract that was already in place, he would again be responsible for signing off on invoices dating back to October 2008, even though the appellant only acted as COTR for this particular contract since February 2009. *Id.* at 11.

¶22 We note at the outset that the appellant reported his belief that he was being asked to breach ethical obligations to officials in the Procurement Office and the human resources office. IAF, Tab 12 at 9-11. We find no basis in the record for concluding that reporting such wrongdoing was part of the appellant's normal job duties and reported through normal channels. Accordingly, there is no basis for finding that these disclosures were unprotected for that reason. *See Huffman*, 263 F.3d at 1352.

¶23 We find that the appellant has made a nonfrivolous allegation that he had a reasonable belief that he was disclosing a violation of law, rule, or regulation with respect to the Govplace invoice. We note in this regard that the appellant does not appear to have identified any specific laws, rules, or regulations in his submissions to the MSPB. However, the appellant appears to have identified two regulations in his communications with OSC, 5 C.F.R. §§ 2635.502 and 2635.702. IAF, Tab 12 at 40.[13] He also appears to have submitted to OSC copies of training materials to support his contentions that he was told during training that he should not work on a contract involving a company that had employed him within the past year, and that he should not sign off on an invoice where he had no personal knowledge of the services rendered.[14] *Id.* at 40-42.

¶24 Section 2635.702, entitled "Use of public office for private gain," does not appear to be relevant to whether the appellant made protected disclosures with regard to the Govplace and Planet Associates invoices. Section 2635.502(a) does appear to have relevance to the Govplace invoice:

> Where an employee knows that . . . a person with whom he has a covered relationship is or represents a party to such matter, . . . and

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[13] According to a letter from OSC to the appellant during OSC's investigation, the appellant provided this information in the course of telephone and e-mail discussions. IAF, Tab 12 at 40.

[14] Copies of these training materials do not appear to have been included in the MSPB record.

> where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee . . . .

An employee has a "covered relationship" with "[a]ny person for whom the employee has, within the last year, served as . . . employee." 5 C.F.R. § 2636.502(b)(iv).

¶25 The language of this government-wide regulation is necessarily general in nature, and does not conclusively answer whether a reasonable person would question the impartiality of a COTR reviewing the work of a contractor with whom he worked in a private capacity within one year of becoming a federal employee. If, however, an employee had received ethics training in which this particular and specific guideline was presented in mandatory terms, he could reasonably conclude that it would be in violation of ethical rules for him to sign off on the Govplace invoice. This is especially so where the appellant says he "checked and confirmed the matter with his Procurement Office," which advised that Harvey, and not the appellant, should sign the invoice. IAF, Tab 12 at 47.

¶26 Turning to the question of whether the appellant could have had a reasonable belief that approving an invoice even though he had no personal knowledge of the services rendered would violate a law, rule, or regulation, section 2635.502(a) does not appear to apply, as it deals with real or apparent conflicts of interest, which are not at issue here. For his belief that requiring him to sign off on these invoices would violate ethical rules, the appellant relied in part on training materials he was provided during orientation. IAF, Tab 12 at 40. The appellant also advised that he learned from others that one was not to sign off on an invoice when he had no knowledge that services were in fact rendered. *Id.* at 41. In addition, the appellant stated that he sought and received advice from

Procurement Office officials, who recommended that Harvey, as Thaker's manager, should sign off on the invoice. *Id.* at 30.

¶27 As the administrative judge found, any disclosure of a violation of law, rule, or regulation is protected if it meets the reasonable belief test. ID at 7. The employee is not required to cite any specific law, rule, or regulation that he believes was violated where the employee's statements and the surrounding circumstances clearly implicate an identifiable law, rule, or regulation; he is only required to make a nonfrivolous allegation that he reasonably believed his disclosure evidenced one of the types of wrongdoing listed in 5 U.S.C. § 2302(b)(8). *See, e.g.*, *Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 12 (2010); *Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 13 & n.2 (2005). In finding that the appellant lacked such a reasonable belief, the administrative judge failed to address her previous finding that the appellant specifically asserted that he sought advice from the Procurement Office and was advised that Harvey should sign off on the invoice. ID at 5. Indeed, in responding to the appeal, the agency submitted Boyle's affidavit in which he averred: "I vaguely remember [the appellant] informing me that the COs recommended Mr. Harvey to sign the invoice."[15] IAF, Tab 14 at 86. The administrative judge did not explain how the appellant lacked a reasonable belief that he was disclosing a violation of law, rule, or regulation, given his undisputed allegation that the Contracting Officer recommended that Harvey sign the invoice.

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[15] In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Ingram*, 114 M.S.P.R. 43, ¶ 10; *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). Here, the agency's evidence supports the appellant's allegation.

¶28 Again, we must resolve any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations in favor of finding jurisdiction. *Ingram*, 114 M.S.P.R. 43, ¶ 10. We make clear that we are not finding, on the merits, that the appellant made disclosures that he reasonably believed evidence the kind of wrongdoing set for in 5 U.S.C. § 2302(b)(8). On remand, as part of his burden of proof on the merits, the appellant must establish by preponderant evidence that he made disclosures that a reasonable person in his circumstances would believe evidence a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See Weed*, 113 M.S.P.R. 221, ¶ 21.

Disclosure of Harvey's alleged denigration of and threats against the appellant

¶29 Following his refusal to sign off on the Govplace invoice, the appellant described a meeting among him, Harvey, and Boyles that he characterized as exhibiting an abuse of authority:

> After Appellant's refusal to sign off on the Govplace invoice, the relationship between Appellant and Mr. Harvey and Mr. Boyles deteriorated quickly. In late November 2008, Appellant, Mr. Harvey, and Mr. Boyles met in Mr. Harvey's office. Mr. Harvey berated Appellant for not overseeing the work of the contractors employed in the Division. Mr. Harvey made veiled threats about Appellant's employment, stating that "you should watch out for your wife and kids and think about them."
>
> Appellant told Mr. Harvey that he had had concerns regarding the minimal staffing levels in the OCIO, and that there was no way in which their office could hold accountable the approximately sixty (60) contractors without additional staff. Appellant reminded Mr. Harvey that Appellant had sent an email requesting additional staff for this purpose, and that Mr. Harvey had not taken any action to remedy the situation. Appellant then confronted Mr. Harvey's accusations that Appellant was incompetent. Appellant described the intense work schedule that he had maintained over the past several months. Mr. Harvey abruptly announced that the meeting was over, stating that he and Mr. Boyles would talk, and that they would "fix"

> Appellant. Appellant understood Mr. Harvey's words as a threat to make his job more difficult.

IAF, Tab 12 at 8-9. The appellant said he reported this matter to human resources officials. *Id.* at 9.

¶30 We first note that the administrative judge erred by failing to adjudicate this claim of a disclosure of an abuse of authority. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify and resolve all material issues of fact and law). Turning to the merits of this claim, the Board has found that a supervisor's use of his influence to denigrate staff members and to threaten their careers constitutes an abuse of authority, and that there is no de minimis standard for such abuse under the WPA. *Pasley*, 109 M.S.P.R. 105, ¶ 18. We find that Harvey's alleged statements were clearly denigrating and threatening in nature, and that the appellant's disclosure of these statements to human resources officials constitutes a nonfrivolous allegation of a disclosure of an abuse of authority.

Disclosure of gross waste of funds

¶31 Like gross mismanagement, establishing a reasonable belief that one is disclosing a gross waste of funds is a substantial hurdle, as gross waste of funds constitutes 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). The appellant did make a specific allegation in this regard:

> Mr. Harvey had initiated a procurement with M. A. Federal, Inc., from Communications Expense Management ("CEM") costing over $400,000-500,000, prior to Appellant's arrival. Appellant communicated to Mr. Harvey that the contract was a waste of government funds because CEM had produced absolutely nothing but was getting paid.

IAF, Tab 12 at 12. Even if the appellant could be said to have disclosed a gross waste of funds in this regard, the "disclosure" was made to the wrongdoer, and therefore would not be protected. *See Huffman*, 263 F.3d at 1350.

¶32 The appellant also alleged that, during a trip to Stennis, Mississippi, he discovered that there were approximately seven boxes of antiquated Unisys servers that were shipped in the last few days of the Unisys contract and that, when he brought this matter to Harvey's attention, characterizing them as a gross waste of funds, Harvey responded angrily and did nothing. IAF, Tab 12 at 13-14. As with the previous allegation of gross waste, this "disclosure" could not be protected because it was made to the wrongdoer.

Disclosures that Harvey and Boyles undermined the appellant's ability to successfully perform his job

¶33 The appellant alleged that the net effect of Harvey's and Boyle's wrongdoing was to undermine his ability to perform the duties of his position successfully:

> By the end of March 2009, Appellant found that the impediments that Mr. Boyles had created left Appellant unable to provide services to his clients in a timely manner. In March 2009, Appellant sent several emails to Mr. Boyles to discuss the projects that needed completion, but Mr. Boyles did not respond. Appellant's inability to meet his performance goals and Mr. Boyles's failure to provide Appellant with the most basic support left him vulnerable to criticisms of his performance.

IAF, Tab 12 at 14. Although we have found that the appellant's disclosures regarding the alleged inadequacy of his supervisors' responses to his reports that contractors were not meeting their contractual obligations did not rise to level of a protected disclosure, we find that these allegations, combined with the alleged effect of his supervisors' directives that he violate ethical obligations,[16] together

[16] Regarding his supervisors' response to reports that contractors were not meeting their obligations, the appellant stated that, "Instead of responding to Appellant's multiple reports, Mr. Harvey and Mr. Boyles not only failed to respond, they merely issued Appellant further work." IAF, Tab 12 at 7. Regarding his refusal to sign off on the Govplace invoice, the appellant noted that Boyles sent him an e-mail that stated, "If you refuse to sign the document, you will write a full report on why you suspect the information on the invoice is fraud." *Id.* at 8 & 54.

with allegations of the unfair distribution of work, *Id.* at 10 & 31, the appellant has made a nonfrivolous allegation of an abuse of authority.

Nonfrivolous allegation of contributing factor

¶34 The term "contributing factor" means any disclosure that affects an agency's decision to threaten, propose, take or not take a personnel action with respect to the individual making the disclosure. 5 C.F.R. § 1209.4(c). An employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor. 5 U.S.C. § 1221(e)(1); *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 15 (2010). To satisfy the test, the appellant need demonstrate only that the fact of, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Id.*

¶35 We find that the appellant has made a nonfrivolous allegation that a protected disclosure was a contributing factor in the determination to terminate him. The appellant has alleged, and the agency has not contested, that the agency officials involved in his termination knew of his disclosures. IAF, Tab 12 at 31-32, 53-56, 67; Tab 14 at 31, 81-82, 86-87. The appellant's disclosures occurred within less than a year of his termination. The Board has found that a period of more than 1 year between a protected disclosure and a personnel action can satisfy the knowledge/timing test. *See, e.g., Inman v. Department of Veterans Affairs*, 112 M.S.P.R. 280, ¶ 12 (2009). On remand, the appellant will have an opportunity to present evidence and argument to show that his disclosures were a contributing factor in the agency's decision to terminate him. *See, e.g., Weed*, 113 M.S.P.R. 223, ¶ 22.

¶36 If the appellant establishes the elements of his claim by preponderant evidence, the Board will order corrective action unless the agency demonstrates

by clear and convincing evidence that it would have taken the same personnel action absent the disclosure. The agency will have an opportunity to make that showing on remand. *See, e.g., Weed*, 113 M.S.P.R. 221, ¶ 23.

ORDER

¶37 We remand the appeal to the Washington Regional Office for further proceedings, including a hearing,[17] and adjudication of the merits of the appellant's IRA appeal.

FOR THE BOARD:

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

[17] Once the appellant establishes jurisdiction, he is entitled to a hearing on the merits of his IRA appeal. *Langer v. Department of the Treasury*, 265 F.3d 1259, 1265 (Fed. Cir. 2001).