UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JOHN S. EDWARDS,
Appellant,

v.

DEPARTMENT OF LABOR,
Agency.

DOCKET NUMBER
DC-1221-16-0227-W-1

DATE: April 20, 2017

Peter Broida, Esquire, Arlington, Virginia, for the appellant.

Elizabeth L. Beason, Esquire, and Rolando Valdez, Esquire, Washington, D.C., for the agency.

BEFORE
Sherry A. Zamora
Administrative Judge

INITIAL DECISION

The appellant timely filed an Individual Right of Action (IRA) appeal with the Merit Systems Protection Board (Board) alleging that agency reassigned him in retaliation for protected whistleblower activity. Appeal File (AF), Tab 1. For the following reasons, the appeal is DISMISSED for lack of Board jurisdiction.

BACKGROUND

The appellant served as the Deputy Director, GS-15, of the agency's Employment and Training Administration (ETA), Office of Information Systems and Technology (OIST), at the U.S. Department of Labor (agency). *Id.* In or around September and October 2015, the appellant verbally "disclosed and protested" to his supervisors, Lisa Lahrman (OIST Acting Administrator and

Administrative Officer) and Aung Htein (OIST Director), regarding their alleged failure to provide opportunities and assignments to African-American employees in OIST because of their race. AF, Tab 5 at 5. He further accused Larhman and Htein of discriminating against his subordinate, Darryl McDaniel, because of his race (African-American) when they refused to promote McDaniel to a vacant Supervisory Information Technology Specialist position for which McDaniel competed. *Id.* at 6. In October 2015, the appellant also filed "parallel" complaints of systemic race discrimination against African-American employees under the agency's Harassing Conduct Policy and also with the Agency's EEO office. *Id.* at 5-6.

On November 1, 2015, Lahrman reassigned the appellant from his supervisory position as Deputy Director to that of Special Assistant, GS-15, within OIST, a non-supervisory position. *Id.* at 9. On November 5, 2015, the agency posted the appellant's former Deputy Director position on USAJobs for recruitment. *Id.*

The appellant timely filed the instant IRA appeal alleging that the agency retaliated against him for whistleblowing activity when it reassigned him and posted his prior position on USAJobs. AF, Tab 1. The appellant asserts that his statements regarding race discrimination in OIST constitute protected disclosures of abuse of authority under 5 U.S.C. § 2302(b)(8), and protected lawful assistance under 5 U.S.C. § 2302(b)(9)(B). AF, Tab 1, Pages 4-5. Because it appeared that the Board may lack jurisdiction over this appeal, I issued an On December 21, 2015, after reviewing the appellant's allegations, I issued an Order to Show Cause setting forth the applicable law and affording the appellant an opportunity to submit evidence and argument to show cause why the appeal should not be dismissed. AF, Tab 3.

In his response to my jurisdictional order, the appellant provided details regarding his statements and complaints regarding race discrimination and his complaint of retaliation to the Office of Special Counsel (OSC). *See* AF, Tab 5.

The appellant argued that these activities constitute both protected disclosures of abuse of authority under § 2302(b)(8) and also protected activity under § 2302(b)(9)(B) as "lawful assistance" to the African-American coworkers he believed were discriminated against.[1] *Id.* In the agency's response to my jurisdictional order, it argued that the appellant did not have a reasonable belief that his allegations constituted disclosures of abuse of authority under §2302(b)(8) because the complainant was aware of the agency's legitimate reason for not promoting McDaniel. AF, Tab 11, Pages 8-10. The agency further asserted that the appellant's activities could not be considered protected "lawful assistance" under § 2302(b)(9)(B) because the affected employees had not exercised any right to file a complaint and had not requested the appellant's assistance in exercising that right. *Id.* at 11-12. Finally, the agency argued that the appellant failed to make a nonfrivolous showing that his disclosures contributed to the personnel actions at issue. *Id.* at 12-14. All submissions from both parties have been fully considered herein.

JURISDICTION

Burden of Proof

The Board does not have jurisdiction to address all matters that are alleged to be incorrect or unfair. *Miller v. Department of Homeland Security*, 111 M.S.P.R. 325, 332-33 (2009), *aff'd*, 361 F. App'x 134 (Fed. Cir. 2010). Rather, the Board adjudicates only those actions for which a right of appeal is granted by law, rule, or regulation. *See* 5 U.S.C.A. § 7701(a); 5 C.F.R. § 1201.3(a); *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir.

[1] The appellant states that his complaints of discrimination are protected by the lawful assistance "and other" provisions of § 2302(b)(9). AF, Tab 5 at 25-26. However, the appellant discusses only the lawful assistance clause set forth in § 2302(b)(9)(B). The appellant has provided no support for his allegation that his activities are protected by any other provision of § 2302(b)(9) and I find that these provisions are inapplicable to the circumstances of this appeal.

1985). The appellant bears the burden of establishing by preponderant evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2). Preponderance of the evidence is defined by regulation as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

To establish jurisdiction over an IRA appeal, an appellant must show that he exhausted his administrative remedies before the OSC and made the following non-frivolous allegations: (1) that he engaged in whistleblowing activity by making a protected disclosure; and (2) that 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); *King v. Department of the Army*, 116 M.S.P.R. 689, ¶ 6 (2011). I may consider only the particular disclosures and personnel actions that Appellant raised before the OSC. *See Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998); *Lewis v. Department of the Army*, 58 M.S.P.R. 325, 332 (1993).

Whistleblowing for these purposes is the disclosure of information that an appellant reasonably believed evidenced gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or a violation of a law, rule, or regulation. 5 U.S.C. § 2302(b)(8)(A). The disclosure must have been specific and detailed, not a broad-brush accusation that amounted only to a vague allegation of wrongdoing. *Rzucidlo v. Department of the Army*, 101 M.S.P.R. 616, ¶ 3 (2006); *Gryder v. Department of Transportation*, 100 M.S.P.R. 564, ¶ 13 (2005).

The Whistleblower Protection Enhancement Act (WPEA) of 2012 expanded the categories of protected disclosures. *See Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶ 9 (2014); *see also* WPEA § 101(b)(1)(A). Prior to the enactment of the WPEA, an appellant only could file an IRA appeal with the Board based on allegations of whistleblower reprisal under 5 U.S.C. § 2302(b)(8).

See Wooten v. Department of Health & Human Services, 54 M.S.P.R. 143, 146 (1992), *superseded by statute as stated in Carney v. Department of Veterans Affairs*, 121 M.S.P.R. 446, ¶ 5 (2014). Following the WPEA's enactment, however, an appellant also may file an IRA appeal with the Board concerning alleged reprisal based on certain other classes of protected activity as defined in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), and (D). 5 U.S.C. § 1221(a); *Hooker*, 120 M.S.P.R. 629, ¶ 9. As relevant here, § 2302(b)(9)(A)(i) bars reprisal for an appellant's personal exercise of any appeal, complaint, or grievance right granted by law, rule, or regulation concerning an alleged violation of § 2302(b)(8) (whistleblower reprisal). *See Carney*, 121 M.S.P.R. 446, ¶ 6, n. 3. Reprisal for filing a prior EEO complaint, however, is not included among prohibited personnel practices which can form the basis of an IRA appeal; rather, this prohibition is contained within 5 U.S.C. § 2302(b)(9)(A)(ii), and it does not provide a basis for establishing the Board's jurisdiction over an IRA appeal. *See Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 7 (2013).

An appellant is entitled to a jurisdictional hearing only where he makes a non-frivolous allegation that the Board has jurisdiction over his appeal. *See Smirne v. Department of the Army*, 115 M.S.P.R. 51, ¶ 8 (2010); *Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). Nonfrivolous allegations of Board jurisdiction are allegations of fact that, if proven, could establish that the Board has jurisdiction over the appeal; mere *pro forma* allegations are insufficient to satisfy this non-frivolous standard. *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 18 (2010). *See also Smirne*, 115 M.S.P.R. 51, ¶ 8; *Lara*, 101 M.S.P.R. 190, ¶ 7; *Ferdon*, 60 M.S.P.R. at 329. 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. *Weed*, 113 M.S.P.R. 221, ¶ 19; *Ferdon*, 60 M.S.P.R. at 329.

Exhaustion

The first element to Board jurisdiction over an IRA appeal is exhaustion by the appellant of his administrative remedies before OSC. 5 U.S.C. § 1214(a)(3); *Mudd*, 120 M.S.P.R. 365, ¶ 4; *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). I find the appellant has satisfied this requirement. The appellant contacted OSC on November 1, 2015 and alleged that he was reassigned to the position of Special Assistant in retaliation for making claims of systemic race discrimination to the agency's EEO office and also to his supervisors directly when his supervisors reassigned him to the position of Special Assistant. AF, Tab 1 at 20-48 (OSC Complaint). On November 20, 2015, OSC closed its inquiry into the appellant's allegations. AF, Tab 1 at 7.

Protected Activity

The next requirement is for the appellant to nonfrivolously allege that he engaged in protected activity within the meaning of the Whistleblower Protection Act of 1989 (WPA). *Mudd*, 120 M.S.P.R. 365, ¶ 4. Under the WPA, as amended by the WPEA, the Board has jurisdiction over an IRA appeal if the appellant made a disclosure protected under 5 U.S.C. § 2302(b)(8) or engaged in activity protected by § 2302(b)(9)(A)(i), (B), (C), or (D). *See* 5 U.S.C. 1221(a). A protected disclosure under § 2302(b)(8) is one which the appellant reasonably believed evidenced a violation of law, rule, or regulation, 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). Protected activity under § 2302(b)(9)(B) is "testifying for or otherwise lawfully assisting any individual in the exercise of" any "appeal, complaint, or grievance right granted by any law, rule, or regulation." 5 U.S.C. § 2302(b)(9)(B). *See also Hooker v. Department of*

Veterans Affairs, 120 M.S.P.R. 629, ¶ 9 (2014). Thus, as relevant to this case, the Board has jurisdiction over claims of retaliation for providing testimony for or otherwise lawfully assisting a coworker in exercising their right to complain of race discrimination. *Id.* (discussing the scope of the WPEA amendments to Title 5). The WPEA did not extended Board jurisdiction to claims of retaliation for an employee's own EEO-related protected activity. It is long settled before the Board that statements or complaints of an EEO nature are covered under § 2302(b)(1) and are excluded from coverage under § 2302(b)(8). *See, e.g.*, *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 84 (2001). *See* 5 U.S.C. § 2302(b)(9)(A)(ii).

I find, for the reasons set forth below, that the appellant fails to make a nonfrivolous allegation that his statements or complaints are protected under either § 2302(b)(8) or § 2302(b)(9)(B) and the Board lacks jurisdiction over the appellant's claims as an IRA.

Abuse of Authority

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 results in personal gain or advantage to himself or to preferred other persons. *See Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 15 (2014); *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 22 (2013). To establish that he held a reasonable belief that his disclosure evidenced an abuse of authority, the appellant need not prove that the condition disclosed actually established an abuse of authority, but he must show that the matter disclosed was one which a reasonable person in his position would believe evidenced an abuse of authority. *See Huffman v. Office of Personnel Management*, 92 M.S.P.R. 429, ¶ 9 (2002). The test to determine whether the appellant had a reasonable belief that his disclosures evidenced an abuse of authority 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" an abuse of authority under 5 U.S.C. § 2302(b)(8). *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed.Cir.1999), cert. denied, 528 U.S. 1153, 120 S.Ct. 1157, 145 L.Ed.2d 1069 (2000); *Huffman*, 92 M.S.P.R. 429, ¶ 9; *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 19 (2002).

As noted above, the Board has long held that claims of race discrimination alone are more appropriately within the jurisdiction of the EEOC and, therefore, are not considered protected disclosures under § 2302(b)(8). *See, e.g., Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 84 (2001) (purported disclosures that involve alleged discrimination or reprisal for engaging in activities protected by Title VII, even if made outside of the grievance or EEO processes, do not constitute protected whistleblower activity under section 2302(b)(8) because they pertain to matters of discrimination covered by section 2302(b)(1)(A)), review dismissed, 32 Fed. Appx. 543 (Fed. Cir. 2002); *Peterson v. Department of Transportation*, 54 M.S.P.R. 178, 183 (1992) (the employee's allegations of reprisal for allegedly providing information to an EEO investigator regarding sex and racial discrimination did not constitute "whistleblowing" disclosures under Section 2302(b)(8)). As discussed above, this remained true even after the WPEA as it also excluded from IRA jurisdiction coverage for disclosures made in the exercise of any appeal, complaint, or grievance other than those with regard to remedying a violation of 5 U.S.C. § 2302(b)(8).

In similar circumstances as those present in this appeal, the Board has held that allegations of discrimination alone do not constitute disclosures of abuse of authority under § 2302(b)(8). *See Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300 (2003). In *Applewhite*, the appellant made disclosures of, *inter alia*, racial discrimination, harassment, and creation of a hostile work environment due to management's failure to promote African-American employees. *See Applewhite*, 94 M.S.P.R. 300, ¶ 15-18. The

Board found that the appellant's statements and complaints to management solely related to discrimination matters, *id.* at ¶ 17, and noted:

> [w]hen the appellant did not get satisfaction from [her supervisors] or anyone else at the agency, she filed a formal discrimination complaint, which included the same allegations of harassment and hostile work environment due to the purposed discrimination.

Id. at ¶ 22. The Board held that the appellant's complaints to her supervisors were the same as her complaint of discrimination and harassment in violation of Title VII and, as such, the appellant did not have a reasonable belief that such complaints were protected by § 2302(b)(8). *Id.* at ¶ 23, citing *Spruill, Redschlag, Peterson.*

Similarly, in this appeal, it is readily apparent that the appellant's allegations are solely regarding perceived race discrimination as covered by Title VII. The appellant made allegations directly to his supervisors that McDaniel and other African-American employees were not promoted or given employment opportunities because of their race. *See* AF, Tab 5 at 4; *see also* AF, Tab 1, Pages 12-17. Within approximately one month, he filed a complaint under both the agency's Harassing Conduct Policy and also with the agency's EEO office regarding these issues of systemic and individual race discrimination. *Id.* The appellant also copied the agency's EEO personnel on his email to his supervisors detailing his claims of discrimination and retaliation following his reassignment to the Special Assistant position. *Id.* at 30-31. Finally, the appellant's OSC complaint explained that the agency retaliated against him for making race discrimination complaints. *Id.* at 27. It is clear from the appellant's OSC complaint and jurisdictional response that his allegations were related solely to his belief that his supervisors discriminated against African-American employees, i.e. that his disclosures were purely of an EEO nature protected by Title VII.

The underlying allegations in Appellant's EEO complaints do not establish that he made a disclosure under the WPA but, rather, his alleged disclosures

focus on claims of race and EEO-based retaliation under Title VII-§ 2302(b)(9). Accordingly, I find that the appellant did not establish IRA jurisdiction over his claims. As such, I find that the appellant's statements to his supervisors and complaints to the agency are appropriately covered by § 2302(b)(9)(A)(ii) and are excluded from coverage by § 2302(b)(8).[2] *See Applewhite*, 94 M.S.P.R. 300, ¶ 23; *Redschlag*, 89 M.S.P.R. 589, ¶ 84.

Claims of Lawful Assistance

An employee's act of "testifying for or otherwise lawfully assisting any individual in the exercise of any right" regarding their exercise of any appeal, complaint, or grievance is within the Board's jurisdiction in an IRA. 5 U.S.C. § 2302(b)(9)(B). *See Hooker*, *supra*. The appellant asserts that he was assisting African-American employees when he engaged in the Title VII activity discussed above. A plain reading of § 2302(b)(9)(B) requires that another employee be exercising a right protected by § 2302(b)(9)(A) with which the appellant is assisting. The appellant fails to make a nonfrivolous allegation that he was

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[2] The appellant cites to *Armstrong v. Department of Justice*, 107 M.S.P.R. 375 (2007), for the proposition that a disclosure regarding a potential EEO violation constitutes a nonfrivolous allegation of a protected disclosure under 5 U.S.C. § 2302(b)(8). *See* AF, Tab 5 at 25. In *Armstrong*, the Board upheld an administrative judge's finding that that the appellant reasonably believed his disclosure that African-American employees had not been given the opportunity to serve in positions typically required in order to qualify for a promotion evidenced a nonfrivolous allegation of a violation of law, rule, or regulation, or an abuse of authority. 107 M.S.P.R. 375, ¶17. However, the Board did not engage in any substantive analysis when it upheld the administrative judge's finding, instead determining that the appellant had failed to prove the disclosures were contributing factors in the employment actions at issue. *Id.* at ¶ 24. As such, I find that this case is an aberration that does not invalidate consistent and well-reasoned Board precedent that disclosures of an EEO nature do not constitute protected disclosures under 5 U.S.C. § 2302(b)(8). *See, e.g., Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 690 (Fed. Cir. 1992); *Mudd*, 120 M.S.P.R. 365, ¶ 7; *Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300 (2003); *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 84 (2001); *Peterson v. Department of Transportation*, 54 M.S.P.R. 178, 183 (1992). The remainder of the cases cited by the appellant involve disclosures that contain both EEO and non-EEO factors and, therefore, are inapplicable to this appeal. *See* AF, Tab 5 at 25.

providing assistance to coworkers who themselves raised claims of discrimination or were otherwise engaged activity covered by § 2302(b)(9)(A). In fact, the appellant does not allege that his coworkers were engaged in protected activity at all. *See generally*, AF, Tabs 1 and 5. Thus, the appellant has not engaged in activity protected under § 2302(b)(9)(B). To find otherwise would controvert Congress' clear intention to exclude from Board jurisdiction claims of retaliation for an employee's own EEO-related activity. *See* 5 C.F.R. § 1221(a) (specifically excluding from coverage retaliation for disclosures or complaints unrelated to § 2302(b)(8) subjects).

In sum, the appellant's underlying allegations do not establish that he made a disclosure under the WPA or the WPEA. The appellant clearly objects to an alleged agency practice whereby the agency fails to promote African-American employees and, to that end, he has filed formal EEO complaints. However, he cannot appeal his reassignment as an IRA appeal under these facts. The appellant has an avenue of recourse for these complaints, which he has taken in filing a discrimination complaint. The WPEA did not change the law that opposition to discrimination, without a b(8) component, does not qualify for protection under the WPA. *See Mudd*, 120 M.S.P.R. 365, ¶¶ 6-7. The appellant's attempt to cast his discrimination claims as whistleblower complaints fails as neither § 2302(b)(8) nor § 2302(b)(9) establishes IRA jurisdiction over the appellant's alleged disclosures. Moreover, the appellant's claims of jurisdiction based on his assertions that he was assisting other employees in the exercise of their complaint rights must also fail. For these reasons, the appeal is dismissed without a hearing because Appellant's allegations, even if proved, would not establish jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: _____/S/_____
Sherry A. Zamora
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **May 25, 2017**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice to the Appellant Regarding Your Further Review Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be

received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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 want to request review of this decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this decision only after it becomes final by filing in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-Bono/Overview-FAQ

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.