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: December 21, 2015

THIS DOCUMENT CONTAINS IMPORTANT INFORMATION ABOUT THIS APPEAL AND ITS PROCESSING. PLEASE READ THE ENTIRE DOCUMENT CAREFULLY.

ORDER ON JURISDICTION AND PROOF REQUIREMENTS

There is a question whether this appeal is within the Board's jurisdiction. As a result, the Board might dismiss the appeal for lack of jurisdiction without addressing the merits of the case. This Order provides necessary information concerning the jurisdictional issue and the burdens of proof the appellant must meet to show that the Board should not dismiss this appeal for lack of jurisdiction, as well as how to prove the claim on the merits.

The appeal claims the agency took retaliatory action because of the appellant's whistleblowing or other protected activity. I **ORDER** the parties to follow the procedures set out below. If either party has a question about any of the case processing instructions in this Order, you may call this office at the telephone number listed under my signature at the end of the Order for assistance.

NOTICE TO THE APPELLANT

Your claim that the agency retaliated against you because of your whistleblowing or other protected activity appears to be an individual right of action (IRA) appeal. *See* 5 U.S.C. § 1221. To establish Board jurisdiction over an IRA appeal, you must show that you exhausted your administrative remedies before the Office of Special Counsel (OSC) and make non-frivolous allegations that: (1) you engaged in whistleblowing activity by making a protected disclosure, or engaged in other protected activity as specified below; and (2) the disclosure or activity was a contributing factor in the agency's decision to take or fail to take a personnel action.

Specifically, you must show that you brought your whistleblower or other complaint to the attention of OSC, and exhausted OSC's procedures. You have "exhausted" OSC's procedures once OSC has notified you that it is terminating its investigation into your complaint. You may also show you exhausted OSC's procedures if 120 days have passed since you filed your claim with OSC and you have not received a termination notice. To satisfy this requirement, you must have informed OSC of the precise ground of your claim and given it a sufficient basis to pursue an investigation which might lead to corrective action. The test of the sufficiency of your claim to OSC is the statement you made in the complaint requesting corrective action or in other submissions to OSC, not any later characterization of those statements. It is not necessary, though, that you have correctly labeled the category of wrongdoing when you raised it to OSC.

A whistleblowing "disclosure" is defined at 5 U.S.C. § 2302(a)(2)(D) (eff. December 27, 2012) as "a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences-(i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds,

an abuse of authority, or a substantial and specific danger to public health or safety." *See* 5 U.S.C. § 2302(b)(8).

In addition, 5 U.S.C. § 2302(b)(9) also protects certain activity that may form the basis for an IRA appeal.[1] Specifically, that section makes it unlawful to take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of (A) the exercise of any appeal, complaint or grievance right granted by any law, rule, or regulation with regard to remedying a violation of section 2302(b)(8), discussed immediately above; (B) 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; (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or (D) refusing to obey an order that would require an individual to violate a law. I note that, in your appeal, you appear to allege retaliation for complaints made to agency managers alleging discrimination against African American employees. The Board has found that allegations that are limited to EEO matters covered under 5 U.S.C. § 2302(b)(1) and (b) (9) are excluded from coverage under section 2302(b)(8). *Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300, ¶ 23 (2003). Thus, an appellant cannot predicate his appeal on disclosures of EEO matters. *See McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶ 21 (2005).

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[1] Pursuant to the Whistleblower Protection Enhancement Act of 2012 (WPEA), an employee may now seek corrective action in an IRA appeal for any personnel action taken as a result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). 5 U.S.C. § 1221(a); *see Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677, ¶ 6 (2014). Reprisal for filing a prior EEO complaint, however, is not included among this listing of 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).

A non-frivolous allegation is a claim supported by affidavits or other evidence relevant to the matter at issue that, if proven, could establish the matters it asserts. Because you must make non-frivolous allegations as to each of the jurisdictional requirements set out in this Order, your claim and evidence must pertain to the proof required to support each element of those jurisdictional requirements. Conclusory, vague, or unsupported allegations are not enough to meet this standard. See 5 C.F.R. § 1201.4(s). As an administrative agency, the Board has wide latitude in the kinds of evidence that it can accept, and affidavits are just one example of the kind of evidence that may be used to support an allegation. The way in which an allegation may be supported will often depend on the particular facts of the case.

The Board has held that a "gross waste of funds" is more than a debatable expenditure, and is one that is significantly out of proportion to the benefit reasonably expected to accrue to the government; that "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; and that an "abuse of authority" occurs when a Federal official or employee arbitrarily or capriciously exercises power and adversely affects anyone's rights or causes personal gain or advantage to himself or to someone he prefers.

If your claim is made under section 2302(b)(8), you need not prove that the matter you disclosed actually established any of the conditions described above, such as gross mismanagement. You must, however, make a non-frivolous allegation that the matter you disclosed was one that a reasonable person in your position would believe was evidence of any of these situations. The test for determining whether your belief was reasonable is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger. 5 U.S.C. § 2302(b).

A non-frivolous allegation that a protected disclosure or activity was a contributing factor in the decision to take or fail to take a personnel action against you is a detailed, factual allegation that you disclosed one of the above matters or engaged in one of the protected activities, and that agency officials responsible for the personnel action were aware of your disclosure or activity and acted within such time that a reasonable person could find that the disclosure or activity contributed to the action. A disclosure shall not be excluded from 5 U.S.C. § 2302(b)(8), however, because of the amount of time which has passed since the occurrence of the events described in the disclosure. 5 U.S.C. § 2302(f)(1)(F). Meeting the knowledge and timing test satisfies your burden, but there are also other ways for you to satisfy it. If you do not introduce allegations and evidence to meet that test, the Board will then consider any relevant evidence on the contributing factor question, including the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing or activity was personally directed at the proposing or deciding official, and whether those individuals had a desire or motive to retaliate against you. You may also show that the official accused of taking retaliatory action had imputed knowledge of your protected disclosure or activity by showing that individuals with actual knowledge of it influenced the official's action.

In addition, you must make a non-frivolous allegation that the agency retaliated against you for your disclosure or activity. "Retaliated against you" means that the agency took or failed to take, or threatened to take or fail to take, a personnel action as defined by 5 U.S.C. § 2302(a)(2), such as a removal, suspension, or reassignment.

There is also another way to gain whistleblower status, which is by making a non-frivolous allegation that the agency perceived you as a whistleblower. For example, you may gain this status if you make a non-frivolous allegation that: The agency believed you to be the person who made anonymous complaints concerning violations of law, even though you were not, *see Special Counsel v.*

Department of the Navy, 46 M.S.P.R. 274 (1990); the agency knew of your intention to blow the whistle, although you had not done so, *see Mausser v. Department of the Army*, 63 M.S.P.R. 41 (1994); or you disagreed with a public position of the agency but expressed that only within the agency and did not intend for your expression of disagreement to constitute a whistleblowing disclosure but the acting official saw your view as dangerous, *see Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569 (1991); *see also Holloway v. Department of the Interior*, 82 M.S.P.R. 435, ¶ 15 (1999) (a newspaper reported, with no discussion of the particulars, that the appellant had disclosed "fraud, waste and abuse," but the appellant showed that the agency acted because of the report). The Board has not decided whether an individual alleging a violation of 5 U.S.C. § 2302(b)(9) may gain protected status by claiming to have been perceived as having engaged in protected activity.

In cases of perceived whistleblowing, the analysis focuses on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that you made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302(b)(8). In those cases, the issue of whether you actually made protected disclosures is immaterial to both the jurisdictional and merits issues of the appeal. However, you must still establish that you exhausted your remedies with OSC on the issue of whether the agency perceived you as a whistleblower and make non-frivolous allegations that the agency's perception was a contributing factor in its decision to take or not take the personnel action at issue. *King v. Department of the Army*, 116 M.S.P.R. 689, ¶¶ 8, 9 (2011).

PROOF OF CLAIM

If you show that the Board has jurisdiction over your appeal, you are entitled to a hearing on the merits of the appeal, at which you must prove each of those same matters by preponderant evidence, i.e., that you engaged in

whistleblowing that contributed to the personnel action(s). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.4(q). In other words, you must show that it is more likely than not that you engaged in whistleblowing or other protected activity that contributed to the personnel action.

If you meet this burden, then for the agency to prevail it must show by clear and convincing evidence that it would have taken the same personnel action even if you had not made a disclosure or engaged in other protected activity. In order to determine whether the agency met its clear and convincing evidence burden, the Board looks at the strength of the evidence the agency used in support of the personnel action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision(s), and any evidence that the agency takes similar actions against employees who are not whistleblowers or have not engaged in other protected activity, but who are in other ways similar to you with respect to your Federal employment.

If you claim that you were perceived as a whistleblower, as noted above, whether you actually were is not material; however, you must establish by preponderant evidence the same matters that established jurisdiction. If you meet your burdens on the merits of the appeal, the agency may still prevail if it can show by clear and convincing evidence that it would have taken the personnel action even if it had not perceived you as a whistleblower.

REQUIRED SUBMISSIONS

For purposes of deciding whether the Board has jurisdiction over your appeal (that is, whether you made non-frivolous allegations as to each of the jurisdictional elements discussed earlier), I **ORDER** the appellant to file a statement, accompanied by evidence, listing the following: (1) your protected disclosure(s) or activity(ies); (2) the date(s) you made the disclosure(s) or

engaged in the activity(ies); (3) the individual(s) to whom you made any disclosure(s); (4) why your belief in the truth of any disclosure(s) was reasonable; (5) the action(s) the agency took or failed to take, or threatened to take or fail to take, against you because of your disclosure(s) or activity(ies); (6) why you believe a disclosure or activity was a contributing factor to the action(s); and (7) the date of your complaint to OSC and the date that it notified you it was terminating its investigation of your complaint, or if you have not received such notice, evidence that 120 days have passed since you filed your complaint with OSC. Unless you submit a copy of the complaint you submitted to OSC, along with any amendments you filed there, and a copy of the OSC letter notifying you of your right to appeal to the Board, your response must be in the form of an affidavit, sworn statement, or declaration under penalty of perjury, 28 U.S.C. § 1746, a form for which is found in the Board's regulations at 5 C.F.R. Part 1201, Appendix IV. The law does not require that you submit a copy of OSC's letter, but it does provide that you bear the burden of establishing the required elements of an IRA appeal.

You must file this statement within 10 calendar days of the date of this Order, and must serve a copy on the agency at the same time. The agency may file a response on the jurisdictional issue within 20 calendar days of the date of this Order. Unless I tell the parties otherwise, the record on the issue of jurisdiction will close on the date the agency's response is due. No evidence and/or argument on jurisdiction filed after that date will be accepted unless the party submitting it shows that it was not readily available before the record closed. Notwithstanding the close of the record, however, pursuant to 5 C.F.R. § 1201.59(c), a party must be allowed to respond to new evidence or argument submitted by the other party just before the close of the record. If there is no

jurisdiction, I will dismiss your appeal. If the Board has jurisdiction, I will adjudicate your appeal and will schedule a hearing as requested.

FOR THE BOARD: _____/S/_____

Sherry A. Zamora
Administrative Judge
Phone: (703) 756-6250
Fax: (703) 756-7112

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

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December 21, 2015
(Date)

/s/
Latisha Clinton
Paralegal Specialist