UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GILBERTO TELLO,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DA-1221-10-0137-W-1

DATE: July 18, 2011

THIS ORDER IS NONPRECEDENTIAL

Rebecca L. Fisher, Esquire, McGregor, Texas, for the appellant.

Stephanie L. Ciechanowski, Esquire, Laredo, Texas, for the agency.

BEFORE

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

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. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). For the reasons

set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

In his refiled IRA appeal,[1] Initial Appeal File (IAF), Tab 1, the appellant, a GS-11 Senior Patrol Agent, renewed his claims that he disclosed in an April 28, 2009 letter to the Department of Justice that on April 16, 2009, during an investigation of alleged welfare fraud, individuals believed to be Federal agents detained, threatened, and assaulted a woman who is the mother of his children, and that on April 21, 2009, he was mistreated during an interview with the Customs and Border Patrol Agents from the Office of Internal Affairs. *See id*., Tab 13 at 1-3. The appellant also alleged that he disclosed the detention and assault, along with other instances of agency wrongdoing, in May 26, 2009 letters to President Obama and the Attorney General. *Id.*, Tab 13, Subtab 7. Because of these disclosures, the appellant alleged he learned on June 16, 2009, that the agency had failed to select him for a GS-12 Lead Border Patrol Agent position for which he had applied, and that, on August 4, 2009, the agency stripped him of all status as a law enforcement officer and assigned him to administrative duties. *Id.*, Tab 7, Tab 13, Subtab 5. The appellant also alleged that he had now exhausted his remedy before the Office of Special Counsel (OSC). *Id.*, Tab 7, Tab 13, Subtab 4. He requested a hearing. *Id.*, Tab 7 at 2.

The administrative judge denied the appellant's request for a hearing after finding that he had failed to make a nonfrivolous allegation of Board jurisdiction over his appeal. Initial Decision (ID) at 2 n.2. Based on the written record, the administrative judge found that the appellant had exhausted his remedy before

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[1] The appellant's first IRA appeal was dismissed for lack of jurisdiction because the Office of Special Counsel (OSC) had not yet notified him that it was terminating its investigation into his claims of whistleblower retaliation, and 120 days had not passed from the date of his filing with OSC. *Tello v. Department of Homeland Security*, MSPB Docket No. DA-1221-09-0690-W-1 (Initial Decision, Oct. 23, 2009).

OSC, *id.* at 15, 18, and that he showed that he was subjected to two personnel actions. *Id.* at 12-13, 18. The administrative judge found, however, that the appellant failed to make a nonfrivolous allegation that his letter to the Department of Justice was a protected disclosure because it did not provide facts that a disinterested observer could reasonably conclude described actions of the government. *Id.* at 16. The administrative judge further found that, assuming arguendo that the letter was a protected disclosure, the appellant failed to nonfrivolously allege that it was a contributing factor to any of the alleged retaliatory actions because he did not show that any agency official had knowledge of the letter before the actions occurred. *Id.* at 17. Similarly, the administrative judge found, as to the letters to President Obama and the Attorney General, that the appellant did not show that any agency officials knew about the letters, and that he had therefore failed to nonfrivolously allege that the letters were a contributing factor to any of the alleged retaliatory actions. *Id.* Based on these findings, the administrative judge dismissed the appeal for lack of jurisdiction.

The appellant has filed a petition for review and has submitted additional documents with his petition.[2] Petition for Review file, Tab 1. The agency has responded in opposition. *Id.*, Tab 3.

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[2] The four documents the appellant has submitted with his petition for review consist of: (1) a copy of a slip of paper that the investigators allegedly gave to the woman at the time she was detained; (2) the name, address, and phone number of a state employee who allegedly has knowledge of the welfare fraud matter; (3) a copy of the complaint the woman filed with the state Attorney General regarding her alleged detention and assault; and (4) a copy of a complaint she filed with the American Civil Liberties Union regarding that matter. Petition for Review File, Tab 1, Exhibits 1-4. The appellant has not shown that any of the documents or the information they contain was unavailable despite his due diligence prior to the close of the record below. Therefore we have not considered them. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); *see also Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989).

ANALYSIS

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (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 satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving 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). A protected disclosure under 5 U.S.C. § 2302(b)(8) is any disclosure of information by an employee that the employee reasonably believes evidences 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. *Drake v. Agency for International Development*, 543 F.3d 1377, 1380 (Fed. Cir. 2008). The proper test for determining whether an employee has 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 wrongdoing as defined by the Whistleblower Protection Act (WPA). *Id.* at 1382. A broad range of personnel actions fall within the Board's jurisdiction under the WPA. *See* 5 U.S.C. § 2302(a)(2)(A).

In an IRA appeal, the jurisdictional threshold is met if the employee presents nonfrivolous allegations that he made a protected disclosure that was a

contributing factor to a personnel action that the agency took or proposed to take against him. *Johnston v. Merit Systems Protection Board*, 518 F.3d 905, 909 (Fed. Cir. 2008). The appellant need not prove his allegations on the merits as part of the jurisdictional inquiry, *id.* at 911, and whether he has presented nonfrivolous allegations is determined on the written record; if jurisdiction exists, the Board then conducts a hearing on the merits. *Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008).

Here, the administrative judge correctly found that the appellant exhausted his remedy before OSC. IAF, Tab 13, Subtab 4; Tab 7, Exhibits A, C. *See Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶¶ 12-15 (2008) (an appellant may establish exhaustion of his OSC remedy through his initial complaint, as well as evidence that he amended that complaint, including, but not limited to, OSC's determination letter and other letters from OSC referencing his amended allegations, and his written responses to OSC referencing OSC's discussion of the amended allegations). The administrative judge also correctly found that the appellant was subject to two personnel actions.[3] A nonselection for promotion is a "personnel action" for purposes of the WPA. *Reeves v. Department of the Army*, 99 M.S.P.R. 153, ¶ 15 (2005). And, stripping the appellant of his law enforcement authority and placing him on administrative duties constitutes a significant change in duties, also recognized as a covered personnel action under the WPA. *See* 5 U.S.C. § 2302(a)(2)(A)(xi); *see also Johnston*, 518 F.3d at 912.

As noted, the administrative judge found that the appellant failed to nonfrivolously allege that his letter to the Department of Justice was a protected

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[3] As noted, at this stage of the proceedings, an appellant is only required to make nonfrivolous allegations. We find that he nonfrivolously alleged that he was subject to two personnel actions and that the administrative judge's adjudicatory error in making a merits determination on this issue did not prejudice the appellant's substantive rights. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

disclosure. ID at 15-16. If a sexual assault was committed under "color of law," as alleged by the appellant in his April 28, 2009 letter, such action would constitute a violation of law. IAF, Tab 13, Subtab 6 at 60-63. Indeed, the appellant cited specific provisions of the Texas Penal Code that he believed were violated. *Id.*, Subtab 2.

The administrative judge reasoned, however, that the allegation that "men possibly pretending to be Federal Agents on State property" had committed a sexual assault does not provide facts that a disinterested observer could reasonably conclude described actions of the government. ID at 16. It is, in fact, government wrongdoing that the WPA encourages government personnel to disclose. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998). However, the Board has found that, when the government's interests and good name are implicated in the alleged wrongdoing, and when the appellant shows that he reasonably believed that the information disclosed evidenced that wrongdoing, the disclosure is protected under 5 U.S.C. § 2302(b)(8). *Miller v. Department of Homeland Security*, 99 M.S.P.R. 175, ¶¶ 12-13 (2005) (disclosure regarding alleged wrongdoing of state government officials was protected because the state and federal agencies were engaged in a joint operation, and the alleged misconduct by the state employees as part of that joint operation implicated the federal government's interests and good name); *Arauz v. Department of Justice*, 89 M.S.P.R. 529, ¶ 7 (2001) (disclosure regarding alleged wrongdoing by a private organization was protected when the agency was in a position to influence or exercise oversight over the organization's performance of a federal agency's responsibilities).

Here, at the time the appellant made this disclosure, it was his understanding, based on what the woman in question related to him, that, on April 16, 2009, she was summoned to a state government building in connection with an investigation concerning possible welfare fraud; that, when she left the building, she was followed; and that she was subsequently forced into a van and

detained for several hours during which time she was questioned further about the alleged welfare fraud, threatened with deportation, and sexually assaulted. The appellant was also aware that the woman had contacted the police department about the incident and that an investigation had been opened. In addition, he knew that, when he was interviewed several days later by Office of Internal Affairs investigators, the interview focused on the same allegations of welfare fraud as those that were discussed with the woman, and that some of the same questions were asked. Under these circumstances, the interests and good name of the federal government are clearly implicated. We find that a disinterested observer with knowledge of these essential facts could reasonably conclude that the woman was detained and assaulted by government officials, and that one or more of the officials who later questioned the appellant participated in her detention and assault, and we therefore find that the appellant nonfrivolously alleged that his letter to the Department of Justice constituted a protected disclosure. *See Drake v. Agency for International Development*, 103 M.S.P.R. 524, ¶ 11 (2006) (any doubt or ambiguity as to whether the appellant has made nonfrivolous allegations should be resolved in favor of finding jurisdiction).

The administrative judge found that, assuming arguendo that the appellant had nonfrivolously alleged that his letter to the Department of Justice was a protected disclosure, he did not nonfrivolously allege that it was a contributing factor to either his nonselection for promotion or the agency's stripping him of his status as a law enforcement officer and placing him on administrative duties. ID at 17. The administrative judge found that the appellant failed to show that any agency officials knew of the disclosure before the alleged retaliatory actions occurred. *Id.*

In order to satisfy the contributing factor standard at the jurisdictional stage, the appellant need only nonfrivolously allege that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 12

(2008). In a 1994 amendment to the WPA, Congress established a knowledge/timing test that allows an employee to demonstrate that a disclosure was a contributing factor in a 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 in the personnel action. *Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 12 (2009), *aff'd*, 353 F. App'x 435, *cert. denied*, 130 S. Ct. 2084 (2010). As to his claim that he was stripped of his law enforcement authority and assigned administrative duties, the appellant alleged that he sent copies of his April 28, 2009 letter to the Department of Justice to the Hebbronville Border Patrol Station and the Laredo Sector Station where he was employed. IAF, Tab 13, Subtab 6 at 61-64. Even though he did not copy the letter to any particular individual, it is reasonable to assume, as the appellant alleged, that management officials, including Acting Deputy Chief Patrol Agent John Esquivel, would have been aware of the letter in that it contained very serious allegations of wrongdoing. Moreover, Esquivel notified the appellant by memorandum of August 4, 2009, that, effective immediately, his authority to carry a Service-issued firearm and non-deadly force weapons was rescinded, based on allegations of off-duty misconduct for which he had been recently interviewed and that he was placed on administrative duties, effective immediately. IAF, Tab 13, Subtab 5. This personnel action occurred within a period of time such that a reasonable person could conclude that the appellant's disclosure was a contributing factor in the personnel action. *Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 26 (2010). Based on the knowledge/timing test, we therefore find that the appellant nonfrivolously alleged that his disclosure to the Department of Justice was a contributing factor in the agency's decision to strip him of the law enforcement duties and place him on

administrative duties,[4] and that he has therefore established the Board's jurisdiction over his IRA appeal.[5]

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[4] In finding that the appellant did not nonfrivolously allege that his letter to the Department of Justice was a contributing factor in his non-selection for the GS-12 Lead Border Patrol Agent position, the administrative judge relied on evidence submitted by the agency which showed that the selecting official chose another candidate on April 2, 2009, weeks before the appellant sent his letter to the Department of Justice. ID at 18. 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. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). The agency's evidence that a selection was made on April 2, 2009, is merely a contradiction of the appellant's otherwise adequate nonfrivolous allegations of fact as to this matter. However, because we agree with the administrative judge's finding that the appellant failed to nonfrivolously allege that the selecting official had knowledge of his letter to the Department of Justice, and because that failing defeats his jurisdictional claim as to this issue, the administrative judge's error with regard to the timing portion of the knowledge/timing test did not prejudice the appellant's substantive rights. *Panter*, 22 M.S.P.R. at 282.

[5] The administrative judge failed to make a specific finding as to whether the appellant nonfrivolously allege that his May 26, 2009 letters to President Obama and the Attorney General were protected disclosures. IAF, Tab 13, Subtab 7. In the first letter, the appellant related the alleged detention and sexual assault of the mother of his children. Because we have found that, in making that same claim in his letter to the Department of Justice, the appellant nonfrivolously alleged that he made a protected disclosure, we make that same finding here. However, we agree with the administrative judge that the appellant did not allege that any of the management officials who were involved in the personnel actions at issue had any knowledge of his letter to President Obama and that therefore the appellant failed to nonfrivolously allege that his letter to President Obama was a contributing factor to either personnel action. ID at 17. In his letter to the Attorney General, the appellant made allegations of abuse of authority against Acting Deputy Chief Patrol Agent Esquivel, *id.*, but even if they amounted to a nonfrivolous allegation of a protected disclosure, we again agree with the administrative judge that the appellant did not, as with his letter to President Obama, allege that any management officials who were involved in the personnel actions at issue had any knowledge of the letter to the Attorney General and that therefore the appellant failed to nonfrivolously allege that his letter to the Attorney General was a contributing factor to either personnel action.

ORDER

Accordingly, because we have found that the appellant has met his burden to show that the Board has jurisdiction over this IRA appeal, we VACATE the initial decision and REMAND the appeal to the Dallas Regional Office for a hearing and adjudication on the merits.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.