NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARGARET M. REED,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1628

Petition for review of the Merit Systems Protection Board in No. CH-1221-13-1557-B-1.

Decided: February 7, 2024

MARGARET MICHELLE REED, Jupiter, FL, pro se.

VIJAYA SURAMPUDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, FRANKLIN E. WHITE, JR.

Before LOURIE, PROST, and REYNA, *Circuit Judges*.

Opinion for the court filed PER CURIAM.

Dissenting opinion filed by *Circuit Judge* REYNA.

PER CURIAM.

Margaret Michelle Reed appeals from a decision of the Merit Systems Protection Board ("the Board") denying a request for relief in an Individual Right of Action ("IRA") appeal that asserted agency retaliatory action for alleged whistleblowing activity. *Reed v. Dep't of Veterans Affs.*, No. CH-1221-13-1557-B-1, 2023 WL 2213175 (M.S.P.B. Feb. 24, 2023), R.A. 78–92.[1]

For the following reasons, we *affirm*.

BACKGROUND

In 2009, Reed began working as a Human Resources Specialist at a Department of Veterans Affairs Medical Center. On January 12, 2012, she engaged in a verbal exchange with her supervisor, Jennifer Pardun, regarding Pardun's apparent refusal to answer a work-related question that Reed had raised several times over e-mail. On January 13, 2012, Pardun submitted a Report of Contact, accusing Reed of engaging in threatening and disrespectful behavior during the previous day's exchange. R.A. 96.

On February 13, 2012, the Assistant Chief of the Human Resources Management Service ("HRMS"), Rolanda Watkins, issued Reed an admonishment for disrespectful conduct based on Pardun's account of the January 12, 2012 incident. R.A. 93–95. Reed filed both an informal and a formal grievance challenging the factual basis of that admonishment. Both were denied. *See, e.g.*, R.A. 111–17; P.A. 253.[2]

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[1] "R.A." refers to the appendix filed with Respondent's brief.

[2] "P.A." refers to the appendix filed with Petitioner's brief.

On June 22, 2012, Reed e-mailed the Medical Center Director, Glenn Costie, to inform him of what she believed was a futile grievance process. R.A. 118. In her e-mail, she averred that the allegations underlying her admonishment had been fabricated by Pardun in an attempt to secure an admonishment. *Id.* She also expressed that she had expected that the agency would have conducted further fact finding while investigating her formal grievance. *Id.* Her e-mail also included a request to meet with Director Costie to discuss the matter. *Id.*

On July 26, 2012, Reed sent an additional e-mail to Director Costie as well as HRMS Chief Jerry Erwin outlining her concerns regarding the grievance process. R.A. 120. In particular, she wrote that HRMS management had ignored the factual disputes that she had raised and had failed to make additional factual inquiries as required by agency policy. *Id.* She further contended that that agency failure constituted a violation of her due process rights. *Id.*

On August 3, 2012, a meeting was held by Reed's department managers, including HRMS Chief Erwin and HRMS Assistant Chief Watkins, announcing that any employee who contacted the Director's office without approval from his or her management team would face disciplinary action. *See* P.A. 174.

On August 29, 2012, Reed met with Director Costie and contended that her admonishment was an unwarranted personnel action taken without due process. *See* P.A. 175–77. She also asserted that, in retaliation for her filing the grievances, the Chief and Assistant Chief of HRMS failed to follow various agency rules. *Id.*

Somewhat contemporaneously, on August 15, August 24, and October 1, 2012, three agency employees filed reports suggesting that Reed was unhelpful or rude in performing her duties of giving advice on various personnel matters. *See* R.A. 130–31 (reporting that she was rude on a phone call); *id.* at 128 (reporting that she spoke with a

"snippy tone" on a phone call and sighed on a voice mail); *id.* at 125–26 (asserting frustration that she did not provide a citation to support an answer that she had given, while acknowledging that she was still helpful and that the complainant's frustrations may lie in the procedural aspects of his job rather than with Reed). Reed provided responses to each of those reports, providing context and her own experiences, as well as evidence supporting her continued attempts to be helpful and to provide beneficial service. *See* P.A. 16–22 (August 17, 2012 response to the August 15, 2012 complaint), 33–35 (August 30, 2012 response to the August 24, 2012 complaint), 41–44 (October 2, 2012 response to the October 1, 2012 complaint).

On October 4, 2012, HRMS Chief Erwin proposed suspending Reed for three days. P.A. at 4–7. Soon thereafter, he issued a decision effecting that suspension. P.A. 8–9 (asserting that "the sustained charges against [Reed were] of such gravity that mitigation of the proposed penalty is not warranted"). In the notice of suspension, Erwin noted that his decision involved consideration of the three recent reports on Reed's conduct as well as Reed's past disciplinary record, which included the February 13, 2012 admonishment that remained in her personnel file.[3] *Id.*

In a November 7, 2012 complaint to the Office of Special Counsel ("OSC"), Reed asserted that the suspension was evidence of agency retaliation for whistleblowing activity in violation of 5 U.S.C. § 2302(b)(8). P.A. 62–72. On May 16, 2013, the OSC issued a preliminary decision to close the file without taking corrective action in view of a lack of "evidence that any management officials

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[3] Although agency procedures allow for such an admonishment to be removed from an employee's personnel file six months after issuance and Reed timely requested such a removal, HRMS Assistant Chief Watkins elected not to do so. *See* R.A. 67 n.3, 93–95; P.A. 168–69, ¶¶ 6–7.

responsible for the personnel actions suffered any adverse impact as a result of [Reed's] meeting with the Director." R.A. 157–58. Reed responded, noting that the cited rationale was not the relevant legal standard, *id.* at 159–62, but the OSC nevertheless closed its file on June 7, 2013 without taking corrective action. *Id.* at 163–64.

Reed then filed an IRA appeal under the Whistleblower Protection Act ("WPA") on July 29, 2013. R.A. 1. In a March 31, 2014 initial decision, an administrative judge ("AJ") held that she had not met her burden to establish jurisdiction because she had failed to nonfrivolously allege that she had made protected disclosures under § 2302(b)(8). R.A. 1–16. But on November 25, 2014, the Board modified that initial decision, finding that she had made a nonfrivolous allegation of at least one protected disclosure in the form of her OSC complaint, and that Reed should also be given an opportunity to argue on remand that the agency perceived her to be a whistleblower even in the absence of a protected disclosure. *Id.* at 21–29. The Board subsequently remanded the case for further adjudication. *Id.* at 29. However, on January 6, 2015, the Board vacated its November 25, 2014 decision and instead affirmed the March 31, 2014 initial decision that found a lack of jurisdiction. *Id.* at 32–47.

Reed then appealed to this court. While that appeal was pending, the Board requested that we vacate its January 6, 2015 decision in light of its new determination that Reed had, in fact, made a nonfrivolous allegation that each of her June 22, July 26, and August 29, 2012 disclosures were protected and were contributing factors in various personnel actions. R.A. 48–50. At the Board's request, its decision was vacated by this court on June 23, 2015 and the case was remanded for further adjudication. *Id.* The Board subsequently issued its own remand order on September 25, 2015, instructing the AJ to issue a new initial decision evaluating whether or not Reed's June 22, July 26, and August 29, 2012 disclosures were protected under

§ 2302(b)(8). R.A. 51–56. If so, the AJ was to evaluate whether or not those disclosures contributed to the alleged retaliatory actions consisting of (1) discipline threatened for meeting with the Director; (2) the August 29, 2012 decision not to remove Reed's admonishment from her personnel file; (3) the 3-day suspension proposed on October 4, 2012; and (4) the 3-day suspension issued on October 29, 2012. *Id.*

On remand, the AJ found that none of the disclosures were protected because Reed could not have reasonably believed that her admonishment was an abuse of authority or that an agency rule had been violated in the course of issuing her admonishment or handling her subsequent grievances. R.A. 57–77. Reed filed a petition for review, which was denied. The remand initial decision thus became the Board's final decision on February 23, 2023. R.A. 78–92. Reed appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

Reed contends that the Board erred in holding that she failed to establish that any of the June 22, July 26, or August 29, 2012 disclosures was protected under § 2302(b)(8). We review the Board's legal determinations *de novo* and its underlying findings of fact for substantial evidence. *Welshans v. United States Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008). A court will not overturn an agency decision if it is not contrary to law and was supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. Nat'l Lab. Rel. Bd.*, 305 U.S. 197, 229 (1938).

Under the WPA, any supervisory employee with the authority to take, recommend, or approve a personnel action may not take, or threaten to take, such an action because of an employee's disclosure that that employee "reasonably believes 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," assuming the disclosure is not specifically prohibited by law or otherwise "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A). An employee may be protected from retaliation under the WPA even if her reasonable belief of agency wrongdoing was mistaken. *See Drake v. Agency for Int'l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008).

Here, the four allegedly prohibited personnel practices identified by the Board in its September 25, 2015 remand order all fall within the umbrella of disciplinary or corrective actions under 5 U.S.C. § 2302(a)(2)(A)(iii). *See* R.A. 55–56. There appears to be no dispute that those four personnel practices were performed at the behest of agency employees with the authority to take, recommend, or approve personnel actions.

Reed does not allege that her disclosures evidence a gross waste of funds or a substantial and specific danger to public health or safety. And, although the AJ, Board, and government on appeal each discussed a lack of a showing of gross mismanagement, Reed has never asserted gross mismanagement. She does allege, however, that each of her disclosures demonstrated that she reasonably believed that the agency (i) violated a law, rule, or regulation under 5 U.S.C. § 2302(b)(8)(A)(i) and (ii) committed an abuse of authority under 5 U.S.C. § 2302(b)(8)(A)(ii). We address both in turn below.

I.

We turn first to protection under 5 U.S.C. § 2302(b)(8)(A)(i). Reed asserts that the agency violated its grievance policies, which she asserts amounts to the violation of a rule. She does not appear to assert that the agency violated a law or regulation.

We begin with her first disclosure, the June 22, 2012 e-mail bringing concerns regarding an allegedly futile grievance process to the attention of the Medical Center Director. The Board determined that that e-mail could not have disclosed such a violation because she "failed to show that the agency was required by its own rules to conduct any further fact finding regarding her grievance or to allow her to present her grievance orally, and the record did not reflect that the agency had denied her any required procedural protections." R.A. 84.

The proper test for determining if an employee made a protected disclosure rests on whether or not that employee had a reasonable belief that her disclosures revealed misconduct prohibited under the WPA. *See* 5 U.S.C. § 2302(b)(8)(A). That inquiry involves evaluating whether or not 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 agency evidence wrongdoing as defined by the WPA. *See Drake*, 543 F.3d at 1382; *see Huffman v. Office of Pers. Mgmt.*, 92 M.S.P.R. 429, 433 (2002) ("To establish that he held such a reasonable belief, an appellant need not prove that the condition disclosed actually established one or more of the listed categories of wrongdoing, but he must show that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified in 5 U.S.C. § 2302(b)(8).").

The analysis therefore turns not on Reed's ability to establish that the agency violated its own rules, but whether or not she reasonably believed that it had.

We agree with the Board that the June 22, 2012 e-mail did not evidence a belief that a rule had been violated. *See* P.A. 234. Rather, it served to bring the nature of the existing grievance process to the attention of the Medical Center Director. *Id.* Although Reed did note that she "thought that an additional fact finding would occur with employees

who could shed light on the fact that the scenario depicted within the admonishment never happened" and that "no one did an additional fact-finding," she did not assert that failure to perform additional fact-finding was a rule violation. The June 22, 2012 e-mail therefore does not constitute a protected disclosure under § 2302(b)(8)(A)(i).

The July 26, 2012 e-mail did not merely raise a concern with a futile grievance process. Rather, Reed asserted that "in order to afford me any real due process, an additional inquiry would have had to occur. I believe this was required as the policy is written." R.A. 242. Nevertheless, we do not find that such a cursory statement sufficiently alleges a rule violation, and for that reason do not find the July 26, 2012 disclosure to be a protected disclosure under the WPA.

The limited evidence describing what was asserted at Reed's August 29, 2012 meeting with the Medical Center also appears insufficient to overturn the Board's conclusion that those disclosures were not protected. For example, a statement signed by an attorney who accompanied Reed to the meeting describes how Reed "reiterated many of the same points that were in her grievance." R.A. 169. However, the attorney's statement does not sufficiently explain what those points were. The statement seems to indicate that Reed asserted that the agency deviated from standard procedures in handling her grievances, *see* R.A. 169, but that is not the same as alleging that those deviations were actual rule violations. Similarly, the attorney testified that he "reviewed the agency's grievance policy and found that [Reed] w[as] afforded none of the procedures that would have amounted to a substantive process for review." *See* R.A. 168. But there does not appear to be a sufficiently pled allegation that such deviations were rule violations.

In view of the above, there is insufficient evidence before us to overturn the Board's determination that none of the three disclosures constitutes a protected disclosure

under § 2302(b)(8)(A)(i).

II.

We next turn to Reed's allegations of an abuse of authority under 5 U.S.C. § 2302(b)(8)(A)(ii). In adopting the AJ's remand initial decision, the Board agreed with the AJ's holding that all three disclosures lacked a reasonably believed assertion of an abuse of authority. *See* R.A. 83–84. In particular, the AJ found that the evidence most favorable to Reed describing the January 12, 2012 exchange with Pardun described her as being involved "in a loud, non-productive exchange" that involved acting with disrespect toward her supervisor. R.A. 64–66. The AJ reasoned that, because her own testimony could be viewed as supporting a finding that she was disrespectful toward her supervisor, Reed deserved the admonishment, and she therefore could not have reasonably believed that the issuance of the admonishment constituted an abuse of authority. *Id.* The Board agreed.

"Although § 2302 does not define abuse of authority, related whistleblower-protection statutes" define it as "an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned." *Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, 1352 (Fed. Cir. 2022).

The foundational question that Reed presents at the heart of her appeal is a factual one: did she engage in the January 12, 2012 altercation as Pardun alleged. The AJ and Board found that she did. R.A. 84–85. Reed appears to have acknowledged that evidence in the record supports the conclusion that she acted disrespectfully toward her supervisor. She has also acknowledged that if she did engage in disrespectful conduct, it would have been reasonable for her to be disciplined. R.A. 118. But Reed challenges that evidence in the record, asserting that it was fabricated to support an unjust admonishment. She alleges that a complaint of fabricated evidence appears in each of the June

22, July 26, and August 29, 2012 disclosures and that establishes her charge of an abuse of authority, not simply the fact that she was admonished.

But the Board found (1) that Reed's "insistence that the agency fabricated the evidence in support of her admonishment is not supported by the record," (2) that her own testimony regarding the January 12, 2012 incident supported the admonishment, and (3) that even her most favorable evidence corroborated the agency's version of the events on January 12, 2012. We review such factual findings for substantial evidence. *Welshans*, 550 F.3d at 1102.

There is some evidence to support that the report submitted by Pardun was embellished, as several employees filed statements testifying to that effect. *See* R.A. 58–59 (employee reports describing Pardun's account as "embellished" and "not accurate"); *id.* ("the exchange I heard does not support" Pardun's accounting of events); *id.* at 60 ("I do not believe that the incident in the admonishment [occurred] as reported."); *id.* (the incident had not risen "to the level of intensity reported"); *id.* ("not believ[ing]" Pardun's account).

However, even if Reed reasonably believed, and some evidence in the record supports that, Pardun's Report of Contact unfairly characterized their interaction, such behavior is not an abuse of authority under the whistleblowing statutes. Our case law has emphasized that routine disputes between an employee and a supervisor are not encompassed by the WPA. *Langer v. Dep't of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). The facts of this case reflect only an employee-supervisor dispute. We therefore find that none of the June 22, July 26, and August 29, 2012 disclosures asserting abuses of authority was protected under 5 U.S.C. § 2302(b)(8)(A)(ii).

III.

Because we find none of the three disclosures to be

protected under § 2302(b)(8)(A), we need not assess whether the disclosures contributed to allegedly retaliatory personnel actions.

CONCLUSION

We have considered Reed's remaining arguments and do not find them persuasive. For the foregoing reasons, we *affirm* the Board's determination that none of the June 22, July 26, and August 29, 2012 disclosures was protected under 5 U.S.C. § 2302(b)(8).

AFFIRMED

COSTS

No costs.

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARGARET M. REED,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1628

Petition for review of the Merit Systems Protection Board in No. CH-1221-13-1557-B-1.

REYNA, *Circuit Judge*, dissenting.

This appeal comes upon a curious path, the facts and history of which are aptly laid out in the majority opinion. The underlying case has involved several remands by the Board, a remand from this court, and two decisions by the ALJ, all addressing the "foundational question" that the majority declares is "at the heart of [Reed's] appeal": "did she engage in the January 12, 2012 altercation as Pardun alleged." Maj. Op. 10. This is a question of fact that we review for substantial evidence. *Welshans v. United States Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008).

The majority concludes that Reed engaged in an altercation as alleged by her supervisor, Pardun. Based on that

finding, the majority asserts that this case involves a routine "employee-supervisor dispute." Maj. Op. 11. The majority affirms, in part, on the basis that Reed fails to allege an abuse of authority under 5 U.S.C. § 2302(b)(8)(A)(ii) because the Whistleblower Protection Act ("WPA") does not apply to routine employee-supervisor disputes. *Id.*

But this case is not a routine employee-supervisor dispute. This case is about an inaccurate, embellished report filed by supervisor Pardun against Reed that formed the basis for an admonishment, later followed by suspension.

The January 12, 2012 incident between Reed and her supervisor Pardun was witnessed by Reed's co-workers. What those co-workers said speaks directly to the foundational question of whether the altercation was "as Pardun alleged." Thus, while the incident report prepared by Pardun relays her side of the altercation, the overwhelming eyewitness evidence establishes that the characterizations in the incident report were false, or "embellished." Consider that all but one employee who witnessed the exchange either contradicted Pardun's incident report or provided a perspective that rendered it suspect, if not outright fabricated. *See* P.A. 58–59 (describing Pardun's account as "embellished" and "not accurate"); *id.* (stating "the exchange I heard does not support" Pardun's accounting of events); *id.* at 60 (stating "I do not believe that the incident in the admonishment [occurred] as reported."); *id.* (stating the incident had not risen "to the level of intensity reported"); *id.* ("not believ[ing]" Pardun's account and allegations of potential violence).

One witness related that it was the supervisor, Pardun, that was "the person [they] heard using an inappropriate tone with an elevated vocal range" during the January 12, 2012 incident. P.A. 58. The witness statement clearly identifies the supervisor as the inappropriate actor: "Ms. Pardun continued to engage in an inappropriate verbal manner with Michelle Reed," and, "instead of diffusing the

situation[,] [was] elevat[ing] the situation to the point [that] Ms. Pardun was raising her voice for the entire area to hear her interaction with Ms. Reed." P.A. 58. The witness continued, explaining that "[i]t appeared [Pardun] was actually trying to provoke/bait Ms. Reed" and that "[i]t was obvious from Ms. Reed's comments that she was only trying to obtain Ms. Pardun's full attention about something." P.A. 58; *see also* R.A. 98 (identifying Pardun as the aggressor that escalated the exchange). Only one coworker colleague lent limited support to Pardun's version of events. R.A. 101.

This case is also not a routine employee-supervisor dispute because senior officials above Reed were also involved. After the January incident, Reed was admonished by the Assistant Chief of the Human Resources Management Service ("HRMS"), Rolanda Watkins, for disrespectful conduct based on the incident report. R.A. 93–95. Once it was placed in Reed's employment file, the admonishment became an adverse personnel action. *See* § 2302(a)(2) (defining personnel actions). Subsequently, based on the admonishment, Reed was suspended—another adverse personnel action. P.A. 4–9. During this process, Reed alleged to the Director of the Department of Veterans Affairs Medical Center, Mr. Alex Costie, that she was deprived of her due process rights because factual disputes that she had raised were ignored and the agency had failed to make additional factual inquiries. R.A. 118–20. Importantly, all the individuals involved, other than Reed, are senior level officials in the Department of Veterans Affairs Medical Center, such as Director Costie, or those in the human resources department, including HRMS Chief Jerry Erwin, HRMS Assistant Chief Rolanda Watkins, and Pardun. It seems to me that conduct by such officials in levying personnel actions on the basis of inaccurate and embellished information would support a reasonable basis of an abuse of authority.

Section 2302 of the WPA does not define abuse of authority. Some statutes related to whistleblower-type protection define it as "an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned." *E.g.*, 41 U.S.C. § 4712(g)(1) (whistleblower protections for employees of federal contractors). The Board has maintained that abuse of authority occurs when there is an "arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, 1351 (Fed. Cir. 2022) (citing *Wheeler v. Dep't of Veterans Affs.*, 88 M.S.P.R. 236, 241 (2001)). In *Smolinski*, applying the definition of an abuse of authority from related whistleblower statutes, we reasoned that sexual harassment and bullying by a superior officer would be an abuse of authority as this conduct is inconsistent with the mission of the army. *Id.* at 1352. Here, the evidence points to an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned.

Our substantial evidence standard of review considers the entire record, not just bits and pieces. *Parker v. United States Postal Serv.*, 819 F.2d 1113, 1115 (Fed. Cir. 1987) (explaining the substantial evidence standard requires evaluation of the "evidence on the record as a whole"). The majority acknowledges that there is "some evidence to support that the report submitted by Pardun was embellished" and that Pardun "unfairly characterized" the altercation with Reed. Maj. Op. 11. But the majority's final perspective is too limited and fails to account for the entire record. The record evidence demonstrates arbitrary and capricious conduct by high-level officials, and that such conduct is inconsistent with the mission of the agency, recognizing that the primary individuals involved in this matter worked in the human resources department of the agency.

Based on the foregoing, I would find that substantial evidence supports that Reed alleged a reasonable belief that the June 22, July 26, and August 29, 2012 disclosures each were protected disclosures under § 2302(b)(8)(A)(ii). I respectfully dissent.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARGARET M. REED,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2023-1628

Petition for review of the Merit Systems Protection Board in No. CH-1221-13-1557-B-1.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM.

O R D E R

On March 25, 2024, Margaret M. Reed filed a corrected petition for rehearing en banc [ECF No. 32]. The petition

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[1] Circuit Judge Newman did not participate.

was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue May 1, 2024.

FOR THE COURT

Jarrett B. Perlow
Clerk of Court

April 24, 2024
Date

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARGARET M. REED,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
CH-1221-13-1557-B-1

DATE: February 24, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Margaret M. Reed, Jupiter, Florida, pro se.

Demetrious A. Harris, Esquire, Dayton, Ohio, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the remand initial decision, which denied her request for corrective action in this individual right of action (IRA) appeal. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact;

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

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 administrative 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; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

¶2 The Assistant Chief of Human Resources at the agency's Medical Center in Dayton, Ohio, issued the appellant, a GS-12 Human Resources Specialist at the same facility, an admonishment for disrespectful conduct. *Reed v. Department of Veterans Affairs*, 122 M.S.P.R. 165, ¶ 4 (2015). The appellant grieved the admonishment, but the agency denied her grievance. *Id.*, ¶¶ 4-6. The appellant then complained to the Medical Center Director that she had been admonished without due process and that the agency failed to follow the administrative grievance procedures. *Id.*, ¶¶ 7-8. Approximately 1 month later, the Chief suspended the appellant for 3 days based on three complaints that he recently received about the appellant from other agency officials. *Id.*, ¶ 9.

¶3 The appellant filed a whistleblower reprisal complaint with the Office of Special Counsel (OSC). *Id.*, ¶ 10. OSC closed its file without taking corrective action, and the appellant filed a Board appeal. *Id.* The administrative judge issued an initial decision that dismissed the appeal for lack of jurisdiction on the basis that the appellant failed to make a nonfrivolous allegation that she made a

protected disclosure. *Id.* The appellant petitioned for review, and the Board affirmed the initial decision as modified, finding that, although the appellant made a nonfrivolous allegation that she made a protected disclosure, she failed to make a nonfrivolous allegation that her disclosure was a contributing factor in a personnel action. *Id.*, ¶¶ 2, 11, 15-25. The Board also found that the appellant failed to make a nonfrivolous allegation that the agency perceived her as a whistleblower. *Id.*, ¶¶ 26-27.

¶4 The appellant appealed the Board's decision to the U.S. Court of Appeals for the Federal Circuit. *Reed v. Merit Systems Protection Board*, 611 F. App'x 719 (Fed. Cir. 2015). After reviewing the file, the Board determined that the appellant had, in fact, made a nonfrivolous allegation that at least one of her disclosures was a contributing factor in a personnel action. *Id.* At the Board's request, and with the appellant's concurrence, the court vacated the Board's decision and remanded the appeal to the Board for further proceedings. *Id.* The Board, in turn, remanded the appeal to the regional office for further adjudication. *Reed v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-13-1557-M-1, Remand Order (Sept. 25, 2015).

¶5 In its Remand Order, the Board found that the appellant made nonfrivolous allegations sufficient to establish jurisdiction over claims that she made protected disclosures in email messages she sent on June 22 and July 26, 2012, and in an August 29, 2012 meeting. *Id.*, ¶¶ 6-8. The Board further found that, by virtue of the knowledge/timing test, the appellant nonfrivolously alleged that those disclosures were contributing factors in the four personnel actions[2] at issue in this

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[2] The appellant exhausted her administrative remedies before OSC regarding four alleged personnel actions: (1) the proposed 3-day suspension; (2) the decision to sustain the 3-day suspension; (3) the refusal to remove the admonishment from the appellant's personnel file; and (4) threats to discipline the appellant for meeting with the Medical Center Director. *Reed*, 122 M.S.P.R. 165, ¶ 14 & n.7; *Reed v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-13-1557-B-1, Remand File, Tab 11 at 3 n.4.

IRA appeal. *Id.*, ¶ 9; *see* 5 U.S.C. § 1221(e)(1) (providing that an employee may demonstrate that a disclosure was a contributing factor in a personnel action by showing that the official taking the action knew of the disclosure and that the action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor); *see also Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 17 (2014) (finding that an interval of approximately 4 months satisfied the timing prong of the knowledge/timing test).

¶6 After holding a 2-day hearing, the administrative judge denied the appellant's request for corrective action, finding that she did not prove by preponderant evidence that her disclosures were protected. *Reed v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-13-1557-B-1, Remand File (RF), Tab 51, Remand Initial Decision at 14 (RID). Regarding the appellant's June 22, 2012 email message, in which she complained about the disposition of her formal grievance, the administrative judge found that the appellant failed to demonstrate by preponderant evidence that a reasonable person in her position would believe that the information she disclosed evidenced an abuse of authority, a violation of law, rule, or regulation, or gross mismanagement. RID at 8-13. Concerning the appellant's July 26, 2012 email message and her August 29, 2012 meeting with the Director, in which the appellant raised essentially the same contentions regarding the grievance process, the administrative judge similarly found that a reasonable person in the appellant's position would not believe that the information she disclosed evidenced wrongdoing as set forth in 5 U.S.C. § 2302(b)(8). RID at 12-13.

¶7 Thus, because she found that the appellant failed to establish by preponderant evidence that her disclosures were protected, the administrative judge found that the appellant failed to meet her burden of proving the merits of her IRA appeal and consequently denied her request for corrective action. RID at 14-15. In her petition for review of the remand initial decision, the appellant provides an exhaustive review of the evidence and contends that the record, as

well as the parties' joint stipulations,[3] indicate that her disclosures were protected and a contributing factor in the personnel actions at issue. *Reed v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-13-1557-B-1, Remand Petition for Review (RPFR) File, Tab 1 at 4. The appellant also challenges the administrative judge's ruling to deny one of her requested witnesses and accuses the administrative judge of "bias and careless workmanship." *Id.* at 5, 30-31. The agency responds in opposition to the appellant's petition for review, and the appellant provides a reply to the agency's response.[4] RPFR File, Tabs 3-4.

DISCUSSION OF ARGUMENTS ON REVIEW

¶8 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Hugenberg v. Department of Commerce*, 120 M.S.P.R. 381, ¶ 9 (2013). In an IRA appeal, the standard for establishing subject matter jurisdiction and the right to a hearing is

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[3] Regarding the appellant's contention that the parties' joint stipulations indicate that her disclosures were protected, RPFR File, Tab 1 at 4, the pleading that she designated below as "Joint Stipulations" does not bear the signature of the agency's representative, nor does it otherwise indicate that both parties agreed to the statement in the appellant's pleading, RF, Tab 29. Moreover, the appellant fails to point out where in the record the agency indicated its assent to her purported stipulations. In any event, the parties could not stipulate to the legal conclusion that the appellant's disclosures were protected. *See, e.g., Wilson v. Department of Homeland Security*, 122 M.S.P.R. 262, ¶ 11 (2015) (holding that parties may not stipulate to legal conclusions).

[4] In her reply to the agency's response, the appellant argues that the agency's response was untimely filed. RPFR File, Tab 4 at 4-5. The record reflects that the agency's response was due on September 24, 2016, and that the agency filed it at 9:57 a.m. on September 25, 2016. RPFR File, Tab 2 at 1, Tab 4. As the appellant correctly points out, the Board's regulations require that such late-filed pleadings be accompanied by a motion showing good cause for the untimely filing. RPFR File, Tab 4 at 5; 5 C.F.R. § 1201.114(g). Because the agency failed to submit the required motion, we have not considered its response.

an assertion of a nonfrivolous claim, while the standard for establishing a prima facie case is that of preponderant evidence. *MaGowan v. Environmental Protection Agency*, 119 M.S.P.R. 9, ¶ 5 (2012).

¶9 The essence of the administrative judge's analysis in this appeal is her finding that a reasonable person in the appellant's position as a Human Resources Specialist would not have believed that the information she disclosed evidenced an abuse of authority, gross mismanagement, or a violation of a law, rule, or regulation. RID at 10-13. The proper test for determining whether an employee had a reasonable belief that her disclosures revealed misconduct prohibited under the Whistleblower Protection Act (WPA) is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the Government evidence wrongdoing as defined by the WPA?[5] *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 5 (2013). We agree with the administrative judge that the appellant failed to establish by preponderant evidence that she made a protected disclosure.

¶10 The administrative judge found that the appellant's June 22, 2012 email, in which she contended that the agency's case in support of the letter of admonishment was "based on dishonest evidence," did not contain any protected disclosures. The email did not disclose an abuse of authority. RID at 9-10. "Abuse of authority" occurs when there is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Mc Corcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶ 24 (2005) (quoting *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85

[5] Because all relevant facts in this appeal occurred prior to December 27, 2012, the WPA, as clarified by the Whistleblower Protection Enhancement Act of 2012 (WPEA), applies to the appellant's claims. *See generally Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶¶ 3, 7-26 (2013) (discussing the effective date of the WPEA, as well as its retroactivity).

(1995)). The administrative judge found that the agency's record documented the appellant's disrespectful behavior towards her supervisor, amply demonstrating that she had engaged in the cited misconduct. RID at 9-10. The administrative judge further found no evidence that the supervisor admonished the appellant for personal gain or to adversely affect anyone's rights, consequently finding that the appellant failed to establish by preponderant evidence that she reasonably believed that her disclosure evidenced an abuse of authority. RID at 10.

¶11 The administrative judge also found that the June 22, 2012 email did not disclose a violation of law, rule, or regulation because the appellant failed to show that the agency was required by its own rules to conduct any further fact finding regarding her grievance or to allow her to present her grievance orally, and the record did not reflect that the agency had denied her any required procedural protections. RID at 10-11. The administrative judge further found that the appellant's June 22, 2012 email message did not disclose gross mismanagement but instead reflected her conclusory disagreement with the agency's adjudication of her grievance. RID at 11-12. Because the appellant's July 26 and August 29, 2012 disclosures involved the same alleged wrongdoing as her June 22 disclosure, the administrative judge found that they also were not protected. RID at 12-13.

¶12 On review, the appellant argues that the administrative judge based her findings on the evidence in the file supporting her admonishment, which she contends "has no bearing on the disclosures at issue within this case." RPFR File, Tab 1 at 17-18. We disagree. The appellant's arguments all revolve around her basic contention that the misconduct on which the agency based the letter of admonishment simply did not happen. In her own words, she "essentially disclosed that she had received an unfounded admonishment based on dishonest evidence and that this issue had been ignored and unaddressed within her grievances." *Id.* at 11. The administrative judge determined otherwise, finding that not only did the appellant's own statements support the agency's decision to

issue the letter of admonishment, but even the most favorable evidence to the appellant corroborated the agency's version of the events at issue. RID at 9-10.

¶13 We agree with the administrative judge. The appellant's insistence that the agency fabricated the evidence in support of her admonishment is not supported by the record. *Id.* Her contentions regarding the agency's grievance process also lack credibility. For example, we agree with the administrative judge that the appellant failed to establish that the agency was required to conduct further fact finding as the relevant agency policy only states that further fact finding may be warranted, not that it is required. RID at 11; *Reed v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-13-1557-W-1, Initial Appeal File, Tab 4 at 64 of 70. Similarly, the appellant's insistence on review that the Director is the only person authorized to settle her grievance is unsupported in the record.[6] RPFR File, Tab 1 at 7; RF, Tab 13 at 177-94. Moreover, an employee's disagreement with an agency ruling or adjudication does not constitute a protected disclosure, even if that ruling was legally incorrect. *See O'Donnell v. Department of Agriculture*, 120 M.S.P.R. 94, ¶ 15 (2013), *aff'd*, 561 F. App'x 926 (Fed. Cir. 2014). Thus, we find that the administrative judge correctly denied the appellant's request for corrective action.

¶14 The appellant challenges the administrative judge's denial of one of her proffered witnesses. RPFR File, Tab 1 at 30-31. On review, the appellant contends that the witness could have spoken as to the appellant's reasonable belief in her purported whistleblowing disclosures. *Id.* By contrast, in her prehearing submissions, she asserted that the witness generally would testify in

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[6] The agency's handbook does indicate that the facility Director will be the deciding official in a grievance filed by a Title 38 employee, which the handbook identifies as "physicians, podiatrists, chiropractors, optometrists, nurses, nurse anesthetists, physician assistants, expanded-function dental auxiliaries [appointed under 38 U.S.C. § 7401(1) and part-time registered nurses, including those with an intermittent duty basis, appointed under 38 U.S.C. § 7405(a)(1)(A)]." RF, Tab 13 at 195-96. As a Human Resources Specialist, the appellant is not a Title 38 employee, and these procedures do not apply to her.

support of the appellant's contentions, show that certain individuals in the organization did not like the appellant, and discuss an August 2012 email message advising employees to use the chain of command. RF, Tab 8 at 38. The record reflects that the administrative judge rejected the witness as immaterial. RF, Tab 11 at 7. The administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses when it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). The appellant has failed to show that the administrative judge abused her considerable discretion in this regard.

¶15 Finally, we reject the appellant's contentions of bias on the part of the administrative judge. RPFR File, Tab 1 at 31. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). The appellant's allegations of bias fail to make this required showing.

¶16 Accordingly, we affirm the remand initial decision, finding that the administrative judge properly denied the appellant's request for corrective action.

NOTICE OF APPEAL RIGHTS[7]

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such

[7] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the

EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[8] The court of appeals must receive your petition for

[8] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on

review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

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If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

/s/ for
Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

Additional material from this filing is available in the Clerk's Office.