APPENDIX

APPENDIX

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NOT FOR PUBLICATION

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APR 21 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHRYN A. FLYNN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE ARMY,

Respondent.

No. 18-73009

MSPB No. SF-1221-18-0406-W-1

MEMORANDUM*

On Petition for Review of an Order of the
Merit Systems Protection Board

Submitted April 7, 2020**

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

Dr. Kathryn A. Flynn petitions pro se for review of the Merit Systems Protection Board's ("MSPB") final order in her administrative action against the Department of the Army ("the agency") alleging violations of the Whistleblower Protection Enhancement Act of 2012, 5 U.S.C. § 2302(b)(8), arising out of the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

agency's disciplinary decisions and ultimate failure to renew her employment. We have jurisdiction under 5 U.S.C. § 7703(b)(1)(B). We review de novo questions of the MSPB's jurisdiction, *Daniels v. Merit Sys. Prot. Bd.*, 832 F.3d 1049, 1054 (9th Cir. 2016), and we affirm.

The MSPB properly dismissed for lack of jurisdiction Flynn's claims related to her filing an Equal Employment Opportunity Commission ("EEOC") complaint and reporting sexual harassment because such complaints fall within the province of the EEOC. *See Daniels*, 832 F.3d at 1051 (explaining that the MSPB jurisdiction is limited to whistleblower disclosures) (citing 5 U.S.C. § 1221(a)); *see also Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 692 n.17 (Fed. Cir. 1992) (noting that "the EEOC framework specifically provides for employees who suffer reprisal for the filing of [an] EEOC complaint").

The MSPB properly dismissed for lack of jurisdiction Flynn's claims related to the agency's alleged lack of transparency because Flynn failed to allege non-frivolous allegations of protected whistleblower activity under Section 2302(b)(8) of the Whistleblower Protection Act ("WPA"). *See* 5 C.F.R. § 1201.4(s) (for purposes of MSPB jurisdiction, a non-frivolous allegation is "more than conclusory," "plausible on its face," and "material to the legal issues in the appeal"); *see also* 5 U.S.C. § 2302(b)(8)(A) (under the WPA, an employee must

"reasonably believe[]" that the disclosure relates to an activity prohibited under the statute); *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 890 (9th Cir. 2004) (to determine whether a disclosure relates to a prohibited activity under the WPA, courts examine whether a "'disinterested observer with knowledge of the essential facts . . . reasonably [would] conclude that a disclosure" evidences activity prohibited under the statute (quoting *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999))).

The MSPB properly dismissed Dr. Flynn's remaining claims related to the agency's mismanagement and abuse of government contracts as barred under the doctrine of res judicata because Flynn could have raised these claims in her prior MSPB complaint, MSPB No. SF-1221-14-0620-W-1, which was adjudicated in a final decision on the merits. *See Bldg. Materials & Constr. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1195 (9th Cir. 1988) (res judicata bars relitigation of an administrative determination by a federal agency "when the agency's determinations have been made in a proceeding complying with standards of due process and when the findings are supported by substantial evidence in the administrative record" (citation and internal quotation marks omitted)); *see also Carson v. Dep't of Energy*, 398 F.3d 1369, 1375-76 (Fed. Cir. 2005) (concluding that employee's MSPB petition was barred by a prior MSPB petition under the doctrine of res judicata).

The MSPB did not abuse its discretion by denying Flynn's motion to compel discovery. *See Duggan v. Dep't of Defense*, 883 F.3d 842, 847-48 (9th Cir. 2018) (setting forth standard of review for denial of discovery requests in administrative proceedings); *see also Langer v. Dep't of Treasury*, 265 F.3d 1259, 1265 (Fed. Cir. 2001) (explaining that "the admissibility of evidence is within the sound discretion of the [MSPB]").

We reject as unsupported by the record Flynn's contention that the MSPB did not properly conduct a de novo review of her petition and erroneously relied on the Office of Special Counsel's determination in her prior petition.

AFFIRMED.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

KATHRYN A. FLYNN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SF-1221-18-0406-W-1

DATE: July 31, 2018

Kathryn A. Flynn, Claremont, California, pro se.

Michael L. Halperin, Esquire, Monterey, California, for the agency.

BEFORE
Franklin M. Kang
Administrative Judge

INITIAL DECISION

INTRODUCTION

Prior to filing this individual right of action (IRA) appeal on March 27, 2018, the appellant filed an IRA on June 6, 2014 through her attorneys, alleging that the agency unlawfully declined to extend her not-to-exceed (NTE) appointment as an Associate Professor at the agency's Defense Language Institute and Foreign Language Center (DLIFLC) in Monterey, California. Initial Appeal File (IAF), Tab 1; *Flynn v. Department of the Army*, MSPB Docket No. SF-1221-14-0620-W-1, slip op. (Initial Decision, March 21, 2016) (*Flynn-1*). The appellant's NTE appointment thereafter ended effective October 28, 2013

when it was not extended. *Flynn-1* Initial Appeal File (Flynn-1 IAF), Tab 7 at 1713, 1716;[1] *Flynn*, slip op.

On November 21, 2013, the appellant filed a complaint with the Office of Special Counsel (OSC), alleging that the agency declined to extend her NTE appointment based on her whistleblowing activities, then filed an IRA on June 6, 2014 following the lapse of more than 120 days. Flynn-1 IAF, Tab 1; *see* 5 U.S.C. § 1214(a)(3)(B). Following a hearing, the administrative judge issued an initial decision on the merits of her claim that was thereafter affirmed by the Board. *Flynn*, slip op.; *Flynn v. Department of the Army*, MSPB Docket No. SF-1221-14-0620-W-1, (Non-Precedential Final Order, January 6, 2017) (NPFO); 5 U.S.C. § 1221.

According to the appellant, on December 1, 2017, approximately 11 months after the Board issued the NPFO denying her petition for review, she filed the OSC complaint underlying the instant appeal, raising a variety of allegations about her prior employment as an NTE. IAF, Tab 1. There is nothing in the record to suggest that the appellant returned to work at the agency in any capacity following the lapse of her NTE term appointment at issue in *Flynn-1*. *Id.* On January 30, 2018, OSC issued its decision closing the appellant's underlying OSC complaint. *Id.* In its January 30, 2018 closing letter, OSC declined to review the appellant's underlying complaint because the decision in *Flynn-1* addressed her NTE employment history to include the issues she recently raised with OSC. *Id.* Referencing this same period of NTE service and attaching OSC's January 30, 2018 letter noted above, the appellant filed this IRA with the Board on March 27, 2018. *Id.* For the reasons discussed below, this appeal is DISMISSED for lack of Board jurisdiction.

[1] Pinpoint citations to the IAF refer to the page numbers affixed upon entry and/or submission of a referenced item into the Board's electronic repository.

ANALYSIS AND FINDINGS

Jurisdiction

The Board does not have jurisdiction over all agency actions that are alleged to be incorrect. *See, e.g.*, *Preece v. Department of the Army*, 50 M.S.P.R. 222, 226 (1991); *Hipona v. Department of the Army*, 39 M.S.P.R. 522, 525 (1989). Further, merit system principles are intended to furnish guidelines to Federal agencies; they do not constitute an independent basis for appeal. *Neal v. Department of Health & Human Services*, 46 M.S.P.R. 26, 28 (1990). The appellant bears the burden of proving that the Board has jurisdiction over this appeal. 5 C.F.R. § 1201.56.

The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that she engaged in whistleblowing activity by making a protected disclosure; and 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).

The Whistleblower Protection Act prohibits government personnel actions taken against an employee in reprisal for whistleblowing. 5 U.S.C. § 2302(b)(8); *Mintzmyer v. Department of the Interior*, 84 F.3d 419, 422 (Fed. Cir. 1996). Except where an independent right to appeal an adverse personnel action directly to the Board exists, an employee or former employee aggrieved by a personnel action must first seek corrective action from OSC. *Id.* Only after OSC has notified the employee or former employee that it has terminated its investigation, or has failed to commit to pursuing corrective action within 120 days, may that person file an IRA appeal under 5 U.S.C. § 1221 with the Board. 5 U.S.C. § 1214(a)(3); *Mintzmyer*, 84 F.3d at 422.

To satisfy this IRA exhaustion requirement, an appellant must inform OSC of the precise ground of his or her charge of whistleblowing, so OSC has a sufficient basis to pursue an investigation which might lead to corrective action.

Further, once the OSC process has terminated and the appellant has filed his or her Board IRA appeal, the Board will consider only those matters that the appellant asserted before OSC, and it will not consider any subsequent recharacterization of those charges put forth by the appellant in his or her appeal to the Board. *See Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992); *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 231-32 (1993), *modified in part by Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998). The test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he or she makes in the complaint requesting corrective action, not his or her *post hoc* characterization of those statements. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993).

A disclosure is protected under 5 U.S.C. § 2302(b)(8) if the appellant shows that he or she reasonably believed that the disclosed information evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. To establish that he or she had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), the appellant need not prove that the condition disclosed actually established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A); rather, he or she must show that the matter disclosed was one which a reasonable person in his or her position would believe evidenced one of the situations specified in section 2302(b)(8)(A). *See, e.g., Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 10 (1998). Under the Whistleblower Protection Enhancement Act of 2012, a disclosure is not excluded from protection because it was made to a supervisor, a person who participated in the activity that is being disclosed, or because the information was previously disclosed. Similarly, it is not excluded because it is made during the normal course of duties if an authorized employee took or threatened a personnel action in reprisal for the disclosure.

In determining whether an appellant's disclosures are "protected" under the statute, as stated above, the Board will review his or her characterization of his or her disclosures to OSC, not a *post hoc* characterization of those statements. *Ellison*, 7 F.3d at 1036. Moreover, while the Board has rejected the requirement that an appellant correctly label which category in 5 U.S.C. § 2302(b)(8) he or she is alleging his or her disclosure implicated, an appellant must still give OSC information that is sufficient to pursue an investigation that might lead to corrective action. *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 236-37 (1998), *overruled on other grounds*, *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, 37 (2000).

Background

Appellant's NTE Appointment and Supervision

Effective October 29, 2007, the appellant received an excepted indefinite appointment to the position of Associate Professor, AD-1701-00, NTE two years, in the Research and Analysis division (R&A) of DLIFLC's Evaluation & Standardization, Research and Analysis Directorate (ESRA). *Flynn*, slip op. Her NTE appointment was extended through multiple extensions for shorter NTE periods between October 2009 and October 2011, with a final extension issued on October 27, 2011 for a two-year period ending on October 28, 2013. *Id.* During the relevant time period, Gary Hughes served as the R&A Team Leader, and was the appellant's first level supervisor. *Id.* The undisputed record reflects that Associate Provost for Evaluation and Standards Deniz Bilgin was the appellant's second level supervisor until January 2013, when he became her third level supervisor; from January 2013 through May 2013, Sherilyn Kam was the appellant's second-line supervisor. *Id.*

September 2012 Notice of Warning for Unprofessional Behavior and 2012 Rating

Beginning in the summer of 2012, Dr. Hughes initiated a process of progressive discipline of the appellant that carried into the spring of 2013. *Id.*

First, on September 10, 2012, Dr. Hughes issued the appellant a Notice of Warning (NOW), based on an incident that occurred on August 21, 2012. *Id.* Stating that the appellant had engaged in a verbal altercation using abusive language directed to Pradyumna Amatya, the NOW advised the appellant to "control your temper and respond to colleagues and support staff in a professional and appropriate manner." *Id.* The record reflects that the appellant received the NOW on September 10, 2012. *Id.* In her annual rating for fiscal year 2012 (FY 2012) ending on September 30, 2012, Dr. Hughes rated the appellant's overall performance as Fair, specifying that the appellant Needs Improvement in one or more objectives with a comment that the appellant's interpersonal relationships need improvement. *Id.*

As set forth in greater detail below, through disclosures 2, 3, 5, 9, and 28, the appellant asserts in her 2018 IRA that her 2012 interaction with Dr. Amatya was sexual harassment that she disclosed to, *inter alia*, Dr. Hughes, and that this disclosure caused Dr. Hughes to lower her FY 2012 rating, and caused Dr. Hughes to recommend allowing her NTE term appointment to lapse in 2013. IAF, Tab 10 at 48-71. She also claims in her 2018 IRA that Dr. Hughes removed her from the "Working Memory" project (WMP) in 2013, approximately two months prior to her NTE term lapsing in October 2013. *Id.*; *Flynn*, slip op.

Events in FY2013 Forward

On October 30, 2012, Dr. Hughes issued the appellant a Letter of Reprimand (LOR) for inappropriate behavior the appellant exhibited during an October 18, 2012 staff meeting and in a separate discussion with Dr. Kam. *Flynn*, slip op. On March 5, 2013, Dr. Hughes issued the appellant a proposed two-day suspension for failure to follow instructions, defiance, and causing undue workplace disruption. *Id.* In his proposed suspension letter, Dr. Hughes cited a series of emails written by the appellant, quoting sections that he considered "defiant, unproductive and burdensome to the work operations." *Id.* One of the supporting specifications alleged that the appellant carbon-copied Assistant

Commandant Colonel (COL) Laura Ryan on several of the emails cited in the proposed suspension letter, despite COL Ryan's express prior warning to the appellant not to include her in work emails of this sort. *Id.* According to the proposal, she gave this instruction to the appellant on September 12, 2012. *Id.* The proposed two-day suspension was upheld by Mr. Bilgin, who issued the appellant's suspension notice on April 2, 2013 (Suspension). *Id.*

Assignment to Project

On March 20, 2013, Dr. Hughes assigned the appellant to serve as the DLIFLC Coordinator for a project commonly referred to as the WMP. *Id.* The WMP was one of approximately a dozen projects (referred to contractually as "task orders") undertaken on behalf of DLIFLC by the University of Maryland's Center for Advanced Study of Language (CASL), through a University Affiliated Research Center agreement with the National Security Agency (NSA). *Id.* The WMP was more formally referred to as the Cognitive and Working Memory Training on Mobile Platforms, and was intended to test whether working memory training could accelerate brain growth and improve cognitive functions above and beyond instructional methods alone, and above and beyond a language-only tool. *Id.*

Appellant's Project Concerns

Several days after being assigned to the WMP, the appellant emailed Dr. Hughes to request that she be taken off the project, citing workload concerns and a lack of contract management experience, and stating that she would need significant training on contract management to successfully take on this new project. *Id.* After Dr. Hughes sought to reassure the appellant that the WMP was only a part-time effort and that contract management would remain the responsibility of the designated certified contracting officer, not the appellant, the appellant responded with a second email, in which she reiterated her earlier concerns and also alleged that the assignment was an attempt to add undue stress for her, undermine her morale, and prevent her from preparing for an upcoming

equal employment opportunity (EEO) complaint investigation. *Id.* After receiving a follow-up email from Dr. Hughes in which he attempted to address each of the appellant's concerns, she agreed to begin work on the WMP. *Id.*

Recommendation to Allow Appellant's NTE Appointment to Lapse

In an email from the appellant to Dr. Hughes on April 24, 2013, the appellant expressed concern that she was not getting responses to her requests for information and documentation from either her DLIFLC project colleagues or from CASL. *Id.* In a May 16, 2013 email, Assistant Director of the Testing Directorate Jurgen Sottung, concurred with Dr. Hughes's recommendation to remove the appellant from her NTE position, stating that the appellant "challenges and questions everyone and everything in an endless stream of email, which is engaging our contractors and 4-5 researchers in daily unproductive exchanges." *Id.*

Appellant's Disclosures Pursued in Flynn-1 and Lapse of NTE Appointment

According to the appellant, on May 22, 2013, the appellant made what was, according to her 2014 petition, her first whistleblower disclosure by making a report to the local Office of Inspector General (IG) for claims related to contract fraud, waste, abuse, and mismanagement. *See* Flynn-1 IAF, Tab 1 (prior OSC complaint with attached timeline). To this point, the record reflects that on May 23, 2013, the appellant sent an email to the IG, along with several attachments, requesting an investigation. *Id*; *Flynn*, slip op. The appellant alleged violations of law, gross mismanagement, waste of funds, and abuse of authority, based on an alleged failure to meet contractual requirements related to security; a lack of deliverables and accountability; a lack of clarity on ownership of results; and other contract issues. Flynn-1 IAF, Tab 39 at 26-31; Flynn-1 IAF, Tab 1 (prior OSC complaint).

The agency was at the same time moving forward with a decision to modify the scope of the WMP. *Flynn*, slip op. In an email dated May 23, 2013, Dr. Hughes explained that, due to staffing issues related to the Department of

Defense's planned sequestration and other logistical concerns, DLIFLC had decided not to initiate further data collection or student involvement with the WMP, and to instead focus on winding down the project. Dr. Hughes provided a list of objectives, which included: obtaining a summary report from CASL based on previous year's data; obtaining a "how to" manual on word list development; receiving training instructions for DLIFLC staff so that the project could be replicated in-house; and gaining access to software, technical specifications, and staff training manuals. *Id.*

From late May 2013 until she was taken off the WMP in August 2013, the appellant continued to convey her concerns about the project to DLIFLC management. *Id.* While the appellant raised a variety of complaints related to her NTE position in *Flynn-1*, she identified the ones she intended to pursue in *Flynn-1* through the 2014 petition filed by Robert Atkins, one of her attorneys. Flynn-1 IAF, Tab 1. In *Flynn-1*, the appellant complained about a "perilous lack of oversight for the content, accuracy and scientific merit" of the WMP; "dubious" management practices; waste of government resources; and the agency's obstruction of the appellant's efforts to exercise due diligence in the management of the WMP. *Flynn*, slip op.

In the meantime, management continued to weigh different disciplinary options in connection with appellant's behavior. *Id.* In late May or early June, 2013, the agency began to draft a proposed 14-day suspension of the appellant, which they intended to treat as a "last chance" disciplinary action short of removal from her NTE position. *Id.* In an email dated June 19, 2013, Dr. Hughes directed the appellant to stop sending "For Official Use Only" (FOUO) documents to outside sources, warning her that continuation of the activity could result in disciplinary action. *Id.* Rather than impose further discipline, however, the agency ultimately chose not to renew the appellant's NTE appointment. *Id.*

On July 16, 2013, Mr. Bilgin emailed Assistant Commandant COL Ginger Wallace, and notified her of his intent not to renew the appellant's NTE

appointment. *Id.* In that same email, Mr. Bilgin requested that the appellant be placed on administrative leave because of concerns of possible violent behavior by the appellant. *Id.* In an email dated August 8, 2013, Dr. Hughes notified the appellant that he did not recommend extending her NTE appointment. *Id.* On August 14, 2013, Dr. Hughes notified the appellant that she was being taken off the WMP, effective immediately, based on several factors, including her unwillingness to focus on the contract modifications; her failure to complete a review of the current deliverables necessary to close out the project; and complaints from staff regarding her "hostile and harassing communications." *Id.* Finally, in a memorandum dated August 27, 2013, Mr. Bilgin notified the appellant of the agency's final decision not to extend her NTE appointment. *Id.* The appellant's NTE appointment expired on October 28, 2013. *Id.*

Flynn-1 IRA

On or about November 21, 2013, the appellant initiated the prior OSC complaint alleging that her NTE appointment was not extended in retaliation for her whistleblowing disclosures. *Id.* There was no evidence in the record as to any action taken by OSC in response to the appellant's 2013 OSC complaint. *Id.* On June 6, 2014, the appellant filed *Flynn-1* as an IRA, and the Board convened a hearing to address the merits of the appellant's claims. *Id.* Following the hearing, through a detailed initial decision, I concluded that the agency established by clear and convincing evidence that it would still have decided not to renew the appellant's NTE term appointment absent her whistleblowing disclosures. *Id.* As such I denied the appellant's request for corrective action in *Flynn-1* on the merits. *Id.* *Flynn*, slip op. became the final decision of the Board on January 6, 2017 when the Board issued the NPFO. *Flynn*, NPFO.

December 1, 2017 OSC-11 and NTE Position

On December 1, 2017, referencing the same NTE position above, the appellant filed another OSC-11 claiming that the agency retaliated against her during the course of her NTE appointment because she made 29 disclosures.

IAF, Tab 10 at 48-71. The appellant's submissions reflect that she initially identified these disclosures through documents dated November 30, 2017 and December 1, 2017, and opined, "I believe that the fact of multiple personnel actions (adverse) lead to termination of my appointment and supports my original claims of retaliation and job loss." *Id.* (original in mixed case lettering). The appellant identified disclosures 1 through 29 respectively, as follows:[2]

> Jul-12 Flynn reported lack of transparency of promotion processes at DLIFLC which was required to file a promotion appeal, and LCOL Laura Ryan, the overseer of the promotion processes, threatened Flynn with disciplinary measures and also told Flynn not to contact her again. Flynn had informed LCOL Laura Ryan that promotion processes at DLIFLC were shrouded and not transparent and violated merit promotion requirements.
>
> Aug-12 Flynn advised Gary Hughes, her supervisor, of sexual harassment at her cubicle and Gary Hughes told Flynn that Flynn would lose her job if she filed a formal complaint. Then Flynn told Hughes that Flynn would have to file an EEO complaint to rectify the situation.
>
> Sep-12 Flynn had rejected sexual harassment at her cubicle by Amatya, and Flynn's supervisor, Gary Hughes, wrote a letter of warning to Flynn. ... Flynn filed an EEO complaint (starting with the required informal process) ...
>
> Sep-12 Flynn reported violation of Merit Promotion processes and COL Ryan threatened disciplinary action if Flynn contacted Ryan, failing to add a protected activity statement[.]
>
> Oct-12 Flynn reported retaliation for filing EEO complaint and Hughes ordered Flynn not to contact COL Ryan or Command Group for any reason, failing to add an exception for protected activity statement[.]
>
> Dec-12 Flynn reported security violations by cc'ing supervisors and Provost Fischer, before he retired and went to work for the contractor ...

[2] The appellant's disclosures are set forth above in the same order utilized by the appellant in her OSC-11 attachment. IAF, Tab 10 at 48-71.

Jan-13 Flynn reported to COL Ryan, Flynn's third level supervisor, that the act of not identifying supervisory chain of command was a violation of federal employment law and not in accordance with regulations or law ...

Jan-13 Flynn asked Kam for clarity in Kam's instruction, saying Kam's instructions needed to be clear, so Flynn could complete an assignment made by Kam, which Flynn completed in timely and superior fashion ...

Mar-13 Flynn filed EEO complaints that included Hughes as subject, and Hughes added the WM contract management assignment in retaliation for EEO activity.

Mar-13 Flynn reported a security violation assigning Flynn to work with contracts without regulatory training ...

Apr-13 Flynn report security violation when cc'd COL Ryan to elevate a serious security mailer which Flynn believed to be illegal regarding provision of sensitive reports to CASL contractors ...

Apr-13 Flynn named Bilgin in her EEO and whistleblower disclosures ...

May-Aug 13 Flynn reported several contract violations to Sottung, Hughes, Kam, Bilgin ...

Jul-13 Flynn filed complaints to OIG and Hughes threatened to discipline Flynn if Flynn provided information outside the command to her attorney "or others" ...

Aug-13 Flynn reported to supervisors and NSA and CASL representatives that the CASL contract modification was an extreme waste of government funding ...

Aug-13 Flynn reported contract modification discrepancies to supervisors and the provost Leaver ...

Aug-13 Flynn contacted Provost Leaver about fraud, waste, and mismanagement of CASL contract ...

Aug-13 Flynn reported multiple contract lack of specifications and performance criteria and fraud, waste and abuse of the contract modification ...

May-Aug 13 Flynn reported to Bilgin his illegal mismanagement of the CASL contract ...

Aug-13 Flynn attempted to meet with COL Wallace ... and COL Wallace denied Flynn an Open-Door meeting, effectively subjecting Flynn to non-disclosure[.]

> Jun-13 Flynn requested training to perform her duties, and Hughes denied Flynn's repeated request for training ...
>
> Jun-13 Flynn objected to being assigned contract duties without training ...
>
> Jun-13 Flynn reported serious discrepancies in the CASL contract and contract modification ...
>
> Aug-13 Flynn reported the fraud, waste, and mismanagement of the CASL WM contract modification ...
>
> Sep-13 Flynn filed EEO complaint and reported on CASL contract discrepancies and fraud, waste and abuse. Flynn also reported on several occasions a hostile working environment and asked for transfer ...
>
> 9/2012 to 10/2013 Flynn reported unclear supervision and lack of supervision. Hughes and Kam and Bilgin refused to clarify who was Flynn's supervisory chain of command ...
>
> Jul-13 Flynn reported to Kam that Kam was trying to implicate Flynn in her nefarious practices related to the WM contract criminal investigation ...
>
> 9/2012 and 10/2013 Flynn notified Hughes that Flynn had and been harassed by Amatya in August 2012 and Hughes threatened Flynn with job loss if Flynn should complain formally. Flynn notified Hughes that she would have to file an EEO complaint to rectify the situation. Flynn entered into an EEO complaint process ...
>
> Oct-13 Flynn wrote emails to Bilgin to notify him of contract failure and his participation in contract fraud, waste, abuse, and gross mismanagement, and his unwillingness to intervene in hostile environment ...

Id. (disclosures 1 through 29 respectively)

Flynn-2 IRA

After receiving OSC's January 30, 2018 letter informing her that OSC was unable to review her alleged disclosures based on the Board's decision in *Flynn*, slip op., the appellant filed this IRA. IAF, Tab 1. In noting that it would not act on the appellant's December 1, 2017 OSC complaint, OSC added that it was unable to review the appellant's 2017 OSC complaints because the Board's decision in *Flynn*, slip op., based on her 2013 OSC complaint, was binding on OSC. *Id.*

Through a detailed Order, the Board informed the appellant that it did not appear to have jurisdiction over the appellant's instant appeal based on the appellant's submissions and/or the final decision in her prior appeal in *Flynn-1*. IAF, Tab 3. The appellant responded by arguing that while this IRA involves the same NTE appointment as the one considered in *Flynn-1*, this IRA "introduces several new causes of action" that she and her attorneys failed to assert in *Flynn-1*, and that these new assertions were not addressed in *Flynn*, slip op. and NPFO. IAF, Tab 10. On July 24, 2018, the appellant filed a motion to compel discovery. IAF, Tab 16. Following a careful review of the record, the appellant's July 24, 2018 motion is denied for failure to meet the requirements of 5 C.F.R. section 1201.73(c) and (d)(3).

Appellant's 29 Claimed Disclosures

In setting forth disclosures 2 and 3, the appellant revisits her misconduct underlying her ~~2012~~ NOW discussed in *Flynn-1* by characterizing her 2012 verbal altercation with Dr. Amatya as an incident of sexual harassment by Dr. Amatya that she then disclosed to, *inter alia*, Dr. Hughes in 2012, while working as an NTE as set forth in greater detail above. She also states that she identified Mr. Bilgin in her EEO complaint through disclosure 12, and asserts that she identified him in her disclosures as the management official upholding the 2013 Suspension as set forth above. However, as with disclosures 5, 9, and 28, conveying to OSC in 2017 that she disclosed sexual harassment in 2012 to Dr. Hughes and others through these other disclosures, is not a protected disclosure for the purposes of an IRA. *See, e.g.*, *Spruill v. Merit Systems Protection Board*, 978 F.2d 679 (Fed. Cir. 1992). Similarly, stating that she filed an EEO complaint as set forth in disclosure 25, discussed further below, without more, is not necessarily a protected disclosure for the purposes of an IRA. *See id.* The Board has stated that disclosures that are limited to certain EEO matters covered under 5 U.S.C. § 2302(b)(1) and (b)(9), are excluded from coverage under section 2302(b)(8). Moreover, the appellant fails to sufficiently allege that these matters involved

disclosures that a reasonable person in her position would believe evinced one of the situations specified in section 2302(b)(8). *See, e.g.*, *Juffer*, 80 M.S.P.R. 81. Thus, even if the appellant made such an EEO complaint in 2012 as claimed, shortly before receiving the related NOW, the appellant fails to nonfrivolously allege that any of these EEO disclosures, identified as 2, 3, 5, 9, 12, and 28, constitute a protected whistleblowing disclosure. *Id.*; *Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300 (2003).

Through disclosures 1, 4, 7, 8, and 26, the appellant revisits her misconduct underlying her 2013 Suspension discussed in *Flynn-1* by claiming that the underlying instructions were unclear, claims that her superiors did not sufficiently explain DLIFLC promotions to her, and claims that her chain of command was unclear. Through her petition, she explains that this disclosure involved the agency's failure to "meet legal requirement" resulting "in violation of civil rights laws and merit systems principles[.]" IAF, Tab 1. In Flynn-1, the appellant alleged that while she was recommended for "advancement to Professor" in February 2012, she had a "disagreement" with the Dr. Amatya in August 2012, and that this disagreement was cited by her rater in assigning her a rating of needs improvement in her October 2012 NTE review. Flynn-1 IAF, Tab 60 at 5, 6; *Flynn*, slip op. The appellant declines to explain how reporting a "lack of transparency" involved a protected disclosure, and she declines to adequately clarify what legal requirements she is referencing in relation to her prior NTE employment. IAF, Tab 1. Through disclosure 20, the appellant states that she disclosed to COL Wallace that COL Wallace had denied the appellant an open door meeting with COL Wallace, and that Mr. Bilgin was similarly instructing the appellant to stop contacting COL Wallace. To this point, the appellant previously submitted a printed copy of an email from Mr. Bilgin, with copy to COL Wallace, instructing the appellant to not contact COL Wallace. Flynn-1 IAF, Tab 68 at 31; *Flynn*, slip op. While I have no reason to doubt that the appellant desired to transition from her NTE term appointment to a permanent position, and took issue

with her superiors as discussed in *Flynn-1*, the appellant fails to sufficiently allege that these matters involved disclosures that a reasonable person in her position would believe evinced one of the situations specified in section 2302(b)(8). *See, e.g.*, *Juffer*, 80 M.S.P.R. 81. To this point, while the appellant made it clear to OSC that she disagreed with her superiors as set forth above and made a series of assertions as set forth above, she fails to adequately show that any of these claims involve properly exhausted protected disclosures that were not within the discretion of management. *Ellison*, 7 F.3d at 1036; *Thomas*, 77 M.S.P.R. at 236-37; *Webb v. Department of the Interior*, 122 M.S.P.R. 248 (2015). Thus, the appellant fails nonfrivolously allege that any of these disclosures, identified as 1, 4, 7, 8, and 26, constitute a protected whistleblowing disclosure. *Id.*

Through disclosures 6, 10, 11, 13-19, 27, and 29, the appellant continues to argue that she raised a variety of concerns about the WMP that was undertaken on behalf of DLIFLC by CASL through an agreement with NSA as noted above and in greater detail in *Flynn*, slip op. While she claims that these are new disclosures that were not previously asserted in *Flynn-1*, through her jurisdictional submission in *Flynn-1,* she previously addressed disclosures 6, 10, and 11 when she alleged that on December 6, 2012, the appellant she sent an email to multiple management officials about "security violations[;]" on March 25, 2013, the appellant complained to her superiors that it was improper to assign her to work on the CASL contracts without significant training in regulations; and after receiving the WMP assignment on March 20, 2013, the appellant reported that it was a serious breach of security for the appellant, as an NTE, to work on the WMP with CASL contractors, adding that the CASL researchers had not shown her that the CASL researchers had completed background security checks. Flynn-1 IAF, Tabs 1, 33 (appellant's *Flynn-1* jurisdictional submission). Similarly, with respect to disclosures 13 through 19 respectively, the appellant previously asserted that she reported several WMP contract issues to management

from May 2013 forward; filed complaints with the IG offices on various dates including May 2013 and July 2013; took issue with WMP contract modifications in July and August 2013, and requested an IG investigation; reported contract discrepancies related to the contract modifications in July and August 2013, and reported these concerns to her superiors; copied Provost Betty Leaver on a series of messages critical of the WMP in July and August 2013; made various complaints about the lack of measurable performance by CASL in July and August 2013 on the WMP inclusive of the modifications referenced by the appellant in her earlier complaint; and reported Mr. Bilgin's mismanagement of the WMP contract to Mr. Bilgin in July 2013, then reported Mr. Bilgin's WMP contract management issues to others in August 2013, with copy to Mr. Bilgin. *Id.* As with the first group of disclosures in this 2018 IRA discussed within this paragraph above, disclosures 13 through 19 were previously addressed in *Flynn-1* as set forth above in detail. *Id.* With respect to disclosure 27, the appellant's earlier submissions reflect that in July 2013, she disclosed to Dr. Kam that he was taking improper actions with respect to the WMP contract. *Id.* Turning to disclosure 29, while the appellant claims that she sent an email to Mr. Bilgin in October 2013 critical of the WMP and his involvement in the WMP, her earlier IRA record reflects that she reported these matters to Mr. Bilgin directly and indirectly on earlier occasions as noted above. *Id.* As with the first two groups of disclosures in this 2018 IRA discussed within this paragraph above, disclosures 27 and 29 were previously addressed in *Flynn-1* as set forth above. *Id.* While not relevant to the question of whether disclosure 29 is protected for the purposes of this IRA, I note that the appellant claims that she made this disclosure to Mr. Bilgin in October 2013, well after she received Mr. Bilgin's August 27, 2013 letter informing her that her NTE term with DLIFLC would lapse on October 28, 2013 as set forth in greater detail above. *Id.* Turning to disclosures 21 through 24, the record reflects that the appellant previously alleged in *Flynn-1* that in March 2013, her superiors refused the appellant's request for

additional training in conjunction with her WMP duties as noted in part above; in March 2013, she objected to being assigned to her WMP duties without training as noted in part above; in May through July 2013, she reported discrepancies in the CASL contract inclusive of modification issues; and reported matters characterized by one of her attorneys, Heidi Rosenfelder, to OSC as waste, fraud, abuse, and gross mismanagement of the WMP. Flynn-1 IAF, Tabs 1, 33. As with disclosure 24, disclosure 25 was previously alleged in *Flynn-1* through a variety of complaints collectively referred to by Ms. Rosenfelder as reports of waste, fraud, abuse, and gross mismanagement of the WMP. *Id.* As noted in the Board's April 2, 2018 Order, based on the adjudication of the WMP, CASL, and related matters in *Flynn-1*, disclosures 6, 10, 11, 13-19, 21-24, 27, and 29 appear to revisit the same assertions that she raised in detail through *Flynn-1*, except that her 2017 submissions to OSC largely consisted of conclusory assertions. *Id.*; IAF, Tabs 1, 3, 10. Disclosure 20, discussed in the paragraph above, similarly appears to revisit the same assertion raised in greater detail though *Flynn-1. Id.*; *see* Flynn-1 IAF, Tab 68. Similarly, through disclosure 25, the appellant repeats her assertion that she reported these matters. *Id.*

In *Flynn-1*, the appellant submitted the underlying emails relevant to disclosure 20, and previously asserted this same matter as her sixth enumerated disclosure in her 2014 petition for appeal. *Id.* While the appellant subsequently explained her assertions to the Board, her dated submissions indicate that this information was not necessarily submitted to OSC; rather, the narratives were written after OSC issued its January 30, 2018 closing letter based on the date on these documents. *Id.* Even if the appellant had properly supported these assertions in her 2017 OSC complaint, the appellant largely repeats the claims she conveyed in her 2013 OSC complaint as set forth above through disclosures 6, 10, 11, 13-19, 20-24, 27, and 29, and fails to adequately explain why these claims should not be precluded on the basis of claim preclusion. *Id.* While the appellant's attorneys in *Flynn-1* opted to file the 2014 IRA prior to OSC

completing its inquiry, then asserted specific issues within that earlier IRA as explained in *Flynn*, slip op. and NPFO, the appellant's submissions reflect that these 13 issues overlap with the 2018 IRA as set forth above in detail. *Id.* As previously explained to the appellant, res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: the prior judgment was rendered by a forum with competent jurisdiction; the prior judgment was a final judgment on the merits; and the same cause of action and the same parties or their privies were involved in both cases. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995); *see Corpuz v. Office of Personnel Management*, 100 M.S.P.R. 560, 562-63 (2005). Here, it is undisputed that the prior judgments in *Flynn*, slip op. and NPFO were rendered by a forum with competent jurisdiction; the prior judgment was a final judgment on the merits; and the same cause of action and the same parties were involved in both cases. *Id.* Thus, whether or not the appellant recast her prior complaints, I find that res judicata precludes the appellant from relitigating these specified disclosures that were, or could have been raised in *Flynn-1* based on a careful review of her prior 2013 OSC complaint with supplementation in 2014. *Id.*

For the reasons set forth above and following a careful review of the entire record, I conclude that the appellant has not made a nonfrivolous allegation that she made a protected disclosure. *See id.*; *Harvey v. Department of the Navy*, 92 M.S.P.R. 51, ¶ 9 (2002). While it remains clear that the appellant felt entitled to a permanent position and disagreed with the actions of various agency officials as she served as an NTE, I find that the appellant has not made a nonfrivolous allegation that these reported matters were protected disclosures. *See, e.g.*, *Gryder v. Department of Transportation*, 100 M.S.P.R. 564 (2005); *Mc Corcle v. Department of Agriculture*, 98 M.S.P.R. 363 (2005). The appellant has therefore failed to show that IRA jurisdiction exists.

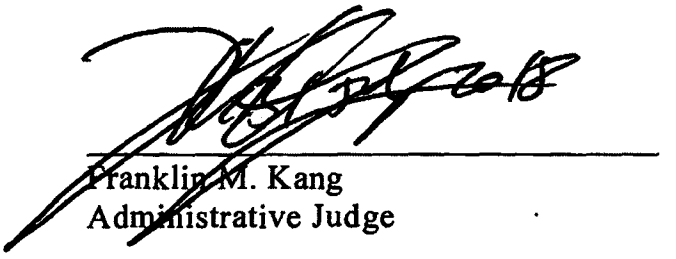
There is no law, rule, or regulation which provides an individual with a direct right of appeal to the Board on any of the matters raised in this appeal, and

the appellant has failed to nonfrivolously allege Board jurisdiction on any basis. Thus, while the appellant may have been dissatisfied with her superiors, coworkers, and contractors, the appellant fails to meet her burden of nonfrivolously alleging Board jurisdiction over these matters on any basis.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:



Franklin M. Kang
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **September 4, 2018**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

NOTICE OF LACK OF QUORUM

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

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in

which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

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

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

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

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

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

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

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

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such 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 decision when it becomes final, 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 this decision becomes final. 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 this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ___ , 137 S. Ct. 1975 (2017). 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 this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

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 you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review

with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 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

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.

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

CERTIFICATE OF SERVICE

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

Appellant

U.S. Mail

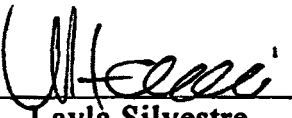
Kathryn A. Flynn
2161 Forbes Avenue
Claremont, CA 91711

Agency Representative

Electronic Mail

Michael L. Halperin, Esq.
Department of the Army
Office of the Staff Judge Advocate
Language Center (DLIFLC) & POM
1336 Plummer Street, Bldg. 275
Monterey, CA 93944-3327

July 31, 2018
(Date)



Layla Silvestre
Paralegal Specialist

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHRYN A. FLYNN, Petitioner, v. UNITED STATES DEPARTMENT OF THE ARMY, Respondent.	No. 18-73009 MSPB No. SF-1221-18-0406-W-1 Merit Systems Protection Board ORDER

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Flynn's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 42) are denied.

No further filings will be entertained in this closed case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

KATHRYN A. FLYNN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SF-1221-14-0620-W-1

DATE: March 21, 2016

Kathryn A. Flynn, Claremont, California, pro se.

Michael L. Halperin, Esquire, Monterey, California, for the agency.

BEFORE
Franklin M. Kang
Administrative Judge

INITIAL DECISION

INTRODUCTION

The agency elected not to extend the appellant's not-to-exceed (NTE) appointment as an Associate Professor at the agency's Defense Language Institute and Foreign Language Center (DLIFLC) in Monterey, California, ending the appellant's excepted NTE appointment effective October 28, 2013. Initial Appeal File (IAF), Tab 7 at 1713, 1716;[1] IAF, Tab 1 at 49, 50. On November 21, 2013, the appellant filed a complaint with the Office of Special Counsel (OSC), alleging that the agency declined to extend her NTE appointment based on her

[1] Pinpoint citations to the IAF refer to the page numbers affixed upon entry and/or submission of a referenced item into the Board's e-Appeal Online repository.

whistleblowing activities. IAF, Tab 1 at 6, 15-32. The appellant electronically filed an individual right of action appeal (IRA) with the Board on June 6, 2014, more than 120 days after seeking corrective action from OSC, alleging that the agency's decision not to extend her term appointment was in retaliation for her whistleblowing activities. IAF, Tab 1; *see* 5 U.S.C. § 1214(a)(3)(B). The Board has jurisdiction over this matter pursuant to 5 U.S.C. § 1221. At the request of the appellant, a hearing was convened. Hearing Compact Disc (HCD). For the reasons explained below, the request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

Appellant's NTE Appointment and Supervision

Effective October 29, 2007, the appellant, with a service computation date of October 29, 2007, received an excepted indefinite appointment to the position of Associate Professor, AD-1701-00, NTE two years, in the Research and Analysis division (R&A) of DLIFLC's Evaluation & Standardization, Research and Analysis Directorate (ESRA). IAF, Tab 7 at 1721. Her appointment was extended through multiple extensions for shorter NTE periods between October 2009 and October, 2011, with a final extension issued on October 27, 2011 for a two-year period ending on October 28, 2013. IAF, Tab 7 at 1716-1720.

During the relevant time period, Gary Hughes served as the R&A Team Leader, and was the appellant's first level supervisor. IAF, Tab 7 at 155; HCD (testimony of Dr. Hughes). The undisputed record reflects that Associate Provost for Evaluation and Standards Deniz Bilgin was the appellant's second level supervisor until January 2013, when he became her third level supervisor; from January 2013 through May 2013, Sherilyn Kam was the appellant's second-line supervisor. *See* IAF, Tab 7 at 5, 155.

DLIFLC provides resident instruction in two dozen languages to active and reserve components of domestic and foreign uniformed personnel, as well as

civilian personnel working in the Federal government and various law enforcement agencies. IAF, Tab 7 at 1763. The appellant's primary role at DLIFLC was to serve as a Program Evaluator, where she was responsible for, *inter alia*, initiating, designing, leading, and conducting comprehensive program evaluations; establishing evaluation program priorities; and developing the capacity of DLIFLC departments to independently conduct program evaluations. IAF, Tab 7 at 1759-60.

September 2012 Notice of Warning for Unprofessional Behavior and 2012 Rating

For most of her time at DLIFLC, the appellant had an exemplary work record, and regularly received outstanding performance reviews. *See* IAF, Tab 59 at 29-52; HCD (testimony of Dr. Hughes). However, beginning in the summer of 2012, Dr. Hughes initiated a process of progressive discipline of the appellant that carried into the spring of 2013. *Id*. First, on September 10, 2012, Dr. Hughes issued the appellant a Notice of Warning (NOW), based on an incident that occurred on August 21, 2012. IAF, Tab 7 at 1748-49. Stating that the appellant had "engaged in a verbal altercation using abusive language directed to Dr. Pradyumna Amatya[,]" the NOW advised the appellant to "control your temper and respond to colleagues and support staff in a professional and appropriate manner." *Id.* The record reflects that the appellant received the NOW on September 10, 2012 and was given an opportunity to comment on the contents. *Id*.

In her annual rating for fiscal year 2012 (FY 2012) ending on September 30, 2012, Dr. Hughes rated the appellant's overall performance as Fair, specifying that the appellant Needs Improvement in one or more objectives with a comment that the appellant's interpersonal relationships need improvement. *Id*. at 1752; HCD (testimony of Dr. Hughes).

October 2012 Letter of Reprimand (LOR) for Unprofessional Behavior

On October 30, 2012, Dr. Hughes issued the appellant a LOR for inappropriate behavior the appellant exhibited during an October 18, 2012 staff

meeting and in a separate discussion with Dr. Kam. IAF, Tab 7 at 1745. Specifically, Dr. Hughes disciplined the appellant for engaging in "inappropriately confrontational and disrespectful behavior toward the Acting Dean, Dr. Sherilyn Kam" and Dr. Hughes during the meeting. *Id*.

2013-14 Events that Followed

On March 5, 2013, Dr. Hughes issued the appellant a proposed two-day suspension for failure to follow instructions, defiance, and causing undue workplace disruption. *Id*. at 1740. In his proposed suspension letter, Dr. Hughes cited a series of emails written by the appellant, quoting sections that he considered "defiant, unproductive and burdensome to the work operations." *Id*. One of the supporting specifications alleged that the appellant carbon-copied Assistant Commandant Colonel (COL) Laura Ryan on several of the emails cited in the proposed suspension letter, despite COL Ryan's express prior warning to the appellant not to include her in work emails of this sort. *Id.* According to the proposal, she gave this instruction to the appellant on September 12, 2012. *Id*. The proposed two-day suspension was upheld by Mr. Bilgin, who issued the appellant's suspension notice on April 2, 2013 (Suspension). *Id*. at 1734.

On March 20, 2013, while the proposed suspension was still pending, Dr. Hughes assigned the appellant to serve as the DLIFLC Coordinator for a project commonly referred to as the "Working Memory" project (WMP). IAF, Tab 33 at 35-36. The WMP was one of approximately a dozen projects (referred to contractually as "task orders") undertaken on behalf of DLIFLC by the University of Maryland's Center for Advanced Study of Language (CASL), through a University Affiliated Research Center agreement with the National Security Agency (NSA). IAF, Tab 59 at 71; HCD (testimony of Dr. Hughes); IAF, Tab 7 at 6. The WMP was more formally referred to as the Cognitive and Working Memory Training on Mobile Platforms, and was intended to test whether working memory training could accelerate brain growth and improve cognitive functions above and beyond instructional methods alone, and above and beyond a language-

only tool. IAF, Tab 59 at 71, 79, 80. The training regimen was designed as an iPad application that offered training in Iraqi Arabic, Spanish and Persian Farsi. *Id*. at 1037, 1087-89. The record reflects that CASL had been assigned as the contractor for the project since 2011. *Id*. at 72. While the record does not indicate the total amount of funds expended by DLIFLC for the WMP, the record shows that the agency appropriated $716,632.74 in April 2012 for the second phase of the WMP, for a performance period from September 2012 through August 2013. *Id*. at 98.

Several days after being assigned to the WMP, the appellant emailed Dr. Hughes to request that she be taken off the project, citing workload concerns and a lack of contract management experience, and stating that she would need significant training on contract management to successfully take on this new project. IAF, Tab 33 at 43. After Dr. Hughes sought to reassure the appellant that the WMP was only a part-time effort and that contract management would remain the responsibility of the designated certified contracting officer, not the appellant, the appellant responded with a second email, in which she reiterated her earlier concerns and also alleged that the assignment was an attempt to add undue stress for her, undermine her morale, and prevent her from preparing for an upcoming EEO investigation. *Id.* at 40-42. After receiving a follow-up email from Dr. Hughes in which he attempted to address each of the appellant's concerns, she agreed to begin work on the WMP. *Id*. at 39.

The record reflects that the appellant began to work on the WMP starting in early April 2013, reviewing project documents and exchanging emails with CASL staff and with her DLIFLC colleagues regarding the project's scope, the availability of background documents, necessary points of contact, and other project-related matters. IAF, Tab 34 at 7-26. The record also reflects that the appellant soon began to develop concerns as to the overall management and feasibility of the project. For example, in an email from the appellant to Dr. Hughes on April 24, 2013, the appellant expressed concern that she was not

getting responses to her requests for information and documentation from either her DLIFLC project colleagues or from CASL. IAF, Tab 36 at 53.

In an email to CASL staff dated May 1, 2013, the appellant relayed concerns expressed by DLIFLC instructors that the working memory exercises contained spelling errors, and of her expectation that CASL would present DLIFLC staff with a product that had already been properly proofed. IAF, Tab 36 at 46. On May 2, 2013, the appellant sent an internal email in which she raises concerns that, because CASL had not yet collected data on the effect of the training exercises on the acquisition of Iraqi Arabic – the first language to be tested – it would not be a prudent use of agency resources for CASL to move forward with testing on the next two languages, Spanish and Persian Farsi. IAF, Tab 35 at 53; *see id.* at 60.

By late April, 2013, the appellant's internal working relationship with Dr. Hughes and other DLIFLC colleagues was deteriorating to the point that Dr. Hughes sent an email, dated April 25, 2013, to DLIFLC's human resources staff with a request to initiate the appellant's removal. IAF, Tab 37 at 5. In that email, Dr. Hughes expressed significant concern regarding the appellant's "poor behavior[,]" which he claimed "has only accelerated and become more subversive since her suspension[,]" citing difficult email exchanges that he considered "insubordinate" and which he claimed were undermining staff morale and adverse impacting project deadlines. *Id*.

In an apparent reference to the September 2012 NOW and October 2012 LOR, in addition to the explicit reference to the April 2013 Suspension, Dr. Hughes explained that he wanted to proceed with dismissing the appellant because he had "pursued every avenue of progressive discipline process addressing Dr. Flynn's behavior but to no avail." *Id*. Dr. Hughes noted that the appellant was copying one of her attorneys in responding to communications about assigned projects. *Id*.

Several weeks later, in a May 15, 2013 email to DLIFLC human resources staff, Dr. Hughes reiterated his request to dismiss the appellant, claiming that the appellant was trying to "entrap" him and other staff "in some type of unspecified issue or wrongdoing[,]" and that she had created "a hostile working environment for [Dr. Hughes] and the staff at large." *Id*. at 6. In a May 16, 2013 email, Assistant Director of the Testing Directorate Jurgen Sottung, concurred with Dr. Hughes's recommendation to remove the appellant, stating that the appellant "challenges and questions everyone and everything in an endless stream of email, which is engaging our contractors and 4-5 researchers in daily unproductive exchanges." IAF, Tab 59 at Subtab 5 at 2 of 5. Dr. Hughes again raised problems regarding Dr. Flynn's behavior in a May 22, 2013 email to DLIFLC human resources staff, and indicated that he had begun receiving complaints from CASL regarding her behavior. IAF, Tab 37 at 15. That same day, Dr. Hughes provided Mr. Bilgin and Dr. Kam with documentation regarding the appellant's prior discipline and began to draft a proposed removal letter. *Id*. at 22-23.

An email exchange between DLIFLC human resources staff and Mr. Bilgin indicates that a removal letter was prepared by the agency on May 23, 2013, and that Mr. Bilgin was planning to issue the letter to the appellant that day. IAF, Tab 36 at 7, 9. However, prior to the issuance of the letter, Mr. Bilgin was informed that a "short letter" of removal (without 30-day advanced notice and MSPB appeal rights) could not be issued to the appellant, and that removal letter was never issued. *Id*. at 9. Dr. Hughes thereafter began to prepare a separate proposed removal letter and asked DLIFLC human resources staff if the appellant could be removed from the workplace while her appeal period ran, indicating concern that the appellant's behavior was becoming "egregious" and that he expected it to only worsen. *Id*. at 8. During this same time period, the appellant continued to raise concerns regarding the WMP, with her concerns growing more detailed and emphatic as she further familiarized herself with project details. In a May 7, 2013 email to several of her colleagues, the appellant wrote that she was

"finding a lot of gaps in the provision of information, and … evidence of non-provision of various requirements" including security requirements. IAF, Tab 35 at 59. In a May 15, 2013 email to Dr. Hughes, the appellant complained about the difficult position in which she had been placed in trying to "bring a nefarious contract situation out of its tailspin." IAF, Tab 7 at 443-44. On May 20, 2013, the appellant emailed Dr. Hughes with a list of "major concerns" with the WMP contract, including a failure on CASL's part to meet security requirements outlined in the Work Performance Statement; CASL's failure to complete the iPad applications required for the study; and failure to "identif[y] criteria for contract deliverables ... with no proven concept." *Id*. at 486-489. She followed up with a separate email shortly thereafter in which she notified Dr. Hughes and other DLIFLC colleagues of her intent to "request a formal security and contract review by an independent party." IAF, Tab 35 at 35. Dr. Hughes responded that if the appellant "felt there is some impropriety regarding [the WMP] project, you have the right to request a review." *Id*. at 34.

According to the appellant, on May 22, 2013, the appellant made what was, according to her OSC Complaint, her first whistleblower disclosure by making a report to the local Office of Inspector General (IG) for claims related to contract fraud, waste, abuse, and mismanagement. *See* IAF, Tab 1 (OSC Complaint with attached timeline).[2] To this point, the record reflects that on May 23, 2013, the appellant sent an email to the IG, along with several attachments, requesting an investigation. *Id*; IAF, Tab 36 at 50. The appellant alleged violations of law, gross mismanagement, waste of funds, and abuse of authority, based on an alleged failure to meet contractual requirements related to security; a lack of

[2] In an IRA, the Board is limited to reviewing the specific protected disclosures and personnel actions that the appellant raised before OSC. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998); *Lewis v. Department of the Army*, 58 M.S.P.R. 325, 332 (1993).

deliverables and accountability; a lack of clarity on ownership of results; and other contract issues. IAF, Tab 39 at 26-31; IAF, Tab 1 (OSC Complaint).

The agency was at the same time moving forward with a decision to modify the scope of the WMP. In an email dated May 23, 2013, Dr. Hughes explained that, due to staffing issues related to the Department of Defense's planned sequestration and other logistical concerns, DLIFLC had decided not to initiate further data collection or student involvement with the WMP, and to instead focus on winding down the project. Dr. Hughes provided a list of objectives, which included: obtaining a summary report from CASL based on previous year's data; obtaining a "how to" manual on word list development; receiving training instructions for DLIFLC staff so that the project could be replicated in-house; and gaining access to software, technical specifications, and staff training manuals. IAF, Tab 59 at 362-363.

From late May 2013 until she was taken off the WMP in August 2013, the appellant continued to convey her concerns about the project to DLIFLC management. According to her OSC complaint, the appellant made a total of seven separate disclosures to her supervisors during this time period. IAF, Tab 39 at 26-31; IAF, Tab 1 (OSC Complaint). These disclosures described, among other things, a "perilous lack of oversight for the content, accuracy and scientific merit" of the WMP; "dubious" management practices; waste of government resources; and the agency's obstruction of the appellant's efforts to exercise due diligence in the management of the WMP. *Id.*

In July 22, 2013, the appellant elected to elevate her IG complaint by submitting a request for investigation to the agency's headquarters level IG. IAF, Tab 40 at 9. In her request to the agency's headquarters IG, the appellant alleged that she had "been put in a situation of entrapment and made to oversee the management of a potentially fraudulent contract that may be under criminal investigation[.]" *Id*. As with her previous IG communication, the appellant alleged that CASL was not being held to any legitimate contract requirements and

had not provided DLIFLC with any deliverables. *Id.* More specifically, the appellant wrote that CASL "appears to have been issued essentially a blank check in the form of a cost-plus-fixed-fee sole-source contract with little or no requirement, justification, minimal defining criteria for deliverables, and no ... discernible oversight" and asked the IG to investigate whether the agency's contract expenditures were in fact warranted. *Id*. at 9, 16.

In the meantime, management continued to weigh different disciplinary options in connection with appellant's behavior. In late May or early June, 2013, the agency began to draft a proposed 14-day suspension of the appellant, which they intended to treat as a "last chance" disciplinary action short of removal. IAF, Tab 37 at 52. In an email dated June 19, 2013, Dr. Hughes directed the appellant to stop sending "For Official Use Only" (FOUO) documents to outside sources, warning her that continuation of the activity could result in disciplinary action. IAF, Tab 59 at 686. This appears to be a reference to the appellant copying one of her attorneys on agency communications, as noted above. *See, e.g., id*. at 687, 693, 694,

Rather than impose further discipline, however, the agency ultimately chose not to renew the appellant's NTE term. On July 16, 2013, Mr. Bilgin emailed COL Wallace, and notified her of his intent not to renew the appellant's NTE appointment. IAF, Tab 37 at 50. In that same email, Mr. Bilgin requested that the appellant be placed on administrative leave because of concerns of possible violent behavior by the appellant. *Id*.

In an email dated August 8, 2013, Dr. Hughes notified the appellant that he did not recommend extending her NTE appointment. IAF, Tab 59 at 22. On August 14, 2013, Dr. Hughes notified the appellant that she was being taken off the WMP, effective immediately, based on several factors, including her unwillingness to focus on the contract modifications; her failure to complete a review of the current deliverables necessary to close out the project; and complaints from staff regarding her "hostile and harassing communications."

IAF, Tab 7 at 518-519. Finally, in a memorandum dated August 27, 2013, Mr. Bilgin notified the appellant of the agency's final decision not to extend her NTE appointment. *Id*. at 1726. The appellant's NTE appointment expired on October 28, 2013. *Id*. at 1713.

On or about November 21, 2013, the appellant initiated an OSC complaint alleging that her NTE appointment was not extended in retaliation for her whistleblowing disclosures. IAF, Tab 1.[3] In her OSC complaint, the appellant identified three separate categories of disclosures: her disclosure on May 22-23, 2013 to DLIFLC's IG; her disclosure on July 22, 2013 to the agency's headquarters IG; and a series of disclosures to DLIFLC management between May and August 2013.[4] *Id*. The appellant alleged that the disclosures showed a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; and an abuse of authority.

There is no evidence in the record as to any action taken by OSC in response to the appellant's complaint, nor is there any documentation from OSC terminating appellant's complaint. On June 6, 2014, the appellant filed an IRA. IAF, Tab 1. Based on the appellant's allegations, a hearing was convened via video-conference to address the merits of the appellant's claims. HCD. A

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[3] The record lacks any direct evidence of the date, if any, that OSC received the appellant's complaint. In support of her appeal, the appellant has submitted an OSC Complaint form, signed by the appellant's attorney on the appellant's behalf and dated November 21, 2013, as well as a cover letter from the appellant's attorney to OSC, also dated November 21, 2013. In submitting these documents, the appellant declared under penalty of perjury that their content was true. I therefore find that the appellant's OSC complaint was filed on or about November 21, 2013.

[4] In her OSC complaint, the appellant indicates that she made a disclosure in March 2013 to her chain of command, then clarifies that her first disclosure was made to the IG in May 2013, and that on March 25, 2013, Dr. Hughes did not grant the appellant's request for training after assigning her to WMP, even though the appellant had no contract management experience at this facility; as noted above, the appellant was assigned the WMP March 20, 2013. IAF, Tab 33 at 35-36; IAF, Tab 1 at 22, 28.

prehearing conference was convened on March 10, 2015 and is memorialized in the record. IAF, Tab 82.

Applicable Law

In order to demonstrate Board jurisdiction in an IRA appeal, the appellant must show that (1) she has exhausted her administrative remedies before OSC, and (2) she must make non-frivolous allegations that (a) she made a disclosure protected under 5 U.S.C. § 2302(b)(8) and that (b) the disclosure was a contributing factor in the agency's decision to take a personnel action under 5 U.S.C. § 2302(a). *Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1371–72 (Fed. Cir. 2001); *Rusin v. Department of the Treasury,* 92 M.S.P.R. 298, 304 (2002).[5] Once jurisdiction has been established, the appellant must then prove the elements of her claim by preponderant evidence. *Spencer v. Department of the Navy,* 327 F.3d 1354, 1356–57 (Fed. Cir. 2003). Thus, an appellant must show by a preponderance of the evidence that she made a protected disclosure and that it was a contributing factor in the decision to take a personnel action. *Willis,* 141 F.3d 1139, 1143. The agency may still prevail if it shows by clear and convincing evidence that it would have taken the action in the absence of any protected disclosures. *Rusin,* 92 M.S.P.R. at 302.

The Board has jurisdiction over this appeal

To establish that she exhausted her administrative remedies before OSC, the appellant must prove that she filed a complaint with OSC and then waited until 120 days passed, or until OSC notified her that it was terminating its investigation. 5 U.S.C. § 1214(a)(3). The appellant has the burden of showing that she properly exhausted her remedies before OSC. *Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶ 14 (2004).

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[5] The expanded definition of protected disclosures in the Whistleblower Protection Enhancement Act of 2012 (WPEA) applies to this appeal. *Day v. Department of Homeland Security*, 119 M.S.P.R. 589 (2013).

As noted above, the record reflects that the appellant filed her OSC complaint on November 21, 2013. There is no evidence in the record, nor did the agency allege, that OSC notified the appellant that an investigation concerning her complaint had been terminated. The appellant filed her IRA with the Board on June 6, 2014, more than 120 days after she filed her OSC complaint. The appellant therefore properly exhausted her administrative remedies. 5 U.S.C. § 1214(a)(3)(B).

The appellant non-frivolously alleged that she made a protected disclosure under 5 U.S.C. § 2302(b)(8). The appellant's disclosures to her supervisors and the IG alleged that, *inter alia*, the WMP – a multi-year project costing the agency well over $1 million – was being operated without sufficient oversight to ensure that security clearances and other contract specifications were being satisfied, and that CASL was receiving funding for a second project phase prior to producing results from the project's initial phase. These disclosures were sufficiently detailed to satisfy appellant's burden of making a non-frivolous allegation of a protected disclosure. *See Johnston v. Merit Systems Protection Board,* 518 F.3d 905, 910 (Fed. Cir. 2008) (finding that the appellant had made a non-frivolous allegation of a protected disclosure where her allegations were detailed and facially well supported.); *Yunus,* 242 F.3d at 1372 (allegations were facially sufficient to establish jurisdiction where factual underpinnings of claim were not frivolous). By doing so, the appellant disclosed matters that a reasonable person in her position could have believed evidenced a violation of law, rule or regulation; gross mismanagement; and/or a gross waste of funds, pursuant to 5 U.S.C. § 2302(b)(8). *See Garst v. Department of the Army*, 60 M.S.P.R. 514, 518 (1994). Any doubt or ambiguity as to whether the appellant has made a non-frivolous allegation should be resolved in favor of finding jurisdiction. *Santos v. Department of Energy,* 102 M.S.P.R. 370, 375 (2006). Thus, I concluded that the appellant non-frivolously alleged that she made at least one protected disclosure under 5 U.S.C. § 2302(b)(8).

The appellant must also non-frivolously allege that one or more of her protected disclosures was a contributing factor in the agency's decision to take a personnel action. Here, the agency's decision not to renew the appellant's NTE appointment constituted a personnel action under 5 U.S.C. § 2302(a)(2)(A). *See, e.g., O'Brien v. Office of Independent Counsel*, 79 M.S.P.R. 406, 410-11 (1998); *Special Counsel v. Social Security Administration*, 76 M.S.P.R. 392, 394 (1997). Because that personnel action was taken within months after the appellant made her disclosures, she satisfied the contributing factor criterion based on what is commonly referred to as the "knowledge-timing" test, under which an employee submits evidence showing 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. *See* 5 U.S.C. § 1221(e)(1); *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 20 (2013). The Board has held that the knowledge-timing test is generally satisfied if the personnel action occurred within this time period after the protected disclosure. *See Agoranos*, 119 M.S.P.R. at ¶¶ 21-23; *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 22 (2010).

Based on the above, I concluded that the appellant exhausted her remedies before OSC, and that she non-frivolously alleged that she made a protected disclosure which was a contributing factor in the agency's decision not to renew her NTE appointment. Thus, the appellant established Board jurisdiction over this appeal as an IRA.

Once jurisdiction has been established, the appellant must prove by preponderant evidence that she made a disclosure protected under 5 U.S.C. § 2302(b)(8), and that such disclosure was a contributing factor in the personnel action in question. *Holloway v. Department of the Interior,* 95 M.S.P.R. 650, ¶ 13 (2004), *aff'd*, 131 Fed.Appx. 717, 718–19 (Fed. Cir. 2005). In determining whether the disclosure was protected, the Board must find that a disinterested

observer with knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude that the actions evidence one of the statutory categories of disclosures. 5 U.S.C. § 2302(b).

There is no dispute that the appellant disclosed to her supervisors, including Dr. Hughes and Mr. Bilgin, her belief that DLIFLC had failed to ensure that CASL met certain security clearances delineated in the WMP contract. *See, e.g.,* IAF, Tab 34 at 59-60; IAF, Tab 35 at 33. Specifically, the appellant alleged that CASL had failed to meet the requirements set forth in Section C-3 of the WMP's Performance Work Statement (PWS) addressing security. IAF, Tab 34 at 63. Section C-3 required CASL to implement procedures to safeguard the security and confidentiality of all deliverables and government furnished materials; ensure that CASL employees and subcontractors sign confidentiality agreements; and that CASL employees entering DLIFLC's facilities complete background checks. IAF, Tab 59 at 83-84. These security requirements were based in part on Army Regulation 611-5. *Id*. at 84.[6]

When the appellant requested documentation from CASL demonstrating that it had satisfied the WPS security requirements, she was informed that most of the security requirements she cited were not applicable to the WMP because these requirements only applied to "testing material" belonging to the government, while CASL was only producing training material. IAF, Tab 34 at 70-71. This explanation, however, does not appear to align with the express language set forth in PWS section C-3, which required CASL to maintain the confidentiality of information it obtained in the performance of tasks included in the PWS and to apply security procedures to materials pertaining to the contract. IAF, Tab 59 at 83. Furthermore, in response to the appellant's request for evidence that the CASL personnel going to the DLIFLC facility had the necessary background checks completed, the appellant was simply told that all CASL staff had to pass

[6] *See* http://armypubs.army.mil/epubs/611_Series_Collection_1.html.

background checks before reporting to CASL. The record does not contain any evidence that the appellant ever received documentation that the CASL staff who were expected to come on base had in fact passed the necessary background checks.

I find that a disinterested observer, considering the circumstances as a whole, reasonably could have concluded that DLIFLC violated agency requirements, related to army regulations addressing security, including the need to obtain the proper background checks for CASL personnel coming on base, as well as related safeguards regarding the confidentiality and security of its project data as set forth above. A disclosure of a violation of an internal agency rule or regulation can constitute whistleblowing. *See, e.g.*, *Reed v. Department of Veterans Affairs*, 122 M.S.P.R. 165, ¶ 17 (2015). Because I find that the appellant reasonably believed that her disclosure evidenced a violation of a regulation, I need not decide whether it also fell within one of the other protected categories.

To establish the contributing-factor element by preponderant evidence, the appellant may rely on the knowledge-timing test discussed above: specifically, that the officials at issue knew of her protected disclosure and that the personnel action at issue occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1). The Board has held that the contributing-factor element is generally is satisfied if the personnel action occurred less than two years after the protected disclosure. *See Agoranos*, 119 M.S.P.R. 498, ¶¶ 21-23; *Schnell*, 114 M.S.P.R. 83, ¶ 22.

Here, there is no dispute that Dr. Hughes, who recommended against extending the appellant's NTE appointment, and Mr. Bilgin, who made the decision not to extend her NTE appointment, knew about the appellant's disclosures as set forth in greater detail above. The recommendation and decision were both made in August 2013, just weeks after the appellant's final disclosure

and only three months after her initial disclosures in May 2013. Accordingly, I find that the timing of the decision is enough to satisfy the knowledge-timing test. Thus, I find that the appellant established as a matter of law that her disclosure was a contributing factor in the decision to not extend her NTE appointment when its term lapsed.

The agency would have taken the same personnel action absent the disclosure

Where the appellant has met her burden of proving by preponderant evidence that she made a protected disclosure that was a contributing factor in the agency's personnel action against her, the Board must order corrective action unless the agency can prove by clear and convincing evidence that it would have taken the same personnel action absent the disclosure. *Holloway*, 95 M.S.P.R. 650, ¶ 13. In determining whether the agency met its burden, I must consider all of the evidence presented, not just the evidence supporting the agency's position. *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012). Relevant factors include (1) the strength of the agency's evidence in support of its action, (2) the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Ryan v. Department of the Air Force*, 117 M.S.P.R. 362, ¶ 12 (2012). These are not discrete elements, each of which the agency must prove by clear and convincing evidence, but rather factors that should be weighed together to determine whether the evidence is clear and convincing as a whole. *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶ 44 (2011). As explained below, I find that the factors on the whole weigh in the agency's favor and that the agency met its burden of proof.

In assessing the strength of the evidence, I look at the record as it stood at the time of the decision not to extend the appellant's NTE appointment, since the action must be weighed in view of what the agency officials knew at the time

they acted. *Yunus*, 242 F.3d 1367, 1372. As noted earlier, the agency initiated its discipline of the appellant for behavioral issues well before the date of the first disclosure as specified by the appellant. Dr. Hughes issued the appellant a NOW on September 10, 2012, more than eight months prior to the appellant's first protected disclosure, identified as "Disclosure No. 1[,]" and long before she was assigned to work on the WMP. IAF, Tab 7 at 1748-49; IAF, Tab 1 at 28. Dr. Hughes subsequently issued the appellant a LOR on October 30, 2012 and a proposed suspension on March 5, 2013, both of which were also issued well before the appellant made any protected disclosures or was even assigned to the WMP. (The two-day suspension decision issued by Mr. Bilgin on April 2, 2013 was also issued prior to the appellant's first protected disclosure). IAF, Tab 7 at 1734, 1740-41, 1745, 1748. Notably, these disciplinary actions involved unprofessional and/or inappropriate conduct, including the use of "abusive language" towards a colleague; "inappropriately confrontational and disrespectful behavior" that was "creating a disturbance in the workplace[;]" and initiating multiple emails that were "defiant, unproductive and burdensome to the work operations." *Id*.

While the personnel action at issue here – the agency's decision not to extend the appellant's term appointment – occurred after the appellant had already made her protected disclosures, I find it significant that both Dr. Hughes and Mr. Bilgin were actively pursuing efforts to remove the appellant for behavioral issues in late April 2013, nearly a full month before the appellant made her first protected disclosure. The record reflects that Dr. Hughes first began to pursue the appellant's removal on April 25, 2013, when he emailed DLIFLC's human resources staff with a request to initiate the appellant's removal, noting that the appellant's behavior issues, for which she had already been disciplined, had only accelerated and become more subversive. Dr. Hughes's concerns were soon echoed by others, including Dr. Sottung, who complained of the appellant's constant challenging and questioning "of everyone

and everything," which he said was adversely impacting the WMP. IAF, Tab 59, Subtab 5 at 2 of 5. DLIFLC's Assistant Commandant COL Ginger Wallace testified that Mr. Bilgin had discussed his desire to move forward with the appellant's removal with her. HCD (Wallace Testimony). COL Wallace testified that these discussions had been based solely on the appellant's conduct, and that Mr. Bilgin never raised any concerns about the appellant's whistleblowing activities. *Id*. COL Wallace testified that, in her opinion, Mr. Bilgin's actions, described above, to remove the appellant, were warranted based on the appellant's conduct issues. *Id*. In observing COL Wallace as she testified about these matters, I found her testimony to be specific, detailed, consistent with record, and not inherently improbable. *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458 (1987). To this latter point, the record is also replete with emails written by the appellant to colleagues and supervisors which could be characterized as strident, sarcastic, and confrontational. *See, e.g.*, IAF, Tab 35 at 15, 51, 57; IAF, Tab 36 at 5, 6, 38, 39; IAF, Tab 59 at 567, 573, 581, 591, 605, 647, 659, 680. Thus, I credit her testimony. *Hillen,* 35 M.S.P.R. at 458.

The negative tenor of these emails only increased over time, despite admonitions from her supervisors to use a more respectful tone of language toward her superiors and colleagues. Dr. Kam, who was the appellant's second level supervisor at that time, sent the appellant at least three emails between July and August 2013 asking the appellant to refrain from using inflammatory language in her communications. IAF, Tab 36 at 12; IAF, Tab 59 at 567, 573. For example, in a July 17, 2013 email to the appellant, Dr. Kam wrote:

> Your communications need to be professional and respectful. Please take a moment to reflect on the impact your words have on others, and how best to achieve the goals that you have. Your stated goal is to receive information but your approach is to make demands and malign others' character. That is unacceptable and must stop. You are instructed to not send any additional emails to me on this matter unless you can be specific, clear, respectful, and professional.

IAF, Tab 36 at 12. Dr. Kam's emails appear to have had little or no effect on the tone and substance of the appellant's email exchanges with her supervisors and colleagues.

Dr. Hughes testified that he would have recommended the non-renewal of the appellant's NTE appointment regardless of the substance of her disclosures, and that his recommendation was solely based on the appellant's behavioral issues, which he noted had started long before her whistleblowing activities. HCD (Hughes Testimony). Dr. Hughes testified that he did not consider the appellant's efforts to ensure that CASL complied with the WMP contract requirements inappropriate in and of itself. *Id.* Rather, he indicated that it was the way in which the appellant conducted herself that made her behavior so disruptive. *Id.* In his testimony, Dr. Hughes cited the appellant's disrespectful and unprofessional conduct toward Dr. Kam; her inclusion of outside sources on FOUO emails; complaints he had been receiving from CASL regarding the appellant's behavior; and issues regarding the appellant's potential use of violence as reasons for his recommendation not to extend her NTE appointment. *Id*. In observing Dr. Hughes testify about these matters, I found his testimony to be specific and detailed. Further, as set forth above, his testimony is consistent with the written record, and not inherently improbable. *Hillen*, 35 M.S.P.R. at 458. Thus, I find his testimony credible.

As both the Federal Circuit and this Board have long held, whistleblowing does not shield an employee from discipline for wrongful or disruptive conduct. *Marano v. Department of Justice,* 2 F.3d at 1142, n.5 (Fed. Cir. 1993); *Russell v. Department of Justice*, 76 M.S.P.R. 317, 325 (1997). The record reflects that both before and during her whistleblowing activity, the appellant engaged in repeated disruptive and inappropriate conduct, and that this misconduct continued to escalate despite prior discipline and multiple warnings from her supervisors to alter her behavior as set forth above in greater detail. Thus, based on the information the agency had at the time, I find that there is ample justification for

its decision not to extend the appellant's NTE appointment. I note that I am not adjudicating the merits of a removal, but I find that the strength-of-the-evidence factors weighs strongly in the agency's favor.

I find that the agency officials had at most a moderate motive to retaliate against the appellant for her protected disclosures. By all accounts, the WMP was not a successful project. HCD (testimony of Dr. Hughes and Provost Betty Leaver). Dr. Leaver testified that when she was first appointed as Provost in January 2013, she conducted an evaluation of all of the DLIFLC-CASL projects, including the WMP, and concluded that they were not cost effective, and that the agency would be better served bringing the projects "in-house." HCD. She further testified that she believed that the WMP was indeed wasteful to the extent that it "duplicated what [DLI] can do." *Id*. Dr. Leaver also testified that this was "broad knowledge [within DLIFLC] for some time" and that the appellant's allegations were "not new information" to the agency. *Id.*

In her testimony, Dr. Leaver noted that the agency began having discussions about winding down the WMP and other CASL projects as early as late January 2013, when the agency began to prepare for sequestration and the loss of approximately $49 million in funding. *Id.* For these reasons, as well as others, including issues with respect to the WMP taking too much of the language students' time away from actual classroom learning, she and other senior DLIFLC officials made the decision to begin to wind down the project. *Id*. The close out of the WMP and other CASL projects, Dr. Leaver stated in her testimony, had nothing to do with the appellant's whistleblowing but was simply a "budgeting issue and an effectiveness issue." *Id.* In observing Dr. Leaver as she testified about these matters, I found her testimony to be specific, detailed, consistent with record, and not inherently improbable. *Hillen,* 35 M.S.P.R. at 458. Dr. Hughes testified similarly, stating that the decision to wind down the WMP was largely due to sequestration, and that the agency was no longer able to continue these

multi-year contracts with CASL. HCD. Following a careful review of the record inclusive of my observations, I find Dr. Leaver's testimony credible.

The record also reflects that, by the time the appellant made her first whistleblowing disclosure, Dr. Hughes had already begun to actively wind down the WMP, and had initiated procedures for modifying the WMP to ensure that the agency obtained the data it needed from CASL to continue the project in-house. Specifically, in a May 23, 2013 email to the WMP team members, Dr. Hughes explained that – due to staffing issues related to the agency's planned sequestration and other logistical concerns – DLIFLC had decided not to initiate further data collection or student involvement with the WMP, and he presented a list of objectives for winding down the project. IAF, Tab 59 at 362-363. The timing of this email supports the testimony of Drs. Hughes and Leaver that the decision to wind down the project had already been made prior to the appellant's specified disclosures.

In addition, I found no evidence in the record that the agency tried to undermine the appellant's whistleblowing activities. When the appellant notified Dr. Hughes of her intent to "request a formal security and contract review [of the WMP] by an independent party," Dr. Hughes responded that if the appellant "felt there is some impropriety regarding [the WMP] project, you have the right to request a review." IAF, Tab 35 at 34-35. Dr. Hughes testified that he told the appellant to "go for it" when she threatened to go to the IG with her concerns regarding the WMP, and further testified that he believed the appellant had every right to go to the IG with any allegations of contract impropriety. HCD. In observing Dr. Hughes testify about these matters, I found his testimony to be specific, detailed, and not inherently improbable. As noted above, his testimony was consistent with the written record, and that of Dr. Leaver. *Hawkins v. Smithsonian Institution,* 73 M.S.P.R. 397, 403-04 (1997).

While the appellant alleges that the agency was obstructing her efforts to obtain necessary contract documentation, I find nothing in the record to suggest

that any failure on the agency's part to provide the appellant with WMP documentation was based on an intent to hide any agency wrongdoing. Rather, the record reflects that there was simply a great deal of confusion among DLIFLC, CASL, and NSA staff as to what documentation the appellant was seeking, and who might have that information. *See, e.g.*, IAF, Tab 7 at 491; IAF, Tab 33 at 66; IAF, Tab 34 at 44-45; IAF, Tab 35 at 57; IAF, Tab 36 at 5; IAF, Tab 59 at 680. The record also reflects that the agency made multiple efforts to comply with the appellant's requests for information, but that the appellant remained dissatisfied with these efforts. *See, e.g*., IAF, Tab 7 at 680; IAF, Tab 35 at 54; IAF, Tab 36 at 5 and 12; IAF, Tab 59, Subtab 4. The only time that the appellant was expressly told to stop engaging in communications regarding the WMP was when she was officially taken off the project by Dr. Hughes. IAF, Tab 7 at 445-446.

Moreover, the appellant fails to adequately explain what motive any of the officials had to retaliate against the appellant for her whistleblowing. While the appellant had alleged that the WMP was under "criminal investigation," she herself recognized that the investigation was focused on a former DLIFLC official who had gone to work for CASL, rather than on the contract itself. IAF, Tab 40 at 9. There is no evidence in the record that the WMP or other CASL projects were themselves under criminal investigation. Furthermore, COL Wallace testified that the criminal investigation was in fact solely focused on a former DLIFLC employee, not the contract itself. HCD. *Hawkins,* 73 M.S.P.R. at 403-04.

During her testimony, the appellant repeated much of what was already contained in the record regarding her belief that the WMP was grossly mismanaged and a waste of government resources "on a grand scale." HCD. While I have no reason to doubt that the appellant, among others, believed that the WMP was a wasteful and poorly managed project, she failed to adequately show that the agency's decision not to extend her NTE appointment was done in

retaliation for her whistleblowing activities. Even assuming there was some motive for the agency to retaliate against the appellant for her whistleblowing activities, I find that this motive was at most moderate. Thus, on the whole, I find that the motive-to-retaliate factor weighs in favor of the agency. Further, there is nothing in the record to suggest that similarly situated non-whistleblowers are more favorably treated. *See Sutton v. Department of Justice*, 94 M.S.P.R. 4, 14 (2003). Considering the factors as a whole, I am left with a firm belief that the agency would have decided not to renew the appellant's term appointment regardless of whether she had made any protected disclosures as set forth above. Given the strength of the agency's evidence in support of its action, the absence of sufficient motive to retaliate against the appellant, and the absence of any evidence that non-whistleblowers are treated more favorably, I find that the agency established by clear and convincing evidence that it would still have decided not to renew the appellant's term appointment absent her whistleblowing disclosures.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

_____
Franklin M. Kang
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **April 25, 2016**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period

begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

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

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

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

Criteria for Granting a Petition or Cross Petition for Review

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

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

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

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

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

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

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

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

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of this decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this decision only after it becomes final by filing in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

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

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

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

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KATHRYN A. FLYNN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SF-1221-14-0620-W-1

DATE: January 6, 2017

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Kathryn A. Flynn, Claremont, California, pro se.

Michael L. Halperin, Esquire, Monterey, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the 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 when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application

[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).

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).

¶2 On October 29, 2007, the agency effected an "Excepted Appointment NTE [Not to Exceed] 29-OCT-2009" of the appellant to an Associate Professor position at the agency's Defense Language Institute and Foreign Language Center (DLIFLC). Initial Appeal File (IAF), Tab 7, Subtab D at 6-8. The agency extended the appointment several times for shorter NTE periods between October 2009 and October 2011, with a final extension issued on October 27, 2011, for a 2-year period ending on October 28, 2013. *Id.* at 1-5. On October 28, 2013, the agency effected the appellant's termination upon the expiration of her NTE appointment. IAF, Tab 7, Subtabs C, E.

¶3 On appeal to the Board, the appellant alleged that the agency decided not to extend her appointment based on reprisal for whistleblowing. IAF, Tab 1 at 5. In particular, the appellant asserted that she disclosed to her supervisors and the Inspector General (IG) a gross waste of funds relating to a Government contract. IAF, Tab 33 at 10-19. The agency, by contrast, asserted that it became clear over time that the appellant's conduct and performance was not up to the agency's standards, not meeting management's expectations, and impacting the agency's mission. IAF, Tab 7 at 2, 4. The agency noted that it had issued the appellant a September 2012 letter of warning for using abusive language and an

October 2012 letter of reprimand for repeatedly demonstrating unprofessional behavior by being insubordinate and discourteous and creating a disturbance in the workplace. *Id.* at 5. The agency also asserted that it had given the appellant a "Fair" rating on her October 1, 2011, through September 30, 2012 performance evaluation, including a "Needs Improvement" rating in the area of Interpersonal Relationships, and imposed a 2-day suspension in April 2013, for failure to follow instructions, defiance, and causing undue workplace disruption. *Id.* at 6.

¶4 After a hearing, the administrative judge denied the appellant's request for corrective action. IAF, Tab 94, Initial Decision (ID) at 2, 24. The administrative judge found that the appellant exhausted her remedy with the Office of Special Counsel and reasonably believed that she made protected disclosures to her supervisors and the agency's IG that a multi-year project costing over $1 million was being operated by a contractor in violation of an agency regulation and without sufficient oversight to ensure that security clearances and other contractual specifications were being satisfied. ID at 13-16. The administrative judge also found that the disclosures were a contributing factor in the decision not to extend her appointment. ID at 16-17.

¶5 Nevertheless, the administrative judge held that the agency proved by clear and convincing evidence that it would have taken the same personnel action absent the disclosures. ID at 17. The administrative judge noted that the agency had initiated disciplinary actions against the appellant, including a notice of warning, a letter of reprimand, and a 2-day suspension for behavioral issues, well before the date of her first protected disclosure. ID at 18. He found that these disciplinary actions were based on charges of unprofessional and/or inappropriate conduct, including the use of abusive language toward a colleague, inappropriately confrontational and disrespectful behavior that created a disturbance in the workplace, and initiating multiple emails that were defiant, unproductive, and burdensome to work operations. *Id.* The administrative judge also found it significant that the recommending and acting officials were pursuing

efforts to remove the appellant for behavioral issues nearly 1 month before she made her first protected disclosure, and that an assistant commandant credibly testified that the acting official raised his concerns with her about the appellant's behavior but not her whistleblowing activities. ID at 18-19. The administrative judge noted that the record was replete with emails sent by the appellant that could be characterized as becoming more strident, sarcastic, and confrontational over time, even though her supervisors had instructed her on several occasions to use a more respectful tone. ID at 19. Thus, the administrative judge held that the agency had a strong justification for its decision not to extend the appellant's NTE appointment. ID at 19-21. Moreover, the administrative judge found that the agency officials had, at most, a moderate motive to retaliate against the appellant because the project about which she made her disclosures was broadly known by the agency to not be successful or cost effective and already in the process of being "w[ound] down" and moved in-house by the time the appellant made her first disclosure. ID at 21-22. The administrative judge noted that there was no evidence that the agency tried to undermine the appellant's whistleblowing activities; in fact, the appellant's supervisor had encouraged her to report her concerns to the IG. ID at 22. Finally, the administrative judge found that there was no evidence suggesting that similarly situated nonwhistleblowers were treated more favorably. ID at 24.

¶6 The appellant asserts on review that the administrative judge incorrectly credited her with having only 6 years of Federal service instead of nearly 16 years of service, and that this increased length of service showed that the agency's allegations of insubordination and disrespect were "highly suspect." Petition for

Review (PFR) File, Tab 1 at 5.[2] She also contends that several agency officials wrote notes of excellence regarding her work in 2011 and otherwise praised her work in 2012, describing her as a valued employee and highly recommending her for promotion. *Id.* at 5-6. The appellant asserts that the agency's actions toward her changed after she filed an equal employment opportunity (EEO) complaint based on alleged sexual harassment during an altercation at her cubicle with a coworker in September 2012. *Id.* at 6-7.

¶7 The administrative judge did not find that the appellant had only 6 total years of Federal service, nor did he consider the appellant's length of service in finding that the agency proved by clear and convincing evidence that it would have taken the same action in the absence of her disclosures. ID at 17-24. Instead, the administrative judge simply noted that, as of the appellant's initial NTE appointment on October 29, 2007, her Standard Form 50 indicated that her service computation date was October 29, 2007. ID at 2; *see* IAF, Tab 7 at 1721. Thus, the appellant's argument regarding her length of service demonstrates no error in the initial decision. Further, the administrative judge correctly held that, in determining whether the agency met its burden, the Board must consider all of the evidence presented, not just the evidence supporting the agency's position. ID at 17; *see Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012). Consistent with *Whitmore*, the administrative judge

[2] The appellant submitted an "updated" petition for review after submitting her original petition for review. PFR File, Tab 2. This document includes a summary and changes to some of the headings and paragraph endings of the original petition for review, as well as additional phrases and sentences. *Id.* at 32. *Compare, e.g.*, PFR File, Tab 1 at 5, *with* PFR File, Tab 2 at 5-6. It does not, however, substantially differ in substance from the original petition for review.

The appellant also filed a supplement to her reply to the agency's response to her petition for review. PFR File, Tab 7. Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review. 5 C.F.R. § 1201.114(a). The appellant did not file a motion for leave to submit this pleading. *See* 5 C.F.R. § 1201.114(a)(5). Thus, we have not considered the supplemental reply.

correctly considered the fact that, for most of her time at the DLIFLC, the appellant had an exemplary work record and regularly received outstanding performance reviews. ID at 3. To the extent that the appellant asserts that the agency's failure to extend her appointment was based on reprisal for filing an EEO complaint, such a claim of a violation under 5 U.S.C. § 2302(b)(9)(A)(ii) does not provide a basis for Board review in an IRA appeal. 5 U.S.C. § 1221(a); *see Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 7 (2013).

¶8 The appellant also contends that the administrative judge misapplied the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999), for determining whether the agency showed by clear and convincing evidence that it would have taken the same personnel action in the absence of her whistleblowing. PFR File, Tab 1 at 7. The appellant asserts that her communications were direct, consistent, and detailed and did not evidence disrespect, obstruction, and insubordination. *Id.* She also contends that the emails the agency cited as reasons for terminating her employment transmitted information on contract violations, a lack of deliverables already purchased, or security and contract violations, or requested specific information relating to contract line items required in the Work Performance Statement. *Id.* at 8. The appellant contends that her supervisors repeatedly asserted that they did not know what information was required, even though they were running the contracts. *Id.*

¶9 We agree, however, with the administrative judge's analysis of the *Carr* factors. *See* ID at 17-24. Although the appellant asserts that the emails in question were direct, consistent, and detailed, the administrative judge correctly found that they also could be characterized as "strident, sarcastic, and confrontational," and that the negative tenor of the appellant's emails increased over time despite instructions from her supervisors to use a more respectful tone. ID at 19-20; *see, e.g.*, IAF, Tab 35 at 15-16, 57, Tab 36 at 5-6, 12, 37-39, 59 at 567-69, 573-74, 581, 605-06, 659, 680-81. Many emails and behavior that may be characterized in a similar fashion predated the appellant's first protected

disclosure, which occurred in late May 2013. *See, e.g.*, IAF, Tab 7, Report of Investigation at 160-61, 166, 171-72, 178-79, 183-84, 210-11, 213-14, 218-19, Tab 33 at 33-34, 39-40, Tab 34 at 79-80; ID at 8-9. The appellant has not shown that any lack of knowledge on the part of her supervisors as to what information was required regarding the contract justified the tone set forth in her emails. Moreover, as both the U.S. Court of Appeals for the Federal Circuit and the Board have held, whistleblowing activity does not shield an employee from discipline for wrongful or disruptive conduct. *Marano v. Department of Justice*, 2 F.3d 1137, 1142 n.5 (Fed. Cir. 1993); *Russell v. Department of Justice*, 76 M.S.P.R. 317, 325 (1997); ID at 20.

¶10 In addition, the administrative judge found credible the testimony of the appellant's supervisor that he recommended the nonrenewal of her appointment because of the way in which she conducted herself, not because of her efforts to ensure compliance with the contract requirements; this credibility determination was based in part on the administrative judge's observations of the supervisor's demeanor. ID at 20, 22; *see Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002) (finding that, the Board must defer to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on observing the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so). The appellant has not established a basis for overturning this credibility determination. As further found by the administrative judge, the agency disciplined the appellant long before she made her first protected disclosure, and the appellant's supervisors were pursuing efforts to remove her approximately 1 month before she made her first protected disclosure. ID at 18-19; *see* IAF, Tab 37 at 5. Under these circumstances, we find that the appellant has shown no error in the administrative judge's finding that the agency presented strong evidence supporting its determination not to extend her appointment. ID at 20-21; *see Rumsey v. Department of Justice*, 120 M.S.P.R.

259, ¶¶ 44-48 (2013) (finding the agency's documented concerns regarding the appellant's performance well before she made her protected disclosures strengthened the agency's evidence in support of its action).

¶11 The appellant also contends that the agency's rationale for the nonrenewal of her contract was a pretext for whistleblower reprisal because her supervisor indicated during an EEO investigation that he did not renew her appointment because her project ended and the mission changed, yet there was no reduction in work requirements and this reason differed from the reasons given by the supervisor during his testimony before the Board. PFR File, Tab 1 at 21-22.

¶12 The appellant's supervisor indicated during an EEO investigation that he recommended to the acting official that the appellant's term appointment not be extended because the organization no longer needed her services under the "business rule," and that she was assigned to a project that she did not complete. IAF, Tab 7 at 24, Report of Investigation at 1187-88. The acting official, however, indicated that he did not renew the appointment based on the supervisor's recommendation, and that the supervisor suggested that the appointment should not be renewed "because of [the appellant's] failure to meet expectations as evidenced by her disciplinary record, refusal to perform work and poor interpersonal relations." *Id.* at 24, Report of Investigation at 1519, 1522. We find that the above descriptions regarding the reason the appellant's supervisor recommended that her appointment not be renewed are not necessarily inconsistent with each other, and are consistent with the administrative judge's finding that the supervisor testified at the hearing that his recommendation was based on the appellant's behavioral issues. ID at 20. Thus, we discern no reason to disturb the administrative judge's finding that the supervisor was credible.

¶13 The appellant further contends that the administrative judge improperly denied her the opportunity to conduct depositions and other discovery and to call certain witnesses, including her second- and third-level supervisors and IG employees. PFR File, Tab 1 at 22. She also asserts that the administrative judge

should have recused himself after her representative asserted that he had engaged in erratic, irrational, and biased conduct. *Id.* In addition, the appellant contends that the administrative judge refused to hold the hearing in a more neutral location, did not permit her to refer to notes or use a power point projector, asked her how much longer her testimony would continue, and permitted an agency witness to testify first. PFR File, Tab 1 at 23.

¶14 An administrative judge has broad discretion in ruling on discovery matters, and absent an abuse of discretion the Board will not find reversible error in such rulings. *Kingsley v. U.S. Postal Service*, 123 M.S.P.R. 365, ¶ 16 (2016). Here, the administrative judge denied the appellant's motion to compel depositions because she did not provide timely notice of the individuals she sought to depose along with the specific time and place of such depositions. IAF, Tab 50 at 2-3. The appellant has shown no abuse of discretion by the administrative judge in this regard. *See* 5 C.F.R. § 1201.73(a) (requiring requests for discovery to specify the time and place of the taking of depositions). Moreover, an administrative judge has wide discretion to control the proceedings, including the authority to exclude testimony he believes would be irrelevant, immaterial, or unduly repetitious. *Parker v. Department of Veterans Affairs*, 122 M.S.P.R. 353, ¶ 21 (2015). The appellant has not shown the administrative judge abused his discretion in denying her request for certain witnesses or in otherwise controlling the hearing-related proceedings, particularly given that the appellant's request for witnesses was untimely filed. IAF, Tab 82 at 2-3; 5 C.F.R. § 1201.43(c). In fact, the administrative judge provided an alternative basis for denying the requested witnesses based on the appellant's proffers as to their testimony and approved several witnesses requested by the appellant, even though her request was untimely filed. IAF, Tab 82 at 3. Although the appellant contends that the administrative judge was biased against her, she has not shown that any comments or actions by the administrative judge evidenced a deep-seated

favoritism or antagonism that would make fair judgment impossible. *See Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002).

¶15 The appellant also asserts that the agency had more than a "moderate" reason for retaliation, as found by the administrative judge, because senior leaders and her supervisors were personally responsible for committing money to the contracts and misappropriation of funding, one such individual acknowledged a friendship with the contractor's personnel, her supervisor wrote a contract modification that "dismiss[ed]" most substantive requirements, the contract was under criminal investigation and the supervisors were interviewed by the investigators, and the agency created a hostile work environment by excluding her from meetings, telephone calls and teleconferences, isolating her, denying her training, ignoring her requests for an end to the hostile environment, refusing to transfer her to a different division, and requiring her to spend a specific number of hours on each of her projects. PFR File, Tab 1 at 23-25. The appellant contends that the hostile work environment caused her to communicate more directly and assertively and challenge what she believed were fraudulent and abusive management practices regarding the contract. *Id.* at 25. The appellant also notes that the agency had a motive to retaliate because the contract involved the National Security Agency (NSA), which was under public scrutiny in connection with the Edward Snowden release of classified information, and one agency manager specifically noted with respect to the appellant's communications that there was a need to avoid public scrutiny of the NSA. *Id.* at 26.

¶16 We agree with the administrative judge that agency officials had at most a moderate motive to retaliate against the appellant for her protected disclosures. ID at 21. The administrative judge noted that the agency had decided months before the appellant's first disclosure that the project upon which she based her disclosures was neither successful nor cost effective and would be closed out based on budgeting and effectiveness issues. ID at 21-22. Moreover, as the administrative judge found, the appellant's supervisor did not undermine her

whistleblowing activities, but instead informed her that it was her right to request a formal security and contract review by an independent party if she believed there was some impropriety regarding the project. ID at 22; IAF, Tab 35 at 34-35. The administrative judge also found that there was no apparent motive for agency officials to retaliate against the appellant, and that any criminal investigation relating to the contract was focused on a former DLIFLC official who had left the agency to work for the contractor, not on the project or contract itself or the recommending or acting officials in this case. ID at 23. The administrative judge concluded that, even assuming that there was some motive for the agency to retaliate against the appellant for her whistleblowing activities, the motive was at most moderate and the motive-to-retaliate factor weighed in favor of the agency. ID at 24. We find that the allegations set forth by the appellant on review, even if true, do not establish that the agency had more than a moderate motive to retaliate.

¶17 Finally, the administrative judge found that there was nothing in the record to suggest that similarly situated nonwhistleblowers were treated more favorably than the appellant. ID at 24. Even if the absence of such evidence could be found to "cut slightly against the Government," *see Miller v. Department of Justice*, No. 2015-3149, 2016 WL 7030359, at *8 (Fed. Cir. Dec. 2, 2016), we are nevertheless left with the firm belief that the agency would have taken the same action in the absence of the appellant's protected disclosures based on the strength of the evidence in support of its action, including the evidence showing that the agency had taken steps to separate the appellant from employment before she made her first disclosure, and the absence of a sufficient motive to retaliate against her, *see Mithen v. Department of Veterans Affairs*, 122 M.S.P.R. 489, ¶ 36 (2015) (holding that the Board does not view the *Carr* factors as discrete elements, each of which the agency must prove by clear and convincing evidence; rather, the Board will weigh the factors together to determine whether the evidence is clear and convincing as a whole), *aff'd*, 652 F. App'x 971 (Fed. Cir.

2016); 5 C.F.R. § 1209.4(e) (defining "clear and convincing evidence" as that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established).

¶18 Accordingly, we deny the petition for review and affirm the initial decision.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this final decision by the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the U.S. Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in

title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode.htm. Additional information about the 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, and 11. Additional information about other 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.

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

FOR THE BOARD:

_____
Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHRYN A. FLYNN, Petitioner, v. MERIT SYSTEMS PROTECTION BOARD and UNITED STATES DEPARTMENT OF THE ARMY, Respondents.	No. 17-70617 MSPB No. SF-1221-14-0620-W-1 MEMORANDUM*

On Petition for Review of an Order of the
Merits Systems Protection Board

Submitted January 7, 2019**

Before: GOODWIN, LEAVY, and SILVERMAN, Circuit Judges.

Dr. Kathryn A. Flynn, proceeding pro se, petitions for review of the Merit Systems Protection Board's ("MSPB") final order in her action alleging that the Department of the Army ("the agency") took disciplinary action and ultimately

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

failed to renew her employment in violation of the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). We have jurisdiction under 5 U.S.C. § 7703(b)(1)(B). We review de novo questions of the MSPB's jurisdiction, *Daniels v. Merit Sys. Prot. Bd.*, 832 F.3d 1049, 1054 (9th Cir. 2016), and will set aside the MSPB's actions, findings, or conclusions only if they are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence," 5 U.S.C. § 7703(c). We affirm.

To the extent that Dr. Flynn's claims are based on personnel actions allegedly taken because she filed an Equal Employment Opportunity complaint, the MSPB properly concluded that it lacked jurisdiction to consider the claims. *See* 5 U.S.C. § 1221(a); *Daniels*, 832 F.3d at 1051 (MSPB jurisdiction over an individual right of action ("IRA") appeal requires non-frivolous allegations of whistleblower disclosures). Moreover, Dr. Flynn did not raise this argument before the Office of Special Counsel ("OSC") and therefore failed to exhaust it. *See id.* at 1051 (MSPB jurisdiction over an IRA appeal requires that the appellant have exhausted administrative remedies before the OSC).

Substantial evidence supports the MSPB's determination that the agency proved by "clear and convincing evidence that it would have taken the same

personnel action in the absence of" the protected disclosures. 5 U.S.C. § 1221(e)(1); *see Duggan v. Dep't of Defense*, 883 F.3d 842, 846-47 (9th Cir. 2018) (adopting the Federal Circuit's three-factor test, as set out in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999), for determining whether the agency has carried this burden).

Dr. Flynn has not demonstrated an abuse of discretion by the administrative judge in denying any of her discovery requests or requests to compel depositions. *See Duggan*, 883 F.3d. at 848 (standard of review).

The record does not support Dr. Flynn's contention that the administrative judge was biased against her.

The MSPB's motion to dismiss the MSPB as a party to this appeal (Dkt. No. 10) is GRANTED. *See Johnen v. U.S. Merits Sys. Prot. Bd.*, 882 F.3d 1171, 1174 (9th Cir. 2018) (("[B]ecause Petitioner is seeking review of the Board's decision on the merits of his termination and exclusion, the [MSPB] is not the proper respondent. Only the agency that took the action . . . is properly [the] respondent.").

Maurice M. Carter's motion for leave to file a brief as amicus curiae (Dkt. No. 34) is DENIED.

AFFIRMED.