UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DAVID P. MARANA,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
AT-1221-20-0543-M-1

DATE: April 26, 2022

David P. Marana, Evans, Georgia, pro se.

Deborah E. Shah, Esquire, Fort Gordon, Georgia, for the agency.

BEFORE
Jeffrey S. Morris
Administrative Judge

INITIAL DECISION

On May 28, 2020, the appellant filed an individual right of action (IRA) appeal alleging that the agency took personnel actions against him in retaliation for his engagement in protected whistleblowing activity. Initial Appeal File (IAF), Tab 1. On October 2, 2020, I dismissed the appeal for lack of jurisdiction. *Id.*, Tab 69. On January 20, 2022, the United States Court of Appeals for the Federal Circuit remanded the case to the Board. Litigation File, Tab 13. The Board subsequently docketed the remanded appeal. Remanded

Appeal File (RAF), Tab 5. For the reasons set forth below, the remanded appeal is DISMISSED as withdrawn.

WITHDRAWAL OF APPEAL

On April 25, 2022, the appellant filed a pleading which stated he wished to withdraw the remanded appeal. The appellant stated in his pleading that the withdrawal was voluntary and with prejudice. RAF, Tab 11. A withdrawal must be clear, decisive and unequivocal. A voluntary withdrawal of an appeal is an act of finality. *See Amante v. Department of the Army*, 77 M.S.P.R. 636, 638 (1998). An appellant may withdraw his appeal at any time. *See Kravitz v. Office of Personnel Management*, 75 M.S.P.R. 44, 47-48 (1997). Based upon the appellant's stated intention in the filed pleading, I find he has clearly, decisively, and unequivocally withdrawn his remanded petition for appeal. I further find there is nothing in the record to indicate that the appellant's decision to withdraw his appeal was based on misleading or incorrect information provided by the Board or the agency. Therefore, I GRANT the appellant's voluntary request to withdraw his appeal.

In view of the appellant's withdrawal of the appeal, there are no issues left for the Board to adjudicate. Accordingly, the appeal is DISMISSED as withdrawn.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /S/
Jeffrey S. Morris
Administrative Judge

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

DAVID P. MARANA,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2021-1463

Petition for review of the Merit Systems Protection Board in No. AT-1221-20-0543-W-1.

Decided: January 20, 2022

DAVID P. MARANA, Evans, GA, pro se.

DEANNA SCHABACKER, Office of General Counsel, United States Merit Systems Protection Board, Washington, DC, for respondent. Also represented by TRISTAN L. LEAVITT, KATHERINE MICHELLE SMITH.

Before MOORE, Chief Judge, BRYSON and DYK, *Circuit Judges*.

PER CURIAM.

David P. Marana seeks review of an order of the Merit Systems Protection Board dismissing his Individual Right of Action ("IRA") appeal for lack of jurisdiction. We affirm in part and remand in part.

I

Mr. Marana was employed as a nurse at the Dwight David Eisenhower Army Medical Center at Fort Gordon, Georgia. In February 2019, he sent an email containing a patient's name, partial social security number, and medications to various persons who were not authorized to receive that information. Following that action, the agency suspended Mr. Marana's access to electronic health records and conducted an investigation of the incident. In May 2019, the agency proposed to remove Mr. Marana for conduct unbecoming a federal employee in connection with his inappropriate disclosure of personal health information. He was removed from his position in June 2019.

Mr. Marana subsequently filed a whistleblower retaliation complaint with the Office of Special Counsel ("OSC") regarding his suspension and removal. In March 2020, the OSC closed its investigation into his complaint without taking action. In its closing letter, the OSC identified six disclosures that Mr. Marana had alleged in his OSC complaint as the basis for his whistleblower retaliation complaint. Those disclosures were: (1) reporting problems with recordation and infection control at the hospital; (2) informing the agency

that his position could be performed by a nurse or administrative assistant with a lower GS rating; (3) accusing the Chief of Medical Management of denying care to patients; (4) complaining to supervisors about alleged favoritism in the Medical Evaluation Board process; (5) raising concerns about the treatment of "against medical advice" patients; and (6) making disclosures about the sterilization of flexible endoscopes.

Mr. Marana filed his IRA appeal with the Merit Systems Protection Board in May 2020. The administrative judge who was assigned to the case required Mr. Marana to file a statement establishing Board jurisdiction by showing that he had exhausted his administrative remedies with the OSC and that his allegations of retaliation for whistleblowing were non-frivolous.

Mr. Marana, proceeding pro se, filed a large number of documents in response to the administrative judge's initial order and a follow-up order in which the administrative judge directed him to provide a more specific and concise account of each of his alleged disclosures. Among those submissions, Mr. Marana provided additional details regarding the six disclosures set forth in the OSC's closing letter.

In October 2020, the administrative judge issued a decision dismissing Mr. Marana's IRA appeal for lack of jurisdiction. The administrative judge ruled that Mr. Marana had exhausted his remedies with the OSC with regard to the six disclosures identified in the OSC's closing letter, and that he had non-frivolously

alleged that he had been subjected to covered personnel actions (1) when his access to electronic health records was suspended, (2) when the agency proposed his removal, and (3) when it removed him. With respect to the six identified disclosures, however, the administrative judge found that Mr. Marana had failed to show that the Board had jurisdiction over his appeal.

In particular, the administrative judge found that Mr. Marana had failed to make a non-frivolous allegation that disclosures number 4 and number 5 constituted protected disclosures and had failed to show that disclosures number 1, 2, 3, and 6, even if protected, contributed to the personnel actions the agency took against him in 2019.

Mr. Marana has petitioned for review by this court of the decision of the administrative judge dismissing his appeal.

II

As was the case before the administrative judge, Mr. Marana is proceeding pro se in this court, and the precise nature of the claims Mr. Marana seeks to raise is not easy to discern. The claims he presented to the OSC and renewed before the Board are set forth in the OSC's closing letter and in one of Mr. Marana's submissions to the administrative judge. *See* Supp. App'x 57-71, 134-35.

1. As noted, the administrative judge ruled that Mr. Marana failed to non-frivolously allege that

disclosures number 4 and number 5 were protected under the Whistle-blower Protection Act, 5 U.S.C. § 2302(b)(8).

The OSC characterized Mr. Marana's disclosure number 4 as follows: "you communicated to various supervisory employees of the Agency about favoritism in the Medical Evaluation Process." Supp. App'x. 134. Before the administrative judge, Mr. Marana characterized that disclosure as follows: "MEB [Medical Evaluation Board] is a Haven for soldiers; Impact Army Readiness; Need review of MEB policy and procedures." *Id.* at 67. His disclosure, he alleged, revealed "[p]ossibly abuse of MEDICAL authority at the expense of Readiness with impact on National Defense and Security." *Id.* (emphasis omitted). He added: "Essentially, Unit commanders have limited command and control over soldiers in the MEB and it impacts Unit readiness. This is a critical issue if/when soldier has motives other than genuinely wanting to perform duties as a soldier including deployment." *Id.*

The administrative judge found Mr. Marana's explanation of the significance of disclosure number 4 to be "speculative and vague," and that Mr. Marana therefore failed to show that the alleged disclosure met the standard for a non-frivolous allegation for purposes of establishing Board jurisdiction. *Id.* at 8. We agree with that characterization. *See Garvin v. Merit Sys. Prot. Bd.*, 737 F. App'x 999, 1004 (Fed. Cir. 2018) (non-precedential); *Auston v. Merit Sys. Prot. Bd.*, 371 F. App'x 96, 102 (Fed. Cir. 2010) (non-precedential); *Smart v. Dep't of the Army*, 157 F. App'x 260, 262 (Fed.

Cir. 2005) (non-precedential). Notably, Mr. Marana barely alludes to that disclosure in his brief in this court, and nothing he says on that score alters our conclusion that the administrative judge's characterization of his argument was correct.

As for disclosure number 5, the OSC characterized Mr. Marana's claimed disclosure as follows: "[y]ou communicated to the Chief of Patient Administration about your concerns with how the 'against medical advice' patients were treated by nurses, and whether the agency had adequate policy to handle them." Supp. App'x at 134. Before the Board, Mr. Marana characterized that disclosure as follows: "Coumadin clinic patient follow-up issues including backlog and patient non-compliance with treatment plan; Need for against medical advice (AMA) policy." *Id.* at 69. As noted by the administrative judge, Mr. Marana stated that the disclosure revealed "Management issues but not meet [sic] the following: (a) violation of law, rule, regulation; (b) gross mismanagement; (c) gross waste of funds; (d) abuse of authority; and/or (e) a substantial and specific danger to public health and safety." *Id.* at 8, 69. Interpreting that statement as a disclaimer that disclosure number 5 had disclosed conduct falling within the scope of the Whistle-blower Protection Act, the administrative judge ruled that the disclosure did not meet the standard for a non-frivolous allegation for purposes of establishing Board jurisdiction.

It is not entirely clear that Mr. Marana intended that statement to disclaim reliance on disclosure number 5. In any event, however, even setting aside the

apparent concession in his response to the Board, Mr. Marana has offered nothing of substance to suggest that disclosure number 5 was sufficient to give rise to a viable whistleblower complaint.

2. The administrative judge found that the four remaining disclosures were not sufficient to constitute a non-frivolous showing that they contributed to the actions taken against Mr. Marana, because they all were made more than two years before the personnel actions at issue in this case. The administrative judge concluded that under the circumstances, a period in excess of two years between the disclosures and the personnel actions was too long an interval to justify an inference of cause and effect between the two events. *Id.* at 7. In addition, the administrative judge found that no other relevant factors supported a finding that those four disclosures contributed to the personnel actions taken against Mr. Marana. *Id.* at 7 n.4.

With respect to three of those four disclosures, i.e., disclosures number 1, number 3, and number 6, we agree with the administrative judge. The disclosures were remote in time from the personnel actions that Mr. Marana is challenging. *See Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372, 1377 (Fed. Cir. 1999) ("A two-year gap between the disclosures and the allegedly retaliatory action is too long an interval to justify an inference of cause and effect between the two. . . ."); *Salinas v. Dep't of the Army*, 94 M.S.P.R. 54, 59 (2003) (the disclosure and the allegedly retaliatory act two years later were "too remote in time" for a reasonable person to conclude that the disclosure was a

contributing factor to the action taken). Moreover, as the administrative judge noted, Supp. App'x at 7 n.4, the other circumstances surrounding those disclosures, i.e., the strength or weakness of the agency's reasons for taking the personnel action, whether the disclosures were personally directed at the official responsible for the adverse actions, and whether the responsible official had a motive to retaliate, were not suggestive of retaliation for whistleblowing.

The remaining disclosure, number 2, presents a different issue. The administrative judge characterized disclosure number 2 as informing the "Human Resources and Civilian Personnel Advisory Center (CPAC) that [Mr. Marana's] position 'can be performed by an appropriately trained nurse or administrative assistant with a lower GS level.'" *Id.* at 6-7. The result, Mr. Marana alleged, was "a waste and or mismanagement of government personnel funds." *Id.* at 63. In his submission to the Board, Mr. Marana also contended that disclosure number 2 revealed "Backlog of coumadin patient followup—[Dwight D. Eisenhower Army Medical Center] patient care neglect." *Id.*

The administrative judge treated disclosure number 2 in the same manner as disclosures number 1, 3, and 6, that is, as being too remote in time to support a claim of retaliation for whistleblowing. As the government acknowledges in its brief, however, the administrative judge erroneously characterized disclosure number 2 as having been made more than two years before the personnel actions against Mr. Marana. In fact, Mr. Marana alleges that he made that disclosure,

among other times, shortly before the issuance of the removal letter in June 2019. Therefore, the government concedes that the timing factor cannot be relied upon to support the conclusion that disclosure number 2 fails the jurisdictional test. In addition, the government acknowledges that the medical center's Human Resources department allegedly revealed Mr. Marana's disclosure to Major Orr, the agency official responsible for taking the removal action against Mr. Marana.

The government argues that even though the administrative judge's decision with respect to disclosure number 2 cannot be sustained on the basis of the timing of the disclosure, the administrative judge's decision can be upheld on an alternative ground not invoked by the administrative judge. In particular, the government argues that the court can affirm the Board's jurisdictional dismissal on the ground that Mr. Marana failed to non-frivolously allege that it was reasonable for him to believe that disclosure number 2 was protected.

With respect to Mr. Marana's "staffing mismatch" disclosure, the government argues that even if Mr. Marana's duties could have been performed by a lower-level employee, his disclosure "could not plausibly evidence a reasonable belief in a substantial risk of significant adverse impact on the agency's ability to perform its mission or a more-than-debatable expenditure that is significantly out of proportion with the benefit reasonably expected to accrue to the government." Appellee's Br. 19.

The government acknowledges that in his jurisdictional submission Mr. Marana alleged that his disclosure number 2 included not only a claim of "resource-wasteful staffing mismatch," but also claims of "backlog of coumadin patient followup" and "patient care neglect." *Id.* at 17-18.

With respect to Mr. Marana's claim of "backlog of coumadin patient followup," the government contends that disclosure number 2 duplicated the contents of disclosure number 5, which the Board found did not meet the standard for a nonfrivolous allegation for purposes of establishing Board jurisdiction. The government also argues that Mr. Marana did not provide specific details regarding "the nature of the backlog, the number of patients involved, or what danger the alleged backlog presented to public health and safety." *Id.* at 20-22.

With respect to the claim of "patient care neglect," the government argues that Mr. Marana failed to disclose "any specific incidents of patient neglect or the nature of the alleged neglect." *Id.* at 23. The government notes that Mr. Marana contended that patients who had received anticoagulation medicine at the medical center had been injured, had been hospitalized, or had died because of inadequate follow-up. But the government argues that in light of Mr. Marana's failure "to provide any specific details regarding his patient care neglect disclosure, he has failed to nonfrivolously allege a reasonable belief that he disclosed a substantial and specific danger to public health and safety, or

of any of the other types of covered wrongdoing." *Id.* at 23-24.

It is a general principle of administrative law that a court may not uphold an agency's decision on grounds different from those employed by the agency in the decision under review. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Although recognizing that general principle, the government invokes an exception to that principle that applies when the reviewing court can uphold the agency's decision on a purely legal basis without making any factual determination not previously made by the agency. *See Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993); *see also Lisanti v. Office of Pers. Mgmt.*, 573 F.3d 1334, 1340 (Fed. Cir. 2009).[1]

It is not necessary for us to decide whether an exception to the *Chenery* doctrine would permit us to decide the jurisdictional issue in this case, because we have determined that the appropriate course is for us to exercise our discretion to remand the case for the Board to address that question in the first instance.

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[1] An agency's ruling can also be upheld on a different ground from the one invoked by the agency if the court concludes that the agency's error was harmless, i.e., if it is clear that the agency would have reached the same ultimate result under the proper standard. *See Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1291 (Fed. Cir. 2020); *Grabis v. Office of Pers. Mgmt.*, 424 F.3d 1265, 1270 (Fed. Cir. 2005); *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998); 5 U.S.C. § 706 (In conducting judicial review, "due account shall be taken of the rule of prejudicial error.").

See 28 U.S.C. § 2106; *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 783 (Fed. Cir. 1995).

To determine whether the Board has jurisdiction to decide Mr. Marana's whistleblower claim as to disclosure number 2, it will be necessary for the Board to determine whether Mr. Marana's disclosure went beyond allegations concerning the staffing level necessary for the duties assigned to his position and whether such allegations, if made, could be viewed as involving a reasonable belief that what he disclosed evidenced an abuse of authority, gross mismanagement, or a waste of funds. Depending on whether the other two facets of disclosure number 2 (i.e., "backlog of coumadin patient followup" and "patient care neglect") were presented to the OSC and are considered disclosures independent from the "staffing mismatch" disclosure, it may also be necessary for the Board to determine whether Mr. Marana could reasonably have believed that the failure to follow up with patients on anti-coagulants and the denial of patient care constituted a substantial danger to public health or safety.[2]

The record before us does not make resolution of those questions practicable. The administrative judge, who can obtain further submissions from the parties if necessary, is in a much better position to address those

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[2] It is unclear from the materials before us whether Mr. Marana's "patient care neglect" allegation was separate from his allegation of a "[b]acklog of coumadin patient followup." *See* Supp. App'x 63.

issues than we are, and we therefore remand the issues surrounding disclosure number 2 to the Board.

It is open to the administrative judge on remand to consider the government's arguments as to why disclosure number 2 is not protected. For example, the administrative judge may consider whether the "staffing mismatch" disclosure is merely a disagreement with an agency policy decision that did not reflect gross mismanagement or a gross waste of funds. *See* 5 U.S.C. § 2302(a)(2)(D); *White v. Dep't of the Air Force*, 391 F.3d 1377, 1381-82 (Fed. Cir. 2004); *Hansen v. Merit Sys. Prot. Bd.*, 746 F. App'x 976, 981 (Fed. Cir. 2018) (nonprecedential). With respect to the "backlog of coumadin patient followup" facet of disclosure number 2, the administrative judge may consider whether that disclosure tracks disclosure number 5 in substance and can be disposed of on the same grounds as disclosure number 5. With respect to the "patient care neglect" facet of disclosure number 2, the administrative judge may consider whether that allegation constituted a separate disclosure or simply part of the "backlog of coumadin patient followup" allegation, and whether that allegation was fatally lacking in detail, as the government contends.

As part of the proceedings on remand, the Board should also address the extent to which Mr. Marana exhausted his administrative remedies before the OSC with respect to disclosure number 2. In its closing letter to Mr. Marana, the OSC made clear that he had exhausted his administrative remedies with respect to his claim that the staffing mismatch was "a waste or

mismanagement of government personnel or funds." Supp. App'x 134. What is unclear is whether he exhausted his administrative remedies with respect to the claim he made before the administrative judge that the staffing mismatch resulted in a "backlog of coumadin patient followup" and "patient care neglect" in the medical center.

Some or all of those issues will bear on the question whether Mr. Marana could reasonably believe the conduct reported in disclosure number 2 was protected and can be the subject of a whistleblowing claim. But that determination is one that should initially be made by the Board, not the court. *See, e.g.*, *Hessami v. Merit Sys. Prot. Bd.*, 979 F.3d 1362, 1371 (Fed. Cir. 2020) (remanding "for the Board to assess in the first instance whether [the employee] non-frivolously alleged that her disclosures were a contributing factor to a personnel action against her"); *Holderfield v. Merit Sys. Prot. Bd.*, 326 F.3d 1207, 1209-10 (Fed. Cir. 2003) (determinations underlying decision whether Board has jurisdiction over an IRA appeal are for the Board in the first instance); *Conejo v. Merit Sys. Prot. Bd.*, No. 2021-1347, 2021 WL 3891099, at *3 (Fed. Cir. Sept. 1, 2021) (nonprecedential) ("Whether or not we could resolve that issue [whether certain disclosures met the standards of a non-frivolous allegation of all elements required for coverage under the Whistleblower Protection Act] ourselves, we deem it appropriate in this case to leave the analysis to the Board in the first instance."). We therefore remand the portion of the case relating to disclosure number 2 to allow the Board to decide

whether disclosure number 2, to the extent it was preserved for consideration by the Board, is sufficient to give the Board jurisdiction over Mr. Marana's IRA appeal, and for any further proceedings that may be necessary thereafter.

Each party shall bear its own costs for this appeal.

AFFIRMED IN PART AND REMANDED IN PART

United States Court of Appeals
for the Federal Circuit

DAVID P. MARANA,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2021-1463

Petition for review of the Merit Systems Protection Board in No. AT-1221-20-0543-W-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED IN PART
AND REMANDED IN PART

FOR THE COURT

January 20, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES OF AMERICA
MERITS SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DAVID P. MARANA,
Appellant

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
AT-1221-20-0543-W-1

DATE: October 2, 2020

David P. Marana, Evans, Georgia, pro se.

Robert N. Rushakoff, Esquire, Fort Gordon, Georgia, for the agency.

BEFORE
Jeffrey S. Morris
Administrative Judge

INITIAL DECISION

On May 28, 2020, the appellant filed an individual right of action (IRA) appeal with the Board alleging the agency retaliated against him for making protected disclosures when it took several alleged personnel actions against him. These actions culminated in his removal from federal employment effective March 24, 2020. Appeal File (AF), Tab 1. Because the appellant has not met his burden to set forth a non-frivolous allegation of jurisdiction, the hearing he requested was not held. *See Manning v. Merit Systems Protection*

Board, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984). For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed. The appellant was employed by the agency as a Nurse (Clinical/Case Management), GS-0610-12, at Fort Gordon, Georgia. On or about May 19, 2019, he filed a complaint with the Office of Special Counsel (OSC). As ultimately considered by OSC, the appellant essentially alleged in this complaint that he had made a series of protected disclosures over a period of years for which the agency retaliated by taking several personnel actions in 2019. These actions consisted of his being subjected to a HIPAA investigation, and his access to electronic health records suspended, in March 2019, his removal proposed in May 2019, and his removal effected in June 2019. OSC issued a letter to the appellant on March 24, 2020, which informed him that it was terminating its investigation into the allegations. The letter also advised the appellant of his right to file an IRA appeal with the Board. As noted above, the appellant filed the instant appeal on May 28, 2020. AF, Tab 1.

By my order dated June 1, 2020, the appellant was notified of the applicable law and burden of proof requirements, and he was ordered to file evidence and argument establishing the Board's jurisdiction over the instant IRA appeal. AF, Tab 3. In dozens

of separate submissions dated July 31, 2020 and August 11, 2020 the appellant argued that the Board had jurisdiction over his appeal. AF, Tabs 11-44, 48-54. On August 7, 2020, the agency filed its jurisdictional response, requesting that the appeal be dismissed for lack of jurisdiction. *Id.*, Tab 45. In an effort to receive a more succinct and comprehensible jurisdictional response from the appellant, I issued an Order to Show Cause on August 12, 2020. *Id.*, Tab 55. The appellant filed a multi-part response on September 11-13, 2020. *Id.*, Tabs 57-67. The agency responded to the Order to Show Cause on September 24, 2020, again maintaining that the appeal should be dismissed for lack of jurisdiction. *Id.*, Tab 68. The record on jurisdiction closed on September 25, 2020. AF, Tab 3. I have considered all the parties' submissions in rendering this initial decision.

JURISDICTION

Applicable law

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Generally, an appellant bears the burden of proving Board jurisdiction over his appeal by a preponderance of the evidence. 5 C.F.R. § 1201.56(b)(2)(i). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find

that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

The Board has jurisdiction over an IRA appeal if the appellant exhausts his administrative remedies before OSC and makes non-frivolous allegations that (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D), and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 6 (2014).

Under the Whistleblower Protection Enhancement Act of 2012 (WPEA), vague, conclusory, unsupported, and pro forma allegations of alleged wrongdoing do not meet the non-frivolous pleading standard needed to establish the Board's jurisdiction over an IRA appeal. *See, e.g., Linder*, 122 M.S.P.R. 14, ¶ 14 (concluding that to establish IRA jurisdiction, an appellant must make a specific and detailed allegation of wrongdoing, rather than a vague one); *see also* 5 C.F.R. §§ 1201.4(s) (a non-frivolous allegation must be more than conclusory), 1201.57.

Under 5 U.S.C. § 1214(a)(3), an employee is required to seek corrective action from OSC before appealing to the Board. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 8 (2011) (citing *Baldwin v, Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 8 (2010)). To satisfy the exhaustion requirement of 5 U.S.C.

§ 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). The test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he makes in the complaint requesting corrective action, not his post hoc characterization of those statements. *Id.*; *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993). The Board may only consider those disclosures of information and personnel actions that the appellant raised before OSC.[1] *Mason*, 116 M.S.P.R. 135, ¶ 8. The appellant must prove exhaustion. *Id.*, (citing *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin*, 92 M.S.P.R. 298, ¶ 12)).

In the event that an appellant establishes the elements of his prima facie case by preponderant evidence, then the agency must prove by clear and convincing evidence that it would have taken the same personnel action even absent the disclosure. *Ryan v. Department of the Air Force*, 117 M.S.P.R. 362, ¶ 12 (2012) (citations omitted). The agency's rebuttal burden is only addressed if the appellant can meet his initial burden of proof. *See Clarke v. Department of*

[1] Exhaustion is demonstrated through the appellant's initial OSC complaint, evidence the original complaint was amended (including but not limited to OSC's determination letter and other letters from OSC referencing any amended allegations), and the appellant's written responses to OSC referencing the amended allegations. *Mason*, 116 M.S.P.R. 135, ¶ 8.

Veterans Affairs, 121 M.S.P.R. 154, ¶ 19, n.10 (2014), *aff'd*, 623 Fed. App'x 1016 (Fed. Cir. 2015).

The appellant established exhaustion of remedies before OSC

In view of OSC's termination letter dated March 24, 2020, I find that the appellant exhausted his remedy before OSC regarding his claim that the agency took personnel actions against him in 2019 in retaliation for whistleblowing. AF, Tab 1. I further note that the appellant timely filed the instant IRA appeal within 65 days of OSC's letter.

The appellant identified three personnel actions

I find that the agency's HIPAA investigation concerning the appellant in March 2019 did not constitute a personnel action. The Board has held that an investigation is not a personnel action. *Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 7 (2007).[2] I further find that the agency actions removing the appellant's access the electronic health records in March 2019, as well as proposing and effecting his removal in May and June 2019 (respectively) are personnel actions under 5 U.S.C. § 2302(a). In particular, I find that the electronic

[2] The Board will consider evidence regarding the conduct of an agency investigation when the investigation was so closely related to a personnel action that it could have been a pretext for gathering evidence to retaliate against an employee for whistleblowing activity. *Russell v. Department of Justice*, 76 M.S.P.R. 317, 323-24 (1997).

health access removal constituted a significant change in duties, responsibilities, or working conditions as provided in section 2302(a)(2)(A)(xii). The proposed and effected removal from federal employment are personnel actions under section 2302(a)(2)(iii).

The appellant failed to establish contributing factor as to certain disclosures

To prove that a protected disclosure or protected activity was a contributing factor in a personnel action, the appellant need only demonstrate that the fact of, or the content of, the protected disclosure or activity was one of the factors that tended to affect the personnel action in any way. *Carey v. Department of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 10 (2003). The "knowledge/timing test" allows an employee to demonstrate that the disclosure/protected activity was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure or activity, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action. *Id.*, ¶ 11; *see* 5 U.S.C. § 1221(e)(1). Once the "knowledge/timing test" has been met, an administrative judge must find that the appellant has shown that his whistleblowing/protected activity was a contributing factor in the personnel action at issue, even if after a complete analysis of all of the evidence a reasonable factfinder could not conclude that the appellant's whistleblowing/protected activity

was a contributing factor in the personnel action. *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 21 (2010).[3]

In this case, the OSC termination letter listed six potential protected disclosures raised by the appellant, as follows. The disclosure number and date listed for each disclosure are taken from the appellant's response to my Order to Show Cause:

a. Appellant identified problems with recordation and infection control to the Chief of the Department of Medicine, the former Commander of the Center, and the Chief of Hematology (Disclosure 1, 2016);

b. Appellant informed Human Resources and Civilian Personnel Advisory Center (CPAC) that his position 'can be performed by an appropriately trained nurse or administrative assistant with a lower GS level . . . In appellant's opinion, it is a waste and or mismanagement of government personnel or funds' (Disclosure 2, "multiple prior and June 20, 2019");

c. Appellant accused the Chief of Medical Management of denying patients care (Disclosure 3, August 2016);

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[3] In addition to the "knowledge/timing test," the Board may consider any relevant evidence on the contributing factor question, including the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing/protected activity was personally directed at the responsible official and whether that individual had a desire or motive to retaliate. *Armstrong v. Department of Justice*, 107 M.S.P.R. 375, ¶ 23 (2007); *Salinas v. Department of the Army*, 94 M.S.P.R. 54, ¶ 11 (2003).

d. Appellant communicated to various supervisory employees of the Agency about favoritism in the Medical Evaluation Process (Disclosure 4, August 23, 2018);

e. Appellant communicated to the Chief of Patient Administration about his concerns with how the 'against medical advice' patients were treated by nurses, and whether the agency had adequate policy to handle them (Disclosure 5, February 2019);

f. Appellant made disclosures about the sterilization of flexible endoscopes in the Department of Veterans Affairs Augusta Medical Center in approximately April 2008. The disclosures were publicized in a September 2010 Augusta Chronicle article (Disclosure 6, re-disclosed August 2016).

AF, Tabs 1, 61-66.

I find that four of the disclosures listed above (Disclosures 1-3, 6) were not contributing factors because, by the appellant's admission, they occurred more than two years prior to the personnel actions at issue (in 2019). As such, they fail the so-called "knowledge/timing test." The Board has generally found that two years is too long to create an inference of causal connection. *Costello v. Merit Systems Protection Board*, 182 F.3d 1372, 1377 (Fed. Cir. 1999) (a 2-year gap between the disclosures and the allegedly retaliatory action was too long an interval to justify an inference of cause and effect between the two events).[4] As for the remaining

[4] The "knowledge/timing test" aside, I find that no other relevant factors (*e.g.*, the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing/protected activity was personally directed at the responsible

disclosures listed above (Disclosures 4 and 5), I find for the reasons discussed below that they are not protected disclosures under 5 U.S.C. § 2302(b)(8), and therefore are inapposite for purposes of the contributing factor analysis.

The appellant failed to establish that the remaining disclosures were protected.

In his response to the Order to Show Cause, the appellant stated the following with regard to the kind of malfeasance evidenced by Disclosure 4: "Possibly abuse of MEDICAL authority at the expense of Readiness with **impact on National Defense and Security**." AF, Tab 66, p. 4 (emphasis in original). As noted above, under the WPEA, vague, conclusory, unsupported, and pro forma allegations of alleged wrongdoing do not meet the non-frivolous pleading standard needed to establish the Board's jurisdiction over an IRA appeal. *See, e.g.*, *Linder*, 122 M.S.P.R. 14, ¶ 14. I find that the appellant's explanation for the significance of this disclosure is, by its very terms ("possibly"), speculative and vague. As such, it does not meet the standard for a non-frivolous allegation for purposes of establishing Board jurisdiction.

As regards Disclosure 5, the appellant admitted in his response to the Order to Show Cause that it did not constitute a protected disclosure:

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official and whether that individual had a desire or motive to retaliate) support a finding that these four disclosures constituted contributing factors.

> 4. Disclosure evidences: *Management issues but not meet the following*: (a) violation of law, rule, regulation; (b) gross mismanagement; (c) gross waste of funds; (d) abuse of authority; and/or (e) a substantial and specific danger to public health and safety:
>
> 5. Basis for each category of wrongdoing listed in response to #4 above: *N/A*
>
> 6. Evidence supporting response to # 5 above: *N/A*

AF, Tab 63, p. 4 (emphasis added). I agree with the appellant's characterization of this disclosure, and therefore find it does not meet the standard for a nonfrivolous allegation for purposes of establishing Board jurisdiction. As such, I need not engage in the contributing factor analysis as to Disclosures 4 and 5.

Conclusion

I find that the appellant has failed to make nonfrivolous allegations sufficient to demonstrate that IRA jurisdiction exists over the instant appeal. Therefore, I dismiss this appeal for lack of jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /S/
Jeffrey S. Morris
Administrative Judge

[SEAL] **U.S. OFFICE OF SPECIAL COUNSEL**
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Washington, DC 20036-45005
(202) 804-7000

March 24, 2020

Mr. David Marana
431 Arden Way
Evans, GA 30809
Sent via email to: <thedavidamando@gmail.com>

RE: **OSC File No. MA-19-3554**

Dear Mr. Marana:

The U.S. Office of Special Counsel (OSC) terminated its inquiry into your allegations of violations of prohibited personnel practices under 5 U.S.C. § 2302(b)(8) or (b)(9) on March 24, 2020. The purpose of this letter is to notify you that you may file an "individual right of action" (IRA) appeal seeking corrective action from the Merit Systems Protection Board (Board).

You were a Nurse Case Manager with the Agency at the Dwight D. Eisenhower Army Medical Center. During your time in the Agency you disclosed the following issues: You identified problems with recordation and infection control to the Chief of the Department of Medicine, the former Commander of the Center, and the Chief of Hematology; you informed Human Resources and Civilian Personnel Advisory Center (CPAC) that your position "can be performed by an appropriately trained nurse or administrative assistant with a

lower GS level . . . In my opinion, it is a waste and or mismanagement of government personnel or funds"; you accused the Chief of Medical Management of denying patients care; you communicated to various supervisory employees of the Agency about favoritism in the Medical Evaluation Process, and you communicated to the Chief of Patient Administration about your concerns with how the "against medical advice" patients were treated by nurses, and whether the agency had adequate policy to handle them. You also made disclosures about the sterilization of flexible endoscopes in the Department of Veterans Affairs Augusta Medical Center in approximately April 2008. The disclosures were publicized in a September 2010 Augusta Chronicle article.

You allege the following actions were retaliation for your disclosures; The Chief of the Patient Administration Division referred an email you sent for investigation by the Agency's Health Information Portability Accountability Act (HIPAA) Privacy Specialist on March 7, 2019; the Chief removed your access to Electronic Health Records on March 7, 2019; the Chief Nurse Officer In-Charge for Cardiology Services proposed your removal for inappropriate use or disclosure of protected health information, and on June 24, 2019 you were removed by the Chief of Cardiology Services.

In your IRA appeal, you may seek corrective action from the Board under 5 U.S.C. §§ 1214(a)(3) and 1221 for any personnel action taken or proposed to be taken against you because of a protected disclosure and/or protected activity that was the subject of your

complaint to this office. You may file a request for corrective action with the Board within 65 days after the date of this letter. The regulations concerning rights to file an IRA appeal with the Board can be found at 5 C.F.R. Part 1209. If you choose to file such an appeal, you should submit this letter to the Board as part of your appeal.

Although an individual bringing an IRA appeal to the Board must show that he or she has exhausted OSC procedures, our decision to end the investigation may not be considered in an IRA appeal. *See* 5 U.S.C. § 1221(0(2); *Bloom v. Dep't of the Army*, 101 M.S.P.R. 79, 84 (2006). The Board may order an individual to submit a copy of OSC's determination letter, but the order must contain an explanation of why the letter is necessary and give the individual the opportunity to consent. *See* 5 U.S.C. § 1214(a)(2)(13); *Bloom*, 101 M.S.P.R. at 84.

Sincerely,

/s/ David Coard

David Coard
Attorney
Investigation and
Prosecution Division

[SEAL] **U.S. OFFICE OF SPECIAL COUNSEL**
1730 M Street NW, Suite 218
Washington, DC 20036-45005
(202) 804-7000

March 24, 2020

Mr. David Marana
431 Arden Way
Evans, GA 30809
Sent via email to: <thedavidamando@gmail.com>

RE: **OSC File No. MA-19-3554**

Dear Mr. Marana:

On February 4, 2020, we sent you a preliminary determination that set forth our proposed factual and legal determinations. You responded with written comments and evidence.

In your comments and responses, you provided emails, excerpts of Army Regulation 4066, and your position description to disprove the Agency's characterization of your February 22, 2019 communication as a Protected Health information (PHI) violation. You argued that your job duties required you to solve patient issues individually and systemically. You also outlined how you and the Human Resources officials who you communicated the PHI to were involved in the Agency's reorganization of the Nurse case managers. Finally, you argued that the Chief of Patient Administration Division's decision to report your email and suspend your access to Electronic health records led to

your removal. You questioned some of the evidence presented to the HIPAA Office investigator by the Chief.

After reviewing your additional information, we still do not believe we will be able to demonstrate a prohibited personnel practice in this case. The law prohibits officials from taking a personnel action because of a protected disclosure. A disclosure is protected if the employee reasonably believes they disclosed information that evidences: a violation of law, rule or regulation; gross mismanagement; a gross waste of funds; abuse of authority; or a substantial and specific danger to public health and safety. 5 U.S.C. § 2302(b)(8). A protected disclosure does not include a communication concerning policy decisions that lawfully exercise discretionary authority. *Mithen v. Dep't of Veterans Affairs*, 119 M.S.P.R. 215, ¶ 13, n.9 (2013). The Agency can meet its burden to support its personnel action by demonstrating by clear and convincing evidence that it would have taken the action regardless of the protected conduct. 5 U.S.C. §§ 1214, 1221.

The evidence you provided does not assist OSC in demonstrating a nexus between a protected disclosure and the proposing or deciding officials' decision to remove you from your position. The information you provided gave OSC a better understanding of your job duties and your various interactions with former supervisors and active duty members of the Agency, but it did not present and OSC has not identified evidence to suggest these parties were aware of or motivated to retaliate against you for protected disclosures. Further the evidence does not demonstrate or indicate that

these parties were involved in the decisions to suspend your access to information or to remove you.

Neither does the information provided change our conclusion that the agency can support the removal. You question the Chief of Patient Administration's decision to report your February 22, 2019 email to the PHI office; however even assuming the Chief had knowledge of a protected disclosure, we lack evidence of animus for it. We believe the Agency will be able to demonstrate his act of reporting the email and suspending your access to PHI is a routine response to such alleged violations. We also believe the Agency can demonstrate that you intentionally communicated protected health information about a patient to parties who had no need for access to such information to perform their job duties. Ultimately, we believe the Agency will be able to demonstrate that it independently analyzed your PHI violation on its merits and determined to remove you regardless of your disclosures. For these reasons, OSC has closed its investigation of your complaint.

Because you alleged potential violations of 5 U.S.C. § 2302(b)(8) or (9), you may have a right to seek corrective action from the Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221. You may file a request for corrective action with the Merit Systems Protection Board within 65 days after the date of this letter. The Board's regulations concerning rights to file a corrective action case can be found at 5 C.F.R. Part 1209. We sent you a separate letter on this date regarding your right to file a corrective action case with the

Board. It is important that you keep the enclosed letter because the Board may require that you submit a copy should you choose to seek corrective action there.

Sincerely,

/s/ David Coard

David Coard
Attorney
Investigation and
Prosecution Division

APPENDIX

Acronyms and or definitions

Admin – Administrative

AFGE – American Federation of Government Employees

Agency – Dwight David Eisenhower Medical Center and or Department of the Army

AR – Army Regulation

BLS – Basic Life Support

CAFC – Court of Appeals for the Federal Circuit

CC – Care Coordinator

CCM – Certified in Case Management

CDC – Centers for Disease Control

CDR – Commander

CFR – Code of Federal Regulations

COC – Commission on Cancer

Ch – Chapter

C of S – Chief of Staff

COL – Colonel

CPHQ – Certified Professional in Healthcare Quality

CPR – Cardiopulmonary Resuscitation

DAC – Department of the Army Civilian

DDEAMC – Dwight David Eisenhower Army Medical Center

DHA – Defense Health Agency

DHHS – Department of Health and Human Services

DHS – Department of Homeland Security

Disability – Veterans' Affairs adjudicated service-connected disability

DOD – Department of Defense

DTF – Dental Treatment Facility

GS – General Schedule

HIPAA – Health Insurance Portability and Accountability Act of 1996

HR – Human Resources

IOM – Institute of Medicine

JCS – Joint Chiefs of Staff

MAJ – Major

MDR – Management Directed Reassignment

MEDCOM – Medical Command

MHS – Military Health System

MMWR – Morbidity and Mortality Weekly Report

MSP – Merit Systems Principles

MSPB – Merit Systems Protection Board

MTF – Military Treatment Facility

NCM – Nurse Case Manager

OSC – Office of Special Counsel

PAD – Patient Administration Division

PD – Position Description (or Job Description; or Roles, Responsibilities and Expectations)

PHI – Protected Health Information

PII – Personally Identifiable Information

PPP – Prohibited Personnel Practices

RN – Registered Nurse

Sec – Secretary

SOP – Standard Operating Procedure

TeamSTEPPS – Team Strategies & Tools to Enhance Performance & Patient Safety

TDA – Table of Distribution and Allowances

TOE – Table of Organization and Equipment

U.S. – United States

USA – United States of America

USC – United States Code

VA – Veterans Administration

VAMC – Veterans Administration Medical Center

WB – Whistleblowing

WW – World War