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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

FAYE RENNELL HOBSON,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2021-1693

Petition for review of the Merit Systems Protection Board in No. CH-1221-20-0604-W-1.

Decided: March 21, 2022

FAYE RENNELL HOBSON, Clarksville, TN, pro se.

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

PER CURIAM.

APPENDIX TABLE OF CONTENTS

Faye R. Hobson appeals the Merit Systems Protection Board's dismissal of her Individual Right of Action appeal under the Whistleblower Protection Act and Whistleblower Protection Enhancement Act for lack of jurisdiction. The Board found Mrs. Hobson failed to make a non-frivolous allegation that her protected activity was a contributing factor to personnel (retaliatory) action taken against her. We affirm.

BACKGROUND

The Whistleblower Protection Act ("WPA") and Whistleblower Protection Enhancement Act ("WPEA")[1] prohibit an agency from taking personnel action against an employee for disclosing information that the employee reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See Chambers v. Dep't of the Interior*, 602 F.3d 1370, 1375–76 (Fed. Cir. 2010) (citing 5 U.S.C. § 2302(b)(8)). To report a whistleblower violation, an employee may file a complaint with the Office of Special Counsel ("OSC"). *See Cahill v. Merit Sys. Prot. Bd.*, 821 F.3d 1370, 1373 (Fed. Cir. 2016). If no action is taken by the OSC, the employee may file an Individual Right of Action ("IRA") appeal before the Merit Systems Protection Board (the "Board"). *See id.*

Appellant Faye R. Hobson worked for the Department of Defense, Education Activity ("Defense Ed") beginning in 2002. Appx. 236.[2] In 2005, Mrs. Hobson's military spouse

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1 The WPA of 1989 provides the general framework of the whistleblower protection process. In 2012, the WPEA made amendments to the existing framework.

2 "Appx." refers to the appendix submitted with Appellant's Opening Brief. For the sake of clarity, the cited

was assigned to duty at Fort Campbell, Kentucky. That year, Mrs. Hobson accepted a position as a Special Education Teacher at Barkley Elementary School in Fort Campbell. *Id.* After reviewing student files, Mrs. Hobson discovered what she believed were improper special education practices at the elementary school for the 2005–2006 school year.[3] Appx. 61. Mrs. Hobson disclosed the improper practices to the Assistant Principal, the Special Education Coordinator, the Community Superintendent, and the Fort Campbell Schools Superintendent. Appx. 237.

Mrs. Hobson subsequently applied for eight teaching positions during 2012 and 2014 but was not selected. Appx. 61. In December 2014, Mrs. Hobson filed a complaint with the OSC alleging that Defense Ed retaliated against her for disclosing the improper practices. Appx. 238. The OSC closed her case without taking action. She then filed an IRA appeal before the Board. *Id.* In September 2016, the Board determined that Mrs. Hobson had made a protected disclosure but denied her claim on grounds that she failed to make a non-frivolous allegation that the disclosure was a contributing factor in the decision by Defense Ed not to select her for a teaching position. Appx. 235–36.

In August 2019, Mrs. Hobson filed a second whistleblower complaint with the OSC. Appx. 96–108. Mrs. Hobson asserted that she faced retaliation for her prior disclosure of the improper practices and for certain other protected activity, including her previous IRA appeal; serving as a witness in another Board hearing; and filing a

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page numbers refer to the page numbers included in the electronic stamp at the top of the page.

[3] According to Mrs. Hobson, the elementary school violated federal and state special education funding requirements regarding services provided and student record maintenance. Appx. 236–37, 241–42.

complaint in federal court. Appx. 102–03. Mrs. Hobson alleged her non-selection for teaching positions as retaliatory action. Appx. 99. Specifically, Mrs. Hobson identified the Fort Campbell Middle School Principal (the "Principal") as the official responsible for the retaliation, but she did not allege that the Principal was aware of her protected activity. *Id.* Her complaint stated that she is a "known whistleblower" but did not explain *who* knew her as a whistleblower or *how* they knew she is a whistleblower. *Id.* The OSC asked Mrs. Hobson to explain how the selecting officials knew about her protected activity. Appx. 124. Mrs. Hobson responded by reiterating her allegations of retaliatory activity but did not provide further explanation. Appx. 113–18. In June 2020, the OSC determined Mrs. Hobson's activity was whistleblower protected activity, but it closed her claim on grounds that she failed to allege that her protected activity was a contributing factor in the personnel decision not to hire her. Appx. 120, 123–25.

Mrs. Hobson appealed the OSC's decision to the Board. Appx. 60. The Board issued an "Order on Jurisdiction and Proof Requirements" ("Jurisdiction Order"). Appx. 164–71. The Jurisdiction Order advised Mrs. Hobson on the requirements for establishing jurisdiction and provided instructions. Appx. 165–69. As a result, Mrs. Hobson submitted supplemental filings to the Board, including communications with the OSC. Appx. 62.

The Board reviewed Mrs. Hobson's supplemental filings and dismissed her appeal for lack of jurisdiction. Appx. 60–62. The Board explained that Mrs. Hobson's appeal addressed only one of the non-selections at issue—a Fort Campbell Middle School English position. Appx. 64–66. The Board further determined that because Mrs. Hobson did not allege that her protected activity was a contributing factor in her non-selection for that position, she failed to make a non-frivolous allegation as required under the WPA. Appx. 66–69. Accordingly, the Board

found that it lacked jurisdiction over Mrs. Hobson's appeal and dismissed the appeal.

Mrs. Hobson timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

STANDARD OF REVIEW

Whether the Board has jurisdiction is a question of law that this court reviews de novo. *Kerrigan v. Merit Sys. Prot. Bd.*, 833 F.3d 1349, 1353 (Fed. Cir. 2016) (citing *Herman v. Dep't of Justice*, 193 F.3d 1375, 1378 (Fed. Cir. 1999)).

DISCUSSION

The Board has jurisdiction over an IRA appeal provided that the appellant makes "non-frivolous allegations" of whistleblowing activity. A non-frivolous allegation is one that alleges a protected disclosure or activity and that the protected disclosure or activity "was a contributing factor in the agency's decision to take or fail to take a personnel action." *Hessami v. Merit Sys. Prot. Bd.*, 979 F.3d 1362, 1367 (Fed. Cir. 2020).

It is not disputed that Mrs. Hobson engaged in protected activity. We agree. We next examine whether Mrs. Hobson made a non-frivolous allegation that her protected activity was a contributing factor to the alleged personnel action.

To demonstrate that the protected activity was a contributing factor to the personnel action, the appellant may allege that "the official taking the personnel action knew of the disclosure or protected activity" and "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." 5 U.S.C. § 1221(e)(1).

Here, Mrs. Hobson does not make a non-frivolous allegation that her protected activity was a contributing factor

to the personnel action, the alleged retaliation. Throughout the filings and communications with the OSC, Mrs. Hobson fails to allege that the Principal or anyone else knew of her protected activity. Accordingly, we determine that Mrs. Hobson has failed to make a non-frivolous allegation that her protected activity contributed to her non-selection for the Middle School position. As such, we affirm the Board's determination that it lacks jurisdiction.

CONCLUSION

Mrs. Hobson demonstrated she engaged in protected activity. But to establish Board jurisdiction, Mrs. Hobson must allege that official(s) responsible for alleged personnel action knew of her protected activity. Because Mrs. Hobson did not allege that the Principal was aware of the whistleblower activity, Mrs. Hobson failed to establish Board jurisdiction over her IRA appeal. Accordingly, we affirm.

AFFIRMED

COSTS

No costs.

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United States Court of Appeals for the Federal Circuit

FAYE RENNELL HOBSON,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2021-1693

Petition for review of the Merit Systems Protection Board in No. CH-1221-20-0604-W-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

March 21, 2022
Date

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

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

FAYE R. HOBSON,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
CH-1221-20-0604-W-1

DATE: December 10, 2020

Faye R. Hobson, Fort Campbell, Kentucky, pro se.

Melissa Martinez, Peachtree City, Georgia, for the agency.

BEFORE
Daniel R. Fine
Administrative Judge

INITIAL DECISION

The appellant, Faye R. Hobson, filed this Individual Right of Action ("IRA") appeal with the Board. She maintains that the Department of Defense Education Activity ("DoDEA" or the "agency") retaliated against her for engaging in whistleblowing activity. *See* Initial Appeal File ("IAF"), Tab 1.

The appellant has requested a hearing, but it is apparent from the documentary record that the Board lacks jurisdiction over this appeal. Accordingly, the appeal is DISMISSED for lack of jurisdiction.

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United States Court of Appeals for the Federal Circuit

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v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2021-1693

Petition for review of the Merit Systems Protection Board in No. CH-1221-20-0604-W-1.

MANDATE

In accordance with the judgment of this Court, entered March 21, 2022, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

May 12, 2022
Date

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

Background

The appellant, a former employee of the agency, states that she was forced to resign in October 2016. *See* IAF, Tab 1, Attachment at 0014/0047–0015/0047. The alleged forced resignation followed a September 2016 initial decision of this Board. That decision, arising out of a previous IRA appeal by the appellant, denied the appellant's request for corrective action. The decision found that the appellant had made a protected disclosure involving allegedly improper special-education practices at an elementary school in Fort Campbell, Kentucky, during the 2005–06 school year. The decision further found, however, that the appellant failed to show that her disclosure was a contributing factor in the agency's decision not to select her for eight specific teaching positions between 2012 and 2014. *Id.*; IAF, Tab 7 at 77–79.[1]

The appeal that is currently before the Board arises out of the appellant's prior appeal, as well as certain other proceedings that she initiated or in which she participated. In an August 2019 complaint that the appellant filed with the Office of Special Counsel ("OSC") (*see* IAF, Tab 7 at 14–26 (the "OSC Complaint")), she contends that she has faced retaliation for her activity before the Board; for serving as a witness in another Board hearing in March 2019; and for filing a complaint in federal court that went to a jury trial in 2017. *Id.* at 17. The retaliation took the form of non-selections for teacher positions to which she applied. From June 2019 to July 2019 "and beyond," she avers that she received notices that her name was placed on "several list [sic] for various positions at Fort Campbell DoDEA Schools," but that she was ultimately not selected for the positions. *Id.* at 17, 29. She attributes these non-selections to her "disclosures and prior protected activities." *Id.* at 22. OSC issued a closure letter in June 2020, notifying the appellant of her right to file a Board IRA appeal. *Id.* at 10.

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[1] The appellant filed a petition for review in that appeal, which remains pending. *See* MSPB Docket No. CH-1221-15-0470-W-1.

This timely appeal followed. After reviewing the appeal, the Board issued an order entitled "Order on Jurisdiction and Proof Requirements" (the "Jurisdiction Order"). IAF, Tab 3. The Jurisdiction Order advised the appellant that it was her burden to establish that she had exhausted her administrative remedies before OSC and to make (to the Board) nonfrivolous allegations that (1) she had engaged in whistleblowing activity by making a protected disclosure or by engaging in certain other protected activity and (2) "the protected disclosure or activity was a contributing factor in the agency's decision to take or fail to take" a personnel action listed in 5 U.S.C. §2302(a). *See id.* at 2. The Jurisdiction Order elaborated on those requirements and provided additional instructions to the appellant on how to plead jurisdiction. *Id.* at 2–8. The agency was provided an opportunity to weigh in as well, *id.* at 8, though it did not do so.

The appellant responded to the Jurisdiction Order. IAF, Tab 7. But she did not "file a statement, accompanied by evidence, listing" the information required by the Jurisdiction Order. *See* IAF, Tab 3 at 7 (numbered list of specific information requested by the Board). The appellant's submission consists of filings and communications that she previously made to OSC, including the initial decision in her prior Board appeal and the appellant's written closing argument from that appeal.

To evaluate the sufficiency of the appellant's submission of documents, the Board undertook its own review of them. *See Luecht v. Department of Navy*, 87 M.S.P.R. 297, ¶ 8 (2000) (error for administrative judge to dismiss IRA appeal without attempting to discern whether submissions constituted nonfrivolous allegations of jurisdiction); *but cf. Keefer v. Department of Agriculture*, 92 M.S.P.R. 476, ¶ 18 n.2 (2002) (Board not obligated to "pore through the record" and "make sense of allegations" scattered throughout a voluminous case file).

The record on jurisdiction has closed; this matter is ripe for adjudication.

Legal Standards

The WPA "generally provides whistleblower protections to an employee who discloses information revealing 'any violation of any law, rule, or regulation,'" *Department of Homeland Security v. MacLean*, 574 U.S. 383, 385–86 (2015), as well as disclosures of gross mismanagement, gross waste of funds, abuses of authority, and substantial and specific dangers to public safety," 5 U.S.C. § 2302(b)(8). Protections also extend to those who refuse to obey unlawful orders; to those who file Board appeals (or pursue certain other complaint procedures); and to those who assist whistleblowers—either directly or by cooperating with an official investigation. 5 U.S.C. § 2302(b)(9).

An employee who seeks to invoke the WPA's statutory protections in an IRA appeal before the Board must prove that he or she exhausted administrative remedies before OSC and must also make non-frivolous allegations that (1) he or she made a protected disclosure or engaged in other protected activity; and (2) the disclosure or activity was a contributing factor in the agency's decision to take (or fail to take) a "personnel action" as defined by statute. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

A nonfrivolous allegation is an assertion that, if proved, "could establish the matter at issue." 5 C.F.R. § 1201.4(s). Board regulations provide that an allegation will generally be considered nonfrivolous if it is made under penalty of perjury and is more than conclusory, plausible on its face, and material to the legal issues in the appeal. *Id.* Accordingly, the Board has repeatedly held that conclusory, vague, or unsupported allegations are insufficient to invoke Board jurisdiction. *E.g.*, *Ontivero v. Department of Homeland Security*, 117 M.S.P.R. 600, ¶ 15 (2012); *see also Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008) (explaining that "unsubstantiated speculation" does not pass muster). The analysis is similar to the well-pleaded complaint rule that applies in federal-court civil cases. *Hessami v. Merit Systems Protection Board*, 979 F.3d 1362, 1368–69 & n.5 (Fed. Cir. 2020).

Findings and Analysis

I find that the appellant exhausted her administrative remedies with respect to the sole non-selection that she identifies with specificity, an opening for a middle school English teacher at Fort Campbell, Kentucky. The appellant fails, however, to make nonfrivolous allegations that her protected activity contributed to her non-selection for that position.

The Appellant Proved Exhaustion Only as to One Non-Selection

Before filing an IRA appeal, an appellant must first exhaust administrative remedies with OSC. *See* 5 U.S.C. § 1214(a)(3) (appellant "shall seek corrective action from the Special Counsel before seeking corrective action from the Board"); *see also Carney v. Department of Veterans Affairs*, 121 M.S.P.R. 446, ¶ 4 (2014) ("As with all IRA appeals, the first element to Board jurisdiction over an IRA appeal involving an allegation of reprisal for activities protected by 5 U.S.C. § 2302(b)(9) is exhaustion by the appellant . . . before OSC.").

To exhaust her remedies with OSC, an appellant must inform OSC of the ground of her charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Tuten v. Department of Justice*, 104 M.S.P.R. 271, 275 (2006), *aff'd*, No. 2007-3145 (Fed. Cir. Oct. 5, 2007); *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). The purpose of the exhaustion requirement is to give OSC the opportunity to take corrective action before involving the Board, although an appellant is not obligated "to present to the OSC a perfectly packaged case ready for litigation." *Delgado v. Merit Systems Protection Board*, 880 F.3d 913, 923 (7th Cir. 2018). As the Jurisdiction Order advised the appellant, the Board will review only the disclosures (or protected activity) and personnel actions "that were specifically raised to and exhausted at OSC." IAF, Tab 3 at 2.

Here, the record on exhaustion consists of the appellant's entire jurisdictional submission, because the documents indicate that each was also furnished to OSC. *See, e.g.*, IAF, Tab 7 at 4, 26, 64. Those documents

demonstrate that the appellant alerted OSC to her prior activity before the Board and the Equal Employment Opportunity Commission, as well her federal-court civil proceeding. The appellant has given OSC a sufficient basis to pursue an investigation with respect to those proceedings. *See also Tuten*, 104 M.S.P.R. at 275. Therefore, I find that the appellant exhausted her administrative remedies before OSC with respect to the protected conduct for which the appellant says she faced retaliation. *See also* IAF, Tab 7 at 21, 33, 37.

However, the appellant must also exhaust her administrative remedies with OSC as to the personnel actions she wishes to pursue in this appeal, namely the non-selections. She is obligated to do so with specificity. *Ward*, 981 F.2d at 526 ("For the exhaustion remedy to serve its intended purpose . . . the employee must inform the Special Counsel of the precise ground of his charge of whistleblowing."). Instead, the appellant refers only generally to positions to which she applied in June and July 2019. IAF, Tab 7 at 17. The appellant states in her OSC Complaint that "[d]uring the months of June through July 2019 and beyond, I received EAS [Employment Application System] notices that my name was placed on several list [sic] for various positions at Fort Campbell DoDEA Schools. I also received EAS messages in reference to positions being filled in which I did not receive an EAS message about." *Id.* at 17.

Non-selections are personnel actions within the ambit of the WPA. *See* 5 U.S.C. § 2302(a)(2)(A)(i). Yet the only non-selection that is specifically identified in the appellant's jurisdictional submission is the position of "0210 Middle School English at Ft Campbell under Referral Number 589489" (the "Middle School Position"). The appellant has included as part of her jurisdictional submission an email that purports to be from the agency to the appellant, dated July 12, 2019. *Id.* at 29. The email states that the appellant was not selected for the Middle School Position. *Id.* An earlier, June 4, 2019, email from the agency had advised the appellant that she had been referred to the

"selecting official along with other names of qualified candidates" for the Middle School Position. *Id.* at 30.

Although subsequent correspondence from OSC to the appellant states that the appellant "provided OSC a list of positions that you have applied for since 2017," *id.* at 38, and indicated that the positions were "across the United States to Germany and Japan," *id.*, this fails to prove exhaustion. This is so because: (1) the appellant has not provided the referenced list to the Board; (2) by its terms, the correspondence neither references nor alludes to other positions in the June–July 2019 timeframe; and (3) the appellant does not otherwise identify with specificity any other non-selections that she raised with OSC and presumably would wish to pursue here.

It may well be the case—as a matter of fact, if not law—that the appellant identified other non-selections for OSC in the June and July 2019 timeframe. The correspondence with OSC is consistent with that possibility. But the Jurisdiction Order directed to the appellant to demonstrate to the Board *what* matters she actually raised with OSC (IAF, Tab 3 at 7–8); it is not enough to simply show *that* she raised unspecified matters with OSC.[2]

For these reasons, I find that the only personnel action that the appellant exhausted with OSC is her non-selection for the Middle School Position.

The Appellant Failed To Make Non-Frivolous Allegations of Board Jurisdiction

Because the appellant proved exhaustion as to her non-selection for the Middle School Position, I next evaluate whether the appellant has made nonfrivolous allegations of Board jurisdiction. I find that the appellant has not, because she has failed to plead the "contributing factor" element of a

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[2] In any event, by failing to specify any other positions for which she faced non-selection in her jurisdictional submission, the appellant necessarily fails to make nonfrivolous allegations as to those positions. Thus, whether viewed through the exhaustion lens or in terms of (non)frivolousness, the only issue demanding further analysis is the appellant's non-selection for the Middle School Position.

whistleblower claim. More specifically, she has failed to nonfrivolously allege that the selecting official knew about her protected activity.

Section 1221(e)(1) of Title 5 of the United States Code "expressly addresses how the 'contributing factor' element of the whistleblower claim can be established." *Kerrigan v. Merit Systems Protection Board*, 833 F.3d 1349, 1354 (Fed. Cir. 2016). The provision provides that:

> The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence that—
>
> (A) the official taking the personnel action knew of the disclosure or protected activity; and
>
> (B) 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.

5 U.S.C. § 1221(e)(1). In *Kerrigan*, the Federal Circuit held that an appellant failed to make nonfrivolous jurisdictional allegations where he failed to allege that the person taking a personnel action against him knew of his protected activity. *See* 833 F.3d at 1354.

On the record before me, *see Cahill v. Merit Systems Protection Board*, 821 F.3d 1370, 1374 (Fed. Cir. 2016) (contributing-factor analysis must be based on the entire written record), the appellant has failed to make non-frivolous allegations that the agency official who chose not to select her for the Middle School Position knew of her protected activity.

In correspondence with OSC, dated December 19, 2020, the appellant identifies "the non-selector for the last several positions" as Principal Linda Haberman at Mahaffey Middle School. IAF, Tab 7 at 71. Although the appellant does not say-so explicitly, this allegation appears to encompass the Middle School Position that I found to have been exhausted by the appellant. The

appellant also identifies Haberman in the OSC Complaint itself as the official "responsible for the violation(s) that you are reporting." *Id.* at 17.

Ms. Haberman's name, however, does not appear anywhere else in the jurisdictional record. And although the initial decision in the appellant's prior Board appeal also involved non-selections at Mahaffey Middle School, the principal at that time appears to have been someone else, a person named Steven Gardner. *Id.* at 85. Moreover, correspondence from OSC to the appellant in April 2020 states that the appellant was "referred for and interviewed for positions in which the selecting officials knew of [her] protected activity and for positions in which the selecting official was not aware of [her] protected activity." *Id.* at 38. The record is silent as to where Ms. Haberman falls within that taxonomy. *Compare Benton-Flores v. Department of Defense*, 121 M.S.P.R. 428, ¶¶ 12–13 (2014) (appellant nonfrivolously alleged jurisdiction where she made protected disclosures to the assistant principal who later terminated her employment).

Thus, the appellant has failed to make nonfrivolous allegations that her protected activity was a contributing factor in her non-selection for the Middle School Position. This result is not impacted by the appellant's belief that her protected activity is "generally well known throughout DoDEA." *See* IAF, Tab 7 at 38. Such bare assertions are precisely the sort of conclusory allegations that do not qualify as nonfrivolous. An allegation that someone within an agency, or even multiple people within an agency, knew of the appellant's protected activity is not enough to by itself to support the inference that the person taking a personnel action against the appellant had the requisite knowledge. And here, OSC has indicated that some selecting officials were aware of the appellant's protected activity and others were not. The appellant has not alleged facts reasonably supporting the inference that Ms. Haberman was in the former group. *See also Kerrigan*, 833 F.3d at 1354–55 ("[T]he generalized assertion that *someone* within the agency [was aware]—without any accompanying allegations as to the size, composition, or structure of that agency—is insufficient to establish that the

specific agency official taking the personnel action *knew* of the disclosure or protected activity.").

For these reasons, the appellant has failed to make nonfrivolous allegations of Board jurisdiction. The appeal must be dismissed.

DECISION

The appeal is DISMISSED for lack of jurisdiction.

FOR THE BOARD: /S/
Daniel R. Fine
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 14, 2021**, 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 there are no members 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 two members are 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 your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section

AFFIDAVIT OF COMPLIANCE

This Petition for Writ of Certiorari has been prepared by a Pro Se Litigant and as such, allegations such as those asserted by Petitioner, however in artfully pleaded, are sufficient"…"which we hold to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519 (1972)

I declare under penalty of perjury that the foregoing is true and correct.

Faye Rennell Hobson
Pro Se Petitioner
1948 Whirlaway Circle
Clarksville, TN 37042
(931) 896-2284
Fhobson2652@charter.net

CERTIFICATE OF SERVICE

I certify that the Petition for Writ of Certiorari was forwarded to Katrina Lederer/Tristan L. Leavitt and Katherine Michelle Smith, Attorney Advisors/General Counsels for U.S. Merit Systems Protection Board 1615 M. Street N W Washington, DC 20419, Secretary of Defense, Lloyd James Austin, III 100 Defense Pentagon Washington, DC 20301 United States Attorney General Merrick Garland 950 Pennsylvania Avenue, NW Washington, DC 20530 and Office of the Solicitor General Elizabeth Prelogar 950 Pennsylvania Avenue, NW Washington, DC 20530.

I hereby certify that on this 18th date of June, 2022, a copy of the foregoing was mailed to the following receptions by way of U.S. Postal Prepaid mail service.

Faye Rennell Hobson
Petitioner, Pro Se
1948 Whirlaway Circle
Clarksville, Tennessee 37042
(931) 896-2294
Fhobson2652@charter.net

Petitioner, Pro Se

Date: June 18, 2022