NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHELLE A. FERRELL,
Petitioner

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Respondent

2022-1487

Petition for review of the Merit Systems Protection Board in No. DA-1221-21-0228-W-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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

---

[1] Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

PER CURIAM.

ORDER

Michelle A. Ferrell filed a combined petition for panel rehearing and rehearing en banc and subsequently filed a supplement the petition. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue May 23, 2023.

FOR THE COURT

May 16, 2023
Date

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

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHELLE A. FERRELL,
Petitioner

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Respondent

2022-1487

Petition for review of the Merit Systems Protection Board in No. DA-1221-21-0228-W-1.

Decided: February 9, 2023

MICHELLE FERRELL, N. Richland Hills, TX, pro se.

AUGUSTUS JEFFREY GOLDEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, CORINNE ANNE NIOSI.

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

PER CURIAM.

Michelle A. Ferrell seeks review of the final decision of the Merit Systems Protection Board (Board or MSPB) denying her request for corrective action under the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). *Ferrell v. Dep't of Hous. & Urb. Dev.*, No. DA-1221-21-0228-W-1, 2021 WL 6107603 (M.S.P.B. Dec. 20, 2021) (*Board Decision*) (SAppx. 7-50).[1] For the reasons set forth below, we *affirm* the Board's final decision.

BACKGROUND

Ms. Ferrell was employed as an Equal Opportunity Specialist by the Department of Housing and Urban Development (HUD) in the Intake Branch of its Office of Fair Housing and Equal Opportunity Region 6 office in Fort Worth, Texas. SAppx. 8. Ms. Ferrell's job required her to receive and process complaints made from individuals who claimed their housing rights were violated. *Id.* She had approximately eighteen years of service when she retired from HUD on January 31, 2020. *Id.*

In approximately May 2019, Kimone Paley joined HUD, becoming Ms. Ferrell's first-line supervisor, and remained as such until Ms. Ferrell's retirement. SAppx. 8-9. There was immediate friction between Ms. Paley and Ms. Ferrell. SAppx. 9. During Ms. Paley's first day, at an all-

---

[1] "SAppx." citations herein refer to the appendix filed concurrently with Respondent's brief. Additionally, because the reported version of the Board's decision is not paginated, citations herein are to the version of the Board decision included in the appendix—e.g., *Board Decision* at 1 can be found at SAppx. 7.

hands meeting to introduce Ms. Paley, Ms. Ferrell stated she had been passed over for Ms. Paley's position. *Id.* Later that day, Ms. Paley testified that Ms. Ferrell "accosted" her by physically directing her into a private conference room where Ms. Ferrell stated Ms. Paley had taken her job, and Ms. Paley should not be offended when Ms. Ferrell filed an Equal Employment Opportunity (EEO) complaint against her. *Id.*

Moreover, Ms. Paley testified she observed problematic conduct by Ms. Ferrell soon after Ms. Paley joined HUD. SAppx. 10. This included Ms. Ferrell (1) falsifying dates on documents to make it appear she met deadlines for the completion of work; (2) purposefully refusing to comply with instructions on how to submit work in an appropriate format; (3) falsely claiming not to know how to operate Microsoft Word (Word); (4) placing restrictions on Word documents submitted for review by Ms. Paley so they could not be edited, a multi-step process that could not have been done unintentionally; (5) refusing to complete assigned work; (6) refusing to follow Ms. Paley's instructions to make corrections to her work; and (7) spreading unsubstantiated office gossip to new employees. SAppx. 10, 40. In its final decision, the Board described Ms. Ferrell's conduct as "confrontational, aggressive, and disrespectful." SAppx. 40.

In response, Ms. Paley took personnel actions against Ms. Ferrell, starting with an oral admonishment, then issuing a letter of reprimand, and, finally, issuing a fourteen-day suspension. *Id.* Ms. Ferrell retired soon after returning from her suspension. SAppx. 8.

Eight months after her retirement, on September 30, 2020, Ms. Ferrell filed a combined Whistleblower and Prohibited Personnel Practice complaint with the Office of Special Counsel (OSC). SAppx. 12, 60-64. In February 2021, OSC notified Ms. Ferrell it ended its inquiry, and she

had the right to file an Individual Right of Action (IRA) with the Board, which she did. SAppx. 58-59, 15.

Ms. Ferrell's complaint alleged that HUD took adverse personnel actions against her in retaliation for protected whistleblowing activity and one protected activity. She recited four purported disclosures of whistleblowing activity protected under the WPA and WPEA by disclosing (1) an inappropriate relationship between two co-workers to a supervisor; (2) an improper hiring to her supervisor, HUD's Inspector General (IG) and OSC, and HUD's Assistant Secretary; (3) the improper alteration of a personnel form related to a co-worker's promotion potential to OSC; and (4) the improper selection of her new supervisor to OSC. SAppx. 15. She also alleged that her anonymous complaint to HUD's Office of the IG was protected activity. SAppx. 15-16.

The administrative judge assigned to Ms. Ferrell's appeal suspended the case proceedings in June 2021 for thirty days pursuant to 5 C.F.R. § 1201.28, which permits an administrative judge to make two such suspensions.[2] SAppx. 125. Although the administrative judge originally scheduled the hearing for late August, it had to be cancelled and rescheduled due to the administrative judge having an unavoidable emergency. SAppx. 127-30, 144. Following the hearing cancellation, Ms. Ferrell filed a motion, which took issue with the administrative judge's rulings on evidence and witnesses throughout the appeal and requested her appeal be moved to a different administrative judge in a different region. SAppx. 149-53. The administrative judge denied Ms. Ferrell's venue transfer

---

[2] 5 C.F.R. § 1201.28(a) provides: "The [administrative] judge may issue an order suspending the processing of an appeal for up to 30 days. The judge may grant a second order suspending the processing of an appeal for up to an additional 30 days."

request since MSPB rules do not allow cases to be transferred to a different venue. SAppx. 162. The administrative judge also denied Ms. Ferrell's request for a new administrative judge because she failed to make a substantial showing of bias, which is required to disqualify a judge. SAppx. 162-65. Further, in denying Ms. Ferrell's request for a new administration judge, the order expressly noted Ms. Ferrell had the right to seek an interlocutory appeal of that decision. SAppx. 165.

The hearing was rescheduled for early October, when Ms. Ferrell was given the opportunity to present her witnesses and evidence. SAppx. 186-90. In early November, the administrative judge issued a second order suspending case proceedings for thirty days pursuant to 5 C.F.R. § 1201.28. SAppx. 191. Consequently, Ms. Ferrell filed three documents in response variously objecting to (1) the second suspension, (2) the procedures of the October hearing, (3) the rulings by the administrative judge regarding witnesses and documents, (4) the perceived technical and procedural errors during the October hearing, (5) the alleged bias by the administrative judge, and (6) the perceived unfairness in the appeal process. SAppx. 193-236. Regarding the second suspension in November, Ms. Ferrell argued—as she does in this appeal—that the cancellation of the August hearing constituted a suspension, making the November suspension the third suspension, even though 5 C.F.R. § 1201.28 only allows for two suspensions.[3]

---

[3] Ms. Ferrell also contends there was a fourth case suspension since the administrative judge delivered the initial decision on December 20, 2021, which was eighteen days after the conclusion of the November suspension on December 2, 2021. Informal Reply Br. 2 [ECF No. 54]. Ms. Ferrell does not point to any support for the contention that an initial decision must issue immediately after a case suspension. She also does not identify any evidence that all

The administrative judge issued the Board's initial decision on December 20, 2021, concluding that Ms. Ferrell failed to prove she was entitled to whistleblower protections for the disclosures she identified, and that the claim related to her anonymous complaint lacked merit. SAppx. 7-50. Thus, she was not entitled to her request for corrective action, and the Board denied her appeal. *Id.* The Board's initial decision became its final decision on January 24, 2022. SAppx. 42-43.

Ms. Ferrell timely filed a petition for review in this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our authority to review a final Board decision is limited by law. We may not set aside a final Board decision unless we determine it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence[.]" 5 U.S.C. § 7703(c); *see also Bridgestone/Firestone Rsch., Inc. v. Auto. Club de l'Ouest de la France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. Nat'l Lab. Rels. Bd.*, 305 U.S. 197, 229 (1938). "[W]here two different, inconsistent conclusions may reasonably be drawn from the evidence in record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review for substantial evidence." *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002).

---

activity in her case was suspended between December 2 and 20, 2021, rather than being ordinarily processed.

Substantial evidence supports the Board's conclusions that Ms. Ferrell's disclosures were not protected disclosures and her other protected activity was not a contributing factor in any personnel action.

A protected disclosure under the WPA and WPEA is a disclosure of information that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. 5 C.F.R. § 1209.4(b). The test to determine whether a putative whistleblower has a reasonable belief is an objective one: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence one of the categories of wrongdoing protected by the WPA and WPEA. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). The reasonableness of the disclosure is based upon what the employee knew at the time of the disclosure, not whether later information may have established the reasonableness of an earlier disclosure. *Reardon v. Dep't of Homeland Sec.*, 384 F. App'x 992, 994 (Fed. Cir. 2010). In the event there is a protected disclosure, the inquiry moves to whether the protected activity was a contributing factor in the challenged personnel action. 5 C.F.R. § 1209.4(d).

First, substantial evidence supports the Board's conclusion that Ms. Ferrell failed to establish she reasonably believed she was reporting wrongdoing covered by the whistleblower statues with respect to an alleged relationship between coworkers because Ms. Ferrell did not establish she reasonably believed they were in said relationship and, further, failed to establish she reasonably believed said relationship violated agency policy, rule, or regulation, or that it violated government ethics regulations. The Board found there was no evidence to support Ms. Ferrell's claim the two coworkers were living at the same address at the time she made the disclosure and, even if there was

such evidence, cohabitation alone does not imply an improper relationship. SAppx. 19. All evidence Ms. Ferrell presented to support her belief the two coworkers were cohabitating was obtained years after her disclosure. SAppx. 19. As a result, the evidence could not support her belief the two coworkers were in an inappropriate relationship at the time she made the disclosure. Instead, the evidence showed Ms. Ferrell's belief was based on unsubstantiated office rumors, which are not sufficient to form a reasonable belief. SAppx. 20. Further, because a reasonable person would not have believed that the alleged relationship violated any government policy, the evidence showed that Ms. Ferrell did not have a reasonable belief that she was reporting wrongdoing. SAppx. 22-28.

Second, substantial evidence supports the Board's conclusion that Ms. Ferrell's disclosure of an improper hiring was not protected whistleblower activity because a reasonable person would have known no wrongdoing occurred. Ms. Ferrell's belief that the candidate in question was not eligible for the program under which they were hired was incorrect. SAppx. 28-29. The evidence showed a reasonable person would have simply checked the eligibility requirements and discovered the candidate was in fact eligible and, thus, known there was no wrongdoing. SAppx. 29. Further, Ms. Ferrell's allegations as to the candidate receiving preferential treatment were baseless, without factual support, and contradicted by reliable testimony and record evidence. SAppx. 29-30.

Third, substantial evidence supports the Board finding that Ms. Ferrell's disclosure of the improper alteration of a personnel form related to a co-worker's promotion potential was not entitled to whistleblower protection because a reasonable person would not have believed wrongdoing occurred. Ms. Ferrell did not provide any evidence the error on the personnel form was anything more than a genuine mistake. SAppx. 31-33. There was no evidence to support a motive to make the error on the form, no evidence the

Moving to HUD's disciplinary actions against Ms. Ferrell, there was extensive credible evidence to support these personnel actions. SAppx. 37. The disciplinary actions were supported by testimony as to Ms. Ferrell's resistance to constructive criticism, her prior violation of her roles and responsibilities, falsifying dates on documents to make it appear she met deadlines for the completion of work, purposefully refusing to comply with instructions on how to submit work in an appropriate format, falsely claiming not to know how to operate Word, placing restrictions on Word documents submitted for review by Ms. Paley so they could not be edited, a multi-step process that could not have been done unintentionally, refusing to complete assigned work, refusing to follow Ms. Paley's instructions to make corrections to her work, and spreading unsubstantiated office gossip to new employees. SAppx. 10, 38-40. Thus, substantial evidence supports the Board finding HUD had valid reasons for taking disciplinary actions and the facts were not so lacking to infer any retaliatory intent. SAppx. 41.

In addition to her protected disclosure allegations, Ms. Ferrell points to several other matters as proof that the Board's final decision was "obtained without procedures required by law, rule, or regulation having been followed." 5 U.S.C.§ 7703(c).

Ms. Ferrell argues the Board's decision warrants reversal because (1) the administrative judge suspended the case more than two times in violation of 5 C.F.R. § 1201.28, which allows for only two suspensions; (2) there was judicial bias against her as a pro se litigant; (3) she did not receive copies of the hearing recording on CD and hearing transcript from the administrative judge; and (4) there are issues regarding her claims of retaliation for her prior EEO complaints, union activity, and discrimination based upon race, sex, and disability.

First, the administrative judge only suspended the case two times: first in June 2021 and second in early November

2021. SAppx. 125, 191. The cancellation of the August hearing and the eighteen days in December 2021 were not suspensions under 5 C.F.R. § 1201.28(a). Further, in an IRA appeal before the Board, there is no statutory requirement the appeal be concluded by a particular deadline. 5 U.S.C. § 7701(i)(4); 5 C.F.R. § 1201.11.

Second, there is no evidence of judicial bias or that the administrative judge did not interpret Ms. Ferrell's arguments in the most favorable light. While an administrative judge should interpret a pro se litigant's arguments liberally, a litigant's pro se status does not excuse the ultimate failure of their case. *See Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005). The record reflects the administrative judge in this case followed the recommendations of the MSPB's Judges' Handbook, was patient when handling Ms. Ferrell's filings that needed correction, provided Ms. Ferrell full opportunity to question witnesses for over nine hours during two hearing days, and produced a comprehensive thirty-six-page opinion that thoroughly examined the evidence Ms. Ferrell presented. Moreover, Ms. Ferrell waived any request related to disqualifying the administrative judge by not filing an interlocutory appeal following denial of her motion. *See* 5 C.F.R. § 1201.42(c).

Third, Ms. Ferrell received all that she was entitled to regarding hearing recordings and transcripts. "Copies of recordings or *existing* transcripts will be provided upon request to parties free of charge." 5 C.F.R. § 1201.53(c) (emphasis added). Audio recordings are already in Tabs 59 and 60 in her MSPB appeal file, which she can access online. SAppx. 6. If Ms. Ferrell wanted to have a CD made of the hearing recording, her request should go to the MSPB Office of the Clerk of the Board, not the administrative judge. *See* SAppx. 308-09. Regarding transcripts, "[a]ny party may request that the court reporter prepare a full or partial transcript, *at the requesting party's expense.* Judges do not prepare transcripts." § 1201.53(b) (emphasis added). Hearing transcripts are not automatically created

during the MSPB appeal process. They are not already "existing," meaning Ms. Ferrell is not entitled to a copy of them free of charge. If Ms. Ferrell would like hearing transcripts, she must pay for them as the law requires. Further, the administrative judge is not the appropriate party to contact for this request. *See* SAppx. 309-12. If Ms. Ferrell wants hearing transcripts, she must contact the Office of Regional Operations' Supervisory Paralegal. *Id.*

Finally, Ms. Ferrell attempts to litigate claims of retaliation for her prior EEO complaints, union activity, and discrimination based upon race, sex, and disability. However, allegations of retaliation for exercising a Title VII right do not fall within the scope of the WPA or WPEA and are not the proper subject for inclusion in an IRA appeal. *Young v. Merit Sys. Prot. Bd.*, 961 F.3d 1323, 1329 (Fed. Cir. 2020). Thus, these claims are outside the Board's IRA jurisdiction, and, consequently, outside of our jurisdiction on this appeal. *See* SAppx. 41-42.

CONCLUSION

After careful review of Ms. Ferrell's briefs on appeal, the record of the proceedings before the Board, and all Ms. Ferrell's arguments, we are unable to discern any material error of fact or law, or abuse of discretion in the Board's decision. We therefore affirm the Board's final decision.

AFFIRMED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

MICHELLE A. FERRELL,
Petitioner

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Respondent

2022-1487

Petition for review of the Merit Systems Protection Board in No. DA-1221-21-0228-W-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

February 9, 2023
Date

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

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

MICHELLE A. FERRELL,
Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Agency.

DOCKET NUMBER
DA-1221-21-0228-W-1

DATE: December 20, 2021

Michelle A. Ferrell, North Richland Hills, Texas, pro se.

Maureen Villarreal, Esquire, Fort Worth, Texas, and Tatiana Cooley, Esquire, Fort Worth, Texas, for the agency.

BEFORE
Patrick J. Mehan
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 9, 2021, the appellant filed an individual right of action (IRA) appeal alleging the agency took several personnel actions in retaliation for her protected whistleblowing disclosures and other protected activity under the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act (WPEA) of 2012, Pub.L. No. 112-19, 126 Stat. 1465 (December 27, 2012). I found the appellant raised sufficient allegations of fact to establish Board jurisdiction over this appeal pursuant to 5 U.S.C. §§ 1214(a)(3), 1221(a) and (e). Initial Appeal File (IAF), Tab 17. Therefore, I held the

requested hearing on October 5th and 6th, 2021. The record in the appeal is closed.

For the reasons set forth below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

The U.S. Department of Housing and Urban Development's (HUD or agency) Region 6, located in Fort Worth, Texas, employed the appellant as an Equal Opportunity Specialist (EOS) in the Intake Branch of the agency's Office of Fair Housing and Equal Opportunity (FHEO). The agency is tasked with enforcing the Fair Housing Act, codified in title VIII of the Civil Rights Act of 1968. *See* Kimone Paley (Region 6, Intake Branch Chief) testimony, Hearing Recording (HR), Day 1, Session 3 (D1S3) at 01:37.[1] To accomplish this mission, Region 6 has divided FHEO into three distinct branches: Programs and Compliance, Enforcement, and Intake. As an EOS in the Intake Branch, the appellant received and processed complaints from individuals who claimed their housing rights were violated. The appellant had approximately eighteen years of service when she retired from the agency on January 31, 2020.[2] *See, e.g.*, IAF, Tab 30 at 5.

While employed, the appellant served under Patrick Banis, Branch Chief for the Intake Division, as her first-line supervisor from approximately September 2012 to May 2019. HR, D2S3, Banis testimony. She then served under first-line supervisor Kimone Paley from approximately May 2019 until her retirement in

---

[1] The hearing recording is comprised of six day-one sessions cited as (D1S1, D1S2, D1S3, D1S4, D1S5, and D1S5a) and three day-two sessions cited as (D2S1, D1S2, and D2S3).

[2] The appellant's claim that her retirement was involuntary was litigated through a separate Board appeal. *See* Initial Decision, M.S.P.B. Docket No. DA-0752-20-0212-I-1.

January 2020. HR, D2S3, Paley testimony. Garry Sweeney was the appellant's second-level manager for all times relevant to this appeal.

When Paley assumed the role of Intake Branch Chief from Banis in May 2019, the friction between the appellant and her new supervisor Paley was immediate. Paley testified that her relationship with the appellant was tense from the start; she testified that during her first day on the job during an all-hands meeting called by Sweeney to introduce Paley to the Intake Branch employees, the appellant stated she had 17 years of exemplary history and the agency failed to promote her. HR, D1S3 at 01:42. Paley explained on the same day the appellant "accosted" her by physically directing her into a private conference room where the appellant told Paley that she had applied for the Intake Branch Chief and that Paley had taken her job, and that Paley should not be offended when she filed an Equal Employment Opportunity (EEO) complaint against her. HR, D1S3 at 01:18.

Paley ascribed the tension between the entire Intake Branch staff, including the appellant, to significant changes in Branch operations that she made immediately upon taking the job. HR, D1S3, Paley testimony. The Intake Branch faced a significant back-log of cases due to a government shut-down earlier in the year when Paley arrived from her prior post with the Department of Education. *Id.* Paley was assigned the task of eliminating the back-log. *Id.* She explained the Branch still used physical case files for assignments, even though employees were permitted to telework and were often unavailable to receive assignments or turn in their work because it required exchanging physical case files. *Id.* Therefore, to streamline operations, Paley eliminated the use of physical case files and moved the agency's case processing to an all-electronic model. *Id.* In addition, she changed how work was assigned; Paley explained that she assigned a significant tranche of cases to each EOS, instead of small batches, so that each employee could work at their own pace without need for her to assign additional cases each time an EOS completed their work. *Id.*

Paley testified that she observed problematic conduct by the appellant soon after she joined the agency. *Id.* She testified that she caught the appellant back-dating cases to meet established timeframes for work completion. *Id.* at 38:00. Paley explained she brought this issue to the appellant and the appellant claimed she did not know it was wrong to change the dates on her work—this led Paley to orally admonish the appellant that she could not back-date her work. *Id.* Then Paley explained that, soon after, the appellant refused to send her work for review in Microsoft Word (Word) format and that the appellant claimed she did not know how to use Word. *See* IAF, Tab 27 at 38-40; HR, D1S3 at 22:00. Paley explained that she had directed employees to send their work for review by Word document attachments because, in a digital work environment, she made electronic corrections to her subordinates' work in those documents. HR, D1S3 at 22:00. Paley testified that she offered to show the appellant how to use Word and attach documents to e-mail; however, when she followed the appellant to her desk she observed the appellant with Word documents open on her computer desk top. HR, D1S3 at 31:30. When Paley confronted her and asked whether she remembered telling her in her office moments ago that she did not know how to use Word, Paley testified the appellant claimed she could not remember telling her that. *Id.* In addition to this confrontation, Paley claimed the appellant refused to perform work as assigned with respect to several case assignments, IAF, Tab 27 at 30-32, which led to the issuance of a letter of reprimand. HR, D1S3 at 32:50.

Several months later, in November 2019, Paley issued the appellant a proposed 15-day suspension, later upheld by Sweeney, because the appellant continued to defy Paley's instructions on how to complete her work, lacked candor when asked about her work, and otherwise was inattentive to duty. IAF, Tab 33 at 9-14, 116-122. It was undisputed that Sweeney passed away soon after the issuance of the decision letter upholding the proposed suspension.

The appellant surmised that tensions existed between her and Paley because she, and other senior EOSs in the Intake Branch, intimidated Paley because of their many years of experience. IAF, Tab 11 at 15. She contended that Paley had no authority to change the way she wrote reports and that her work was not deficient simply because she did not write in the manner Paley preferred. *See* IAF, Tabs 1, 12, 27, 31, and 43. Further, she asserted that she could not be held accountable to different case handling procedures when it conflicted with past practices established under her prior supervisor Banis—in particular, complaints that were withdrawn by the complainant. *Id.* The appellant also took issue with Paley's abrasive management style, and claimed Paley harassed her by closely monitoring the appellant's work and presence in the office and by coordinating concerns of alleged misconduct with human resources. *Id.* The appellant was incredulous that Paley could treat a long-term employee so harshly without apparent concern or deference to her "struggles." HR, D1S3 at 19:00, Paley testimony. The appellant contended Paley should have been more understanding of her disability, which she alleged affects her ability to focus, and should have granted her requested accommodations (she requested reassignment to a different supervisor/work environment; approval of overtime; reassignment of her work).[3] IAF, Tab 33 at 123-160; HR, D2S3, Paley testimony.

The record in this appeal shows the entire Intake Branch staff was dissatisfied with Paley's changes. The record also established that the changes implemented by Paley, to include her direct and unbending management style, applied to all employees in the Intake Branch. The employee's discontentment with Paley was patent and articulated through the detailed testimonies of several witnesses in this matter. *See* HR, D2S1, Scott Clear testimony, D1S5, Linda Davis testimony). Banis, the prior Intake Branch Chief, was more circumspect

[3] Paley, however, testified that when she joined the agency, upon inquiry, Banis informed her that no employee in the Intake Branch worked with an approved reasonable accommodation. The appellant disputed this fact and claimed Paley failed to inquire with individual employees about their need for a reasonable accommodation.

with respect to the transition from his regime to Paley. He acknowledged that Paley took a much different approach to managing employees. HR, D2S3, Banis testimony. He testified that his management style was low key, that he was personable and engaged with the staff, and that he put staff needs above the job. *Id.* He testified that Paley, on the other hand, used an authoritative management style, which was less collaborative than Banis and that she prioritized mission accomplishment. *Id.* However, despite the contentiousness of the transition from Banis to Paley, Banis conceded that Paley was able to shepherd in necessary changes to the agency's operations that he was incapable of accomplishing as the Intake Branch Chief. *Id.*

The record shows that in addition to filing her complaint with the Office of Special Counsel (OSC), the appellant filed multiple EEO complaints against Sweeney and Leslie Bradley, Enforcement Branch Chief; she filed union grievances against management; and, she filed a hostile work environment EEO claim with the agency in which she alleged that many of the changes instituted by Paley, and other actions by Paley, constituted a hostile environment based upon her sex, race, age, and retaliation for her prior EEO activity. IAF, Tab 33 at 161-177; *see generally* IAF, Tabs 1, 12, 27, 31, 43 and Tab 31 at 23-37. The appellant specifically requested to litigate her Title VII discrimination claims through her IRA appeal. *See* IAF, Tabs 1, 12, 27, 31. The appellant also contended she was compelled to retire due to the changes made by Paley to preserve her rights and benefits as a Federal retiree. *Id.*

After the appellant's retirement, she filed a combined Whistleblower and PPP Complaint with the Office of Special Counsel (OSC). In her original complaint, the appellant set forth her claim that she believed the agency took several personnel actions because she had disclosed an alleged improper relationship between two agency employees to Sweeney and Paley, and because she had disclosed several improper hiring/selection actions to agency management (and that she also filed a complaint with the agency's Office of

Inspector General (OIG) alleging the same violations). *See* IAF, Tabs 1, 12, 25, 27, 31, 34, 40, 47. She alleged Sweeney and Howard retaliated against her by not selecting her for the Intake Branch Chief position. The appellant also claimed she disclosed additional improper actions of Howard and Sweeney (improperly providing Morgan with a promotion potential to which she was not entitled, and the continuation of an employee in the intern program, Bailee Nance-Piercefield). She contended that these actions were part of Howard's plan to reward people who had knowledge of her alleged improper relationship, or were Howard's efforts to reward close personal friends with unauthorized preference in their Federal employment. *Id.*

After OSC issued a letter closing out its investigation into the appellant's claims, the appellant filed a timely Board appeal. IAF, Tab 1. In her appeal, the appellant requested the Board investigate OSC and its alleged improper and incomplete investigation. I issued the appellant an Order on Jurisdiction setting forth the claims over which the Board may exercise its jurisdiction in an IRA appeal. Through multiple rounds of jurisdictional orders and responses by the appellant, I discerned the claims raised by the appellant that are before the Board in this appeal. IAF, Tab 36 at Addendum; *see also* IAF, Tabs 1, 12, 25, 27, 31, 34, 40, 47.[4]

At the hearing, the appellant contended several of her submissions to OSC were erroneously not part of the record evidence. The appellant speculated the Board deleted the documents when it redacted personally identifiable information (PII) from her initial appeal. HR, D2S3. Therefore, I held the record open for the sole purpose of receiving these documents into the record. *Id.* I also ordered

[4] I also note that the claims specifically identified by the appellant in her prehearing submissions are in accord with the issues summarized in the addendum to my Prehearing Order. *Compare* IAF, Tab 34 at 7-9 with Tab 36 at Addendum. Inasmuch as the appellant now contends these issues identified for adjudication do not accurately state her claim, I find these objections were untimely raised.

the appellant to submit with these documents good cause for why they should be accepted into the record. The record was closed for all other purposes.[5] The agency offered no objection to the acceptance of these additional documents into the evidence of this appeal; consequently, I GRANT the appellant's request to include the additional documents into the record evidence of this appeal. These documents are located in the record at Tab 63, pages 9-14. However, after a careful review of these documents, I find that they do change my prior rulings regarding the claims before the Board in this appeal.

Jurisdiction

An individual establishes Board jurisdiction over an IRA appeal on the written record by providing preponderant evidence she exhausted her administrative remedies before OSC and by making nonfrivolous allegations that (1) she made a disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in other 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). *Graves v. Department of Veterans Affairs*, 123 M.S.P.R. 434, ¶ 12 (2016) (citing *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 6 (2014)). After a review of the written record, I find the appellant has shown she first

[5] Nonetheless, in addition to her submission of the additional documents, the appellant made a motion to file a written closing argument to supplement her oral closing argument, she objected to a case suspension, she objected to not being notified when the hearing recordings were uploaded into the file (and she contended the hearing recordings are not true and accurate recordings of the record proceedings at the hearing), she objected to files being rejected for containing PII, she speculated the agency filed video evidence which has not been made available through the official record of the appeal, she objected to the agency's designation of a representative close in time to the hearing, she objected to a purported change in Zoom for Government connection instructions on the date of the hearing, she claimed the agency engaged in ex parte communications with the undersigned, she objected to the agency representative's facial expressions during the hearing, and she made various other objections to how the hearing, and the appeal in general, was conducted by the undersigned. IAF, Tabs 62, 63. I find all of these motions were submitted after the close of record; therefore, they are DENIED as untimely filed.

sought corrective action from OSC and exhausted its procedures before seeking relief from the Board. Specifically, I find she raised the following purported disclosures and protected activity with OSC:

1. The appellant disclosed an inappropriate relationship between Bonita Howard and James Reed (co-workers) to Garry Sweeney in December 2018 and to Kimone Paley in June 2019.
2. The appellant disclosed to the agency's Inspector General, her supervisor, the Secretary and Assistant Secretary of the agency the improper hiring and promotion of Bailey Nance-Piercefield; to the IG that Marlena Morgan's SF-50 was improperly altered to change her promotion potential; and, to the IG that Kimone Paley's selection for Intake Chief was improper.
3. In 2016 and 2019, the appellant contacted the agency's Inspector General to report alleged improper hiring practices and other alleged wrongful employment practices. Specifically, the appellant raised with OSC, her contact with the agency's Inspector General regarding the hiring and promotion of Bailey Nance-Piercefield; that Marlena Morgan's SF-50 was improperly altered to change her promotion potential; and, that Kimone Paley's selection for Intake Chief was improper.

See IAF, Tab 36, Addendum.

Further, I find the appellant non-frivolously alleged at least one of the disclosures or protected activities she reported in her OSC complaint, *see* IAF, Tab 1, was whistleblowing activity a reasonable person in her position would have believed evidenced one of the situations specified in 5 U.S.C. § 2302(b)(8) or 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). And, the appellant non-frivolously alleged the whistleblowing activity was a contributing factor in at least one of the alleged personnel actions by satisfying the knowledge-timing

test. The appellant alleged the following personnel actions were retaliation for her protected activity:

1. The agency denied the appellant a promotion (Intake Branch Chief—2018 timeframe): IAF, Tab 1 at 11.
2. The agency created a hostile work environment through "constant harassment" and denial of 15 reasonable accommodation requests.
3. The agency disciplined (or threatened to discipline) the appellant by issuing her a Letter of Reprimand, a 14-day suspension (which contained a threat to remove her from Federal service).

See IAF, Tab 36, Addendum.

Accordingly, I concluded the Board has jurisdiction over this appeal.

The Merits

Under the WPA and WPEA, an employee may seek corrective action with respect to any personnel action taken, or proposed to be taken, against her as the result of a prohibited personnel practice described in 5 U.S.C. §§ 2302(b)(8) and (b)(9)(A)(i), (B), (C), or (D) through an IRA appeal to the Board. 5 U.S.C. § 1221(a); *Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶ 9 (2014). When reviewing the merits of an IRA appeal, the Board considers whether the appellant has established by preponderant evidence the jurisdictional elements of her claim set forth above. *See, e.g., Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 21 (2016) (protected disclosure); *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 13 (2015) (protected activity). Preponderant evidence is "the 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).

If the appellant is able to offer such proof, and establish a prima facie case of whistleblower retaliation, she is entitled to corrective action unless the agency can establish by clear and convincing evidence that it would have taken the same

personnel action in the absence of the appellant's protected disclosure or activity. *Scoggins*, 123 M.S.P.R. 592, ¶ 26; *Alarid*, 122 M.S.P.R. 600, ¶ 14. Clear and convincing evidence is "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(e).

The appellant failed to establish she made any protected disclosures.

A. The appellant's disclosures regarding Bonita Howard and James Reed:

The appellant contends that she disclosed an improper relationship between agency employees Bonita Howard, Compliance Branch Chief, and James Reed, Non-supervisory employee in the agency's Central Finance Office, to her second-level supervisor, Garry Sweeney, in December 2018. IAF, Tab 1 at 10. She also contends that she disclosed this relationship to Paley sometime in June 2020. In her submissions to OSC, the appellant stated that she believed the relationship "could lead to [f]avoritism, [c]ronyism and [n]epotism" and violated agency policies and government ethics regulations on nepotism. IAF, Tab 1 at 10, 11. In addition, she claimed the alleged relationship between Howard and Reed eroded "good order, discipline, respect for authority, unit cohesion and ... diverted HUD missions accomplishments." *Id.*

A protected disclosure under the WPA and WPEA is defined as a disclosure of information that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. *See* 5 C.F.R. § 1209.4(b). An appellant need not prove that the matter disclosed actually established one of the categories of wrongdoing under the WPA; rather, the inquiry is whether the appellant's belief that such wrongdoing occurred was reasonable. *E.g., Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015) (citing *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 18 (2013)). The test to determine whether a putative whistleblower has a reasonable

belief is an objective one: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence one of the categories of wrongdoing protected by the WPA and WPEA. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). The reasonableness of the disclosure is based upon what the appellant knew at the time of the disclosure, not whether later information may have established the reasonableness of an earlier disclosure. *Reardon v. Department of Homeland Security*, 384 F. App'x 992, 994 (Fed. Cir. 2010).[6]

The appellant failed to establish she reasonably believed she was reporting wrongdoing covered by the whistleblower statutes with respect to Howard and Reed's alleged relationship. First, the appellant failed to establish she reasonably believed that Howard and Reed were in a relationship. Further, she failed to establish she reasonably believed that any purported relationship violated agency policy, rule or regulation, or that it violated government ethics regulations.

I first examined what evidence the appellant relied upon at the time she made the disclosures to Sweeney and Paley. The appellant submitted documentary evidence into the record of this appeal from the Tarrant County (Texas) Property records which purportedly showed that Howard and Reed shared a common address; in addition, she submitted evidence that Howard had registered to vote from that same common address. IAF, Tab 1 at 18-23; Tab 47 at 10-17. These records suggested that Howard and Reed may have cohabitated, and could have lead a reasonable person to conclude Howard and Reed were in a familial or intimate relationship with each other.[7]

[6] The Board may follow nonprecedential Federal Circuit decisions that it finds persuasive. *See generally Dean v. Office of Personnel Management*, 115 M.S.P.R. 157, ¶ 14 (2010).

[7] The initial appeal was temporarily removed from the Board's e-Appeal repository so that the Personally Identifiable Information (PII) of Howard and Reed could be redacted and anonymized and the PII spillage could be contained. After these documents were redacted by the Board, they were replaced in total into the electronic repository. After

However, the record established the appellant could not have relied upon these records to form her reasonable belief because they were obtained after she made her disclosures regarding Howard and Reed. The appellant admits the voting records of Howard were obtained well after her disclosure and even after she had separated from the agency. The appellant conceded she received the voting records in this appeal on July 29, 2021, years after she made her disclosures. IAF, Tab 47 at 5, 10. The appellant explained these were obtained during "pre-trial [i]nvestigation" and that it is "information pertinent to the protected disclosures that resulting in [the appellant] telling the truth when she disclosed an inappropriate relationship between Howard and Reed." IAF, Tab 40 at 5. Similarly, the Tarrant County property records themselves show they were obtained after the appellant made her disclosures. Specifically, on the face of the records, the documents reflect they were updated on September 25, 2020, months after the appellant had retired from her position with the agency. IAF, Tab 1 at 24. This date is also over a year after the appellant disclosed the alleged improper relationship to Paley. The appellant never disputed this date, nor did she ever explain or submit any evidence showing that she had these records before making her protected disclosures or that they were relied upon to establish her reasonable belief that Howard and Reed were in a relationship. Consequently, I find these after-acquired records cannot establish *ex post facto* that the appellant's belief Howard and Reed were in a relationship was reasonable. *Reardon*, 384 F. App'x at 994.[8]

---

the appellant once again submitted documents with PII, she was ordered to redact and resubmit the documents containing PII found in Tab 47.

[8] Howard and Reed denied that they ever lived together, but they did not deny official records reflected a common address between them. *See* HR, S1D1, Howard and Reed testimonies. Howard and Reed explained the reason for the shared address was because Howard received her mail and/or packages at Reed's address. *Id.* Howard claimed that for safety and convenience purposes, she preferred not to receive her mail at her actual address. Howard acknowledged that she knew Reed through church, and that through this relationship, he offered to allow her to use his address for mail and package deliveries. The appellant contends that Howard and Reed were being untruthful in their

I also carefully reviewed other evidence which could have led the appellant to reasonably believe Reed and Howard were in a relationship. In her submissions to OSC and the Board, the appellant contended that office gossip, her observations of Howard and Reed, and a comment from Bailey Nance-Piercefield, an agency employee, led her to conclude Howard and Reed were in a relationship. The record shows that agency employees gossiped about a possible relationship between Howard and Reed for several years. HR, D1S2, Dominguez testimony. Mary Lou Dominguez, another agency employee, testified that a relationship between Howard and Reed was the subject of office gossip and "water cooler" discussions. *Id.* However, she testified that the allegations were not attributable to any one person. Dominguez, after hearing comments about the alleged relationship between Howard and Reed's, recalled thinking the appellant was very late to the rumors circulating in the office, and she reflected to herself, "this is old news." *Id.* Dominguez, nor the appellant, could explain the genesis of the rumor, nor did she articulate any facts regarding her observations that could have led a reasonable person to conclude Howard and Reed were in a relationship. *Id.* Therefore, Dominguez' hearing testimony that "perhaps" Howard and Reed were dating is not entitled to evidentiary weight because she lacked a reasonable factual basis for her opinion, other than rumor that was repeated by other employees. *See Special Counsel v. Spears*, 75 M.S.P.R. 639, 655-56 (1997).

---

testimonies as a conceit to conceal their intimate relationship, and that the evidence of a shared address in official county records established that they cohabitated and were in an intimate relationship with one another. She further sought to impeach the testimony of Howard, claiming that her testimony in this regard was inconsistent with her prior testimony in a separate Board appeal regarding her purported involuntary retirement from the agency (although she was unable at the time of the hearing to locate the prior hearing testimony which would have impeached her testimony). The appellant has contended several times in written submissions to the Board that Howard and Reed both lied under oath regarding this arrangement. However, because the appellant never established she relied upon this information at the time of her disclosures, and the hearing in the appellant's other appeal occurred years after her disclosures, this factual dispute is not material to this appeal.

The appellant suggested her reasonable belief was supported by the number of rumors, or that the rumors had persisted in the workplace, and that it was apparently discussed by many people within the office. HR, Day 1, Session 2 at 13:00. However, the Board has found that an appellant does not satisfy the reasonable belief requirement if she is merely reporting unsubstantiated rumors. *Huffman v. Office of Personnel Management*, 92 M.S.P.R. 429, ¶ 10 (2002).

The appellant also claimed that Reed's desk was in the area near Howard's work unit and that they "became friendly." IAF, Tab 31 at 3. This suggested the appellant either witnessed acts of friendship between Howard and Reed, or others had told her they were friendly to each other—although the record is devoid of any specific observations of Howard and Reed's office interactions. A reasonable person would not conclude two employees were in a secretive intimate relationship merely because they engaged in a friendly relationship at work.[9] As Paley testified, Reed's cubicle was in a prominent position within the office and you could not avoid passing him when exiting the elevator. HR, D1S2, Paley testimony. She also explained that Reed was personable. *Id.*

I also considered that Howard acknowledged that she used to attend a church where Reed was an outreach pastor. HR, D1S1, Howard testimony. However, the appellant acknowledged that Reed discussed his church to many agency employees and the record shows that Reed served as an outreach minister

---

[9] In her submission to OSC, the appellant claimed that Karen Iseah was a close friend to James Reed. She claimed that at her prior Board appeal, when she questioned Reed he changed his testimony regarding why Reed and Howard appeared to share a mailing address. She contends that Reed had confided in Iseah about having an intimate relationship with Howard. IAF, Tab 1 at 11. I considered whether Iseah's purported knowledge about an "intimate" relationship between Reed and Howard could have contributed to the appellant's reasonable belief that Reed and Howard were in an intimate relationship. However, the only mention of this information by the appellant in the record is in reference to the hearing conducted in her involuntary retirement appeal, which occurred many months after she retired from her position with the agency. In addition, as noted below, at the time of the last personnel action at issue in this appeal, the appellant conceded that her reasonable belief was founded solely on unsubstantiated rumor. *See* IAF, Tab 43 at 6-7.

for his church. I find this also does not establish a reasonable belief that they were in a relationship. Finally, appellant contended that Nance-Piercefield announced at a meeting of inspectors that she saw Howard and Reed at a "ring shop" together. Nance-Piercefield denied having made such a pronouncement and she denied ever having seen Reed and Howard shopping for rings together. HR, D2S1, Nance-Piercefield testimony. In a pleading to the Board, the appellant also contended that in December 2018, she observed Howard and Reed with "matching" rings, and that they stopped wearing the rings after being accused of being in a relationship. However, I find Nance-Piercefield's sworn hearing testimony denying this allegation more credible then the appellant's written statement of the same in a Board pleading. Further, Howard specifically denied having worn matching rings with Reed. HR, D1S1. I find sworn hearing testimony it is entitled to more evidentiary weight than the appellant's written statements in Board pleadings.

Even crediting this information, a reasonable person would not conclude this amounted to sufficient grounds to conclude Reed and Howard were in a relationship together, intimate or otherwise. Finally, and most importantly, the appellant herself has admitted that she subjectively did not believe Howard and Reed were married, and that she was merely passing along unsubstantiated office gossip. IAF, Tab 43 at 7-8 (responding to the agency's charge that she acted in an unbecoming manner when she told a new Intake Branch employee that Howard and Reed were married, the appellant stated: "I don't know of a male employee in FHEO that Bonita Howard has married. I do know that people talk in the office, and the rumor in the office is that Ms. Howard is married to James Reed. I did not start the Rumor; nor do I know its truth.").[10] After reviewing all of the record evidence at the time the appellant made her disclosures, aside from unsubstantiated rumor, there is little evidence showing the appellant had any

[10] The appellant filed a motion to exclude the agency's submission at Tab 43 as untimely. However, I DENY this motion and find it is appropriate to waive the short delay in the agency's submission of these documents.

particular information with respect to Reed and Howard that would support a reasonable belief they were in a "secret" relationship as she alleged.

Moreover, even if the appellant's belief was reasonable that Howard and Reed were in a secret, intimate relationship, there is insufficient evidence to establish that a reasonable person would conclude that such a relationship violated agency policy or ethics restrictions. First, I note the manner in which the appellant reported the alleged improper relationship suggests that she did not believe she was reporting wrongdoing covered by the WPA and WPEA when she made her disclosure. Specifically, Paley testified that when the appellant saw Reed give her a business card for his church, she told Paley: "Hey, be careful, a lot of women like James because he smells good and he dresses nice, and, oh yeah, he is married to Bonita (Howard)." HR, D1S3 at 01:05. Paley's sworn testimony on this point was never rebutted by the appellant. In addition, I credit Paley's sworn testimony because of her earnest demeanor and her unflinching and direct responses to the appellant's questions. In observing Paley testify, I could not discern any evidence of prevarication or evasion. As a whole, in addition to her demeanor, I found Paley's sworn testimony credible based upon her first-hand account of the events at issue in this appeal and the lack of evidence contravening her testimony. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (finding a judge may consider the witness's opportunity and capacity to observe the event or act in question; the contradiction of the witness's version of events by other evidence or its consistency with other evidence; and the witness's demeanor when making credibility determinations). A person with a reasonable belief that she was reporting wrongdoing covered by the WPA and WPEA—which she contended warranted management investigation—would not make her allegations in such a casual manner.

The appellant also claimed that "it was my belief Bonita Howard and James Reed were secretly married and her household received a financial benefit when she didn't disclose their relationship." IAF, Tab 11 at 10. The appellant failed to

point to anything specific which would have supported a reasonable belief at the time of her disclosure that Howard provided any preferential treatment to Reed. *Spears*, 75 M.S.P.R. at 655-56. The appellant suggested Howard could improperly assist Reed in completing his application or his résumé for job opportunities at HUD, but she did not claim she had knowledge that this occurred. The Board has held for WPA protection to extend to a potential violation, there must be a reasonable belief of wrongdoing and the potential wrongdoing is real and immediate. *Ward v. Department of the Army*, 67 M.S.P.R. 482, 488-89 (1995). Without pleading specific facts as to why the appellant believed Howard would provide improper influence in a selection process, in favor of Reed, she failed to show her belief was reasonable, and that the potential for wrongdoing was real and immediate.

In addition, the appellant has failed to establish that a reasonable person would conclude that a senior agency employee's offer, or even provision, of guidance and mentorship to a lower-graded employee seeking promotion is unlawful or improper. Pursuant to the agency's policy, such assistance is not out of bounds, so long as the employee does not orally or in writing "recommend or select a relative for appointment, employment, promotion, or advancement; or, refer a relative for consideration for appointment, employment, promotion or advancement." IAF, Tab 47 at 21. Therefore, short of advocating his selection to panel members, or a selecting official, there is no prohibition on offering assistance in completing a résumé or even an application for employment. Even considering the most liberal requirements of the policy, which restricts "an employee from taking action in his/her Government capacity that are likely to have a direct and predictable affect on the financial interest of a member of his/her household," *id.* at 21, requires that the offending party take an action in their official Government capacity. The appellant contended that her reasonable belief that Howard and Reed's relationship was improper was because she could help him with his application, so that he would qualify for selection. However,

Howard would not be acting in her official Government capacity even if she provided him assistance. The appellant never claimed she had information or evidence, beyond her speculation and concern for events that could happen in the future, that Howard ever, in her official Government capacity, advocated, advanced, or otherwise recommended Reed for promotion.

The appellant did not point to any evidence that would establish she had any reason to believe, besides her own subjective thoughts, that Reed's résumé would be improperly altered, or that, even if Howard assisted Reed in completing his résumé or application, that it would misrepresent his skills and abilities. In her complaint with OSC, filed after her retirement and many months after her disclosure, she again sought OSC to obtain Reed's résumé and to further investigate her claim. IAF, Tab 1 at 11. Courts have consistently held that substantive details must support a claim of whistleblowing retaliation, not mere general assertions. *Young v. Merit Systems Protection Board*, 961 F.3d 1323, 1328 (Fed. Cir. 2020). Here, beyond speculation and general claims of potential improper acts, the appellant failed to set forth substantive details known and readily ascertainable at the time, which would lead a reasonable person to conclude that Howard was improperly favoring Reed. Moreover, the appellant admitted that at the time she made her disclosure there was no evidence Reed had received any improper benefit, and that Reed had been rejected for promotion into an EOS position with FHEO on multiple occasions. Therefore, at the time she made her disclosures, the evidence available and readily ascertainable by the appellant supported the conclusion that no improper benefit from the alleged improper relationship had accrued to Reed.[11]

[11] In her complaint to OSC, the appellant stated that Reed had in fact been selected for a position in FHEO. The record shows that Reed was selected for an EOS position in FHEO in early 2020. However, this selection occurred after the appellant's last disclosure to Paley, in June 2019. Therefore, this information could not have supported the appellant's reasonable belief.

In addition, a reasonable person would consider the appellant's claim in the context of the agency's hiring process. As established in the record, the agency uses Subject Matter Experts (SMEs) to assess the strength of candidates in the application process and their ability to perform the duties of the announced position; this person can provide context to hiring officials regarding relative scores in the selection process. HR, D1S4, Robert Avila testimony. The appellant concedes that the use of SMEs is a distinct disadvantage to *current* employees when they apply. IAF, Tab 27 at 10 (stating that HUD would only know if someone was dishonest on their application if they were already a HUD employee). Therefore, as the appellant aptly points out, hiring officials in the FHEO would already have knowledge of Reed and his work performance rendering any misrepresentation of his skills and abilities ineffective. Further, a reasonable person would consider that the agency uses hiring panels consisting of several managers, who make recommendations to a selecting official. This shows there are additional limitations on any one person's ability to improperly influence a hiring decision.

I considered whether any other evidence could have supported a reasonable conclusion that Howard and Reed's alleged relationship was improper or violated policy or regulation. However, the evidence shows that Reed and Howard worked in completely separate work units. The agency's policy allows relatives to work for the agency, even in the same division, so long as one relative is not in a supervisory position over the other relative. IAF, Tab 47 at 23. Paley testified that when the appellant made the allegation to her, she did not think it was anything that would need to be reported because Howard and Reed worked in completely different divisions of the agency and there was no supervisor/subordinate relationship over which to be concerned. Dominguez testified without rebuttal that there were no overlapping roles or responsibilities between Howard, Compliance Branch Chief in the FHEO, and Reed, who worked as a clerk in the Central Finance Office. The record shows that Howard never

supervised or managed Reed and they were in separate divisions at all times relevant to this appeal.

A reasonable person would consider that there was no clear improper financial benefit that would accrue to Reed even if they were married—as the appellant alleged; that at the time the disclosures were made that Howard and Reed worked in completely separate divisions of the agency; and, the agency's permissive policy allows family members to concurrently work together—even in the same division. I recognize that whether an actual violation of law or rule occurred is not the relevant question when determining whether a disclosure is entitled to protection under the WPA and WPEA. *See Webb*, 122 M.S.P.R. 248, ¶ 6 (citations omitted); *Mithen v. Department of Veterans Affairs*, 122 M.S.P.R. 489, ¶ 24 (2015) (citing *Drake v. Agency for International Development*, 543 F.3d 1377, 1382 (Fed. Cir. 2008)). However, if the belief is not reasonably held, then the disclosure is not entitled to protection under the WPA. *See Mithen*, 122 M.S.P.R. 489, ¶ 24; *see Lachance*, 174 F.3d at 1380-81. An appellant cannot merely make an unsupported allegation and enjoy the protection of the WPEA: she must provide sufficient evidence supporting her belief was reasonable. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 237 (1995). Here, the appellant asserted vague allegations that the alleged relationship between Howard and Reed was a "conflict of interest" and would result in an improper financial benefit to Reed. However, with the exception of her bare claim that Reed could receive improper preference in a hiring action, the appellant failed to articulate any specific improper financial or other benefit that would accrue to Reed and the record is devoid of any specific evidence or argument in this regard. Therefore, I find the appellant has failed to establish by preponderant evidence that her conclusion that she was reporting a violation of policy, ethical requirements, or gross mismanagement, when she disclosed an alleged relationship between Howard and Reed was reasonably held.

B. The appellant's disclosures regarding improper hiring practices

The appellant claimed she disclosed to agency management cronyism and favoritism with respect to Bailee Nance-Piercefield's selection and retention in the agency's "Pathway Program," a student intern program at the agency. IAF, Tab 1 at 13. She asserted that Nance-Piercefield was converted from a "summer hire" to the Pathway Program after she graduated from her bachelor's program and, therefore, was ineligible for her appointment. She claimed this was part of Howard's plan to appoint Nance-Piercefield to a career-ladder position because Nance-Piercefield was one of her "favorites." *Id.*

Given the record before me, the appellant failed to establish she reasonably believed Nance-Piercefield's appointment violated any agency rule or regulation or that it evidenced improper preferential treatment in her selection. In her submission to OSC, the appellant claimed that her belief that Howard was improperly favoring Nance-Piercefield was based upon the fact that Nance-Piercefield had graduated in May of 2016 and, as a result, did not qualify for selection into or retention in the Pathway Program. However, the Pathway Program was not limited to applicants attending undergraduate programs; instead, an individual may be attending classes as part of an associate's degree, a bachelor's degree, or a master's degree. IAF, Tab 34 at 789. Nance-Piercefield, acknowledged that when she applied and was selected for the Pathway Program that she had completed her bachelor program, but she had applied and was accepted into a master's program. HR, D2S1, Nance-Piercefield testimony. A reasonable person would have discovered the Pathway Program requirements showing that it was a flexible program that allowed participants to be engaged in multiple levels of academic pursuit to establish program eligibility. *See* IAF, Tab 34 at 460 (showing the program allows participants to enroll in different types of degree programs and also allows for extensive periods of time to complete the program (as much as 10 years for a bachelor's degree) so long as the employee maintains at least a "half time" course load).

Therefore, even with the knowledge that Nance-Piercefield had completed a bachelor's program while in the Pathway Program, a reasonable person would not conclude this fact alone rendered her ineligible to participate in the program. Nance-Piercefield testified that the appellant never asked her about her education, or how she qualified for selection or retention in the Pathway Program. Therefore, the fact that Nance-Piercefield had continued in her education while remaining in the Pathway Program was readily ascertainable by the appellant had she simply asked Nance-Piercefield the question. Therefore, I find a reasonable person would not conclude, even if they knew someone had recently graduated from an academic course of study, that the person was disqualified from the Pathway's Program.

Appellant contended that Nance-Piercefield's father had a close relationship with Sweeney, that Sweeney attended Nance-Piercefield's wedding, and that Sweeney specifically asked Nance-Piercefield to apply for the Pathway Program. The appellant never explained how she came to believe that Sweeney and Nance-Piercefield's father had a close relationship. I find these claims are conclusory, and without factual support in the record. Moreover, Nance-Piercefield denied this fact at hearing, and she also denied that Sweeney attended her wedding and that Sweeney asked her to apply for the position. *Id.* The appellant also contended that Nance-Piercefield bragged about getting into the Pathway Program. IAF, Tab 12 at 9-10. However, the appellant did not contend that Nance-Piercefield bragged that she was in the Pathway Program when she was not entitled to participate in the program. Even if Nance-Piercefield made this comment, there is nothing suspicious about someone touting being selected for a position.

Moreover, the appellant's allegation to OSC was that Howard—not Sweeney—falsified documents to allow Nance-Piercefield to remain employed when she was otherwise not eligible. The appellant alleged no specific facts that support a reasonable person's conclusion that Howard was improperly motivated

by personal affinity to Nance-Piercefield, or that Sweeney influenced Howard in any way with respect to Nance-Piercefield. Therefore, even if these allegations were reasonably believed, any connection to Sweeney and Howard was too remote to have supported a reasonable conclusion that Howard was engaged in cronyism and favoritism with respect to Nance-Piercefield. The appellant also contended Nance-Piercefield's official SF-50s showing her appointments are evidence of an improper agency action.[12] Nance-Piercefield explained at hearing, the reason for her several appointments in the Pathway's Program is that her initial appointment was in a "not to exceed" term appointment; she later applied and was accepted into a permanent position. This information is evident on the face of the SF-50s. The appellant failed to explain how the progression of Nance-Piercefield from a summer-hire, to a Pathway Program intern, to a full-fledged permanent employee that would lead a reasonable person to conclude this evidenced agency wrongdoing. The Pathway Program requirements clearly state that participants who successfully complete the program may be noncompetitively converted to a term or permanent career conditional appointment. IAF, Tab 34 at 460.

It appears the appellant believed Nance-Peircefield should not have had the benefit of the Pathway Program, namely the opportunity to be converted into a career-ladder position as an EOS, on par with the appellant's appointment. However, she failed to point to any evidence she had at the time which would lead a reasonable person to conclude that her appointment with the agency violated agency policy or regulation, or evidenced improper preference in the

[12] Again, with respect to Nance-Piercefield's official SF-50s documenting her personnel history with the agency, there is no evidence regarding when or how the appellant obtained these documents. *See* IAF, Tab 1 (showing appointments and awards). While the appellant sought testimony on the significance of these documents from Nance-Piercefield at hearing, she never contended that she possessed these documents at the time of her disclosures, and she never specifically stated that she relied upon them at the time she formed her reasonable belief that Nance-Piercefield's was ineligible for appointment into the Pathway's Program. Therefore, I find these documents are entitled to little evidentiary weight as to the appellant's claimed reasonable belief.

selection process. Therefore, I conclude the appellant's disclosure of improper hiring practices related to Nance-Piercefield is not entitled to whistleblower protection.

Next, the appellant claimed she disclosed improper agency action when she disclosed to agency management that Marlena Morgan had a notation on her official Standard Form (SF) 50 which incorrectly documented that her appointment was entitled to a full promotion potential to General Schedule (GS) 13, as opposed to a GS 12. IAF, Tab 1 at 14. It was undisputed that upon Morgan's selection and placement into an EOS position in Ft. Worth, that her SF-50 was miscoded. Howard testified that the coding improperly reflected Morgan was in the Presidential Management Fellows program, which entitles appointees to higher potential grades than other employees not in the program. HR, D1S1, Howard testimony.

The appellant sought to establish at hearing that Morgan was a close-personal friend of Howard, and therefore provided Morgan an improper benefit of employment. However, both Morgan and Howard denied having a close personal friendship. Howard conceded that she had talked with Morgan about her dog; but, a reasonable person would not conclude that evidenced a close relationship, or that that close relationship would result in Howard improperly documenting Morgan's official personnel folder. The record shows that when Morgan transferred to Region 6 from Atlanta, Georgia, in September 2015. HR, D2S1 at 04:30. At that time Howard was not a supervisor with the agency, and it appears that she may have worked for an entirely different agency. IAF, Tab 1 (e-mail from Sweeney to FHEO announcing Howard's selection for Compliance Branch Chief position on October 2016 and that she "joins us from the HHS's Office of Civil Rights). However, to the extent Howard worked for the agency at the time Morgan transferred to Ft. Worth, Howard was not on the supervisory staff in any capacity at that time. HR, D1S1, Howard testimony (testified that she was non-

supervisory staff until she was selected for the Compliance Branch Chief position in 2016).

Moreover, Howard testified without rebuttal that she has no ability whatsoever to code or change an employee's SF-50, and that this is purely a human resources function. The appellant failed to explain why her belief that Howard could change an employee's SF-50 at her discretion was reasonable, given that at the time Morgan joined the office in Ft. Worth that Howard was not a supervisor and when she alleged no facts other than her subjective belief that that showed human resources carried out any improper plan to provide Morgan with an illegitimate promotion opportunity. The mere existence of a coding anomaly on a co-worker's SF-50, even if it appears to provide for a greater promotion potential than actually entitled under the employee's current appointment, does not support a reasonable belief that Howard was providing Morgan an improper benefit.

The appellant contended that Morgan bragged about the error on her SF-50, and when she did, she did not indicate that she was seeking to get it corrected. However, this contention cuts against any reasonable belief that Howard and/or Morgan were involved in an improper scheme to provide her an unjustified promotion potential. If Morgan and Howard sought to achieve an improper employment benefit, it would make no sense that Morgan shared the existence of the error with her colleagues. Therefore, the fact that Morgan shared the error further erodes any reasonable belief that any illegal or improper reason caused the error to Morgan's SF-50. Further, the appellant sought to establish that Morgan transferred to Ft. Worth and then to Chicago, having only remained in Ft. Worth for a relatively short time as supporting her reasonable belief that Morgan received an improper benefit. However, there is nothing inherently suspicious about employee transfers, and, as the appellant conceded, Morgan's transfer out of Ft. Worth and to Chicago was a "hardship" transfer. *See* IAF, Tab 27 at 5. Consequently, based upon the totality of the evidence, I find the appellant's

disclosure that Morgan received an improper promotion opportunity on her SF-50 is not entitled to whistleblower protection.

Finally, the appellant also claimed she reported that Paley received improper preference in hiring when she was selected in May 2019 for the Intake Branch Chief position. *See* IAF, Tab 31 at 6-7. However, the appellant failed to explain, at the time she made these disclosures, what facts led her to conclude that she was reporting agency wrongdoing. In her supplemental responses to OSC, in addition to encouraging OSC to investigate her non-selection further, the appellant contended that she had documentary information that she obtained through her EEO complaint that reflected the appellant's "score" was lowered and led to her non-selection. However, looking at the evidence in this appeal, the appellant cited OSC to Robert Avila's EEO affidavit as evidence of her lowered-score, but Avila did not provide an affidavit as part of the EEO investigation until May 20, 2020, approximately 5 months after the appellant retired. IAF, Tab 31 at 46-54. Moreover, the record also shows that the agency EEO official who handled the initial processing of the appellant's non-selection complaint did not inquire about who the selecting official was until December 11, 2019. *Id.* at 55. While this inquiry occurred prior to the appellant's retirement, it was still after her disclosures that she believed Paley received improper preference in her selection. *See* IAF, Tab 31 at 7. Absent from the record is any specific claim from the appellant that, at the time she made her disclosures to management, she had information to support a reasonable belief that her scores in the selection process were lowered.

The appellant contended that Paley did not have supervisory experience and that she lacked the qualifications for the position. The appellant, however, who claimed she was qualified, also had no supervisory experience. It appears the appellant believed that only someone currently working in Intake Branch would qualify for the position. However, that is not a reasonably held belief because the duties of the job were to manage people and supervisor civil rights

administration. As Paley explained, she had that experience through her Department of Education civil rights experience. A reasonable person would not conclude the only way to gain experience to serve in FHEO was exclusively through performance of the EOS Intake Branch position.

Other than the non-selection itself, the appellant did not allege any other facts to support her claim that Paley received improper preference in the selection process. I find, however, the mere fact she was not selected for the promotion does not support a reasonable belief that Paley was provided any improper preference during the hiring action. Consequently, I find the appellant failed to establish a reasonable person would believe they were making a protected whistleblowing disclosure when she reported that Paley's selection was erroneous. Therefore, this disclosure is also not entitled to protection under the whistleblowing statutes.

The appellant established she engaged in protected activity.

The Board is authorized under 5 U.S.C. § 1221(a) to consider a claim of reprisal for actual or perceived 5 U.S.C. § 2302(b)(9)(C) activity. *Corthell v. Department of Homeland Security*, 123 M.S.P.R. 417, ¶ 9 (2016). The appellant claimed that she filed two OIG complaints, one in 2016 and another in 2019. Therefore, the appellant must establish by preponderant evidence that she was engaged in protected activity under 2302(b)(9)(C). *See Alarid*, 122 M.S.P.R. 600, ¶ 13.

I find the appellant's claim that she filed an OIG complaint in 2016 conclusory and not supported by preponderant evidence. The appellant made vague claims regarding what she purportedly disclosed to the OIG, and she failed to allege specific facts as to when, how, or to whom specifically she made her complaint. *See* IAF, Tab 47 at 7. The record, therefore, does not establish the appellant engaged in protected activity by disclosing information or making a complaint to the OIG in 2016. However, the fact appellant filed an anonymous

complaint to the OIG in 2019 is supported by preponderant evidence. The agency submitted the anonymous complaint filed with OIG, and the dates of the complaint are compatible with the appellant's claims of when she filed her complaint. *See* IAF, Tab 12 at 9; Tab 34 at 8; Tab 47 at 5. The OIG investigation also outlines similar claims the appellant alleged to have raised with OIG. *See* IAF, Tab 43. Consequently, I find preponderant evidence supports the appellant's claim that she filed an OIG complaint in 2019.

I further find the appellant's disclosure to the OIG constitute protected activity under 5 U.S.C. § 2302(b)(9)(C).

The appellant failed to establish her protected activity was a contributing factor in a covered personnel action.

Next, I must determine whether the appellant's participation in the protected activity was a contributing factor in the challenged personnel actions at issue in this appeal. *Alarid*, 122 M.S.P.R. 600, ¶ 13. The term "contributing factor" means any protected activity that affects an agency's decision to threaten, propose, take, or not take a personnel action regarding the individual engaged in the protected activity. *Scoggins*, 123 M.S.P.R. 592, ¶ 21 (citing *Usharauli v. Department of Health & Human Services*, 116 M.S.P.R. 383, ¶ 31 (2011), 5 C.F.R. § 1209.4(d)).

The most common way of proving that protected activity was contributing factor to a personnel action is the "knowledge/timing test." Under that test, an appellant can prove her protected activity was a contributing factor in a personnel action through evidence the official taking the personnel action knew of the activity and took the personnel action within a period of time such that a reasonable person could conclude the disclosure was a contributing factor in the personnel action. *See Chavez*, 120 M.S.P.R. 285, ¶ 27. However, the Board has held there are other ways, in addition to the knowledge/timing test, for an appellant to satisfy the contributing factor standard. *Salinas v. Department of the*

Army, 94 M.S.P.R. 54, ¶ 11 (2003) (citing *Powers v. Department of Navy*, 69 M.S.P.R. 150, 156 (1995)). Other relevant evidence may include the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant. *Id.*

There is no evidence that any of proposing or deciding officials, or anyone alleged to be responsible for the personnel actions, were aware of the appellant's activity with the OIG. The appellant contended that she contacted OIG on May 22, 2019, IAF, Tab 27 at 5, and that Sweeney was aware of her complaint. However, aside from her conclusory claim that Sweeney knew about the IG complaint and her "prior whistleblowing disclosures to Management from 2012-2020," there is no other credible evidence to establish this fact. I recognize that Sweeney was deceased at the time of the hearing, depriving the appellant of the opportunity to call him as a witness. However, the appellant did not provide any sworn testimony about how Sweeney knew of her OIG activity, or that it was apparent that he had learned of her OIG activity. In addition, she failed to produce any other evidence that established Sweeney was aware of her OIG complaint.

The other record evidence also establishes that in addition to Sweeney, Paley, and other management officials lacked knowledge of the appellant's OIG activity. With respect to the appellant's 2019 OIG complaint, the record reflects she made her complaint anonymously. IAF, Tab 43 at 15 (referring to the appellant as the "Protected Identity (PI)"). The appellant did not dispute this fact. Moreover, Howard's sworn testimony stated that when OIG contacted her to respond to the allegations regarding Morgan, that OIG did not identify who made the complaint. HR, D1S1, Howard testimony. Howard speculated it was another FHEO employee, Lorraine Chambers, because Chambers had made prior

complaints related to compensation of Howard's subordinates.[13] The appellant failed to credibly explain how OIG could have divulged to Sweeney, or anyone else in management, that she made the complaint when it was made to OIG anonymously. In addition, in her sworn testimony, Paley credibly denied having any knowledge of the appellant's OIG complaint. HR, D1S3 at 01:55. Beyond the appellant's bare claim that Sweeney knew of her OIG activity, I find no evidence of record to support that anyone relevant to the personnel actions at issue in this appeal knew about the appellant's OIG complaints. Therefore, I find the appellant failed to establish that the knowledge/timing test was satisfied.

Alternatively, the appellant claimed contributing factor was established because the target of her OIG complaints were the management officials that took the personnel actions. The OIG report shows that the target of the allegations made in the complaint was Howard. The record shows that Howard did serve on the panel that recommended Paley's selection. However, the appellant filed her OIG complaint after Howard served on the selection panel; therefore, her selection of Paley could not have been motivated by the appellant's OIG complaint. There is no evidence that Howard was involved or influenced any other personnel action at issue in this appeal. Therefore, there is little evidence that being the target of any investigation motivated Howard to take any action against the appellant.

The other relevant management officials regarding the alleged retaliatory personnel actions were Sweeney and Paley. The record does not establish that either Sweeney or Paley were the target of any of the appellant's OIG complaints, or that they were influenced in any manner by Howard or anyone else that was the target of the appellant's OIG complaints. I also considered that there was little evidence to show Paley was motivated to retaliate against the appellant. The appellant disagreed with Paley's aggressive approach to management; however,

[13] Inasmuch as the appellant could have been perceived as a whistleblower, the appellant raised no such allegations in response to the Board's jurisdictional order or in any other pleading before the Board. Consequently, I find that she waived this claim.

the fact Paley was new to her position and took quick and decisive action cuts against the argument that her actions were tainted by the appellant's protected activity. Moreover, the overwhelming weight of the evidence establishes that Paley managed all of her employees in an authoritative fashion. The appellant argued herself that everyone felt compelled to find other employment, or to retire, and that another agency employee turned down a promotion because it meant working with Paley. Therefore, the evidence does not suggest Paley unfairly singled the appellant out.

The evidence shows the actions taken by the agency were supported by credible reasons. With respect to the selection of Paley, the only sworn testimony on this matter was from Banis. Banis testified that he served on the panel for the selection, and he explained that he found Paley the best candidate by virtue of her diversified background, noting that she had challenged herself in several different positions with different Federal agencies and that her career path showed progressively increasing responsibilities. HR, D2S3, Banis testimony. Further, he noted that he was impressed by her education and that she was a law school graduate. *Id.* On the other hand, Banis noted that the appellant had served mainly in the same role throughout her career and had not taken advantage of opportunities to broaden her experience, like participating in a "systemic investigation." He also noted that appellant was resistant to his constructive criticism of her work, and that she would also act beyond her role as an EOS by advocating for complainants with their sister organizations—Banis explained this violated an EOS's responsibility to remain a neutral in the complaint process. Banis explained that no one on the panel, which included Sweeney and Howard, had the appellant ranked as the number one candidate, but they all agreed on Paley as the best qualified.

The appellant disagrees with the agency's selection, noting that she believed she had superior qualifications because of her years of experience, outstanding performance ratings, and participation in an agency "emerging

leader" program years earlier. However, based upon the record in this appeal, I find the agency's decision to select Paley was supported by credible reasons. Therefore, the evidence regarding why the agency selected Paley is not so inherently weak as to raise an inference of retaliatory animus.

With respect to the letter of reprimand, suspension, and threat of removal, there is extensive credible evidence supporting the agency's actions. Paley denied that Sweeney or Banis directed her to take any actions with respect to the appellant, HR, D1S3 at 01:22, and she testified extensively regarding the valid reasons for taking disciplinary actions against the appellant. The appellant claimed the agency fabricated the allegations against her to support its disciplinary actions, but offered little evidence to support this claim. Instead, the appellant contended that her prior service insulated her from discipline for her actions, that Paley should have taken more informal steps to curtail her behavior, and that Paley should have recognized and acted compassionately due to the fact the appellant was struggling with Paley's changes. The appellant also failed to rebut any of Paley's sworn testimony regarding much of the conduct she described as warranting disciplinary correction.

As explained by Paley, the appellant's conduct was confrontational, aggressive, and disrespectful. Paley convincingly testified regarding the Microsoft Word incident, that when she challenged the appellant's repeated failure to disregard her directive regarding attaching her work as a Word attachment, the appellant feigned ignorance of Word and how to use that program. Minutes later, when she approached the appellant's cubicle to show her how to perform the task, she discovered the appellant trying to close Word documents on her work station. When she challenged the appellant as to why, minutes ago, she claimed she was not familiar with Word, the appellant explained she did not recall saying that. The appellant admitted to spreading unsubstantiated office gossip to a new employee in the Intake Branch, IAF, Tab 43 at 6-7, and she admitted that she purposely continued to send Paley documents

in improper format and, she believed, justifiably lying about doing so. IAF, Tab 43 at 9. She did not deny refusing to make corrections to her work as suggested by Paley, and demanding from higher level management that she not be required to amend her work. The appellant did not deny on at least one occasion that, after finally sending her work as attached Word files, she placed restrictions on the document that blocked Paley's editing rights. Paley explained that this was a multi-step process, and could not have been accomplished unintentionally. Based upon the record before me, there is substantial evidence supporting Paley's decision to discipline the appellant based upon her conduct.

Further, Paley explained that she progressively disciplined the appellant, starting with an oral admonishment, then issuing a letter of reprimand, then issuing a 15 day suspension. The appellant disagreed with the pace of disciplinary actions and contended that Paley should have waited for the results of her grievance of the letter of reprimand before issuing additional discipline. However, Paley testified that the appellant continued to engage in misconduct and that she was under no requirement to stay future discipline while the appellant challenged her prior discipline. The appellant cited to no legal precedent or agency policy or regulation which required Paley to hold future discipline in abeyance while her grievance was pending. Moreover, the suspension decision letter's inclusion of the warning that further acts of misconduct could result in the appellant's removal was not inappropriate given the context. The evidence shows the agency had valid reasons for taking the disciplinary actions. Therefore, these actions are not so lacking in facts supporting the agency's action to infer any retaliatory intent.

The actions the appellant complained of with respect to allegations of a hostile work environment do not establish contributing factor. The appellant believed Paley should manage her in a different manner, and that she be allowed to continue to complete work in the manner she saw fit. However, the record shows the changes instituted by Paley applied evenly to all Intake Branch

employees. While the appellant claimed that she uniquely struggled under the weight of Paley's new management style and requirements, she effectively argued that she was not singled out for mistreatment by Paley. As the appellant highlighted at hearing, all of the Intake Branch employees at the time Paley joined the agency have since retired, left the agency, or transferred away from Paley. Therefore, Paley's increase in workload, close surveillance of work, and other changes in working conditions was equally difficult to all employees and is not probative of any retaliatory intent. *See Salinas*, 94 M.S.P.R. 54 at ¶ 11.

In sum, after considering the totality of the evidence, I find the appellant failed to establish that her protected activity of filing complaints with the OIG was a contributing factor in any personnel action.

EEO claims

Appellant explicitly sought to litigate claims outside of the Board's IRA jurisdiction in this appeal, namely her claims of retaliation for her prior EEO and union activity, and claims of discrimination based upon race, sex, and disability. *See* IAF, Tabs 1, 12, 25, 27, 31, 34, 40, 47. However, allegations of retaliation for exercising a Title VII right do not fall within the scope of section 2302(b)(8) of the WPA and are not the proper subject for inclusion in an IRA appeal. *Young*, 961 F.3d at 1329. Moreover, inasmuch as the appellant contended that she sought to redress whistleblowing within the context of her EEO complaints or grievances, her claims were conclusory and not supported by sufficient allegations of fact to separately establish Board jurisdiction. *See id.* at 1330.[14]

[14] Inasmuch as the appellant separately contends her EEO hostile work environment complaint, IAF, Tab 33 at 161-163, was a protected disclosure because it reported an abuse of authority, she failed to show that such a disclosure was protected. At most, outside of her claims of Title VII discrimination, the appellant reported a strained relationship between her and her supervisor and the Board's reviewing court has found that such disclosures do not find protection under the WPA. *Nelson v. Department of the Army*, 658 F. App'x 1036, 1039 (Fed. Cir. 2016) (citations omitted).

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/
Patrick J. Mehan
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 24, 2022**, 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

Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

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

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