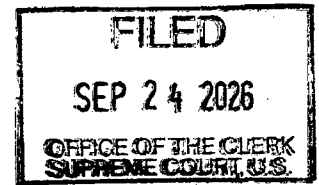


ORIGINAL

No. 26-427



In the Supreme Court of the United States

RICHARD W. COLEMAN, JR.,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SEPTEMBER MMXXVI

QUESTIONS PRESENTED

1. Whether the Federal Circuit and the Merit Systems Protection Board erred in dismissing an Individual Right of Action appeal for lack of jurisdiction where the employee's disclosures raised a nonfrivolous allegation that the agency continued to rely on a position description containing a duplicated electronic signature—described by the agency itself as “sloppy work” yet never corrected—and that such continued reliance, together with the refusal to correct material inaccuracies in the document, evidenced a potential violation of 18 U.S.C. §1001(a)(3) or an abuse of authority under 5 U.S.C. §2302(b)(8).

2. Whether repeated post-disclosure refusals by a federal agency to reinstate hazardous duty pay or to correct a defective official position description constitute independent “failures to take” a personnel action under the plain meaning of 5 U.S.C. §§2302(a)(2)(A)(ix) and (b)(8), sufficient to support Merit Systems Protection Board jurisdiction over an Individual Right of Action appeal.

3. Whether the MSPB's dismissal of an IRA appeal for failure to nonfrivolously allege that protected disclosures were a contributing factor may stand when the disclosures concern the agency's systematic refusal to correct a position description that is factually contradictory on its face regarding hazardous duties (including CBRN and explosives exposure requirements) and that serves as the basis for the ongoing denial of hazardous duty pay under 5 U.S.C. §5545(d) and 5 C.F.R., pt. 550, subpt. I.

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PARTIES TO THE PROCEEDINGS

Petitioner here and below is Richard W. Coleman, Jr.

Respondent here and below is the Merit Systems Protection Board.

The Department of Defense is a respondent in the Board proceedings but is not a party to this petition.

RELATED PROCEEDINGS

United States Office of Special Counsel:

Richard W. Coleman, Jr., OSC complaint filed Oct. 19, 2017 (close-out letter authorizing IRA appeal issued Nov. 18, 2021)

United States Merit Systems Protection Board:

Richard W. Coleman, Jr. v. Department of Defense, No. DC-1221-22-0109-W-1 (Dec. 30, 2022) (initial decision dismissing individual right of action appeal for lack of jurisdiction)

Richard W. Coleman, Jr. v. Department of Defense, No. DC-1221-22-0109-W-1 (Aug. 14, 2024) (final order affirming initial decision as modified)

United States Court of Appeals (CA Fed.):

Richard W. Coleman, Jr. v. Merit Systems Protection Board, No. 2025-2031 (Jun. 10, 2026) (judgment affirmed)

Richard W. Coleman, Jr. v. Merit Systems Protection Board, No. 2025-2031 (Aug. 6, 2026) (panel rehearing and rehearing en banc denied)

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JURISDICTION

The Federal Circuit's judgment was entered on June 10, 2026. The Federal Circuit denied rehearing on August 6, 2026. This Court has jurisdiction under 28 U. S. C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

5 U. S. C. § 1221 provides, in relevant part:

“(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the

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Board under any law, rule, or regulation.” 5
U. S. C. §1221(a) and (b).

5 U. S. C. §2302 (2018 ed.) provides, in relevant part:

“(a) ...

(2) For the purpose of this section—

(A) “personnel action” means—

...

(v) a reinstatement;

...

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph[.]

...

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

...

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

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“(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

“(i) any violation of any law, rule, or regulation, or

“(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

“if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

“(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

“(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

“(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;”

Title 5 U. S. C. §5545(d) (2018 ed.) provides:

“(d) The Office shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazard, and for any hardship or hazard related to asbestos, such

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differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970. Under such regulations as the Office may prescribe, and for such minimum periods as it determines appropriate, an employee to whom chapter 51 and subchapter III of chapter 53 of this title applies is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential—

“(1) does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof, except in such circumstances as the Office may by regulation prescribe; and

“(2) may not exceed an amount equal to 25 percent of the rate of basic pay applicable to the employee.” 5 U. S. C. §5545(d)

5 C. F. R. §550.904 provides:

“(a) An agency shall pay the hazard pay differential listed in appendix A of this subpart to an employee who is assigned to and performs any duty specified in appendix A of this subpart. However, hazard pay differential may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the

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classification of his or her position, without regard to whether the hazardous duty or physical hardship is grade controlling, unless payment of a differential has been approved under paragraph (b) of this section.

(b) The head of an agency may approve payment of a hazard pay differential when—

(1) The actual circumstances of the specific hazard or physical hardship have changed from that taken into account and described in the position description; and

(2) Using the knowledge, skills, and abilities that are described in the position description, the employee cannot control the hazard or physical hardship; thus, the risk is not reduced to a less than significant level.

(c) For the purpose of this section, the phrase 'has been taken into account in the classification of his or her position' means that the duty constitutes an element considered in establishing the grade of the position—*i. e.*, the knowledge, skills, and abilities required to perform that duty are considered in the classification of the position.

(d) The head of the agency shall maintain records on the use of the authority described in paragraph (b) of this section, including the specific hazardous duty or duty involving physical hardship; the authorized position description(s); the number of employees paid the differential; documentation of the conditions described in

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paragraph (b) of this section; and the annual cost to the agency.

(e) So that OPM can evaluate agencies' use of this authority and provide the Congress and others with information regarding its use, each agency shall maintain such other records and submit to OPM such other reports and data as OPM shall require." 5 C. F. R. §550.904.

18 U. S. C. §1001(a) provides:

"(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years."

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INTRODUCTION

Petitioner Richard W. Coleman, Jr., was hired in 2008 as the Supervisory Explosives Specialist in the Pentagon Force Protection Agency's Hazardous Devices Branch. Since then, as a supervisor, he has commanded and controlled the Pentagon Force Protection Agency (PFPA) Hazardous Devices Division. On January 23, 2015, the agency notified him that it would discontinue the 25% hazardous duty pay (HDP) supplement, effective January 24, 2015. The agency presented a revised position description (PD) K406A, but it was not properly classified because it lacked the Classification/Job Grading Certification signature in Block 21. On April 24, 2015, the agency issued a new position description (PD M759A) that removed HDP references and contained a duplicate signature. A consultant's report later documented that this position description contained material inaccuracies and contradictions when compared with Petitioner's actual duties performed since 2008, including overstated requirements for daily CBRN exposure and improper implications regarding medical standards and PFPA not having a DoD-mandated Personnel Reliability Program (PRP) for individuals with access to surety materials.

Beginning February 2, 2015, Petitioner made eleven distinct protected disclosures challenging the legality of the HDP discontinuation and the accuracy and execution of the new position description. These disclosures included evidence that the official OF-8 form bore a duplicated electronic signature, which Petitioner alleged violated 18 U.S.C. §1001(a)(3).

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After receiving those disclosures, the agency continued to withhold the HDP supplement on every subsequent payday and never reinstated it.

The agency's IG investigated the signature issue but closed the complaint after the agency admitted the signature duplication occurred and justified it as "sloppy work," without requiring the agency to correct the position description, which the agency continued to treat as a legally binding document.

After exhausting remedies before the Office of Special Counsel, Petitioner filed an IRA appeal on December 3, 2021. The MSPB dismissed for lack of jurisdiction, finding no nonfrivolous allegation that the disclosures contributed to the 2015 HDP discontinuation or the position description change. The Federal Circuit affirmed on June 10, 2026, holding that all disclosures postdated the discrete 2015 personnel actions and rejecting Petitioner's continuing-reprisal theory.

Beginning February 2, 2015, and continuing through February 12, 2018, Petitioner made eleven protected disclosures challenging the legality of the HDP discontinuation and the accuracy of the revised position description. After receiving those disclosures, the agency continued to withhold the HDP supplement on every subsequent payday and never reinstated it.

In 2021, Petitioner filed an Individual Right of Action appeal alleging that the agency's continued denial of HDP after his disclosures constituted reprisal under the Whistleblower Protection Enhancement Act. The Merit Systems Protection Board dismissed the appeal for lack of jurisdiction, holding that all of the disclosures postdated the January and April 2015

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personnel actions and therefore could not have been contributing factors. The Board further rejected Petitioner's continuing-reprisal theory, concluding that the ongoing effects of the original discrete decisions did not create new actionable personnel actions.

The Federal Circuit affirmed in a nonprecedential opinion issued June 10, 2026. Relying principally on *Bosley v. Merit Systems Protection Board*, 162 F.3d 665 (CA Fed. 1998), the court held that the January 2015 HDP discontinuation was a single discrete act and that subsequent paychecks reflecting the lower rate were merely consequences of that act, not independent failures to take personnel action. Between the January 24 meeting and the issuance of a new PD M759A meeting on April 24, 2015, the Petitioner made numerous protected disclosures challenging the legality of the HDP discontinuation; WHS ignored them. These protected disclosures that WHS ignored before April 24, 2015, constituted reprisal under the Whistleblower Protection Enhancement Act. WHS had already made the arbitrary and capricious decision never to pay HDP to the Petitioner or to the Division's Hazardous Devices Technicians.

The Federal Circuit's decision rests on an overly rigid application of the discrete-act rule announced in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), and applied to federal personnel actions in *Bosley*. *Morgan* holds that discrete discriminatory or retaliatory acts—termination, failure to promote, denial of a pay increase—are independently actionable and each starts its own limitations clock. 536 U.S., at 110–115. The continuing monetary effects of such an act do not transform it into

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a new violation with every successive paycheck. *Bosley*, 162 F.3d, at 667. That principle correctly disposes of claims that seek to revive a long-completed discrete decision solely through its ongoing financial consequences.

This case presents a different question. The original January 24, 2015, discontinuation of hazardous-duty pay was a discrete act that predated Petitioner's protected disclosures. After those disclosures placed the agency on notice that the discontinuation was allegedly unlawful, however, the agency's repeated refusals to reinstate the statutory entitlement were not passive echoes of the original decision. They were independent "failures to take" a personnel action within the plain meaning of 5 U. S. C. §§2302(a)(2)(A)(ix) and (b)(8). Section 2302 expressly prohibits an agency from taking *or failing to take* a personnel action because of a protected disclosure. A post-disclosure determination to continue withholding a claimed statutory pay differential after the employee has disclosed the claimed illegality fits squarely within that statutory language.

Morgan and *Bosley* address the ongoing effects of a completed discrete act. They do not compel the conclusion that an agency may forever immunize itself from scrutiny by making a single pre-disclosure decision and then ignoring subsequent protected disclosures that call that decision's legality into question. Treating every post-disclosure refusal to correct an allegedly unlawful pay decision as barred by the original discrete act creates a safe harbor the Whistleblower Protection Enhancement Act does not authorize. It also undermines the statute's core purpose of

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encouraging employees to report wrongdoing and deterring agencies from continuing retaliatory conduct after receiving such reports.

The distinction is particularly sharp in the context of decisions concerning pay, benefits, or awards—categories of personnel action expressly listed in § 2302(a)(2)(A)(ix). When an employee discloses that the denial of a statutory differential is itself unlawful, and the agency thereafter continues to withhold the differential with knowledge of that disclosure, the later withholding is not merely the automatic consequence of the original decision. It is a new exercise of personnel authority that the statute reaches. The Federal Circuit's contrary holding conflates the passive effects of a discrete act with an affirmative, post-disclosure failure to reinstate a claimed entitlement, and thereby narrows the protections Congress intended the WPEA to provide.

STATEMENT OF THE CASE**I. Legal background**

Under the Whistleblower Protection Act, as amended by the Whistleblower Protection Enhancement Act of 2012, a federal employee may seek corrective action from the Merit Systems Protection Board via an Individual Right of Action (IRA) appeal for personnel actions taken in retaliation for protected disclosures. 5 U. S. C. §§ 1221, 2302(b)(8).

To establish MSPB jurisdiction over an IRA appeal, the employee must exhaust remedies before the Office of Special Counsel and make nonfrivolous allegations that (1) he made a protected disclosure under 5 U. S. C.

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§2302(b)(8), and (2) the disclosure was a contributing factor in a covered personnel action under 5 U. S. C. §2302(a)(2)(A). *Yunus v. Department of Veterans Affairs*, 242 F. 3d 1367, 1371 (CA Fed. 2001). A covered personnel action includes “a decision concerning pay” and expressly reaches both taking and “fail[ing] to take” such an action. 5 U. S. C. §§2302(a)(2)(A)(ix), (b)(8).

A disclosure is a contributing factor if it is one factor that tends to affect, in any way, the agency’s decision to take or fail to take the personnel action. An employee may establish a contributing factor through the knowledge/timing test: evidence that the official taking the action knew of the disclosure and that the action occurred within a period of time such that a reasonable person could conclude the disclosure was a contributing factor. 5 U. S. C. §1221(e)(1). PD K406A, dated January 15, 2015, in Block 21, Classification/Job Grading Certification, was not properly signed and therefore is not an enforceable official document. The Petitioner made numerous protected disclosures challenging the legality of the HDP discontinuation before April 24, 2015, when a different PD (K406A versus M759A) was issued. Disclosures made before the April 24, 2015, meeting are protected disclosures.

The U. S. Court of Appeals for the Federal Circuit did not hold in its opinion that PD M759A violated 18 U. S. C. §1001(a)(3) or that the agency knowingly continued to present the PD as a factual document. The agency continues to enforce PD M759A as legally binding. The panel decision conflicts with the United States Supreme Court’s decision in *Chambers v.*

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NASCO, Inc., 501 U. S. 32 (1991), which addresses the inherent authority of federal courts to sanction fraud on the court through the submission of, or reliance on, forged government documents in discovery.

II. Factual background

Petitioner was hired in 2008 as a Supervisory Explosives Specialist in the Hazardous Devices Branch of the Pentagon Force Protection Agency. His position carried a 25% hazardous duty pay (HDP) supplement under 5 U. S. C. §5545(d).

On January 23, 2015, Bomb Squad employees, including Petitioner, were informed that they had been receiving HDP in “error” and that the supplement would be discontinued effective January 24, 2015. On April 24, 2015, employees received written notice that new position descriptions (PD M759A) had been published to remove references to HDP. WHS issued a new position description without HDP in April 2015.

Beginning February 2, 2015, and continuing through February 2018, Petitioner made protected disclosures challenging the legality of the HDP discontinuation, the accuracy of the position description governing his duties and pay eligibility, and the agency’s ongoing refusal to reinstate the differential or correct the official documents. These disclosures included evidence that the official OF-8 form contained a duplicated electronic signature. The agency’s Inspector General investigated the signature issue (Complaint No. 20160211181214406) and closed the complaint after the agency described the duplication as “sloppy work,” without requiring correction of the position description. The agency continued to treat the

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document as legally binding and never reinstated the HDP supplement. The disclosures were to agency officials, Members of Congress, and the Office of Personnel Management.

The duplicated electronic signature was discovered in February 2016 and brought to the attention of agency management, which had a cavalier attitude of "so what." A DoD IG complaint was filed on February 11, 2016 (20160211181214406). The DoD IG had WHS self-investigate the complaint, in which WHS confirmed the signature was duplicated and that the agency itself characterized it as "sloppy work." WHS has never corrected PD M759A; the agency's repeated refusals to reinstate the statutory entitlement or to correct the defective classification documents were not passive echoes of the original decision. They were independent "failures to take" a personnel action within the plain meaning of 5 U.S.C. §§2302(a)(2)(A)(ix) and (b)(8).

Petitioner contended that the official position description contained several material inaccuracies regarding the position's hazardous duties (including inaccurate CBRN exposure requirements) and that the agency's continued reliance on defective classification documents, despite notice of the problems, constituted ongoing abuse of authority and affected his pay and conditions of employment. The agency's official position has further implications beyond the Petitioner's issue: inaccurate position descriptions, defective classification documents, and abuse of authority by ignoring or refusing to address complaints not on the agency's agenda.

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PD K406A, dated January 15, 2015, Block 21, Classification/Job Grading Certification, was not properly signed and therefore is not an enforceable official document. The Petitioner made numerous protected disclosures challenging the legality of the HDP discontinuation before the April 24, 2015, meeting, when a new PD (M759A) was issued. Disclosures made before the April 24, 2015, meeting were protected disclosures.

III. Proceedings below

On October 19, 2017, Petitioner filed a complaint with the Office of Special Counsel alleging reprisal for his protected disclosures. After OSC did not seek corrective action, it issued a close-out letter on November 18, 2021, authorizing an IRA appeal.

After exhausting remedies before the Office of Special Counsel, Petitioner filed an IRA appeal on December 3, 2021 (MSPB Docket No. DC-1221-22-0109-W-1). The administrative judge dismissed the appeal for lack of jurisdiction on December 30, 2022, finding that all disclosures postdated the January 2015 HDP discontinuation and the April 2015 position-description change. The full Board affirmed on August 14, 2024, treating both 2015 events as a single discrete personnel action and rejecting a continuing-reprisal theory.

On August 14, 2024, the full Board issued a Final Order affirming the dismissal (as modified). The Board held that the January 23, 2015, decision to discontinue HDP was a single, discrete personnel action, and that subsequent paycheck effects did not transform it into a continuing personnel action. It also

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treated the April 2015 position-description revision as a discrete event connected to the January 23, 2015, meeting. On February 2, 2015, Petitioner began the nonfrivolous conversations before the April 2015 meeting and issuance of PD M759A. Because every alleged disclosure occurred after those discrete 2015 actions, none could have been a contributing factor. The Board rejected Petitioner's continuing-reprisal theory.

Petitioner sought review in the United States Court of Appeals for the Federal Circuit (No. 2025-2031). On June 10, 2026, a panel of the Federal Circuit (Lourie, Schall, and Taranto, JJ.) issued a nonprecedential opinion affirming the Board's Final Order. The court held that all of Petitioner's disclosures postdated the discrete 2015 personnel actions and rejected his continuing-reprisal theory, concluding that subsequent consequences of a discrete act of alleged reprisal do not constitute separate acts of reprisal under the Whistleblower Protection Enhancement Act.

The Federal Circuit's judgment is the decision from which review is sought.

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REASONS FOR GRANTING THE PETITION**I. The Federal Circuit's rigid application of the discrete-act rule immunizes post-disclosure refusals to correct an allegedly unlawful pay decision**

The decision below rests on an overly rigid application of the discrete-act rule announced in *National Railroad Passenger Corporation v. Morgan*, 536 U. S. 101 (2002), and applied to federal personnel actions in *Bosley v. Merit Systems Protection Board*, 162 F.3d 665 (CA Fed. 1998). *Morgan* and *Bosley* correctly hold that discrete acts—such as the original January 24, 2015, discontinuation of hazardous duty pay—are independently actionable and that the continuing monetary effects of a completed discrete act do not create a new violation with every successive paycheck. This case, however, presents a different question. After Petitioner's protected disclosures beginning in February 2015 placed the agency on notice that the discontinuation was allegedly unlawful and that the governing position description contained material inaccuracies (including a duplicated electronic signature that the agency itself characterized as "sloppy work" yet never corrected), the agency's repeated refusals to reinstate the statutory entitlement or to correct the defective classification documents were not passive echoes of the original decision. They were independent "failures to take" a personnel action within the plain meaning of 5 U. S. C. §§2302(a)(2)(A)(ix) and (b)(8). Section 2302(b)(8) expressly prohibits an agency from taking or failing to take a personnel action because of a protected disclosure, and

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§2302(a)(2)(A)(ix) defines a covered personnel action to include “a decision concerning pay.” Each post-disclosure determination to continue withholding a claimed statutory pay differential, after the employee has disclosed the claimed illegality and the defects in the official documents, fits squarely within that statutory language. *Morgan* and *Bosley* address the ongoing effects of a completed discrete act; they do not compel the conclusion that an agency may forever immunize itself from scrutiny by making a single pre-disclosure decision and then ignoring subsequent protected disclosures that call that decision’s legality into question. By collapsing all later refusals into the original 2015 act, the Board and the Federal Circuit extended *Bosley* beyond its proper scope and effectively read the statutory phrase “fail to take” out of the Act. The result is a temporal safe harbor the Whistleblower Protection Enhancement Act does not authorize. It also undermines the statute’s core purpose of encouraging employees to report wrongdoing and deterring agencies from persisting in retaliatory conduct after receiving such reports. This Court’s review is necessary to restore the plain meaning of §§2302(a)(2)(A)(ix) and (b)(8), to clarify the proper limits of *Bosley*, and to ensure that ongoing failures to take personnel actions remain subject to IRA jurisdiction under the standard set forth in *Yunus v. Department of Veterans Affairs*, 242 F. 3d 1367, 1371 (CA Fed. 2001). See also *Marano v. Dep’t of Justice*, 2 F. 3d 1137, 1140 (CA Fed. 1993) (contributing factor means any factor that tends to affect the outcome “in any way”).

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II. The decision conflicts with the text and purpose of the Whistleblower Protection Enhancement Act

The Whistleblower Protection Enhancement Act protects federal employees who disclose information they reasonably believe shows a violation of law, rule, or regulation; gross mismanagement; or other specified wrongdoing. 5 U.S.C. §2302(b)(8). Congress deliberately drafted the statute to cover both taking and failing to take a personnel action. Among the personnel actions expressly listed is “a decision concerning pay, benefits, or awards.” §2302(a)(2)(A)(ix).

When an employee discloses that denying a statutory differential is unlawful and the agency thereafter continues to withhold the differential with knowledge of that disclosure, the subsequent withholding is not merely the automatic consequence of the original decision. It is a new exercise of personnel authority that the statute reaches. The Federal Circuit’s contrary holding conflates the passive effects of a discrete act with an affirmative, post-disclosure failure to reinstate a claimed entitlement, thereby narrowing the protections Congress intended the WPEA to provide.

The Board and the court of appeals never reached whether Petitioner’s disclosures were protected; they held only that the disclosures could not have been a contributing factor because they postdated the original 2015 decisions. That reasoning effectively reads the “fail to take” language out of the statute whenever an agency makes its initial decision before the employee speaks. Such a result is incompatible with

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the text Congress enacted and with the WPEA's remedial purpose.

III. The question is important and recurring

Federal employees frequently challenge ongoing denials of pay differentials, locality adjustments, hazardous duty supplements, and other compensation decisions. In many of those cases, the employee first learns of, or first discloses, the alleged illegality only after the agency has already made its initial decision. The issue is not limited to hazardous duty pay; it arises whenever an agency's initial personnel decision has continuing financial or duty-related consequences and the employee later discloses that the decision was unlawful. Because the Federal Circuit's nonprecedential disposition applies a longstanding circuit rule in a way that will continue to govern such claims, the question presented here has importance beyond the parties to this case.

IV. This case is an ideal vehicle

The relevant facts are undisputed. The agency discontinued Petitioner's hazardous duty pay effective January 24, 2015, and issued a revised position description on April 24, 2015. Petitioner's protected disclosures began on February 2, 2015, and continued for years thereafter. The Board and the Federal Circuit rested their decisions solely on the timing of the disclosures relative to the original discrete acts and on the *Bosley* continuing-effects rule. They did not reach the protected character of the disclosures or any alternative ground for dismissal.

Petition for Writ of Certiorari

* * *

The agency's official position—maintaining a position description that a consultant's report demonstrates is materially inaccurate with respect to the actual hazardous duties performed since 2008, continuing to rely on a classification document that bears a duplicated electronic signature (which the agency itself characterized as “sloppy work” yet never corrected, and which Petitioner reasonably believed evidenced a potential violation of 18 U. S. C. §1001(a)(3)), and refusing to address or correct these defects when raised through protected disclosures—reflects a broader practice of insulating defective classification and pay determinations from meaningful review.

When an agency treats a known inaccurate or improperly executed official form as “legally binding,” declines to correct it despite documented discrepancies, and then defeats IRA jurisdiction solely on the ground that the disclosures postdate the initial discrete act, the result is a structural barrier to accountability that affects not only Petitioner but also the class of federal employees whose pay and duties are governed by position descriptions, particularly those performing high-risk work. The case therefore presents a clean legal question: whether a post-disclosure, knowing refusal to reinstate a claimed statutory pay entitlement or to correct a defective official position description can constitute an independent “failure to take” a personnel action under §2302, or whether *Bosley* permanently immunizes all subsequent effects of the original discrete decision. No further factual development is required, and the issue is fully preserved.

Petition for Writ of Certiorari

CONCLUSION

This Court should grant certiorari.

Respectfully submitted.

Richard W. Coleman, Jr.

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Fredericksburg, VA 22406
rwceod@gmail.com
(540) 479-7164

SEPTEMBER 2026

Pro Se Petitioner

Appendix A to Petition for Writ of Certiorari

Appendix A

[Filed: Jun. 10, 2026]

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

RICHARD W. COLEMAN, JR.,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2025-2031

Petition for review of the Merit Systems Protection
Board in No. DC-1221-22-0109-W-1.

Decided: June 10, 2026

RICHARD WALTER COLEMAN, JR., Fredericksburg,
VA, pro se.

CONSTANCE E. TRAVANTY, Office of the General
Counsel, United States Merit Systems Protection
Board, Washington, DC, for respondent. Also repre-
sented by KATHERINE MICHELLE SMITH.

Appendix A to Petition for Writ of Certiorari

Before LOURIE, SCHALL, and TARANTO, *Circuit Judges*.

PER CURIAM.

DECISION

Richard W. Coleman, Jr. petitions for review of the August 14, 2024 Final Order of the Merit System Protection Board (“Board”), Docket No. DC-1221-22-0109-W-1. In the Final Order, the Board dismissed Mr. Coleman’s December 3, 2021 individual right of action (IRA) appeal for lack of jurisdiction. S.A. 1–19.¹ Because the Board properly determined that it lacked jurisdiction over Mr. Coleman’s appeal, we *affirm*.

BACKGROUND

I

The pertinent facts are undisputed. In 2008, Mr. Coleman was hired as a Supervisory Explosives Specialist in the Hazardous Devices Branch (hereinafter referred to as “the Bomb Squad”) of the Pentagon Force Protective Agency (PFPA or “agency”). S.A. 2. The PFPA is a component of the Department of Defense. Mr. Coleman’s position was within the National Security Personnel Systems and included a 25% hazardous duty pay (HDP) supplement. *Id.*; see 5 U.S.C. § 5545(d)(2); 5 C.F.R. § 550.904.

On January 23, 2015, Mr. Coleman and other Bomb Squad employees attended a meeting with agency managers and Human Resources (HR) officials. S.A.

¹ “S.A.” refers to the Supplemental Appendix attached to the Respondent’s Brief.

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2. At the meeting, the Bomb Squad employees were informed that they had been erroneously receiving the HDP supplement and that the supplement would be discontinued. *Id.* The HDP supplement was discontinued the following day, January 24, 2015. *Id.* During a subsequent meeting with the HR Director on April 24, 2015, the Bomb Squad employees, including Mr. Coleman, were provided with a written memorandum explaining the basis for the January 2015 decision. S.A. 3. The memorandum also informed Mr. Coleman that he was no longer eligible for HDP and that his position description had been updated to remove references to HDP. S.A. 106-07; S.A. 159. Thereafter, in July 2015, Mr. Coleman received a new position description that did not include a reference to HDP. S.A. 108.

Beginning in February 2015, via a series of protected disclosures (eleven in all), Mr. Coleman repeatedly challenged the decision to discontinue HDP. S.A. 50-89. The first of the disclosures was on February 2, 2015. S.A. 50-51. The last of the disclosures was on February 12, 2018. S.A. 78.

On October 19, 2017, Mr. Coleman filed a complaint with the Office of Special Counsel (OSC) under the Whistleblower Protection Enhancement Act of 2012 (WPEA) (amending 5 U.S.C. § 2302). In his complaint he alleged that, in reprisal for his protected disclosures concerning the termination of his HDP, the agency continued to deny him HDP and had reassigned him. S.A. 127-38. On November 18, 2021, OSC issued a letter indicating that, although the matter remained open, OSC did not intend to seek corrective action on Mr. Coleman's behalf. See S.A. 96. Mr. Coleman was informed that, therefore, he could file an

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individual right of action (IRA) appeal with the Board, because 120 days had passed since he first sought corrective action from OSC. *Id.*

II

On December 3, 2021, Mr. Coleman filed an IRA appeal with the Board in which he alleged that in reprisal for his various protected disclosures concerning his contention that the termination of his HDP was illegal, the agency refused to reinstate his HDP. S.A. 160–64. In a subsequent jurisdictional submission, he also alleged that he was subjected to an illegal reassignment when the agency removed the HDP from his position description in reprisal for his alleged protected disclosures 6, 8, 10, and 11. S.A. 64, 70, 77, 79.

On December 30, 2022, the administrative judge (AJ) to whom Mr. Coleman's appeal was assigned issued an initial decision dismissing the appeal for lack of jurisdiction. *See* S.A. 20–37. The AJ found, *inter alia*, that Mr. Coleman failed to non-frivolously allege that any of his alleged protected disclosures were a contributing factor in the denial of his HDP because the decision to terminate his HDP was made prior to any of the protected disclosures. S.A. 29; *see also* S.A. 23–24. The AJ also found that Mr. Coleman failed to non-frivolously allege that he had made a protected disclosure under 5 U.S.C. § 2302(b)(8). S.A. 25–29. Following the AJ's initial decision, Mr. Coleman petitioned the Board for review. *See* S.A. 41.

On August 14, 2024, the Board issued its Final Order, affirming the AJ's initial decision, as modified to clarify the basis for concluding that Mr. Coleman failed to meet his jurisdictional burden. S.A. 1–19.

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The Board found that Mr. Coleman failed to non-frivolously allege that his alleged protected disclosures were a contributing factor in the discontinuation of his HDP because all the alleged protected disclosures post-dated the discontinuation of his HDP. S.A. 8-9. The Board also addressed Mr. Coleman's claim that, in reprisal for disclosures 6, 8, 10, and 11, he was subjected to an "illegal reassignment" based on the April 24, 2015 decision to issue him a new position description. S.A. 12-13; *see also* S.A. 64, 70, 77, 79. The Board found that Mr. Coleman failed to non-frivolously allege that these disclosures were contributing factors because each of them came after his reassignment on April 24, 2015. *See* S.A. 12-13; S.A. 62, 68, 74, 78. Having found that Mr. Coleman had failed to non-frivolously allege that any of his disclosures was a contributing factor in the agency's personnel action, the Board did not address the AJ's alternate finding that Mr. Coleman had failed to non-frivolously allege that he made a protected disclosure. S.A. 13 n.6.

Finally, the Board rejected Mr. Coleman's "continuing reprisal" argument that the agency's failure to resume payment of the HDP after its initial January 23, 2015 decision to deny HDP, effective January 24, 2015, gave rise to a separate retaliatory personnel action for each payday that he did not receive the HDP supplement. *See* S.A. 8-11. The Board reasoned that the January 23, 2015 decision was a single discrete act, and the fact that the effects of that decision were reflected in subsequent paychecks did not transform the discrete action into a continuing personnel action.

This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

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DISCUSSION

I

“Our review of a decision of the [B]oard is circumscribed by statute.” *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1319 (Fed. Cir. 2016). “We must affirm the Board’s decision unless 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.” *Wrocklage v. Dep’t of Homeland Sec.*, 769 F.3d 1363, 1366 (Fed. Cir. 2014). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citation and internal quotation marks omitted).

“Whether the [B]oard ha[s] jurisdiction to adjudicate a case is a question of law, which we review de novo.” *Forest v. Merit Sys. Prot. Bd.*, 47 F.3d 409, 410 (Fed. Cir. 1995). “[T]he Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before the OSC and makes non-frivolous allegations that (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action.” *Yunus v. Dep’t of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (internal quotation marks omitted). A protected disclosure under § 2302(b)(8) is one that the employee “reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a

Appendix A to Petition for Writ of Certiorari

substantial and specific danger to public health or safety.” 5 U.S.C § 2302(b)(8)(A). “A petitioner bears the burden of establishing that the Board has jurisdiction by a preponderance of evidence.” *McCarthy v. Merit Sys. Prot. Bd.*, 809 F.3d 1365, 1373 (Fed. Cir. 2016).

II

As noted, an appellant must demonstrate that he made a protected disclosure and that “the disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action.” *Yunus*, 242 F.3d at 1371; *see also, e.g., El v. Merit Sys. Prot. Bd.*, 663 F. App’x 921, 925 (Fed. Cir. 2016); *Davis v. Merit Sys. Prot. Bd.*, 278 F. App’x 1009, 1012–13 (Fed. Cir. 2008). Because all of Mr. Coleman’s protected disclosures were made after the January 24, 2015 discontinuance of his HDP, the personnel action he protests, the Board did not err in concluding that none of them was a contributing factor in the personnel action.

On appeal Mr. Coleman argues that the instant case involves “the agency’s repeated, post-disclosure decisions to continue denying a statutory entitlement” after learning through his continuing protected disclosures that the termination of HDP was unlawful. Pet’r’s Br. 16. According to Mr. Coleman, “[t]he agency’s continued refusal to reinstate HDP after receiving Appellant’s disclosures . . . is independently actionable.” Pet’r’s Br. 16–17.

The Board also did not err in rejecting Mr. Coleman’s theory of continuing reprisals. Subsequent consequences of a discrete act of reprisal do not constitute separate acts of reprisal so as to render the original

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violation continuing under the WPEA. *See Bosley v. Merit Sys. Prot. Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998) (addressing the prior Whistleblower Protection Act of 1989 and holding that the continued monetary effects of a denial of a pay increase in 1988 were not separate continuing violations beyond the 1988 discrete act); *Hamley v. Dep't of the Interior*, 122 M.S.P.R. 290, 294 (2015) (finding that the appellant's continued performance of changed duties after the June 30, 2012 discrete act did not give rise to separate acts of continuing reprisal).

We have considered Mr. Coleman's additional arguments and have found them to be without merit.

CONCLUSION

For the forgoing reasons, we affirm the Final Order of the Board dismissing Mr. Coleman's IRA appeal for lack of jurisdiction.

AFFIRMED

COSTS

No costs.

Appendix B to Petition for Writ of Certiorari

Appendix B

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE**

RICHARD W. COLEMAN, DOCKET NUMBER
JR, DC-1221-22-0109-W-1

Appellant,

v.

DEPARTMENT OF DE- DATE: April 14, 2022
FENSE,

Agency.

ORDER REJECTING PLEADING

On January 24, 2022, I issued an order requiring the appellant to supplement his response on jurisdiction.¹ That order provided very specific instructions on the format for the appellant's response. The appellant's supplemental response is deficient because it fails to comply with my order. Accordingly, the appellant's supplemental response and related exhibits are **REJECTED** and will be deleted from the Board's repository.²

The appellant may submit a corrected response that complies with my instructions using the format set out in my supplemental order. **This format is**

¹ The appellant's response was due on February 11, 2022, but was extended to February 18, 2022, at his request. The agency's request was due on March 4, 2022.

² The following tabs are being rejected: Tab 18-21.

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intended to be self-contained, that is, the response should not refer to an affidavit or other document to be responsive. The appellant should not submit additional documents unless they are directly responsive to questions on the form. The appellant's corrected response must be filed so that it is received by this office and the agency no later than **April 22, 2022**. The record on jurisdiction will close on this date. If I deem it necessary for the agency to file a response, I will reopen the record for that purpose.

FOR THE BOARD:

/S/

Sharon J. Pomeranz
Administrative Judge

Appendix B to Petition for Writ of Certiorari

CERTIFICATE OF SERVICE

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

Appellant

Electronic Mail Richard W. Coleman, Jr
 121 Wateredge Lane
 Fredericksburg, VA 22406

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Electronic Mail Michael J. Riselli, Esq.
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April 14, 2022

(Date)

/s/

Sharon J. Pomeranz
Administrative Judge

Appendix C to Petition for Writ of Certiorari

Appendix C

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE**

RICHARD W. COLEMAN, DOCKET NUMBER
JR, DC-1221-22-0109-W-1
Appellant,

v.

DEPARTMENT OF DE- DATE: December 30,
FENSE, 2022
Agency.

Michael J. Riselli, Esquire, Alexandria, Virginia, for
the appellant.

Lundi McCarthy Shafiei, Esquire, and Supraja T.
Murali, Esquire, Washington, D.C., for the agency.

BEFORE

Sharon J. Pomeranz
Administrative Judge

INITIAL DECISION

The appellant filed this individual right of action (IRA) appeal alleging the agency engaged in unlawful retaliation against him in retaliation for his whistleblowing activity. Initial Appeal File (W-1), Tab 1. The hearing the appellant requested was not granted because he failed to non-frivolously allege facts entitling him to a jurisdictional hearing. *See Manning v. Merit*

Appendix C to Petition for Writ of Certiorari

Systems Protection Board, 742 F.2d 1324, 1428 (Fed. Cir. 1984). For the reasons set forth below, the appellant's appeal is DISMISSED for lack of jurisdiction.

ANALYSIS AND FINDINGS

Background

In December of 2000, the appellant began working for the Defense Threat Reduction Agency (DTRA) as an operations and research officer. W-1, Tab 13 at 7. In October of 2007, the appellant was contacted by John King, Division Director of the Pentagon Force Protection Agency (PFPA), who informed him that he was recruiting for a new bomb squad unit at the Pentagon. *Id.* at 8. In March of 2008, the appellant was informed that the Pentagon Bomb Squad (Bomb Squad) had been approved. *Id.* Thereafter, the appellant applied and was selected for the position of Supervisory Explosives Specialist (Bomb Squad Commander), YC-0301-02, a position under the National Security Personnel System, with the PFPA. *Id.* at 8-9. The appellant was given a 25 percent hazardous duty pay (HDP) supplement.¹ *Id.* at 9; 5 U.S.C. § 5545(d)(2); 5 C.F.R. § 550.904.

¹ 5 U.S.C. § 5545(d) directs the Office of Personnel Management (OPM) to establish a pay differential schedule for duties having unusual physical hardship or hazards. *See* 5 U.S.C. § 5545(d). 5 C.F.R., subpart I sets forth OPM's regulations applicable to pay for duties that involve physical hardship or hazard. Hazardous duty is defined as "duty performed under circumstances in which an accident could result in serious injury or death" and hazardous pay differential is "additional pay for performing hazardous duty or duty involving physical hardship." 5 C.F.R. § 550.902.

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On August 29, 2010, the appellant's position was converted from the National Security Personnel System to the General Schedule, GS-0301-13. *Id.* In May of 2011, the appellant's position was changed from job series GS-0301 to job series GS-1801. *Id.* On February 12, 2012, the appellant was promoted to Supervisory Explosives Investigator, GS-1801-14. *Id.* at 10. During this time, the appellant continued to receive HDP.

In the Fall of 2014, the Department of Defense's Office of Inspector General (OIG) received an anonymous complaint that the employees of the Bomb Squad were erroneously receiving HPD. It appears that this anonymous complaint triggered a review of the position descriptions for Bomb Squad employees because on January 23, 2015, the appellant and other members of the Bomb Squad met with PFPA managers and representatives from the agency's Human Resources Directorate. During the meeting, the Bomb Squad employees were informed that Susan Yarwood, Director of Washinton Headquarter Services, had determined that they were erroneously receiving HDP and that it would be discontinued. W-1, Tab 13 at 11-12. The employees were informed that the agency had determined that their receipt of HDP was illegal and that they would have to repay the overpayment, although the agency later excused this debt.² The appellant stopped receiving HDP on January 24, 2015. *Id.* at 12.

² In July of 2016, Secretary of Defense, Ashton Carter, ordered the DoD Hearing and Appeals Board and the Defense Finance and Accounting Service (DFAS) to grant a waiver of the overpayment to Bomb Squad members. W-1, Tab 12 at 12.

Appendix C to Petition for Writ of Certiorari

On April 24, 2015, the appellant received a memorandum from Director Yarwood explaining the agency's review of his eligibility for HDP, including a review of his position description, and the agency's determination that he was not eligible for HDP. W-1, Tab 2 at 103. In making its determination, the agency had concluded that working with hazardous materials was an inherent part of the appellant's position thus making him ineligible for HDP. *Id.* On April 25, 2015, Ms. Yarwood met with the employees of the Bomb Squad to reiterate the agency's decision to stop HDP. W-1, Tab 13 at 12-14. In July of 2015, the appellant was reassigned to a new position description that did not include a reference to HDP. *Id.* at 14.

The appellant believed the agency was wrong to terminate his HDP and began contacting agency officials and others with his opinion on the matter, including the Secretary of Defense, James Mattis, claiming the termination of his HDP was illegal. *See, e.g.*, W-1, Tab 2 at 82-85. On February 11, 2016, the appellant filed a Hotline Complaint with the agency's OIG alleging that the change to the Bomb Squad members position descriptions to exclude a reference to HDP was in violation of 18 U.S.C. § 1001. W-1, Tab 2 at 35-48.

On April 3, 2017, the appellant filed a prohibited practices complaint with the Office of Special Counsel (OSC). In his complaint, the appellant alleged that the termination of the Bomb Squad's HDP was illegal. It is not clear from the record if the agency was aware of this complaint which OSC closed on November 12, 2017, without taking any action. W-1, Tab 2 at 7. On October 19, 2017, the appellant filed a whistleblower complaint with OSC about the termination of HDP by

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the agency.³ W-1, Tab 2 at 8-28. On November 18, 2021, OSC notified the appellant that it was terminating its inquiry into his complaint. This appeal followed.

Applicable Law

The Board has jurisdiction over an IRA appeal if the appellant exhausts his administrative remedies before OSC and makes nonfrivolous allegations that (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D), and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). 5 U.S.C. § 1214(a)(3), 1221 (e)(1); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). Any disclosure of a violation of law, rule, or regulation is protected if it meets the reasonable belief test. An appellant is not required to cite any specific law, rule, or regulation that he believes was violated where the individual's statements and the surrounding circumstances clearly implicate an identifiable law, rule, or regulation; he is only required to make a nonfrivolous allegation that he reasonably believed his disclosure evidenced one of the types of wrongdoing listed in 5 U.S.C. § 2302(b) (8).

³ During the time that his OSC complaint was pending, the appellant's attorney continued to write agency officials about the termination of the appellant's HDP. W-1, Tabs 13 at 31-34, 70-71; 2 at 30.

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See, e.g., Lane v. Department of Homeland Security, 115 M.S.P.R. 342, ¶ 27 (2010).

In order to meet the contributing factor jurisdictional element, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 22 (2010). The appellant may demonstrate that the disclosure was a contributing factor in a personnel action through circumstantial evidence, including presenting evidence sufficient to satisfy the knowledge/timing test, which requires evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Wells v. Department of Homeland Security*, 102 M.S.P.R. 36, ¶ 8 (2006). If the appellant fails to satisfy the knowledge/timing test, the Board must consider other evidence, such as that pertaining to 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 those individuals had a desire or motive to retaliate against the appellant. *Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 26 (2013). In an IRA appeal, whether an appellant has presented nonfrivolous allegations is determined on the basis of the written record. *Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008); *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003).

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An appellant is entitled to a hearing on the issue of Board jurisdiction over his appeal only if she asserts a nonfrivolous allegation of jurisdiction. Nonfrivolous allegations of jurisdiction supported by affidavits or other evidence confer Board jurisdiction. *Woodworth v. Department of the Navy*, 105 M.S.P.R. 456, ¶ 14 (2007).

The appellant has failed to non-frivolously allege that he made a protected disclosure under 5 U.S.C. § 2302(b)(8).

Protected whistleblowing occurs when an appellant makes a disclosure that he reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 17 (2011). The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Id.*

The appellant was provided two opportunities to address the jurisdictional issues in this appeal. W-1, Tabs 6, 16. The appellant was advised that he had the burden of proving that the Board has jurisdiction over

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his appeal by preponderant evidence.⁴ W-1, Tabs 3, 13. The appellant was informed of the requirements for establishing jurisdiction in an IRA appeal and was provided an opportunity to submit argument and evidence on the issue. *Id.* The appellant has submitted responses to both jurisdictional orders, as has the agency, and those responses have been considered. W-1, Tabs 12-14, 15, 19, 21-22.

Although the appellant identifies numerous dates that he made disclosures, the disclosure is essentially the same – his belief that the agency's decision to deny him HDP was illegal. W-1, Tab 21. For the reasons set forth below, I find these disclosures are not protected.

As discussed above, the agency's HR office informed the appellant and other Bomb Squad employees of its decision to terminate their receipt of HDP during a meeting held on January 23, 2015. While the specifics of that meeting are not entirely clear, the appellant received a memorandum on April 24, 2015, from Director Yarwood explaining to him that the agency had reviewed his position description and hazard pay eligibility. W-1, Tab 2 at 103. Based on that review, the agency had determined that hazardous duties were taken into consideration in the classification of his position making him ineligible for HDP. *Id.*; 5 C.F.R. § 550.904.

According to the appellant, he first raised objections to the agency's decision to terminate his HDP during

⁴ A preponderance of the evidence is the degree of evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.4(q).

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a meeting with Bradley Weiss, Pentagon Force Protection Agency's Ombudsman, on February 2 and 18, 2015. During the meeting, the appellant and other Bomb Squad employees complained that they were not provided with a reason for the termination of their HDP and claimed that the termination was arbitrary and capricious. W-1, Tab 21 at 9-10 (Disclosure 1). I assume for the purposes of jurisdiction that the appellant's claim that he was not given a reason for the termination of his HDP to be true due to the absence of record evidence related to the January 23, 2015, meeting. Nevertheless, I find that the appellant's complaint about the termination of his HDP during this meeting to be too vague and conclusory to constitute a protected disclosure as it does not contain facts that, if true, would support his allegation of arbitrariness. Accordingly, I find this disclosure is not protected.

The appellant claims he next complained about the termination of his HDP during a meeting with Director Yarwood on April 24, 2015, the day after he received her memorandum explaining why his position was eligible for HDP. W-1, Tab 2 at 103 (Disclosure 2). The appellant claims that he disclosed to Director Yarwood that her statement that the U.S. Capitol Police did not receive HDP was wrong. W-1, Tab 21 at 9. According to the appellant, Director Yarwood used this fact as a justification for terminating his HDP and he claims her misstatement was an abuse of authority. An abuse of authority occurs when there is an arbitrary and capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personnel gain or advantage to himself or to preferred other persons. *Wheeler v.*

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Department of Veterans Affairs, 88 M.S.P.R. 236, ¶ 13 (2001). I find that Director Yarwood's statement, even if incorrect, does not rise to the level of abuse of authority. In making that determination, I note that the appellant had been provided with Director Yarwood's memorandum the previous day, which explained the agency's reasons for terminating the appellant's HDP and made no reference to the U.S. Capitol Police as a factor in that determination. W-1, Tab 2 at 103. Rather, the memorandum stated that the appellant was not eligible for HDP because hazardous duties had been considered in classifying his position so his receipt of HDP was contrary to the relevant regulation. *Id.* The relevant regulation was provided to the appellant with Director Yarwood's memorandum.⁵ *Id.* Thus, I cannot conclude that the supposed statement during the meeting, even if incorrect, is sufficient to constitute abuse of authority as it was not a factor in the agency's decision to terminate the appellant's HDP, something that was explained in the memorandum he had been provided the previous day.

⁵ The relevant provision provides, "An agency shall pay hazard pay differential listed in appendix A of this subpart to an employee who is assigned to and performs any duty specified in appendix A of this subpart. However, hazard pay differential may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the classification of his or her position, without regard to whether the hazardous duty or physical hardship is grade controlling, unless payment of a differential has been approved under paragraph (b) of this section." 5 C.F.R. § 550.904(a) (emphasis added).

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The appellant's remaining disclosures 3-11 all concern, in one way or another, the appellant's claim that the agency's denial of HDP was illegal. W-1, Tab 21 at 13-39. All of these alleged disclosures occurred after April 23, 2015, the date of Director Yarwood's memorandum to the appellant explaining the reasons for terminating his HDP. As stated above, the memorandum referenced the relevant regulation, 5 C.F.R. § 550.904, which explicitly states that HDP cannot be paid when hazardous duties were taken into consideration when classifying the position at issue. *Id.*; 5 C.F.R. § 550.904(a). Because hazardous duties were considered in classifying the appellant's position, he was not eligible for HDP. While the appellant disagreed with this determination, he has failed to provide specific facts to support the agency's assertion that the duties were considered in classifying his position. While I understand the appellant was not happy with the decision to terminate his HDP, I find that a reasonable person with the information the appellant knew could not reasonably conclude that the agency's decision was unlawful or incorrect. As a result, I find the appellant has failed to non-frivolously allege that these disclosures were protected.

In addition, I note that during the time period that the appellant made some of these disclosures, he was privy to an OPM claim decision that had been made regarding this issue.⁶ Specifically, on August 9, 2016, OPM issued a compensation claim decision on a claim that had been filed by an employee of the Bomb

⁶ This claim decision was submitted by the appellant as part of the documentation to support his appeal.

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Squad. W-1, Tab 2 at 76-80. The claim alleged the agency had wrongfully terminated the Bomb Squad employee's HDP. *Id.* at 77. OPM concluded that the agency had considered hazardous duties in classifying the Bomb Squad positions and concluded that the employee was not entitled to HDP.⁷ *Id.* at 77-78.

While I note that the appellant received a paid consultant's report on February 5, 2018, that concluded the agency was incorrect in denying him HDP, I give little weight to this evidence as the agency is in the best position to make classification decisions for its positions. W-1, Tab 2 at 57-75.

Based on the above, I find the appellant has failed to non-frivolously allege facts which if true would constitute protected whistleblowing under 5 U.S.C. § 2302(b)(8).

Even assuming the appellant engaged in activity protected under 5 U.S.C. § 2302(b)(9), he has failed to non-frivolously allege that he was subject to a personnel action.

Assuming without deciding that some of the appellant's complaints to OIG and his congressional representatives constitute protected activity under 5 U.S.C. § 2302(b)(9)(A) or (C), I find that he has failed to allege that a personnel action was taken against him for those activities. Specifically, the only personnel action

⁷ The appellant makes other allegations related to his employment including complaints about stand-by pay and use of government vehicles. However, he has not sufficiently explained the basis for his allegations. As a result, I find they are too vague and conclusory to constitute a protected disclosure.

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identified by the appellant and exhausted with OSC was the agency's continuing refusal to reinstate his HDP.

For the purposes of the Whistleblower Protection Act, a personnel action includes, among other things, a decision concerning pay or benefits. 5 U.S.C. § 2302(a)(2)(A)(ix). In this instance, the decision to terminate the appellant's HDP was made in January 2015, before any of his alleged protected activity took place. Although appellant argues that his subsequent complaints about the agency's refusal to reinstate his HDP should be considered a personnel action under the statute, I disagree. As a result, I must conclude that the appellant has failed to non-frivolously allege that a personnel action was taken against him in retaliation for any protected activity he may have engaged in.

Based on the above, I find the appellant has failed to non-frivolously allege fact which, if true, would constitute a protected disclosure, I further find that he has failed to non-frivolously allege facts which, if true, would show that a personnel action was taken against him for any protected activity. Accordingly, I find the appeal must be dismissed for lack of jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

_____/S/
Sharon J. Pomeranz
Administrative Judge

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NOTICE TO APPELLANT

This initial decision will become final on **February 3, 2023**, 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:

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

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

**Criteria for Granting a Petition or Cross
Petition for Review**

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

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

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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

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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

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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

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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

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regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (not the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); see *Perry v. Merit Systems Protection Board*, 582 U.S. ___, 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other

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issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after this decision becomes final** as explained above. 5 U.S.C. § 7702(b)(1).

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.

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

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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:

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Cite as: App. to Pet. for Cert.

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http://www.uscourts.gov/Court_Locator/CourtWeb-sites.aspx

CERTIFICATE OF SERVICE

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

Appellant

Electronic Mail Richard W. Coleman, Jr
 121 Wateredge Lane
 Fredericksburg, VA 22406

Appellant Representative

Electronic Mail Michael J. Riselli, Esq.
 Riselli & Pressler, P.C.
 218 No. Lee Street
 Third Floor
 Alexandria, VA 22314

Agency Representative

Electronic Mail Lundi McCarthy Shafiei, Esq.
 Department of Defense
 1155 Defense Pentagon, Room
 2E1035
 Washington, DC 20301-1155

Electronic Mail Supraja T. Murali, Esq.
 Department of Defense
 1155 Defense Pentagon, Room
 2E1035
 Washington, DC 20301-1155

December 30, 2022
(Date)

_____/s/_____
Sharon J. Pomeranz
Administrative Judge

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

RICHARD W. COLEMAN DOCKET NUMBER
JR., DC-1221-22-0109-W-1
Appellant,

v.

DEPARTMENT OF DE- DATE: August 14, 2024
FENSE,
Agency.

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Michael J. Riselli, Esquire, Alexandria, Virginia, for
the appellant.

Supraja T. Murali, Esquire, and Lundi McCarthy
Shafiei, Esquire, Washington, D.C., for the agency.

BEFORE

Cathy A. Harris, Chairman
Raymond A. Limon, Vice Chairman
Henry J. Kerner, Member*

*Member Kerner did not participate in the adjudica-
tion of this appeal.

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

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FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED to clarify the basis for concluding that the appellant failed to meet his jurisdictional burden, we AFFIRM the initial decision.

BACKGROUND

¶2 The appellant was hired as a Supervisory Explosive Specialist with the Pentagon Force Protection Agency (PFPA) in the Hazardous Device Branch (hereinafter referred to as the Bomb Squad), effective

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June 22, 2008. Initial Appeal File (IAF), Tab 13 at 5-6, 41. This position was within the National Security Personnel System and included a 25% hazardous duty pay (HDP) supplement. *Id.* at 9, 42-45; see 5 U.S.C. § 5545(d)(2); 5 C.F.R. § 550.904. In or around September 2014, an anonymous complaint was made to the Department of Defense's Office of the Inspector General (DoD OIG) alleging that members of the Bomb Squad were improperly receiving the HDP supplement. IAF, Tab 2 at 16-17. On January 23, 2015, Bomb Squad employees were called to a meeting with agency managers and Human Resources (HR) officials and informed that they had been erroneously receiving the HDP supplement and that the supplement would be discontinued. IAF, Tab 2 at 17, Tab 13 at 11. The HDP supplement was discontinued effective the following day, January 24, 2015. IAF, Tab 13 at 12. During a subsequent meeting with the HR Director on April 24, 2015, Bomb Squad employees were provided with a written memorandum explaining the basis for the January 2015 decision.² IAF, Tab 2 at 103-04, Tab 13 at 12-13. Specifically, they were informed that based on an analysis of the affected employee's positions descriptions (PDs) and in accordance with regulations setting forth the requirements for entitlement to HDP, 5 C.F.R. § 550.904, the employee's PDs "inaccurately captured [their] eligibility for [HDP]," and they were "erroneously receiving [HDP] differential."

² Members were also informed at that time that the agency would seek repayment of the HDP overpayment dating back to 2011, although all debts that resulted from the HDP overpayment were later waived. IAF, Tab 13 at 12-13 & n2.

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IAF, Tab 2 at 103. Consequently, the PDs for affected employees were revised to remove the references to HDP and were reissued. *Id.*

¶3 Starting after the January 23, 2015 meeting, the appellant began a multi-year campaign challenging the agency's decision to rescind the HDP supplement through a variety of avenues, including by contacting various DoD officials, Members of Congress, the DoD OIG, and the Office of Personnel Management. On April 3, 2017, the appellant filed an OSC Form 12 "Disclosure of Information" complaint with OSC's Disclosure Unit (DU) regarding the alteration of the PDs and the elimination of HDP. IAF, Tab 2 at 20-28, Tab 21 at 27-30. That complaint was closed out and referred to the Complaints Examining Unit (CEU) on November 21, 2017. IAF, Tab 2 at 7. On October 19, 2017, the appellant filed an OSC Form 11 "Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity" with OSC's CEU regarding the cessation of the HDP supplement, among other things.³ *Id.* at 8-19, Tab 21 at 33-37. By a letter dated November 18, 2021, OSC informed the appellant that it did not intend to seek corrective action on his behalf but that his complaint remained open. IAF,

³ The DU does not review allegations of prohibited personnel practices, and the Board has held that making a disclosure to the Disclosure Unit does not satisfy the exhaustion requirement under 5 U.S.C. § 1214(a)(3). *Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 9 (2016); *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 16 (2011). After the appellant filed these complaints with OSC, OSC reorganized its components such that the functions previously performed by the CEU are now performed by the Investigation and Prosecution Division.

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Tab 14 at 158. The letter also informed the appellant that he had exhausted his administrative remedies with OSC and provided him with notice of his right to file an IRA appeal with the Board. *Id.*

¶4 On December 3, 2021, the appellant filed the instant IRA appeal alleging that the agency continuously denied him HDP in retaliation for his whistleblowing disclosures and activities. IAF, Tab 1. The administrative judge issued an IRA jurisdiction order that notified the appellant of his jurisdictional burden and instructed him to submit evidence and argument establishing Board jurisdiction over his appeal. IAF, Tab 6. After the appellant filed his jurisdictional response, IAF, Tabs 12-14, the administrative judge issued a second jurisdictional order noting that the appellant's initial response was insufficiently specific to allow her to make a jurisdictional determination, IAF, Tab 16. She reopened the record on jurisdiction, instructed the appellant to identify specific information for each of his protected disclosures or activities and retaliatory personnel actions, and included a template for the appellant to provide the information she required to make a jurisdictional determination. *Id.* at 1-3.

¶5 After the appellant submitted a corrected supplemental jurisdictional response⁴, IAF, Tabs 21-22, the administrative judge issued an initial decision without holding the appellant's requested hearing,

⁴ The administrative judge rejected the appellant's initial supplemental jurisdictional response for failure to comply with her instructions. IAF, Tab 20.

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dismissing the appeal for lack of jurisdiction, IAF, Tab 24, Initial Decision (ID) at 1, 10. Specifically, the administrative judge concluded that the appellant failed to nonfrivolously allege that he made a protected disclosure under 5 U.S.C. § 2302(b)(8), *id.* at 6-10, and that even if he nonfrivolously alleged that he engaged in protected activity under 5 U.S.C. § 2302(b)(9)(A) or (C) in connection with his complaints to the OIG and Members of Congress, he nevertheless failed to nonfrivolously allege that he was subjected to a covered personnel action under 5 U.S.C. § 2302(a) because the only personnel action he was challenging—the discontinuation of the HDP supplement—occurred in January 2015, before he engaged in any of the alleged protected activities. ID at 10. In making this finding, she acknowledged but rejected the appellant's argument that each of the agency's subsequent refusals to reinstate HDP should have been considered separate personnel actions for the purpose of establishing Board jurisdiction over his IRA appeal. ID at 10.

¶16 The appellant timely filed a petition for review of the initial decision. Petition for Review File (PFR), Tab 1. The agency filed a response in opposition to the petition for review, and the appellant filed a reply. PFR File, Tabs 3-4.

DISCUSSION OF ARGUMENTS ON REVIEW

¶17 The appellant argues on review that the administrative judge erred by rejecting his argument that he has been subjected to a "continuing retaliatory personnel action, or more correctly, a series of continuing retaliatory personnel actions" based on the agency's

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discontinuation of his HDP supplement after January 23, 2015. PFR File, Tab 1 at 6-9. He also argues that the administrative judge erred by concluding that he failed to make protected disclosures under 5 U.S.C. § 2302(b)(8) in connection with his challenges to the agency's HDP discontinuation decision. *Id.* at 9-14. Finally, he argues that she erred by failing to address his argument that he engaged in protected activity under 5 U.S.C. § 2302(b)(9)(A)(i) when he filed classification appeals with the Office of Personnel Management (OPM) in 2017 and 2020 challenging the agency's decision to discontinue the HDP supplement. *Id.* at 18-19.

Applicable legal standard.

¶8 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that (1) he made a protected disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b) (9)(A)(i), (B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined under 5 U.S.C. § 2302(a). *Edwards v. Department of Labor*, 2022 MSPB 9, ¶ 8, *aff'd*, No. 2022-1967 (Fed. Cir. July 7, 2023); *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 5 (2016).

¶9 A nonfrivolous allegation of a protected whistleblowing disclosure is an allegation of fact that, if proven, would show that the appellant disclosed a matter that a reasonable person in his position would

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believe evidenced one of the categories of wrongdoing specified in 5 U.S.C. § 2302(b)(8). Salerno, 123 M.S.P.R. 230, ¶ 6. The test to determine whether a putative whistleblower has a reasonable belief in the disclosure is an objective one: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Id.*; see 5 U.S.C. § 2302(b)(8).

¶10 An appellant must make specific and detailed allegations; vague, conclusory, or unsupported allegations, such as one that essentially repeats the legal standard, without more, are pro forma and insufficient to meet the nonfrivolous standard. *Clark v. U.S. Postal Service*, 123 M.S.P.R. 466, ¶¶ 6, 8 (2016), *aff'd per curiam*, 679 F. App'x 1006 (Fed. Cir. 2017), and *overruled on other grounds by Cronin v. U.S. Postal Service*, 2022 MSPB 13, ¶ 20 n.11. As the U.S. Court of Appeals for the Federal Circuit held, “the question of whether the appellant has non-frivolously alleged protected disclosures that contributed in a personnel action must be determined based on whether the employee alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face.” *Hessami v. Merit Systems Protection Board*, 979 F.3d 1362, 1369 (Fed. Cir. 2020). In addition, “the Board may not deny jurisdiction by crediting the agency’s interpretation of the evidence as to whether the alleged

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disclosures fell within the protected categories or whether the disclosures were a contributing factor in an adverse personnel action.” *Id.* If an appellant establishes jurisdiction over his IRA appeal, he is entitled to a hearing on the merits of his claim, which he must prove by preponderant evidence. *Salerno*, 123 M.S.P.R. 230, ¶ 5. O

SC Exhaustion.

¶11 The substantive requirements of exhaustion are met when an appellant has provided OSC with sufficient basis to pursue an investigation that might lead to corrective action. *Chambers v. Department of Homeland Security*, 2022 MSPB 8, ¶ 10 (citations omitted). However, an appellant may give a more detailed account of his whistleblowing activities before the Board than he did to OSC. *Id.*; *Skarada v. Department of Veterans Affairs*, 2022 MSPB 17, ¶ 7. An appellant may demonstrate exhaustion through his initial OSC complaint, evidence that he amended the original complaint, including but not limited to OSC’s determination letter and other letters from OSC referencing any amended allegations, and the appellant’s written responses to OSC referencing the amended allegations. *Skarada*, 2022 MSPB 17, ¶ 7. An appellant may also establish exhaustion through other sufficiently reliable evidence, such as an affidavit or declaration attesting that the appellant raised with OSC the substance of the facts in the Board appeal. *Chambers*, 2022 MSPB 8, ¶ 11.

¶12 The administrative judge determined that the appellant exhausted with OSC his claim that he was

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subjected to a decision concerning pay or benefits under 5 U.S.C. § 2302(a)(2)(A)(ix) when the agency continuously refused to reinstate the HDP supplement. Although she did not make specific findings concerning which of the appellant's alleged disclosures or activities he exhausted with OSC, we agree that he has demonstrated exhaustion as to all 11 potential disclosures or activities he identified in his supplemental response to her jurisdictional order. IAF, Tab 21 at 9-39.

¶13 Regarding the retaliatory personnel actions, the appellant alleged in his OSC complaint that he was continuously denied HDP, Stand By Pay (SBP), and Law Enforcement Assistance Pay (LEAP). IAF, Tab 2 at 13-18. However, in his supplemental jurisdictional pleading, he acknowledged that he was not challenging the denial of SBP and LEAP as a part of his IRA appeal. IAF, Tab 21 at 33 n.14. Additionally, he alleged that in retaliation for Disclosures 6, 8, 10, and 11, the agency subjected him to an "illegal reassignment," and referenced 5 U.S.C. § 2302(a)(2)(A)(iv), which identifies "a detail, transfer, or reassignment" as a covered personnel action. IAF, Tab 21 at 21-39. Although the appellant's original OSC complaint does not reference his alleged retaliatory reassignment, some of the documents the appellant states that he provided to OSC do reference an alleged "reassignment" starting on April 24, 2015, following changes made to his PD to remove the references to HDP. IAF, Tab 2 at 48-49, 103. Accordingly, we conclude that the appellant also exhausted this claim with OSC.

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¶14 In sum, we modify the initial decision to clarify that the appellant exhausted what has been identified as Disclosures 1 through 11 with OSC, as well as the appellant's claims that he was subjected to a reassignment under 5 U.S.C. § 2302(a)(2)(A)(iv), and a decision concerning pay or benefits under 5 U.S.C. § 2302(a)(2)(A)(ix) when his HDP supplement was discontinued.

We agree that the appellant failed to meet his jurisdictional burden because he failed to nonfrivolously allege that any of his alleged disclosures or activities was a contributing factor in the agency's decision to take either of the challenged personnel actions.

The January 24, 2015 discontinuation of the HDP supplement.

¶15 As the record reflects that all of the appellant's alleged protected disclosures and activities postdate both of his alleged retaliatory personnel action, that is, the discontinuation of HDP and the appellant's "reassignment" based on the issuance of a new PD following the rescission of HDP, we conclude that he failed to nonfrivolously allege that any of these disclosures or activities were a contributing factor in these personnel actions. See *El v. Department of Commerce*, 123 M.S.P.R. 76, ¶ 10 (2015) (explaining that because the subject personnel action predated the disclosure, the disclosure could not have contributed to the personnel action), *aff'd per curiam*, 663 F. App'x 921 (Fed. Cir. 2016); *Davis v. Department of Defense*, 106 M.S.P.R. 560, ¶ 12 (2007) (same), *aff'd*, 278 F. App'x 1009 (Fed. Cir. 2008).

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¶16 As previously noted, the appellant argues that the agency's failure to resume payment of HDP after January 23, 2015, gave rise to a separate retaliatory personnel action "each and every payday" that he did not receive the HDP supplement, and that therefore the administrative judge erred in finding he failed to establish that his protected disclosures and activities were contributing factors as to these subsequent events. PFR File, Tab 1 at 7. He argues, in other words, that because each paycheck that did not include the HDP supplement was a part of the agency's "continuing reprisal," each of the whistleblowing disclosures and activities he exhausted with OSC preceded a subsequent denial of the HDP supplement, and so he nonfrivolously alleged that he was subjected to personnel actions in retaliation for his various disclosures and activities. *Id.* at 7-9.

¶17 To support this argument, the appellant relies on decisions of the U.S. Court of Claims discussing a "continuing claims" theory of liability. *Id.* at 8-9 (citing *Bevelheimer v. United States*, 4 Cl. Ct. 558 (1984); *Beebe v. United States*, 640 F.2d 1283 (Ct. Cl. 1981), *disagreed with on other grounds by Bodie v. City of Columbia, S.C.*, 934 F.2d 561, 565 (4th Cir. 1991); and *Friedman v. United States*, 310 F.2d 381, 384 (Ct. Cl. 1962)). In *Bevelheimer*, 4 Cl. Ct. at 559-62, the U.S. Court of Claims considered whether a group of employees who alleged that they completed job duties that entitled them to HDP during the period from 1966 through 1977 were barred by the court's statute of limitations from later bringing suit against the Department of the Army on their claim that they should

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have received the HDP differential for that time period. As a part of addressing this argument, the court considered defendants' argument that under the relevant statutory provision, "a separate cause of action accrued each payday' when the Army did not include in plaintiffs' paychecks the hazardous duty pay they may have earned in that pay period which they now seek." *Id.* at 561. The court ultimately agreed with the defendants that, for the purposes of that proceeding, a separate cause of action against the Government accrued for the plaintiffs on each day that the agency failed to include the HDP differential in the plaintiffs' paychecks. *Id.*; see *Beebe*, 640 F.2d at 1292; *Friedman*, 310 F.2d at 384. As the agency correctly observes on review, however, the matter the court was addressing in *Bevelheimer* concerned whether a statute of limitations could apply to bar suit for a prior claim of entitlement to HDP, and so the court's embrace of a "continuing claims" theory of liability in that case has no bearing on the question posed in this case, i.e., whether, following an initial decision to discontinue the HDP supplement, the withholding of the supplement from each subsequent paycheck gives rise to separate covered personnel actions under 5 U.S.C. § 2302(a) for the purposes of an IRA appeal.

¶18 Moreover, the Board has specifically considered and rejected such a "continuing claims" theory of liability under similar circumstances. In *Hamley v. Department of the Interior*, 122 M.S.P.R. 290 ¶ 3 (2015), the appellant filed an IRA appeal alleging that the agency retaliated against him when it significantly changed his work duties by not allowing him to

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assume the original duties of his position at the end of his detail. OSC subsequently ordered the agency to return the appellant to duty as corrective action, and the only issue before the Board was the appellant's entitlement to compensatory damages under the Whistleblower Protection Enhancement Act of 2012 (WPEA). *Id.*, ¶ 3. The challenged personnel action was effected prior to the enactment of the WPEA, which altered the availability of compensatory damages for such actions. *Id.*, ¶¶ 3, 11. Although the appellant acknowledged that he was not entitled to damages for the period prior to the enactment of the WPEA, he argued that the significant change in his duties was "not a discrete act but rather a 'continuing action'" because the change to his duties continued after the enactment of the WPEA. *Id.*, ¶ 3.

¶19 The Board rejected the appellant's "continuing action" theory of liability, noting that although the theory could be applied to toll the statute of limitations for certain Title VII claims, under the WPEA, unlike under Title VII, there is no deadline for an appellant to file an administrative complaint that is associated with the date of the alleged retaliatory act and so the theory was not applicable. *Id.*, ¶ 8. The Board further concluded that even if it were to recognize that the principles underling a continuing violation theory of liability could be applied under the WPEA, the appellant still would not prevail because the administrative judge properly determined that the significant change in the appellant's duties was, in fact, a discrete act. *Id.* ¶ 10. Importantly, the Board noted that the appellant's "continued performance of

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the changed duties” after the effective date of the WPEA was merely “a consequence of the June 30, 2012 discrete act,” and determined that “these consequences do not constitute separate acts of reprisal or render the June 30, 2012 violation ‘continuing’ under the WPEA.” *Id.*

¶20 As in *Hamley*, the single discrete act that constituted a covered personnel action under 5 U.S.C. § 2302(a) in the instant case was the agency’s initial decision on January 23, 2015, to suspend the payment of the HDP supplement to Bomb Squad employees, effective January 24, 2015. IAF, Tab 2 at 103-04, Tab 13 at 12 (acknowledging that the HDP premium payment was discontinued effective January 24, 2015). The fact that the effects of that decision were reflected in each subsequent paycheck thereafter is immaterial and does not transform the agency’s single, discrete decision into a continuing personnel action. Consequently, we find that, because all of the appellant’s alleged protected disclosures and activities postdated the agency’s January 24, 2015 decision to discontinue the HDP supplement, the appellant failed to nonfrivolously allege that any of his eleven disclosures was a contributing factor in the agency’s decision to discontinue payment of the HDP supplement⁵ IAF, Tab 21

⁵ To the extent the appellant is arguing on review that his March 2020 OPM classification appeal was a protected activity under 5 U.S.C. § 2302(b)(9), we find that, even assuming the appeal did constitute a protected activity under this subsection, it likewise postdated both challenged personnel actions by nearly 5 years, and that therefore the appellant also failed to meet his jurisdictional burden with respect to this claim. PFR File, Tab 1

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at 9-39; *see El*, 123 M.S.P.R. 76, ¶ 10; Davis, 106 M.S.P.R. 560, ¶ 12. The April 24, 2015 “reassignment”

¶21 As previously noted, the administrative judge did not address the appellant’s claim that he was “re-assigned” when he received a memorandum on or around April 24, 2015, informing him that his PD had been updated to remove references to the HDP. IAF, Tab 2 at 48-49, 103-04. A “reassignment” is defined at 5 C.F.R. § 210.102(b)(12) as “a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion.” *See Onasch v. Department of Transportation*, 63 M.S.P.R. 158, 162 (1994). Here, it appears that the only result of the agency’s April 24, 2015 action revising the appellant’s PD was to remove the references to HDP. IAF, Tab 2 at 90-102 (appellant’s prior and updated PDs), 105-116 (evaluation statement for appellant’s prior PD). As the appellant’s title, job series, location, or duties were apparently not altered as a result of the reissuance of the PD, it does not appear he was subjected to a covered “reassignment” as a result of the PD change. *Id.* at 90-102.

¶22 In any case, even assuming the appellant was subjected to a reassignment for the purposes of 5

at 18-19, IAF, Tab 21 at 44-45. Although the appellant mentions another “statutory classification appeal” filed in 2017, this is a reference to an internal request to the Director of PFPA for a desk audit of his position description filed on April 10, 2017. IAF, Tab 13 at 17, 107-08, Tab 21 at 40-44. That alleged disclosure, too, postdated both of the allegedly retaliatory personnel actions and thus likewise could not have contributed to the agency’s decision to take either action.

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U.S.C. § 2302(a)(2)(A)(iv) based on the April 24, 2015 changes to his PD, the appellant alleged that the agency took this action in retaliation for Disclosures 6, 8, 10, and 11, each of which postdated the agency's April 24, 2015 PD revisions. IAF, Tab 21 at 21-39. Thus, none of these disclosures could have contributed to the agency's decision to take the challenged action. *See El*, 123 M.S.P.R. 76, ¶ 10; *Davis*, 106 M.S.P.R. 560, ¶ 12. Accordingly, we further modify the initial decision to clarify that although the appellant exhausted with OSC his claim that he was subjected to a reassignment in retaliation for his various protected disclosures and activities, he nevertheless failed to non-frivolously allege that any of these disclosures or activities contributed to the agency's decision to take that action, and that therefore he also failed to meet his jurisdictional burden as to that claim.⁶

¶23 For the foregoing reasons, we deny the appellant's petition for review and affirm the initial decision dismissing the appellant's IRA appeal for lack of jurisdiction, as modified herein to clarify the basis for the jurisdictional determination.

⁶ Because we have concluded that all of the appellant's alleged disclosures and activities postdated all of the alleged retaliatory personnel actions, we need not address the administrative judge's alternative finding that the appellant failed to nonfrivolously allege that he made a protected disclosure under 5 U.S.C. § 2302(b)(8) in connection with his claims. ID at 6-10.

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NOTICE OF APPEAL RIGHTS⁷

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board

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

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order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

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

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

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

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on

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unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (not the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days after your representative** receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after you receive** this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the

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EEOC no later than 30 calendar days after your representative receives this decision.

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.

This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or

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any court of appeals of competent jurisdiction.⁸ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

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

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

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

⁸ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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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.

FOR THE BOARD:

/s/ Gina K. Grippando

Gina K. Grippando

Clerk of the Board

Washington, D.C.

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CERTIFICATE OF SERVICE

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

Appellant

Electronic Service Richard Coleman
Served on email address registered with MSPB

Agency Representative

Electronic Service Supraja Murali
Served on email address registered with MSPB

Agency Representative

Electronic Service Lundi Shafiei
Served on email address registered with MSPB

Private Attorney

Electronic Service Michael Riselli
Served on email address registered with MSPB

08/14/2024

(Date)

/s/ John Hayes

John Hayes

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Cite as: App. to Pet. for Cert.

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Appendix D

[Filed: Aug. 6, 2026]

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

RICHARD W. COLEMAN, JR.,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2025-2031

Petition for review of the Merit Systems Protection
Board in No. DC-1221-22-0109-W-1.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, SCHALL¹, DYK,
PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL,
CUNNINGHAM, and STARK, *Circuit Judges*.²

PER CURIAM.

¹ Circuit Judge Schall participated only in the decision on the
petition for panel rehearing.

² Circuit Judge Newman did not participate.

Appendix E to Petition for Writ of Certiorari

O R D E R

On July 1, 2026, Richard W. Coleman, Jr. filed a petition for rehearing en banc [ECF No. 34]. The petition was first 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.

FOR THE COURT

August 6, 2026
Date

/s/ Jarrett B. Perlow
Clerk of Court

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