

NOTE: This order is nonprecedential.

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

FRANCIS YOMI,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2024-1622

Petition for review of the Merit Systems Protection
Board in No. SF-1221-17-0580-W-1.

ON PETITION FOR REHEARING EN BANC

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

PER CURIAM.

ORDER

On September 22, 2025, Francis Yomi filed a petition
for rehearing en banc [ECF No. 49]. The petition was first

¹ Circuit Judge Newman did not participate.

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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



Jarrett B. Perlow
Clerk of Court

October 10, 2025
Date

Appendix A 2

Ret. App. 2

NOTE: This order is nonprecedential.

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

FRANCIS YOMI,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2024-1622

Petition for review of the Merit Systems Protection
Board in No. SF-1221-17-0580-W-1.

ON PETITION FOR PANEL REHEARING

Before PROST, REYNA, and CHEN, *Circuit Judges*.

PER CURIAM.

ORDER

On August 20, 2025, Francis Yomi filed a petition for
panel rehearing [ECF No. 46].

Upon consideration thereof,

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IT IS ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

September 8, 2025
Date

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NOTE: This disposition is nonprecedential.

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

FRANCIS YOMI,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2024-1622

Petition for review of the Merit Systems Protection
Board in No. SF-1221-17-0580-W-1.

Decided: August 6, 2025

FRANCIS YOMI, Santa Fe, NM, pro se.

STEPHEN FUNG, Office of the General Counsel, United
States Merit Systems Protection Board, Washington, DC,
for respondent. Also represented by ALLISON JANE BOYLE,
KATHERINE MICHELLE SMITH.

Before PROST, REYNA, and CHEN, *Circuit Judges*.
PER CURIAM.

Appendix C 1

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Francis Yomi appeals a decision of the Merit Systems Protection Board ("Board") dismissing his appeal for lack of jurisdiction. For the following reasons, we affirm.

BACKGROUND

Mr. Yomi was employed as a GS-6 Physical Science Technician ("PST") for the Department of the Navy ("Navy") from July 7, 2014, to August 28, 2014. S.A. 2.¹ Before being hired for that position, Mr. Yomi applied for a PST GS-7/8/9 position. S.A. 16. Though the Navy found he was qualified for the PST GS-7/8/9 position, he was ultimately not selected. S.A. 16.

Mr. Yomi sought answers for his non-selection for the PST GS-7/8/9 position. First, on August 19, 2014, Mr. Yomi met in-person with his second-line supervisor, a human resources specialist, and an administrative officer. S.A. 16. During the meeting, the administrative officer told Mr. Yomi that "he had not been selected because he had not been selected," and the human resources specialist told Mr. Yomi that "the selection decision was up to the discretion of management." S.A. 16. In response, Mr. Yomi explained his belief that selection decisions should be based on the qualifications and merits of the applicants, not management discretion. S.A. 39; Resp't's Informal Br. 4. Second, on August 20, 2014, Mr. Yomi sent an email to his third-line supervisor informing her of the substance of the previous day's meeting and asserting that "it should be clearly explained why an applicant has not been selected from an objective criteria point of view, rather than a management discretion point of view." S.A. 16-17.

On August 28, 2014, Mr. Yomi received a Notification of Termination of Appointment from the Navy. S.A. 153-54; see S.A. 17. The notification letter stated that

¹ "S.A." refers to the supplemental appendix included with the government's informal brief.

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he was being terminated for failing to meet academic standards because he failed three exams, which was a listed cause for termination in his contract. See S.A. 112–13. That same day, Mr. Yomi chose to resign rather than being terminated. S.A. 2.

In September 2016, Mr. Yomi filed a complaint with the Office of Special Counsel (“OSC”). S.A. 17. As relevant here, Mr. Yomi alleged that his forced resignation was the result of his August 19 and 20, 2014 statements—which he alleged were whistleblower protected disclosures. S.A. 38–47. In June 2017, OSC closed the case. S.A. 4, 17–18.

In July 2017, Mr. Yomi filed an individual right of action (“IRA”) appeal with the Board mainly alleging that the Navy retaliated against him due to his whistleblowing activities in violation of the Whistleblower Protection Enhancement Act of 2012. S.A. 15. The administrative judge (“AJ”) concluded that Mr. Yomi “failed to non-frivolously allege Board jurisdiction.” S.A. 21. The AJ made several specific findings. First, the AJ found Mr. Yomi’s disclosures did not clearly implicate an identifiable law, rule, or regulation—a requirement for the disclosures being considered “protected” under 5 U.S.C. § 2302(b)(8). S.A. 19 (citing *Langer v. Dep’t of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001)). Mr. Yomi argued his statements implicated the Pendleton Civil Service Reform Act of 1883 (“Pendleton Act”) and merit system principles,² but the AJ rejected Mr. Yomi’s arguments in addition to finding more broadly that Mr. Yomi’s disclosures did not clearly implicate a violation of any other law, rule, or regulation. S.A. 19–20. The AJ also found there was no abuse of authority, as Mr. Yomi did not show how any of his supervisors’ statements adversely affected anyone’s rights.

² See 5 U.S.C. § 2301 (codifying merit system principles).

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S.A. 20–21. The AJ finally rejected Mr. Yomi’s claims that the statements he disclosed could constitute gross mismanagement. S.A. 21.

Mr. Yomi filed a petition for review of the AJ’s initial decision with the Board. S.A. 220–28. The Board denied Mr. Yomi’s petition and affirmed the AJ’s initial decision with one modification relevant here. Specifically, the Board noted that the initial decision improperly “appeared to hold, in part, [Mr. Yomi] to a higher pleading standard than is permissible at the jurisdictional stage by finding that he failed to ‘show’—rather than nonfrivolously allege—that his disclosures evidenced a violation of law, rule, or regulation.” S.A. 6. The Board applied the modified standard and agreed with the AJ’s initial decision that Mr. Yomi failed to non-frivolously allege his claim. See S.A. 6–7.

Mr. Yomi timely petitioned this court for review. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We uphold 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.” 5 U.S.C. § 7703(c). We review whether the Board lacks jurisdiction de novo. *Forest v. MSPB*, 47 F.3d 409, 410 (Fed. Cir. 1995).

To establish Board jurisdiction over an IRA appeal, an appellant must have exhausted his or her administrative remedies before the OSC and make non-frivolous allegations³ that a personnel action was taken in retaliation for

³ A non-frivolous allegation is “an assertion that, if proven, could establish the matter at issue.” 5 C.F.R.

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any protected disclosure under 5 U.S.C. § 2302(b)(8) or protected activity under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). *Young v. MSPB*, 961 F.3d 1323, 1328 (Fed. Cir. 2020). Mr. Yomi's disclosures are protected if he reasonably believes they evidence (1) "any violation of any law, rule, or regulation," or (2) "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8).

The test for whether Mr. Yomi *reasonably* believed the disclosures met the criteria is an objective one. *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) ("A purely subjective perspective of an employee is not sufficient . . ."). This court asks "whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act." *Young*, 961 F.3d at 1328.

"[F]or a lawful agency policy to constitute 'gross mismanagement,' an employee must disclose such serious errors by the agency that a conclusion [that] the agency erred is not debatable among reasonable people. The matter must also be significant." *White v. Dep't of Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004). The Board considers an abuse of authority to include "an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Smolinski v. MSPB*, 23 F.4th 1345, 1351 (Fed. Cir. 2022) (quoting *Wheeler v. Dep't of Veterans Affs.*, 88 M.S.P.R. 236, 241 (2001)).

§ 1201.4(s). It must be more than conclusory, plausible on its face, and material to the legal issues in the appeal. *Id.*

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On appeal, Mr. Yomi mainly challenges the Board's decision that he failed to non-frivolously allege that his disclosures identified violations of the Pendleton Act and merit system principles,⁴ gross mismanagement, or abuse of authority. We reject Mr. Yomi's arguments and affirm the Board's decision.

The Board properly concluded that Mr. Yomi failed to non-frivolously allege that he engaged in protected whistleblowing activity. First, Mr. Yomi's alleged disclosures do not evidence a violation of the Pendleton Act or merit system principles, nor do they clearly implicate an identifiable violation of any other law, rule, or regulation. A disinterested observer would not reasonably conclude that the Navy was required to provide Mr. Yomi a reason for his non-selection in these circumstances or a hiring process entirely free from the discretion of management. That Mr. Yomi insists strongly on his subjective belief that the Navy violated a law, rule, or regulation is insufficient to make the requisite non-frivolous allegation.

Second, Mr. Yomi's allegations do not non-frivolously allege gross mismanagement or abuse of authority. Mr. Yomi clearly disagrees with both the process and substance of his supervisors' decisions, but "[m]ere differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem or the

⁴ At the jurisdictional stage, Mr. Yomi was not required to identify a particular statutory or regulatory provision that he believed was violated if his "statements and the circumstances surrounding the making of those statements clearly implicate[d] an identifiable violation of law, rule, or regulation." *Langer*, 265 F.3d at 1266. But just as Mr. Yomi's statements and the surrounding circumstances do not evidence a violation of the Pendleton Act or merit system principles, neither do they clearly implicate an identifiable violation of any other law, rule, or regulation.

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most appropriate course of action do not rise to the level of gross mismanagement.” *White*, 391 F.3d at 1381. Similarly, nothing Mr. Yomi alleges gives us a basis to find an abuse of authority. For example, no disinterested observer would believe Mr. Yomi’s supervisors’ statements adversely affected anyone’s rights or resulted in personal gain or advantage.

Because we conclude that Mr. Yomi failed to non-frivolously allege that he engaged in any form of protected whistleblowing activity, we hold that the Board properly dismissed Mr. Yomi’s appeal for lack of jurisdiction.

CONCLUSION

We have considered Mr. Yomi’s remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the Board’s dismissal for lack of jurisdiction.

AFFIRMED

COSTS

No costs.

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

FRANCIS YOMI,
Appellant,

DOCKET NUMBER
SF-1221-17-0580-W-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: January 24, 2024

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Francis Yomi, Santa Fe, New Mexico, pro se.

Matthew Dan Rajnus, Bremerton, Washington, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

FINAL ORDER

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

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

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 MODIFIED to find that the appellant exhausted his administrative remedies and to apply the correct evidentiary standard in determining whether the appellant established jurisdiction over his appeal, we AFFIRM the initial decision.

BACKGROUND

The agency employed the appellant as a GS-6 Physical Science Technician (PST) from July 7, 2014, until he resigned in lieu of being terminated on August 28, 2014. Initial Appeal File (IAF), Tab 1 at 121, Tab 6 at 46, 49-50.² After seeking corrective action from the Office of Special Counsel (OSC), the appellant filed the instant IRA appeal. IAF, Tab 1. In response to the administrative judge's order on jurisdiction, the appellant alleged that, as he informed OSC, the agency forced him to resign in retaliation for his August 19 and 20, 2014 disclosures regarding the agency's improper reliance on management discretion in its hiring decisions and its failure to provide him reasons why he was not selected for a higher-graded position. IAF, Tab 5 at 2-5, 12, 14, Tab 7 at 3-7. He also alleged that, as he informed OSC, the agency

² In September 2014, the appellant filed an equal employment opportunity complaint alleging, among other things, that the agency discriminated against him when it discharged him and forced him to resign. IAF, Tab 6 at 14, 21. He also filed a separate Board appeal challenging his alleged involuntary resignation, which the Board dismissed for lack of jurisdiction. *Yomi v. Department of the Navy*, MSPB Docket No. SF-0752-16-0764-I-1, Final Order (Apr. 26, 2023).

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retaliated against him for filing an equal employment opportunity (EEO) complaint in September 2014 by not referring his application for GS-8 and GS-9 PST positions to the selecting official. IAF, Tab 5 at 4-6.

In an initial decision based on the written record, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant "failed to show that he made a protected disclosure." IAF, Tab 8, Initial Decision (ID) at 5. She further found that she was unable to review the appellant's allegation that the agency retaliated against him for filing an EEO complaint or other alleged prohibited personnel practices raised in his OSC complaint. ID at 7-8.

The appellant has filed a petition for review of the initial decision, the agency has responded, and the appellant has submitted a reply. Petition for Review (PFR) File, Tabs, 1, 3-4.

ANALYSIS

Under the Whistleblower Protection Enhancement Act of 2012 (WPEA),³ the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations of the following: (1) he engaged in whistleblowing activity by making a protected disclosure 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). *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ¶ 5 (2016).

The appellant exhausted his administrative remedy with OSC.

Although the administrative judge appeared to assume that the appellant exhausted his administrative remedy, she did not make an explicit finding regarding this jurisdictional requirement. ID. The Board has recently clarified

³ The relevant events in this case occurred after the December 27, 2012 effective date of the WPEA. Pub. L. No. 112-199, § 202, 126 Stat. 1465, 1476. Therefore, we have applied the WPEA to this appeal.

the substantive requirements of exhaustion. *Chambers v. Department of Homeland Security*, 2022 MSPB 8, ¶¶ 10-11. The requirements are met when an appellant has provided OSC with sufficient basis to pursue an investigation. The Board's jurisdiction is limited to those issues that have been previously raised with OSC. However, an appellant may give a more detailed account of his whistleblowing activities before the Board than he did to OSC. 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. 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. *Id.*

Here, the record contains, among other correspondence with OSC, the appellant's February 28, 2017 response to OSC's February 16, 2017 preliminary determination to close the case. IAF, Tab 1 at 80-81, 83-98. Therein, the appellant specifically raised the alleged disclosures, activities, and personnel actions at issue in this appeal. *Id.* at 85, 92-93. By letter dated June 15, 2017, OSC denied the appellant's request for reconsideration. *Id.* at 150-51. Therefore, we find that he exhausted his administrative remedy with OSC.

The appellant failed to nonfrivolously allege that he made a protected disclosure.

Next, we must consider whether the appellant has nonfrivolously alleged that he made one or more protected disclosures or engaged in protected activity. *Salerno*, 123 M.S.P.R. 230, ¶ 5. A nonfrivolous allegation of a protected whistleblowing disclosure is an allegation of facts that, if proven, would show that the appellant disclosed a matter that a reasonable person in his position would believe evidenced one of the categories of wrongdoing specified in 5 U.S.C. § 2302(b)(8). *Id.*, ¶ 6. The test to determine whether a putative whistleblower has a reasonable belief in the disclosure is an objective one:

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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 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.* The disclosures must be specific and detailed, not vague allegations of wrongdoing. *Id.*

Here, as noted above, the appellant alleged that he made several protected disclosures to agency officials on August 19 and 20, 2014. IAF, Tab 5 at 2-4. In particular, he alleged that, after his first-level supervisor, a human resources specialist, and an administrative officer failed to provide him the specific reasons for his nonselection for a higher-graded position during an August 19, 2014 meeting, he informed them that “the selection of applicants for a job open to all U.S. citizens should not be based on the discretion of the management, but should be based on the qualifications and merits of applicants.” *Id.* at 3-5. He also alleged that, in an August 20, 2014 email to his third-level supervisor, he informed her of the following: (1) during the August 19, 2014 meeting, the administrative officer informed him that he was not selected “because he had not been selected,” and the human resources specialist told him that his nonselection “was up to the discretion of management”; (2) pursuant to the merit system principles, hiring decisions should be based on objective criteria, rather than management discretion; and (3) he “just [thought] that it should be clearly explained why an applicant has not been selected from an objective criteria point of view, rather than a management discretion point of view.” IAF, Tab 1 at 48, Tab 5 at 3-4, Tab 7 at 3-7. He alleged that these statements to agency officials constituted disclosures of gross mismanagement and a violation of law, rule, or regulation, including the merit system principles and the Pendleton Civil Service Act of 1883 (Pendleton Act).

On review, the appellant argues that the administrative judge erred in requiring him to prove that his disclosure evidenced a violation of law, rule, or

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regulation, rather than nonfrivolously alleging that he had a reasonable belief that that it did. PFR File, Tab 1 at 2-3, Tab 4 at 8, 10. We agree that the administrative judge appeared to hold, in part, the appellant to a higher pleading standard than is permissible at the jurisdictional stage by finding that he failed to “show”—rather than nonfrivolously allege—that his disclosure evidenced a violation of law, rule, or regulation. ID at 5-7. We therefore modify the initial decision to apply the correct evidentiary standard. For the reasons that follow, we find that the appellant failed to nonfrivolously allege that he had a reasonable belief that his disclosure evidenced a violation of law, rule, or regulation.

As noted above, the appellant alleges that his disclosures evidence a violation of the Pendleton Act or the merit system principles.⁴ IAF, Tab 5 at 12, 14, Tab 7 at 4. Resolving any doubt or ambiguity in the appellant’s favor, we find that his purported disclosures do not constitute a nonfrivolous allegation of a reasonable belief that the agency violated the Pendleton Act or the merit system principles. Nothing in the Pendleton Act or the merit system principles requires—or could reasonably be read to require—an agency to inform an applicant who is not selected for a position of the specific reasons for his nonselection or to completely remove management discretion from the hiring process. Likewise, nothing in these laws could reasonably be read to suggest that an agency official may not tell an employee that he was not selected “because he was not selected” or that his nonselection was “up to the discretion of management.” The appellant’s insistence on review that he subjectively believed that the agency violated a law, rule, or regulation and that the administrative officer’s statement was personally insulting do not suggest that he had an objectively reasonable belief that the matters disclosed evidenced a violation of the Pendleton Act, the

⁴ An appellant is not required to identify the particular statutory or regulatory provision that the agency allegedly violated when his statements and circumstances of those statements clearly implicate an identifiable law, rule, or regulation. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 17 (2011). We find that the appellant’s alleged disclosures do not clearly implicate an identifiable law, rule, or regulation.

merit system principles, or any other law, rule, or regulation. PFR File, Tab 1 at 2-8. Therefore, we find that the appellant has failed to nonfrivolously allege that a disinterested observer with knowledge of the essential facts could reasonably conclude that his disclosures evidenced a violation of law, rule, or regulation.

As noted above, the administrative judge also found that the appellant failed to show that his disclosure evidenced an abuse of authority or gross mismanagement. ID at 6-7. The appellant does not challenge these findings on review, PFR File, Tabs 1, 4, and we discern no basis to conclude that he has nonfrivolously alleged that he disclosed an abuse of authority or gross mismanagement, *see Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 10 n.3 (2015) (defining abuse of authority as an arbitrary or capricious exercise of power by a Federal official that has adversely affected the rights of any person or has resulted in personal gain or advantage to himself or to preferred other persons); *Francis v. Department of the Air Force*, 120 M.S.P.R. 138, ¶ 12 (2013) (defining gross mismanagement as a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission).

The appellant apparently believes that management discretion should not play any role in hiring decisions and that the agency officials acted improperly when they told him it did and when they failed to provide him the specific reasons for his nonselection. General philosophical or policy disagreements with agency decisions or actions, however, are not protected unless they separately constitute a protected disclosure of one of the categories of wrongdoing listed in section 2302(b)(8)(A). *Webb*, 122 M.S.P.R. 248, ¶ 8. The appellant's mere disagreement with the agency's hiring practices and handling of his request for reasons why he was not selected, therefore, do not amount to a nonfrivolous allegation of a protected disclosure. *See Bradley v. Department of Homeland Security*, 123 M.S.P.R. 547, ¶ 11 (2016) (finding that the employee's disclosure

regarding an alleged difference of opinion concerning a policy was not a nonfrivolous allegation of a protected disclosure).

The appellant failed to nonfrivolously allege that he engaged in protected activity when he filed an EEO complaint in September 2014.

As noted above, the administrative judge found that she was unable to review the appellant's allegation that he engaged in protected activity under 5 U.S.C. § 2302(b)(9) when he filed an EEO complaint in September 2014. ID at 7-8. Under the WPEA, however, an appellant may establish Board jurisdiction over an IRA appeal by nonfrivolously alleging that he engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), which includes filing an EEO complaint that seeks to remedy whistleblower reprisal. *Bishop v. Department of Agriculture*, 2022 MSPB 28, ¶ 15; *Salerno*, 123 M.S.P.R. 230, ¶ 5.

Here, the appellant alleged that the agency retaliated against him for filing a September 2014 EEO complaint, but he has not alleged that his EEO complaint sought to remedy whistleblower reprisal. IAF, Tabs 1, 5, 7; PFR File, Tabs 1, 4. In fact, he stated below that his "EEO complaint is about discrimination, which is totally different from the reprisal for whistleblowing complaint or IRA appeal." IAF, Tab 7 at 8. Therefore, we find that the appellant has not made a nonfrivolous allegation that his EEO complaint constitutes protected activity under section 2302(b)(9)(A)(i). *See Bishop*, 2022 MSPB 28, ¶ 15. Because the appellant failed to nonfrivolously allege that he made a protected disclosure or engaged in any protected activity, we find that the Board lacks jurisdiction over this IRA appeal.⁵

⁵ Insofar as the appellant raised other alleged prohibited personnel practices below, the Board lacks jurisdiction to consider them absent an otherwise appealable action. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (explaining that a prohibited personnel practice under 5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

NOTICE OF APPEAL RIGHTS⁶

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 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:

⁶ 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.

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

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

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after 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

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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 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

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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 any court of appeals of competent jurisdiction.⁷ 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.caafc.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.

⁷ 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.

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.

Jennifer Everling

FOR THE BOARD:

Jennifer Everling
Acting 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 Francis Yomi
Served on email address registered with MSPB

Agency Representative

Electronic Service Matthew Rajnus
Served on email address registered with MSPB

01/24/2024

(Date)

Markita Bryant

Markita Bryant
Paralegal Specialist

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