



U.S. Department of Justice

Office of Attorney Recruitment and Management

Washington, D.C. 20530

IN THE MATTER OF
DARIN JONES

OARM-WB No. 13-4

OPINION ON REMAND

This matter is before the Director of the Office of Attorney Recruitment and Management (OARM) on remand from the Office of the Deputy Attorney General (ODAG) “for consideration of whether [Complainant’s] allegations amounted to protected disclosures (if they had been made to the proper designated person or office), and if so, whether he met his burden to non-frivolously allege that such alleged disclosures were a contributing factor in the FBI’s decision to take a personnel action.” For the reasons given below, assuming arguendo that Complainant made a disclosure to a designated recipient office or individual under 28 C.F.R. § 27.1(a), we find that Complainant has nonfrivolously alleged that some, but not all, of his disclosures amounted to protected disclosures, and that such alleged protected disclosures were a contributing factor in the FBI’s decision to take, or fail to take, a personnel action under 28 C.F.R. § 27.2(b) against him.

BACKGROUND

On August 28, 2011, Complainant entered on duty as a GS-15 Supervisory Contract Specialist with the FBI’s Finance Division, FBI Headquarters (FBIHQ), subject to a one-year probationary period. Request for Corrective Action File (RCAF), Tab 1, Exh. 4. Complainant alleges that, between November 2011 and August 2012, he made a number of disclosures to managers in the FBI’s Finance Division, Procurement Section, and Facilities Logistics Service Division (FLSD) regarding alleged Federal Acquisition Regulation (FAR) violations, procurement law violations, waste and abuse in contracting, contractor use of unentitled benefits, award ceremony cost concerns, staffing violations, and other regulatory violations. RCAF, Tab 1, Exh. 1. Specifically, Complainant alleges that he made the following eight disclosures, which he alleges he reasonably believed collectively evidenced violations of law, rule, and regulation; a gross waste of funds; an abuse of authority; and mismanagement:

1. Alleged Improper Use of Contracting Officer Warrants

Complainant alleges that he made disclosures evidencing violations of the FAR and FBI Procurement regulations regarding the alleged “improper use of Contracting Officer Warrants and Contracting Officers obligating funds and issuing modifications on contracts that are beyond the Contracting Officer’s Warrant authority” in November 2011, December 2011, and January 2012, via electronic mail (email) to Finance Division Chief Acquisition Officer and Procurement Section Chief Deborah Broderick, Finance Division Deputy Procurement Section Chief (SC) Karyn Jones, Procurement Section Acting Assisting Chief Acquisition Officer Heather Cayer, Procurement Law Unit Chief Christine Costello, and Procurement Section Unit Chief Patty Yates. *Id.* at 15-16.

2. Alleged Antideficiency Act Violations

Complainant alleges that he disclosed “numerous cases of alleged Antideficiency Act violations where countless ratifications were not processed and were knowingly, willfully, and purposely ignored” in emails sent in November and December 2011, and January, February, and March 2012, to Costello and Covert Contracts Unit Contracting Officer Maury Taylor. *Id.* at 13-14. Complainant further alleges that he disclosed the same instances of alleged Antideficiency Act violations during an oral presentation at a January 18, 2012 Procurement Section Town Hall Meeting (Town Hall Meeting) to Town Hall Meeting attendees: Broderick; SC Jones; Cayer; AD Haley; Finance Division Deputy AD Janice Lambert; Procurement Section Unit Chief Porter Dunn;¹ and Procurement Section Unit Chief Kristen Nelson. *Id.* at 14. According to Complainant during the Town Hall Meeting, he also disclosed that: “firm fixed prices are funded with incremental funding in violation of FAR, and funding is obligated to pay for services that had already been provided in violation of the FAR.” *Id.* at 13-14.

3. Alleged Violations of Office of Management and Budget Regulations

Complainant alleges that, during the Town Hall Meeting, he additionally expressed his concern to AD Haley “regarding the proper use of GS-1102 employees in accordance with Office of Management and Budget (OMB)/Office of Personnel Management personnel standards.” *Id.* at 7. Specifically, Complainant expressed to meeting attendees that his “staff was being overwhelmed with what [Complainant] believed to be responsibilities and tasks of non GS-1102s in violation of the OMB standards.” *Id.*

¹ Complainant indicates that Porter Dunn was promoted from Procurement Section Unit Chief to Acting Procurement Section Chief/Chief Acquisition Officer in February of 2012 after Deborah Broderick was removed from that position. RCAF, Tab, 3, at 8-9. To avoid any confusion resulting from Mr. Dunn’s change in title as of February 2012, hereinafter, Mr. Dunn will merely be referred to as Dunn.

4. Alleged Deficiencies in FAR Compliance

Complainant alleges that, in January 2012, he sent emails and made oral disclosures at the Town Hall Meeting to AD Haley, Lambert, Broderick, SC Jones, Cayer, and Dunn that “the Finance Division’s Acquisition Review Board for procurements over \$5 million functions as a rubber-stamp for procurements and was severely deficient in FAR compliance reviews.” *Id.* at 11.

5. Alleged Unlawful and Improper Award of \$40 Million Contract

Complainant alleges that he made disclosures in emails in April, May, and June 2012, to AD Haley, Finance Division Chief of Staff Tiffany Prizio, Office of Integrity and Compliance AD Pat Kelly, and Dunn regarding the allegedly unlawful and improper award of and continued problems with a \$40 million Enterprise Operations Center (EOC) telecommunications contract in which a former AD of the FBI’s Information Technology Branch was allegedly working for a subcontractor of the prime contractor. *Id.* at 3-4.

6. Alleged Unlawful Use of Reimbursable Work Authorizations

Complainant alleges that he made disclosures in emails in April, May, and June 2012, that “tens of millions of dollars in [Reimbursable Work Authorizations (RWA)] were willfully and knowingly submitted to [General Service Administration (GSA)] for [Federal Acquisition Services] procurements[,]” in violation of GSA Public Building Service procurement policy, FAR, and the FBI’s policy on RWA. *Id.* at 5-6. According to Complainant, “[t]he RWAs were for furniture, HVAC[] services, and telecommunications products and services.” Complainant claims that: “All of these violations would have had a significant effect on the annual financial statements. These deficiencies were never reported.” *Id.* at 6. Complainant alleges he made the disclosures to AD Haley, SC Jones, Dunn, FLSD Deputy AD Michael Donnelly, FLSD Headquarter Section Chief Mark Hochberg, and Procurement Law Unit Chief Christine Costello. *Id.* at 6-7.

7. Alleged Contractor Use of Unentitled Benefits

Complainant alleges that between April and June 2012, he sent emails to Dunn and Costello disclosing a specific case of an unentitled benefit that contractors were wrongfully receiving, in violation of FAR, which the FBI knowingly, willfully, and purposefully ignored, *i.e.*, contractor use of gym facilities at no cost at FBIHQ. *Id.* at 12.

8. Alleged Failure to Obtain Proper Approval of Funds for Awards Ceremony

Complainant alleges that, in August 2012, he sent emails to Dunn, Prizio, Kranzberg, and other individuals in the Finance Division and FBI Office of General Counsel (OGC) regarding need for approval “at the highest level at DOJ” for a procurement request in the amount of \$300,000.00 for an FBI Awards Ceremony scheduled for September 6, 2012. *Id.* at 9. According to Complainant, he was

“the only person trying to ensure that the Awards Ceremony had all of the proper approvals due to the well-publicized firings of the GSA Administrator” and other senior GSA officials as related to recent reports of the monies spent by GSA on GSA conferences and ceremonies. *Id.*

The FBI terminated Complainant's employment effective August 24, 2012, during his probationary period. RCAF, Tab 1 (SF-50 Notice of Personnel Action).

PROCEDURAL HISTORY

Complainant filed his Request for Corrective Action (RCA) with OARM on November 5, 2013, alleging that the FBI's termination of his employment during his probationary period on August 24, 2012, was in reprisal for his above-enumerated disclosures regarding federal acquisition regulation violations, procurement law violations, waste and abuse in contracting, contractor use of unentitled benefits, award ceremony cost concerns, and other regulatory violations. RCAF, Tab 1.

By Order dated November 14, 2013, OARM notified Complainant that, before OARM could take jurisdiction over his RCA, he must: (1) establish that he exhausted his Conducting Office remedies by filing a prior complaint of whistleblower reprisal with either the Department of Justice's Office of Professional Responsibility (OPR) or Office of the Inspector General (OIG), with respect to the same alleged protected disclosures and personnel actions raised in his November 5, 2013 RCA filed with OARM; and (2) make a nonfrivolous allegation that he made his alleged disclosures to an individual or office designated to receive a "protected disclosure" under 28 C.F.R. § 27.1(a). RCAF, Tab 2. In that Order, OARM directed Complainant to show cause as to why his RCA should not be dismissed for lack of jurisdiction. *Id.*

Complainant replied to OARM's November 14, 2013 Order to Show Cause on November 26, 2013, asserting that he exhausted his Conducting Office remedies by previously filing a complaint of reprisal with OIG on August 25, 2012. RCAF, Tab 1; Tab 3 at 11. Complainant further argued that OARM should use "its established discretion" to find that his disclosures to various FBI supervisors and individuals are "protected," despite that he failed to make his disclosures to a designated recipient office or official under 28 C.F.R. § 27.1(a). RCAF, Tab 3, Exh. 1 at 5-7. In support of his contentions in that regard, he submitted the following: (1) the February 14, 2006 testimony of former DOJ Inspector General Glenn A. Fine before the House Committee on Government Reform; (2) the May 21, 2008 testimony of former FBI Special Agent Michael German before the House Judiciary Committee; (3) a January 2012 email between AD

Haley and William McCarty finalizing AD Haley's memorandum titled "Alleged Violations of Law Contracting Officers Performing Budget and Accounting Functions"; (4) AD Haley's memorandum titled, "Alleged Violations of Law Contracting Officers Performing Budget and Accounting Functions";² (5) a November 16, 2013 email from Complainant to Deborah Broderick requesting an email affidavit, and the November 25, 2013 email affidavit of Ms. Broderick in support of Complainant's whistleblower reprisal complaint; (6) a November 18, 2013 email from Complainant to Kristen Nelson requesting an email affidavit, and the November 20, 2013 email affidavit of Ms. Nelson supporting Complainant's whistleblower reprisal complaint; (7) a November 15, 2013 email from Complainant to Patrick Kelly requesting an email affidavit confirming his communication about the non-compliant \$40 million contract, a November 19, 2013 reply from Mr. Kelly indicating that an affidavit from him would not assist Complainant's case as a disclosure to him [Mr. Kelly] would not be "protected," and a November 19, 2013 reply email from Complainant to Mr. Kelly arguing that Complainant's disclosure to Mr. Kelly was a protected disclosure; (8) a November 16, 2013 email from Complainant to Christine Costello requesting an email affidavit in support of Complainant's whistleblower reprisal complaint; (9) a November 5, 2013 letter from Congressman Chris Van Hollen to the Department of Justice's Office of Legislative Affairs requesting that Complainant's RCA be considered timely filed; and (10) a November 22, 2013 email from FBI OGC Assistant General Counsel Gail Serenco to Complainant indicating that she is the attorney of record representing the FBI with regard to Complainant's RCA, and a November 22, 2013 reply email from Complainant indicating that OARM's November 14, 2013 Order to Show Cause identified Thomas Bondy as the FBI contact and further notifying Ms. Serenco that he had filed a Motion for Reconsideration and Motion to Submit Additional Documents to the MSPB and to Ms. Serenco. RCAF, Tab 3.

In an Opinion and Order dated December 20, 2013, OARM dismissed Complainant's RCA for lack of jurisdiction. RCAF, Tab 4. Specifically, OARM found that Complainant failed to nonfrivolously allege that his disclosures to various individuals in the FBI's Finance Division, Office of Integrity and Compliance, Procurement Section, and FLSD were made to a proper recipient office or individual under 28 C.F.R. § 27.1(a). OARM therefore concluded that

² AD Haley's Memorandum titled, "Alleged Violations of Law Contracting Officers Performing Budget and Accounting Functions," did not indicate to whom the Memorandum was sent or when the Memorandum was issued. RCAF, Tab 3, Attachment 3, at 3.

Complainant failed to nonfrivolously allege that he made a protected disclosure under 28 C.F.R. § 27.1(a). *Id.*

On January 17, 2014, Complainant sought review by the Deputy Attorney General (DAG) of OARM's December 20, 2013 Opinion and Order. Appeal File (AF), Tab 1 (Complainant's Appeal Brief). Complainant argued that OARM's Opinion is "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law" as OARM: (1) failed to consider a number of material facts in the record; (2) failed to consider Complainant's arguments regarding those facts when the same or similar arguments resulted in OARM finding jurisdiction for prior complainants; and (3) failed to apply the law to the totality of the facts and circumstances. *Id.* Complainant additionally asserted that OARM's Opinion was obtained without procedures required by law, rule, or regulations having been followed, and unsupported by substantial evidence. *Id.*

On February 27, 2014, the FBI responded to Complainant's appeal. AF, Tab 9 (FBI's Brief in Response to Complainant's Request for DAG Review). Therein, the FBI contends that Complainant failed to demonstrate that he complied with the jurisdictional requirements for making a protected disclosure under 28 C.F.R. § 27.1(a). *Id.* The FBI further contends that Complainant failed to establish that OARM's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* According to the FBI, the DAG should uphold OARM's Order dismissing Complainant's case for lack of jurisdiction. *Id.*

On March 7, 2014, Complainant submitted his reply to the FBI's brief. AF, Tab 10. Complainant reiterated his contentions that OARM's December 20, 2013 Opinion and Order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; and is unsupported by substantial evidence. *Id.* at 5-17. Complainant further argued that the FBI failed to prove that it would have terminated his employment during his probationary period by clear and convincing evidence. *Id.* at 17-20.

On June 25, 2014, Complainant filed a motion to supplement the record with the June 24, 2014 deposition testimony of Deborah Broderick provided for Complainant's Equal Employment Opportunity claim. AF, Tab 11. According to Complainant, Broderick's testimony constitutes new and material evidence that was unavailable before the close of record which supports his claim of reprisal by AD Haley for his alleged whistleblowing activity. *Id.* On July 10, 2014, the FBI submitted its opposition to Complainant's motion to supplement the record, arguing that the

deposition testimony of Deborah Broderick fails to address the jurisdictional issue of whether Complainant made a disclosure to a designated recipient office or individual under 28 C.F.R. § 27.1(a). AF, Tab 13 at 2-3. In a reply dated July 14, 2014, Complainant reasserted that Broderick's deposition testimony is substantial evidence that establishes that Complainant suffered retaliation due to his alleged disclosures. AF, Tab 14 at 5. That same day, Complainant submitted a copy of Broderick's June 24, 2014 deposition testimony, as well as other documents in support of his RCA. AF, Tab 15.

In an Order dated August 19, 2014, the ODAG remanded the matter to OARM for further consideration, as described below. AF, Tab 16. In that same Order, ODAG denied Complainant's motion to supplement the record, finding that Complainant failed to establish that the information contained in Broderick's deposition testimony and other documents was new and previously unavailable despite his due diligence before the record closed. *Id.* ODAG afforded the parties with the opportunity to brief the issues on remand. *Id.*

On September 23, 2014, Complainant submitted to OARM a motion for a copy of Attorney General Eric Holder's Report on Presidential Policy Directive 19 (PPD-19) to President Obama (PPD-19 Report).³ AF, Tab 22. Complainant asserts that the PPD-19 Report is material to his case and that he should be provided a copy to use in support of his arguments on remand. *Id.* On October 15, 2014, the FBI filed its opposition to Complainant's motion for a copy of the PPD-19 Report, arguing that the PPD-19 Report is not relevant to Complainant's RCA, as it does not change the jurisdictional regulatory requirements under 28 C.F.R. § 27.1(a). AF, Tab 24 at 2. On October 17, 2014, Complainant replied to the FBI's October 15, 2014 opposition brief, and reiterates that the PPD-19 Report is material to his case. AF, Tab 25.

³ The October 10, 2012 Presidential Policy Directive 19/PPD-19 required a review 28 C.F.R. part 27, as follows:

Within 180 days of the date of this directive, the Attorney General, in consultation with the Special Counsel and Federal Bureau of Investigation employees, shall deliver a report to the President that assesses the efficacy of the provisions contained in part 27 of title 28, Code of Federal Regulations in deterring the personnel practices prohibited in section 2303 of title 5, United States Code, and ensuring appropriate enforcement of that section, and describes any proposed revisions to the provisions contained in Part 27 of title 28 that would increase their effectiveness in fulfilling the purposes of section 2303 of title 5, United States Code.

On October 20, 2014, the parties simultaneously submitted their respective briefs on the issues remanded to OARM. AF, Tabs 26, 27.

REMAND INSTRUCTIONS

The ODAG has remanded this matter “for consideration of whether Mr. Jones’ allegations amounted to protected disclosures (if they had been made to the proper designated person or office), and if so, whether he met his burden to non-frivolously that such alleged protected disclosures were a contributing factor in the FBI’s decision to take a personnel action.” AF, Tab 23. The Remand Order did not require reconsideration of any other issue. *Id.*

CONTENTIONS OF THE PARTIES ON REMAND

A. Complainant’s Contentions

On remand, Complainant contends that: (1) all eight of his disclosures amount to protected disclosures (if they had been made to a proper designated person or office); and (2) he has nonfrivolously alleged that his alleged protected disclosures were a contributing factor in the FBI’s decision to take a personnel action against him – namely, its decision to terminate his employment on August 24, 2012, during his probationary period.⁴ AF, Tab 26 at 4-13.⁵

B. The FBI’s Contentions

The FBI requests that OARM’s initial determination that it lacks jurisdiction over Complainant’s RCA should be upheld as Complainant failed to nonfrivolously allege that he made a disclosure to a designated recipient office or individual identified in 28 C.F.R. § 27.1(a). AF, Tab 27 at 4-5. The FBI also argues that Complainant failed to nonfrivolously allege that the FBI

⁴ For the first time on remand, Complainant additionally alleges that AD Haley and Dunn created a hostile work environment. AF, Tab 26 at 3. As there is no indication in the record that Complainant raised such allegation before OIG, we will not consider the allegation on remand.

⁵ As Attachment 2 to his October 20, 2013 submission on remand, Complainant submits a motion for ODAG reconsideration of its August 19, 2014 decision denying his June 25, 2014 motion to supplement the record with the EEO deposition testimony of Deborah Broderick. *Id.*, Attach 2. Complainant argues that the June 24, 2014 deposition testimony is both new and material to the issue of whether his disclosures were protected and a “contributing factor” in the FBI’s decision to take a personnel action against him. *Id.* As set forth below, OARM finds that, even without review of Broderick’s June 24, 2014 deposition testimony, Complainant has nonfrivolously alleged that his disclosures were “protected disclosures” (if they had been made to the proper designated person or office under 28 C.F.R. § 27.1(a)), and his alleged disclosures were a contributing factor in the FBI’s decision to terminate his employment on August 24, 2012, during his probationary period. Therefore, for purposes of rendering this decision on remand, we need not – and do not – address Complainant’s motion for reconsideration.

took personnel actions against him in reprisal for any alleged protected disclosures. *Id.* at 5.⁶

FINDINGS AND ANALYSIS

I. Jurisdictional Legal Standard

In order for a complainant to establish OARM's jurisdiction over his RCA, the complainant must exhaust his Conducting Office remedies (by first filing a complaint of reprisal with OPR or OIG) and make nonfrivolous allegations that: (1) he made a protected disclosure under 28 C.F.R. § 27.1(a); and (2) the disclosure was a contributing factor in the FBI's decision to take or fail to take (or threaten to take or fail to take) a personnel action as defined by 28 C.F.R. § 27.2(b) against him. Nonfrivolous allegations of OARM's jurisdiction are allegations of fact which, if proven, could establish a prima facie case of OARM's jurisdiction over a RCA. *See Murphy v. Dep't of the Treasury*, 86 M.S.P.R. 131, ¶ 5 (2000).⁷ Conclusory, vague, or unsupported allegations are insufficient to meet the "nonfrivolous allegations" standard. *See Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, ¶ 5 (2000).

A. Exhaustion

As explained in our Order dated November 14, 2013, Complainant must show that he brought his whistleblower reprisal complaint to the attention of OIG or OPR, informed OIG or OPR of the precise ground of his claim or whistleblowing, and gave either office sufficient basis to pursue an investigation which might lead to corrective action. RCAF, Tab 2 at 2. OARM's jurisdiction is limited to only those issues Complainant raised before OIG, and not his post hoc characterization of those claims. *See Campo v. Dep't of the Army*, 93 M.S.P.R. 1, ¶ 9 (2002), *aff'd*, 134 Fed. Appx. 447 (Fed.Cir. 2005) (Table) (finding lack of Board jurisdiction where the appellant failed to exhaust specific claims with the Office of Special Counsel).

Here, Complainant has submitted a copy of the whistleblower reprisal complaint he previously filed with OIG. RCAF, Tab 1, Exh. 5. In his whistleblower reprisal complaint to

⁶ The FBI further argues that, even if OARM has jurisdiction of Complainant's RCA, the record demonstrates that the FBI would have taken the personnel action at issue in the absence of Complainant's alleged protected disclosures. *Id.* at 6-20 (referencing a number of alleged personnel issues which the FBI maintains led to its finding that Complainant was deficient in suitability standards, conscientiousness, cooperation, and judgment). Pursuant to the scope of the August 19, 2014 Remand Order, this Opinion does not address the FBI's claims in this regard.

⁷ The case law of the U.S. Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit, although not binding on OARM, is instructive and looked to for guidance.

OIG, Complainant alleged that he was wrongfully terminated:

In retaliation for the numerous, significant procurement and other violations that I informed FBI Finance Division management and Procurement Section management about. . . .

Id.

Based upon our review of the record, and in liberally construing Complainant's whistleblower reprisal complaint filed with OIG, we find that he has exhausted his administrative remedies with respect to his alleged disclosures to Finance Division and Procurement Section managers regarding waste and abuse of sole source contracts, classified contracts, noncompliant contracts in violation of FAR; improper expenditure of tens of millions of dollars of RWA; staffing augmentation in violation of federal regulations; a \$40 million noncompliant contract that went to a company of a former FBI Assistant Director; improper use of contractors; improper relationships between federal employees and contractors; use of unentitled benefits by contractors; and other procurement violations. *Id.* Exh. 5 at 2-6; see *Mudd v. Dep't of Veteran Affairs*, 120 M.S.P.R. 365, 10-11 (2011) (requiring appellant to establish which specific claims were presented to the Office of Special Counsel).

We further find that Complainant exhausted his administrative remedies with respect to the alleged personnel actions he raised in his RCA. Specifically, we find that Complainant has established that he raised before OIG the personnel action alleged in his RCA, *i.e.*, the FBI's decision to terminate his employment on August 24, 2012, during his probationary period. RCA, Tab 1, Exh. 5.

B. Nonfrivolous Allegations

1. Protected Disclosure

a. Recipients of Complainant's Disclosures

In light of the ODAG's directive on remand, OARM assumes *arguendo* that Complainant made his disclosures to a designated recipient office or individual under 28 C.F.R. § 27.1(a).

b. Reasonable Belief

However, our inquiry as to whether he has made a nonfrivolous allegation of a "protected disclosure" does not end there. Complainant must also make a nonfrivolous allegation that he had a reasonable belief that his alleged disclosures evidenced a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger

to public health or safety. See *Lachance v. White*, 174 F.3d 1378 (Fed.Cir.1999); *Comito v. Dep't of the Army*, 90 M.S.P.R. 58, ¶ 8 (2001). To establish that he had a reasonable belief that a disclosure met the criteria of 28 C.F.R. § 27.1(a), Complainant need not prove that the matter disclosed actually evidenced any of the situations specified in 28 C.F.R. § 27.1(a). *Id.* Rather, he must show that the matter disclosed was one that a reasonable person in his position would believe evidenced any of the situations specified in 28 C.F.R. § 27.1(a). *Comito*, 90 M.S.P.R. 58, ¶ 8. In assessing whether a belief is reasonable, the test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by Complainant could reasonably conclude that the actions of the government evidenced a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *Id.*

On remand, Complainant contends that he reasonably believed that his disclosure regarding the expenditures purportedly related to the September 2012 Awards Ceremony evidenced a gross waste of funds. AF, Tab 26 at 8. With respect to all of his other alleged disclosures, he argues that he reasonably believed they evidenced violations of law, rule, or regulation. *Id.* at 6-9.⁸

Although Complainant fails to specifically identify who allegedly violated the laws, rules, or regulations to which he generally refers, we find that his allegations are sufficient for OARM to find that he nonfrivolously alleged a reasonable belief that his alleged disclosure evidenced a violation of law, rule, or regulation.⁹ See *Mason v. Dep't of Homeland Security*, 116 M.S.P.R. 135, ¶ 17 (2011) (stating that the appellant is not required to identify the particular statutory or regulatory provision that the agency allegedly violated when his statements and circumstances of

⁸ As noted above, Complainant alleged in his RCA that he reasonably believed his disclosures also evidenced an abuse of authority and mismanagement. RCAF, Tab 1. Our focus in this Opinion is, in large part, on Complainant's contentions on remand, *i.e.*, involving his alleged reasonable belief that his disclosures evidenced violations of law, rule, and regulation; and a gross waste of funds. AF, Tab 26. Regardless, consideration of Complainant's additional reasonable belief allegations in his RCA is unnecessary to reach the same conclusion here – namely, that he has nonfrivolously alleged that he reasonably believed that his disclosures evidenced a type of wrongdoing specified under 28 C.F.R. § 27.1(a).

⁹ Although Complainant refers generally to FAR, procurement law, the Antideficiency Act, OMB regulations, and various FBI policies, he does not specifically identify the policies or regulatory provisions underlying his allegations.

those statements clearly implicate an identifiable law, rule, or regulation); *White v. Dep't of the Air Force*, 391 F.3d 1377, 1382, n.2 (Fed. Cir. 2004) (in determining whether an individual had a reasonable belief that a violation of law, rule, or regulation occurred, the existence of an actual violation may be debatable); *Rubendall v. Dep't of Health & Human Servs.*, 101 M.S.P.R. 599, ¶¶ 6-7 (2006) (there is no de minimus exception for the violation of any law, rule, or regulation aspect of the protected disclosure standard). We find that a disinterested observer with knowledge of the facts known to Complainant – a Supervisory Contract Specialist in the FBI's Finance Division Facilities Contract Unit (FCU) “tasked with overseeing all of the FCU's procurements to ensure compliance with the FAR and agency procurement regulations,” AF, Tab 26 at 6 – could reasonably conclude that his emails of November and December 2011, and of January, February, March, April, May, and June 2012, as well as his oral disclosures made at the Town Hall Meeting, evidenced a violations of law, rule, or regulation. *See, e.g.*, 31 U.S.C. § 1301 (regarding uses of appropriated funds); 31 U.S.C. § 1501 (requiring documentation of the purpose for a RWA); 48 C.F.R. § 1.4 (regarding deviations from FAR); 48 C.F.R. § 6 (regarding competitive contracts); 48 C.F.R. § 3 (regarding improper business practices and conflicts of interests in government contracting); 48 C.F.R. § 42 (regarding contract audit services); 48 C.F.R. §§ 46.4, 46.601 (regarding contract quality requirements); 48 C.F.R. § 45.509 (regarding contractor use of Government property); 48 C.F.R. § 51.102 (regarding contractor use of Government supply services).

Accordingly, we find that Complainant has nonfrivolously alleged that he reasonably believed that such emails and Town Hall Meeting disclosures evidenced a violation of law, rule, or regulation. *See Reid v. Merit Systems Protection Board*, 508 F.3d 674, 676, 678 (Fed Cir. 2007) (disclosure of FAR violations can constitute a protected disclosure); *Schnell v. Dep't of Army*, 114 M.S.P.R. 83, ¶ 20 (2010) (finding disclosures which exposed potential violations of FAR relating to quality assurance in government contracting were protected disclosures); *Comito*, 90 M.S.P.R. 58, ¶¶ 10-11 (disclosures of financial irregularities can constitute protected disclosures). As such, Complainant has nonfrivolously alleged that such emails and oral disclosures – again, assuming for purposes of this analysis only that his disclosures were made to a proper recipient under 28 C.F.R. § 27.1(a) – are “protected” within the meaning of 28 C.F.R. § 27.1(a).

However, with respect to Complainant's alleged August 2012 emails to FBI OGC, and Finance Division and Procurement Section management regarding the scheduled September 6,

2012 awards ceremony expenditures in the amount of \$300,000.00 (purportedly for travel, venue, catering, flowers, awards, etc.), we find that Complainant has failed to nonfrivolously allege that he reasonably believed that his disclosures in that regard evidenced a gross waste of funds. Specifically, Complainant has failed to nonfrivolously allege sufficient facts from which a disinterested observer could reasonably conclude that the awards ceremony expenditures were significantly out of proportion to the benefit expected to accrue to the government. *See Lane v. Dep't of Homeland Security*, 115 M.S.P.R. 342, ¶ 19 (2010) (stating that establishing a reasonable belief that one is disclosing a gross waste of funds is a substantial hurdle, as a gross waste of funds constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government).

2. Contributing Factor

To satisfy the contributing factor criterion, Complainant need only raise a nonfrivolous allegation that the fact or content of his alleged protected disclosures were a contributing factor in the FBI's decision to take, or fail to take, the alleged personnel action at issue. *Cassidy v. Dep't of Justice*, 118 M.S.P.R. 74, ¶ 12 (2012). In the absence of direct evidence, Complainant may establish this criterion by the knowledge-timing test. *Id.* Complainant may rely on circumstantial evidence to support his contributing factor allegations, including that: (1) the officials taking the personnel action had either direct or imputed knowledge of his disclosures; and (2) the alleged personnel action occurred within a period of time such that a reasonable person could conclude that his disclosures were a contributing factor in the contested personnel action. *Id.*; *Carney v. Dep't of Veterans Affairs*, 121 M.S.P.R. 446, ¶ 9 (2014) (where the official taking the personnel action had actual knowledge of the disclosure and the personnel action occurred within a period of time such that a reasonable person could conclude that the activity was a contributing factor in the personnel action, the knowledge-timing test is satisfied).

Under 28 C.F.R. § 27.2(b), a "personnel action" includes: an appointment; a promotion; an adverse action under chapter 75 of title 5, United States Code, or other disciplinary or corrective action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation under chapter 43 of title 5, United States Code; 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 personnel action; a decision to order psychiatric testing or examination; and any other significant change in

duties, responsibilities, or working conditions. Complainant contends that he was subject to a personnel action when the FBI terminated his employment during his probationary period. *See Mogyorossy v. Dep't of Air Force*, 96 M.S.P.R. 652, ¶ 22 (2004) (termination of employment during the probationary period is a covered personnel action upon which an individual right of action reprisal appeal before the Board may be based).

Complainant alleges that his alleged protected disclosures were a contributing factor in the FBI's decision to terminate his employment during his probationary period under the knowledge-timing test. AF, Tab 26 at 12. With respect to the knowledge factor, Complainant asserts that the officials responsible for proposing his termination – *i.e.*, AD Haley, Deputy AD Lambert, Dunn, and SC Jones – were all aware of his disclosures, since, as described above, they were all at some point alleged recipients of his emails and/or in attendance at the January 18, 2012 Town Hall Meeting. *Id.*; RCAF, Tab 1 (partial copy of 8/17/12 email recommending Complainant's removal during his probationary period "for lack of suitability" (drafted by SC Jones, and approved by AD Haley, Deputy AD Lambert, and Dunn)). We find that the record evidence supports finding that Complainant has nonfrivolously alleged that these proposing officials had actual knowledge of his alleged protected disclosure(s) prior to the August 24, 2012 effective date of his termination (beginning with his disclosures at the Town Hall Meeting). AF, Tab 27 (FBI's 10/20/14 Brief in Opposition to RCA), Attach. 1 at 7, 10 (full copy of 8/17/12 email recommending Complainant's removal, citing, among other things, Complainant's 1/18/12 oral disclosure to "AD Haley and Procurement Section Senior Managers" regarding Contracting Officers' budgeting and accounting responsibilities; Complainant's May 2012 email regarding the roles and responsibilities of "Job Series 1170s"; and Complainant's June 2012 email regarding a Contracting Officer's warrant authority); Attach. 10 (AD Haley's 1/22/12¹ [sic] EEO Affidavit (discussing the 1/18/12 meeting)). We further note Complainant's contention that "the proposing officials influenced the deciding official (David Bennett, Assistant Director, Human Resources Division) with the 'Removal Document' written by [SC] Jones and signed by each of the proposing officials." AF, Tab 26 at 12; AF, Tab 27, Attach. 2 (8/22/12 termination letter signed by HRD AD Bennett). In his affidavit, AD Haley acknowledges the ongoing dialogue he and a number of Procurement Section officials had with the Human Resources Division (including the HRD "AD") and others regarding Complainant's dismissal from the roles of the FBI prior to the end of Complainant's probationary period. AF, Tab 27, Attach. 10. We find that, based on the

alleged knowledge of the proposing officials, as well as AD Haley's statement of record, Complainant has nonfrivolously alleged that HRD AD Bennett had constructive, *i.e.*, imputed, knowledge of Complainant's alleged protected disclosures, at the latest, by August 17, 2012, the date of the email proposing Complainant's termination. *See Weed v. Soc. Sec. Admin.*, 113 M.S.P.R. 221 ¶ 22 (2010) ("An appellant may establish imputed knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action.").

We are further satisfied that Complainant has nonfrivolously alleged that the period of time between the proposing and deciding officials' knowledge of Complainant's alleged protected disclosures and his termination from the FBI on August 24, 2012, is sufficiently proximate to infer reprisal. *See Smith v. Dep't of Agriculture*, 64 M.S.P.R. 46, 65 (1994) (finding that, where the personnel actions were taken less than one year after the protected disclosure, the knowledge-timing contributing factor test was satisfied); *Peterson v. Dep't of Veterans Affairs*, 116 M.S.P.R. 113, ¶ 16 (2011) (finding that a personnel action taken within ten months of the appellant's disclosure satisfies the knowledge-timing contributing factor test).

Accordingly, we find that Complainant has nonfrivolously alleged that his alleged January, May, and June 2012 emails, and the Town Hall Meeting oral disclosures were a contributing factor to the FBI's decision to take a "personnel action" within the meaning of 28 C.F.R. § 27.2(b), when it terminated Complainant's employment on August 24, 2012, during his probationary period.

II. Complainant's Motion for a Copy of the AG's PPD-19 Report

By letter dated October 17, 2014, the Department provided Senators Charles E. Grassley and Ron Wyden with a copy of the Attorney General's PPD-19 Report titled "Department of Justice Report on Regulations Protecting FBI Whistleblowers." Because the PPD-19 Report is publicly available, Complainant's motion for a copy of the report is denied as moot.

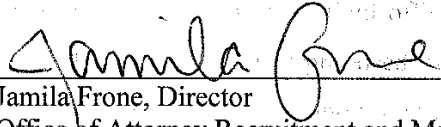
Moreover, we find that the PPD-19 Report is not material to the instant case. Although the PPD-19 Report recommends expanding the list of recipients designated to receive a protected disclosure under 28 C.F.R. § 27.1(a), it does not amend or change in any way 28 C.F.R. § 27.1(a) as it currently reads. Such change can only happen with the usual public notice and comment procedures involved in the rulemaking process. Further, even if the Department's proposed change to the regulation were in effect today, Complainant still would have failed to make a nonfrivolous allegation that he made a disclosure to a designated recipient office or individual

under 28 C.F.R. § 27.1(a). Specifically, in the PPD-19 Report, the Department recommends expanding the list of designated recipients of a protected disclosure under 28 C.F.R. § 27.1(a) to include, in addition to the highest ranking FBI field office official, the second highest ranking tier of field office officials (*i.e.* the Special Agent in Charge (SAC) in 53 field offices) or to any Assistant Special Agent in Charge (ASAC). The list, if expanded as proposed, would still not render Complainant's numerous alleged disclosures to Finance Division and Procurement Section managers "protected" under 28 C.F.R. § 27.1(a). Further, Complainant has neither alleged nor established that he made a disclosure to an SAC and/or ASAC at FBIHQ, and, therefore, the PPD-19 Report is not relevant to his alleged protected disclosures.

CONCLUSION

For the reasons set forth above, assuming arguendo that Complainant made his disclosures to a designated recipient office or individual under 28 C.F.R. § 27.1(a), we find that Complainant has nonfrivolously alleged that he made at least one disclosure protected by that regulatory provision that was a contributing factor in the FBI's decision to terminate his employment on August 24, 2012, during his probationary period.¹⁰

Dated: December 8, 2014



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¹⁰ Our conclusion here does not change OARM's initial determination that OARM lacks jurisdiction over Complainant's RCA based on Complainant's failure to nonfrivolously allege that he made a disclosure to a designated recipient office or individual as required under 28 C.F.R. § 27.1(a).

NOTICE OF RIGHT TO FURTHER REVIEW

Pursuant to 28 C.F.R. § 27.5, Complainant and/or the FBI may request, within 30 calendar days of the date of this Opinion, review by the DAG. Any requests for further review by the DAG shall be addressed to: David Margolis, Associate Deputy Attorney General, U.S. Department of Justice, Office of the Deputy Attorney General, 950 Pennsylvania Avenue, N.W., Room 4113, Washington, D.C., 20530-0001.

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