UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

GARY A. STRADER,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
SF-1221-09-0692-S-1

DATE: June 24, 2009

April Hollingsworth, Esquire, Salt Lake City, Utah, for the appellant.

Brian E. Guy, Washington, D.C., for the agency.

BEFORE
Craig A. Berg
Administrative Judge

ORDER GRANTING STAY REQUEST

INTRODUCTION

On June 11, 2009, the appellant filed a written request for a stay of the agency's action allowing his term appointment to the position of Biological Science Technician, Animal and Plant Health Inspection Service, to expire, effective April 9, 2009. Stay Appeal File (SAF), Tab 1. On the same date, the appellant filed an individual right of action (IRA) appeal alleging that the agency's decision to allow the term appointment to expire was taken in retaliation for his whistleblowing disclosures; that appeal has been docketed, and will be

adjudicated, separately.[1] *Strader v. Department of Agriculture*, MSPB Docket No. SF-1221-09-0692-W-1. As explained below, the Board has jurisdiction over this stay because it has jurisdiction over the underlying IRA appeal, pursuant to 5 U.S.C. §§ 1214(a)(3), 1221(a), (e); *see Kramer v. General Services Administration*, 47 M.S.P.R. 349, 351 (1991) (a stay request derives its jurisdictional basis from the underlying appeal).

For the reasons discussed below, the appellant's request for a stay is GRANTED.

ANALYSIS AND FINDINGS

Jurisdiction

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The appellant bears the burden of proving that the Board has jurisdiction over this appeal. 5 C.F.R. § 1201.56(a). The Board's jurisdiction to order a stay of a personnel action is limited to personnel actions allegedly based on reprisal for whistleblowing. 5 U.S.C. § 1221(c)(1); 5 C.F.R. § 1209.8(a). *See Williams v. Department of Defense*, 46 M.S.P.R. 549, 551-52 (1991).

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 engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the

[1] Certain portions of the Board's appeal form that the appellant submitted, as well as the agency's decision letter, were placed in either the underlying IRA appeal file or the stay file, but not both. Accordingly, I will consider evidence in the IRA appeal file in adjudicating this stay request, rather than requiring the appellant to re-submit the entire appeal form for inclusion in both files. Citation to the record in the IRA appeal is to the "Initial Appeal File."

agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

Exhaustion Before OSC

Where, as here, the personnel action at issue are not "otherwise appealable" to the Board, the appellant must first seek corrective action with OSC before appealing to the Board. 5 C.F.R. § 1209.2(b)(1).[2] Here, the appellant has submitted letters from OSC, dated April 22, 2009, notifying him that it has terminated its investigation into his allegation of reprisal for whistleblowing, and of his right to file a Board appeal. IAF, Tab 1. Although I note that these letters indicate that OSC's investigation terminated very soon after the effective date of the action at issue, the agency has not argued that OSC's investigation concerned allegations of retaliation for different disclosures or a different personnel action than raised by the appellant in his stay request. And, I note that the appellant alleges that he was first notified that the agency planned to terminate his employment in March, 2009. IAF, Tab 1. Accordingly, based on this record, I find that the April 22, 2009 letters from OSC concerned the disclosures and the

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[2] Although the appellant termed his appeal an "IRA appeal," it is possible the Board has jurisdiction over his underlying appeal as an adverse action appeal. On his appeal form, the appellant indicated that he had four years of service at the time his appointment was terminated, but he did not specify whether that service was continuous, whether it was all with the Department of Agriculture, or whether it was in the same or a similar position. IAF, Tab 1. Nor is it clear from this record whether the appointment was to a position in the competitive or excepted service. Under various scenarios, such as if the appellant had completed a trial period under a term appointment, or if he served in successive term appointments adding up to more than one year in the competitive service in the same or a similar position, or adding up to more than two years in the excepted service in positions in the "same line of work," without a break in service of over 30 days, the Board could have jurisdiction over this appeal as an "otherwise appealable action." *See, e.g., Williams v. Department of Defense*, 76 M.S.P.R. 270, 275-76 (1997) (competitive service tacking); *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶¶ 12-13 (2006) (excepted service tacking). This possibility may be more fully explored in adjudication of the IRA appeal, but because I have preliminarily found Board jurisdiction over that appeal as an IRA, for purposes of this stay request I need not further discuss this potential jurisdictional issue.

action at issue in his stay, and that the appellant has shown that he has exhausted his remedy with OSC.

Personnel Action

I find that the agency's decision to terminate the appellant's term appointment constitutes a "decision concerning pay" and/or a "significant change in duties, responsibilities, or working conditions," and is therefore a personnel action as defined in 5 C.F.R. § 1209.4.

Protected Disclosures

A disclosure is protected under 5 U.S.C. § 2302(b)(8) if the appellant shows that she reasonably believed that the disclosed information evidenced a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. To establish that she had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), the appellant need not prove that the condition disclosed actually established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A); rather, she must show that the matter disclosed was one which a reasonable person in her position would believe evidenced one of the situations specified in section 2302(b)(8)(A). *See., e.g., Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 10 (1998). The proper test for determining whether an employee had a reasonable belief that her disclosures revealed misconduct prohibited under the WPA, is this: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA? *See Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

Here, the appellant alleges that, between October, 2007 and February, 2009, he disclosed to a District supervisor and a Regional Director of the agency, as well as a Nevada State Wildlife Game Warden and an FBI Agent, that two of

his co-workers had hunted mountain lions from a government airplane, in violation of the Airborne Hunting Act. IAF, Tab 1. Although the appellant did not provide significant detail explaining how he learned of the actions of the two employees, again, the agency has not attempted to rebut his contention, and I find that he has made a nonfrivolous allegation that he had a reasonable belief he had reported a violation of law by the agency employees.[3]

Contributing Factor

An appellant who files an IRA appeal must also make a nonfrivolous allegation that the protected disclosures were a "contributing factor" in the personnel action at issue in order to establish Board jurisdiction over his appeal. He may demonstrate that a disclosure was a contributing factor through circumstantial evidence, such as the acting officials' knowledge of the disclosure and the timing of the personnel action. 5 U.S.C. § 1221(e)(1); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). Thus, an appellant's submission of 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, i.e., evidence sufficient to meet the knowledge/timing test, satisfies the contributing factor standard. *See Horton v. Department of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996).

[3] I note that the Airborne Hunting Act is codified at 16 U.S.C. § 742j-l, and prohibits shooting or attempting to shoot or harassing any bird, fish, or other animal from aircraft except for certain specified reasons, which do not appear applicable here from the record evidence at this stage.

In his petition, the appellant asserts that the deciding official, M.J.[4], State Director, Nevada Wildlife Services, told him that he (the appellant) was to be terminated on June 30, 2009, and that when the appellant asked M.J. whether he would still have a job if he had not made his disclosures, M.J. "nodded affirmatively." IAF, Tab 1. The appellant stated that subsequently, M.J. moved the date of his termination up to April 9, 2009, without explanation, and has since "done everything he could to hurt me financially and otherwise…. He is clearly angry with me because I complained about illegal hunting in his agency." *Id.*

In the absence of any evidence or even argument rebutting the appellant's claims, I find that the appellant's assertion that M.J. responded to a reference to the disclosures amounts to a nonfrivolous allegation that M.J. knew about the disclosures. I further find that the agency's decision to terminate the appellant's term appointment was taken within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the action.

Thus, I conclude that the appellant has met the knowledge/timing test, and he has therefore made a nonfrivolous allegation that his disclosures were a contributing factor in the decision to terminate his term appointment.

At this preliminary stage, based on the record evidence, I conclude that the appellant has established jurisdiction over his IRA appeal.

The Merits

A stay request may be granted when the appellant shows that: (1) The action taken is a "personnel action" defined by 5 C.F.R. § 1209.4; (2) the agency action was based on "whistleblowing" as defined by 5 C.F.R. § 1209.4(b); and (3) there is a substantial likelihood that the appellant will prevail on the merits of the appeal. *See* 5 U.S.C. § 1221(e)(1); 5 C.F.R. § 1209.9(a)(6)(i)(ii) and (iii). If the

[4] Because the record is undeveloped at this stage, and the agency has not yet presented any evidence from the official who issued the letter terminating the appellant's term appointment, I find it appropriate to refer to him by initials in this order.

appellant meets this burden, the stay will be granted unless the respondent-agency demonstrates a substantial likelihood that it will prove by clear and convincing evidence that it would have taken the same action even in the absence of the whistleblowing activity or that granting the stay would result in extreme hardship. *See* 5 U.S.C. § 1221(e)(2); 5 C.F.R. § 1209.9(c)(2)(i) and (ii) (1999). *See also Williams v. Department of Defense*, 45 M.S.P.R. 146, 148 (1990), *rev'd on other grounds*, 46 M.S.P.R. 549 (1991).

Agency counsel informed the Board by telephone on June 23, 2009 that it does not oppose the appellant's stay request, and therefore it did not file a response, despite being afforded the opportunity to do so by my June 12, 2009 order. As discussed above, I have found that the action at issue is a "personnel action," as defined by 5 C.F.R. § 1209.4. Moreover, the appellant has, at minimum, raised a nonfrivolous allegation that he made whistleblowing disclosures to multiple agency and other law enforcement officials, and the agency has presented no evidence as to the reason(s) it terminated his term appointment. On this point, I note that M.J. states in the decision letter that the decision was made "based on the lack of funds due to the discontinuation of cooperative funding." IAF, Tab 1. The agency has not provided any evidence to corroborate his claim that a lack of funds was the reason it terminated the appellant's term appointment, however, and I find that the statement in the decision letter by itself is outweighed by the appellant's unrebutted claim that M.J. admitted the action would not have been taken but for the appellant's disclosures. *Cf. Depauw v. U.S.I.T.C.*, 782 F.2d 1584 (Fed. Cir. 1986) (a proposal notice may constitute evidence of the charges when it is detailed and is corroborated by other evidence), *cert. denied*, 479 U.S. 815. Accordingly, I conclude that the appellant has shown that the action was "based on" his whistleblowing. Finally, in the absence of any evidence to undercut the appellant's argument, and considering that the agency does not oppose the

appellant's stay request, I must find that there is a substantial likelihood that the appellant will prevail on the merits of the appeal.

The burden now shifts to the agency to demonstrate a substantial likelihood that it will present clear and convincing evidence that it would have removed the appellant in the absence of the whistleblowing. "Clear and convincing evidence" is defined as "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(d). Again, the agency has stated that it does not oppose the appellant's request for a stay of its decision to terminate his term appointment, and it filed no evidence or argument in opposition, nor has it claimed that granting the stay would cause it extreme hardship. Thus, I conclude that the agency has failed to show that there is a substantial likelihood that it will present clear and convincing evidence that it would have terminated the appellant's term appointment in the absence of the whistleblowing, or that extreme hardship would result from granting the request.

Accordingly, I grant the appellant's request for a stay of the agency's decision to terminate his term appointment. I emphasize that this determination is based only on the record as it stands at this point, and the merits determination in the IRA appeal will be based on a more fully developed record, and will enable me to make more detailed and conclusive findings.

ORDER

The appellant's stay request is GRANTED. This stay will remain in effect until an initial decision is issued on the appellant's IRA appeal, or until the Board

vacates or modifies it, whichever comes first.[5] 5 C.F.R. § 1209.11(a).

FOR THE BOARD: _____

Craig A. Berg
Administrative Judge

BOARD REVIEW

Pursuant to 5 C.F.R. § 1209.3, any party to the proceeding may file a motion for certification of an interlocutory appeal of an order granting or denying a stay as provided in 5 C.F.R. §§ 1201.91-1201.93. A motion for certification must be filed with this Administrative Judge within 10 days of the date of this Order.

[5] The appellant requested that the stay remain in effect until he "receive[s] a decision letter from the Office of Special Counsel on [his] complaint to them filed earlier this week, in which [he] allege[d] additional retaliation from M.J. for the same complaint." I find that tying the length of the stay to completion of an OSC investigation on a related, but distinct, complaint is impracticable and does not provide a result reasonably calculated to remedy the only allegations currently before the Board. I find it more reasonable for the stay to remain in effect for the period that the IRA appeal is under adjudication, or until such time as there is cause to vacate or modify the stay, as provide for by regulation.