2020-1834

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEBRA TAO

Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD

Respondent

BRIEF OF PETITIONER

Petition for Review of Board Decision in
Case No. CH-1221-19-0002-W-1

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CERTIFICATE OF INTEREST

Petitioner, Debra Tao, by and through her undersigned attorney, states her Certificate of Interest as follows:

1. The full name of the party represented by the attorney in the case.

Response. Debra Tao

2. The name of the real party in interest.

Response. The party named in the caption is the real party in interest.

3. The corporate disclosure statement prescribed in Rule 26.1.

Response. The Petitioner is not a corporate entity interest.

4. The names of the law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Response. From Solomon, Maharaj & Kasimati, Mr. Daniel Maharaj.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

Response. Though unlikely to be directly affected, Petitioner has a related matter pending before an administrative judge of the EEOC, Tao v. VA, EEOC No. 480-2018-00405X.

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for Petitioner is unaware of any related matters currently pending before this Court.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes that oral argument is no necessary as the facts and legal arguments will be adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

STATEMENT OF JURISDICTION

The Merit Systems Protection Board ("Board") entered their final order dismissing the individual right of action ("IRA") appeal by Debra Tao Pharm.D for lack of jurisdiction on March 17, 2020. Appx9. Petitioner Debra Tao timely filed the Petition for Review on May 14, 2029, which was later docketed on May 22, 2020. Jurisdiction is conferred upon the United States Circuit Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9).

The Board, and this Court by extension, has jurisdiction over individual right of action claims based on violations of the Whistleblower Protection Enhancement Act of 2012 ("WPEA") if an appellant: (1) exhausts her administrative remedies with OSC and makes "non-frivolous allegations that: ([2]) [she] engaged in a whistleblowing activity by making a protected disclosure …; and ([3]) based on the protected disclosure, [her employer] took or failed to take a personnel action as defined by 5 U.S.C. § 2302(a)." *Willis* 141 F.3d at 1142; see *Yunus v. Dep't of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); see also *Spruill v. MSPB*, 978 F.2d 679, 687-89 (Fed. Cir. 1992) ("[S]ubject-matter jurisdiction existed—as long as the petitioner asserted nonfrivolous claims.").

Whether an appellant has made a nonfrivolous allegation as a threshold matter is determined based on the "well-pleaded allegations in the complaint." *Spruill,* 978 F.2d at 686. A "non-frivolous allegation[]" is an allegation "that, if proven, can establish the Board's jurisdiction." *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1330 (Fed. Cir.

2006) (en banc); see also *Id.* at 1344; *Reid*, 508 F.3d at 678-79 (holding that an appellant need only "allege[] facts sufficient, if true, to meet the prima facie standard"); 5 C.F.R. § 1201.4(s) (defining a "[n]onfrivolous allegation" as "an allegation that: (1) [i]s more than conclusory; (2) [i]s plausible on its face; and (3) [i]s material to the legal issues in the appeal").

STANDARD OF REVIEW

This Court must set aside the Board's decision "if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without following applicable procedures; or 'unsupported by substantial evidence.'" *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 774 n.5 (1985) (*quoting* 5 U.S.C. § 7703(c)). The Board's determination that it lacked jurisdiction to consider Dr. Tao's IRA appeal is a question of law and reviewed de novo. *See, e.g, Parrott v. MSPB*, 519 F.3d 1328, 1334 (Fed. Cir. 2008). Further, "[a]ny doubt or ambiguity as to whether the [Petitioner] made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction." *Ingram v. Dep't of the Army*, 114 M.S.P.R. 43, ¶ 10 (M.S.P.B. 2010).

STATEMENT OF THE ISSUES

Whether, for the purpose of a jurisdictional ruling prior to hearing, the Board erred in failing to consider whether Dr. Tao had engaged in protected activity under 5 U.S.C. § 2302(b)(9) (activity described therein is commonly referred to as "(b)(9)" activity along with "(b)(8)" activity). Appx6.

Whether, for the purpose of a jurisdictional ruling prior to hearing, the Board

erred in determining that Dr. Tao lacked a reasonable belief that her disclosures evidenced a violation of law, rule, or regulation. Appx6-8.

Whether, for the purpose of a jurisdictional ruling prior to hearing, the Board erred in determining that Dr. Tao lacked a reasonable belief that her disclosures evidenced gross mismanagement, abuse of authority, a substantial and specific danger to public health or safety, or a gross waste of funds. Appx7-8.

Whether, for the purpose of a jurisdictional ruling prior to hearing, the Board erred by failing to address certain disclosures as included in Dr. Tao's submissions to the Board. Appx6-8.

Whether, for the purpose of a jurisdictional ruling prior to hearing, the Board was correct in finding Dr. Tao had exhausted the administrative remedies of the Office of Special Counsel prior to her IRA appeal to the Board. Appx25.

Whether, for the purpose of a jurisdictional ruling prior to hearing, the relevant disclosures and protected activities were contributing factors to the relevant personnel actions. For the purpose of this jurisdictional ruling, this would simply require a showing that the Responsible Management Officials new of the disclosure or protected activity, and that the action was taken within a reasonable time thereafter.

STATEMENT OF THE CASE

I. Procedural Background

Following submission of Dr. Tao's IRA appeal, it was ordered that Dr. Tao provide information establishing jurisdiction. Appx148. The Complainant sent this

information in her 194-page submission. Appx172. The Agency provided a response to which Dr. Tao filed a reply. Appx369, Appx629. The Administrative Judge characterized the Agency's response as an argument that "the Board lacked jurisdiction . . . since it did not have jurisdiction over proposed removal actions that had not been implemented." Appx671.

Without first securing or requesting leave of the administrative judge, the Agency filed their "Response to Appellant's Reply to Agency's Jurisdiction Order Response". Appx642. Even more so than their first response, the Agency's second response focused almost entirely on their argument that the case should be dismissed without prejudice until the underlying removal action is decided upon. Appx642-644. Dr. Tao then submitted a motion to strike the Agency's second response, or in the alternative, request for leave to file a second reply. Appx650. This Administrative Judge did not acknowledge or rule on Dr. Tao's motion to strike or request to submit a supplemental reply.

The case continued towards hearing and both the Complainant and Appellant submitted prehearing submissions. Following receipt of the prehearing submissions, the Administrative Judge issued an order on October 16, 2019, vacating the scheduled prehearing conference and suspending processing of the appeal for 30 days. Appx2980. On February 11, 2020—*i.e.* 118 days later—without any further proceedings or notice to the parties, the Administrative Judge issued his initial decision dismissing the case

for lack of jurisdiction without a hearing, which later became the final decision of the Board. Appx1.

II. Factual Background

The factual background that was submitted in the record is primarily found in the Declaration of Attorney by James Solomon and the exhibits referenced therein, which was enclosed in Dr. Tao's submission on jurisdiction. Appx177. As explained, Dr. Tao's Office of Special Counsel ("OSC") Form 11 submission evidenced four disclosures, A through D. Appx178, Appx205-244. It is further explained that, after her initial Form 11 submission, Dr. Tao continued to disclose multiple issues to OSC attorneys. Appx182-183, Appx245-264, Appx291-313. Further, OSC issued a preliminary determination letter that summarized certain disclosures and proffered retaliatory actions. Appx184-185; Appx269-273. As explained in the declaration of attorney, [the] response [to the preliminary determination letter], standing alone, is likely sufficient to establish jurisdiction before the Board" and it was requested that the entirety of such response be incorporated into the declaration. Appx185-186; Appx274-288.

The following factual overview was expressly relayed to the Administrative Judge in the aforementioned Declaration of Attorney by James Solomon and referenced exhibits. Appx177-200; Appx205-363.

Petitioner's OSC Form 11 complaint was submitted to the Office of Special Counsel on or about February 20, 2018. Appx205-219. In addition to the standard

form, Appellant sent additional documentation to OSC attorney Brian Critz evidencing the disclosures included in her complaint. Appx220-244.

Disclosure A, as found on the Form 11, is that, on or about June 20, 2017, Dr. Tao concurred in an email from Ms. Elizabeth Luevano, the Administrative Office at the VA Greater Los Angeles Healthcare System ("VAGLAHCS"), to then Chief of Staff, Dr. Scotte Hartronft and other Human Resources Management Officials reporting abuse of authority and harassment by then Acting Chief of Pharmacy[1], Dr. Yusuf Dawoodbhai. Appx213.

Dr. Tao described a meeting between herself, Dr. Dawoodbhai, and the Associate Chief of Pharmacy, Dr. Irene Marshall, which occurred on May 16, 2017. Appx213. OSC was provided with supporting documentation detailing this meeting, in which Dr. Dawoodbhai yelled at Dr. Tao while pointing fingers in her face. Appx223-227. OSC was also provided with evidence that Dr. Tao reported this harassment to Dr. Hartronft. Appx221-222. As noted, Complainant's direct supervisor, Dr. Irene Marshall, was present at the meeting but did not intervene. Appx179, Appx223-227.

Disclosure B to the Form 11 is that Dr. Tao "wrote a letter to Senator Dianne Feinstein to report the abuse of authority, harassment and hostile work environment that [Petitioner] was undergoing by not only Dr. Yusuf Dawoodbhai but also from the

[1] Though Dr. Dawoodbhai is described as the Acting Chief of Pharmacy, his actual position is a point of contention and discussed herein.

other VA senior management officials (Dr. Hartronft and Human Resources)." Appx213, Appx231-234.

The letter was escalated to the Secretary of the Department of Veterans Affairs and then sent to Veterans Integrated Service Leadership ("VISN") and leadership officials within the Veterans Affairs Greater Los Angeles Healthcare System ("VAGLAHCS"). Appx179.

In addition to discussing the May 16 meeting, Dr. Tao raised more concerns about Dr. Dawoodbhai's treatment of herself and other employees, as well as concerns of Dr. Hartronft abusing his authority to favor Dr. Dawoodbhai. Appx231-233.

Dr. Dawoodbhai was a formulary program manager at the Portland VA Medical Center. After Dr. Jeffrey Sayers was removed as the Chief of Pharmacy—a removal that has since been reversed by this Court (docket number 18-2195)—Dr. Irene Marshall was temporarily promoted from Associate Chief to Acting Chief, but later replaced by Dr. Dawoodbhai. As a GS-13 Formulary Program Manager, Dr. Dawoodbhai was unqualified for the Chief of Pharmacy position and was unable to meet the boarding requirements for the position. Appx342:15-19 ("So the way it works is that, um, when I came on board, um, they had sent my boarding to the national boarding per a -- uh, for a GS-15, but I didn't qualify for a GS-15 position. So, um, I was made an associate chief, which is a GS-14."). As he could not be hired as a GS-15 Chief of Pharmacy, on paper Dr. Dawoodbhai was temporarily promoted to be the Acting Associate Chief, and then using the logic that an Associate Chief of Pharmacy

could temporarily fill in as Acting Chief of Pharmacy during a vacancy, was made the Acting Chief of Pharmacy. Appx343:1-8 (I was an acting associate chief, um, that allowed, um -- so as I -- when I came on board as an associate chief and there wasn't -- they weren't able to get someone in that role, I was the acting chief of pharmacy. So if you get into an associate chief position as a GS-14 and there isn't someone that's assigned as a chief of pharmacy, then you would be an acting chief while they are trying to find someone."). This first required that additional Associate Chief positions be created, as there was previously a single Associate Chief on the approved organization chart. None of the pharmacy employees, including Dr. Marshall, were informed or aware that Dr. Dawoodbhai was temporarily promoted to an Acting Associate Chief of Pharmacy position; in effect, the Agency completely circumvented the Boarding requirements for the Chief of Pharmacy position and nobody was made aware that the Acting Chief was never boarded.

Though Dr. Tao was ignorant to the extent of the illegal hiring practice at that time, specifically she was unaware that Dr. Dawoodbhai was hired on paper as an Acting Associate Chief of Pharmacy as a frivolously unlawful attempt to circumvent boarding requirements for the Chief position, she nonetheless was aware that Dr. Dawoodbhai was unqualified and brought this to the attention of Senator Feinstein. She wrote, "Dr. Dawoodbhai may not meet the qualifications to hold this position" and emphasized that he was previously a GS-13 manager that lacked any prior Chief of Pharmacy or Associate Chief of Pharmacy experience. Appx233.

Also explained in the letter to Senator Feinstein is that, after Dr. Hartronft brought in Dr. Dawoodbhai as the Acting Chief of Pharmacy, he also brought in Dr. Dawoodbhai' s spouse on a temporary detail to a position within VAGLAHCS human resourced and further temporarily promoted her to a supervisory position as the Human Resources Supervisory Staffing Specialist. Appx233. Dr. Tao presented concerns over the conflict of interest and that leadership accommodated Dr. Dawoodbhai "by hiring his wife also to a supervisory job at VAGLAHCS." Appx233.

Disclosure C involves Complainant raising the same concerns present in Disclosure B to the newly formed Office of Accountability and Whistleblower Protection. Appx213. This also included notice to the Agency of her disclosure to OSC, DI-18-0706. Appx244

Dr. Tao's Disclosure D explains that she submitted an Unfair Labor Practice claim on August 15, 2017. Appx213. The Agency issued a detail memorandum to appellant designating her as a Staff Pharmacist; at which point, she no longer performed manager duties. Appx248, Appx323-325. After Dr. Tao attempted to claim Union rights based on this classification, Dr. Dawoodbhai issued an amended detail letter the following day stating that Appellant would remain as a Pharmacy Manager, which was on paper only as Dr. Tao was restricted to staff pharmacy duties. Appx324. It was ultimately determined that the Agency violated the 5 U.S.C. § 7116 (a). *See* Appx248 (Agency Human resources informing management that Dr. Tao is now considered a

bargaining unit employee and copying an official from the Federal Labor Relations authority).

Following Dr. Tao's Form 11 filing, Dr. Tao and her counsel continued to inform the assigned OSC attorney, Mr. Brian Critz, of additional disclosures. Dr. Tao copied Mr. Critz on an email to Congressman Ted Lieu's office explaining she believed her proposed termination was retaliation for protected activity with the EEOC, OSC, MSPB, OAWP, Congress, and in state court. Appx245-246.

On June 20, 2018, Dr. Tao copied Mr. Critz on an email chain to Ms. Ahnya Slaughter, who led the Administrative Investigation Board ("AIB") into allegations Dr. Tao and others brought against Dr. Dawoodbhai. Appx256-257. As stated in the email, Appellant raised concerns that other individuals who provided testimony as part of the AIB's investigation experienced retaliation. Appx.257.

On June 26, 2018, Appellant forwarded an email chain to Mr. Critz and others explaining that leadership failed to complete a required delegation of authority to inform members of the pharmacy service of the identity of the Chief of Pharmacy, or Acting Chief of Pharmacy, after Dr. Dawoodbhai's detail was terminated. Appx259. As seen in the email chain, Dr. Dawoodbhai announced his departure on June 1, 2018, but neither Appellant nor any other staff were informed that Dr. Frank Evans, a VISN executive, assumed the role of Acting Chief, which he performed remotely and in addition to his normal VISN duties. Appx259-260. Dr. Tao explains to Mr. Critz that this failure to complete a delegation of authority violated VA Directive 0000 and 38

C.F.R. Part 2. Appx258. It is specifically noted that a Veteran requested to speak with the Chief of Pharmacy and Dr. Tao was unable to direct the Veteran to the appropriate official. Appx259.

On June 26, 2018, Appellant disclosed to multiple OSC attorneys, including Mr. Critz, that the Agency was attempting to quietly rectify past issues that whistleblowers had recently brought to light, specifically that certain employees had allowed their license to expire. Appx261. Though it is obviously preferred that the Agency take corrective action when such issues are brought to light, it shows that leadership routinely corrects major violations without disciplinary action, which lays in stark contrast to how they treated Dr. Tao and other whistleblowers. Further, Dr. Tao explains that Ms. Luevano, who is the Administrative Officer for the Pharmacy Service, was removed from the email list as retaliation for whistleblower reprisal. Appx261.

Prior to July 24, 2018, Appellant had advanced her OSC prohibited personnel practices complaint *pro se*. On July 24, 2018, Mr. Critz issued an adverse preliminary determination. Appx269. The preliminary determination specifically acknowledged much of the protected activity discussed above, but also that

> [Petitioner] participated in Ms. Luevano's equal employment opportunity (EEO) complaint against Dr. Dawoodbhai and Dr. Irene Marshall [prior to June 20, 2017][;] . . . [Petitioner filed] an EEO claim on or about July 13, 2017; . . . [Petitioner filed] a grievance on or about November 9, 2017[;] . . . [Petitioner] offered a statement to the [Board] in support of Dr. Jeffrey Sayers on or about February 5, 2018[;] . . . [and] [Petitioner] participated in an administrative investigation (AIB) against Dr. Dawoodbhai in May 2018.

Appx269-270. As outlined in the preliminary determination letter, OSC was informed of several proffered retaliatory actions, including that,

> [T]he Agency proposed to suspend [Petitioner] on June 5, 2017 . . . [and] [t]he suspension became final in July 2017[;] . . . [o]n or about July 24, 2017, the Agency detailed [Petitioner] . . . pending a fact-finding "into [Petitioner's] performance and conduct issues"[;] [t]he Agency extended [Petitioner's] detail in October 2017[;] . . . [and] [o]n February 16, 2018, the Agency proposed to remove [Petitioner].

Appx270

In the letter dated August 6, 2018, Complainant's representative responded to the preliminary determination letter. Appx274-275. Based on the content of the preliminary determination, Complainant's representative emphasized and listed protected activity that took place outside of the EEO process. Appx274. This included that,

> (i) On November 20, 2017, Director Brown, Dr. Dawoodbhai, Dr. Marshall, and Dr. Hartronft were made aware that Dr. Tao had a pending OSC claim [Appx276] (ii) Dr. Tao prepared a witness affidavit that was used by another employee in his response to a proposed removal on or about January 3, 2018 [Appx277]; (iii) Dr. Tao provided . . . multiple emails in support of another employee for his MSPB hearing on or about February 6, 2018, these emails were included in the evidence file and evidence was specifically attributed to Dr. Tao at hearing in the presence of Director Brown, Dr. Evans, Dr. Hartronft, Yusuf Dawoodbhai, and Irene Marshall on or about February 14, 2018 [Appx278]; (iv) Dr. Tao provided testimony that was served upon Yusuf Dawoodbhai in the state court action *Luevano v. Dawoodbhai*, which was filed on or about March 7, 2018.

Appx274 (references to exhibits updated to reflect pagination in the appendix). The letter further detailed how the Agency unlawfully extended Complainant's detail, which is still extended to date, and provided specific examples of disparate treatment. Appx274-275. In the Petitioner's submission on jurisdiction, the Administrative Judge was encouraged to read this response in its entirety as it is highly relevant to the discussion of jurisdiction. Appx185-186.

On September 21, 2018, Dr. Tao copied Mr. Critz on an email where she disclosed a breach of her own Personally Identifying Information ("PII"), as well as the PII of other employees, in violation of the Privacy Act. Appx305. This email was sent to the Privacy Officer, but leadership officials including Director Ann Brown, Dr. Hartronft, Dr. Evans, and others, were copied. Appx304-305. The Agency later substantiated the disclosure and found there was a "policy violation" when Dr. Tao's full social security number, name, and signature was sent in an unencrypted email message to management, with private email accounts copied. Appx354.

On July 31, 2028, the AIB completed their investigation into conduct unbecoming by Dr. Dawoodbhai. Appx328. The allegation of conduct unbecoming was substantiated based on three bullet points. Appx335-336. Though the report that Petitioner obtained is through a Freedom of Information Act Request so it is limited by redactions and non-availability of testimonies, it is clear that the first bullet point is that Dr. Dawoodbhai pointed his fingers in Dr. Tao's face during the May 16, 2017, meeting. Appx235. It was found that this violated VA ICARE Core Values as it

constituted communication in a manner that "convey[ed] or impl[ied] threat, coercion, intimidation, harassment, slander, defamation , disrespect, or other abuse." Appx336. Upon information and belief, the third bullet point relates to the affidavit of Ms. Luevano that was also signed by another witness to the meeting, which explains that Dr. Dawoodbai questioned her about filing an EEO complaint.

On October 11, 2018, Mr. Critz issued a final determination letter. Appx318. In his letter, Mr. Critz provided an extremely condensed overview of what was reported to OSC, including that,

> In [Petitioner's] complaint, [Petitioner] alleged that the Agency retaliated against [Petitioner] for [Petitioner's] protected disclosures and/or activities. [Petitioner] reported that [Petitioner] disclosed in June 2017 that the Chief of Pharmacy, then serving on a detail to GLAHS, subjected [Petitioner] to a hostile workplace. [Petitioner] further reported that [Petitioner] filed, or participated in, complaints to Congress, [EEO] claims, unfair labor practices claims, Agency grievances, appeals to the [Board], and complaints in other venues. In retaliation for [Petitioner's] disclosures and/or protected activities, [Petitioner] alleged that the Agency: (i) suspended [Petitioner] in July 2017; (ii) detailed [Petitioner] pending a fact-finding in July 2017; and (iii) proposed to remove [Petitioner] from Federal service in February 2018. We previously considered [Petitioner's] complaint under 5 U.S.C. § 2302(b)(8), (b)(9), and (b)(12).

Appx318. Complainant's representative raised certain issues with OSC's determination in a responsive email. Appx315-317. Dr. Tao was presented with an Individual Right of Action letter. Appx320-321.

III. The Board Decision.

Administrative Judge Kang explained that, to prove jurisdiction, Dr. Tao must exhaust administrative remedies through OSC, make nonfrivolous allegations that she engaged in whistleblowing activity by making a protected disclosure, and demonstrate that the disclosure was a contributing factor in the Agency's decision to take or fail to take a personnel action. Appx3 (citation omitted).

Though Administrative Judge Kang was not specific as to what disclosures and activity had been discussed with OSC, he made no adverse finding on the exhaustion requirement and did not address the Agency's exhaustion argument. Appx379.

AJ Kang held that Dr. Tao did not raise a disclosure and therefore does not address whether such disclosures contributed to the Agency taking or failing to take a personnel action. Appx29.

The focus of the Board's analysis was whether the purported disclosures were legally sufficient. Appx6-8. The Administrative Judge listed seven purported disclosures, which were then analyzed. The list is as follows:

> 1. On June 20, 2017, she "concurred" with Administrative Officer Elizabeth Luevano's June 20, 2017 email to Chief of Staff Scotte Hartronft and Human Resources (HR) "Officials" conveying that acting Chief of Pharmacy Yusef Dawoodbhai abused his authority by engaging in unspecified "inappropriate abusive treatment" as set forth in the referenced email. While not set forth within the specified June 20, 2017 email cited as the first disclosure, the appellant informed OSC that Dawoodbhai

yelled at her, pointed his fingers, threatened discipline, and improperly called her a senior manager.[;] [2]

2. June 26, 2017, she wrote a letter to a U.S. Senator complaining that Dawoodbhai, Hartronft, and HR officials were acting improperly towards her, improperly detailing Dawoodbhai without competition, improperly detailing Dawoodbhai's spouse to a supervisory HR position creating an "improper alliance between the two services" as set forth in the record;

3. July 13, 2017, she informed the agency's Office of Accountability and Whistleblower Protection that Dawoodbhai and Hartronft were improperly disciplining and otherwise taking action against employees that management had not previously addressed;

4. August 15, 2017, she disclosed to the Federal Labor Relations Authority (FLRA), through a claim of unfair labor practice (ULP), that the agency improperly "stated that I was a "manager" through an "amended detail letter" even though she has been detailed to a staff pharmacist position, away from her manager position "in order that I cannot seek Union assistance" as set forth in the record;

5. November 13, 2017, she informed the OSC Disclosure Unit that Dawoodbhai was improperly disciplining employees;

6. January 6, 2018, she testified in support of Luevano's request for a restraining order against Dawoodbhai arising from Luevano's equal employment

[2] While technically the information was not set forth within the email, the email includes Dr. Hartronft's request for Reports of Contact ("ROC") describing the meeting and Dr. Tao's response stating they will be provided on June 26, 2017. Appx221. The provided reports are included in the same exhibit immediately following the email. Appx223-227. It was specifically alleged in the Declaration of Attorney by James Solomon that the Report of Contact was provided to Dr. Hartronft. Appx178.

> opportunity (EEO) claim of sexual harassment, in a local court proceeding; and[3]
>
> 7. February 5 and 21, 2018, she disclosed to a Board administrative judge that management was improperly disciplining employees.[4]

Appx2-3 (citations to the record omitted).

It was held that the above disclosures (6) and (7) did not "involve[] a protected whistleblowing disclosure." Appx6. It was further held that disclosures (1) through (5) did not evidence a violation of law, rule, or regulation, gross mismanagement, a substantial or specific danger to public health, or a gross waste of funds. Appx6-8.

ARGUMENT

I. Summary of the Argument

Both the Agency and Administrative Judge focus solely on 5 U.S.C. § 2302 (b)(8) as a basis for jurisdiction. The Administrative Judge rejected jurisdiction for certain claims that were presented as evidence of protected activity under section 2302(b)(9)(A)(i), (B), (C), or (D) by analyzing such activity in the context of a (b)(8) activity. The Agency similarly makes arguments that certain alleged activity should be discounted because it pertains to section 2302(b)(9) rather than (b)(8).

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[3] The action raised in the California courts did not arise from the EEO claim, but did arise from the sexual harassment that separately gave rise to the EEO claim.

[4] Dr. Tao provided emails to Dr. Sayers to be used as an exhibit in his Board appeal; the email provided information that tended to exonerate Dr. Sayers of one of the Agency's specifications to his removal. Appx278. It was introduced and discussed on or about February 21, 2018, in the presence of leadership including Director Brown, Dr. Hartronft, Dr. Dawoodbhai, and Dr. Marshall. Despite minor misspellings of her name in the transcript, the emails were clearly and specifically attributed to Dr. Tao. *See, e.g.,* Appx2541, Appx2686.

This approach predates that Whistleblower Protection Enhancement Act of 2012, which changed the Board's jurisdiction over Individual Right of Action appeals to include reprisal for protected activity under section 2302(b)(9)(A)(i), (B), (C), and (D).

In addition to failing to properly consider (b)(9) activity, the Administrative Judge fails to consider protected (b)(8) and (b)(9) activity that was raised in the Petitioner's submission on jurisdiction. Finally, the Administrative Judge fails to consider certain disclosures as violations of law, rule, or regulation where there is a clear violation of a statute and/or Agency policy.

II. Dr. Tao Exhausted Administrative Remedies.

Though it appears undisputed that Dr. Tao exhausted her administrative remedies through the Office of Special Counsel, the Agency raised an exhaustion argument that was not in the decision. The Agency argued that Appellant had not exhausted administrative remedies as to the proposed removal because the Agency's newly formed Office of Accountability and Whistleblower Protection stayed the action pending investigation into Dr. Tao's disclosures. Appx379. This argument plainly fails as the exhaustion requirement is provided by statute and specific to exhaustion through the Special Counsel, and not expansive to other administrative remedies available through the Office of Accountability and Whistleblower Protection. See 5 U.S.C. § 1214 ("Except in a case in which an employee . . . has the right to appeal directly to the . . . Board, . . . any such employee . . . shall seek corrective action from the Special

Counsel before seeking corrective action from the Board."); see, e.g., Briley v. Nat'l Archives & Records Admin., 236 F.3d 1373, 1377 (Fed. Cir. 2001). It appears uncontested that Dr. Tao satisfied the requirement to exhaust the administrative remedies available through the Office of Special Counsel.

III. The Board Decision Fails to Address All Disclosures and Protected Activities Raised.

The Board's decision mischaracterizes several protected activities as disclosures. The Decision also fails to address several disclosures and/or occurrences of protected activity. Continuing from the numbering provided by the Board, these disclosures and activities (herein referenced as "actions") are as follows:

8. Dr. Tao disclosed Dr. Dawoodbhai was unqualified for the Chief of Pharmacy position;

9. Dr. Tao disclosed concerns of nepotism and abuse of authority regarding the detail of Dr. Dawoodbhai' s spouse;

10. Dr. Tao's formal and informal EEO activity, including contacting the Agency's EEO counselor on two separate occasions, filing a formal complaint, requesting a hearing, and continuing to engage in the EEO process;

11. Dr. Tao's protected activity of submitting and pursuing both a disclosure and a prohibited personnel practices complaint to the Office of Special Counsel, as well as copying OSC attorneys onto certain Agency emails;

12. Dr. Tao's submission of disclosures to the Agency's Office of Accountability and Whistleblower Protection;

13. Dr. Tao's participation in an Administrative Investigation Board into conduct unbecoming and other charges for Dr. Dawoodbhai;

14. Dr. Tao's disclosure that the Agency failed to complete a delegation of authority after Dr. Dawoodbhai was relieved of the position and the identity of the new Acting Chief of Pharmacy was unknown to pharmacy employees.

15. Dr. Tao's email to Ms. Ahnya Slaughter alleging that individuals who participated in the Administrative Investigation Board were retaliated against for their participation;

16. Dr. Tao's email to the Privacy Officer disclosing a breach of her own PII, as well as the PII of other employees, in violation of the Privacy Act;

IV. Dr. Tao Engaged in Protected (b)(9) Activity.

In addition to disclosures protected by 5 U.S.C. section 2302 (b)(8), an employee may bring an IRA appeal and seek corrective action by the Board for violations of section 2302(b)(9)(A)(i), (B), (C), or (D). 5 U.S.C. § 1221 (a).

In their response regarding jurisdiction, the Agency apparently argues that certain of Complainant's alleged activities are not protected because they fall under (b)(9), not (b)(8). Appx381. This appears that the Agency is mistakenly applying old jurisdictional standards that have since been changed by statute.

An agency violates (b)(9) when they "take or fail to take, or threaten to take or fail to take, any personnel action against any employee . . . because of" the exercise of specified protected activity. 5 U.S.C. § 2302 (b)(9). Included in these protections are the exercise of "any appeal, complaint, or grievance right granted by any law, rule, or regulation" that relates to remedying a violation section 2302 (b)(8), or "testifying for or otherwise lawfully assisting any individual in the exercise of" any appeal, complaint, or grievance right regardless of whether it regards remedying a violation of section 2302 (b)(8). 5 U.S.C. § 2302 (b)(9)(A)(i), (B).

It is also protected to "cooperat[e] with or disclos[e] information to . . . any . . . component responsible for internal investigation or review[] of an agency, or the Special Counsel[.]" 5 U.S.C. § 2302 (b)(9)(C). In fact, Dr. Tao would be protected even if she is merely perceived as engaging in such activity. *Corthell v. Department of Homeland Security*, 123 M.S.P.R. 417 (2016).

In a straightforward application of section 2302 (b)(9)(C), what the administrative judge styled as "disclosure" (5) is clearly protected activity as it is the disclosure of information to the Special Counsel. This also applies to the newly introduced protected activity labeled action (11). It is also clear that the Agency's Office of Accountability and Whistleblower Protection, the Agency's Administrative Investigation Board, and the Agency's privacy office, constitute any "component responsible for internal investigation or review[] of an agency," and therefore actions (3), (12), (13), (15) and (16) are all plainly protected activity. Action (16) also relates to

a clear disclosure that the Agency had violated the privacy act when they sent Dr. Tao's social security number over unencrypted email and copied personal email accounts, which was substantiated by the privacy office. Appx354. As this clearly violates a law, it is also a disclosure under section 2302 (b)(8).

Section 2302 (b)(9)(B) is similarly straightforward. Actions (6) and (7) involve Dr. Tao's lawful assistance to others in state court proceedings and a Board appeal and are therefore protected.

With regards to section 2302 (b)(9)(A)(i), jurisdiction is limited to such appeals, complaints, and grievances to the extent they seek to remedy a violation of section 2302 (b)(8). Therefore, the activity must relate to remedying a personnel action taken following disclosures of law, rule, regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302 (b)(8).

Considering action (4), Dr. Tao prevailed in a grievance that the Agency committed an unfair labor practice, *i.e.* a violation of 5 U.S.C. § 7116 (a). Therefore, action (4) can be considered both a disclosure, as Dr. Tao first alleges the violation of a law, and protected activity, as Dr. Tao then exercised a grievance right to remedy the violation of law.

Considering action (10), Dr. Tao's EEO second EEO action, EEOC No. 480-2018-00405X, was initiated on or About July 13, 2017, and is presently pending before the Commission's Administrative Judge. As the action is still pending before the

Commission, there are additional confidentiality and privacy considerations. However, the claims as characterized by the Agency in their Notice of Acceptance allege violations of the Civil Rights Act of 1964, as amended. Therefore, this is also a complaint to remedy a violation of law, rule, or regulation and protected under section 2302 (b)(9)(A)(i).

V. Dr. Tao Engaged in Protected (b)(8) Activity.

As explained in the Board's decision, in order to advance a section (b)(8) disclosure, it is required only that the Petitioner disclosed information she "reasonably believed . . . 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." Appx5. "To establish that . . . she had a reasonable belief that a disclosure met the criteria . . ., the [petitioner] 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). Appx5 (*citing* Juffer v. U.S. Information Agency, 80 M.S.P.R. 81, ¶ 10 (1998)).

For the purpose of protected disclosures, the words "rule or regulation" extends to agency policy statements. *See, e.g., Russell v. Dept. of Justice*, 68 MSPR 337, 345 (1995).

Note that, despite constituting protected (b)(8) disclosures, actions (4) and (16) are discussed above in the context of (b)(9) protected activity.

Action (2), as framed by the Administrative Judge, is an incomplete characterization of Dr. Tao's disclosure. As written, it covers allegations that, Hartronft "detail[ed] Dawoodbhai without competition, [and] improperly detail[ed] Dawoodbhai's spouse to a supervisory HR position creating an 'improper alliance between the two services'". Appx2. This omits or vaguely touches on actions (8) and (9), which are that Dawoodbhai was unqualified for the position and allegations of nepotism. Nepotism, which includes a public official advocating for the employment of a relative, is illegal. 5 U.S.C. § 3110; *see also,* 5 U.S.C. § 2302 (b)(7).

Ultimately, Dr. Hartronft created a new human resources position that fell within the purview of the office of the Chief of Staff, when all other Human Resources employees were separately organized in the organizations approved chart, then detailed Dr. Dawoodbhai's pregnant wife into the local Human Resources. Dr. Tao, any virtually any third party apprised of this allegation, would reach the reasonable conclusion that Dr. Dawoodbhai either directly requested this detail or that Dr. Hartronft acted alone and abused his authority to create this position as a favor for a preferred employee. If this were indeed nepotism, it would constitute both a violation of law and abuse of authority. Under the less likely alternative theory presented above that Dr. Hartronft acted without first receiving a request from Dr. Dawoodbhai, then this would still constitute an abuse of authority.

Regarding Dr. Dawoodbhai's qualifications, the Agency clearly violated Department rules. VA Directive 5005 Appendix G15 provides specific requirements

for a GS-15 Service Chief. For example, in order to have qualified, it is required that Dr. Dawoodbhai first have "1 year of experience equivalent to the next lower grade level", *i.e.* GS-14. Appendix G15 (3)(b)(5)(a). Even accepting the Agency's ridiculous workaround, in which they temporarily promoted Dr. Dawoodbhai to an Acting Associate Chief on Paper, which was unknown to all pharmacy employees including the actual Associate Chief, then they run into a separate issue.

Specifically, there was no competitive announcement for the temporary promotion to Acting Associate Chief, which was ultimately in excess of one year. VA Handbook 5005 Part III, Chapter 2, paragraph 13(c)(2) states that, "If a detail of more than 120 days is made to a higher graded position, or to a position with known promotion potential, it must be made under competitive promotion procedures." Dawoodbhai was the only one to apply for the GS-15 Chief position, primarily because the plethora of interested GS-13 applicants were aware that they did not meet the stated qualifications, but that did not prevent Dawoodbhai's application. Instead of reposting for a temporary promotion to an Associate Chief, which GS-13 applicants could apply for, Hartronft temporarily promoted Dawoodbhai non-competitively, violating the VA rules and Merit Systems Principles. Further, to the extent Dr. Dawoodbhai was able to apply for a GS-15 service without requisite experience as a GS-14 for one year while no other GS-13 employees were similarly able to apply, Hartronft illegally "grant[ed] [a] preference or advantage . . . for the purpose of improving . . . the prospects of [a] particular person for employment". 5 U.S.C. § 2302 (b)(6).

The length of Dawoodbhai's detail of over a year also violates VA rules, as a temporary detail may be extended to a maximum of 240 days. VA Handbook 5005 Part III, Ch. 2, ¶13(c)(2).

Regarding a gross waste of funds, the Agency paid for Dr. Dawoodbhai's temporary promotion as a GS-15 from when he began on or about April 2017 until at least approximately October or November 2017, potentially as late as his departure date on or about June 8, 2018. Further, Dr. Dawoodbhai was paid for travel and lodging in Los Angeles for the entirety of his temporary promotion, which was far in excess of a year. Though Dr. Tao does not have access to the details, it is reasonable to estimate that the travel and lodging alone exceeded $25,000, which the Agency would not have had to spend if it announced the position competitively and provided the temporary promotion to any of the interested applicants within the Greater Los Angeles area.

Action (14) relates to Dr. Tao's disclosure that the Agency failed to complete a delegation of authority after Dr. Dawoodbhai was relieved of the position and the identity of the new Acting Chief of Pharmacy was unknown to pharmacy employees. As previously explained, Dr. Tao expressed to Mr. Critz that this violated VA Directive 0000 and 38 C.F.R. Part 2. Appx258.

Action (15) relates to Dr. Tao's email to Ms. Ahnya Slaughter alleging that individuals who participated in the Administrative Investigation Board were retaliated against. It is unlawful to retaliate against an employee for their participation with the

AIB in their capacity as a "component responsible for internal investigation or review[] of an agency". 5 U.S.C. §2302 (b)(9)(C).

This leaves action (1), which is Dr. Tao's initial disclosure relating to Dr. Dawoodbhai's behavior during the May 16, 2017, meeting, as well as similar behavior on related occasions. As the Agency concluded in the AIB, "[p]er [Dawoodbhai's] own admission and testimony by others, [Dawoodbhai] did point his finger in [Tao's] face thereby violating the GLA Common Standards of Conduct and VA ICARE Core Values" which was one of the primary reasons supporting the Agency's conclusion that Dr. Dawoodbhai engaged in conduct unbecoming an Acting Chief of Pharmacy. Appx335. By the Agency's own determination, Dr. Tao disclosed conduct constituting a violation of VA rules.

VI. Dr. Tao's Protected (b)(8) and (b)(9) Activity Contributed to Personnel Actions.

All that is necessary to satisfy the threshold jurisdiction relating to whether the protected activity contributed to a personnel action in an IRA appeal is for an employee to make a nonfrivolous allegation that "the '[responsible management officials] *knew* of the disclosure' and that the adverse action 'was initiated *within a reasonable time* of that disclosure.'" *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 912 (Fed. Cir. 2008) (emphasis added) (quoting *Reid v. Merit Sys. Prot. Bd.*, 508 F.3d 674, 678 (Fed. Cir. 2007)).

It appears undisputed that the various responsible management officials knew of Dr. Tao's protected activities prior to the relevant personnel actions, and that the

relevant personnel actions, especially the proposed removal, took place within a reasonable time after the protected activity. The Agency did not raise any arguments relating to timing and knowledge in either of their jurisdictional responses, the Administrative Judge did not rule on this question in his decision, and the great weight of evidence, as summarized in the Declaration of Attorney by James Solomon, makes it clear that further discussion of this issue is unnecessary.

As described by the Administrative Judge, the personnel actions were "a proposed adverse action; low performance appraisal and/or award related decision; and a significant change in duties." Appx2. Though only a few of Dr. Tao's protected activities predated the earlier suspension, any argument regarding jurisdiction over the suspension is unnecessary as the suspension falls within the purview of Dr. Tao's pending EEO matter.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Board's decision that it lacked jurisdiction over Dr. Tao IRA appeal and remand her case for hearing, as well as award Dr. Tao any and all monetary or other damages, including attorney's fees, as deemed just and equitable by this Court.

Respectfully submitted,

/s/ James Solomon

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Federal Circuit Rule 38(a). The brief contains 6,924 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure. The brief has been prepared in a 14-point proportional Garamond typeface using Microsoft Word Office 365.

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