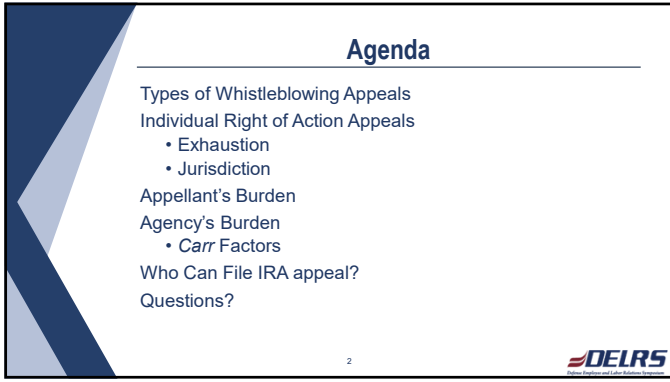
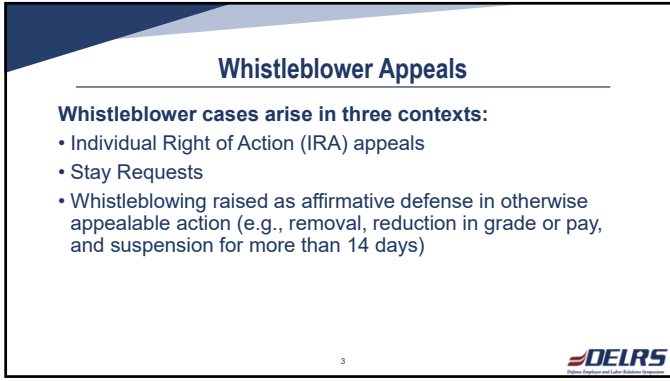


1



2



3

IRA Appeals


The threshold questions are:

(1) Did appellant exhaust administrative remedies with Office of Special Counsel (OSC)?

(2) Does the U.S. Merit System Protection Board (MSPB or Board) have jurisdiction over the matters raised?

MSPB Administrative Judge (AJ) may not assume jurisdiction to dispose of whistleblower issues based on the merits.

- *Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (2000).
- Compare *Kahn v. Department of Justice*, 618 F.3d 1306 (2010) with *Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263 (2011).



4


Exhaustion

Appellant must exhaust administrative remedies with OSC before seeking corrective action from MSPB.

- *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992).

MSPB's jurisdiction is limited to issues appellant raised before OSC.

- *Mintzmyer v. Department of the Interior*, 84 F.3d 419, 422 (Fed. Cir. 1996).
- *Chambers v. Department of Homeland Security*, 2022 MSPB 8.




5

Exhaustion

Appellant must inform OSC of precise ground of charge of whistleblowing. They must give OSC sufficient basis to pursue an investigation which might have led to corrective action. See *Knollenberg v. MSPB*, 953 F.2d 623, 626 (Fed. Cir. 1992).

- *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993).
- *Delgado v. Merit Systems Protection Board*, 880 F.3d 913, 921 (7th Cir. 2018).
- *Thomas v. Department of the Treasury*, 77 M.S.P.R. 224, 236-37 (1998).
- *Bloom v. Department of the Army*, 101 M.S.P.R. 79, ¶ 10 (2006), *aff'd*, 245 F. App'x 953 (Fed. Cir. 2007).




6

Affirmative Defense

Whistleblower Retaliation may be used as an affirmative defense for otherwise appealable actions under 5 U.S.C. § 7512.

Eliminates the requirement for exhaustion with OSC and jurisdictional question (proceeds directly to preponderant evidence standard).

- *Whitmore v. Department of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012).
- *Robinson v. Department of Veterans Affairs*, 923 F.3d 1004 (Fed. Cir. 2019).
- *Chambers v. Department of the Interior*, 116 M.S.P.R. 17 (2011).
- *Kaszowski v. Department of the Air Force*, 2023 MSPB 15.




7

IRA Jurisdiction

Appellant must make nonfrivolous allegations supported by affidavits or evidence of fact, which, if proven, show elements that appellant:

- Made a protected disclosure under 5 U.S.C. § 2302(b)(8) or engaged in protected activities under 5 U.S.C. § 2302(b)(9) AND
- Whistleblowing was a contributing factor in 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).
- *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002).




8

Nonfrivolous Allegation

A nonfrivolous allegation of fact is one that if proven would show that appellant made a protected disclosure.

- *Woodworth v. Department of the Navy*, 105 M.S.P.R. 456, ¶ 14 (2007).
- *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶¶ 18-19 (2010).
- *Rice v. Department of Agriculture*, 97 M.S.P.R. 501, ¶ 9 (2004); *but see Ryan v. Department of the Air Force*, 117 M.S.P.R. 362 (2012) and *Mason v. DHS*, 116 M.S.P.R. 135 (2011).
- *Chambers v. Department of Homeland Security*, 2022 MSPB 8.
- *Hessami v. MSPB*, 979 F.3d 1362, 1368-69 (Fed. Cir. 2020): In determining if an appellant met the nonfrivolous pleading standard, we look at her allegations rather than the agency's contrary evidence or "interpretation of the evidence."




9

Protected Disclosure

5 U.S.C. § 2302(b)(8): For disclosure to be protected, appellant must have had a *reasonable belief* that disclosure evidenced a:

- violation of any law, rule, or regulation
- gross mismanagement
- gross waste of funds
- abuse of authority
- substantial and specific danger to public health or safety



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Protected Disclosure

Rainey v. Department of State, 122 M.S.P.R. 592 (2015), *aff'd*, 824 F.3d 1359 (Fed. Cir. 2016).

- violation of any law, rule, or regulation

Swanson v. General Services Administration, 110 M.S.P.R. 278 (2008).

- gross mismanagement

Boechler v. Department of the Interior, 109 M.S.P.R. 542 (2008).


- gross waste of funds

Pasley v. Department of Treasury, 109 M.S.P.R. 105 (2008).

- abuse of authority

Chambers v. Department of the Interior, 116 M.S.P.R. 17 (2011).

- substantial and specific danger to public health or safety




11

Reasonable Belief

Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant reasonably conclude that the information disclosed evidences one of the categories of wrongdoing set forth in 5 U.S.C. § 2302(b)(8)?


- *Lachance v. White*, 174 F.3d 1387 (Fed. Cir. 1999).
- *Edenfield v. Department of Veterans Affairs*, 54 F.4th 1357, 1361 (2022).



12

Reasonable Belief

- *Swinford v. Department of Transportation*, 107 M.S.P.R. 433, ¶ 8 (2007).
- *Drake v. Agency for Int'l Development*, 543 F.3d 1377 (Fed. Cir. 2008).
- *Johnson v. Department of Justice*, 104 M.S.P.R. 624 (2007) (alleged fight between employees).
- *Shope v. Department of the Navy*, 106 M.S.P.R. 590 (2007) (email to supervisor, "I don't want the \$500 [bonus]. Stick it where the sun doesn't shine.")
- *Hessami v. MSPB*, 979 F.3d 1362 (Fed. Cir. 2020) (policy disputes).
- *Nasuti v. Department of State*, 120 M.S.P.R. 588 (2014) (normal course of duties).
- *Salazar v. Department of Veterans Affairs*, 2022 MSPB 42.




13

5 U.S.C. § 2302(f)(1)

A disclosure shall not be excluded from subsection (b)(8) because—

- a) it was made to the wrongdoer;
- b) it revealed information previously disclosed or generally known;
- c) of the employee's motive for making the disclosure (see *Delgado v. Department of Justice*, 979 F.3d 550, 555 (7th Cir. 2020));
- d) it was not made in writing;
- e) it was made while employee was off duty;
- f) it was made before the date the employee was appointed or applied for appointment to position; or
- g) of the amount of time which has passed since the occurrence of the events described in the disclosure.




14

Protected Activity

5 U.S.C. § 2302(b)(9):

- A. The exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation
 - i. with regard to remedying a violation of paragraph (8);
 - ii. other than with regard to remedying a violation of paragraph (8).
- B. testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii).
- C. cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel or any other component responsible for internal investigation or review, in accordance with applicable provisions of law; or
- D. for refusing to obey an order that would require the individual to violate a law, rule, or regulation.



15

Protected Activity

5 U.S.C. § 2302(b)(9)(A)(i)


- *Bishop v. Department of Agriculture*, 2022 MSPB 28.
- *Edwards v. Department of Labor*, 2022 MSPB 9.
- *Gabel v. Department of Veterans Affairs*, 2023 MSPB 4.

5 U.S.C. § 2302(b)(9)(B)

- *Soto v. Department of Veterans Affairs*, 2022 MSPB 6.

5 U.S.C. § 2302(b)(9)(C)

- *Fisher v Department of the Interior*, 2023 MSPB 11.




16

Contributing Factor

Appellant need only raise nonfrivolous allegation that protected disclosure was one factor that tended to affect personnel action in any way.

Appellant may prove contributing factor by circumstantial evidence, such as, official taking action knew of disclosure and personnel action occurred within a period of time such that a reasonable person could conclude disclosure was a contributing factor in personnel action. 5 U.S.C. § 1221(e)(1).

- *Chambers v. Department of the Interior*, 116 M.S.P.R. 17 (2011).
- *Ingram v. Department of the Army*, 116 M.S.P.R. 525 (2011).
- *Perkins v. Department of Veterans Affairs*, 98 M.S.P.R. 250, ¶ 19 (2005).
- *Scott v. Department of Justice*, 69 M.S.P.R. 211 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996).
- *Cahill v. Merit Systems Protection Board*, 821 F.3d 1370 (Fed. Cir. 2016).
- *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135 (2011).




17

Knowledge Timing Test

Knowledge prong may be met by showing that official taking the personnel action had constructive knowledge of the disclosure.

For timing prong, relevant inquiry is time between when agency official taking action had actual or constructive knowledge of disclosure – not necessarily date of disclosure itself – and time that action was taken.

- *Caddell v. Department of Justice*, 57 M.S.P.R. 508 (1993).




18

Constructive Knowledge

Appellant need only make a nonfrivolous allegation that agency official who acted had constructive knowledge of disclosure.


- *Swinford v. Department of Transportation*, 107 M.S.P.R. 433, ¶ 9 (2007).
- *McCarthy v. Int'l Boundary and Water Comm: U.S. and Mexico*, 116 M.S.P.R. 594 (2011).
- *Cassidy v. Department of Justice*, 2012 MSPB 60.
- *Karnes v. Department of Justice*, 2023 MSPB 12.



19

Personnel Action – 5 U.S.C. § 2302(a)(2)(A)

<p>Covered Personnel Actions</p> <ul style="list-style-type: none"> • Appointment • Promotion • Detail, transfer, or reassignment • Performance evaluation • Leaving a vacancy unfilled • Creation of a hostile work environment • Significant change in duties • Decisions concerning pay • A threat of disciplinary action 	<p>Not a Personnel Action</p> <ul style="list-style-type: none"> • An agency investigation* • An agency's allegation that employee engaged in wrongdoing • Letter of counseling*
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20

Clear and Convincing Test

Carr Factors

- **Strength of evidence in support of its action**
- **Existence and strength of any motive to retaliate on part of agency officials involved in the action.**
- **Any evidence that agency takes actions against other individuals who are not whistleblowers but are similarly situated.**

- *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999).
- *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012).




21

Carr Factor 1

Strength of evidence in support of its action
Miller v. Department of Justice, 842 F.3d 1252 (Fed. Cir. 2016).
 • The Court reversed Board's determination that evidence was weak when the only evidence was conclusory testimony.

Soto v. Department of Veterans Affairs, 2022 MSPB 6.
 • Board disagreed with AJ's analysis because an employee's at-will status does not diminish an agency's burden of proof.

Robinson v. Department of Veterans Affairs, 923 F.3d 1004 (Fed. Cir. 2019).
 • Finding strong evidence supporting agency's decision because substantial evidence supports finding of appellant's negligence.




22

Carr Factor 1

Strength of evidence in support of its action
Parikh v. Department of Veterans Affairs, 116 M.S.P.R. 197 (2011).
 • Board found agency did not present sufficient evidence that appellant would have been removed in the absence of the protected disclosures.

Rickel v. Dep't of the Navy, 31 F.4th 1358 (Fed. Cir. 2022).
 • The court agreed with Board that there was strong evidence in support of its penalty.

Greenspan v. Department of Veterans Affairs, 464 F.3d 1297, 1303-05 (Fed. Cir. 2006).
 • The court found that strong evidence is not established if charges are anchored in the disclosures themselves.



23


Carr Factor 2

Existence and strength of any motive to retaliate on part of agency officials involved in the action.
Robinson v. Department of Veterans Affairs, 923 F.3d 1004 (Fed. Cir. 2019).
 • Finding evidence supporting AJ's finding that second Carr factor slightly favored agency.

Chambers v. Department of the Interior, 116 M.S.P.R. 17 (2011).
 • Finding evidence of retaliatory motive when appellant's disclosure was potentially embarrassing to agency.

Soto v. Department of Veterans Affairs., 2022 MSPB 6.
 • Finding AJ took too narrow approach because failed to address relevant record evidence.

Smith v. Department of Army, 2022 MSPB 4.
 • Board agreed with AJ that agency did not present legitimate reason for not selecting appellant for position.



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Carr Factor 2

Existence and strength of any motive to retaliate on part of agency officials involved in the action.

Pridgen v. Office of Management and Budget, 2022 MSPB 31.


- Found AJ improperly limited analysis of agency's motives to retaliate and should have considered whether disclosures reflect on their capacities as managers and employees, which may be sufficient to establish substantial retaliatory motive.

Miller v. Department of Justice, 842 F.3d 1252 (Fed. Cir. 2016).

- Finding Board's conclusion was reasonable, but Carr Factor 2 did not unflinchingly support agency.

Smith v. Department of Army, 2022 MSPB 4.

- Found that despite there being no direct implication of the selecting official, there was still some retaliatory motive against appellant for her disclosure.



25

Carr Factor 3

Any evidence that agency takes actions against other individuals who are not whistleblowers but are similarly situated.

Rickel v. Department of the Navy, 31 F.4th 1358 (Fed. Cir. 2022).

- When neither agency nor appellant presented evidence relevant to third Carr factor, appropriate to remove factor from consideration.

Siler v. EPA, 908 F.3d 1291 (2018).


- The court found agency did not compare appellant to similarly situated non-whistleblowers.

Miller v. Department of Justice, 842 F.3d 1252 (Fed. Cir. 2016).

- The court stated agency's failure to produce evidence may be "at the agency's peril" given advantage in accessing this type of evidence.

Whitmore v. Department of Labor, 680 F.3d 1353 (Fed. Cir. 2012).

- Finding agency must meet its clear and convincing evidence to show it would have imposed "exact same penalty" in the absence of protected disclosures.




26

Stay Requests

5 U.S.C. § 1221 authorizes Board to grant a stay of any personnel action that, *inter alia*, is allegedly taken, or proposed to be taken, in retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8) or (b)(9).

To establish entitlement to stay, appellant must show by preponderance of evidence that there is "substantial likelihood" that they will prevail on merits of claim that reprisal for protected disclosure was contributing factor in personnel action.

5 C.F.R. §§ 1209.9 and 1209.10



27

Stay Request Procedures


AJ must rule on stay request within 10 business days after receiving request.

- 5 C.F.R. § 1209.10(b).
- *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135 (2011).

MSPB requires appellants to simultaneously serve stay requests on agency.

- 5 C.F.R. § 1209.8(c)

Agencies must respond to stay requests promptly.



28


Who Can File IRA Appeal?

NAF Employees

- Ineligible to file IRA appeals with Board
- *DeGrella v. Department of Air Force*, 2022 MSPB 44.

Non-Federal Employees

- Appellants need not be applicants at time of disclosure or protected activity to potentially receive IRA appeal rights.
- *Abernathy v. Department of the Army*, 2022 MSPB 37.



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ANY QUESTIONS



30



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