

Paul Desaulniers v. U.S. Government Accountability Office

Docket No. 14-02

Date of Decision: December 1, 2014

Cite as: Desaulniers v. GAO, No. 14-02 (12/1/14)

Before: William E. Persina, Administrative Judge

Headnotes:

Discipline

Motion to Dismiss

Personnel Action/Adverse Action

Prohibited Personnel Practice

Reprisal/Retaliation

Timeliness of Complaint

Whistleblowing

DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

The Agency filed its Motion to Dismiss the Petition on July 28, 2014. The grounds for dismissal advanced by GAO were that: 1) Petitioner's prohibited personnel practice claim concerning his supervisor's request for a misconduct investigation of Petitioner was untimely filed; and 2) none of Petitioner's prohibited personnel practice claims state a claim on which relief can be granted. In this connection, GAO argues that Petitioner did not make disclosures that are protected under the Whistleblower Protection Enhancement Act (WPEA) (Pub.L. No. 112-199, §108a, 126 Stat. 1465 (2012)), and that the alleged retaliatory actions taken against Petitioner are not the kind of personnel actions that can constitute retaliation under the WPEA. Petitioner filed a Reply to GAO's Motion to Dismiss, and GAO filed a Sur-reply.

II. FACTUAL BACKGROUND

At all relevant times in this case, Petitioner was employed in the Forensic Audits and Investigation Service team (FAIS) of GAO. Pet. ¶4. In July 2012, GAO's Strategic Issues (SI) team requested the assistance of FAIS concerning proposed undercover work in connection with the Refund Anticipation Checks (RAC) engagement. RACs are direct deposits of tax refunds into temporary accounts established by a financial institution. They are offered to taxpayers by paid tax preparers or banks in connection with federal and state tax refunds. Pet. ¶¶50-51, 53. Petitioner was assigned to this engagement.

On July 26, 2012, Petitioner submitted his Investigative Plan (IP-1) to his immediate supervisor, Gary Bianchi, and to his second level supervisor, Wayne McElrath. Pet. ¶52. Under GAO Order 0130.1.5, "[t]he Chief Operating Officer or designee and the General Counsel must provide written authorization for ... FSI to engage in any undercover operation." GAO Order 0130.1.5, ¶6.b.1 (July 22, 2010). Further, such undercover investigative plans are required by

section 315 of the GAO Policy Manual to be reviewed and approved by an oversight board (FSI Board) composed of several management officials. Pet. ¶7.

At some point between July 26 and September 6, 2012, Mr. McElrath revised Petitioner's IP-1 and submitted the revision (IP-2) to his (Mr. McElrath's) supervisor, FAIS Managing Director Rick Hillman, and GAO Assistant General Counsel (AGC) Barbara Lewis for approval. Pet. ¶57. On September 7, 2012, Mr. McElrath directed Petitioner to begin work on the engagement without specifying whether he meant to proceed with IP-1 or IP-2. As of that date, Mr. McElrath still had not informed Petitioner that he had revised IP-1, which became plan IP-2. Pet. ¶¶60, 65. Petitioner therefore understood this directive to be in connection with IP-1. Pet. ¶14.

On Monday, September 10, 2012, Petitioner e-mailed Mr. McElrath (Disclosure 1), copying Ms. Lewis, and Messrs. Bianchi and Hillman, as well as members of the SI team, stating: "I just want to clarify, are you authorizing us to conduct the undercover work using an undercover identity prior to receiving formal approval of the Investigative/Operation Plan and contrary to FAIS policy?" Pet. ¶66. Mr. McElrath promptly sent a reply e-mail to Petitioner, stating "Yes! I have received authorization (formal approval) from Pat Dalton [GAO's Chief Operating Officer (COO)] with the concurrence of OGC that we can commence work on this engagement. A signed copy of this document is forthcoming." Pet. Ex. 2; Pet. ¶64. Mr. McElrath did not indicate in his e-mail whether he was referring to IP-1 or IP-2, nor did he even state that there was an IP-2. Pet. ¶68.

On September 11, 2012, Petitioner sent an e-mail to Mr. Bianchi and Ms. Lewis expressing his understanding that Mr. McElrath had instructed him to proceed with the undercover work on the RAC engagement without having obtained signed approval of an

investigative plan. Pet. ¶76. Petitioner also expressed his understanding that Mr. McElrath had agreed that the methodology described in IP-1 should be used to comply with data reliability requirements requested by SI since Petitioner was not aware that there was an IP-2. Finally, Petitioner requested authorization to proceed. *Id.* Not receiving a response to this e-mail, Petitioner began work on the RAC engagement pursuant to IP-1. Pet. ¶78.

On September 13, 2012, AGC Lewis held a meeting with Petitioner and Mr. McElrath to discuss the RAC engagement. Pet. ¶81. After the meeting Ms. Lewis made certain changes to the investigation plan and submitted the new plan (IP-3) to the FSI Board for approval. This new plan was approved in writing by the FSI Board members on September 13 and 14, 2012. Pet. ¶¶83-85. Petitioner completed his work on the RAC engagement on October 2, 2012. Pet. ¶19.

He was not shown a copy of IP-3 until October 15, 2012 when he met with Mr. Bianchi. Pet. ¶¶20, 92. Mr. Bianchi agreed that Petitioner should draft the Memorandum of Investigation (MOI) based on how work on the engagement was performed under IP-1. Petitioner submitted his MOI draft to Messrs. Bianchi and McElrath in November 2012. Until he read this draft, Mr. McElrath did not realize that Petitioner had proceeded with his work under IP-1. Pet. ¶¶93-95. Mr. McElrath asked Petitioner to revise the MOI to reflect changes that did not accurately state how the investigation was actually conducted. Pet. ¶95.

In November 2012, Mr. McElrath met with Tom Gilbert, then Analyst-in-Charge in SI for the RAC engagement. According to Mr. McElrath, Mr. Gilbert complained at this meeting about the lack of work Petitioner had done during the RAC engagement, that Petitioner had not safeguarded social security numbers used in the investigation, and that Petitioner had charged 18 days' worth of work to this engagement and GAO "had gotten nothing in return." Pet. ¶¶97-98. Petitioner claims that Mr. Gilbert never made these complaints. Pet. ¶¶99-100.

On November 29, 2012, Mr. McElrath met with a specialist in the Workforce Relations Center of the Human Capital Office (HCO) and requested that Petitioner be investigated for suspected time and attendance fraud, submitting documents that concealed such alleged fraud, and failure to follow instructions. Pet. ¶103. HCO began its investigation on November 29th. Pet. ¶115. The investigation was conducted by Ms. Sandy Antonishek, a contractor for HCO. Pet. ¶42. Because the misconduct investigation had the potential to result in disciplinary action against Petitioner, Ms. Antonishek informed Petitioner before interviewing him that he had "the right to union representation during an investigation of this nature." Pet. ¶117. At the conclusion of her investigation, Ms. Antonishek concluded that there were grounds to impose discipline on Petitioner. Pet. ¶138. However, Eric Adams, then Director of Work Force Relations, and Colleen Marks from HCO concluded that the evidence did not support the imposition of any formal discipline. Pet. ¶140.

On January 2, 2013, Petitioner sent an e-mail to Mr. Bianchi (Disclosure 2), with a copy to Mr. McElrath, stating in pertinent part: "I am very concerned with Wayne's request that I prepare a Memorandum of Investigation (MOI) that does not reflect the work performed by me on this engagement" Pet. ¶110.

On July 3, 2013, Mr. McElrath issued Petitioner a memorandum "for your failure to safeguard investigative materials and for providing inaccurate or misleading information concerning your involvement during the Refund Anticipation Checks (RAC) engagement in late 2012 with Strategic Issues (SI)." Pet. ¶144. Mr. McElrath additionally stated that Petitioner's actions were "inexcusable and exhibit a lack of sound judgment"; that he was "very concerned with [Petitioner's] lack of accountability and possible misrepresentations"; and that "[g]iven the record, I have come to the reluctant conclusion that you were either inexcusably inefficient in

performing your work or inaccurate in reporting the time you worked on the matter.” Pet. ¶145. Mr. McElrath concluded that he was “hopeful that this counselling will impress” on Petitioner that the “casual approach” that Mr. McElrath believed Petitioner demonstrated concerning time and attendance and safeguarding of investigative materials “will not be tolerated”; and that if Petitioner continued to engage in such “misconduct,” he may be “subject to discipline, up to and including ... removal from Federal service.” Pet. ¶¶144, 145.

III. THE PETITION BEFORE THE BOARD

1. Based on the facts set out above, Petitioner filed a charge with the PAB Office of General Counsel (PAB/OGC) on August 2, 2013, pursuant to 4 C.F.R. §28.11. Opposition to MTD (Opp.) at 8. The PAB/OGC then filed the instant Petition with the Board on Petitioner’s behalf. In Count I the Petition alleges that: 1) Disclosure 1 (Petitioner’s September 10, 2012 e-mail to Mr. McElrath) was a contributing factor in both Mr. McElrath’s November 29, 2012 request for a misconduct investigation of Petitioner, and in Mr. McElrath’s July 3, 2013 counseling memo to Petitioner; and 2) that Petitioner’s Disclosures 1 and 2 (Petitioner’s January 2, 2013 e-mail to Mr. Bianchi) were contributing factors in Mr. McElrath’s July 3, 2013 counseling memo to Petitioner. The Petition alleges that Mr. McElrath’s November 29, 2012 request for a misconduct investigation of Petitioner, and Mr. McElrath’s July 3, 2013 memo to Petitioner, were prohibited personnel actions under 5 U.S.C. §2302(b)(8), in that they were taken in retaliation for Petitioner’s protected disclosures.¹ Pet. ¶¶150-54.

¹ Section 2302(b)(8) provides in relevant part that:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

...

In Count II the Petition alleges that the misconduct investigation of Petitioner, initiated at Mr. McElrath's request, which "lead to the issuance" of Mr. McElrath's July 3, 2013 "counseling" memo to Petitioner, was conducted in a manner that was in violation of various provisions of GAO Order 2735.1, Code of Ethics. The Petition further asserts that the conduct of the investigation was therefore in violation of 5 U.S.C. §2302(b)(12).² Pet. ¶¶155-157. Petitioner requests as relief that the Agency be declared to have committed prohibited personnel practices under 5 U.S.C. §§2302(b)(8) and (12); that appropriate relief be awarded under 5 U.S.C. §§1214(g) and (h)³ and 1221(g)⁴; and that GAO be directed to discipline Mr. McElrath. Pet. ¶158.

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
(i) a violation of any law, rule, or regulation, or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

² Section 2302(b)(12) provides:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
...

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

³ This provision states:

(g) If the Board orders corrective action under this section, such corrective action may include—
(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and
(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).
(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

2. In its Motion to Dismiss the Petition (MTD) the Agency first takes the position that Petitioner’s claim, that Mr. McElrath’s November 29, 2012 request that HCO initiate a misconduct investigation of Petitioner is a prohibited personnel practice, was untimely filed under 4 C.F.R. §28.11(b)(2) of the Board’s rules.⁵ In this connection, GAO argues that Petitioner knew of the initiation of the misconduct investigation more than 30 days before he filed his charge with the PAB/OGC on August 2, 2013. Therefore, GAO argues, this portion of the Petition should be dismissed. MTD at 5-6.

The Agency next argues that Petitioner’s e-mail of September 10, 2012 is not a protected disclosure under 5 U.S.C. §2302(b)(8). Rather, it claims, Petitioner was merely “seeking

The “Board” referenced in this section is the Merit Systems Protection Board (MSPB), which adjudicates prohibited personnel practice cases in the Executive branch. However, this provision applies to GAO cases pursuant to 31 U.S.C. §732(b)(2).

⁴ This section states:

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

(B) Corrective action shall include attorney’s fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party in an appeal before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney’s fees and any other reasonable costs incurred.

(3) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney’s fees and any other reasonable costs incurred, regardless of the basis of the decision.

(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

⁵ This provision states in relevant part that a charge like that filed by Petitioner must be filed within 30 days after the effective date of the personnel action complained of, or 30 days after the charging party “knew or should have known of the action.”

clarification” from Mr. McElrath about his work assignment, and not disclosing a possible violation of law, rule or regulation. MTD at 7-8. Even if Disclosure 1 did report a violation of law, GAO argues, it was “so trivial in nature” that it is not protected under section 2302(b)(8). MTD at 8-9. Thus, as Disclosure 1 is the only basis for the claim that Mr. McElrath’s request for a misconduct investigation is a prohibited personnel practice under section 2302(b)(8), the claim should be dismissed.

GAO states that the initiation of an investigation standing alone is not a personnel action that can give rise to a prohibited personnel action claim under 5 U.S.C. §2302(b)(8). The Agency relies on several decisions of the MSPB to support this assertion. MTD at 10-11. Nor, GAO argues further in this vein, was the initiation of the investigation in this case a threat to take a personnel action because a personnel action covered in section 2302(b)(8) “was not the inevitable, or even most likely, outcome of the investigation.” MTD at 11-12. Accordingly, GAO contends that Mr. McElrath’s request for a misconduct investigation of Petitioner is not an action that is covered under section 2302(b)(8), and this portion of the Petition should therefore be dismissed for failure to state a claim.

The Agency similarly contends that Mr. McElrath’s July 3, 2013 memo to Petitioner is not a personnel action which can form the basis for a claim under section 2302(b)(8). MTD at 13-16. In support of this position, GAO states that the memo was a form of counseling, and not an adverse action or a threat of one, as is required under 5 U.S.C. §2302(a)(2)(A)(iii) in order to be actionable as a prohibited personnel practice.⁶ Relying on court precedent, GAO stipulates

⁶ 5 U.S.C. § 2302(a)(2)(A)(iii) provides in relevant part as follows:

- (a) ...
- (2) For the purpose of this section—
- (A) "personnel action" means— ...
- (iii) an action under chapter 75 of this title or other disciplinary or corrective action.

that “the line between a counselling measure and a threat is not a bright one,” but it asserts that the memo in this case is “speculative” and “less immediate” in terms of the prospect of discipline, so that it falls on the counseling side of the line. MTD at 15-16.

GAO next contends that Petitioner’s charge that the misconduct investigation was conducted in such a way that it violated GAO ethics rules is contrary to precedent of this Board. In particular, the Agency cites to *Perry v. GAO*, PAB No. 07-02 (1/29/08). In that case, the Board held that an allegation that the conduct of an investigation is a prohibited personnel practice under 5 U.S.C. §2302(b)(12) does not state an actionable claim because the Board ultimately has jurisdiction over whatever adverse personnel action may be taken against an employee as a result of such an investigation. MTD at 16-17.

The Agency next points to MSPB precedent that, it contends, establishes that an investigation cannot form the basis for a prohibited personnel practice claim under 5 U.S.C. §2302(b)(12). MTD at 18-19. In this regard, GAO argues that an investigation of an employee itself does not have “a significant effect on an employee’s day-to-day work experience,” as GAO claims is required under 5 U.S.C. §2302(a)(2)(A)(xii)⁷ to give rise to an actionable prohibited personnel practice claim under section 2302(b)(12).

Further, GAO asserts that only an Agency employee can commit a prohibited personnel practice under section 2302, and Ms. Antonishek, who conducted the investigation at issue, was a contractor, not an employee. Accordingly, GAO claims that it cannot be held liable under section 2302 for the actions of a contractor. MTD at 19-20. For the reasons set forth above,

⁷ 5 U.S.C. § 2302(a)(2)(A)(xii) provides in relevant part as follows:

- (a) ...
- (2) For the purpose of this section—
- (A) "personnel action" means—
- ...
- (xii) any . . . significant change in duties, responsibilities, or working conditions.

GAO contends that the Petition should be dismissed in its entirety for failure to state a claim on which relief can be granted.

GAO states that, aside from whether the Petition states an actionable claim, Petitioner's request that the Board direct GAO to discipline Mr. McElrath is improper. MTD at 20-24. It argues that a Petition brought in the name of a particular individual, as is the case here, can only obtain make-whole relief affecting that individual. Under the Board's regulations, 4 C.F.R. §28.132, GAO argues that a remedy of directing discipline against an employee can only be sought by the PAB/OGC in its own name, and not on behalf of an individual petitioner.

3. Petitioner opposed GAO's Motion to Dismiss. He first asserts that GAO is in error when it argues that the portion of the Petition dealing with Mr. McElrath's request for a misconduct investigation should be dismissed as untimely. Opp. at 7-8. Petitioner points out that GAO bears the burden of establishing his charge was untimely filed. Petitioner further states that he had no reason to conclude that the investigation initiated by HCO in November 2012 was in retaliation for his September 10, 2012 e-mail to Mr. McElrath (Disclosure 1) concerning the RAC engagement. It was only when he received the July 3, 2013 counseling memo from Mr. McElrath that Petitioner became aware that the investigation was a pretext for gathering evidence to retaliate against him. Accordingly, his August 2, 2013 charge was timely filed as regards the investigation request. Petitioner further says that even if the Board finds the charge is untimely filed, the Board should exercise its discretion to waive the timely filing requirement because, among other things, the issue of whether an investigation request is an adverse personnel action under section 2302(b)(8) is one of first impression. Opp. at 8-9.

Petitioner next proffers that his September 10, 2012 e-mail to Mr. McElrath was a protected disclosure under section 2302(b)(8) of the WPEA. Opp. at 9-11. In that e-mail,

Petitioner argues, he expressed concern to Mr. McElrath about the legality of proceeding with the investigation without proper authorization from appropriate GAO officials. He further contends that this kind of statement satisfies the standard for what constitutes a protected disclosure. Moreover, he continues, the matter addressed in the e-mail is not a trivial one, as the Agency contends, because the disclosure concerns “deliberate and intentional acts,” which are not covered by the “triviality” rule GAO cited. *Id.* at 11.

Petitioner next argues that the investigation conducted at Mr. McElrath’s request did threaten him with discipline. *Opp.* at 14-16. He asserts in this regard that the HCO investigator, Ms. Antonishek, informed him of his right to have a union representative present at the time of his interview. This right is only triggered by law when an employee reasonably believes that discipline could result from his being interviewed. *Id.* at 15-16.

Petitioner also disputes GAO’s claim that the memo he received from Mr. McElrath on July 3, 2013 is not actionable because it is counseling. Petitioner argues that the memo was “corrective in nature,” and thus, under current MSPB case law, not only a threat to take a prohibited personnel action, but also a prohibited personnel action in itself. *Opp.* at 16-20. Indeed, Petitioner points out, the memo makes explicit mention of discipline as a possible outcome of Petitioner’s actions.

Petitioner states that, consistent with PAB case law, his Petition does state an actionable claim of a prohibited personnel practice under 5 U.S.C. §2302(b)(12). Unlike situations involving GAO investigations of discrimination claims, Petitioner argues, the PAB process does not provide Petitioner with a similar *de novo* opportunity to litigate the merits of the claims investigated by HCO; *i.e.*, did GAO reach the correct conclusion at the end of its investigation. Accordingly, PAB case law that GAO relies on is inapposite. *Opp.* at 26-28.

Petitioner also alleges that GAO failed to conduct the misconduct investigation in its usual manner, which was to ensure that the investigator conducted a fair and impartial investigation, and thus qualifies as a significant change in Petitioner's working conditions. Opp. at 27.

Finally, Petitioner rejects GAO's claim that his allegation about the conduct of the investigation and its inconsistency with GAO rules fails to state an actionable claim because the investigation was conducted by a contractor, and not a GAO employee. Petitioner asserts that the contractor was acting at the behest of GAO. Petitioner points out that the action is against GAO, not the contractor. He also notes that the PAB/OGC will request that the Board authorize it to bring an action for discipline against Mr. McElrath.

IV. DISCUSSION

In ruling on a motion to dismiss for failure to state a claim on which relief can be granted, I must accept as true all the complaint's factual allegations and construe them in a light most favorable to the plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283 (1986). Further, a party opposing a motion to dismiss for failure to state a claim need only plead factual allegations that support a facially "plausible" claim to relief in order to avoid dismissal for failure to state a claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). As this Board has previously held, an AJ should dismiss a claim pursuant to Fed. R. Civ. P. Rule 12(b)(6)⁸ only if it is shown "beyond doubt that the [petitioner] can prove no set of facts in support of his claim which would entitle him to relief." *Frankel v. GAO*, PAB Dkt. No. 05-02 (6/10/05), at 3 (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Before addressing GAO's assertions concerning Petitioner's failure to establish an actionable claim, however, it is first necessary to consider

⁸ The Board is guided, but not bound, by the Federal Rules of Civil Procedure. 4 C.F.R. §28.1(d).

GAO's contention regarding the timeliness of Petitioner's claim based on Mr. McElrath's request for a disciplinary investigation.

A. Whether Petitioner's Claim Regarding the Request for an Investigation of His Alleged Misconduct was Timely Filed.

Petitioner argues, and GAO does not dispute, that an assertion of an untimely filing of a claim as a ground for dismissal of that claim is an affirmative defense, and GAO therefore has the burden of establishing this defense. For the reasons that follow, I deny GAO's request to dismiss the investigation request claim as untimely, without prejudice to its being renewed at a later point in this case.

Under the Board's rules, 4 C.F.R. §28.11(b)(2), a charge relating to a personnel action must be filed within 30 days of the effective date of the action, or 30 days after the charging party "knew or should have known of the action." It appears clear that prior to July 3, 2013, Petitioner was well aware of the fact that he was under investigation for certain allegations of misconduct. In this connection, he was interviewed by Ms. Antonishek no later than in March 2013, as her investigation concluded in March. What is not clear is whether Petitioner knew or should have known of a connection between the investigation and his allegedly protected Disclosure 1. The record of the case at this time is insufficient to demonstrate his knowledge of any such connection.

Petitioner claims that it was only on July 3, 2013, when he received Mr. McElrath's memo, that he became aware of the connection. More particularly, according to Petitioner, it was not until he received the memo that he had reason to link the subject matter of the investigation to Mr. McElrath's complaints about Petitioner's conduct set out in the July 3rd

memo. Opp. at 8. Prior to that time, while obviously aware of the investigation itself, there is no evidence to show that he knew that Mr. McElrath was the person who precipitated it.⁹

In my view, the timeliness issue turns on whether Petitioner knew or should have known of this connection. I do not agree with GAO's claim that in a whistleblower reprisal case such as this one, Petitioner's mere knowledge of the pendency of a misconduct investigation, without more, can form the basis for a finding of lack of timeliness. As set out in 5 U.S.C. §2302(b)(8), "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority," take or threaten to take a personnel action because of a protected disclosure. (Emphasis added.) Thus, the statute itself makes clear that the prohibited personnel practice identified in section 2302(b)(8) is committed by an individual employee. In this case, the Petition (Pet. at ¶ 5) names Mr. McElrath as the GAO official responsible for the alleged prohibited practices. There is no evidence that Petitioner knew of Mr. McElrath's involvement at the time he was advised of the investigation such that his time to file a charge would begin to run.

Without some indication that Petitioner knew or should have known that Mr. McElrath had some involvement in initiating the investigation request, I do not believe that Petitioner had a sufficient reason to know that he had a basis for filing a whistleblower claim under section 2302(b)(8). Put another way, based on the current state of the record, Petitioner could be said to have reason to know nothing more than that he was the subject of a misconduct investigation. There is no basis in the record to conclude that Petitioner had reason to know how the investigation came to pass, much less Mr. McElrath's involvement in it.

⁹ The record does not indicate when, if at all prior to his interview with Ms. Antonishek, Petitioner became aware that he was the subject of a misconduct investigation. Nor does the record reflect exactly what matters were discussed by Ms. Antonishek with Petitioner at his investigatory interview.

Petitioner advances a related reason for concluding that GAO has not established its untimeliness defense. More particularly, Petitioner points out that he does not argue that every GAO investigation is an act of retaliation for a protected disclosure. Opp. at 7. Rather, it is not until the investigation has concluded and the Agency takes action, that it becomes clear that the investigation was a pretext for gathering evidence to retaliate. The Agency itself recognizes (MTD at 10) that an investigation of an employee can be the subject of a whistleblower retaliation claim if it is “so closely related to a personnel action that it could have been pretext for gathering evidence to retaliate.” *Johnson v. Dep’t of Justice*, 104 M.S.P.R. 624, 631 (2007).¹⁰

I agree with Petitioner that based on the current state of the record, this relationship between the misconduct investigation and Mr. McElrath’s allegedly retaliatory action was not something Petitioner could reasonably have been aware of until he received the July 3rd memo from Mr. McElrath. See 5 U.S.C. §§1214(b)(4)(B)(i), 1221(e)(1) (the Special Counsel or a whistleblower claimant must show that a protected disclosure was a “contributing factor” in the taking of a covered personnel action); see also *Jones v. U.S. Postal Service*, 502 Fed. Appx. 930, 933-34 (Fed. Cir. 2013) (applying §1221(e)(1)).

As I indicated previously, my denial of GAO’s claim of untimeliness is without prejudice to its being renewed at some later point in the proceedings, if additional evidence should come to light that Petitioner had sufficient knowledge, as described above, to establish that he knew or

¹⁰ The Board looks to MSPB decisions for guidance but is not bound by them. See *General Accounting Office v. GAO Personnel Appeals Board*, 698 F.2d 516, 535 (D.C. Cir. 1983).

should have known that he had an actionable whistleblower claim based on Mr. McElrath's actions.¹¹

B. Whether Petitioner Has Stated a Viable Claim That Disclosure 1 Is Protected Under 5 U.S.C. §2302(b)(8).

The Agency argues that Disclosure 1 is not a protected disclosure under section 2302(b)(8) because it is nothing more than Petitioner asking a question of his superior, Mr. McElrath, as to whether he should begin work on the RAC investigation. Thus, GAO argues, Disclosure 1 does not concern a violation of law, rule or regulation, as required under 5 U.S.C. §2302(b)(8)(A)(i). I do not find that GAO's argument on this point establishes a basis for dismissing Petitioner's claim.

Petitioner's September 10, 2012 e-mail to Mr. McElrath states in its entirety:

I just want to clarify, are you authorizing us to conduct the undercover work using an undercover identity prior to receiving formal approval of the Investigative/Operation Plan and contrary to FAIS policy?

In my view, this e-mail adequately states a viable claim that Petitioner had a reasonable belief that Mr. McElrath was ordering him to take action that was contrary to GAO rules concerning the procedures for obtaining authorization to carry out undercover investigations.¹² That Petitioner made his disclosure in the form of a question is to my mind of no moment. The point Petitioner was making to Mr. McElrath was abundantly clear: do you really want me to violate

¹¹ Based on the foregoing, I need not address at this time Petitioner's request for a waiver of the time limit for filing a charge. However, if GAO should renew its motion to dismiss on timeliness grounds later in this proceeding, I will address that question as necessary at that time.

¹² The fact that Petitioner referred in the e-mail to FAIS "policy," as opposed to a specific law, rule or regulation, does not alter my conclusion on this point. It is not necessary for an employee to identify a statutory or regulatory provision by specific cite as part of a protected disclosure. *Langer v. Dep't of Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001). I think it clear from the record that Mr. McElrath knew full well the basis in GAO rules for the authorization requirement Petitioner was referring to in his e-mail.

Agency rules by conducting the investigation without proper authorization? I do not find the grammatical construct Petitioner used to make this point to Mr. McElrath significant.

I also find that GAO has not shown that Petitioner cannot establish a viable claim on Disclosure 1 because the disclosure concerns a “trivial” matter, that is, it only addresses a “technical violation” of GAO rules on the undercover authorization process. The Federal Circuit has held that the “trivial” rule applies only to “minor and inadvertent miscues.” *Drake v. Agency for Int’l Development*, 543 F.3d 1377, 1381 (Fed. Cir. 2008).

I conclude that Petitioner has stated a reasonable claim that the disclosure here did not concern a “minor and inadvertent miscue.” The use of false identities by GAO personnel to ascertain whether possible unlawful activity is occurring is obviously a serious matter. Agency management therefore has a substantial interest in making sure that such operations are carried out with the utmost care, and that they are fully informed as to the nature of undercover investigations the Agency is undertaking. Compliance with the Agency’s rules on obtaining proper authorization to conduct such operations cannot therefore be said to be, at least at this stage of the proceedings, a “trivial” matter.

C. Whether Petitioner Has Stated a Viable Claim That Mr. McElrath’s Request For a Misconduct Investigation Is a Personnel Action Covered By 5 U.S.C. §2302(b)(8).

The Agency argues that under applicable case law, the initiation of a misconduct investigation cannot be considered a covered personnel action under section 2302(a)(2)(A), and dismissal of the claim concerning Disclosure 1 is therefore appropriate at this time. However, I do not find the matter to be so straightforward.

It is true that the MSPB has said that an investigation is not generally considered to be a personnel action under section 2302(b)(8). But as GAO itself recognizes (MTD at 10), the

MSPB has held that it is proper to consider evidence regarding an investigation if it is “so closely related to a personnel action that it could have been a pretext for gathering information to retaliate for whistleblowing.” *Shibuya v. Dep’t of Agriculture*, 119 M.S.P.R. 537 (2013) (citing *Mattil v. Dep’t of State*, 118 M.S.P.R. 662 (2012)); see also, *supra*, at 16 (discussion regarding timeliness of claim).

In fact, in *Mattil*, upon which GAO places great weight, the MSPB held that the connection, if any, between a misconduct investigation and possible whistleblower reprisal is something the complaining employee should have the opportunity to develop through discovery. *Mattil*, 118 M.S.P.R. at 673, ¶21. I believe the same approach should be followed here. It is only after Petitioner has had the opportunity to explore the connection between the investigation Mr. McElrath requested and his July 3, 2013 memo to Petitioner that it can be determined whether it is appropriate to consider the investigation a “personnel action” within the meaning of section 2302(b)(8). If in discovery Petitioner can establish “retaliation by investigation,” his Petition will state a claim on which relief can be granted.

D. Whether Petitioner Has Stated a Viable Claim That Mr. McElrath’s July 3, 2013 Memo Is a Personnel Action Covered By 5 U.S.C. §2302(a)(2)(A).

The Agency argues that Mr. McElrath’s July 3, 2013 memo to Petitioner also fails to qualify as a personnel action that is covered under section 2302(a)(2)(A), and therefore the Petition does not state a viable claim as to this issue. I do not find that applicable case law supports GAO’s claim on this point.

The Agency relies heavily on *Special Counsel v. Spears*, 75 M.S.P.R. 639 (1997) for the proposition that a counseling memo does not qualify as a “personnel action” within the meaning of 5 U.S.C. § 2302(a)(2)(A). MTD at 13. In that case an employee alleged that an oral

counseling session with her supervisor, later confirmed in writing, was a personnel action within the meaning of section 2302(a)(2)(A), and that it was taken in retaliation for a protected disclosure the employee made under section 2302(b)(8). The supervisor told the employee in this counseling session that he (the supervisor) believed the employee was spending too much time away from her desk talking to other employees. The supervisor also told the employee that the counseling was not a threat to take a personnel action. The MSPB held that “counseling such as [the employee] received does not constitute disciplinary or corrective action within the coverage of the statute,” and therefore the counseling was not a covered personnel action.¹³

The Agency also relies on *Koch v. S.E.C.*, 48 Fed. Appx. 778 (Fed. Cir. 2002), *cert. denied* 537 U.S. 1234 (2003). In *Koch*, an employee received a memo from his supervisor informing him that he continued to fail to meet time deadlines on work assignments, and unless he started to make “immediate and profound improvements” in his performance, “it will be necessary to discharge” the employee. *Id.* at 787. The court noted that “[t]he line between a counseling measure and a threat is not a bright one, and the distinction between the two is very fact-dependent.” *Id.* However, the court went on to hold that “not all such general statements setting forth performance expectations and the consequences of failing to meet them” constitute actionable “threats” under section 2302(b)(8), and the MSPB therefore properly held that the particular counseling memo was not an actionable personnel action. *Id.*

But in *Campo v. Dep’t of the Army*, 93 M.S.P.R. 1 (2002), *aff’d* 134 Fed. Appx. 447 (Fed. Cir. 2005), the MSPB found that a “Memorandum of Warning” to an employee did constitute a threat of disciplinary action that came within the scope of section 2302(a)(2)(A). The employee had made a protected disclosure concerning possible fraud by another employee.

¹³ See also *Hudson v. Dep’t of Veterans Affairs*, 104 M.S.P.R. 283 n.* (2006) (a counseling memo concerning sick leave usage was not a personnel action for the purposes of 5 U.S.C. §2302(b)(8) because it did not threaten discipline or propose to restrict the employee’s leave usage).

An investigation found no merit to the claim, but the employee repeated the charge to the Office of Special Counsel. The “Memorandum of Warning” said “[y]our conduct was unprofessional and disruptive to the orderly functioning of this Branch. Your refusal to accept management’s decisions in these matters borders on insubordination.” The memo further stated that “[y]ou are warned that if there are any further instances of this nature, you will be charged with insubordination and/or creating a disturbance, which subjects you to disciplinary action, to include removal.” The MSPB therefore concluded the memorandum of warning contains a direct threat to take a “chapter 75 ... or other disciplinary or corrective action” and thus constitutes a threat to take a “personnel action” under section 2302(a)(2)(A). *Campo*, 93 M.S.P.R. at 4.

Accepting the Federal Circuit’s observation that the line between a threat and counseling is not a bright one, I conclude that Mr. McElrath’s July 3, 2103 memo to Petitioner falls on the “threat” side of the line. Mr. McElrath detailed his concern with Petitioner’s alleged failure to safeguard investigative materials, and with his alleged “lack of accountability and possible misrepresentations” in performing his official duties in connection with the RAC investigation. Mr. McElrath indicated that his concerns with Petitioner’s purported misrepresentations made him (McElrath) “uneasy” about the “reliability and accuracy” of the information Petitioner provided concerning the investigation. Mr. McElrath concluded by stating that “if you [Petitioner] engage in this or other types or forms of misconduct, you may be subject to discipline, up to and including removal from Federal service.” Exh. 1 of Petition.

While certainly having a dimension that touches on job performance issues (particularly the safeguarding of investigative materials), the weight of the memo is directed more to misconduct matters (particularly the providing of allegedly unreliable information). This fact

tends to distinguish the present case from *Spears* and *Koch*, which involved memos that were more focused on improving job performance than on potential discipline. Mr. McElrath's memo focuses more on corrective action than it does on improved performance. Indeed, he explicitly states that he views Petitioner's actions as constituting "misconduct." Further, Mr. McElrath's memo explicitly mentions the possibility of future disciplinary action for such misconduct, similar to *Campo*. I therefore conclude that the memo here is more in line with the one at issue in *Campo* than it is with those at issue in *Spears* or *Koch*. Based on the foregoing, at this time I deny without prejudice GAO's Motion to Dismiss insofar as it asserts that Mr. McElrath's memo is not a personnel action under section 2302(a)(2)(A). However, in keeping with the Federal Circuit's observation that the issue is "very fact-dependent," in the event that future developments in the record of this case should shed further light on the nature and import of the memo as a covered personnel action, I will reconsider this holding in light of such new evidence as may be presented.

E. Whether Petitioner Has Stated a Viable Claim That the Manner In Which the Misconduct Investigation Was Conducted Is a Prohibited Personnel Practice Under 5 U.S.C. §2302(b)(12).

The Agency next moves to dismiss the Petition insofar as it alleges that the manner in which the misconduct investigation was carried out by Ms. Antonishek is a prohibited personnel action under section 2302(b)(12). GAO first cites to the Board's decision in *Perry v. GAO*, *supra*, in which, according to GAO, the Board held that its *de novo* review of the merits of Petitioner's complaint – in that case GAO's allegedly discriminatory acts – essentially mooted any claims concerning the conduct of the preceding investigation. MTD at 17 (*citing Perry, supra*, at 8).

I agree with Petitioner that the *Perry* line of Board cases is limited to discrimination complaints under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e *et seq.*), filed with GAO’s Office of Opportunity and Inclusiveness (O&I). In such cases, the issue under O&I investigation (*i.e.*, whether GAO unlawfully discriminated against an employee) is the identical issue that will eventually come before the Board if O&I’s investigation finds no discrimination and the employee appeals to the Board under 4 C.F.R. §28.98 of the PAB’s rules. In contrast, in the present case, the subject investigated (whether Petitioner engaged in misconduct) is different from the issue Petitioner has presented to the Board (whether the investigation was a prohibited personnel practice under 5 U.S.C. §2320(b)(12) because it was conducted in a manner that violates GAO’s Code of Ethics, GAO Order 2735.1). The facts of the instant case demonstrate the significance of this distinction.

Although Ms. Antonishek’s investigation led her to the conclusion that Petitioner had engaged in misconduct, this conclusion was rejected by Agency management officials. Accordingly, no disciplinary charges were brought against Petitioner pursuant to GAO Order 2751.1. Despite this fact, Mr. McElrath decided to “counsel” Petitioner on the behavior that was the subject of Ms. Antonishek’s investigation. Mr. McElrath’s memo made no explicit mention of the investigation,¹⁴ and the memo appears to be based on Mr. McElrath’s own observations and conclusions about Petitioner’s conduct. In contrast to the situation in *Perry*, therefore, the issue presently before the Board does not subsume the issue that was under investigation for possible misconduct. Put another way, the question of whether GAO committed a prohibited personnel action under section 2320(b)(12), based on the manner in which the misconduct

¹⁴ The memo does refer to “an inquiry regarding whether investigative materials were properly safeguarded” during the RAC engagement. However, it does so only for the purpose of identifying and addressing Petitioner’s response to the charges.

investigation was conducted, will not be addressed by the Board's decision on whether Mr. McElrath's memo was retaliation for Petitioner's protected disclosures under section 2302(b)(8). As a result, I reject GAO's argument on this point.

The Agency next argues that the Petition fails to state an actionable prohibited personnel practice claim under section 2302(b)(12) because the manner in which an investigation is conducted does not qualify as a covered "personnel action" under section 2302(a)(2)(A)(xii). More particularly, the Agency argues, the manner in which an investigation is conducted does not significantly change an employee's working conditions, as called for under section 2302(a)(2)(A)(xii).¹⁵

Research does not disclose that the question has yet to be addressed, of whether the manner in which a misconduct investigation is conducted qualifies as a personnel action under section 2302(a)(2)(A)(xii). That section has been described as a "catch-all" provision that is intended to include various types of personnel actions not specifically listed elsewhere in the section. *Hesse v. Dep't of State*, 217 F.3d 1372, 1378-80 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1154 (2001) (denial of a security clearance is not a covered personnel action because it is a threshold requirement for a position). However, it is not intended to be all-inclusive. For example, a "progress review," as opposed to a performance appraisal, has been held not to be a personnel action under section 2302(a)(2)(A). Rather, an action must have "practical consequences" for the employee. *King v. HHS*, 133 F.3d 1450, 1452-53 (Fed. Cir. 1998).

¹⁵ Section 2302(a)(2)(A)(xii) also refers to actions effecting significant changes in an employee's duties or responsibilities as covered personnel actions. Based on the record as it currently stands, however, I do not find that the manner in which Ms. Antonishek's investigation was carried out had any significant impact on Petitioner's duties or responsibilities. As a result, the only issue I see for resolution here is whether the manner in which Ms. Antonishek's investigation was carried out had any significant impact on Petitioner's working conditions.

Based on the record of this case in its present state, I do not find that the manner in which Ms. Antonishek conducted her misconduct investigation had a sufficient impact on Petitioner's working conditions to qualify as a personnel action under section 2302(a)(2)(A)(xii). In this connection, there is no indication that the investigation affected how Petitioner went about performing his job duties. Indeed, except for his interview, there is no indication that he was even aware of exactly what Ms. Antonishek was doing on the investigation. I therefore cannot conclude that the manner in which the investigation was conducted could be said to have effected a "significant change" in Petitioner's working conditions under section 2302(a)(2)(A)(xii). I therefore grant GAO's Motion to Dismiss as it relates to the second count of the Petition, again without prejudice to Petitioner reinstating Count II if further proceedings in this case demonstrate the appropriateness of reconsidering the matter.¹⁶

V. CONCLUSION AND ORDER

I deny GAO's Motion to Dismiss as it concerns Count I of the Petition, ¶¶150-154, without prejudice to GAO's jurisdictional arguments being raised at a later point in the case after discovery has been completed. I grant GAO's Motion to Dismiss as it concerns Count II of the Petition, ¶¶155-157, without prejudice to Petitioner seeking to reinstate the claim if further proceedings make such reconsideration appropriate.

¹⁶ In light of my ruling on GAO's Motion to Dismiss Count II of the Petition, I need not determine whether Count II should also be dismissed for the additional reason that the misconduct investigation was carried out by a contractor as opposed to an Agency employee. Also, I do not address at this time the Agency's argument concerning the scope of the Board's remedial power as it relates to Petitioner's request that GAO be directed to take discipline against Mr. McElrath.

Discovery is to **commence no later than 30 days** from the date of this Decision and Order and **completed by March 2, 2015**.

SO ORDERED.

Date: December 1, 2014

William E. Persina
Administrative Judge

CERTIFICATE OF SERVICE

This is to certify that on December 1, 2014 the foregoing Decision and Order in the case of *Desaulniers v. GAO*, Docket No. 14-02, was sent to the parties listed below in the manner indicated.

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