UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 235

Docket No. DA-1221-09-0045-W-1

Raymond H. Ryan,

Appellant,

v.

Department of the Air Force,

Agency.

December 28, 2009

Raymond H. Ryan, Saint Hedwig, Texas, pro se.

William M. Ekadis, II, Esq., Tinker AFB, Oklahoma, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that denied his request for corrective action under the Whistleblower Protection Act (WPA). For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed this individual right of action (IRA) appeal on October 20, 2008. Initial Appeal File (IAF), Tab 1. In accordance with the procedures set

forth in the administrative judge's October 27, 2008 acknowledgment order, IAF, Tab 2 at 3, the appellant served a discovery request on the agency on November 12, 2008, IAF, Tab 9, Attachment 1.

¶3 When the agency failed to respond to his timely discovery request, the appellant filed a motion to compel on December 2, 2008. IAF, Tab 9. During a December 17, 2008 telephonic status conference, the agency indicated that it would respond to the appellant's discovery request, and the administrative judge therefore did not rule on the motion to compel. IAF, Tab 12 at 1. On January 20, 2009, the appellant filed another motion to compel. IAF, Tab 16. He attached to his motion his discovery request, *id.*, Attachment 1, and the agency's response, *id.*, Attachment 4. The agency argued in its response that 20 of the appellant's 21 requests for admission were not material to the claims presented in this appeal, and that the remaining request was overly broad. *Id.*, Attachment 4 at 1-3. The agency refused to either admit or deny 17 of those requests. *Id.* The agency failed to provide any documents in response to the appellant's 16 requests for production, arguing that many of the requests were overly broad and/or immaterial to the matters raised in this appeal. *Id.* at 3-4.

¶4 On February 9, 2009, the agency responded to the appellant's motion to compel. IAF, Tab 21. The agency argued that the appellant's discovery request was essentially the same as one submitted in another Board appeal almost a year earlier. *Id.* at 1.

¶5 On February 10, 2009, the appellant filed a motion to compel in connection with his second discovery request. IAF, Tab 20. He attached to his motion his discovery request, *id.*, Attachment 1, and the agency's response, *id.*, Attachment 2. The agency failed to provide any documents in response to the appellant's 6 additional requests for production, arguing that each request was overly broad and immaterial. *Id.*, Attachment 2 at 1.

¶6 On March 16, 2009, the agency responded in opposition to the appellant's motions to compel. IAF, Tab 31. The agency argued that the appellant's

discovery requests were "purely a 'fishing expedition' by the appellant." *Id.* at 6. The agency offered responses to the appellant's individual requests for admissions and requests for production, but the majority of those responses consisted of statements that the request in question was "overly broad," "immaterial," and/or "irrelevant." *Id.* at 6-11. On March 25, 2009, the appellant filed a pleading in which he addressed the relevance of each of his discovery requests. IAF, Tab 35 at 2-15. During a March 30, 2009 telephonic status conference, the administrative judge informed the parties that the appellant's "motion to compel" was denied. *See* IAF, Tab 44 at 2. The administrative judge did not specify which motion to compel he was denying. *Id.*

¶7 On April 9, 2009, the appellant moved for certification of an interlocutory appeal with respect to the administrative judge's ruling denying his motion to compel. IAF, Tab 40. The following day, the appellant moved to postpone the hearing in light of his inability to obtain materials from the agency through discovery. IAF, Tab 42. The administrative judge denied both motions. IAF, Tab 43.

¶8 In an initial decision dated May 15, 2009, the administrative judge denied the appellant's request for corrective action under the WPA.[1] IAF, Tab 55. He found that the appellant established that the agency took personnel actions against him, and he assumed *arguendo* that the appellant showed that he made protected disclosures and that his disclosures were a contributing factor in the agency's personnel actions. *Id.* at 3-5. He found, however, that the agency established by clear and convincing evidence that it would have taken some of the same personnel actions in the absence of the appellant's protected disclosures, and that claims regarding the remaining personnel actions were barred by res judicata. *Id.* at 5-13.

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[1] The administrative judge found prior to the hearing that the appellant had established Board jurisdiction over his IRA appeal. IAF, Tab 44 at 3-4.

¶9 The appellant has filed a timely petition for review of the initial decision. Petition For Review (PFR) File, Tab 1. The appellant argues, among other things, that he was unable to effectively present his case because of his inability to obtain materials through discovery, and that the administrative judge's application of res judicata was improper. *Id.* at 4-12, 23-24. He also argues that the administrative judge erred in failing to address the agency's agreement during the hearing to remove 3 suspensions at issue from the appellant's personnel record. *Id.* at 32-33. In its opposition to the petition for review, the agency argues that it raised proper objections to the appellant's discovery requests. PFR File, Tab 3 at 4.

ANALYSIS

The administrative judge erred in finding that 2 of the appellant's claims were barred by res judicata.

¶10 In the initial decision, the administrative judge found that the appellant's claims regarding his involuntary placement on leave without pay (LWOP) from January 3, 2006, to March 21, 2006, and the denial of his request for sick leave on January 30, 2006, were barred by res judicata. IAF, Tab 55 at 9-10. The appellant argues on review that the administrative judge's application of res judicata was improper. PFR File, Tab 1 at 23-24.

¶11 Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Id.*

¶12 The administrative judge found that the Board's decision in *Ryan v. Department of the Air Force*, 107 M.S.P.R. 71 (2007) barred relitigation of the appellant's claims regarding his involuntary placement on LWOP from January 3, 2006, to March 21, 2006, and the denial of his request for sick leave on January 30, 2006. IAF, Tab 55 at 9-10. At issue in that appeal was the appellant's March 21, 2006 removal. *Ryan*, 107 M.S.P.R. 71, ¶¶ 1-2. The appellant argued that his removal constituted retaliation for whistleblowing and that the agency failed to provide reasonable accommodation for his disability. *Id.*, ¶¶ 8-10. The Board reversed the removal, *id.*, ¶ 11, but found that the appellant failed to prove his affirmative defenses, *id.*, ¶¶ 8-10.

¶13 Generally, the Board has held that an individual who appeals his removal directly to the Board is barred by res judicata from bringing, after exhausting his administrative remedies, a second whistleblower appeal challenging the same removal action. *See Sabersky v. Department of Justice*, 91 M.S.P.R. 210, ¶¶ 2-3, 7-8 (2002), *aff'd*, 61 F. App'x 676 (Fed. Cir. 2003). Thus, any attempt by the appellant to allege in the present appeal that his March 2006 removal was in retaliation for whistleblowing would be barred by res judicata. *See Zgonc v. Department of Defense*, 103 M.S.P.R. 666, ¶¶ 7-8 (2006), *aff'd*, 230 F. App'x 967 (Fed. Cir. 2007). However, whether the appellant's placement on LWOP from January 3, 2006, to March 21, 2006, and the denial of his request for sick leave on January 30, 2006, constituted retaliation for whistleblowing were not, and could not have been, raised in the removal appeal. Those claims are therefore not barred by res judicata. *See Jackson v. Department of Veterans Affairs*, 95 M.S.P.R. 152, ¶ 13 (2003) (whistleblowing allegations that would not have been properly before the Board in the prior appeal are not barred by res judicata), *aff'd*, 97 F. App'x 297 (Fed. Cir. 2004). We therefore vacate the initial decision and remand the appeal for adjudication of the merits of those claims.

The administrative judge should determine whether the agency removed the appellant's suspensions of November 23, 2005, February 2, 2006, and February 7-9, 2006, from the appellant's personnel record and adjusted the appellant's leave status for those dates.

¶14 The administrative judge addressed the following personnel actions in the initial decision:

> (1) the agency's failure to give the appellant a midterm evaluation during the 2003-2004 appraisal cycle and its issuance of a low appraisal score to the appellant for the same appraisal period; (2) the agency's issuance of a low appraisal score to the appellant for the 2004-2005 appraisal cycle; (3) the agency's failure to compensate the appellant for eight hours on March 6, 2005; (4) the agency's failure to compensate the appellant for "extra" hours worked between August 15, 2005, and November 21, 2005; (5) the agency's charge of absence without leave (AWOL) on November 21, 2005; (6) the agency's placement of the appellant on annual leave for November 25, 2005; (7) the agency's involuntary placement of the appellant on [LWOP] from January 3, 2006, to March 21, 2006; (8) the agency's denial of the appellant's sick leave request on January 30, 2006; (9) the agency's involuntary placement of the appellant on LWOP from March 22, 2006, until October 14, 2007; (10) the agency's failure to give the appellant performance appraisals for 2005-2006 and 2006-2007; (11) the agency's transfer of the appellant from position "15855-769985" to position "161282-1051157," effective January 6, 2008; and (12) the agency's involuntary placement of the appellant in an LWOP status from March 22, 2006, through October 14, 2008, generating a debt with "DFAS" for $74,277, not including interest.

IAF, Tab 55 at 4. On petition for review, the appellant argues that the administrative judge improperly failed to address the following 3 additional personnel actions: (1) his suspension and placement on LWOP on November 23, 2005; (2) his suspension and placement on AWOL on February 2, 2006; and (3) his suspension and placement on AWOL from February 7 through February 9, 2006. PFR File, Tab 1 at 32-33. The appellant notes that the agency agreed to rescind each of the suspensions, but he argues that his leave status on the dates in question remains in dispute. *Id.* at 33. The administrative judge included those suspensions in the list of issues in dispute prior to the hearing, IAF, Tab 44 at 1;

see IAF, Tab 17 at 1-3, but he indicated in his initial decision that the appellant had withdrawn his claims with respect to those actions during the hearing, IAF, Tab 55 at 4 n.4. The appellant argues that the administrative judge erred by failing to mention in the initial decision the agency's agreement to remove those suspensions from his personnel record and by failing to address the issue of his leave status on the dates covered by those suspensions. PFR File, Tab 1 at 33. We agree. Therefore, on remand, the administrative judge should determine whether the agency has removed the 3 suspensions from the appellant's record, as it agreed to do during the hearing in this matter, and whether it adjusted the appellant's leave status for the relevant dates.

The administrative judge should reconsider the appellant's motions to compel discovery.

¶15 We also find that the administrative judge erred in denying the appellant's motions to compel discovery in their entirety. Discovery is the process by which a party may obtain relevant information from another party to an appeal. 5 C.F.R. § 1201.72(a). Relevant information includes "information that appears reasonably calculated to lead to the discovery of admissible evidence." *Beam v. Office of Personnel Management*, 77 M.S.P.R. 49, 57 (1997); 5 C.F.R. § 1201.72(a). What constitutes relevant information in discovery is to be liberally interpreted, and uncertainty should be resolved in favor of the movant absent any undue delay or hardship caused by such request. *McGrath v. Department of the Army*, 83 M.S.P.R. 48, ¶ 7 (1999); *Bize v. Department of the Treasury*, 3 M.S.P.R. 155, 164 (1980). A party to whom a proper discovery request has been made must either comply or "stat[e] an objection to the particular request and the reasons for the objection." 5 C.F.R. § 1201.73(d). The scope of discovery is broad: "[d]iscovery covers any nonprivileged matter that is relevant to the issues involved in the appeal. . . ." *Baird v. Department of the Army*, 517 F.3d 1345, 1351 (Fed. Cir. 2008); 5 C.F.R. § 1201.72(b).

¶16 The administrative judge's decision to deny the appellant's request for corrective action in this case was primarily based on his determination that the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the appellant's protected disclosures. IAF, Tab 55 at 5-13. In determining whether an agency has made the required showing by clear and convincing evidence, the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Information relating to any of those factors is therefore discoverable. *See McGrath*, 83 M.S.P.R. 48, ¶¶ 9-14. Information relating to whether the appellant made protected disclosures or whether those disclosures were a contributing factor in any personnel actions may also be discoverable. *Id.*, ¶ 15.

¶17 The agency objected to each of the appellant's 21 requests for admission and 22 requests for the production of documents. IAF, Tab 16, Attachment 4 at 1-4; IAF, Tab 20, Attachment 2 at 1. It appears the administrative judge denied the appellant's motions to compel in their entirety. IAF, Tab 44 at 2. However, at least some of the appellant's discovery requests clearly meet the standard of seeking "information that appears reasonably calculated to lead to the discovery of admissible evidence." *See* 5 C.F.R. § 1201.72(a). For example, the appellant's first document request seeks "all e-mails or any other correspondence related to or referring to [the] appellant (directly or indirectly) or related to one of the appellant's disclosures from 01 August 2002 to current date." IAF, Tab 16, Attachment 1 at 7. The agency might argue that this request is overly broad, but that would not excuse the agency from providing documents that are clearly relevant to the matters at issue in this appeal.

¶18 In its opposition to the appellant's first motion to compel, the agency argued that the appellant had served essentially the same discovery requests in a prior Board appeal, and produced a document indicating the administrative judge in that appeal denied the appellant's motion to compel in part, and granted it in part. *See* IAF, Tab 21 at 1; *id.*, Exhibits A & B. However, information that was not relevant in another appeal might be relevant in the present appeal. The denial of the appellant's motion to compel in a prior Board appeal therefore has very little relevance to the present appeal.

¶19 On remand, the administrative judge shall give both parties an opportunity to address the relevance of the appellant's discovery requests that were the subject of his motions to compel.[2] In their responses, the parties should focus on the extent to which each of the appellant's requests is reasonably calculated to lead to the discovery of admissible evidence in light of the factual matters in dispute in this appeal. To the extent the agency believes that a request is overly broad, it should comply with the request to the maximum extent possible and explain why it should not be required to respond more fully. The administrative judge shall then determine whether the agency has properly responded to each of the appellant's discovery requests.

¶20 After the completion of discovery on remand, the administrative judge shall afford the appellant an opportunity to submit admissible, discovered evidence into the record. The administrative judge shall also afford the appellant a hearing, if requested by him, at which the parties may examine witnesses, including new witnesses uncovered through the discovery process, with respect to such newly discovered admissible evidence. The administrative judge shall hear any other evidence, including evidence pertaining to whether the appellant's

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[2] We note that the appellant has already raised specific arguments with respect to each of his discovery requests. *See* IAF, Tab 35 at 2-15. The agency's submission on remand should respond to those arguments, and the appellant should have an opportunity to reply to the agency's submission.

disclosures were protected, that he determines is necessary for the disposition of this appeal. The administrative judge shall then issue a new initial decision that incorporates any new evidence and testimony submitted on remand. *McGrath*, 83 M.S.P.R. 48, ¶ 20.

ORDER

¶21 Accordingly, we VACATE the initial decision and REMAND the appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.