UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 8

Docket No. DE-1221-08-0354-W-2

Kristin K. Phillips,

Appellant,

v.

Department of Transportation,

Agency.

January 11, 2010

George M. Chuzi, Esquire, Washington, D.C., for the appellant.

Peter Hines, Esquire,Washington, D.C., and Steven M. Ellard, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision, which denied her request for corrective action in her individual right of action (IRA) appeal. For the reasons set forth below, we find that the petition does not meet the Board's review criteria set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. However, we REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant was a GS-14 Program Manager/Division Administrator in the Montana Division of the agency's Federal Motor Carrier Safety Administration (FMCSA). *Phillips v. Department of Transportation*, Docket No. DE-1221-08-0354-W-1, Initial Appeal File (IAF1), Tab 8, Subtabs 4C, 4G at 1. As such, the appellant was the most senior FMCSA official in the state of Montana. Hearing Transcript (Tr.) at 233 (testimony of Rose McMurray), 644 (testimony of Frank Daniel Hartman). The Montana Division falls under the purview of the FMCSA Western Service Center. IAF1, Tab 8, Subtab 4C; *Phillips v. Department of Transportation*, Docket No. DE-1221-08-0354-W-2, Initial Appeal File (IAF2), Tab 9 at 6.

¶3 On April 11, 2006, while the appellant was serving on a rotational detail in Washington, D.C., five of her subordinate Montana Division employees submitted a hotline complaint to the agency's Office of Inspector General (OIG), making various allegations of misconduct against the appellant. IAF1, Tab 7 at 45-46, Tab 8, Subtab 4J at 2-4 & n.1. The appellant remained on her rotational detail until October 2006, at which time the agency placed her on a telecommuting detail with the Western Service Center in Denver, Colorado, pending the outcome of the OIG investigation. IAF1, Tab 8, Subtab 4J at 2 n.1; IAF2, Tab 12 at 6; Tr. at 340 (testimony of the appellant).

¶4 On March 10, 2007, while the OIG investigation was still pending, the appellant and another agency employee released to several news outlets, elected officials, and federal agencies a complaint regarding the agency's alleged abrogation of its enforcement obligations vis-à-vis Summit Transport Incorporated, a motor carrier under the agency's regulatory purview. IAF1, Tab 7 at 10-37. The agency does not dispute that the Summit complaint constituted a protected disclosure under the Whistleblower Protection Act (WPA). IAF2, Tab 16 at 2.

¶5 On May 25, 2007, the OIG concluded its investigation into the appellant's alleged misconduct and issued a Report of Investigation (ROI), IAF1, Tab 8, Subtab 4J, along with a cover memorandum, IAF2, Tab 12 at 181-84, and a Legal Analysis, *id*. at 186-98. The OIG found that: (1) The appellant used her public office for the gain of a private business, Checkers, Inc.; and (2) the appellant violated the Standards of Ethical Conduct by maintaining a close personal friendship with Ms. Dale Spettigue, a principal of Truckers Express, Inc. (TEI), a carrier over which the appellant was exercising the agency's regulatory authority. IAF1, Subtab 4J at 2-3; IAF2, Tab 12 at 182, 186, 189.

¶6 On August 20, 2007, the agency directed the appellant's reassignment to the position of GS-14 Transportation Specialist in the Southern Service Center. IAF2, Tab 9 at 105-06. The agency's asserted basis for the reassignment was that the appellant could no longer effectively perform the duties of Montana Division Administrator because her actions had damaged her working relationship with her coworkers in that office, as well as the agency's reputation among motor carriers there. *Id*. at 105. However, the agency subsequently withdrew the directed reassignment to "allow the Agency time to fully consider [the appellant's] response to the findings of the [ROI] regarding her conduct," and "to consider how to most effectively manage the FMCSA Montana Division." IAF2, Tab 19 at 140. The appellant submitted her response on October 26, 2007. IAF1, Tab 8, Subtab 4H. On January 16, 2008, the agency directed the appellant's reassignment to the position of GS-14 Highway Safety Specialist/HAZMAT Program Manager for the Midwest Service Center, a nonsupervisory position in Olympia Fields, Illinois. *Id*., Subtabs 4A, 4G; Tr. at 297-98 (testimony of the appellant).

¶7 The appellant filed a complaint with the Office of Special Counsel (OSC), alleging that her reassignment was in retaliation for the Summit complaint. IAF1,

Tab 7 at 57-88.[1] After the OSC notified the appellant that it had terminated its investigation into her complaint, *id*. at 91, the appellant filed an IRA appeal with the Board, renewing the allegations that she made before the OSC, IAF1, Tab 1 at 3-6, Tab 7 at 4-9. The administrative judge found that the appellant established Board jurisdiction over her appeal, and that she was therefore entitled to a hearing on the merits.[2] IAF1, Tab 9.

¶8 After the hearing, the administrative judge issued an initial decision denying the appellant's request for corrective action. IAF2, Tab 30, Initial Decision (ID) at 2, 21. The administrative judge found that the appellant established by preponderant evidence that her disclosure was protected under the WPA and was a contributing factor in the agency's decision to reassign her, ID at 3-5, but that the agency proved by clear and convincing evidence that it would have reassigned her even in the absence of the disclosure, ID at 21. He found that the agency had a strong basis to direct the appellant's reassignment, ID at 6-15, there was little evidence that the relevant agency officials had any motive to retaliate for the disclosure, ID at 15-20, and there was no significant evidence regarding whether the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated, ID at 20-21.

¶9 The appellant has filed a petition for review, arguing that the administrative judge erred in finding that the agency proved by clear and convincing evidence that it would have reassigned her notwithstanding her protected disclosure. Specifically, she argues that: (1) The agency had a weak case to support its reassignment decision, Petition for Review File (PFRF), Tab 1

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[1] The OSC complaint and the instant appeal originally involved not only the reassignment, but also a 3-day suspension arising out of the same events. However, the appellant is no longer requesting corrective action for the suspension. Petition for Review File, Tab 1 at 6 & n.2.

[2] Prior to the hearing, the appeal was reassigned to another administrative judge for logistical reasons. IAF2, Tabs 3, 4.

at 33-77; (2) the agency officials responsible for her reassignment had a strong motive to retaliate, *id*. at 77-89; and (3) the agency declined to take any action against nonwhistleblowers who were otherwise similarly situated to the her, *id*. at 89-93.

ANALYSIS

¶10 In determining whether reprisal for whistleblowing activities occurred, an inquiry must be made into whether: The appellant made a disclosure protected under 5 U.S.C. § 2302(b)(8); the disclosure was a contributing factor in the agency's personnel action; and the agency can prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Morgan v. Department of Energy*, 424 F.3d 1271, 1273 (Fed. Cir. 2005). Only the third question is at issue here.

¶11 In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (1) The strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) 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); *Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 17 (2007). The Board does not view these factors as discrete elements, each of which the agency must prove by clear and convincing evidence. Rather, the Board will weigh the factors together to determine whether the evidence is clear and convincing as a whole. *See, e.g., Yunus v. Department of Veterans Affairs*, 84 M.S.P.R. 78, ¶ 27 (1999), *aff'd*, 242 F.3d 1367 (Fed. Cir. 2001).

Strength of the Evidence

¶12 When applying the first *Carr* factor, the Board will consider the weight of the evidence that was before the agency when it acted. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1372 (Fed. Cir. 2001). Associate Administrator of Field Operations Frank Daniel Hartman, the appellant's third-level supervisor, was the official who directed the appellant's reassignment. IAF1, Tab 8, Subtab 4G at 1; Tr. at 265 (testimony of Ms. McMurray), 640, 659 (testimony of Mr. Hartman). In the uneffected August 20, 2007 reassignment letter, Mr. Hartman stated:

> Management has determined that you can no longer effectively perform the duties of Division Administrator in Montana. Your conduct as described in the ROI has irreparably damaged your working relationships with other FMCSA employees in the Montana Division and tarnished the reputation of the Agency among motor carriers there.

IAF2, Tab 9 at 105.[3] Mr. Hartman testified that his determination was based primarily on the ROI, but also on his conversations with Western Service Center Director Kent Fleming, Western Field Administrator William Paden, and Associate Administrator for Policy and Program Development Rose McMurray. Tr. at 660, 662. These officials were the appellant's first, second, and fourth-level supervisors respectively. Tr. at 265 (testimony of Ms. McMurray). The record contains scant evidence regarding the substance of Mr. Hartman's conversations with Mr. Paden and Mr. Fleming. Therefore, the only evidence before the Board regarding the strength of the agency's evidence at the time it directed the appellant's reassignment is evidence pertaining to the ROI and to Mr. Hartman's conversations with Ms. McMurray.

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[3] Although this rationale was not explicitly contained in the ultimate January 16, 2008 reassignment letter, Mr. Hartman testified that his reasons for directing the appellant's reassignment did not change. IAF1, Tab 8, Subtab 4G; Tr. at 702.

¶13 The ROI itself is a 40-page document with fifty attachments. IAF1, Tab 8, Subtab 4J. Mr. Hartman testified that he never saw that document, but instead based his decision on a document that was substantially similar to the 13-page OIG Legal Analysis contained in the record. Tr. at 700-01; IAF2, Tab 12 at 186-98. He testified that the document upon which he relied was not identical to the document in the record inasmuch as the first pages of the documents were different. Tr. at 655, 666, 701. The appellant argues on review that the agency cannot prove that Mr. Hartman had a strong basis to reassign her because the document upon which Mr. Hartman relied is not itself contained in the record. PFRF, Tab 1 at 33-38. However, Mr. Hartman testified that the two documents contained substantially the same information, and the main difference between the two documents is that the one upon which Mr. Hartman relied also contained the additional summary found in the ROI cover memorandum. Tr. at 666, 701; IAF2, Tab 12 at 181-82. Moreover, Mr. Hartman's recollection of the document upon which he relied was entirely consistent with the content of the Legal Analysis document in the record and the ROI cover memorandum. In light of Mr. Hartman's straightforward and unrebutted testimony, the Board finds that the Legal Analysis document in the record is not materially different than the one upon which Mr. Hartman actually relied.

¶14 The cover memorandum background section lists the eight allegations that the Montana Division employees made in their hotline complaint. IAF2, Tab 12 at 181-82. The Legal Analysis explains that, of these eight allegations, six could not be substantiated. *Id*. at 192-98. Investigation of the other two allegations, however, led the OIG to conclude that the appellant committed misconduct. *Id*. at 186-89, 191-92. Specifically, the OIG found that the appellant misused her position by using government property and official time to assist Checkers, Inc., in soliciting business and implying government sanction of its services, *id*. at 186, and that the appellant's friendship with Ms. Spettigue created the appearance of a lack of impartiality regarding the appellant's interactions with TEI, *id*. at

191. The OIG concluded that the appellant's actions constituted violations of several provisions of the Standards of Ethical Conduct for Employees of the Executive Branch. *Id*. at 182-84, 187-88, 191-92; *see generally* 5 C.F.R. part 2635. The administrative judge found that there was strong evidence to support the OIG's findings, although he found that the appellant's conduct regarding Checkers was not especially serious. ID at 11, 15.

¶15 The appellant argues extensively on review that the evidence does not support a finding that she violated any of the ethics regulations cited by the OIG. PFRF, Tab 1 at 42-76. However, in an IRA appeal, the relevant inquiry is not whether the appellant committed any actual misconduct, but whether the agency had strong evidence to support its personnel action. *Yunus*, 84 M.S.P.R. 78, ¶ 12. Even if the appellant did not actually violate any ethics regulations, this does not mean that the agency lacked a legitimate basis to direct her reassignment at the time it acted. *See Yunus*, 242 F.3d at 1372-73 (in removing the appellant, the agency reasonably relied on an investigatory report's findings of misconduct; later-developed evidence did not undercut the reasonableness of the agency's action based on its knowledge at the time it removed the appellant). An agency may direct an employee's reassignment, without a reduction in pay or grade, in a manner consistent with its rules and regulations and any applicable collective bargaining agreement, as long as the reassignment is based on legitimate management reasons. *See Shenwick v. Department of State*, 92 M.S.P.R. 289, ¶ 11 (2002) ("[T]he Board's general review of a directed reassignment action is to assure that it is used for legitimate reasons and therefore its focus is on the legitimacy of the reasons for the reassignment."); 5 C.F.R. § 335.102(a) (an agency has the authority to reassign a career employee). Mr. Hartman's testimony and the August 20, 2007 reassignment letter show that Mr. Hartman's decision was influenced less by the OIG's findings of ethical violations than it was by the practical effects that the appellant's conduct as described by the OIG

had on her ability to perform her duties as Montana Division Administrator. IAF2, Tab 9 at 105; Tr. at 656-58, 662-65.

¶16 The appellant argues that her friendship with Ms. Spettigue created no appearance of partiality with respect to her dealings with TEI. PFRF, Tab 1 at 62-67. The evidence as a whole, however, supports the administrative judge's finding that the appellant's friendship with Ms. Spettigue was problematic under the circumstances. The appellant acknowledged that her friendship with Ms. Spettigue was known to the staff in her office. Tr. at 304-05. She also acknowledged that the relationship could raise appearances of partiality, Tr. at 310, and she voluntarily, albeit unofficially, recused herself from enforcement matters involving TEI with respect to "any sort of fines or penalties that could be considered financial,"[4] Tr. at 305, 307. However, the Montana Division was a small office, so the appellant was unable to remove herself totally from TEI matters, and she retained oversight over TEI enforcement decisions. Tr. at 310, 312 (testimony of the appellant). Although there is no evidence to show that the appellant ever actually handled any TEI matter improperly, Mr. Hartman was still legitimately concerned about the appellant's friendship with Ms. Spettigue. The record shows that agency officials are routinely required to exercise discretion and judgment when implementing the agency's investigation, compliance, and enforcement functions. Tr. at 136-37 (testimony of Mr. Shelton), 321-22 (testimony of the appellant). The appellant's friendship with Ms. Spettigue would always leave her motivations for exercising her discretion and judgment vis-à-vis TEI open to doubt, even where there was no abuse of discretion or error in judgment. One of the appellant's subordinate employees, Federal Program Specialist Carol Mandera, wrote an April 19, 2005 e-mail to the appellant regarding a TEI compliance review, in which she described the predicament well:

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[4] It would appear that any investigatory, enforcement, or compliance decision that the agency might make regarding a regulated carrier would ultimately have financial ramifications for that carrier.

> Your position is awkward in that, regardless of what you say or do, the fact of your friendship with [Ms. Spettigue] opens the door to accusations of impropriety – even though no actual preferential treatment may be given. Defending against "appearance" is pretty difficult (been there, done that). Much better, in my opinion, to protect. Having TEI follow the same path as other carriers, i.e., directing [Ms. Spettigue's] questions to the investigators during the review or contesting the review findings through the administrative review process available equally to all carriers. I do, however, realize that we do go above that level of service fairly often, and strict adherence of that level of service for the TEI review would have been tipping the scale toward the perception of being unfairly tough.
>
> I don't envy . . . your position at all.

IAF2, Tab 12 at 213.[5]

¶17 In light of all the information that was before Mr. Hartman at the time he made his decision, the appellant's friendship with Ms. Spettigue was per se problematic for the agency. *Id*. at 191-92. The appellant was the senior official in the agency's Montana Division, Tr. at 233 (testimony of Ms. McMurray), and Ms. Spettigue was the general manager and part owner of TEI, a major motor carrier directly regulated by the Montana Division, IAF2, Tab 12 at 181, 189. The very existence of this friendship raised suspicions that could not be eliminated by even the appellant's most scrupulous precautions. We therefore find that the appellant's friendship with Ms. Spettigue, as described in the documentation available to Mr. Hartman regarding the results of the OIG investigation, constituted a legitimate management reason for Mr. Hartman to direct the appellant's reassignment to a position where that friendship would no longer raise doubts about the appellant's impartiality. Tr. at 661-63 (testimony of Mr. Hartman); IAF2, Tab 9 at 105.

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[5] This e-mail is not evidence that was before Mr. Hartman at the time he made his decision. *See Yunus*, 84 M.S.P.R. 78, ¶ 8. Nevertheless, it aptly illustrates the legitimacy of the agency's concerns about the appellant's friendship with Ms. Spettigue.

¶18 The other record evidence regarding Mr. Hartman's reasons for reassigning the appellant pertains to his conversations with Ms. McMurray. Tr. at 660 (testimony of Mr. Hartman). Ms. McMurray testified that she discussed the allegations against the appellant and what should be done about the matter at two to four staff meetings. Tr. at 264-71, 273. She indicated that she was concerned about the appearance of partiality caused by the appellant's friendship with Ms. Spettigue, Tr. at 278, as well as the appellant's damaged relationship with the employees under her supervision, Tr. at 269. She stated, "To place [the appellant] back in that situation where employees were concerned about her leadership and her conduct was not the appropriate action that the Agency should take," *id*., and "I felt that [the appellant] had lost the confidence of her staff, and that we had to remove [the appellant] from that situation," Tr. at 270. Mr. Hartman echoed Ms. McMurray's concerns about the appellant's relationship with the Montana Division employees in his testimony, Tr. at 664-65, and in the August 20, 2007 directed reassignment letter, IAF2, Tab 9 at 105.

¶19 Under the circumstances of this case, the appellant's damaged relationship with the employees in the Montana Division also constituted a legitimate management reason for the agency to reassign her. *See Special Counsel v. Brown*, 28 M.S.P.R. 133, 140 (1985) (reassignment of employees based on interpersonal conflicts and resulting tensions is a legitimate tool of management). It is undisputed that the Montana Division is a small office, Tr. at 310 (testimony of the appellant), 664 (testimony of Mr. Hartman), and that five employees from that office filed an OIG hotline complaint against the appellant, IAF1, Tab 7 at 45-46, Tab 8, Subtab 4J at 2 n.1, 4-5. In fact, it appears that the five complainants comprised the entire Montana Division staff. IAF1, Tab 8, Subtab J at 2 n.1; Tr. at 269 (testimony of Ms. McMurray). Under these circumstances, the agency was legitimately concerned about returning the appellant to duty in that office, where she would be required to supervise and manage all of these complainants on a daily basis.

¶20 The record lends further support to a finding that Mr. Hartman's and Ms. McMurray's stated concerns about the appellant's working relationship with her subordinates was not pretextual. It is undisputed that the agency never returned the appellant to the Montana Division office after her rotational detail ended in October 2006. Rather, it temporarily assigned her to telecommute to the Western Service Center pending the outcome of the OIG investigation. IAF1, Tab 8, Subtab 4J at 2 n.1; IAF2, Tab 12 at 6; Tr. at 340 (testimony of the appellant). Mr. Fleming testified that the purpose of the temporary assignment was to separate the appellant from the Montana Division and prevent any further troublesome interactions with the employees there. Tr. at 475-76, 525-27. Because the October 2006 temporary assignment came before the March 10, 2007 Summit complaint, the record shows that the agency's stated concerns about the appellant's ability to manage the Montana Division were not mere pretext. For all these reasons, we find that the agency had a strong basis for directing the appellant's reassignment.

Motive to Retaliate

¶21 When applying the second *Carr* factor, the Board will consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision. *See Carr*, 185 F.3d at 1326; *Mangano v. Department of Veterans Affairs*, 109 M.S.P.R. 658, ¶ 30 (2008). In this case, the relevant agency officials are Mr. Hartman, who issued the reassignment letter, as well as Mr. Paden, Ms. McMurray, and Mr. Fleming, whom Mr. Hartman consulted about the reassignment. Tr. at 660, 662 (testimony of Mr. Hartman). The administrative judge found that Mr. Hartman lacked any retaliatory motive, ID at 16, but he made no findings with regard to the other three officials involved. The administrative judge also found that the appellant's disclosure did not generally cause the agency a great deal of concern, ID at 18-20, and there was no evidence to show that the Summit complaint influenced the OIG's investigation into the

allegations against the appellant, ID at 17-18. The appellant disputes each of these findings on review and makes several arguments regarding the other three officials' alleged motives to retaliate against her. PFRF, Tab 1 at 77-89.

¶22 The Summit complaint is titled "Lack of Institutional Control and Oversight by Federal Motor Carrier Safety Administration." IAF1, Tab 7 at 10. In strong language, it describes a number of alleged ongoing dangerous and illegal practices by Summit Transport, and the agency's refusal to curb these practices by enforcing its regulations against Summit. *Id*. at 10-36. The complaint was directed primarily toward the conduct of Mr. Fleming and the Montana Division, and more generically toward the leadership of the Western Service Center. *Id*. at 19-34.

¶23 Since October 2006, Mr. Hartman has served as the Associate Administrator of Field Operations, where he is responsible for monitoring the performance of the field staff and making sure that agency regulations are carried out correctly and consistently throughout the United States. Tr. at 228 (testimony of Ms. McMurray), 640, 683-84 (testimony of Mr. Hartman). Accordingly, the allegations in the Summit complaint, which pertain to events that occurred between September and November 2006, would reflect poorly on Mr. Hartman in that capacity. Mr. Hartman was also named personally in the complaint. IAF1, Tab 7 at 26. We therefore disagree with the administrative judge's finding that Mr. Hartman would have "no plausible basis" to retaliate against the appellant for the Summit complaint. ID at 16. In addition, although Mr. Hartman indicated that he was unaware of the particulars of the disclosure, ID at 16; Tr. at 652-54, he also indicated that he knew the general subject of the disclosure was "lack of institutional control and oversight by FMCSA," Tr. at 684. Therefore, we find that the disclosure did create a retaliatory motive for Mr. Hartman. However, the administrative judge also found that Mr. Hartman did not become personally involved in the complaint and "could scarcely be bothered to read it." ID at 16, 19; Tr. at 651-54, 677-82, 684-86.

¶24 The appellant correctly points out that Mr. Hartman directed her reassignment without awaiting a decision on her proposed suspension for the misconduct alleged in the ROI or reading her response to the ROI. PFRF, Tab 1 at 28-29, 37-39; Tr. at 699-700 (testimony of Mr. Hartman); IAF1, Tab 8, Subtabs 4E, 4G, 4H, 4I. Arguably, Mr. Hartman should not have done so because the agency told the appellant that it would reassess the reassignment decision in light of these matters. IAF2, Tab 19 at 140. Under certain circumstances, Mr. Hartman's actions might be viewed as a failure to conduct an adequate investigation into the relevant facts and circumstances underlying the reassignment action. *See Social Security Administration v. Carr*, 78 M.S.P.R. 313, 335 (1998) (an agency's failure to conduct a sufficient investigation before bringing an action might indicate an improper motive), *aff'd*, 185 F.3d 1318 (Fed. Cir. 1999).

¶25 Ms. McMurray testified that, at the time the Summit complaint was filed, she was the Chief Safety Officer for the FMCSA. Tr. at 224. In that capacity, she is responsible for ensuring that the agency carries out its enforcement function responsibly and according to policy; she sometimes testifies on these matters before Congress. Tr. at 225, 228-29. She stated that she read the Summit complaint, was concerned about the allegations therein, and took the complaint very seriously. Tr. at 231-33, 236, 255. However, the conduct alleged in the Summit complaint took place in the fall of 2006, before Ms. McMurray became Chief Safety Officer. IAF1, Tab 7 at 19-34. It appears that, at that time, Ms. McMurray was serving as the Associate Administrator for Policy and Program Development, where she had responsibility for agency rulemaking development, and not any actual supervisory enforcement responsibilities. Tr. at 226-27 (testimony of Ms. McMurray). In addition, Ms. McMurray was not named in the Summit complaint. Accordingly, we find that the Summit complaint was unlikely to have motivated Ms. McMurray to retaliate against the appellant.

¶26 The appellant correctly argues on review that Mr. Paden discussed her reassignment with Mr. Hartman, and that Mr. Paden was aware of the Summit complaint at the time of those discussions. PFRF, Tab 1 at 26-27. Nevertheless, neither the agency nor the appellant have identified on review any evidence relating to Mr. Paden's responsibilities as Western Field Administrator, and neither party has explained why the Summit complaint would or would not have reflected poorly upon him.[6] The evidence regarding Mr. Paden's motive to retaliate is therefore inconclusive.

¶27 Mr. Fleming, however, was one of the chief subjects of the Summit complaint, which strongly impugned his conduct. IAF1, Tab 7 at 19-21, 26, 28, 32. He testified that Ms. McMurray asked him to respond to the allegations in the Summit complaint by making notes in the margins, Tr. at 467, but he felt compelled to respond in detail in a separate document, Tr. at 472; IAF2, Tab 10 at 114-38. Accordingly, we find that Mr. Fleming was well aware of the particulars of the Summit complaint and had a strong motive to retaliate against the appellant because of it.

¶28 The appellant also argues on review that the administrative judge erred in finding that the agency was not actually disturbed by the allegations in the Summit complaint, PFRF, Tab 1 at 77-81, 83-89; ID at 18-20, and that the complaint did not influence the OIG's investigation into the allegations against the appellant, *id*. at 81-83; ID at 17-18. We find, however, that the appellant has not presented an adequate basis to disturb the administrative judge's findings on these matters.

¶29 In light of all the evidence, we find that the Summit complaint created a strong retaliatory motive for Mr. Fleming. However, we also find that Mr. Hartman and Ms. McMurray lacked such a strong motive, and that these two officials were the most heavily involved in the reassignment decision. Tr. at 345-

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[6] Mr. Paden was not personally named in the Summit complaint.

46, 361 (testimony of the appellant). Accordingly, while there was some motive to retaliate on the part of the relevant agency officials, we find that the evidence of such motive does not outweigh the strength of the evidence in support of the agency's reassignment decision.

Comparison with similar actions against non-whistleblowers

¶30 On review, the appellant argues that the administrative judge erred in finding that there was no evidence regarding the agency's treatment of similarly-situated non-whistleblowers. PFRF, Tab 1 at 89-93. She argues that the agency "utterly failed to meet its burden of proof on this factor" because it failed to introduce any evidence that it disciplined other employees for conduct similar to that described in the ROI. *Id*. She also argues that other employees engaged with impunity in conduct similar to the conduct for which she was disciplined. *Id*. at 90-92. However, we find that these alleged comparison employees were not similarly situated inasmuch as they lacked close social relationships with principals of regulated carriers, and there is no evidence that their working relationships with their home offices were severely damaged. Accordingly, the administrative judge correctly found that the third *Carr* factor is not a significant factor for the Board's analysis in the instant appeal. ID at 21.

¶31 Weighing the three *Carr* factors against one another, we find that the agency established by clear and convincing evidence that it would have reassigned the appellant notwithstanding her protected disclosure. Although one of the agency officials involved with the reassignment decision had a clear motive to retaliate, the two primary decision makers lacked a strong retaliatory motive. Most significantly, the agency had a strong basis to direct the appellant's reassignment because of her friendship with Ms. Spettigue and the damaged relationship with her subordinate employees in the Montana Division. The administrative judge properly denied the appellant's request for corrective action. ID at 2, 21; *see Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 16, *aff'd*, No. 2009-3167 (Fed. Cir. Nov. 19, 2009).

ORDER

¶32 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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