UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 28

Docket No. DA-1221-08-0402-W-2

Randall T. Stiles,

Appellant,

v.

Department of Homeland Security,

Agency.

February 18, 2011

Gail M. Dickenson, Esquire, Dallas, Texas, for the appellant.

Robert H. Moore, Esquire, Del Rio, Texas, 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 that denied his request for corrective action he sought in connection with his individual right of action (IRA) appeal. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the initial decision IN PART, and AFFIRM the initial decision IN PART AS MODIFIED by this Opinion and Order. The appellant's request for corrective action is DENIED.

BACKGROUND

¶2 The appellant is a GS-12 Supervisory Border Patrol Agent who was, during the period of time under consideration, assigned to the Carrizo Springs, Texas Border Patrol Station. MSPB Docket No. DA-1221-08-0402-W-1, Initial Appeal File (W-1 IAF), Tab 1 at 4; Tab 11, Subtab 1 at 1. On January 11, 2005, he reported to the Joint Intake Center (JIC) in Washington, D.C., that two Border Patrol Agents illegally fired their weapons on aliens who had illegally crossed the Rio Grande River. *Id.*, Tab 1 at 5-6, Tab 11, Subtab 4K. According to the appellant, when the agency took no action on this information, he reported the alleged inaction to the JIC in September 2005, and to the Office of Inspector General (OIG) on October 21, 2005. *Id.*, Tab 1 at 7, 16, 23. In October 2005, the appellant also disclosed to OIG, and at some point to the JIC, that officials at the border patrol station engaged in procurement violations and conflicts of interest by purchasing horses for the station's Horse Patrol Unit from border patrol agents working within that unit and other local friends for large sums of money, that the same officials sold diseased or injured horses to preferred border patrol agents for little money or gave them away, and that the agents then sold the horses to the general public for a significant profit. *Id.* at 7-8, 16, 24-25. And, around April 5, 2007, the appellant reported to the JIC that Border Patrol Agent in Charge Jeff Parsons misused his official government vehicle (OGV) by transporting a civilian employee of the county sheriff's department. *Id.* at 8, 32.

¶3 On May 21, 2007, the appellant filed a complaint with the Office of Special Counsel (OSC) in which he alleged that, in reprisal for his disclosures, the agency denied him promotional opportunities in 2005 and 2006 and a lateral transfer in 2006, and significantly changed his work situation by, among other things, making derogatory and demeaning remarks about him and closely scrutinizing his work. *Id.* at 9-10, 19. In addition, the appellant claimed that, because of his disclosure regarding the Horse Patrol Unit and possibly his other disclosures of

agency wrongdoing to the JIC, his supervisor improperly threatened him with disciplinary action. *Id.* at 10-11.

¶4 After OSC terminated its inquiry into his allegations and issued its closure letter, *id.* at 33, the appellant filed an IRA appeal with the Board and requested a hearing. *Id.* at 2. He clarified that, because of his disclosure regarding Parsons's misuse of the OGV, the agency gave him the undesirable assignment of working the car wash detail. *Id.*, Tab 32 at 6. In an order and summary of telephonic conference, the administrative judge memorialized his determination that the appellant had exhausted his remedies with OSC, that he nonfrivolously alleged that he made protected disclosures, at least one of which was a contributing factor to the personnel actions he claimed the agency took against him, and that he had therefore satisfied the jurisdictional requirements of an IRA appeal. W-1 IAF, Tab 40 at 4. Subsequently, the parties requested that the administrative judge dismiss the appeal without prejudice to allow them additional time to pursue discovery, *id.*, Tab 44, and the administrative judge granted the request. *Id.*, Tab 45 (Initial Decision at 1-4).

¶5 The appellant refiled his appeal in accordance with the administrative judge's directions, MSPB Docket No. DA-1221-08-0402-W-2, Initial Appeal File (W-2 IAF), Tab 1, but later withdrew his request for a hearing. *Id.*, Tab 10 at 3. The parties submitted additional documentation prior to the close of the record. *Id.*, Tabs 14, 15, 17.

¶6 In his initial decision, the administrative judge first found that the appellant's disclosure that the two Border Patrol Agents had fired on illegal aliens was not protected because the agency was already aware of the misconduct at the time the appellant disclosed it. W-2 IAF, Tab 18 (Initial Decision) at 3-4. The administrative judge next found that the appellant's disclosure of agency inaction regarding his first disclosure was also not protected because it was a conclusory assumption not based in fact and not specific enough to support a finding that he reasonably believed it evidenced whistleblowing. *Id.* at 4-5.

Next, the administrative judge assumed, without deciding, that the appellant's disclosure regarding the Horse Patrol Unit was protected, but concluded that it was not a contributing factor in the alleged threatened disciplinary action. *Id.* at 5-6. And, the administrative judge found that the appellant's disclosure regarding Parsons's purported misuse of the OGV was not protected because, like the first disclosure, the agency was aware of it at the time the appellant disclosed it, and because he did not establish that he reasonably believed that Parsons was violating agency regulations by transporting the civilian in his OGV. *Id.* at 6-7. Accordingly, the administrative judge denied the appellant's request for corrective action. *Id.* at 2, 8.

¶7 In his petition for review, the appellant challenges the administrative judge's findings with regard to all of his disclosures. Petition for Review File, Tab 3. The appellant also argues that the administrative judge abused his discretion with regard to discovery. *Id.* The agency has not responded to the appellant's petition.

ANALYSIS

The administrative judge did not abuse his discretion in handling the discovery matters.

¶8 The appellant argues in his petition for review that the administrative judge erred in denying him discovery. Petition for Review File, Tab 3 at 4-5. The appellant requested documentation from the agency regarding selection actions for positions for which he had applied. W-1 IAF, Tab 20. On January 27, 2009, the administrative judge ordered the agency to produce the documents. *Id.*, Tab 40. On March 5, 2009, the administrative judge dismissed the appeal without prejudice to allow the parties an additional 90 days in which to complete discovery. *Id.*, Tab 45; *Stiles v. Department of Homeland Security*, MSPB Docket No. DA-1221-08-0402-W-1 (Initial Decision, Mar. 5, 2009). The appellant refiled his appeal on June 2, 2009, W-2 IAF, Tab 1, but did not advise the

administrative judge until September 8, 2009, that he was still waiting for the agency to produce certain documents, *id.*, Tab 7, documents which the agency asserted it had already provided. *Id.*, Tab 9. Construing the appellant's request as a motion to compel, the administrative judge denied it initially, *id.*, Tab 10, and on reconsideration. Initial Decision at 8 n.*. The appellant had considerable time in which to try to resolve the discovery issue. To the extent that he was dissatisfied with the documents the agency provided, it was incumbent upon him to bring the matter to the administrative judge's attention in a timely manner. However, the appellant waited three months after refiling his appeal to complain about the agency's response, and he at no time sought the imposition of sanctions. Having reviewed the matter, we find that the administrative judge did not abuse his discretion in handling the discovery matter. *See Brasch v. Department of Transportation*, 101 M.S.P.R. 145, ¶ 17 (2006); *Markland v. Office of Personnel Management*, 73 M.S.P.R. 349, 353 (1997), *aff'd*, 140 F.3d 1031 (Fed. Cir. 1998) (administrative judges have broad discretion in regulating discovery and, absent a showing that the administrative judge abused his discretion, the Board will not find reversible error).

Notwithstanding errors in his analysis, the administrative judge correctly found that the appellant's report to the JIC regarding the two Border Patrol Agents firing at illegal aliens did not constitute a protected disclosure.

¶9 To establish that he made a protected disclosure under the Whistleblower Protection Act (WPA), the appellant must demonstrate by preponderant evidence that he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety. *Horton v. Department of Veterans Affairs*, 106 M.S.P.R. 234, ¶ 15 (2007). The proper test for determining whether an employee had a reasonable belief that his disclosure was protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could

reasonably conclude that the actions of the government evidence one of the categories of wrongdoing triggering whistleblower protection. *Id.*

¶10 As noted above, the administrative judge found that the appellant's disclosure regarding the two Border Patrol Agents firing on illegal aliens was not protected because the agency already knew about the information at the time he disclosed it. Initial Decision at 3-4. Specifically, the administrative judge found that the appellant did not dispute that another Supervisory Border Patrol Agent reported the incident to the JIC before he did. *Id.* at 3. In finding the appellant's disclosure not protected on that basis, the administrative judge relied on the Federal Circuit's decision in *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000), for its holding that "[a] disclosure of information that is publicly known is not a disclosure under the WPA." Initial Decision at 3. The court also stated that a matter that is "not concealed" or "already known" cannot be the subject of a protected disclosure, and that "disclose" means to "uncover[];" "to expose; to make known." *Meuwissen*, 234 F.3d at 13.

¶11 However, the Board distinguished *Meuwissen* in *Askew v. Department of the Army*, 88 M.S.P.R. 674, ¶ 22 (2001). There, the Board found that the appellant made a protected disclosure when she reported accounting irregularities to the OIG, even though they were longstanding and well-known to management and to the OIG. *Id.*, ¶¶ 20-23. In addressing the applicability of *Meuwissen*, the Board in *Askew* initially noted that a key aspect of the *Meuwissen* holding was the public nature of the information disclosed.[1] *Id.*, ¶ 21. Further, the Board declined to give a broad reading to the *Meuwissen* court's words quoted above, noting that, although the court had stated that its holding was consistent with the legislative history of the WPA, it had relied for support on the legislative history

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[1] The disclosure that Mr. Meuwissen, an administrative judge, alleged was protected was an administrative decision he issued wherein he expressly declined to follow precedent that he believed was contrary to law. *Meuwissen*, 234 F.3d at 11.

of the Civil Service Reform Act (CSRA) of 1978, a comprehensive law that contained an earlier definition of a protected whistleblowing disclosure. *Id.*, ¶ 22. The Board went on to point out that, 11 years after passage of the CSRA, Congress passed the WPA in an effort to strengthen the CSRA's protections for whistleblowers, and that the Senate Report on the bill that later became the WPA firmly rejected the notion that an individual who communicates wrongdoing that is "not concealed" or "already known" should not be protected from retaliation. *Askew*, 88 M.S.P.R. 674, ¶ 22 (citing S. Rep. No. 100-413, 100th Cong., 2d Sess., at 13 (1988) ("OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected . . . only if the employee is the first to raise the issue")).

¶12 In finding that the appellant's disclosure regarding the two Border Patrol Agents firing on the illegal aliens was not protected, we note that the administrative judge did not specifically find that the disclosure was publicly known, and we would agree that it was not. Even if a member of the public had observed the border shooting – and there is no suggestion that that occurred – such an observation would not necessarily have indicated a violation of law without consideration of the additional information the appellant provided to the JIC, information that was not publicly known. *Cf. Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 8, *aff'd*, 353 F. App'x 435 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 2084 (2010) (the appellant physician's disclosures to the IG alleging safety violations at a medical center were protected, even though members of the public might have observed safety devices, or the lack thereof, in the waiting area; members of the public did not have access to the examination rooms and were not privy to other alleged deficiencies, including lack of notice regarding potentially violent patients). The administrative judge in this case found that the appellant's disclosure was not protected because another

Supervisory Border Patrol Agent had reported the shooting to the JIC before the appellant did. Initial Decision at 3. Based on the Board's holding in *Askew*, and its well-placed reliance on the legislative history of the WPA, we find that that factor did not preclude the appellant's disclosure from being protected.

¶13 There is another factor, however, that warrants consideration in determining whether this disclosure was protected, and that is whether it was part of the appellant's normal duties to report this type of activity. The administrative judge did not consider the agency's argument that this disclosure was not protected because it was the appellant's responsibility to report the activity to the JIC. W-1 IAF, Tab 11, Subtab 1 at 2. In this regard, the agency argued that Field Operations Supervisor Johnny Rodriguez directed the appellant to report the shootings to the JIC. W-2 IAF, Tab 14, Subtab 4W.

¶14 In *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1351-54 (Fed. Cir. 2001), our reviewing court clarified whether reports of misconduct are covered by the WPA if the disclosures are part of the employee's normal duties. In doing so, the court distinguished between three different situations. The first is where the employee has, as part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels. *Id.* at 1352. The court found that such activity is not protected by the WPA. *Id.* at 1353-54. The second situation is where an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels, *id.* at 1354, and the third is where the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties. *Id.* The court found that these latter two types of activity are protected by the WPA. *Id.*

¶15 The appellant has acknowledged that, as the assigned Duty Supervisor on the date of the shootings, it was his responsibility to handle the incident reporting for that day and that, in accordance with that responsibility, he filed the

memoranda and significant reports to the JIC. W-1 IAF, Tab 1 at 5-6; W-2 IAF, Tab 17 at 3-4. Evidence submitted by the agency is in accord. W-2 IAF, Tab 14, Subtabs 4P, 4S, 4T, 4V, and 4W. We find, therefore, that, because the appellant's normal duties on the day in question included reporting this type of activity, and because he did so through normal channels, his disclosure to the JIC is not protected. *Huffman*, 263 F.3d at 1352; *see also Kahn v. Department of Justice*, 618 F.3d 1306, 1308-10, 1313 (Fed. Cir. 2010) (a Drug Enforcement Administration employee's reporting to a supervisor misconduct in the use of an informant by an officer from a local sheriff's office was not a protected disclosure under the WPA where the employee was the lead agent responsible for reviewing operational plans and the use of informants, the employee's job duties included reporting about ongoing investigations, and the employee reported misconduct to his supervisor through normal channels); *Layton v. Merit Systems Protection Board*, 392 F. App'x 875 (Fed. Cir. 2010)[2] (an environmental law attorney was acting within the scope of his duties when he prepared a report regarding environmental problems encountered during a construction project, and thus that report did not constitute a disclosure protected by the WPA, in light of evidence that he performed the audit pursuant to a direct order, conferred with his superiors regarding his progress, and reported findings of his investigation within normal channels).

The administrative judge erred in finding that the appellant's report of the agency's inaction following the incident involving the two Border Patrol Agents firing at illegal aliens was not a protected disclosure.

¶16 The administrative judge found that the appellant's disclosure regarding the agency's inaction following his first disclosure was not protected because it was conclusory and not based in fact, and because he did not establish that he

[2] Although *Layton* is an unpublished decision by our reviewing court, we may, and do, rely on its reasoning because we find it persuasive. *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 11 (2010).

reasonably believed it evidenced whistleblowing. Initial Decision at 4-5. The administrative judge further found that the only basis behind the appellant's belief that the agency was covering up the shooting incident was that he noticed no outward difference in the way the agency treated the suspected Border Patrol Agents. *Id.* In fact, however, the appellant specifically stated in his OSC complaint that, notwithstanding the shooting incident, one of the Agents was thereafter designated as a Range Officer and sent to the Border Patrol Academy to teach new agents about firearms, and that, for almost a year after the incident, the agency permitted the Agents to carry weapons and to remain on regular duty. W-1 IAF, Tab 1 at 6-7, 21.

¶17 An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001). A disinterested observer who knew what the appellant knew about the shooting incident could reasonably have concluded that the agency officials were abusing their authority by taking no action against the Agents involved in the shooting incident. That is so despite the fact that the agency did ultimately discipline the Agents, nearly two years later, for their involvement in this incident. W-1 IAF, Tab 1 at 21; *see* W-2 IAF, Tab 14, Subtab 4U at 1. An employee need not prove an actual violation to establish that he had a reasonable belief that his disclosure met the statutory criteria. *See, e.g., Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 7 (2004). Under the circumstances, we find that the appellant proved that he reasonably believed that his disclosure regarding the agency's inaction following the shooting incident was protected under the WPA.

¶18 To prevail on a claim under the WPA, an appellant must also prove by preponderant evidence that his disclosure was a contributing factor in a covered personnel action. 5 U.S.C. § 2302(b)(8)(A); *Grubb v. Department of the Interior*,

96 M.S.P.R. 377, ¶ 12 (2004). The administrative judge did not consider whether, as the appellant claims, this protected disclosure was a contributing factor in any claimed personnel actions. Because the record in this appeal is complete, we may make such a finding without remanding this case to the administrative judge. *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 14 (2008).

The appellant's disclosure of the agency's inaction following the incident involving the two Border Patrol Agents firing at illegal aliens was not a contributing factor in the claimed personnel actions.

¶19 In his order and summary of the telephonic conference setting out with specificity the issues in this appeal, the administrative judge described each alleged protected disclosure and the appellant's claim that each contributed to one or more personnel actions. W-2 IAF, Tab 10. The administrative judge noted the appellant's alleged protected disclosure regarding the shooting incident but did not mention his additional claims that the agency failed to act upon that disclosure and that he disclosed that inaction. *Id.* The administrative judge set out the personnel actions which the appellant alleged management took based on his disclosure regarding the shooting incident, specifically, changing his work situation by excluding him from muster, not allowing him to speak, instructing supervisors to keep tabs on him, and denying him promotions. *Id.* In challenging the summary, the appellant pointed out only that his disclosure regarding the shooting incident included the agency's inaction following that disclosure. *Id.*, Tab 16. In the initial decision, the administrative judge considered the claim of agency inaction as a separate alleged protected disclosure, but he found that it was not, in fact, protected and, as noted, did not consider whether the disclosure was a contributing factor in any personnel action. ID at 4-5. The appellant did not indicate which personnel actions the agency took in retaliation for his disclosure that the agency failed to act following the shooting incident. Accordingly, we shall consider that he is claiming that his protected disclosure

regarding the agency's inaction was a contributing factor in the same personnel actions he raised in connection with his first disclosure, that the agency changed his work situation by making derogatory remarks about him and closely scrutinizing his work and denied him promotions.

¶20 In a 1994 amendment to the WPA, Congress established a "knowledge/timing test" as one means to establish the contributing factor element in a case alleging reprisal for whistleblowing. *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006). Under that test, an appellant can prove that his disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See* 5 U.S.C. § 1221(e)(1)(A), (B); *Rubendall*, 101 M.S.P.R. 599, ¶ 12.

¶21 The appellant claims that the agency changed his work situation in a negative way beginning on January 22, 2005, and continuing "[o]ver the next several weeks." W-2 IAF, Tab 17 at 6. However, he also claims that he reported the agency's alleged inaction regarding the shooting incident to the JIC in September 2005 and to the OIG on October 21, 2005. W-1 IAF, Tab 1 at 7, 16, 23. Because this alleged personnel action occurred before the protected disclosure, the disclosure could not have been a contributing factor in this personnel action. *Davis v. Department of Defense*, 106 M.S.P.R. 560, ¶ 12 (2007).

¶22 With regard to his claim that he was denied promotions in retaliation for this protected disclosure, the appellant has submitted, as part of his affidavit, a list of positions for which he applied but was not selected. He has also submitted a summary of the "job documentation" that the agency provided him, presumably during discovery, regarding the qualifications of the selectees for those positions and his reasoning as to why, for each such position, he believes he was better

qualified. W-2 IAF, Tab 17 at 25-68. In another submission, the appellant indicated the date he applied for each of these positions and the closing date. W-1 IAF, Tab 32 at 11-13. And he submitted a list of other supervisors who were promoted "during the time he worked at Carrizo Springs." *Id.*, W-2, Tab 15 at 11-13.

¶23 The appellant has not, however, as to any of these positions for which he claims he was denied promotion, provided the name of the selecting official. Therefore he has not established that any such official was aware of his protected disclosure or that it was a factor in his not being selected. He surmises that Parsons or some other supervisor at Carrizo Springs gave him negative recommendations, but he has provided no specifics in support of his assertion.[3] *See* W-2 IAF, Tab 14, Subtabs 4y, 4z. Therefore, application of the knowledge/timing test does not establish that the appellant's disclosure was a contributing factor in these personnel actions.

¶24 However, the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard. *Daniels v. Department of Veterans Affairs*, 105 M.S.P.R. 248, ¶ 16 (2007); *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 156 (1995). Even if the appellant fails to satisfy that test, the Board shall consider other evidence, such as that pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether those individuals had a desire or motive to retaliate against the appellant. *Daniels*, 105 M.S.P.R. 248, ¶ 16; *Powers*, 69 M.S.P.R. at 156. As set forth above, the appellant has failed to indicate the names of the selecting officials in these actions. In the absence of any evidence showing that Parsons was the

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[3] To the extent the appellant may be suggesting that he was prevented from submitting such information because the agency did not provide it to him during discovery, we have found no abuse of discretion on the part of the administrative judge with regard to his discovery rulings.

selecting official or that any of the selecting officials had a motive to retaliate against the appellant, we find that he has failed to establish that his protected disclosure was a contributing factor in his being denied promotions.[4]

The appellant's disclosure regarding procurement violations and conflicts of interest in connection with the agency's Horse Patrol Unit was protected.

¶25 The administrative judge assumed, without finding, that the appellant's disclosure regarding the Horse Patrol Unit was protected. Initial Decision at 6. As noted, the appellant disclosed that officials at the border patrol station engaged in procurement violations and conflicts of interest by purchasing horses for the station's Horse Patrol Unit from border patrol agents working within that unit and other local friends for large sums of money, that the same officials sold diseased or injured horses to preferred border patrol agents for little or no money, and that the agents then sold the horses to the general public for a significant profit. W-1 IAF, Tab 1 at 7-8, 16, 24-25. We find that the appellant disclosed information that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude evidenced a violation of law, rule, or regulation, and that it is therefore protected. *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 20 (2010) (disclosure of a potential violation of the Federal Acquisition Regulations can constitute a protected disclosure); *Comito v. Department of the Army*, 90 M.S.P.R. 58, ¶¶ 3, 10-11 (2001) (disclosure of financial irregularities can constitute protected

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[4] In *Kahn*, 618 F.3d at 1316, the Court of Appeals for the Federal Circuit stated in dicta that, in an IRA appeal, even where the Board finds a contested merits issue dispositive, it should nevertheless resolve the remaining merits issues to expedite resolution of the case on appeal. However, if we assume, in this case, that the appellant showed that this protected disclosure was a contributing factor in his non-selection for promotions, we are simply unable to determine, based on the insufficiency of the record, including the appellant's failure to identify the agency officials involved, whether the agency has shown by clear and convincing evidence that it would not have selected him for the various positions even absent any whistleblowing. Under these circumstances, and because we are able to clearly resolve the contributing factor issue, we have determined not to pursue further analysis of this claim.

disclosures); *see also Reid v. Merit Systems Protection Board*, 508 F.3d 674, 676, 678 (Fed. Cir 2007) (disclosure of Federal Acquisition Regulations can constitute a protected disclosure).

Although for different reasons, we concur with the administrative judge's finding that the appellant's disclosure regarding procurement violations and conflicts of interest in connection with the agency's Horse Patrol Unit was not a contributing factor in a covered personnel action.

¶26 After assuming that this disclosure was protected, the administrative judge found that the appellant did not establish that it was a contributing factor in the agency's alleged threatened discipline. Initial Decision at 6. In his analysis, the administrative judge focused on whether the assumed disclosure contributed to the threatened disciplinary action. He made no findings, however, as to whether the appellant in fact established that, when the agency allegedly threatened him with discipline, it thereby subjected him to a covered personnel action. On review, we find that the appellant did not establish that any threat was in fact made.

¶27 The appellant submitted a memorandum regarding this matter to the OIG in October 2005. W-1 IAF, Tab 1 at 16, 24-25. According to the appellant's declaration made under penalty of perjury, Patrol Agent in Charge Parsons and Acting Patrol Agent in Charge King visited him in his office on March 5, 2007, and threatened him with disciplinary action. Specifically, according to the appellant, Parsons told him that he would propose the most severe discipline available against the appellant if he was ever arrested. W-2 IAF, Tab 17 at 20; W-1 IAF, Tab 1 at 10. In his declaration made under penalty of perjury, Parsons stated that one of the appellant's neighbors had complained to him regarding a property dispute in which the two were involved; that, after talking with the individual, Parsons concluded that the dispute was a civil matter that did not involve the Border Patrol; and that he told the neighbor so. W-2 IAF, Tab 14, Subtab 4U at 2. Parsons recalled that he and King went to the appellant's office following that meeting to give him a "heads up," but maintained that he told the

appellant that he did not view the matter as involving the Border Patrol and that he did not want to interfere in the appellant's personal affairs. *Id.* Parsons denied ever threatening the appellant with discipline, pointing out that he told him he was not documenting the neighbor's complaint and did not do so, and that he also did not report it "up the chain of command." *Id.* In King's declaration made under penalty of perjury, he also denied ever threatening the appellant with discipline in connection with this matter. *Id.*, Subtab 4R at 2. As noted, the appellant must prove by preponderant evidence that he was subject to a covered personnel action. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). Based on our review, we find that the appellant has failed to establish by preponderant evidence that the agency ever, in fact, threatened him with discipline or that he was the subject of a covered personnel action in connection with this protected disclosure.

The administrative judge correctly found that the appellant's report that Parsons misused his OGV by transporting a civilian did not constitute a protected disclosure.

¶28 Lastly, the administrative judge found that the agency already knew about Parson's allegedly transporting a civilian in his OGV by the time the appellant disclosed it and that, therefore, his disclosure was not protected. Initial Decision at 7. As we have found, however, the fact that someone else reported the matter to the JIC two days before the appellant did does not mean that the appellant's disclosure was not protected. *Askew*, 88 M.S.P.R. 674, ¶¶ 20-23. However, the administrative judge also found that the appellant's disclosure was not protected because he did not show that he reasonably believed that it evidenced wrongdoing as defined by the WPA. Initial Decision at 7. With that finding, we agree. Although the appellant asserted that transporting a civilian in an OGV without a written waiver violated station policy, he provided no support for his assertion.

W-1 IAF, Tab 1 at 8. Parsons stated that the appellant's understanding of the policy was erroneous. W-2 IAF, Tab 14, Subtab 4U at 3. Even if such a policy existed, the appellant did not claim to know whether or not Parsons had secured a written waiver. W-1 IAF, Tab 1 at 8. A disinterested observer who knew what the appellant knew regarding this matter could not reasonably have concluded that Parsons was violating agency policy by transporting a civilian employee of the county sheriff's department in his OGV, and therefore the appellant's disclosure was not protected. *Horton*, 106 M.S.P.R. 234, ¶ 15.

¶29 Notwithstanding the administrative judge's errors in the first two prongs of the WPA analysis, we conclude, based on our additional analysis, that he correctly denied the appellant's request for corrective action.

ORDER

¶30 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.