UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 15

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

Raymond H. Ryan,

Appellant,

v.

Department of the Air Force,

Agency.

February 10, 2012

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

William M. Ekadis, II, Esquire, Tinker Air Force Base, 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 a remand initial decision that denied his request for corrective action under the Whistleblower Protection Act (WPA). For the reasons set forth below, we VACATE the remand initial decision and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed the present individual right of action (IRA) appeal in October 2008. The administrative judge issued an initial decision denying the appellant's request for corrective action. Initial Appeal File (IAF), Tab 55. However, in *Ryan v. Department of the Air Force*, 113 M.S.P.R. 27 (2009), the Board remanded this IRA appeal for further adjudication. The Board found that the administrative judge had erred in dismissing 2 of the appellant's claims as barred by res judicata. *Id.*, ¶¶ 10-13. The Board also directed the administrative judge to determine on remand whether the agency had actually rescinded several of the personnel actions at issue in this appeal, as it had agreed to do. *Id.*, ¶ 14. In addition, the Board found that the administrative judge had improperly denied the appellant's motions to compel discovery in their entirety, and it therefore directed the administrative judge to reconsider those motions after the parties had an opportunity to address the relevance of the requested materials. *Id.*, ¶¶ 15-20.

¶3 After holding a supplemental hearing, the administrative judge issued a remand initial decision again denying the appellant's request for corrective action. He assumed that the appellant had proven that he made protected disclosures and that those disclosures were a contributing factor in the alleged personnel actions. However, he found that the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the appellant's disclosures. Remand Appeal File (RAF), Tab 68.

¶4 On review, the appellant argues that the administrative judge erred in failing to certify his interlocutory appeals regarding discovery, witnesses, and the hearing location. Petition for Review File (PFR File), Tab 1 at 3-5. He also argues that the administrative judge erred in failing to postpone the hearing. *Id.* at 5-7. The appellant also challenges the hearing location, *id.* at 7-8, and the denial of some of his proposed witnesses and exhibits, *id.* at 8-12. In addition, the appellant argues that the administrative judge improperly limited his oral closing argument at the end of the hearing, *id.* at 12-13, and erred in denying his

motions to compel discovery, *id.* at 13-24. The appellant also challenges the administrative judge's credibility findings. *Id.* at 25-40.

ANALYSIS

¶5 Upon review of the record, we find no abuse of discretion in the administrative judge's rulings concerning the date or location of the hearing, or the extent of oral argument permitted at the end of the hearing. *See Fritz v. Department of Health & Human Services*, 87 M.S.P.R. 287, ¶ 15 (2000) (noting "the well-established rule that administrative judges have broad discretion in regulating the proceedings before them"). We also find no abuse of discretion in the administrative judge's decision to deny some of the appellant's requested witnesses, *see Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985) (an administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious), or in his rulings regarding discovery, *see Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992) (the Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table).[1]

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[1] The Board's regulations at 5 C.F.R. § 1201.92 provide that an administrative judge will certify a ruling for interlocutory review only if the ruling involves an important issue of law or policy about which there is a substantial ground for difference of opinion and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public. *Robinson v. Department of the Army*, 50 M.S.P.R. 412, 418 (1991). The Board will not reverse an administrative judge's denial of a request for certification absent an abuse of discretion. *Id.* We find no such abuse of discretion in any of the administrative judge's rulings denying the appellant's various requests for certification of interlocutory appeals. We note that the appellant has been able to challenge the administrative judge's underlying rulings on review, and that certification was therefore not necessary.

The appellant did not validly withdraw his claims with respect to personnel actions 1, 2, 6, 10, 11, and 14.

¶6 The administrative judge identified the following 16 personnel actions at issue in this appeal:

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 [8] 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 suspension of the appellant on November 23, 2005, and charge of leave without pay (LWOP);
7. The agency's placement of the appellant on annual leave for November 25, 2005;
8. The agency's failure to consider the appellant for a self-nominated position;
9. The agency's involuntary placement of the appellant on LWOP from January 3, 2006, to March 21, 2006;
10. The appellant's suspension and placement on AWOL on February 2, 2006;
11. The appellant's suspension and placement on AWOL from February 7-9, 2006;
12. The agency's denial of the appellant's sick leave request on January 30, 2006;

13. The agency's involuntary placement of the appellant on LWOP from March 22, 2006, until October 4, 2007;
14. The agency's failure to give the appellant performance appraisals for 2005-2006 and 2006-2007;
15. The agency's transfer of the appellant from position "15855-769985" to position "161282-1051157," effective January 6, 2008;
16. The agency's involuntary placement of the appellant in an LWOP status from March 22, 2006, through October 14, 2008, generating a debt with [the Defense Finance and Accounting Service (DFAS)] for $74,277, not including interest.

RAF, Tab 68 at 4-5.

¶7 In the remand initial decision, the administrative judge found that the appellant had withdrawn his claims relating to personnel actions 1, 2, 6, 8, 10, 11, and 14 at various points during the adjudication of his appeal. *Id.* at 5 n.5. He also found that the agency had properly expunged 3 suspensions (personnel actions 6, 10, and 11) from the appellant's personnel records and properly adjusted his leave status. *Id.* at 9. In his petition for review, the appellant argues that he had entered into settlements regarding both the suspensions (personnel actions 6, 10, and 11) and the appraisals (personnel actions 1, 2, and 14), and that he expected the terms of those settlements to be set forth in the remand initial decision. PFR File, Tab 1 at 44-45, 65-67. After the close of the record on review, the appellant submitted a printout of his Civilian Brief that appears to show that personnel actions 6, 10, and 11 remained in his personnel records as of October 11, 2011. PFR File, Tab 4, Attachment 16. In the same submission, the appellant stated that he had a Freedom of Information Act appeal pending with the agency regarding his appraisal history and indicated that the records requested in connection with that appeal would establish whether the agency amended his appraisal history in accordance with the parties' agreement. PFR File, Tab 4 at 3. In a subsequent filing, the appellant submitted documentation that, he argues,

shows that the agency failed to adjust his appraisal scores in accordance with the parties' agreement regarding personnel actions 1, 2, and 14. PFR File, Tab 5. The appellant has not specifically challenged the administrative judge's finding with respect to personnel action 8.

¶8 During the first hearing in this appeal, the agency acknowledged that personnel actions 10 and 11 were improper and represented that it would remove the record of those actions from the appellant's personnel file. Hearing Transcript (HT) at 755. The agency argued that those actions were therefore moot. *Id.* at 755-56. The appellant expressed a concern that all references to the suspensions be removed from his personnel file, and the agency representative informed him that all such references would be removed. *Id.* at 756. Based on that assurance from the agency, the appellant agreed that personnel actions 10 and 11 were "no longer an issue." *Id.* at 757. The parties subsequently reached a similar agreement with respect to personnel action 6. *Id.* at 768-772.

¶9 The Board has held that a matter is not moot "until the agency provides acceptable evidence showing that it has actually afforded the appellant all of the relief that [he] could have received if the matter had been adjudicated and [he] had prevailed." *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 22 (2007), *dismissed*, 267 F. App'x 934 (Fed. Cir. 2008). Thus, personnel actions 6, 10, and 11 were not moot at the time of the first hearing. Nor does it appear that those actions have been rendered moot, because the appellant's evidence submitted for the first time on review[2] shows that personnel actions 6, 10, and 11

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[2] Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Because it appears that the appellant did not receive the copy of his personnel file until October 2011, we find that it was unavailable before the close of the record despite his due diligence. Therefore, although the evidence available to the administrative judge appeared to show that the agency had fully rescinded personnel actions 6, 10, and 11, we find that the appellant's new evidence justifies reopening the appeal with respect to those personnel actions.

remain in his personnel file. We further find that the appellant's agreement to withdraw claims relating to those personnel actions was conditioned upon the removal of the suspensions, and that he therefore did not clearly, decisively, and unequivocally agree to withdraw those claims. *See Page v. Department of Transportation*, 110 M.S.P.R. 492, ¶ 5 (2009) (discussing the standards for valid withdrawal of an appeal). Accordingly, we find that the appeal must be remanded. If the agency presents evidence on remand establishing that it has actually removed those personnel actions from the appellant's personnel files and has otherwise provided all relief to which the appellant would have been entitled had he prevailed with respect to those personnel actions, those claims may be dismissed as moot. Otherwise, the administrative judge should adjudicate the appellant's whistleblower reprisal claim with respect to those personnel actions.[3]

¶10 With respect to personnel actions 1, 2, and 14, the administrative judge found that the appellant withdrew his claims with respect to those actions "[b]ecause the agency agreed to give the appellant a performance rating of '75.'" RAF, Tab 68 at 5 n.5. However, as noted above, the agency's promise to take a certain action is not sufficient to render those claims moot. Moreover, because the appellant's agreement to withdraw his claims regarding those personnel actions was dependent on the actions the agency promised to take, we find that he did not unequivocally agree to withdraw those claims. Nor did the administrative judge make all of the findings necessary to dismiss those claims as settled.

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[3] The parties are also free to enter into a settlement agreement regarding particular claims. However, prior to dismissing claims as settled, the administrative judge must document for the record that the parties have reached a settlement agreement, understood its terms, and agreed whether or not it was to be enforceable by the Board. *Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 148-49 (1988). Oral settlements are valid before the Board, and the same requirements apply to both oral and written settlements. *Parks v. U.S. Postal Service*, 113 M.S.P.R. 60, ¶ 11 (2010). We note that the parties did not enter into a valid oral settlement of any claims during the 2009 hearing in this appeal because there is no evidence that they agreed whether or not any such agreements were to be enforceable by the Board.

Accordingly, the administrative judge should determine on remand whether the agency has rendered the appellant's claims with respect to personnel actions 1, 2, and 14 moot. If he determines that those claims are not moot, he should adjudicate them on the merits.

¶11 We find, however, that the appellant did knowingly and unequivocally withdraw his claim with respect to personnel action 8. Specifically, the appellant indicated in his post-hearing submission after the first hearing in this appeal that he learned through discovery that the position for which he applied was actually his old position. IAF, Tab 52 at 4-5. His expressed willingness to withdraw that claim was not dependent on any promise or action by the agency. Thus, the administrative judge need not address that claim further on remand.

<u>The administrative judge should make additional findings on remand with respect to the appellant's remaining claims</u>.

¶12 The WPA prohibits any employee from taking, failing to take, or threatening to take or fail to take, any personnel action against an employee in a covered position because of the disclosure of information that the employee reasonably believes to be evidence of a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2), (b)(8). In order to establish a prima facie case under the WPA, the appellant must prove, by preponderant evidence, that he made a protected disclosure and that the disclosure was a contributing factor in a personnel action against him. 5 U.S.C. § 1221(e)(1); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 12 (2011). If the appellant makes out a prima facie claim of reprisal for whistleblowing, the agency is given an opportunity to prove, by clear and convincing evidence,[4] the affirmative defense that it would have taken the same

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[4] Clear and convincing evidence is "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(d).

personnel action in the absence of the protected disclosure. *Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 970-71 (Fed. Cir. 2009); *see* 5 U.S.C. § 1221(e)(2); *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 18 (2010). 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 strength of the agency's evidence in support of its action, the existence and strength of any motive to retaliate on the part of 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. *See, e.g., Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Gonzales v. Department of the Navy*, 101 M.S.P.R. 248, ¶¶ 11-12 (2006). Because direct evidence of retaliatory motive is rare, appellants are entitled to rely on circumstantial evidence giving rise to an inference of impermissible intent. *Fellhoelter*, 568 F.3d at 971.

¶13 Because the WPA does not mandate any particular sequence for trying the elements of a whistleblower case, in appropriate cases, the Board has historically first addressed the agency's affirmative defense and then, if necessary, turned to the question of whether the appellant has established a prima facie whistleblower claim. *See, e.g., Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 16 (2007). Our reviewing court has tacitly approved of the Board's approach. *See Fellhoelter*, 568 F.3d at 971 (citing *Kalil v. Department of Agriculture*, 479 F.3d 821, 824-25 (Fed. Cir. 2007)); *Greenspan v. Department of Veterans Affairs*, 464 F.3d 1297, 1303-04 (Fed. Cir. 2006); *Clark v. Department of the Army*, 997 F.2d 1466, 1470-71 (Fed. Cir. 1993), *superseded by statute on other grounds as recognized in Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995)); *but see Kahn v. Department of Justice*, 618 F.3d 1306, 1316 (Fed. Cir. 2010) (stating in *dicta* that, "in a hearing on the merits," the Board should make findings on whether (1) the acting official had authority concerning the personnel

action; (2) the employee made a protected disclosure; (3) the acting official used his authority against the employee; (4) the protected disclosure was a contributing factor in the personnel action; and (5) the agency would have taken the same action in the absence of the protected disclosure; and that "[i]f the Board finds one of those contested issues dispositive, it should nevertheless resolve the remaining issues to expedite resolution of a case on appeal"). In the present case, the administrative judge found that the agency had proven its affirmative defense by clear and convincing evidence and therefore did not reach the question of whether the appellant proved his prima facie case by preponderant evidence.

¶14 Under certain circumstances, however, the Board has found that full and fair consideration of an appellant's claims requires adjudication of both the merits of his prima facie case as well as the agency's affirmative defense. *See, e.g.*, *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶¶ 31-32 (2011). In *McCarthy*, the Board held that "the circumstantial evidence bearing on retaliatory motive includes the substance of the appellant's allegedly protected activity as well as the extent to which the deciding official was aware of it. Thus, resolution of both the merits of the appellant's prima facie case and the agency's affirmative defense is required." *Id.*, ¶ 32. We find that the same is true in the present case. We cannot properly assess the existence and extent of any retaliatory motive in this appeal without considering the nature of the appellant's disclosures and the extent to which the management officials responsible for the challenged personnel actions were aware of those disclosures.

¶15 We agree with the administrative judge that the agency presented significant evidence in support of many of the challenged personnel actions. However, those findings alone are insufficient to support a finding 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 whistleblowing. Therefore, on remand, the administrative judge should also make findings with respect to both motive to retaliate and the agency's treatment of similarly situated

non-whistleblowers. Additionally, in order to avoid the need for any further remands in this appeal, the administrative judge should also make findings with respect to the appellant's prima facie case of reprisal for whistleblowing. The administrative judge should permit the parties to submit additional argument on those issues, and he should determine whether the submission of additional evidence (including additional hearing testimony) is necessary to make the required findings.

ORDER

¶16 Accordingly, we REMAND this case to the regional office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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