UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 87

Docket No. DA-1221-11-0224-W-1

Patrick R. Massie,

Appellant,

v.

Department of Transportation,

Agency.

July 17, 2012

Patrick R. Massie, Fort Worth, Texas, pro se.

Raymond A. Martinez, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision that denied his request for corrective action. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-13 Aerospace Engineer with the Federal Aviation Administration (FAA), filed an individual right of action (IRA) appeal in which

he alleged that he disclosed to the agency's Inspector General (IG) in August and September 2008 that the agency had engaged in dealings with Eclipse Aviation that resulted in it not being held to proper safety standards. Initial Appeal File (IAF), Tab 1 at 3-12. The appellant further alleged that, because of his disclosures, his supervisor, Monica Merritt, gave him a "negative" performance appraisal for Fiscal Year 2009 that did not entitle him to receive a Superior Contribution Increase (SCI). *Id.* at 4.

¶3 After convening the requested hearing, the administrative judge issued an initial decision in which he first found that the appellant had established the Board's jurisdiction over his appeal. *Id.*, Tab 26, Initial Decision (ID) at 3-6. As to the merits, the administrative judge determined that it would be most efficient to adjudicate the appeal by assuming arguendo that the appellant had shown that he made protected disclosures and that they were a contributing factor in his performance appraisal and award determination, and then determining whether the agency showed by clear and convincing evidence that, absent any protected disclosures, it would have rated the appellant's performance as it did and consequently determined that he was not eligible for an SCI. *Id.* at 7. After reviewing the testimony and documentary evidence, *id.* at 7-14, the administrative judge found that, while Merritt knew that the appellant claimed to be a whistleblower after he filed an earlier IRA appeal in 2009, there was no evidence that she knew of his disclosures or that she considered them when she wrote his performance appraisal. *Id.* at 14. Moreover, the administrative judge found that the evidence supported Merritt's determination that the appellant adequately, though minimally, performed his duties such that, while he received a cash award for his work on a particular project, he failed to provide outstanding contributions to the agency's mission and therefore did not merit an SCI. *Id.* The administrative judge further found that the appellant's co-worker, a self-styled whistleblower who had also disclosed to the IG information regarding the agency's dealings with Eclipse Aviation and who was also supervised by Merritt,

did receive an SCI, thereby supporting Merritt's claim that it was the appellant's performance that caused her to evaluate him as she did. *Id.* at 15. The administrative judge found that there was strong evidence to support Merritt's performance appraisal and determination not to give the appellant an SCI, no evidence on Merritt's part of retaliatory motive, and no evidence that the agency failed to take similar actions against similarly situated non-whistleblowers, and she therefore concluded that the agency had presented clear and convincing evidence that it would have taken the same actions absent the appellant's disclosures. *Id.* Accordingly, the administrative judge denied the appellant's request for corrective action. *Id.* at 1, 16.

¶4 The appellant has filed a petition for review, Petition for Review File, Tabs 1, 2, to which the agency has responded in opposition. *Id.*, Tab 4.

ANALYSIS

¶5 In determining whether the agency proved by clear and convincing evidence that it would have taken the same actions against the appellant, even absent any protected disclosures, the administrative judge considered the three factors which the Board and the court have considered appropriate: (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 agency officials 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. ID at 7; *see Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 23 (2010).

¶6 However, our reviewing court has recently issued a decision providing further guidance regarding the Board's consideration of the evidence presented by an agency in an effort to meet its clear and convincing evidence burden. *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). In *Whitmore*, the court stated that "[e]vidence only clearly and convincingly supports a

conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Id.* at 1368. The court further determined that "[i]t is error for the [Board] to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately." *Id.* Upon its review in *Whitmore*, the court found that the administrative judge had taken an unduly dismissive and restrictive view on the issue of the existence and strength of any motive to retaliate by the agency, *id.* at 1370-72, and that remand for further fact finding was necessary. *Id.* at 1372, 1377.

¶7 Here, the administrative judge's analysis of Merritt's motive to retaliate was similarly inadequate. In his prehearing submission, the appellant contended that Merritt and Kimberly Smith, the Directorate manager, were highly motivated to retaliate against him because, among other things, they were responsible for briefing FAA headquarters on the IG investigation's findings. IAF, Tab 21 at 9. The appellant also noted that Merritt had a reason to retaliate against him because the IG interviewed her regarding his whistleblower complaints, some managers were called before Congress to defend the agency's actions, and at least one agency manager was reprimanded as a result of the Eclipse Aviation investigation. *Id.*

¶8 The administrative judge failed to consider in his analysis the effect that the Eclipse Aviation investigation had upon Merritt or other agency managers. Rather, the administrative judge focused on the strength of Merritt's testimony that she was unaware of any specific disclosure that the appellant may have made, her testimony that the appellant's performance was merely adequate, and evidence that a similarly situated co-worker of the appellant, the self-styled whistleblower discussed above, received a performance award from Merritt. As set forth above, the administrative judge's analysis of this issue was not based on

all of the evidence, considered as a whole.[1] Accordingly, the appeal must be remanded for further consideration.

ORDER

On remand, the administrative judge must first determine whether the appellant established by preponderant evidence that he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8) and that such disclosure was a contributing factor in the personnel actions in question.[2] *Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 16 (2007). If the administrative judge finds that the appellant has met his burden, the administrative judge must then determine whether the agency has met its burden to show by clear and convincing evidence that it would have taken the personnel action, even absent the appellant's protected disclosure. In analyzing that issue, which includes a finding as to the existence and strength of retaliatory motive by the agency, the administrative judge shall, consistent with the guidance provided by the court in *Whitmore*, reconsider the record as a whole and make thoroughly

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[1] We note the appellant's argument that the administrative judge should not have denied portions of his motions to compel discovery and his request that the Board consider the objections he made before the administrative judge. Under 5 C.F.R. § 1201.41(b)(4), an administrative judge has broad discretion in ruling on discovery matters and, absent an abuse of discretion, the Board will not find reversible error in such rulings. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). We have carefully reviewed the appellant's claims regarding the administrative judge's rulings on the requests for production that the appellant sought to compel, and we find that he has not shown that the administrative judge abused his discretion in those rulings.

[2] Notwithstanding our order in this case, an administrative judge may, under appropriate circumstances, resolve the merits issues in an IRA appeal in any order he or she deems most efficient. *See, e.g., Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 16 (2007); *Santos v. Department of Energy*, 102 M.S.P.R. 370, ¶ 12 (2006).

reasoned findings that address both the evidence supporting his conclusions and the countervailing evidence.

FOR THE BOARD:

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