

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

RYAN ZUMWALT,  
Appellant,

DOCKET NUMBERS  
DE-0752-10-0100-I-2  
DE-1221-10-0101-W-2

v.

DEPARTMENT OF VETERANS  
AFFAIRS,  
Agency.

DATE: September 20, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

James R. Tanner, Esquire, Tooele, Utah, for the appellant.

Scott B. Davis, Esquire, Salt Lake City, Utah, for the agency.

**BEFORE**

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

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The agency removed the appellant from the position of police officer for (1) improperly accessing an acquaintance's criminal records, (2) giving false answers during an investigation, and (3) improperly using a tape recorder in performing his duties. *Zumwalt v. Department of Veterans Affairs*, MSPB Docket No. DE-0752-10-0100-I-2 (I-2 Appeal), Initial Appeal File (IAF), Tab 8, Subtab 4E. The appellant appealed the agency's action, denying the misconduct and alleging that the agency took the removal action and certain pre-removal actions in retaliation for the appellant's whistleblowing, disclosing that his supervisor had misused a government credit card. I-2 Appeal, IAF, Tab 1. Based on the extensive record developed by the parties, including the testimony at the 3-day long hearing, the administrative judge found that the agency proved the first two charges and that the appellant failed to establish that the action constituted retaliation for whistleblowing because the agency showed by clear and convincing evidence that it would have taken the action absent the appellant's protected disclosure. I-2 Appeal, IAF, Tab 31.<sup>2</sup>

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<sup>2</sup> The appellant made additional allegations against the supervisor, including that the supervisor had a drunk driving offense. Hearing Transcript (HT) at 105-108. To support his assertion regarding the drunk driving allegation, the appellant ran a criminal background check on the supervisor, using the Utah Bureau of Criminal Identifications (BCI) database. *Id.* The agency suspended the appellant for 3 days for misusing the BCI database to investigate his supervisor. HT at 118-29. The appellant filed a complaint with the Office of Special Counsel (OSC) and subsequently an individual right of action (IRA) appeal alleging that the agency suspended him in retaliation for his whistleblowing. *Zumwalt v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-08-0449-W-1 (2008 IRA appeal). The parties entered into a settlement agreement of the 2008 IRA appeal on February 9, 2009, and, during the pendency of the removal action, the appellant filed a petition for enforcement alleging that the agency violated the settlement agreement. *Id.*, Tab 23. The administrative judge joined the compliance proceeding with the removal action and the IRA appeal relating to

The appellant has not shown that the administrative judge's discovery rulings provide a basis for reversing the initial decision.

The appellant argues that the administrative judge abused his discretion by denying some of the appellant's discovery requests. Petition for Review (PFR) File, Tab 3 at 4. In particular, the appellant claims on review that the administrative judge denied him discovery regarding the disciplinary records of similarly situated agency employees who were not whistleblowers or who had not engaged in the equal employment opportunity process. *Id.* The appellant asserts that the administrative judge noted the absence of such evidence in the initial decision, but "cut the [a]gency slack." *Id.*

In the initial decision, the administrative judge noted that the agency could have, but did not, present evidence of what disciplinary action it took regarding agency employees throughout the country who engaged in conduct similar to the sustained misconduct in the present case. Initial Decision (ID) at 25. He found that such evidence could have assisted the agency in demonstrating by clear and convincing evidence that it would have taken the same actions against the appellant in the absence of his alleged protected disclosures. *Id.* However, the appellant has not shown that he ever requested such nationwide disciplinary records. In his Motion to Compel, the appellant sought certain disciplinary records, but his request was specifically limited to the facility at which he worked. I-2 Appeal, IAF, Tab 12 at 9. Following a telephonic status conference, the administrative judge ordered the agency to provide limited additional discovery that did not include any of the requested disciplinary records. I-2 Appeal, IAF, Tab 13. The appellant did not object to the administrative judge's

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personnel actions taken immediately prior to the removal. We find that the legal and factual issues presented in the compliance proceeding are distinct from those presented in the removal and IRA appeals, and that joinder of all three of the appellant's pending Board proceedings will no longer expedite processing of the cases. Therefore, this decision addresses only the removal and IRA appeals. We will address the appellant's petition for enforcement in a separate decision.

discovery rulings with respect to disciplinary records below, and we therefore find that he is precluded from objecting to those rulings on review. *See Kimble v. Office of Personnel Management*, [102 M.S.P.R. 604](#), ¶ 10 n.2 (2006).

The administrative judge properly affirmed the appellant's removal.

With respect to his removal, the appellant contends that the administrative judge erred in finding that the agency proved its charges by preponderant evidence. Overall, the appellant's arguments in this regard constitute mere disagreement with the administrative judge's proper findings and credibility determinations. *Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133-34 (1980), *review denied*, [669 F.2d 613](#) (9th Cir. 1982) (per curiam).

The appellant also alleges that the agency's investigation violated his Fifth Amendment rights. PFR File, Tab 3. An employee must answer possibly-incriminating questions in an investigation if an agency first advises the employee that (1) his refusal to answer may result in his removal, and (2) any true statement he may make will not be used against him in a criminal proceeding. *See, e.g., Kalkines v. United States*, [473 F.2d 1391](#), 1393 (Ct. Cl. 1973); *Ashford v. Department of Justice*, [6 M.S.P.R. 458](#), 465-66 (1981). The agency properly advised the appellant of his rights in the investigation and thus the appellant has not shown any violation of his constitutional rights.

We agree with the administrative judge that the agency's penalty of removal is well within the tolerable limits of reasonableness for the sustained charges of misconduct. Law enforcement officers are held to a higher standard of honesty and integrity. *See e.g., Phillips v. Department of the Interior*, [95 M.S.P.R. 21](#), ¶ 16 (2003) (a law enforcement officer was removed for falsifying information on her pre-employment documents), *aff'd*, 131 F. App'x 709 (Fed. Cir. 2005); *Scott v. Department of Justice*, [69 M.S.P.R. 211](#), 243-44 (1995) (same), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). Even absent consideration of the charge that the agency failed to prove, the agency's

remaining charges provide a reasonable basis for the agency's removal penalty under the circumstances of this case. *See Schoeffler v. Department of Agriculture*, [47 M.S.P.R. 80](#), 86 (removal for falsification and engaging in dishonest activity promotes the efficiency of the service since such behavior raises serious doubts regarding the employee's reliability, veracity and trustworthiness); *vacated in part on other grounds*, [50 M.S.P.R. 143](#) (1991).

The administrative judge properly found that the appellant failed to prove his claims of whistleblower retaliation.

The appellant asserts that the administrative judge erred in finding that the appellant failed to prove his affirmative defense of retaliation for whistleblowing related to disclosing his former supervisor's credit card abuse. PFR File, Tab 3 at 37-46. The Whistleblower Protection Act (WPA) prohibits any federal agency 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 or a waste of funds, or a substantial and specific danger to public health or safety. [5 U.S.C. § 2302\(a\)\(2\)](#), (b)(8).

As a preliminary matter, we note that there is no issue of jurisdiction over the appellant's allegation of retaliation for whistleblowing as an affirmative defense in connection with his removal, an otherwise appealable action. However, with regard to the appellant's allegations that pre-removal personnel actions constituted retaliation for whistleblowing, the appellant had to establish Board jurisdiction by showing that he exhausted his administrative remedies before OSC and by making nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371

(Fed. Cir. 2001); *Rusin v. Department of the Treasury*, [92 M.S.P.R. 298](#), ¶ 12 (2002). The administrative judge found that the appellant met this jurisdictional standard with respect to the pre-removal actions, ID at 20-21, and we see no reason to disturb that finding. We therefore turn to the merits of the appellant's whistleblower reprisal claims.

In order to establish a prima facie claim 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 an adverse 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 such a claim, the agency must prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. [5 U.S.C. § 1221\(e\)\(2\)](#); see *Schnell v. Department of the Army*, [114 M.S.P.R. 83](#), ¶ 18 (2010). Because the WPA does not mandate any particular sequence for trying the elements of a whistleblower case, the Board has in appropriate cases 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 the Board's approach. See *Fellhoelter v. Department of Agriculture*, [568 F.3d 965](#), 971 (Fed. Cir. 2009) (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. For the reasons set forth below, we agree with the administrative judge’s approach in this case.

In determining whether the agency showed by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the administrative judge considered the appropriate 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; (3) and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, [185 F.3d 1318](#), 1323 (Fed. Cir. 1999).

With respect to the first *Carr* factor, we note that the pre-removal actions of suspending the appellant’s firearms authority, placing him on administrative leave, and barring him from the agency facility unless escorted were based on the same underlying facts as the removal. Although the administrative judge did not sustain the charge of misuse of a recording device, we find that he properly sustained the charges of (1) accessing the BCI database for personal use and (2) falsification. *See* ID at 11-17. Given the seriousness of the sustained charges, we find that the agency had strong evidence in support of both the removal and the related pre-removal actions. *See Redschlag v. Department of the Army*, [89 M.S.P.R. 589](#), ¶ 89 (2001) (weighing the first *Carr* factor in the

agency's favor, despite the fact that not all of the charges and specifications were sustained).

With respect to the second *Carr* factor, the administrative judge acknowledged that some officials involved in the personnel actions against the appellant had a strong motive to retaliate against him. ID at 23. However, the administrative judge found that the deciding official, who had recently come to the facility, did not harbor any retaliatory motive. *Id.* He further found that the proposing official was not the subject of the appellant's whistleblowing and had not been directed by another official more knowledgeable about the appellant's whistleblowing to remove the appellant. *Id.*; see *Whitmore v. Department of Labor*, [680 F.3d 1353](#), 1371 (Fed. Cir. 2012) (when applying the second *Carr* factor, the existence and strength of any motive to retaliate on the part of agency officials involved in the decision, the Board must consider any motive to retaliate on the part of the official who ordered the action and other agency officials who influenced the decision).

The administrative judge noted that the agency failed to produce evidence regarding the third *Carr* factor, i.e., whether the agency takes actions against non-whistleblowers who had engaged in similar misconduct, or to present evidence of its national practice regarding discipline for BCI database misuse and making false statements during investigations. The administrative judge properly considered that the lack of such evidence detracted from the agency's showing of clear and convincing evidence, ID at 25, but he nevertheless found that the agency had proven by clear and convincing evidence that it would have removed the appellant and taken the related pre-removal actions in the absence of his protected disclosures. In light of our consideration of all of the *Carr* factors, we agree with the administrative judge that the agency met its burden. See *Whitmore*, 680 F.3d at 1374 (noting that the agency is not required to submit evidence with respect to each *Carr* factor, and recognizing that the absence of

evidence relating to the third *Carr* factor “can effectively remove that factor from the analysis”).

The administrative judge also considered the appellant’s assertion that the investigation of Office of the Inspector General (OIG) agent Michael Morse, which led to the challenged personnel actions, was in itself retaliation for the appellant’s whistleblowing. Citing *Russell v. Department of Justice*, [76 M.S.P.R. 317](#), 323 (1997), the administrative judge noted that the Board will consider evidence regarding the conduct of an investigation when the investigation was so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate against an employee for whistleblowing activity. We note that agent Morse testified at the hearing. *Cf. Whitmore*, 680 F.3d at 1368-69 (administrative judge abused her discretion in excluding investigator of workplace incident and the investigator’s interviewees from testifying at Board hearing). Based on Morse’s testimony, the administrative judge found that the investigation was initiated by OIG, not agency management. ID at 22. He noted that Morse was not supervised by the officials at the appellant’s facility, and had the independent authority to conduct his investigation after gaining approval from his OIG supervisors. *Id.* The administrative judge also noted that Morse began his investigation after he heard from an agency official, who had no connection to the appellant’s allegations of whistleblowing, the rumor that the appellant and other officers had improperly accessed the BCI database. *Id.* The administrative judge found that, even if that official had heard the rumor from another employee whom the appellant believed disliked him, it was not sufficient to taint the investigation because Morse independently decided to investigate. *Id.*; *see Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002) (the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing). The administrative judge also found that

Morse's inclusion of other officers in his investigation showed the lack of retaliation by investigation.

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) ([5 U.S.C. § 7702](#)(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, DC 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, NE  
Suite 5SW12G  
Washington, DC 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

#### Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5\(f\)](#); [29 U.S.C. § 794a](#).

#### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. 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](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.