



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 5, 2015

BOARD DECISIONS

Appellant: Francis A. Mithen

Agency: Department of Veterans Affairs

Decision Number: [2015 MSPB 38](#)

MSPB Docket No.: CH-1221-11-0498-B-1

Issuance Date: May 28, 2015

Appeal Type: Individual Right of Action (IRA) Appeal

Action Type: Detail

Credibility Findings

Reasonable Belief of Protected Disclosure

In this remanded individual right of action (IRA) appeal, the appellant originally served in the positions of Program Manager of Neurology at the St. Louis Veterans Administration Medical Center (VAMC) and VAMC Residency Program Coordinator, which supervised medical residents from St. Louis University (SLU). The Chairman of Neurology and Psychiatry at SLU conveyed to the agency that several medical residents complained about the appellant's conduct in administering the neurology residency program, and noted that SLU would not continue participating in the VAMC neurology residents program if the appellant continued as coordinator. The agency then convened an Administrative Investigative Board (AIB), which concluded that the appellant was responsible for creating a hostile work environment with respect to his communication and interactions with the medical residents. Thereafter, the agency approved a reorganization which created new positions, including a Chief of Neurology position that conducted the duties of the appellant's positions. The appellant was informed that he could apply for this position,

and allegedly was also told that the SLU chairman would have veto power over the selection for the position. The appellant then sent a letter to VAMC authorities alleging that the SLU Chairman caused an unsubstantiated AIB investigation, and that the SLU Chairman improperly held veto authority over the selection of the new Chief of Neurology position. Shortly thereafter, the SLU chairman notified the agency that it was officially restricting its residents' activities at the agency. Approximately one week later, the agency indefinitely detailed the appellant to a Staff Neurologist position and relieved him of any responsibility related to the residency program.

The appellant filed an IRA appeal with the Board, alleging that his detail to the Staff Neurologist position was retaliation for protected whistleblowing activity. In an initial decision, the administrative judge (AJ) found that the appellant failed to show that he made a protected disclosure, but found in the alternative that, assuming the appellant did make a protected disclosure, he established through the knowledge/timing test that the disclosure was a contributing factor in the agency's actions. The AJ concluded, however, that the agency showed through clear and convincing evidence that it still would have detailed the appellant in the absence of the disclosure. The appellant filed a petition for review with the Board, and the Board remanded the matter for further consideration. In its remand order, the Board instructed the AJ to make credibility findings to determine whether the appellant made a protected disclosure, and whether the agency proved by clear and convincing evidence that it would have detailed the appellant absent his disclosure. In a remand initial decision, the AJ concluded that the appellant failed to show that he reasonably believed his disclosure evidenced an abuse of authority.

Holding: The Board granted the appellant's petition for review, vacated the AJ's finding on an abandoned claim, reversed the finding that the appellant did not make a protected disclosure, found that the agency proved by clear and convincing evidence that it would have taken the same action absent the appellant's protected disclosure, and denied the appellant's request for corrective action.

1. The AJ made proper credibility findings consistent with *Hillen* because the AJ took particular care in observing each witness as they testified via video conference, there was no indication that the AJ relied on demeanor as the sole deciding factor in making her credibility determinations, and there was no showing by the appellant that the AJ's credibility findings were incomplete, inconsistent, or not otherwise supported by the record as a whole. The Board further held that not specifically discussing every

evidentiary matter or *Hillen* factor did not establish that the AJ failed to consider them.

2. The appellant established through preponderant evidence that he reasonably believed that he was disclosing an abuse of authority because an individual making a disclosure may be protected from retaliation for whistleblowing based on his belief that his disclosure evidenced one of the categories of wrongdoing listed in 5 U.S.C. § 2302(b)(8), even when his belief is mistaken. Here, the appellant's belief that the SLU Chairman would have a dispositive role in selecting the newly reconstituted position of Chief of Neurology was reasonable.

3. The agency established by clear and convincing evidence that it would have detailed the appellant from his position even in the absence of his protected disclosure because the evidence showed that the agency was motivated to detail the appellant to preserve the existing residency program with SLU.

The U.S. Court of Appeals for the Federal Circuit issued the following nonprecedential decisions this week:

Petitioner: Cesar A. Delarosa

Respondent: Office of Personnel Management

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Numbers: [2015-3074](#)

MSPB Docket No. SF-0831-14-0602-I-1

Issuance Date: June 4, 2015

Holding: The Court affirmed the Board's decision denying the petitioner the opportunity to redeposit his refunded retirement deductions because the petitioner was not an employee eligible to redeposit retirement deductions.

Petitioner: Eric Vaughan

Respondent: United States Postal Service

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Numbers: [2015-3056](#)

MSPB Docket No. NY-0752-14-0377-I-1

Issuance Date: June 4, 2015

Holding: The Court affirmed the Board's decision dismissing the petitioner's

appeal for lack of jurisdiction because the petitioner waived his appeal rights via settlement agreement.

Petitioner: Robert Henderson

Respondent: Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Numbers: [2015-3055](#)

MSPB Docket No. SF-0752-14-0474-I-1

Issuance Date: June 4, 2015

Holding: The Court affirmed the Board's dismissal of the appellant's petition for review as untimely because he did not initially respond to the administrative judge's orders on timeliness and later failed to explain how his disability caused his delay in filing.

Petitioner: Lawrence W. Passiatore

Respondent: Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Numbers: [2015-3015](#)

MSPB Docket No. NY-0752-09-0124-I-1

Issuance Date: June 4, 2015

Holding: The Court affirmed the Board's dismissal of the appellant's appeal as untimely because he did not provide any explanation as to why his illness caused his delay in filing.