



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 5, 2018

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Michael J. Johnen

Respondents: U.S. Merit Systems Protection Board
U.S. Department of the Army

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

Case Number: [16-73427](#)

Docket Number: SF-1221-14-0338-W-2

Issuance Date: February 26, 2018

Whistleblower Protection Act

-Contributing Factor

Due Process

The petitioner was a Supervisory Engineering Technician at a Department of the Army (agency) military base in California. In October 2012, he filed a complaint with the Department of Defense Inspector General (IG) alleging that he was the subject of an investigation during which agency employees made false statements about him and that agency managers failed to address his concerns about nepotism within the agency. In a July 2013 meeting, the petitioner again raised his concerns regarding nepotism to an agency official. In August 2013, the agency terminated the petitioner and subsequently barred him from the military base for 180 days. The petitioner filed a complaint with

the Office of Special Counsel (OSC) in September 2013, alleging that the agency terminated him and barred him from the base as a result of his protected disclosures. Thereafter, he filed an individual right of action appeal with the Board.

Following a hearing, the administrative judge issued an initial decision denying the petitioner's request for corrective action. She found that the petitioner exhausted his administrative remedies with OSC regarding his termination, the decision to bar him from base, and his IG complaint. She found, however, that the petitioner failed to exhaust his July 2013 disclosure regarding nepotism. She further found that the Board lacked jurisdiction over the decision to bar him from the base as a personnel action. As to the merits, she found that the petitioner failed to establish that his IG complaint was a contributing factor to his termination. The petitioner filed a petition for review and the Board, in a decision by its two Members at the time, affirmed the initial decision.

Holding: The court dismissed the petition for review as to the case against the Board and it denied the petition in part, granted the petition in part, and remanded the appeal to the Board as to the case against the Department of the Army.

1. This is a "mixed" case, in that the petitioner challenged both jurisdictional or procedural matters and the merits of an adverse personnel action. In such a case, the agency that took the adverse personnel action is the proper respondent. Here, the court found that the Department of the Army is the only proper respondent because it took the adverse personnel actions against the petitioner. It therefore dismissed the case against the Board.
2. The court rejected the petitioner's argument that the Board violated his due process rights by deciding his appeal when there was a vacancy on the three-Member Board. The court found that the relevant statute and the applicable regulations suggest that the Board can take action without all three Board Members.
3. As to the merits of the appeal, the court found that the IG complaint constituted a protected disclosure and that both the termination and the decision to bar the petitioner from the base were personnel actions. It then concluded that substantial evidence supported the Board's finding that the petitioner failed to establish that his IG complaint was a contributing factor to the two personnel actions.
4. In an unpublished Memorandum issued the same day as this published Opinion, the court determined that a fair reading of the petitioner's OSC complaint encompassed his disclosure in July 2013 concerning nepotism within the agency. Accordingly, the court found that the petitioner

exhausted this claim, vacated the Board's contrary finding, and remanded the appeal to the Board for adjudication.

Petitioner: George Duggan
Respondent: U.S. Department of Defense
Tribunal: U.S. Court of Appeals for the Ninth Circuit
Case Number: [16-73640](#)
Docket Number: SF-1221-14-0544-W-2
Issuance Date: February 26, 2018

Whistleblower Protection Act
-Clear and Convincing Evidence
Evidence
-Admission

The petitioner, a Senior Auditor at the Defense Contract Audit Agency, filed a Board appeal alleging that the agency's decisions to suspend him for 10 days, rate his performance as only minimally successful, revoke his telework agreement, and fail to grant him a cash award were taken in retaliation for his 7 protected disclosures.

Following a hearing, the administrative judge issued an initial decision denying the petitioner's request for corrective action. He found that the petitioner exhausted his administrative remedies with OSC and that the petitioner had made four protected disclosures that were a contributing factor to the challenged personnel actions. The administrative judge concluded, however, that the agency had shown by clear and convincing evidence that it would have taken the same personnel actions in the absence of the protected disclosures. The petitioner filed a petition for review and the Board affirmed the initial decision. In its decision, the Board found that the administrative judge did not abuse his discretion when he denied the petitioner's motion to compel discovery and request for additional witnesses at the hearing.

Holding: The court denied the petition of review and affirmed the Board's decision.

1. The court assumed without finding that all seven of the petitioner's disclosures were protected and found that substantial evidence supported the Board's conclusion that the agency proved by clear and convincing evidence that it would have taken the challenged personnel actions in the absence of those protected disclosures. In analyzing the agency's burden, it adopted the U.S. Court of Appeals for the Federal Circuit's test as set forth in *Carr v. Social Security Administration*,

185 F.3d 1318, 1323 (Fed. Cir. 1999).

2. The court found that the administrative judge did not abuse his discretion when he excluded the disputed evidence.

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