UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

76 M.S.P.R. 317

Docket Number DE-0752-94-0377-B-1

EDWARD M. RUSSELL, Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date: August 18,1997

Anna Hall Owen, Esquire, Canon City, Colorado, for the appellant.

Paul Jessup, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

The appellant petitions for review of a remand initial decision, issued June 28, 1996, that found that he did not establish the affirmative defense of whistleblowing because the agency showed by clear and convincing evidence that it would have taken the same personnel action in the absence of his protected disclosure. For the reasons set forth below, the Board GRANTS the appellant's petition for review, REVERSES the remand initial decision, and ORDERS CANCELLATION of the appellant's demotion.[1]

BACKGROUND

Effective May 29, 1994, the agency demoted the appellant from his GS-12 Disciplinary Hearing Officer (DHO) position in Florence, Colorado, to the position of GS-11 Warranty Coordinator. The agency's demotion action was based on the following charges and specifications:

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[1] Previously, the Board affirmed the parts of the initial decision dealing with the charged misconduct and the mitigation of the penalty from a demotion to a 14-day suspension but vacated that part of the initial decision regarding the alleged reprisal for whistleblowing. *See Russell v. Department of Justice*, 68 M.S.P.R. 337, 345 (1995). Our affirmance of the parts of the initial decision concerning the charged misconduct and the mitigation of the penalty was provisional in nature in that it was dependent on the outcome of the appellant's whistleblowing claim.

Charge 1: Preferential treatment toward inmates.

Specification 1: Giving a pen to an inmate.

Specification 2: Allowing inmates to make personal and/or legal telephone calls.

Charge 2: Unprofessional Conduct.

Specification 1: Using inappropriate language in an official document, *viz.*, writing in a hearing report that he felt that in a particular case "the shot is bullshit."

Specification 2: Engaging in flirtatious conduct with female staff.

Specification 3: Making derogatory comments about prison officials in front of inmates.

Charge 3: Failure to report an alleged assault on an inmate.

See Initial Appeal File (IAF), Tab 8, Subtabs 4b and 4h. On appeal to the Board, the administrative judge sustained specification one of the first charge (giving a pen to an inmate) and all three specifications of the second charge. The administrative judge did not sustain the third charge. Initial Decision (ID), IAF, Tab 34. In addition, the administrative judge found that the appellant had not proven his affirmative defense of reprisal for whistleblowing. *Id*.

The appellant filed a petition for review asserting, in part, error in the administrative judge's findings concerning his affirmative defense of reprisal for whistleblowing. The Board vacated that part of the initial decision regarding the alleged reprisal for whistleblowing finding, contrary to the administrative judge, that an October 10, 1993, memorandum written by the appellant to Regional Director Patrick Kane concerning improper interference in the disciplinary process was a protected disclosure under 5 U.S.C. § 2302(b)(8). *See Russell v. Department of Justice*, 68 M.S.P.R. 337, 345 (1995). Specifically, the Board found that the appellant disclosed in his October 10, 1993, memorandum that Tom L. Wooten, the Warden of the Florence, Colorado, facility, and Darwin L. Campbell Jr., the Regional Discipline Hearing Administrator (DHA), improperly interfered in his adjudication of inmate misconduct during an incident in the prison's recreation poolroom. *See id*. at 343-45. The Board then remanded the appeal to the administrative judge to determine whether the protected disclosure was a contributing factor in the agency's action and if so, whether the agency proved that it would have taken the same personnel action absent the protected disclosure. *Id*.

In his remand initial decision, the administrative judge found that the agency showed by clear and convincing evidence that it would have taken the action in the absence of the disclosure. Remand Decision (RD), Remand Appeal File (RAF), Tab 9. In a timely petition for review, the appellant argues that the administrative judge failed to properly examine the agency's motivation for initiating investigations into his conduct. The agency did not submit a response to the petition for review.

ANALYSIS

The appellant proved that his disclosure was a contributing factor.

In order to establish an affirmative defense of reprisal based on whistleblowing, an appellant must prove by preponderant evidence that his disclosure was a contributing factor in a personnel action against him. *Braga v. Department of the Army*, 54 M.S.P.R. 392, 396 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table).2 The administrative judge found it unnecessary to determine whether the appellant showed that his disclosure was a contributing factor in the agency's decision to demote him because the agency presented clear and convincing evidence that it would have demoted him in the absence of the protected disclosure.3 RAF, Tab 9 at 4. Since, however, as detailed below, we find that the agency has not presented clear and convincing evidence that it would have taken the same action against the appellant in the absence of the protected disclosure, we must determine whether the appellant showed that his disclosure was a contributing factor. Although resolving conflicts in the evidence and deciding issues of credibility are normally the province of the administrative judge, the record in this appeal is sufficiently well-developed to make such a finding without a remand. *See Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995), *cert. denied,* 116 S. Ct. 728 (1996).

In 1994, Congress amended the Whistleblower Protection Act of 1989 (WPA) to establish a "per se" knowledge/timing test that allows an employee to demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action against the employee knew of the disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table); *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 155 (1995). The Board has held that the amendment applies retroactively. *Scott*, 69 M.S.P.R. at 238-40. We therefore apply it in this appeal. The deciding official, Regional Director Kane, had actual knowledge of the appellant's whistleblowing activity and the decision to demote was made approximately 7 months after the disclosure. IAF, Tab 8, Subtabs 4b, 4e; HT at 38. Accordingly, we find that the appellant has shown by preponderant evidence that his disclosure was a contributing factor in the agency's demotion action.

Under the unique circumstances of this case, however, even if the deciding official did not have actual knowledge of the disclosure, we would find that imputed knowledge impermissibly influenced his decision. *Cf. Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108-09 (1994) (an appellant may establish constructive knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking a retaliatory action). A whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged

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[2] In *Clark v. Department of the Army*, 997 F.2d 1466, 1471-72 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994), the court modified some of the authority relied on in *Braga*. The court's decision did not affect the aspects of *Braga* relied on herein.

[3] We note that the administrative judge inadvertently refers to the demotion as a "removal" throughout his decision.

prohibited action in order to establish that his disclosure was a contributing factor to the personnel action. *See Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993). "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." *See Id.* (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)). As discussed below, but for the allegations made by the subjects of the protected disclosure, Regional Director Kane would not have been presented with the incidents in question. Thus, we find that the protected disclosure was a contributing factor in the personnel action. When such a showing is made, the Board will order corrective action unless the agency can demonstrate by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure. *See Page v. Department of Justice*, 59 M.S.P.R. 452, 455 (1993), *review dismissed*, No. 94-3118 (Fed. Cir. Jan. 13, 1994).

The agency did not prove, by clear and convincing evidence, that it would have taken the personnel action absent the appellant's whistleblowing.

The appellant claimed below that the reports of the misconduct, the ensuing investigations, and the demotion action constituted acts of retaliation. *See* IAF, Tab 31. In his petition for review, however, the appellant alleges error only with respect to the administrative judge's findings regarding the reports of the misconduct which led to the investigation, and we grant the petition for review solely to address that argument.

The Board will consider evidence regarding the conduct of an agency 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. *See Geyer v. Department of Justice*, 70 M.S.P.R. 682, 688, *aff'd*, No. 96-3328 (Fed. Cir. June 18, 1997) (Table); *Mongird v. Department of the Navy*, 33 M.S.P.R. 504, 507 (1987). In considering such evidence, the Board looks at where the investigation had its beginnings. *Geyer*, 70 M.S.P.R. at 689.

The three charges in the instant case were based on six specifications. IAF, Tab 8, Subtab 4h. Five of the six specifications arose from the findings of certain investigations by the agency's Office of Internal Affairs (OIA).4 The OIA investigations were initiated because of allegations about the appellant made by one of the two subjects of the protected disclosure, Warden Wooten. On January 13, 1994, three (3) months after the appellant's disclosure, Warden Wooten reported to the agency's OIA that the appellant: used annual leave without approval; failed to report an assault of an inmate by a staff member; established inappropriate relationships with inmates; placed phone calls for an inmate; promised inmates transfers and early releases; held himself out as acting captain; and made unprofessional comments and gestures to female staff. IAF, Tab 28, Subtab V, at 2-3. Three of those allegations, that the appellant failed to report an assault of an inmate, placed phone calls for inmates, and made unprofessional comments and gestures to female staff, formed the bases of the agency's charges. In addition, during OIA's investigation of the Warden's allegations,

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[4] The only specification unrelated to the OIA investigations, that the appellant made an inappropriate/unprofessional remark in a DHO report, arose from an allegation by DHA Campbell. IAF, Tab 8, Subtab 4i.

the appellant averred that he gave a pen to an inmate and that he made derogatory comments about staff in front of inmates. IAF, Tab 28, Subtab V-10. These averments were relied on to support two of the agency's charges. IAF, Tab 8, Subtab 4h.

When, as here, an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant will prevail on his affirmative defense of retaliation for whistleblowing. That the investigation itself is conducted in a fair and impartial manner, or that certain acts of misconduct are discovered during the investigation, does not relieve an agency of its obligation to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *See* 5 U.S.C. § 1221(e)(2).

To here hold otherwise would sanction the use of a purely retaliatory tool, selective investigations. Congress included protection for whistleblowers in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), to assure federal employees that "they will not suffer if they help uncover and correct administrative abuses." S. Rep. No. 969, 95th Cong., 2d Sess., 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730. Eleven years later Congress strengthened protection for whistleblowers in enacting the WPA, Pub. L. No. 101-12, 103 Stat. 16 (1989), one goal of which was "to encourage government personnel to blow the whistle on wasteful, corrupt, or illegal government practices without fearing retaliatory action by their supervisors or those harmed by the disclosures." *Marano*, 2 F.3d at 1142 (citing WPA § 2, 103 Stat. 16, 5 U.S.C. § 1201 note). "So long as a protected disclosure is a contributing factor to a contested personnel action, and the agency cannot prove its affirmative defense, *no harm* can come to the whistleblower." *Id*. (emphasis added). Thus, an agency's selective use of investigations, i.e., its choice to investigate a whistleblower, because of his or her status as a whistleblower, would contravene this goal. Since the investigations in the present case gave rise to five of the six specifications and all of the charges underlying the demotion action, *see supra* note 4, the OIA investigations were so closely related to the adverse action, we will therefore consider the appellant's claim of "retaliation by investigation."

In considering the appellant's claim of "retaliation by investigation," we recognize that the WPA is not intended to shield employees who engage in wrongful conduct merely because they have, at some point, "blown the whistle." *See Marano,* 2 F.3d at 1142 n.5. The appellant's situation, however, is more akin to cases where the Board sustains a charge, finds discrimination, and reverses the adverse personnel action because of the taint of discrimination. The taint in such cases is not "cleansed" by arguing that the employee cannot be shielded from his misconduct by anti-discrimination laws. *See, e.g., Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 601, 610 (1994)(although the Board found that the employee was, as charged, absent without leave, it ordered the agency to cancel the removal because it was tainted by race discrimination, and the agency had failed to show by preponderant evidence that it would have taken the same action absent consideration of a discriminatory motive). An employee is not completely shielded from his misconduct by anti-discrimination laws or the WPA. Rather, those laws shield an employee only to the extent the record supports

a finding that he would not have been disciplined except for his status as a whistleblower or a member of a protected class. *See id.*

In determining whether the agency showed, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the whistleblowing, the Board considers the following factors: The strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the 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. *Geyer,* 70 M.S.P.R. at 688.

When examining the strength of the agency's evidence, the Board will look at "the evidence that the agency had before it" when it took the alleged retaliatory action. *See Geyer*, 70 M.S.P.R. at 694. The record evidence shows that at the time Warden Wooten made his allegations to OIA that the appellant failed to report that a staff member assaulted an inmate, placed phone calls for an inmate housed in administrative detention, and made unprofessional remarks and gestures to female staff, the Warden had strong evidence of the conduct on which the charges were based. IAF, Tab 29, Subtab X, at 2, 10-11; Tab 28, Subtab V-8; H.T. at 194. The sixth specification, the use of inappropriate language in an official document, arose from an allegation by DHA Campbell, the second subject of the protected disclosure. On February 8, 1994, Mr. Campbell sent a memorandum to Regional Director Kane stating, *inter alia*, that the appellant wrote a DHO hearing report that contained the phrase, "DHO felt in this case the shot was bullshit...." IAF, Tab 8, Subtab 4i. Mr. Campbell testified that he became aware of that language when the report was forwarded to him by Associate Warden Cannon. Hearing Transcript (H.T.) at 89. Thus, at the time he reported the appellant's alleged "unprofessional conduct toward an inmate" to Regional Director Kane, Mr. Campbell had clear evidence to support his accusation.

The record evidence shows that Warden Wooten and Mr. Campbell both had a strong motive to retaliate. They were both subjects of the appellant's protected disclosure, they were the subjects of an OIA investigation due to the appellant's protected disclosure, and both knew about the appellant's protected disclosure when they made their reports about the incidents that formed the basis of the charged misconduct. IAF, Tab 1, at 17-19; Tab 28, Subtab T. The agency did not call Warden Wooten as a witness and while it called Mr. Campbell, it did not question him concerning his reasons for sending the memorandum to Regional Director Kane concerning the appellant's conduct. H.T. 89-91.

The record evidence shows that the appellant began working as a DHO in May 1993. H.T. 80; Hearing Tape 8, Side B.[5] The appellant worked at two separate institutions as a DHO, FCI-Florence, where Mr. Wooten was the warden, and FCI-Englewood. During the hearing, Mr. Campbell testified that he received no reports from FCI-Englewood about misconduct by the appellant nor did he receive any reports about the appellant from FCI-Florence until after the appellant made his protected disclosure.

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[5] Certain cites to the hearing transcript are not available because pages 324-331 are missing from the hearing transcript.

H.T. at 105-06. Further, within 3 months of making his protected disclosure, the appellant was the subject of three separate OIA investigations based on allegations made by Warden Wooten and Mr. Campbell. IAF, Tab 28, Subtabs S, U, V. As shown by the record evidence, the appellant made his protected disclosure on October 10, 1993, and investigations were initiated on October 18, 1993; January 6, 1994; and January 13, 1994. *See* IAF, Tab 29, Subtab AA, *see also id*., Tab 28. Absent any evidence to the contrary, we find that the circumstantial evidence concerning Warden Wooten and Mr. Campbell's actions after the protected disclosure was made was sufficient to show that they both had a strong motive to retaliate against the appellant.

As to the last factor, the agency's treatment of similarly situated non-whistleblower employees, we find that the agency submitted no evidence, let alone clear and convincing evidence, showing that the kinds of matters reported to OIA in this case were the kinds of matters reported in the cases of similarly situated employees who were not whistleblowers. While the record evidence shows that the agency's policy required management to report violations or apparent violations of its standards of conduct, there is no record evidence showing whether that policy was uniformly and even-handedly adhered to by the officials who made the reports at issue here. IAF, Tab 8, Subtab 4s, at 3. Regional Director Kane's testimony that anyone could raise allegations of misconduct, and that all such allegations were referred to OIA, sheds no light on whether Warden Wooten or Mr. Campbell reported misconduct by similarly situated non whistleblower employees. The agency had an opportunity to call Warden Wooten to testify about his treatment of similarly situated employees, but it did not take advantage of this opportunity. Further, the agency elicited no testimony on this issue from Mr. Campbell.

Weighing the three factors (strength of the agency's evidence, motive to retaliate, and treatment of similarly-situated non-whistleblowers), we find that although the reporting officials had strong evidence to support their reports concerning the appellant, this factor is far outweighed by their strong motive to retaliate and the lack of any evidence showing that they treated non-whistleblower employees the same way they treated the appellant. Accordingly, we conclude that corrective action is warranted.

In reaching this determination we recognize that the agency has a policy requiring employees to report misconduct immediately, and that the agency needs to know as soon as possible about conduct that can jeopardize security or endanger the lives of prison staff or inmates. The WPA, however, requires, even under the circumstances presented here, that the agency show by clear and convincing evidence that it did not treat the appellant differently from similarly situated non-whistleblowers under that policy. This is particularly important where, as here, the record evidence shows that the reporting officials had a strong motive to retaliate and may have used the reporting policy as a means of furthering a retaliatory end. Moreover, the question of whether the OIA investigations were conducted in a fair and impartial manner is irrelevant. Rather, the question under the WPA is whether Warden Wooten and Mr. Campbell made their reports as a pretext for retaliation. Given the agency's complete failure to meet its burden of proof under the WPA, we have no choice but to order corrective action.

ORDER

We ORDER the agency to cancel the appellant's demotion. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. § 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE PARTIES

This decision is being referred to the Special Counsel under 5 U.S.C. § 1221, "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction.

See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.