UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LYNN R. RIOS,
Appellant,

v.

DEPARTMENT OF COMMERCE,
Agency.

DOCKET NUMBER
NY-1221-10-0261-W-2

DATE: June 14, 2013

THIS ORDER IS NONPRECEDENTIAL[1]

Rosemary Dettling, Esquire, Washington, D.C., for the appellant.

Monique Cioffalo, Esquire, and Lindsay Young, Esquire, Silver Spring, Maryland, for the agency.

BEFORE

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

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge, which denied the appellant's request for corrective action under the Whistleblower Protection

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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).

Act (WPA). Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed.[2] *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). For the reasons discussed below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Order.

The appellant is a Criminal Investigator (Special Agent) in pay band III with the National Marine Fisheries Service (NMFS) Office of Law Enforcement. In April 2009, the appellant's supervisor, Assistant Special Agent in Charge Jeff Radonski, assigned the appellant to conduct an investigation into allegations that a citizen assaulted a fellow agent, Special Agent Ken Henline. MSPB Docket No. NY-1221-10-0261-W-1, Initial Appeal File (IAF) 1, Tab 18, Subtab 4P at 2-3. Upon completion of the investigation, the appellant submitted a written report to Radonski in which he disclosed that Henline had been untruthful. IAF 1, Tab 9 at 51-70, 75-76; Tab 18, Subtab 4J. The appellant also disclosed the results of his investigation to Special Agent in Charge Harold Robbins (the appellant's third-level supervisor), to Federal Bureau of Investigation (FBI) agent Hector Gonzalez, and to Assistant United States Attorney (AUSA) Warren Vasquez, all

[2] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

without the prior approval of his chain of command, and to the agency's Office of Inspector General (OIG). IAF 1, Tab 9 at 51-74, 80, 86-88; Tab 18, Subtab 4K.

The appellant's performance rating for that year, issued in November 2009, was lower than it had been in prior years, in part because the appellant violated the chain of command when he sent the report to Vazquez. IAF 1, Tab 18, Subtabs 4F, 4Q. Also, the appellant applied for a promotion to pay band IV in December 2009, but Radonski did not recommend his promotion, and, in fact, he was not promoted. IAF 1, Tab 18, Subtabs 4B, 4E.

After exhausting his administrative remedies with the Office of Special Counsel, IAF 1, Tab 9 at 78-100, the appellant filed this appeal and requested a hearing, IAF 1, Tab 1. After a hearing the administrative judge found that the appellant's disclosure to Radonski and to the FBI and AUSA were not protected because he made those disclosures in the normal course of his duties and through normal channels. MSPB Docket No. NY-1221-10-0261-W-2, Initial Decision (ID 2) at 10. The administrative judge did not determine whether the appellant's disclosures to the OIG were protected because she found that the appellant made those disclosures after the personnel actions at issue took place. *Id.* at 11. Without deciding whether the agency showed by clear and convincing evidence that it would have taken the same actions absent any whistleblowing, the administrative judge denied the appellant's request for corrective action. *Id.* at 2-11.

The WPA makes it a prohibited personnel practice to take or fail to take a personnel action because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: (1) a violation of any law, rule, or regulation, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A); *Farrington v. Department of Transportation*, 118 M.S.P.R. 331, ¶ 5 (2012). In *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001), the U.S. Court of Appeals

for the Federal Circuit, while noting that the definition of "any disclosure" under the WPA is broad, held that an employee's disclosure must communicate information either outside the scope of his normal duties or outside of normal channels to qualify as a protected disclosure. In particular, the court outlined three categories into which an employee's communications may fall: (1) disclosures made as part of normal duties through normal channels; (2) disclosures made as part of normal duties outside of normal channels; and (3) disclosures made outside of normal or assigned duties. *Id.*; *see also Fields v. Department of Justice*, 452 F.3d 1297, 1305 (Fed. Cir. 2006). A communication can qualify as a protected disclosure under the WPA only if it falls within the latter two categories. *Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008); *Fields*, 452 F.3d at 1305.[3]

The administrative judge here found that, although the appellant had never before been assigned to investigate a claim of an assault on a federal officer, the disclosures resulting from that investigation were made in the normal course of his duties. ID 2 at 10. The administrative judge found that the appellant was a trained investigator, the agency had at one point in the unspecified past conducted an assault investigation, and it was expedient to have the appellant perform the investigation rather than another agent or the FBI. *Id.* The agency has the right to assign work as it sees fit, *see* 5 U.S.C. § 7106(a)(2)(b), and the agency had the discretion to assign this investigation to the appellant regardless of whether it was efficient or expedient to do so. However, neither the agency's reasons for assigning this investigation to the appellant nor the fact that he was qualified to perform the assignment are relevant to whether the appellant made his disclosures in the normal course of his duties.

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[3] Because we find that the appellant's disclosures were made outside of his normal activities, we do not reach, in this decision, the question of the retroactivity of the Whistleblower Protection Enhancement Act of 2012 which broadened the definition of protected disclosures.

We find that this appeal is similar to the Federal Circuit's decision in *Kahn v. Department of Justice*, 528 F.3d 1336 (Fed. Cir. 2008). In *Kahn*, 528 F.3d at 1343, the court found that the appellant made a nonfrivolous allegation that his disclosures fell under *Huffman* category 3. Mr. Kahn was a Special Agent with the Drug Enforcement Administration (DEA) who was assigned to work on a task force along with other federal agents and some local law enforcement officers. *Id.* at 1339. During the course of that assignment, the appellant discovered and reported alleged misconduct on the part of one of the local law enforcement officers on the task force. *Id.* The court weighed the description of the job duties contained in Mr. Kahn's position description and Mr. Kahn's statement that his normal duties did not include investigating misconduct committed by other agents, against the agency's statement that Mr. Kahn's disclosures fell within the scope of the requirement that Mr. Kahn keep the agency abreast of developments in the task force's operations. *Id.* at 1342-43. The court concluded that the evidence was sufficient to find that Mr. Kahn made a nonfrivolous allegation that his disclosure was not made within the course of his normal duties. *Id.* at 1343.

Like Mr. Kahn, the appellant is a federal agent with a specialized, rather than general, area of responsibility. Mr. Kahn, as a DEA agent, investigated drug-related crimes; the appellant, as an NMFS agent, investigates civil and criminal violations of various statutes associated with marine fisheries. Both Mr. Kahn and the appellant received a specific job assignment from their supervisors, and both discovered and reported to their supervisors that a fellow law enforcement officer committed alleged misconduct of a type outside Mr. Kahn's and the appellant's usual bailiwick. Mr. Kahn's disclosure did not involve a drug crime; the appellant's disclosure did not involve a fisheries violation. Mr. Kahn's disclosure occurred in the context of his official participation in a task force convened to investigate drug crimes (i.e., a work assignment clearly within the scope of his ordinary duties), although the disclosure itself did not involve a drug crime.

However, the appellant's disclosure occurred in the context of an unusual assignment to investigate an alleged assault on a federal officer, a type of investigation that neither the appellant nor his supervisors had been called to perform for the agency. Radonski testified that the appellant had no prior experience investigating assault on federal officers. Hearing Transcript (Tr.) at 428. He also testified that he himself had never investigated an assault on a federal officer in a 27-year career. *Id.* Similarly, Deputy Special Agent in Charge Tracy Dunn, the appellant's second line supervisor, had not investigated an assault at any point during his 22-year career. *Id.* at 528. Although the administrative judge relied on Radonski's general testimony that the agency had investigated "other assault issues" as support for the agency's claim that investigating assaults on federal officers was a normal part of the appellant's duties, *see* Tr. at 415; ID 2 at 10, there is no evidence as to when these investigations might have taken place or under what circumstances. Moreover, both Radonski's and Dunn's testimony about prior assault investigations involved incidents with crew and observers aboard National Oceanic and Atmospheric Administration (NOAA) ships,[4] not an assault on a federal officer. Dunn explicitly testified that "[i]nvestigating an assault on a federal officer, no, is definitely not in [the appellant's] normal course of duties." Tr. at 513. This testimony is substantiated by the appellant's position description, which nowhere mentions any variety of violent crime in connection with the position's "Principal Objective." IAF 1, Tab 18, Subtab 4W; *see Farrington*, 118 M.S.P.R. 331, ¶ 9 (the Board and the court have consistently relied upon position descriptions to determine whether disclosures were made as part of an employee's normal duties), citing *Kahn*, 618 F.3d at 1313.

Consistent with *Kahn*, we find that the disclosures that the appellant made in connection with the investigation into the alleged assault on a federal officer

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[4] The NOAA is the parent agency to NMFS.

did not fall within the scope of his normal job duties and are protected under *Huffman* category 3. *See Kahn*, 528 F.3d at 1342-43; *Huffman*, 263 F.3d at 1353-54. We further find that the appellant has shown by a preponderance of the evidence that he reasonably believed that his disclosure evidenced a violation of law, rule, or regulation, he was affected by two personnel actions that occurred within six months of his disclosures, and the agency managers responsible for the personnel actions knew of the disclosures. Thus, the appellant has shown that he made protected disclosures that were a contributing factor in a personnel action.[5]

The burden of proof now shifts to the agency to show by clear and convincing evidence that it would have rated the appellant in the same manner and not selected the appellant for a promotion in the absence of any whistleblowing. *See Mithen v. Department of Veterans Affairs*, 119 M.S.P.R. 215, ¶ 11 (2013). The administrative judge in her initial decision did not make any findings as to whether the agency has met this burden. Because resolution of this issue may involve resolving conflicting evidence and testimony based on the demeanor of witnesses, the administrative judge is in the best position to resolve such questions. *See Durr v. Department of Veterans Affairs*, 119 M.S.P.R. 195, ¶ 15 (2013). Accordingly, we vacate the initial decision and remand the appeal for further adjudication consistent with this Opinion and Order.

ORDER

We vacate the initial decision and remand this appeal for further adjudication concerning whether the agency has shown by clear and convincing evidence that it would have taken the same personnel actions in the absence of any protected disclosures. On remand, the administrative judge shall apply the

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[5] We agree with the administrative judge that the appellant has not shown that his disclosure to the OIG was a contributing factor in a personnel action because the appellant made that disclosure after the decisions in both personnel actions had been made. *See Hawkes v. Department of Agriculture*, 95 M.S.P.R. 664, ¶ 14 (2004).

principles set forth in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), in determining whether the agency has met its burden of proof.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.