UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 86

Docket No. DC-1221-10-0534-B-1

Igor M. Belyakov,

Appellant,

v.

Department of Health and Human Services,

Agency.

October 30, 2013

Igor M. Belyakov, Gaithersburg, Maryland, pro se.

Jennifer Blake, Esquire, Washington, D.C., for the agency.

Roman Lesiw, Esquire, Bethesda, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of a remand initial decision that denied his request for corrective action in this individual right of action (IRA) appeal. For the following reasons, we GRANT the appellant's petition for

review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.[1]

BACKGROUND

¶2 The appellant was appointed as a Staff Scientist, pursuant to 42 U.S.C. § 209(g), at the National Cancer Institute for a 5-year term beginning November 18, 2001. Initial Appeal File (IAF), Tab 11 at 21. Before this appointment, the appellant had served as a postdoctoral fellow in the same research laboratory with the same supervisor. IAF, Tab 7 at 9. By letter dated November 7, 2005, the appellant's supervisor informed him that his appointment would not be renewed and would expire on November 17, 2006, and that the appellant should begin making arrangements to find another job. IAF, Tab 15, Subtab 4b.

¶3 After the appellant's term ended, he unsuccessfully pursued a discrimination claim against the agency in the federal courts. *See* IAF, Tab 11 at 42-80, 97-140. On October 15, 2009, the appellant filed a whistleblower complaint with the Office of Special Counsel (OSC). IAF, Tab 4. OSC informed the appellant that it was closing its investigation on March 11, 2010. IAF, Tab 15, Subtab 2. The appellant filed a timely IRA appeal alleging that he made two primary disclosures: (1) A September 25, 2003 memorandum to the Director and Deputy Director complaining about alleged ethical violations and abuse of authority[2] on the part of the head of the selection committee that chose another individual over the appellant for a tenure-track immunologist position; and (2) a

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[1] 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.

[2] The alleged improper action took the form of alleged favoritism toward the other candidate that allegedly included filling the selection panel with subordinates of the selecting official, the Branch Chief, whose laboratory was where this position would be filled. The panelists allegedly were the other candidate's friends and coworkers. IAF, Tab 7 at 5.

February 9, 2004 memorandum to the Secretary of the agency complaining about the alleged ethical violations and abuse of authority in the hiring process and the Deputy Director's efforts to cover up these improprieties during his purported investigation. IAF, Tab 7 at 4-5. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation that his alleged protected disclosures were a contributing factor to the agency's decision to take, or fail to take, various personnel actions, including the agency's decision not to reappoint him to his position pursuant to 42 U.S.C. § 209(g). IAF, Tab 26. The administrative judge also concluded that the Board lacked jurisdiction to review the agency's decision not to reappoint the appellant under 42 U.S.C. § 209(g). IAF, Tab 26 at 3-7.

¶4 On review, the Board found that the agency's decision not to renew a Title 42 appointment is a personnel action under the Whistleblower Protection Act (WPA) and remanded the appeal to the Washington Regional Office for adjudication on the merits. *Belyakov v. Department of Health & Human Services*, MSPB Docket No. DC-1221-10-0534-W-1, Remand Order (Oct. 25, 2011); Petition for Review (PFR) File, Tab 6, Remand Order. On remand, the administrative judge denied the appellant's request for corrective action. The administrative judge found that the appellant's October 15, 2009 OSC complaint alleged that the agency: (1) failed to promote him to or select him for a tenure track position; (2) failed to renew his appointment; (3) denied him training and significantly changed his working conditions; and (4) prevented his general reemployment in reprisal for his alleged whistleblowing activities. Remand File (RF), Tab 26, Remand Initial Decision (RID) at 6. The administrative judge noted that he found it appropriate to bifurcate the hearing on the merits in this case and thus to limit the hearing to whether the agency established by clear and convincing evidence that it would have taken the complained of personnel actions absent the appellant's disclosures. *Id.* at 7. The administrative judge found that the agency officials involved in taking the challenged actions lacked a motive to

retaliate against the appellant and that the actions were based on the appellant's conduct and performance, rather than on his alleged disclosures. *Id.* at 30-34. The administrative judge concluded that the agency established by clear and convincing evidence that it would have taken the complained-of personnel actions absent the appellant's disclosures. *Id.* at 34-35.

¶5 The appellant has filed a petition for review of the remand initial decision in which he raises, inter alia, numerous arguments challenging the administrative judge's hearing-related rulings, findings, and determinations in this case. Remand Petition for Review (RPFR) File, Tab 1. For example, the appellant argues that the administrative judge erred by denying several of his requested witnesses, including the appellant himself. RPFR File, Tab 1 at 5, 13-17. The appellant, who is pro se, asserts that the administrative judge did not advise him that he had to request himself as a witness, and, because he did not place his own name on the witness list, the administrative judge precluded him from testifying and presenting his case during the hearing. *Id*. In addition, by challenging the administrative judge's denial of his motion to compel discovery and failure to address the substance of his disclosures, the appellant is also challenging the administrative judge's decision to bifurcate the hearing. *Id*. at 6-9. The agency has filed a response in opposition to the appellant's petition for review. RPFR File, Tab 6.

ANALYSIS

¶6 As noted above, the administrative judge bifurcated the hearing and limited the evidence and argument on remand to "whether the agency can prove by clear and convincing evidence it would have taken the aforementioned personnel actions even in the absence of the appellant's alleged protected disclosures." RF, Tab 17. The administrative judge clarified at the start of the hearing that he would not consider any evidence, arguments, or discovery issues related to the appellant's protected disclosures. RF, Tab 21, Hearing CD (Feb. 14). Many of

the procedural errors alleged on review stem from the administrative judge's decision to bifurcate the hearing on the merits and to hold an initial hearing limited to the question of whether the agency would have taken any of the alleged personnel actions in the absence of any of the alleged protected disclosures. For the reasons set forth below, we find that the decision to bifurcate the hearing was unwarranted under the circumstances in this appeal.

¶7 The WPA[3] prohibits any federal agency from taking, failing to take, or threatening to take or fail to take, a 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 gross waste of funds, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2), (b)(8). In order to establish a prima facie case of reprisal for whistleblowing, the appellant must prove, by preponderant evidence, that he made a protected disclosure and that the disclosure was a contributing factor in a personnel 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 out a prima facie case, the agency is given an opportunity to 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 Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 970-71 (Fed. Cir. 2009). In determining whether an agency has shown by clear and

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[3] The WPA was recently amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465. Under the WPEA, an administrative judge must first address the alleged disclosures and the contributing factor elements prior to addressing whether the agency proved by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *See* WPEA § 114(b) (amending 5 U.S.C. § 1221(e)(2) to permit a finding on whether the agency met its burden only "after a finding that a protected disclosure was a contributing factor"). However, because we find that remand is appropriate even under the pre-WPEA standard, we need not determine whether section 114(b) of the WPEA applies to this appeal, which was pending on review when the WPEA went into effect on December 27, 2012.

convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following 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; and (3) 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).

¶8 The Board has held that, although there are times when it is appropriate to determine whether the agency has met its burden by clear and convincing evidence before proceeding to whether the appellant has established a prima facie case of reprisal, such an approach is not always appropriate. *Mattil v. Department of State*, 118 M.S.P.R. 662, ¶ 12 (2012); *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶¶ 29-31 (2011), *aff'd*, 497 F. App'x 4 (Fed. Cir. 2012). Rather, under certain circumstances, the Board has held that full and fair consideration of an appellant's claims requires adjudication of both the merits of his prima facie case as well as the agency's affirmative defense. *See, e.g.*, *McCarthy*, 116 M.S.P.R. 594, ¶¶ 31-32 (adjudication of both the appellant's prima facie case and the agency's affirmative defense was required where both the substance of the appellant's alleged protected disclosures, as well as the extent to which the deciding official was aware of them, were relevant to the issue of retaliatory motive).

¶9 We find that such circumstances exist in the present case. For example, the substance of the appellant's disclosure on September 25, 2003, to the Deputy Director, the agency official who subsequently approved the selection of another individual for the tenure track position at issue in this case, and his disclosure on February 9, 2004, to the Secretary of the agency, in which he alleged that the Deputy Director had made efforts to cover up alleged hiring process improprieties, are intertwined with his claim that he suffered various reprisals

from 2004 through the decision not to renew his appointment in November 2005. Specifically, the appellant alleged that he suffered significant changes in his working conditions, e.g., denial of a second appointment, baseless disciplinary actions, denial of sick leave, and being excluded from interviews for open positions in the lab. *See, e.g.*, IAF, Tab 4 at 26-27; Tab 7 at 9-11. The appellant further alleged that, before he made his disclosures to the top agency officials, he had an exemplary relationship with his supervisor, had received the highest ratings and multiple awards, and was regularly interviewed for tenured positions. IAF, Tab 7 at 9-10. However, the administrative judge refused to consider any evidence, arguments, or discovery issues related to the appellant's alleged protected disclosures to the Secretary, Director, and Deputy Director of the agency regarding alleged ethical violations and abuse of authority in the hiring process and the alleged cover up by the Deputy Director of those improprieties. In doing so, the administrative judge precluded the appellant from having the opportunity to show that the changes in his working conditions, as well as the relationship with his supervisor, who, as the Chief of the Vaccine Branch, appears to be a direct report to the Deputy Director, were impacted because of his disclosures. Without evidence regarding the appellant's alleged disclosures and the extent to which the relevant management officials were aware of those disclosures, it is impossible to properly evaluate the existence and extent of any retaliatory motive. *See Ryan v. Department of the Air Force*, 117 M.S.P.R. 362, ¶ 14 (2012).

¶10 Furthermore, our reviewing court has issued a decision providing further guidance regarding the Board's consideration of the evidence presented by an agency in an effort to meet its clear and convincing burden of proof. *See Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). In *Whitmore*, the court stated that "[e]vidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion."

Id. at 1368. The court further determined that "[i]t is error for the [Board] to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately." *Id*. The court found that the administrative judge had taken an unduly dismissive and restrictive view on the issue of the existence and strength of any motive to retaliate by the agency and that remand for further fact finding was necessary. *Id*. at 1370-72, 1377. While we do not think that *Whitmore* forecloses bifurcated hearings or proceeding directly to the agency's rebuttal case under appropriate circumstances, the Board is required to use care in doing so and to reserve bifurcation for unusual cases. *See Herman v. Department of Justice*, 119 M.S.P.R. 642, ¶ 19 (2013). Administrative judges should bear in mind that full and fair consideration of the appellant's claims may require adjudication of both the merits of his showing of a contributing factor as well as the agency's affirmative defense. *See id*.

¶11 Here, because the administrative judge bifurcated the hearing, and thus restricted testimony and discovery regarding the appellant's disclosures, we find that the administrative judge has taken an unduly dismissive and restrictive view on the issue of the existence and strength of any motive to retaliate by the agency. We therefore find that remand for a complete adjudication of the issues in this appeal is required, including the opportunity for further discovery and the submission of documentary evidence and hearing testimony. *See Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶¶ 20, 26-29 (2012).

¶12 On remand, the administrative judge shall allow the parties to further develop the record regarding the appellant's disclosures. The administrative judge should then determine whether the appellant established by preponderant evidence that he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8), and whether any such disclosure was a contributing factor in the personnel actions in question. *See Massie v. Department of Transportation*, 118 M.S.P.R. 308, 312 (2012). If the administrative judge finds that the appellant has met his burden, the

administrative judge must then determine whether the agency has met its burden to show by clear and convincing evidence that it would have taken the personnel action, even absent the appellant's disclosure. In analyzing that issue, which includes a finding as to the existence and strength of the retaliatory motive by the agency, the administrative judge shall, consistent with the guidance provided by our reviewing court in *Whitmore*, reconsider the record as a whole and make thoroughly reasoned findings that address both the evidence supporting his conclusions and the countervailing evidence.

¶13 In addition, we note that there is nothing in the record to indicate that the appellant, who is pro se, was advised by the administrative judge that he had to request himself as a witness in order to be allowed to testify. *See* RF, Tab 17. Rather, the record reflects that, at the end of the testimony on February 15, 2012, the administrative judge reviewed the witness list, stated that the appellant was not identified as a witness, and promptly closed the hearing, with the exception of recalling one witness at a later date. RF, Tab 22, Hearing CD (Feb. 15). While the administrative judge did not further address this issue on the record, he found in the initial decision that "since the appellant did not testify at the hearing, I find that the testimony of the agency's witnesses far outweighs the appellant's bare and unsworn contrary assertions." RID at 29. Because it is unclear whether the appellant was aware that he needed to list himself as a witness in his prehearing submission in order to testify at the hearing, on remand the administrative judge shall provide the appellant the opportunity to testify.

ORDER

¶14 Accordingly, we REMAND this appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.