UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 127

Docket No. DC-1221-11-0274-W-1

James F. Mattil,

Appellant,

v.

Department of State,

Agency.

November 21, 2012

James F. Mattil, Laughlin, Nevada, pro se.

Nathan Nagy, Esquire, and Stacy J. Hauf, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins recused himself and did not participate in the adjudication of this appeal.

OPINION AND ORDER

¶1 The appellant petitions for review[1] of the initial decision that denied his request for corrective action in this individual right of action (IRA) appeal. For

[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.

the reasons set forth below, we VACATE the initial decision and REMAND the appeal for further adjudication.

BACKGROUND

¶2 On October 25, 2006, the agency appointed the appellant to the position of Chief of Staff with the Office of Accountability and Transparency (OAT) in its Iraq Reconstruction Management Office and its successor entity, the Iraq Transition Assistance Office. Initial Appeal File (IAF), Tab 12, Subtab C. The agency appointed the appellant pursuant to 5 U.S.C. § 3161, which concerns employment and compensation of employees in a temporary organization. *Id.* (citing hiring authority at 5 C.F.R. § 213.3199, which discusses hiring by temporary organizations under 5 U.S.C. § 3161(a)). The Standard Form (SF) 50 documenting his appointment indicates that the appointment was temporary and was not to exceed 1 year, that the appellant could be terminated at any time, and that the appellant was not eligible to acquire competitive status. *Id.* Although the appellant's duty station was Washington, D.C., he was on temporary duty status when performing duties in Iraq. *Id.* The agency did not reappoint the appellant, and his employment ended on October 25, 2007. IAF, Tab 12, Subtab D.

¶3 The appellant filed an IRA appeal asserting that the agency retaliated against him for making two alleged protected disclosures. IAF, Tab 1. Specifically, the appellant alleged that, on March 15, 2007, he informed the Regional Security Officer at the U.S. Embassy in Baghdad, Iraq, that an individual was violating security policy and endangering the lives of security personnel. *Id.* at 6. The appellant initially claimed that this disclosure angered his immediate supervisor because the supervisor feared it might impede his own chances for advancement and that the supervisor, therefore, retaliated against him by declining to extend the temporary appointment. *Id.* at 6, 8.

¶4 The appellant also alleged that, on July 28, 2007, he disclosed information about corruption in Iraq and actions by Iraqi Prime Minister Al-Maliki to

undermine anti-corruption programs in Iraq to the Counsel and Chief Counsel for the House Committee on Oversight and Government Reform and that this disclosure generated a request by Representative Waxman for the appellant to appear before the Oversight Committee for a sworn interview on September 12, 2007. *Id*. at 7. The appellant claimed that, as a result of this disclosure, the agency conducted an investigation into whether he was the source of a leak of information, relieved him of his duties, ordered him to work from home rather than return to Iraq, denied him access to agency computers, phones, resources, and offices, and excluded him from communications related to ongoing events. *Id*. at 8.

¶5 The administrative judge informed the appellant about the burdens of proof in an IRA appeal and directed the appellant to submit evidence and argument establishing jurisdiction. IAF, Tab 3. The appellant then submitted a voluminous package of documents, which included a more detailed description of his disclosure and the alleged instances of retaliation, as well as numerous exhibits. IAF, Tab 11.

¶6 More specifically, the appellant alleged that in retaliation for his first disclosure, the agency told him to "forgo" his chief of staff duties and "denied" him the opportunity to extend his employment beyond 1 year. IAF, Tab 11 at 8 of 70. The appellant also alleged that the agency took numerous personnel actions in retaliation for his second protected disclosure. *Id*. at 15-16 of 70. These included relieving him of his Chief of Staff duties, ordering him to remain in Washington, D.C., rather than return to Iraq, directing him to work from home, failing to provide him with an office, computer, phone, and access to agency resources, ordering him to call for an appointment before going to the office, directing him to call in from home every day, not issuing a position description, failing to process his Office of Workers' Compensation Programs claim for injuries sustained in Iraq, denying post-deployment psychological counseling, refusing to ship his personal belongs from Iraq to Washington, not issuing a

SF-50 documenting his change in status, failing to process his equal employment opportunity (EEO) complaint, failing to offer alternative dispute resolution or mediation or stay his "termination," not offering to extend his employment term, "terminating" his employment, failing to hire him to the position of Executive Assistant with the Anti-Corruption Coordinator's Office, and "blacklisting" him from future employment opportunities. *Id*.

¶7 The administrative judge found that the appellant's submissions constituted a nonfrivolous allegation of jurisdiction that entitled him to a hearing on the merits of his whistleblowing claim. IAF, Tab 17. The administrative judge also found, however, that only some of the appellant's alleged instances of retaliation constitute personnel actions under 5 U.S.C. § 2302(a)(2)(A) for which the appellant could seek corrective action in an IRA appeal under 5 U.S.C. § 1221(a). IAF, Tabs 27, 84. These personnel actions included the following: allowing the appellant's appointment to expire without renewing it; directing him to work from home, rather than the Washington office, thus denying him access to agency computers, phones, resources, and offices; failing to select him for the position of Executive Assistant with the Anti-Corruption Coordinator's Office; refusing to ship the appellant's personal effects from Iraq to Washington; and excluding the appellant from work communications related to ongoing events in which he was previously involved. IAF, Tab 84 at 4-7. Further, the administrative judge bifurcated the hearing, first addressing the issue of whether the agency could prove by clear and convincing evidence that it would have taken all of the appellant's alleged personnel actions deemed at issue absent the appellant's alleged whistleblowing. IAF, Tab 73, Tab 84 at 4.

¶8 Following that hearing, the administrative judge denied the appellant's request for corrective action, finding that the agency established by clear and convincing evidence that it would have taken the alleged personnel actions at issue absent the appellant's two alleged disclosures. IAF, Tab 106. In reaching this conclusion, the administrative judge credited the testimony of the agency

witnesses that these actions were unrelated to the appellant's alleged whistleblowing, and he found that the appellant's version of the incidents lacked credibility. *Id*. at 23-28.

¶9 On review, the appellant challenges many of the administrative judge's procedural and substantive rulings and findings. Petition for Review (PFR) File, Tab 1. These include allegations that the administrative judge denied him a full opportunity to present his case at hearing, failed to provide clear instructions at the prehearing conference, failed to timely and expeditiously process the appeal, denied proper discovery, denied him an opportunity to introduce evidence, failed to afford the assistance required for a pro se appellant, erred in excluding alleged personnel actions from consideration, incorrectly assessed credibility, and generally erred in finding that the agency met its burden of proving by clear and convincing evidence that it would have taken the personnel actions at issue absent the appellant's whistleblowing. *Id*. The appellant has also submitted documents for the first time on review that purportedly support his claim that the agency failed to meet its burden of proof. *Id*. at 73-79.

ANALYSIS

Full and fair consideration of the appellant's claim requires adjudication of both the merits of his prima facie case of whistleblower reprisal as well as the agency's affirmative defense.

¶10 Many of the alleged procedural errors at issue on review stem from the administrative judge's determination to bifurcate the hearing on the merits and 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. We find that the decision to bifurcate the hearing was unwarranted under the circumstances in this appeal.

¶11 Federal agencies are prohibited from taking, failing to take, or threatening to take or fail to take, any 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, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 2302(a)(2), (b)(8); *see Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 16 (2012). In order to establish a prima facie case of whistleblower reprisal in an IRA appeal, the employee 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); *Jenkins*, 118 M.S.P.R. 161, ¶ 16. If the appellant makes out a prima facie claim of whistleblower reprisal, 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); *Jenkins*, 118 M.S.P.R. 161, ¶ 16. In determining whether an agency has shown by clear and 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 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); *see Jenkins*, 118 M.S.P.R. 161, ¶ 16.

¶12 Although there are times when an administrative judge may properly determine whether the agency met its burden of showing by clear and convincing evidence that it would have taken the personnel actions at issue absent the appellant's alleged whistleblowing before proceeding to whether the appellant established a prima facie case of reprisal, such an approach is not always appropriate. *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶¶ 29-31 (2011), *aff'd*, No. 2011-3239, 2012 U.S. App. Lexis

21262 (Fed. Cir. Oct. 15, 2012). Instead, certain circumstances require adjudication of both the merits of the appellant's prima facie case as well as the agency's affirmative defense. *See, e.g.*, *id.*, ¶¶ 31-32. These circumstances arise where the substance of the alleged disclosure, as well as the extent to which the retaliating official was aware of the disclosure, is relevant to retaliatory motive. *Id.*; *Jenkins*, 118 M.S.P.R. 161, ¶ 17.

¶13 Such is the case here. For example, the substance of the appellant's first disclosure is intertwined with his claim that his immediate supervisor was concerned with the effect of that disclosure on his own career. IAF, Tab 1 at 6, 8. The administrative judge did not address this claim in determining that the agency established by clear and convincing evidence that it would have taken the personnel actions at issue absent the appellant's alleged whistleblowing. IAF, Tab 106 at 7-28. 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.[2]

On remand, the administrative judge shall allow the parties to further develop the record regarding certain alleged "personnel actions."

¶14 In an IRA appeal, an employee may seek corrective action from the Board with respect to any "personnel action" taken, or proposed to be taken, against him as the result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(a). In this context, a "personnel action" is defined as follows: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a

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[2] In this regard, we note that, on review, the appellant has submitted for the first time payroll records purportedly showing that he worked overtime, thereby disputing testimony that there was no need to retain him because there was little work. PFR File, Tab 1 at 25, 73-80. The administrative judge should consider these documents in analyzing the appeal on remand. *See Jenkins*, 118 M.S.P.R. 161, ¶ 29 n.4.

reemployment; (viii) a performance evaluation under 5 U.S.C. chapter 43; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A).

¶15 In his prehearing conference summary, the administrative judge stated that the appellant alleged that five retaliatory personnel actions resulted from his first disclosure. IAF, Tab 84 at 4. Specifically, the administrative judge explained that the appellant claimed that the agency: (1) failed to sign or approve a valid position description between January 26 and June 2, 2007; (2) failed to process a revised position description effecting a promotion; (3) denied him any "opportunity to extend his one-year employment term on March 15, 2007"; (4) eliminated the OAT Chief of Staff position; and (5) terminated the appellant from his employment on October 29, 2007. *Id*.

¶16 The administrative judge found that only the third alleged action, i.e., the agency's denial of an extension of the appellant's appointment, is a personnel action under 5 U.S.C. § 2302(a)(2)(A). *Id*. at 4-5. The administrative judge found that the first two actions do not fit within any of the definitions listed in section 2302(a)(2)(A) and that, to the extent the appellant claimed that the agency's failure to certify a valid position description constitutes a significant change in duties or working conditions, the appellant failed to exhaust his remedies with the Office of Special Counsel (OSC) regarding this matter. *Id*. at 4-5. In finding that the appellant's fourth and fifth actions are not personnel actions, the administrative judge noted that they are "intertwined" with the third action, which is a personnel action under section 2302(a)(2)(A). *Id*. The administrative judge explained that, although the agency's decision not to extend the appellant's appointment is a personnel action, the "elimination of his position" at the expiration of the temporary appointment is not a personnel action.

Id. at 5. The administrative judge further found that the appellant's characterization of the end of his employment as a "termination" does not constitute a personnel action because this "termination" was not a separate action but instead resulted from the agency's decision not to extend his appointment. *Id*.

¶17 The administrative judge then described the twelve actions that the appellant claimed the agency took in retaliation for his second disclosure. *Id*. at 5-6. These were the following: (1) illegally investigating the appellant; (2) relieving the appellant of his OAT Chief of Staff duties; (3) failing to give the appellant a position description; (4) directing the appellant to work from home rather than in the State Department offices; (5) denying the appellant access to agency computers, phones, resources, and offices; (6) excluding the appellant from communications related to ongoing events in which he was involved; (7) refusing to ship the appellant's personal effects from Iraq to Washington; (8) failing to extend the appellant's employment pending resolution of his pending EEO complaint; (9) failing to take action on the appellant's EEO complaint, provide mediation, or initiate an investigation, until after terminating his employment; (10) failing to process the appellant's workman's compensation claim for injuries sustained in Iraq; (11) failing to provide standard psychological post-deployment counseling upon the appellant's request; and (12) "blacklisting" the appellant, thereby "effectively destroying" his ability to obtain subsequent employment with the agency. *Id*.

¶18 The administrative judge found that actions 4 through 6 are covered under section 2302(a)(2)(A)(xi) because they constitute a significant change in duties, responsibilities, or working conditions. *Id*. at 6. He also found that action 7 is a benefit covered under section 2302(a)(2)(A)(ix) and that action 12 is a covered personnel action only with respect to the appellant's claim that the agency did not select him for an Executive Assistant position, because this was the only claim he had raised with OSC. *Id*.

¶19 The administrative judge found that the remaining actions are not "personnel actions" as defined at 5 U.S.C. § 2302(a)(2)(A). *Id*. at 6-7. More specifically, the administrative judge found that an investigation is not specifically listed as a personnel action under section 2302(a)(2)(A) and that being relieved of duties as OAT's Chief of Staff and not receiving a position description are also not specifically listed as personnel actions and do not otherwise constitute a change in duties, responsibilities, or working conditions under section 2302(a)(2)(A)(xi). *Id*. The administrative judge further found that actions 8, 9, and 10 do not fall under the provision of 5 U.S.C. § 2302(b)(8) precluding reprisal for whistleblowing, but instead are covered by section 2302(b)(9), which is beyond the Board's purview in an IRA appeal. *Id*. In making these findings, the administrative judge also noted that action 8 preceded the appellant's disclosure and thus the alleged disclosure could not have been a contributing factor in that action, and that actions 9 and 10 were not personnel actions under section 2302(a)(2)(A). *Id*. Finally, the administrative judge found that action 11 is not a decision to provide psychological testing under section 2302(a)(2)(A)(x). *Id*.

¶20 We agree with the administrative judge's determinations that action 3 under the first disclosure, and actions 4 through 7 with respect to the second disclosure are personnel actions under the section 2302(a)(2)(A). We also agree that action 12 under the second disclosure is a personnel action with respect to the failure to select the appellant for the Executive Assistant position. We further agree that a failure to provide a valid position description is not a covered personnel action. Even if such a failure may be deemed a change in working conditions, we find it is not a significant change in working conditions, as required to be covered under section 2302(a)(2)(A)(xi). We also agree that the appellant's claims regarding the denial of an extension of his appointment, the elimination of his position, and his termination are all intertwined. Because they are intertwined, however, we find, contrary to the administrative judge, that all of these matters are personnel

actions properly before the Board. *See Usharauli v. Department of Health & Human Services*, 116 M.S.P.R. 383, ¶ 11 (2011).

¶21 We also find that further adjudication is warranted to develop the appellant's claims regarding the remaining alleged personnel actions stemming from the second disclosure. Although an investigation is not generally a personnel action, it is proper to consider evidence regarding the investigation if it is so closely related to the personnel action that it could have been a pretext for gathering information to retaliate for whistleblowing. *See Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 7 (2007). We find that the appellant should be afforded the opportunity to develop this claim on remand.

¶22 Further, to the extent the appellant's claim regarding being relieved of his duties relates to the agency's decision to not renew or extend his appointment after 1 year, this matter is a personnel action for the reason discussed above regarding this same allegation with respect to the first disclosure. The appellant's claims regarding the agency's failure to extend his appointment during resolution of his EEO complaint and its delayed action on that complaint are not excluded from section 2302(b)(8) coverage simply because they may also fall under subsection (b)(9). *See Massie v. Department of Transportation*, 114 M.S.P.R. 155, ¶ 12 n.1 (2010). Construing these claims broadly, as required, *see Usharauli*, 116 M.S.P.R. 383, ¶ 10, we find that the appellant has nonfrivolously alleged that the agency's failure to process his EEO complaint in its usual manner may constitute a significant change in working conditions, which would be a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xi). Similarly, the appellant's claims that the agency changed its normal procedures for processing OWCP claims and providing "standard" post-deployment psychological counseling could also be broadly construed as a significant change in working conditions. We therefore find that the appellant should be allowed to further develop these claims on remand.

¶23 We further note that the administrative judge found that the appellant's claim that the agency "blacklisted" him from employment opportunities is not a personnel action and that, even if it were, the appellant did not exhaust his remedies with OSC with respect to this claim. IAF, Tab 84 at 4-7; Hearing Transcript at 6. Although "blacklisting" per se is not an enumerated personnel action under 5 U.S.C. § 2302(a)(2)(A), construed broadly, it could constitute a failure to appoint, which would be properly before the Board in an IRA appeal if the appellant identifies particular employment opportunities that the agency denied as part of the alleged "blacklisting." 5 U.S.C. §§ 2302(a)(2)(A)(i), 2302(b)(8). Further, contrary to the administrative judge's finding, the record shows that the appellant specifically raised this issue with OSC, stating that the agency "blacklisted" him in retaliation for testifying to Congress, and he included this claim in some of his submissions below. IAF, Tab 11 at 58 and 65 of 70; Tab 91. Further adjudication is, therefore, warranted on this issue as well.

The administrative judge's findings regarding the agency's affirmative defense must address both the evidence supporting his conclusion and the countervailing evidence.

¶24 The appellant has also alleged that the administrative judge committed numerous adjudicatory and factual errors. PFR File, Tab 1 at 29-69. Many of these assertions pertain to the appellant's claim that the administrative judge did not consider all of the evidence in concluding that the agency established by clear and convincing evidence that it would have taken the alleged personnel actions at issue absent the appellant's alleged whistleblowing. We agree that the administrative judge did not properly evaluate all the relevant evidence in reaching his conclusion that the agency met this burden of proof. The administrative judge must, therefore, reanalyze this issue after conducting further adjudication on remand.

¶25 In *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), the U.S. Court of Appeals for the Federal Circuit explained how the Board should evaluate the record in determining whether an agency has shown by clear and convincing evidence that it would have taken the personnel actions at issue absent an appellant's whistleblowing. It explained that whether evidence is sufficiently clear and convincing to meet this burden of proof is not determined by examining only the evidence that supports the ultimate conclusion reached. 680 F.3d. at 1368. Instead, evidence satisfies this burden of proof only when it is considered with all the pertinent record evidence and despite the evidence that fairly detracts from that conclusion. *Id*. The court further specifically stated that it is error to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been adequately proven. *Id*.

¶26 The court then applied this standard in evaluating the factors set forth in *Carr*, 185 F.3d at 1323, for determining whether an agency showed by clear and convincing evidence that it would have taken the personnel actions at issue absent the appellant's whistleblowing. *Whitmore*, 680 F.3d at 1368-75. These factors include the strength of the agency's evidence supporting 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 took similar actions against employees who were not whistleblowers but who were otherwise similarly situated. *Carr*, 185 F.3d at 1323.

¶27 In examining retaliatory motive, the court cautioned the Board against taking an unduly dismissive and restrictive view, noting that, where the whistleblowing disclosure reflects on agency officials in their capacities as managers and employees, or is highly critical of an agency's conduct, agency officials may be motivated to retaliate even when they are not directedly implicated by the disclosures, do not know the whistleblower personally, are outside the whistleblower's chain of command, were not directly involved in the alleged retaliatory actions, or were not personally named in the disclosure.

Whitmore, 680 F.3d at 1370-72. The court further stated that, when applying the retaliatory motive factor, the Board should consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision. *Id*. at 1371.

¶28 The court then discussed the similarly situated non-whistleblower factor, noting that Board precedent has taken an unduly narrow view of the meaning of "similarly situated" in determining whether an agency met its burden of proving by clear and convincing evidence that it would have taken the alleged personnel actions in the absence of the appellant's whistleblowing. *Id*. at 1373. The court criticized Board precedent requiring that the appellant's employment situation be "nearly identical" to the comparison employees, finding that *Carr* requires the comparison employees to be "similarly situated" rather than identically situated. *Id*. The court then explained that the "requisite degree of similarity between employees cannot be construed so narrowly that the only evidence helpful to the inquiry is completely disregarded." *Id*. The court added that "[d]ifferences in kinds and degrees of conduct between otherwise similarly situated persons within an agency can and should be accounted for to arrive at a well-reasoned conclusion . . ., particularly where . . . there was only a single person in the record for which a comparison can be made." *Id*. at 1373-74.

¶29 Here, the administrative judge focused almost exclusively on the hearing testimony in making his clear and convincing evidence determination. IAF, Tab 106 at 7-28. In doing so, he mainly discussed the agency's testimony supporting its reason for taking the actions at issue. *Id*. In fact, the administrative judge did not discuss any evidence supporting the appellant's position for some of these alleged personnel actions at issue. *Id*. As such, the initial decision does not meet the requirement in *Whitmore* that an initial decision examine all the pertinent

record evidence, rather than focusing on only the evidence supporting the ultimate conclusion reached.[3] 680 F.3d at 1368.

¶30 The appellant's petition for review, however, is replete with allegations identifying specific evidence, both documentary and testimonial, weighing against finding that the agency proved by clear and convincing evidence that it would have taken the actions at issue absent the appellant's whistleblowing. PFR File, Tab 1 at 26-28, 32-43, 47-58. In making this observation, we note that the administrative judge properly rejected the appellant's attempt to submit some of the referenced documents because the appellant failed to timely submit them.[4] Many of the documents in the appellant's rejected submission, however, are still properly in the record because they are duplicated in the agency file and should, therefore, be considered in the *Whitmore* analysis. *Id*. at 26-28; *see, e.g*., IAF, Tab 28, Part 1, Exhibits 4a-4c, 4g, 4v, 4x, 4z; Tab 28, Part 2, Exhibits 4jj, 4kk, 4nn, 4oo, 4pp.

¶31 The initial decision also omits discussion or meaningful analysis of the appellant's claims that his supervisor expressed a motive to retaliate against the appellant for his whistleblowing because the supervisor feared that the appellant's action would hamper the supervisor's career, and that the appellant was the only OAT employee denied an extension and whose position was threatened with

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[3] We note that the administrative judge relied heavily upon credibility determinations, including demeanor observations, in reaching his ultimate conclusion, and such credibility determinations are typically entitled to deference on review. IAF, Tab 106 at 23-27; *see Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). *Whitmore*, however, requires more than just an evaluation of testimonial evidence and instead specifically requires an evaluation of all of the pertinent record evidence. 680 F.3d at 1368.

[4] As explained elsewhere in this Opinion and Order, the parties will be afforded the opportunity to further develop the record regarding certain issues. To the extent that any of the appellant's previously rejected exhibits are relevant to those issues, the appellant may resubmit them for due consideration, provided that he complies with the time limits and instructions for doing so set by the administrative judge on remand. *See Jenkins*, 118 M.S.P.R. 161, ¶ 29 n.4.

elimination. PFR, Tab 1 at 33, 42; IAF, Tab 11, Part A at 6-7 of 70. In determining whether the agency met its burden of proof, the administrative judge should analyze all of the record evidence in accordance with the instruction in *Whitmore* and make thoroughly reasoned findings that address both the evidence supporting his conclusion and the countervailing evidence. *See Massie v. Department of Transportation*, 118 M.S.P.R. 308, 310-12 (2012).[5]

ORDER

¶32 Accordingly, we REMAND this appeal for further adjudication of the appellant's prima facie case of whistleblower reprisal and, if necessary, a new analysis of whether the agency established by clear and convincing evidence that it would have taken the personnel actions at issue in the absence of the appellant's whistleblowing, in accordance with the guidance set forth in *Whitmore*. On remand, the administrative judge shall afford the parties the opportunity to conduct discovery and submit evidence on the issues identified in

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[5] We note that the appellant's petition for review raises an allegation of administrative judge bias and requests that the case be reassigned to another administrative judge should the Board remand it for further adjudication. PFR File, Tab 1 at 23, 71. To prevail on a bias claim, an appellant must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if his comments or actions evidence a deep-seated favoritism or antagonism that would make fair judgment impossible. *See Smets v. Department of the Navy*, 117 M.S.P.R. 164, ¶ 15 (2011). The appellant's allegations on review here neither overcome the presumption of honesty and integrity that accompanies an administrative judge, nor establish that the administrative judge showed a deep-seated favoritism or antagonism that would make fair judgment impossible. We, therefore, find no reason to order this appeal reassigned to another administrative judge on remand.

this Opinion and Order that were not fully adjudicated during the initial proceedings before the administrative judge.

FOR THE BOARD:

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