UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

64 M.S.P.R. 136

Docket Number AT035192064 8I1

HARRY C. SANDERS, Appellant,

v.

DEPARTMENT OF THE ARMY, Agency.

Date: August 11, 1994

Barry Staples, Esquire, Marietta, Georgia, for the appellant.

Robin Allen, Esquire, Ft. McPherson, Georgia, For the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision that sustained his separation by reduction-in-force (RIF) procedures. After full consideration, we DENY the petition for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN the appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision AS MODIFIED by the Opinion and Order. The appellant's separation IS SUSTAINED.

BACKGROUND

In August 1990, the agency informed the appellant of recent cuts in the operating budget of the Forces Command (FORSCOM) Flight Detachment, Ft. McPherson, Georgia. *See* Initial Appeal File (IAF), Tab 7, Subtab 4g. It further stated that, as a cost-saving measure, it was necessary to abolish through RIF procedures his position as Supervisory Aircraft Pilot, GS-12, with the Flight Detachment. *See id.* In lieu of separation by RIF, the agency offered the appellant the position of Plans and Operations Specialist, GS-11, but the appellant refused the offer, and his involuntary termination was then effected. *See* IAF, Tab 7, Subtabs 4e, 4f, 4g.

Alleging that the RIF had been taken in reprisal for his whistleblowing activity, the appellant sought corrective action with the Office of Special Counsel (OSC); OSC terminated its investigation in March 1992. *See* IAF, Tab 2. The appellant then timely filed a petition for appeal of his separation with the Board. *See* IAF, Tab 1. He

questioned the bona fides of the RIF as well as the procedures by which it had been effected, and he repeated his allegation of reprisal for whistleblowing. *See id.*; Tab 23. The agency disputed the appellant's assertions. *See* IAF, Tab 7, Subtab 1; Tab 23.

After a hearing, the administrative judge sustained the appellant's separation. *See* Initial Decision (I.D.) at 2- 21. He found that the agency had invoked the RIF regulations for a legitimate management purpose and that it had properly applied RIF procedures. *See* I.D. at 2-8. He concluded that the appellant had established by preponderant evidence that his whistleblowing activity was a contributing factor in the agency's decision to abolish his position. *See id.* at 8-19. The administrative judge also found, however, that the agency had established by clear and convincing evidence that it would have taken the same action absent the appellant's protected activity. *See id.* at 19- 21. In his petition for review, the appellant disputes the administrative judge's findings on the RIF and on his allegations of reprisal for whistleblowing. *See* Petition for Review File (PFRF), Tab 1. The agency has responded in opposition to the appellant's petition. *See* PFRF, Tab 3.[1]

ANALYSIS

Because the RIF action at issue here was directly appealable to the Board, see 5 C.F.R. § 351.901, the Board's scope of review extends to both the merits of the action and any affirmative defenses asserted. Its jurisdiction and scope of review thus is the same as if the appellant had filed a petition for appeal of the separation with the Board in the first instance, rather than first filing a complaint with OSC. *See Massimino **V.** Department of Veterans Affairs,* 58 M.S.P.R. 318, 322-25 (1993).

An agency must show by preponderant evidence that it invoked the reduction-in-force regulations for one of the legitimate management reasons specified in 5 C.F.R. § 351.201(a); it can make out a prima facie case on this element of its decision by establishing that a RIF was undertaken for one of the approved reasons. *See Losure v. Interstate Commerce Commission*, 2 M.S.P.R. 195, 201-02 (1980). The Garrison Commander of Ft. McPherson (Col. Lord) testified that the RIF was part of a cost-saving campaign ordered by him throughout the installation in response to budget cuts mandated by FORSCOM. *See* Hearing Tapes Day One (H.T. 1), Side 1A, Testimony of Col. Gerald Lord. The appellant contends that the agency failed to show that budget cuts occurred and that reductions in the civilian personnel workforce were made in response to those cuts. *See* PFRF, Tab 1 at 1-5.

It appears that FORSCOM did order cuts in the civilian pay budget of Ft. McPherson and that positions were abolished throughout the installation in response to those cuts. *See* H.T. 1, Side 4B, Testimony of Aileen Garrison; IAF, Tab 7, Subtabs 4c,

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[1] The appellant and the agency filed additional submissions after the record closed but did not show that these submissions were based on new and material evidence not previously available before the record closed. *See* PFRF, Tabs 4, 5. Therefore, we will not consider them. *See Nixon v. Department of the Navy*, 51 M.S.P.R. 624, 626 (1991), *aff'd*, 972 F.2d 1354 (Fed. Cir. 1992) (Table).

4d, 4i.[2] Although most of the positions abolished by the agency were vacant, see IAF, Tab 7, Subtab 4d, the potential civilian workforce at Ft. McPherson was nonetheless significantly reduced in response to the budget cuts. Ft. McPherson's budget for fiscal years 1991 and 1992 did increase from the level in 1990. *See* IAF, Tab 21, Exhibit MM. However, the increase seems to have been attributable to funds unexpectedly available as a result of Operation Desert Storm. *See* H.T. 1, Sides 3A, 3B, Testimony of Lt. Col. Gary Hall; Side 4A, Testimony of William Reese. The agency thus showed that, on its face, the RIF was only part of a legitimate cost-cutting effort initiated in response to a general budget cut. *See Losure*, 2 M.S.P.R. at 201-02.

Concerning the procedures by which the RIF was effected, the appellant argues that the administrative judge improperly excluded evidence that would have shown that his position was abolished without required authorization from agency headquarters. *See* PFRF, Tab 1 at 5-6. The proffered evidence was submitted after the record closed, allegedly because the agency had failed to respond to the appellant's discovery request until after the record closed. *See* IAF, Tab 23. To show good cause for failure to comply with time limits set by a Board order, a party must set forth a good reason for the failure to act in a timely manner by showing that he exercised diligence or ordinary prudence under the particular circumstances of the case. *See Thompson v. Department of the Interior*, 35 M.S.P.R. 322, 325-26 (1987). As the administrative judge noted, however, *see* I.D. at 8 n.5, the appellant did not comply with the Board order concerning discovery and failed to initiate discovery in a timely manner. *See* IAF, Tabs 3, 10. Moreover, the appellant failed to submit a motion for extension of time to continue discovery before the record closed, and he did not file a motion to compel discovery from the agency before the record closed. The administrative judge thus properly rejected the proffered evidence as having been untimely filed without a showing of good cause. *See Thompson*, 35 M.S.P.R. at 325-26.

The appellant also alleged that the agency had separated him in retaliation for his protected whistleblowing activity. To establish the affirmative defense of reprisal for whistleblowing activities under the Whistleblower Protection Act (WPA), an employee must prove by preponderant evidence that a disclosure described in 5 U.S.C. § 2302(b)(8) was a contributing factor in a "personnel action" taken against him. If the employee meets this burden, the agency must show by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *See* 5 C.F.R. §§ 1209.1, 1209.7; *Braga v. Department of the Army*, 54 M.S.P.R. 392, 396 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table). The administrative judge found that a separation by RIF procedures could not be a "personnel action"

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[2] The appellant complains that he did not receive budget documents that he requested during discovery. *See* PFRF, Tab 1 at 2-3. The evidence of record shows that the appellant did not file a timely discovery request concerning this matter and does not show that he filed a motion to compel discovery with the administrative judge. *See* IAF, Tabs 3, 10. Because of his lack of due diligence, the appellant was responsible for any absence of documents necessary to support his argument on the bona fides of the RIF, *see Radziewicz v. United States Postal Service*, 42 M.S.P.R. 692, 695-96 (1990), and we conclude that the agency's proof was correctly found sufficient by the administrative judge.

under the WPA. *See* I.D. at 12-13. He nonetheless analyzed whether the appellant had established the other elements of his burden of proof under the WPA, finding that the appellant had made a protected disclosure and that his whistleblowing activity had been a contributing factor to his separation; the administrative judge also determined, however, that the agency had shown by clear and convincing evidence that it would have taken the same action absent the disclosure. *See id.* at 13-21. Because the agency had met its clear-and- convincing burden of proof, he found that the appellant had not established the affirmative defense. *See id.* at 21.

The administrative judge erred in one respect; the Board held after the issuance of the initial decision here that a RIF action that affects an employee for reasons personal to the employee is a personnel action covered under the WPA. *See Carter v. Department of the Army*, MSPB Docket No. DA122192005M1, slip op. at 5-8 (May 3, 1994). We need not address, however, whether the appellant's separation here was covered under the WPA; even assuming for the sake of argument that it was covered,[3] we concur with the administrative judge's ultimate finding (for the reasons set forth below) that the affirmative defense had not been established. *See Clark v. Department of the Army*, 997 F.2d 1466, 1470-71 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 920 (1994) (it is unnecessary and even wasteful to address a step in the analysis of a whistleblower reprisal claim when the affirmative defense has already been rejected on another ground). His error in stating that a RIF action could not be covered under the WPA thus does not affect the result here. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

The appellant asserted that the commander of the FORSCOM Flight Detachment (Lt. Col. Hall) had recommended the abolishment of his position by RIF procedures after the appellant had disclosed to the Inspector General and other authorities that Lt. Col. Hall and his wife had misused Army aircraft. *See* I.D. at 9-10; IAF, Tabs 12, 23. The administrative judge found that Lt. Col. Hall had on a prior occasion acted in reprisal against the appellant for his whistleblowing activity. *See* I.D. at 8-19. In contrast, however, he found that Col. Lord, who made the final decision on the RIF, had not acted with retaliatory motives and had made a legitimate management decision "to abolish a position that could be covered at a greatly reduced expense." *See* I.D. at 19-21. We agree.

Col. Lord and his Labor Counselor (Mr. Vitaris) were concerned about the appearance of impropriety generated by Lt. Col. Hall's recommendation of the abolishment of the appellant's position. *See* H.T. 1, Side 1A, Testimony of Col. Gerald Lord; IAF, Tab 21, Deposition of Richard Vitaris. Instead of routinely approving the recommendation, as was customary, they thoroughly discussed the proposal together

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[3] Even if the appellant's separation by RIF procedures was not a "personnel action" under the WPA, he would still have the opportunity to prove reprisal under the higher standard of proof set forth in *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). Because we find below that the appellant's reprisal claim fails under the WPA, we conclude that it also fails under the higher standard of proof required in Warren. *See Moran v. Department of the Air Force,* MSPB Docket No. SE0351930031I1, slip op. at 14 (Aug. 8, 1994).

and with other legal and personnel specialists before Col. Lord decided that it was an appropriate action to take. *See* IAF, Tab 21, Deposition of Richard Vitaris. Col. Lord testified that he concluded that Army Reserve pilots could be assigned to perform the duties of the appellant's position on an intermittent, rotating basis, and that he therefore would be able to save the cost of paying for a full-time Supervisory Aircraft Pilot. *See* H.T. 1, Side 1A, Testimony of Col. Gerald Lord. Based on his observation of Col. Lord's demeanor at the hearing, the administrative judge concluded that his testimony was credible and that, along with Mr. Vitaris's corroborating testimony, it established that Col. Lord lacked retaliatory motives and would have taken the same action absent the appellant's protected activity. *See* I.D. at 20-21.

The appellant disputes this finding, alleging that Col. Lord had either endorsed or condoned a number of prior retaliatory acts committed against him by Lt. Col. Hall. *See* PFRF, Tab 1 at 6-12. The evidence of record indicates that Col. Lord convened a board of inquiry into a January 1990 flying incident in which the appellant was involved. *See* IAF, Tab 2, Exhibit Z. The board recommended that the appellant's pilot-in-command (PIC) status be revoked, but it also suggested that it be restored after the appellant received additional training. *See id.* Mr. Vitaris testified that Col. Lord was skeptical of Lt. Col. Hall's ability to take impartial action concerning the incident and convened a board composed of pilots from outside his command in order to ensure that the appellant received fair treatment and a full hearing. *See* IAF, Tab 21, Deposition of Richard Vitaris. The appellant admitted that he had been given an opportunity for a thorough presentation of his case and that the board's recommendation did not on its face show bias against him. *See* Hearing Tapes Day Two (H.T. 2), Side 2A, Testimony of Harry Sanders; IAF, Tab 1 (Appeal Form). Although he also contends that the board treated him more harshly than other pilots involved in several other incidents, see PFRF, Tab 1 at 9-10, he does not indicate whether Col. Lord was involved in the disciplinary decisions concerning those incidents.

The appellant also claims that Col. Lord condoned other "prohibited activities" by Lt. Col. Hall. *See* PFRF, Tab 1 at 10-11. Specifically, the evidence of record shows that OSC directed the agency in March 1990 to cancel a prior RIF action that had been effected against the appellant, and it also ordered the agency to cancel a revised position description of the appellant's duties. *See* IAF, Tab 1, Exhibit R. In addition, the board of inquiry investigating the January 1990 flying incident recommended that more training be given to the appellant. *See* IAF, Tab 2, Exhibit Z. The administrative judge noted, see I.D. at 18, that Lt. Col. Hall did not heed these instructions by restoring the appellant's supervisory duties and affording him additional training. While the administrative judge concluded that Lt. Col. Hall evidenced bias by refusing these directions, see I.D. at 18-19, the appellant has not pointed to evidence of record indicating that Col. Lord was aware of this misconduct and in any sense "condoned" it. In fact, the hearing record indicates that Col. Lord was not extensively involved in the day-to-day operations of the directorates under his command. *See* H.T. 1, Sides 1A, 1B, Testimony of Col. Gerald Lord; IAF, Tab 21, Deposition of Richard Vitaris. The appellant thus has not shown that Col. Lord exhibited retaliatory motive simply because he failed to detect and curtail misconduct by a subordinate.

The appellant also contends that through one of his submissions to the administrative judge he showed that OSC found in its investigation that Col. Lord had engaged in retaliation against him. *See* PFRF, Tab 1 at 9. A narrative summarizing OSC's investigation of the appellant's whistleblowing complaint does not show that OSC ultimately reached such a conclusion. *See* IAF, Tab 17. The appellant also claims, without pointing to supporting evidence in the record, that Col. Lord did not adequately "support" him in the proceedings before the board of inquiry and in securing contributions he made to the Civil Service Retirement System. *See* PFRF, Tab 1 at 11. Even assuming that this unsupported assertion is true, it does not establish retaliatory motive by Col. Lord; at most, it shows nothing more than a lack of diligent assistance on Col. Lord's part. The appellant thus has not set forth any factors that cast doubt on the administrative judge's credibility finding with respect to Col. Lord. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

As noted above, Lt. Col. Hall had retaliatory motives with respect to the appellant and proposed his separation by RIF procedures. Given Lt. Col. Hall's key role in initiating the process that led to the appellant's separation, we agree with the administrative judge that the appellant's disclosure was a contributing factor to the RIF action. *See* I.D. at 19; *Marano v. Department of Justice*, 2 F.3d 1137, 1143 (Fed. Cir. 1993) (an employee's burden of proof on the contributing factor issue is merely to show by preponderant evidence that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action). However, Col. Lord and Mr. Vitaris made apparently conscientious and thorough efforts to ensure that the decision on the RIF was impartially made. And, the RIF appears to have been part of a legitimate cost-reduction campaign instituted by Col. Lord. The agency thus successfully limited the effect of Lt. Col. Hall's improper motives on its decision to effect the RIF. We therefore find that the agency has demonstrated by clear and convincing evidence that it would have taken the same action absent the appellant's protected disclosure, and the appellant therefore has not prevailed on his affirmative defense. *See* Braga, 54 M.S.P.R. at 396.

ORDER

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

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.