UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

J. RICHARD WAGNER, Appellant, v. ENVIRONMENTAL PROTECTION AGENCY, Agency.	DOCKET NUMBER DC122191W0547 DATE: JUN 26 1992

J. Richard Wagner, Dixon, California, pro se.

Joanne M. Hogan, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review, and the agency's cross petition for review, of the August 27, 1991 initial decision that denied the appellant's request for corrective action against the agency. For the reasons discussed below, the Board DENIES the appellant's petition and the agency's cross petition because they do not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this appeal on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial

decision as MODIFIED by this Opinion and Order, still DENYING the appellant's request for corrective action.

BACKGROUND

On May 10, 1991, the appellant, a GM-15 Criminal Investigator with the agency's Office of Inspector General, filed with the Board's Washington, D.C., Regional Office an individual right of action (IRA) appeal,[1] alleging that the agency retaliated against him for his whistleblowing activities when it took the following actions: (1) Rated him "fully successful" in his 1990 performance evaluation; (2) denied him training that he requested on August 21, 1990; and (3) failed to include him in a training conference sponsored by the Association of Federal Investigators. *See* Appeal File, Tab 1.

The administrative judge found that, while a performance evaluation is a personnel action under 5 U.S.C. § 2302(a)(2), and thus within the Board's jurisdiction, the appellant failed to present support for his allegations that the remaining two actions were also personnel actions. He therefore found that

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[1] We note the appellant's objection below, and on review, to the administrative judge's order that he submit a copy of a March 6, 1991 letter from the Special Counsel notifying him that that office would not seek corrective action on his whistleblower complaint. *See, e.g.*, Appeal File, Tab 12; Petition for Review at 50. Because, however, the appellant filed an IRA appeal under the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989), he was required to submit evidence that he had exhausted his administrative remedies before the Special Counsel. *See* 5 U.S.C. § 1214(a)(3)(A); 5 C.F.R. §§ 1209.5(a) and 1201.56(a)(2). Thus, we find that the administrative judge properly requested the March 6 letter. *See id.*

the appellant failed to show that those actions were within the Board's jurisdiction. *See* Initial Decision at 3. Accordingly, he considered only the performance appraisal action. *See id.*

After a hearing on the merits of the appellant's appeal, the administrative judge denied his request for corrective action. The administrative judge found, based on the nature of the appellant's disclosures and the agency's stipulation, that the appellant had made protected disclosures under the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989). *See* 5 C.F.R. § 1209.4(b); Initial Decision at 4-5. The administrative judge found, however, that the appellant failed to establish a prima facie case that his disclosures were a contributing factor in his "fully successful" performance evaluation. *See id.* at 5-13.

In his petition for review, the appellant raises numerous allegations of error by the administrative judge relating to: (1) His determination not to hold a preliminary hearing on the issue of the Board's jurisdiction over his allegation that his exclusion from training adversely affected his performance evaluation and his requirement that the appellant show that the alleged exclusion had a specific effect upon his performance evaluation; (2) his rulings on issues concerning discovery, witness exclusion, testimony exclusion, and the taking of judicial notice of evidence in an earlier appeal filed by the appellant; (3) his failure to make credibility findings and errors in his factual findings; and (4) his

finding that the appellant failed to prove his allegation of reprisal.

The agency has responded in opposition to the petition for review. The agency has also filed a cross petition for review, contending that the administrative judge erred by: (1) Failing to state an alternative ground for "dismissal," i.e., the appellant's failure to prove that the personnel action concerned constituted an act of reprisal; and (2) failing to grant the agency's motion to disqualify the appellant's representative.

ANALYSIS

The appellant's petition for review:

The administrative judge did not err in not holding a preliminary hearing on the issue of the Board's jurisdiction.

The appellant contends that, contrary to the Board's holding in *Alford v. Department of the Army*, 47 M.S.P.R. 271 (1991), the administrative judge, in effect, held that the appellant was required to prove the Board's jurisdiction before being afforded a hearing on the threshold issue of jurisdiction regarding his allegation that the agency improperly excluded him from training. *See* Petition for Review (PFR) at 18-19.

In *Alford*, 47 M.S.P.R. at 274, the Board held that an appellant is not required to prove Board jurisdiction to establish entitlement to a hearing, but rather, need only make a nonfrivolous allegation that the Board has jurisdiction over the appeal. Even after an appellant makes a nonfrivolous

allegation of the Board's jurisdiction, however, he is entitled to a hearing only if the nonfrivolous allegation cannot be decided based on the documentary evidence of record. *See, e.g., Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1428 (Fed. Cir. 1984); *Jarman v. Small Business Administration*, 44 M.S.P.R. 514, 516 (1990); *O'Neal v. U.S. Postal Service*, 39 M.S.P.R. 645, 649, *aff'd*, 887 F.2d 1095 (Fed. Cir. 1989) (Table).

In the instant appeal, the administrative judge found inadequate the appellant's bare allegation that the alleged denial of training constituted a personnel action within the Board's jurisdiction because the training was "'implicitly' considered necessary for every GM-1811-15, and 'might reasonably have been expected to have led to (and have been reflected in)' his performance appraisal." Initial Decision at 2-3. There is no merit to the appellant's argument that the administrative judge required him to prove conclusively that his alleged exclusion from training had a "concrete, identifiable effect upon" his 1990 performance evaluation. *See* PFR at 20-21. Rather, the administrative judge noted that the appellant presented no support for his allegation. *See* Initial Decision at 3.

The appellant contends that he could not have presented supporting evidence for this allegation because he was denied adequate discovery. *See* PFR at 7-14; Initial Decision at 7 n.3. The appellant has not even described the evidence he had hoped to obtain on discovery or explained how his rights

were prejudiced by the alleged denial of this evidence. *See, e.g., Vincent v. Federal Deposit Insurance Corporation*, 41 M.S.P.R. 637, 640 (1989). Thus, we find that the appellant's argument is specious at best and does not establish that a preliminary hearing was warranted on the issue of the Board's jurisdiction over his alleged exclusion from training. *See, e.g., Wagner v. Environmental Protection Agency*, MSPB Docket No. DC122190W0655, slip op. at 5 (Nov. 21, 1991); *see also Manning*, 742 F.2d at 1428; *Jarman*, 44 M.S.P.R. at 516; *O'Neal*, 39 M.S.P.R. at 649.

The appellant has not shown error in the administrative judge's rulings.

Under 5 C.F.R. § 1201.41(b)(4), an administrative judge has broad discretion in ruling on discovery matters and, absent a showing of abuse of discretion, the Board will not find reversible error in such rulings. *See, e.g., Tinsley v. Office of Personnel Management*, 34 M.S.P.R. 70, 73-74 (1987). The appellant has not shown that the administrative judge abused his discretion in his discovery rulings.

The appellant contends that the administrative judge erred by failing to compel discovery from the agency and by failing to postpone the hearing until the appellant had completed discovery from the agency. *See* PFR at 7-14. The administrative judge denied the motion on the bases that it was untimely made and that the appellant did not show good cause for the untimeliness. *See* Initial Decision at 7 n.3. The administrative judge stated that, although he held

prehearing conferences on June 18, 1991, at which he discussed discovery, and on July 3, 1991, and although he established July 1, 1991, as the date for completion of discovery, the appellant did not file his motion to compel until July 8, 1991. He also noted that, when he rescheduled the hearing to begin 3 days earlier than previously scheduled, the appellant's counsel indicated that he had no "serious objections" to the change in schedule. *See id.*; *see also* Appeal File, Tab 11.

The appellant argues that he believed that he had 10 days after the agency's "service of objections on June 28, 1991," to file his motion and that his motion was actually filed on July 5, 1991. PFR at 11. Under 5 C.F.R. § 1201.73(d)(4), a motion for an order to compel discovery must be filed with the administrative judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. The appellant asserts that he first filed his request for discovery on June 10, 1991, and set July 1, 1991, as the date for production of the evidence. *See* PFR at 10. Because, however, the administrative judge established July 1, 1991, as the date for completion of discovery, it was unreasonable for the appellant not to seek an extension of time for discovery and to wait until after July 1 to file his motion to compel. *See, e.g., Radziewicz v. U.S. Postal Service*, 42 M.S.P.R. 692, 695-96 (1990). Therefore, we find that the administrative

judge acted properly in denying his motion to compel discovery. *See id.*; *Tinsley*, 34 M.S.P.R. at 73-74.

As to the appellant's argument that the administrative judge should have postponed the hearing, we have held that an appellant cannot wait until after adjudication is complete to object for the first time to an administrative judge's hearing-related rulings. *See, e.g., Whitehurst v. Tennessee Valley Authority*, 43 M.S.P.R. 486, 491 (1990). We find that, inasmuch as the appellant did not object to the change in the hearing schedule prior to the hearing, he has failed to preserve for the Board's review the alleged error by the administrative judge in this regard. *See id.*

With respect to his contention that the administrative judge improperly excluded certain of his requested witnesses, and did not accord sufficient weight to the affidavit of another requested witness, Deirdre M. Tanaka, the appellant argues that, in excluding the witnesses concerned, the administrative judge misread *Umshler v. Department of Interior*, 44 M.S.P.R. 628, 631, 634 (1990), which permits testimony to establish a pattern of conduct. *See* PFR at 14-18, 27-29. He contends that he was attempting to show by the testimony of the excluded witnesses a pattern of agency reprisal that would tend to support his contention that his performance appraisal was not based on legitimate management considerations but on reprisal for his protected disclosures. *See id.* He asserts that the administrative judge denied his request for these witnesses on the basis that, because they

did not have the same supervisor as the appellant, they were not similarly situated to him. *See* PFR at 14, 27-29.

An administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *See Wagner v. Environmental Protection Agency*, MSPB Docket No. DC122190W0363, slip op. at 13 (Nov. 21, 1991); *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985).

The administrative judge noted that, under *Umshler*, an appellant may establish a pattern of conduct. *See* Initial Decision at 9. He denied five of the appellant's witnesses, however, finding that the appellant failed to show that they were similarly situated to him. *See id.* The administrative judge accepted the affidavit of the sixth witness, Deirdre M. Tanaka, who, like the appellant, was supervised by John E. Barden and had received a similar performance rating for fiscal year 1988. *See id.* The administrative judge found, however, that Tanaka had filed no allegation of reprisal with the Special Counsel, that there had been no findings on a discrimination complaint she had filed with the "Office of Civil Rights," and that the officials she accused had no knowledge of her alleged protected activities. *See id.* at 10. He concluded that the appellant failed to present sufficient evidence to establish a pattern of reprisal by the agency. *See id.*; *see also* Appeal File, Tab 22.

The appellant has not shown that he established below that the proffered testimony of the five excluded witnesses or Tanaka's statements were relevant to his allegation of reprisal. Thus, he has shown no error in these rulings by the administrative judge. Therefore, we find that the administrative judge acted within the scope of his authority in his rulings on these witnesses.

Likewise, we find that the administrative judge acted within the scope of his authority in not taking official notice of the evidence in the appellant's prior appeal. *See* 5 C.F.R. § 1201.41(b)(10). In this regard, we note that the appellant does not allege that the administrative judge denied him the opportunity to present evidence he had submitted in that appeal. Therefore, the appellant has also shown no error here.[2]

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[2] The appellant has raised various other allegations of procedural error by the administrative judge concerning (a) his exclusion of testimony and witnesses, (b) his failure to rule on whether the appellant's protected disclosures in the instant appeal "repeated" earlier disclosures, thereby diminishing their protected status, and (c) failing to rule on the agency's motion that the appellant's IRA appeal was "improper" because the relief it sought differed from that sought in the appellant's complaint to the Special Counsel. *See* PFR at 27-29, 37-38, 56-57. Our review of those allegations indicate that even assuming arguendo that the appellant established error, he has shown no basis for reversal of the initial decision because he has not shown that the alleged errors prejudiced his substantive rights. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

The appellant has not shown error by the administrative judge in finding that he failed to prove his allegation of reprisal based on his whistleblowing activities.

With respect to the administrative judge's findings on the merits of the reprisal allegation, the appellant contends, inter alia, that the administrative judge erred by finding that: (1) The appellant had the burden of establishing a nexus between his whistleblowing activities and his performance evaluation, see PFR at 5-7; and (2) the timing of the appellant's performance evaluation was not a significant factor in establishing reprisal, see *id.* at 34-35.

With respect to these arguments, the Board has held that: (1) There is no legal support for the argument that a nexus requirement is inapplicable to a whistleblowing allegation, see *Wagner*, MSPB Docket No. DC122190W0363, slip op. at 12, 17-18; and (2) an appellant's disclosure is not a factor in a performance evaluation where the timing of the performance evaluation was not within the control of the agency officials against whom an appellant alleges retaliation, see *id.* at 12-13.

The appellant has also raised numerous challenges to the administrative judge's factual findings regarding the merits of his reprisal allegation. We find, however, that the appellant has failed to present any substantial basis for disturbing the administrative judge's evaluation of the hearing testimony and documentary evidence. See *id.* at 20; *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458

(1987); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). Moreover, an administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *See Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141 (1986).

The agency's cross petition for review

With respect to the agency's contention that the administrative judge erred by failing to state an alternative ground for "dismissal," i.e., the appellant's failure to prove that the personnel action concerned constituted an act of reprisal, we find no merit. *See* Agency's Opposition to Petition for Review (and cross petition for review) at 38. This Board has held that there is no requirement for an administrative judge to cite every possible alternative basis for the disposition of an appeal when the basis that he cites is legally sufficient to support his decision. *See Wagner*, MSPB Docket No. DC122190W0363, slip op. at 23.

As to the agency's challenge to Jonathan Chudson's representation of the appellant, the agency contends that the administrative judge erred by not discussing the agency's bases for the motion in his June 21, 1990 order denying the motion. *See* Agency's Opposition to Petition for Review (and cross petition for review) at 39-40. The agency based its motion for disqualification solely on its arguments that:

(1) Chudson breached a settlement agreement with the agency in a separate appeal in which Chudson was an appellant; and (2) he engaged in a conflict of interest arising out of that alleged breach because, in view of the settlement agreement, he could not properly fulfill his responsibilities as the appellant's representative. *See* Appeal File, Tab 4. The agency noted that it made similar arguments for disqualification in *Wagner*, MSPB Docket No. DC122190W0363. *See* Appeal File, Tab 4.

The record shows that the administrative judge denied the agency's motion on the basis that it did not establish the existence of a conflict of interest. *See* Appeal File, Tab 8. The administrative judge's ruling is consistent with *Wagner*, MSPB Docket No. DC122190W0363, slip op. at 24, in which the Board rejected the agency's arguments that Chudson's representation of the appellant constituted a breach of its settlement agreement with Chudson, as well as a conflict of interest. Therefore, we find no merit to the agency's contentions.

ORDER

This is the Board's final order 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, N.W.
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 of the Board

Washington, D.C.