UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 70

Docket No. DC-0752-11-0348-I-1

Cate Jenkins,

Appellant,

v.

Environmental Protection Agency,

Agency.

May 4, 2012

Kathryn Douglass, Esquire, and Paula Dinerstein, Esquire, Washington, D.C., for the appellant.

Mick G. Harrison, Esquire, Bloomington, Indiana, for the appellant.

Paul Winick, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that sustained the agency's removal action and found that the appellant did not prove her affirmative defenses. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, DO NOT SUSTAIN the appellant's removal, and REMAND the appeal to the Washington Regional Office for further adjudication regarding the appellant's affirmative defenses.

BACKGROUND

¶2 The agency removed the appellant from the GS-13 position of Environmental Scientist based on two charges of misconduct: (1) Threatening or attempting to inflict bodily harm; and (2) Abusive or offensive language, gestures, or other conduct. Initial Appeal File (IAF), Tab 3, Subtabs 4B, 4K. Specifically, the agency charged that the appellant threatened to kill her second-level supervisor, Robert Dellinger, while the two were alone in the appellant's cubicle, and used profanity in addressing Dellinger. *Id*., Subtab 4K at 2. In proposing the removal, the agency relied on the appellant's past disciplinary record, i.e., a 2-day suspension for discourteous, unprofessional, and bullying conduct toward colleagues in 2009. *Id*. at 3, 8-11.

¶3 The appellant appealed the agency's action, denying the misconduct and alleging as affirmative defenses that the agency committed several prohibited personnel practices. IAF, Tab 1. Specifically, the appellant alleged that the agency: (1) retaliated against her for whistleblowing in violation of 5 U.S.C. § 2302(b)(8), (2) retaliated against her for exercising her right to file complaints and appeals in violation of 5 U.S.C. § 2302(b)(9), and (3) retaliated against her for providing information to Congress in violation of 5 U.S.C. § 2302(b)(12). *Id.* at 6, 10-19.

¶4 During prehearing proceedings, the administrative judge informed the parties that, over the appellant's objection, she had decided to bifurcate the hearing. IAF, Tabs 48 at 5, 55, 60 at 2-3. She stated that the first session of the hearing was limited to the agency's proof of the charges by preponderant evidence and the agency's proof by clear and convincing evidence that it would have taken the same action in the absence of the appellant's whistleblowing activity. IAF, Tab 48 at 5. She stated further that, if the agency failed to meet its burden of proof, a second session of the hearing would be held to hear evidence relating to the appellant's affirmative defenses. *Id*.

¶5 Based on the record developed by the parties, including the testimony at the first session of the bifurcated hearing, the administrative judge found that the agency proved its charges. IAF, Tab 60 at 5-10. She found Dellinger's version of events credible and the appellant's incredible. *Id*. at 3-5. She found further that the agency proved that the appellant's words constituted a threat. *Id*. at 6-10.

¶6 The administrative judge also found that the record did not show that Dellinger, the proposing official, or Suzanne Rudzinski, the deciding official, was improperly influenced in the decision to remove the appellant by the acting Division Director, Maria Vickers. *Id*. at 10-11. Additionally, she found that the record did not show that the Federal Protective Service investigation of the charged misconduct was irregular. *Id*. at 11. The administrative judge noted that, in any event, the agency did not rely on the investigation to take the removal action. *Id*. Further, the administrative judge found that the record did not show any ex parte communication to the deciding official in her selection of the penalty, despite evidence that, in selecting the removal penalty, she relied on a penalty in the agency's table of penalties for an offense that was not charged. *Id*. at 12. The administrative judge found that the removal penalty was within the bounds of reasonableness for the charged misconduct. *Id*. at 12-15.

¶7 Finally, the administrative judge found that the agency established by clear and convincing evidence that it would have taken the same action in the absence of the appellant's alleged protected activity. *Id*. at 15-17. She found that the appellant would be unable to meet her burden of proof to show that the agency's action constituted reprisal for whistleblowing or other protected activity. *Id*. at 17. She found therefore that a second session of the bifurcated hearing was unnecessary. *Id*. She affirmed the agency's action. *Id*.

¶8 The appellant has petitioned for review. Petition for Review File (PFR File), Tabs 1-4. The agency has responded in opposition to the petition. PFR File, Tab 6.

ANALYSIS

The agency denied the appellant minimum due process.

¶9 The appellant asserts that the administrative judge erred in finding that the deciding official did not engage in prohibited ex parte communication when she relied on an offense in the agency's table of penalties different from the offenses charged in the notice of proposed removal. PFR File, Tab 1 at 23-36. Specifically, the appellant asserts that the deciding official relied on guidance in the table of penalties relating to the charge of generally criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, a charge not referenced in the notice of proposed removal, rather than the table of penalties provisions for threatening to inflict bodily harm and abusive or offensive language, the charges brought against the appellant. *Id.* at 28-29. The deciding official testified that she relied on what she believed was a charge of comparable gravity to those in the notice of proposed removal, i.e., generally criminal, infamous, dishonest, immoral or notoriously disgraceful conduct. Hearing Transcript (HT) at 155-58. She testified further that she relied on it because she felt removal was allowed for the first offense of misconduct described by that charge. HT at 157. The administrative judge found that the deciding official's reliance on the guidance for generally criminal, infamous, dishonest, immoral or notoriously disgraceful conduct did not constitute an ex parte communication. IAF, Tab 60 at 12.

¶10 When an agency intends to rely on an aggravating factor as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the deciding official. *See Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 5 (2011). Our reviewing court has explained that, if an employee has not been given "notice of any aggravating factors supporting an enhanced penalty," an ex parte communication with the deciding official regarding such factors may constitute a constitutional due process violation because it potentially deprives the employee of notice of all the evidence being

used against her and the opportunity to respond to it. *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011). Furthermore, in determining whether a due process violation has occurred, there is no basis for distinguishing between ex parte information provided to the deciding official and information personally known by the deciding official, if the information was considered in reaching the decision and not previously disclosed to the appellant. *See Lopes*, 116 M.S.P.R. 470, ¶¶ 10-13.

¶11 However, not every ex parte communication rises to the level of a due process violation; only ex parte communications that introduce new and material information to the deciding official constitute due process violations. *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999). The question is whether the ex parte communication is "so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Ward*, 634 F.3d at 1279 (citations omitted). The Board will consider the following factors, among others, to determine whether an ex parte contact is constitutionally impermissible: (1) whether the ex parte communication merely introduces cumulative information or new information; (2) whether the employee knew of the information and had a chance to respond to it; and (3) whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. *See Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001). A due process violation is not subject to the harmful error test; instead, the employee is automatically entitled to a new, constitutionally correct removal proceeding. *Ward*, 634 F.3d at 1279.

¶12 Here, the agency did not inform the appellant in its notice of proposed removal that it would consider the recommended penalty for a charge other than those set forth in the notice itself. IAF, Tab 3, Subtab 4K. Nevertheless, the deciding official testified that she considered the recommended penalty for conduct which is generally criminal, infamous, dishonest, immoral or notoriously

disgraceful. HT at 155-58. The appellant did not have an opportunity to respond to that aspect of the agency's table of penalties. We find that the agency's reliance on the recommended penalty for a charge other than those set forth in the notice of proposed removal cannot fairly be deemed cumulative or immaterial to the deciding official's decision. We therefore conclude that the agency violated the appellant's due process rights by denying her notice of the specific information considered and an opportunity to respond. *See Gray v. Department of Defense*, 116 M.S.P.R. 461, ¶¶ 9-13 (2011) (finding a due process violation where the deciding official considered the appellant's likely loss of eligibility for a sensitive position as an aggravating factor without notice to the appellant). Accordingly, the appellant may not be removed unless and until she receives a "new constitutionally correct removal procedure." *Ward*, 634 F.3d at 1280.

The appellant may be entitled to further relief if she prevails on one or more of her affirmative defenses.

¶13 Notwithstanding our reversal of the agency's removal action, the appellant may be entitled to additional relief if she succeeds in proving her allegation that the agency's action constituted retaliation for whistleblowing. If the appellant establishes her affirmative defense that the agency's action constituted a violation of her rights under § 2302(b)(8), she may be entitled to further corrective action, such as attorney fees and consequential damages. *See Walton v. Department of Agriculture*, 78 M.S.P.R. 401, 403-04 (1998) (an individual right of action (IRA) appeal is not rendered moot when the agency completely rescinds the personnel action at issue if the appellant still has outstanding claims for consequential damages and corrective action). Moreover, the administrative judge should have afforded the appellant a specific opportunity to raise a claim for consequential damages before adjudicating this appeal. *See Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 56 (1999) (an administrative judge should afford an appellant a specific opportunity to raise a claim for consequential damages below before dismissing an IRA appeal as moot).

¶14 Unlike her whistleblower retaliation claim, the appellant's claims that the agency retaliated against her for exercising her rights under § 2302(b)(9)[1] and (12) would not entitle her to an award of compensatory damages or other corrective action beyond cancellation of her removal. *Compare* 5 U.S.C. § 7701(c)(2) (stating only that an agency's decision "may not be sustained" if the employee shows that it was based on a prohibited personnel practice under 5 U.S.C. § 2302), *with* 5 U.S.C. § 1221(g)(1)(A) (providing additional corrective action available before the Board for whistleblower retaliation). However, as noted above, our reversal of the appellant's removal on due process grounds does not preclude the agency from reinitiating the action on the same charges. We therefore find that the appellant should be afforded the opportunity to prove her assertions that the agency retaliated against her in violation of § 2302(b)(9) and (12), because proof of such retaliation (or proof of retaliation for whistleblowing) would require a reversal on the merits of the removal that would preclude the agency from reinstituting the action. Accordingly, we find that the appellant's affirmative defenses are not rendered moot by our determination that the agency deprived her of minimum due process.

The administrative judge abused her discretion in bifurcating the hearing.

¶15 As noted above, the administrative judge bifurcated the hearing and limited the evidence at the first hearing to "the agency's proof of the charges by preponderant evidence and the agency's proof by clear and convincing evidence that it would have taken the removal action in the absence of the appellant's whistleblowing activity." IAF, Tab 48 at 5. In response to the appellant's request for clarification, *see* IAF, Tab 49 at 5-7, the administrative judge

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[1] A claim under 5 U.S.C. § 2302(b)(9) of retaliation for engaging in the equal employment opportunity process could result in an award of compensatory damages. *See Harris v. Department of the Air Force*, 96 M.S.P.R. 193, ¶ 11 (2004); *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 19 (2012). However, the appellant has not raised such a claim in the present case. IAF, Tab 1 at 10, 17-19.

indicated that the appellant would not be permitted to present evidence relating to her protected disclosures or her claims of retaliation in violation of 5 U.S.C. § 2302(b)(9) and (12) during the first hearing, IAF, Tab 51 at 1-2.

¶16 The Whistleblower Protection Act (WPA) prohibits any federal agency 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 or a 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 under the WPA, the appellant must prove, by preponderant evidence, that she made a protected disclosure and that the disclosure was a contributing factor in an adverse action against her. 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 claim of reprisal for whistleblowing, 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); *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 18 (2010). 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 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).

¶17 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. *McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶¶ 29-31 (2011). 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 her prima facie case as well as the agency's affirmative defense. *See, e.g., id.*, ¶¶ 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 it, were relevant to the issue of retaliatory motive). We find that such circumstances exist in the present case. 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). By bifurcating the agency's presentation of evidence regarding the charge and its evidence of clear and convincing evidence from the appellant's evidence regarding her affirmative defenses, the administrative judge artificially separated the removal decision from the appellant's affirmative defenses, when in fact the removal and the appellant's affirmative defenses are intertwined.

¶18 We also find that bifurcation of the hearing denied the appellant a full opportunity to present evidence regarding her claims under 5 U.S.C. § 2302(b)(9) and (12). Title 5 U.S.C. § 2302(b)(9) prohibits any employee who has the authority to take, direct others to take, recommend, or approve any personnel action, to take any personnel action against any employee "because of[ ] (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; [or] (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A). . . ." *Id.* Section 2302(b)(12) prohibits the taking of a personnel action when "such action violates

any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in [5 U.S.C.] section 2301." 5 U.S.C. § 2302(b)(12).

¶19 To establish a prima facie violation of subsection (b)(9), the appellant must demonstrate that she engaged in an activity protected by the section; that she was subsequently treated in an adverse fashion by the employer; that the deciding official had actual or constructive knowledge of the protected activity; and that there is a causal connection between the protected activity and the adverse action. *Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 320 (1984). Where, as here, the agency has already articulated a non-retaliatory reason for its action, i.e., the charged misconduct, it has done everything that would be required of it if the appellant had made a prima facie case. Thus, our inquiry proceeds directly to the ultimate question of whether, weighing all the evidence, the appellant has met her burden of proving illegal retaliation. *Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 10 (2010); *see U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). The Board has not previously established the precise elements for proving a violation of 5 U.S.C. § 2302(b)(12). However, under the circumstances of this appeal, we find that it is appropriate to proceed directly to the ultimate question of whether, weighing all the evidence, the appellant has met her burden of proving that the agency's removal action violated a law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. § 2301. *Cf. MacLean v. Department of Homeland Security*, 116 M.S.P.R. 562, ¶¶ 24-27 (2011) (finding it unnecessary to decide the specific legal framework applicable to claims under 5 U.S.C. § 2302(b)(10) because the outcome was the same under either the analytic framework applicable to Title VII claims or the framework applicable to claims under 5 U.S.C. § 2302(b)(9)). Because the appellant has the ultimate burden of proof with respect to her claims under 5 U.S.C. § 2302(b)(9) and (12), she must be given the opportunity to present evidence in support of those claims on remand.

¶20 We find that the administrative judge's bifurcation of the hearing adversely affected the appellant's ability to receive a fair adjudication of her affirmative defenses in relation to the agency's action based on all of the relevant evidence. *See Stein–Verbit v. Department of Commerce*, 72 M.S.P.R. 332, 338–42 (1996) (the administrative judge's decision to bifurcate the charges under the circumstances of the case constituted an abuse of discretion where the decision incurred on the appellant's right to present a full defense and to have a meaningful right to a hearing). We find, therefore, that the interest in simplifying the hearing in this case is outweighed by the incursion on the appellant's right to present a full defense and to have a meaningful right to a hearing. We find that we must remand this appeal to allow the appellant to fully develop the record with documentary and testimonial evidence relevant to her affirmative defenses under 5 U.S.C. § 2302(b)(8), (9), and (12).

The appellant is collaterally estopped from relitigating whether her disclosure concerning fragrances in the workplace was protected under the WPA.

¶21 There is, as the administrative judge noted, IAF, Tab 48 at 3, a significant limitation on the evidence that the appellant may present with regard to her allegation of retaliation for her protected disclosures. The appellant asserted that she made protected disclosures by: (1) advocating for a workplace fragrance ban and (2) disclosing that the agency allegedly falsified the pH level for caustic corrosives and how they related to allowing excessive exposure to these corrosives by first responders to the attack of September 11, 2001, on the World Trade Center. IAF, Tab 17 at 7-9. In a prior IRA appeal, *Jenkins v. Environmental Protection Agency*, MSPB Docket No. DC-1221-10-0405-W-1, the appellant alleged retaliation for the former of these disclosures, but not the latter. *Id.*, Initial Decision at 5 (July 1, 2010). The administrative judge in that IRA appeal concluded that the appellant failed to make a nonfrivolous allegation that her e-mail advocating a fragrance ban in the agency amounted to a protected disclosure. *Id.* at 5-8. The Board affirmed the initial decision by

Nonprecedential Final Order, finding that the administrative judge properly found that the appellant failed to nonfrivolously allege that she made a protected disclosure. *Id.*, Final Order at 3 (Dec. 23, 2010).

¶22 Collateral estoppel, or "issue preclusion," is appropriate when: (1) An issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party or as one whose interests were otherwise fully represented in that action. *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988); *Encarnado v. Office of Personnel Management*, 116 M.S.P.R. 301, ¶ 13 (2011). The elements of collateral estoppel are present in this appeal. Whether the appellant's efforts to have the agency ban fragrances constituted a protected disclosure as raised in her IRA appeal is identical to the affirmative defense that she raises in this appeal[2], the issue was actually litigated in the prior appeal[3], it was the critical issue in the jurisdictional determination that the Board

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[2] The Board has held that collateral estoppel does not apply where the prior decision found that an appellant failed to prove, by preponderant evidence, that he made a protected disclosure, and the issue in the subsequent appeal is whether the appellant made a nonfrivolous allegation that he made a protected disclosure. *Boechler v. Department of the Interior*, 109 M.S.P.R. 619, ¶ 17 (2008), aff'd, 328 F. App'x 660 (Fed. Cir. 1990); *see also Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295, ¶ 17 (2008). The Board reasoned that "[o]ne may make a nonfrivolous allegation of jurisdiction and ultimately be unable to prove the allegation." *Boechler*, 109 M.S.P.R. 619, ¶ 17. The same rationale does not apply to the present case, however; an appellant who fails to nonfrivolously allege that she made a protected disclosure cannot prove that she made such a disclosure by preponderant evidence. We therefore find that it is appropriate to apply collateral estoppel under these circumstances.

[3] The Board's regulations specifically provide that Nonprecedential Final Orders may be cited as authority by a party asserting issue preclusion, claim preclusion, collateral estoppel, res judicata, or law of the case. 5 C.F.R. § 1201.117(c); *McDonnell v. Office of Personnel Management*, 43 M.S.P.R. 400, 402 & note (1990) (unpublished judicial opinions are nonprecedential and may only be cited to support a claim of res judicata, collateral estoppel, or law of the case).

lacked jurisdiction over *Jenkins*, MSPB Docket No. DC-1221-10-0405-W-1, and the appellant, the party precluded from relitigating the issue, had a full and fair opportunity to litigate the issue in the prior action. We therefore find that the appellant is barred by collateral estoppel from relitigating whether her disclosures advocating a workplace fragrance ban were protected under the WPA.

¶23 We note that the Board's decision in *Jenkins*, MSPB Docket No. DC-1221-10-0405-W-1, does not preclude the appellant's claim that the agency's removal action constituted retaliation for filing the IRA appeal. In her petition for review in that appeal, the appellant asserted that the agency was retaliating against her for bringing the IRA appeal. The Board found that such an allegation was a claim that the agency violated § 2302(b)(9), but that the Board would not have jurisdiction over a claim of retaliation for filing a Board appeal in the IRA appeal itself. *Jenkins*, MSPB Docket No. DC-1221-10-0405-W-1, Final Order at 2; *see McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 21 (2005) (because the appellant failed to establish the Board's jurisdiction over the appeal, the Board lacked jurisdiction to review the appellant's claim under section 2302(b)(9)). The Board therefore did not address the allegation of retaliation under section 2302(b)(9) on the merits in the IRA appeal. The impediment to adjudicating that issue, i.e., jurisdiction over the underlying appealed action, is not present in this removal appeal; it is undisputed that the removal action is within the Board's jurisdiction. Moreover, because the issue of retaliation under section 2302(b)(9) was not actually litigated in the prior appeal, collateral estoppel does not apply. *See Kroeger*, 865 F.2d at 239; *Encarnado*, 116 M.S.P.R. 301, ¶ 13. Therefore, the appellant is entitled to raise, as an affirmative defense in this removal appeal, a claim that the agency violated § 2302(b)(9) in taking the removal action.

The appellant is entitled to further discovery on remand.

¶24 The appellant also asserts that the administrative judge abused her discretion in ruling on the appellant's discovery and witness requests. PFR File, Tab 1 at 38-46. The appellant requested to depose a number of agency personnel

and at least one former employee. *See* IAF, Tab 5. The agency requested a protective order for four of the individuals that the appellant sought to depose: Barry Breen, the appellant's fourth-level supervisor who was involved in a prior disciplinary action against her; James Michael, the appellant's immediate supervisor, who was the proposing official for the prior disciplinary action and who placed her on administrative leave when Dellinger reported the charged threat; Paul Winick, the agency's representative; and Wendy Lawrence, the Employee Relations Specialist assigned to provide guidance to the proposing and deciding officials. *Id.* The administrative judge granted the agency's request for a protective order precluding depositions from these individuals, finding that the appellant failed to show that the depositions are reasonably calculated to lead to the discovery of admissible evidence. IAF, Tab 23 at 2. The appellant objected only to the protective order for Michael and Lawrence, and renewed her request to depose them. IAF, Tab 31. The administrative judge denied the appellant's objection and renewed deposition request without explanation. IAF, Tab 38.

¶25 At the same time, the administrative judge issued an Order on Discovery granting the agency's request for a protective order with regard to the appellant's request to depose Ken White, Tracy Attagi, Melissa Kaps, Patty Whiting, Ross Elliot, and Steve Hoffman. *Id*. The agency asserted that taking these depositions would be "a time-consuming and wasteful exercise." IAF, Tab 32 at 7. The administrative judge granted the agency's request for a protective order with regard to all of these depositions, IAF, Tab 38 at 2, despite the fact that the appellant had previously withdrawn her request to depose Tracy Attagi, stating that Attagi likely had no information relevant to the removal case, IAF, Tab 34 at 4 n.1. The administrative judge granted the agency's request for a protective order because the appellant did not file notices of these depositions prior to the suspension of case processing for the parties to pursue discovery, and the appellant had not shown how the depositions were appropriate supplemental discovery. IAF, Tab 38 at 2. The administrative judge also denied the

appellant's motion to compel agency responses on discovery requests because the motion was not shown to be timely filed. *Id*. Subsequently, the appellant sought assistance from the administrative judge in securing the attendance of Maria Vickers to testify at the hearing. IAF, Tab 42. The record suggests that the appellant attempted to depose Vickers, but there is no evidence that the appellant in fact deposed Vickers. In any event, the administrative judge limited the witnesses at the first session of the bifurcated hearing to the appellant, Dellinger, the proposing official, and Rudzinski, the deciding official, thus tacitly denying the appellant's motion, and, in effect, denying the appellant's requests for a number of other witnesses, including, among others, Vickers, Lawrence, and Oris Dearborn, a Federal Protective Service officer contacted by the agency to investigate the charges. IAF, Tabs 42, 48 at 5-6.

¶26 An appellant is entitled to engage in discovery in attempting to obtain relevant information in support of her retaliation claim. *See Redd v. U.S. Postal Service*, 101 M.S.P.R. 182, ¶ 15 (2006) (the appellant was entitled to obtain evidence through discovery to support his claim of disparate treatment race discrimination). Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. *Mc Grath v. Department of the Army*, 83 M.S.P.R. 48, ¶ 7 (1999); 5 C.F.R. § 1201.72(a). What constitutes relevant material in discovery is to be liberally interpreted, *Johnson v. Department of the Treasury*, 8 M.S.P.R. 170, 174-75 (1981), but 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, *Key v. General Services Administration*, 60 M.S.P.R. 66, 68 (1993); 5 C.F.R. § 1201.41(b)(4). Further, it is well-settled that the administrative judge has wide discretion to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985).

¶27 The administrative judge's rulings on the appellant's attempts at discovery severely limited the record regarding any motive on the part of agency officials to retaliate. It also limited the record on the appellant's attempt to establish whether Dellinger credibly denied any motive to retaliate against the appellant. Importantly, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the personnel action decision is relevant in determining whether the agency can show by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing. *Grubb v. Department of the Interior*, 96 M.S.P.R. 361, ¶ 13 (2004). Here, the administrative judge restricted the appellant's attempt to show the strength of the motive to retaliate by agency officials who played a role in the removal decision, and then considered the lack of a strong motive in finding that the agency had met its ultimate burden of proof. IAF, Tab 60 at 15-17. The administrative judge found, for instance, that the appellant failed to show that any officials other than Dellinger and Rudzinski "were shown to have taken the action." *Id.* at 16. The administrative judge made this finding while having limited the appellant's attempt to show that Vickers precipitated that action through her direction. Thus, the administrative judge's analysis was erroneously restrictive in determining the officials "involved" in the termination. In examining retaliatory motive for an agency action, officials "involved" in the action may encompass more than just the proposing or deciding officials, and may include other officials upon whom the proposing or deciding official relied for information. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶¶ 65-66 (2001), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002).

¶28 The appellant's evidence may be critical to determining whether the agency has met its burden to show by clear and convincing evidence that it would have taken the action absent the appellant's whistleblowing. Moreover, the appellant has the ultimate burden to present preponderant evidence in support of her other affirmative defenses. Accordingly, she is entitled to depose witnesses who could

support her claims that agency officials who were involved in the action had a motive to retaliate against her for her protected activity. The administrative judge's severe limitations of the appellant's discovery and presentation of witnesses disallowed the appellant from fully presenting evidence in support of her allegations of retaliation. Although the administrative judge granted the appellant a hearing, by limiting the appellant's discovery, denying her requests for witnesses, and bifurcating the presentation of testimonial evidence, she denied the appellant a full opportunity to establish her claims that the agency's action constituted retaliation for whistleblowing or other protected activity. Under these circumstances, we find that the administrative judge abused her discretion in limiting the appellant's attempts at discovery and requests for witnesses. *See Mangano v. Department of Veterans Affairs*, 104 M.S.P.R. 316, ¶ 14 (2006).

¶29 On remand, the parties shall have an opportunity to conduct additional discovery relating to the appellant's affirmative defenses.[4] After the conclusion of the discovery period, the administrative judge shall hold a supplemental hearing and issue a new initial decision addressing those affirmative defenses.

ORDER

¶30 Accordingly, we VACATE the initial decision, DO NOT SUSTAIN the removal action, and REMAND the appeal to the Washington Regional Office for further adjudication of the appellant's affirmative defenses consistent with this Opinion and Order.

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[4] After the close of the record on review, the appellant filed a motion for leave to submit new evidence. PFR File, Tab 7. The agency responded in opposition. PFR File, Tab 8. We have not considered the appellant's new evidence in deciding to reverse her removal and remand the appeal for further adjudication of her affirmative defenses. We therefore need not rule on her motion for leave to submit the new evidence. To the extent any of the evidence submitted for the first time on petition for review is relevant to her affirmative defenses, the appellant will have the opportunity to submit it on remand.

¶31 We ORDER the agency to cancel the removal and to restore the appellant effective December 30, 2010. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶32 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶33 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶34 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶35 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all

documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

FOR THE BOARD:

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

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.