UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 86

Docket No. AT-1221-09-0874-W-1

Harroll Ingram,

Appellant,

v.

Department of the Army,

Agency.

May 7, 2010

Harroll Ingram, Sanford, Florida, pro se.

Laura A. Cushler, Esquire, Orlando, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision (ID) that dismissed his individual right of action (IRA) appeal under the Whistleblower Protection Act (WPA) for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review (PFR), REVERSE the ID, FIND that the Board has jurisdiction over the appellant's IRA appeal, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was employed by the agency in the position of Computer Engineer/Systems Engineer, YD-0854-02, in the Program Executive Office for

Simulation, Training and Instrumentation (PEOSTRI), in Orlando, Florida. Initial Appeal File (IAF), Tab 1, Appendix A at 3. Among his duties, he provided engineering assistance to the Medical Simulation Training Center (MSTC) in Fort Carson, Colorado. IAF, Tab 1, Appendix A at 3; Tab 3, Subtab 1 at 2; Tab 7 at 1. John Collins was the appellant's first level supervisor; Robert Miller was his second level supervisor; and Lieutenant Colonel (LTC) David Thompson was the Program Manager for the MSTC. IAF, Tab 8, Affidavit. In June 2008, a developmental federal contractor requested permission to demonstrate and test his moulage kit and process (simulated wound product) during a Fort Carson training event. IAF, Tab 1, Enclosure 1; Tab 3, Subtab 1. The contractor requested permission to photograph and videotape the soldiers while they used (or received demonstrations of) the developmental training products and the products currently used (which were provided by a competing contractor). *Id*.

¶3 The appellant objected to the contractor taking photographs and videotaping student-soldiers because of the possibility that the contractor might improperly use the images of the soldiers in future promotional materials, and he discussed his concerns with LTC Thompson and Collins. IAF, Tab 1, Enclosure 2; Tab 7. The appellant also contacted[1] the legal department concerning the proposed event. The legal department responded that no Department of Defense personnel could appear in any photographs or videos without violating Joint Ethics Regulations, that the developmental contractor's products could not be tested with the current contractor's systems because there was a possibility of disclosing trade secret information and providing the developmental contractor an unfair competitive advantage, and the department recommended against letting the developmental contractor participate in the event. IAF, Tab 3, Subtab 4f. Based upon this advice from the legal department, the appellant recommended

[1] There is some dispute in the record whether the appellant was instructed to contact the legal department or whether he did it on his own initiative. *See* IAF, Tab 3, Subtab 4b at 1; Tab 11 at 2.

against permitting the developmental contractor to conduct the tests. IAF, Tab 1, Enclosure 3; Tab 7.

¶4 LTC Thompson commended the legal department's views, but he maintained that the event and testing could still take place within certain guidelines. IAF, Tab 1, Enclosure 3. Over the next couple of months, the appellant expressed continued concerns to his supervisors that LTC Thompson's plans were still contrary to regulations, the legal department's recommendation, and a memorandum[2] from the Assistant Secretary of the Army noting that certain ethics violations could result in criminal prosecution. IAF, Tab 1, Enclosure 4; Tab 7. Collins initially directed the appellant to follow LTC Thompson's directions because LTC Thompson could overrule the legal department's recommendation. *Id*. But Miller came to share the appellant's concerns, and there were several meetings between the appellant's supervisors and LTC Thompson about the planned event. *Id*. In August 2008, the appellant's supervisors concluded that the appellant would not take part in the training event, and ultimately the event was cancelled.[3] IAF, Tab 3, Subtab 1 at 3, Subtab 4a at 10; Tab 7. The appellant, claiming that he and LTC Thompson had previously disagreed about how the appellant should perform his duties, asked to be moved to a new team; his supervisors declined this request. IAF, Tab 1, Enclosure 4.

¶5 In the following months, the appellant complained that LTC Thompson had stopped communicating with him and reduced his responsibilities. IAF, Tab 1, Enclosure 5; Tab 7. The appellant again requested a transfer to another group, but he was not selected for the transfer. *Id*. In January 2009, Collins gave the appellant a performance review, his first such review under the new National Security Personnel System, and he received a rating of 3 (out of 5) and was awarded 2 shares (which resulted in a base salary increase of $1,031 and a bonus

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[2] Neither party provided a copy of this document.

[3] Neither party clearly explains why the event was cancelled.

of $3,233). IAF, Tab 3, Subtab 4g. The appellant challenged this rating, noting his previous ratings under the prior rating system were typically significantly higher. IAF, Tab 3, Subtab 4k. Thereafter, Collins told the appellant he would be supporting the EST 2000 program, which the appellant opposed because he considered it a demotion in light of what he perceived as reduced responsibilities. IAF, Tab 1, Enclosure 5.

¶6 The appellant filed a complaint alleging retaliation for whistleblowing activities with the Office of Special Counsel (OSC); he alleged, specifically, that as a result of his disclosures of LTC Thompson's (attempted) violation of regulations and abuse of authority, he suffered negative personnel actions including a reduction in responsibilities, the denial of transfers, and a punitively low performance appraisal. IAF, Tab 1, Appendix A. The OSC ultimately rejected the appellant's claim and issued him a closure letter terminating its inquiry into his complaint. IAF, Tab 3, Subtabs 4a-4d.

¶7 The appellant then appealed to the Board. IAF, Tab 1. The administrative judge notified the appellant of the standard for establishing jurisdiction over his case and for proving the merits of his case. IAF, Tabs 5, 10. Both sides responded to the order. IAF, Tabs 7, 8, 9, 11. In his ID, the administrative judge concluded that the appellant had exhausted his administrative remedies at OSC and made a nonfrivolous allegation that he was the subject of a covered personnel action. IAF, Tab 12 at 4. However, the administrative judge concluded that the appellant did not make a protected disclosure because (1) the appellant's disclosures were part of his normal duties, (2) he did not make the disclosures to anyone with authority to correct them, (3) the disclosures were made to the wrongdoers, and (4) the purported disclosures were simply disagreements with management. *Id*. at 5-8. The administrative judge dismissed the appeal for lack of jurisdiction. *Id*. at 1.

¶8 The appellant has filed a PFR. PFR File, Tab 1. The agency has filed a response in opposition. IAF, Tab 3.

ANALYSIS

Legal Standard

¶9 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). To satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). A protected disclosure under 5 U.S.C. § 2302(b)(8) is any disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Drake v. Agency for International Development*, 543 F.3d 1377, 1380 (Fed. Cir. 2008). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Id.* at 1382. A very broad range of personnel actions fall within the Board's jurisdiction under the WPA, including a significant change in duties. *See* 5 U.S.C. § 2302(a)(2)(A)(xi); *Johnston v. Merit Systems Protection Board*, 518 F.3d 905, 912 (Fed. Cir. 2008).

¶10 In an IRA appeal, the jurisdictional threshold is met if the employee presents nonfrivolous allegations that he made a protected disclosure that was a contributing factor to a personnel action taken or proposed. *Johnston*, 518 F.3d at 909. Whether the appellant's allegations can be proven on the merits is not part of the jurisdictional inquiry. *Id*. at 911. The determination of whether an appellant has presented nonfrivolous allegations is determined on the written record; if jurisdiction exists, the Board then conducts a hearing on the merits. *Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008). In assessing whether the appellant has made nonfrivolous allegations, the administrative judge may consider the agency's documentary evidence; however, to the extent the agency's evidence constitutes mere factual contradiction of the appellant's allegations, the administrative judge may not weigh evidence and resolve conflicting assertions, and the agency's evidence may not be dispositive. *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 19 (2010). Any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *Drake v. Agency for International Development*, 103 M.S.P.R. 524, ¶ 11 (2006); *see also Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 11 (2008) (any doubt as to whether the appellant made a nonfrivolous allegation of wrongdoing should be resolved in favor of finding jurisdiction).

¶11 There is no dispute[4] regarding the administrative judge's conclusions that the appellant exhausted his remedy at OSC and made a nonfrivolous allegation that he was the subject of a covered personnel action, and these conclusions appear supported by the record. Therefore, the only issue before us is whether the appellant presented a nonfrivolous allegation that he made a protected disclosure.

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[4] The agency has not filed a PFR or cross PFR which would provide the opportunity to dispute the administrative judge's findings on these issues. *See generally Hernandez v. U.S. Postal Service*, 74 M.S.P.R. 412, 415 (1997).

The Appellant's Presentation

¶12 The appellant argues that his disclosure of LTC Thompson's intention to proceed with the presentation despite the legal department's recommendation to his supervisors was a protected disclosure.[5] The administrative judge concluded that the appellant did not make a protected disclosure because (1) the appellant's disclosures were part of his normal duties, (2) he did not make the disclosures to anyone with authority to correct them, (3) the disclosures were made to the wrongdoers, and (4) the purported disclosures were simply disagreements with management. IAF, Tab 12 at 5-8.

¶13 At the outset, the administrative judge applied an incorrect legal standard in requiring the appellant to make his disclosure to someone with actual authority to correct the wrong. *Id*. at 6. Complaints to any supervisor who is not an alleged wrongdoer are sufficient to constitute a disclosure under the WPA; the disclosure need not be made to an individual with actual authority to correct the wrong. *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1351 (Fed. Cir. 2001). Thus, the appellant could make a protected disclosure regarding LTC Thompson's intentions to his first and second level supervisors, given they were not participants in the challenged wrongdoing. *See Reid v. Merit Systems Protection Board*, 508 F.3d 674, 678 (2007).

¶14 The administrative judge also concluded that the appellant failed to make a nonfrivolous allegation of a protected disclosure because his purported disclosures were made to the alleged wrongdoers, including LTC Thompson, Collins, and Miller. IAF, Tab 12 at 7-8. Under the WPA, when an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer,

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[5] The appellant also argues that he made protected disclosures to his immediate supervisors about LTC Thompson's "abuse of power" in retaliating against him after the event was cancelled. PFR File, Tab 1. As presented by the appellant, these do not appear to be "disclosures," but merely part of the challenged personnel actions (change of duties/de facto demotion) allegedly taken in retaliation for his prior disclosure about LTC Thompson's plan to hold the event despite the legal department's contrary recommendation.

the employee is not making a "protected disclosure" of misconduct. *Huffman*, 263 F.3d at 1350.

¶15 The administrative judge is correct that Miller and Collins were listed as "wrongdoers" in the appellant's OSC complaint. IAF, Tab 3, Subtab 4a at 14. But, pro se pleadings are to be construed liberally. *Jordan v. Office of Personnel Management*, 108 M.S.P.R. 119, ¶ 19 (2008). The appellant did not claim that Collins and Miller were wrongdoers for purposes of the disclosure of LTC Thompson's intent to proceed with the event. PFR File, Tab 1 at 3; IAF, Tab 7 at 2. Further, given that the appellant affirmatively alleged that Collins and Miller were helpful in getting the event cancelled,[6] they could not reasonably be deemed wrongdoers regarding the event. IAF, Tab 1, Enclosure 4; Tab 11 at 2. The appellant only claimed Miller and Collins were "wrongdoers" in the context of the subsequent personnel actions that the appellant maintains were taken in reprisal (allegedly at LTC Thompson's behest) for his disclosure. IAF, Tab 11 at 3-4; Tab 7. Thus, the appellant could make a protected disclosure to his supervisors because they were not wrongdoers for purposes of the subject of the disclosure. *See generally Reid*, 508 F.3d at 678.

¶16 The administrative judge also concluded that the appellant failed to make a protected disclosure because his "disclosure" to the legal department was at the direction of his supervisors, and therefore part of his normal duties. IAF, Tab 12 at 6. Under the WPA, disclosures made by employees in the normal performance of their duties cannot constitute "protected disclosures," but disclosures made outside normal duties and disclosures made as part of one's normal duties but outside normal channels may constitute protected disclosures. *Kahn*, 528 F.3d at 1341-42.

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[6] The fact that the potential violation was avoided because the presentation was cancelled does not invalidate the appellant's potential WPA claim, because the public is best served by disclosures being made in time to prevent the wrongful conduct. *See Reid*, 508 F.3d at 678.

¶17 At the outset, the appellant disputes that he was sent to the legal department by his superiors, instead maintaining that he initially sought a legal opinion on his own initiative. PFR File, Tab 1 at 3. Such factual disputes cannot be resolved in assessing jurisdiction. *See Weed*, 113 M.S.P.R. 221, ¶ 19. More significantly, this dispute is of no consequence because the appellant's taking his concerns to the legal department is not the relevant disclosure. Indeed, obtaining the legal opinion created no controversy; LTC Thompson even praised the appellant's efforts in obtaining a legal opinion. IAF, Tab 1, Enclosure 3. The relevant disclosure was the appellant's report to his supervisors that LTC Thompson was taking action, against the advice of the legal department, which could violate the ethics regulations. IAF, Tab 12 at 4. All relevant conflict occurred as a result of this latter disclosure.

¶18 Lastly, the administrative judge concluded that the appellant's disclosure constituted mere disagreement with superiors. IAF, Tab 12 at 7. Discussions and disagreements over job related duties is a normal part of most positions, and not every complaint to a supervisor about the employee's disagreement with the supervisor's conduct is protected by the WPA. *Huffman*, 263 F.3d at 1350; *see also Reid*, 508 F.3d at 678 (discussion between employees and supervisors regarding various courses of action is normal, and such communications can help avoid potential violations); *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (the WPA is not a weapon in arguments over policy or a shield for insubordinate conduct).

¶19 However, in this case, the matter appears beyond a simple dispute between an employee and a supervisor, at least for purposes of assessing whether the appellant has presented a nonfrivolous allegation establishing jurisdiction. *See generally Swanson*, 110 M.S.P.R. 278, ¶ 11 (any doubt as to whether the appellant made a nonfrivolous allegation of wrongdoing should be resolved in favor of finding jurisdiction). Notably, the appellant obtained a legal opinion that the challenged conduct violated ethics regulations, and the agency has not

disputed this conclusion. Further, the appellant, aided by other agency officials, succeeded in getting the disputed event cancelled. Thus, at minimum, there remain issues of fact that require further development on remand. *Kahn*, 528 F.3d at 1343.

¶20 In sum, the appellant has alleged that he disclosed that an agency official was about to engage in conduct contrary to the agency's ethics regulations to his supervisors, and he further alleged that he suffered adverse personnel actions as a consequence. This suffices as a nonfrivolous allegation establishing the Board's jurisdiction. *See Weed*, 113 M.S.P.R. 221, ¶¶ 19-21. If the appellant establishes the elements of his claim by a preponderance of the evidence on remand, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same actions without the disclosure. *Id.*, ¶ 23.

ORDER

¶21 We REMAND this IRA appeal to the regional office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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