UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 106

Docket No. DA-1221-09-0517-W-1

Patrick R. Massie,

Appellant,

v.

Department of Transportation,

Agency.

June 10, 2010

Morris E. Fischer, Esquire, Bethesda, Maryland, for the appellant.

Ellyn Ponton, Esquire, Fort Worth, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review (PFR) of the initial decision (ID) that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellant's PFR, REVERSES the ID, and REMANDS the appeal for further adjudication, including a hearing and decision on the merits.

BACKGROUND

¶2 The appellant serves as an Aerospace Engineer in the Rotorcraft Directorate, Aircraft Certification Service, of the agency's Federal Aviation Administration (FAA). Initial Appeal File (IAF), Tab 5, Subtab 4l. On December 16, 2008, his supervisor learned from the official sign-in logs that, on December 10, the appellant had entered the facility for "work" late at night, signing out in the early morning of December 11. *See id.*, Subtab 4d at 2; *id.*, Tab 4k at 3-4. On December 18, she met with him to explain that he was not allowed to enter the workspace to do any work outside the core hours without her permission. *Id.*, Subtab 4j at 1. The appellant responded that he was doing union-related work. *Id*. On January 11, 2009, the appellant again entered the facility for "work," after hours and without permission. *Id*., Subtab 4k at 7. When his supervisor learned that he had done so, she again told him that he was not authorized to be at work after hours. *Id*., Subtab 4j at 2. On January 16, 2009, the appellant's supervisor issued the appellant a Written Admonishment stating that he had failed to follow her instructions, that his actions were inappropriate, and that they could not and would not be tolerated in the workplace. *Id*., Subtab 4i at 1. The memorandum stated that the Admonishment would not be placed in the appellant's electronic Official Personnel Folder, but that it served as notice that any such further incidents could result in more severe disciplinary action. *Id*. at 2.

¶3 On February 2, 2009, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency had issued the Written Admonishment in retaliation for his protected whistleblowing disclosures. IAF, Tab 21, Exhibit A at 19-31. Specifically, he stated that he had disclosed to the agency's Inspector General (IG) that certain managers, including his supervisor, did not follow agency orders in their handling of Type Inspections Records for the Eclipse program and audit findings with regard to Eclipse Aviation, and that management was still promoting a Customer Focus initiative program through

performance appraisals, even though management and Congress had agreed that it was not appropriate for FAA regulators to treat companies as customers. *Id*. at 22-23, 26-28.

¶4 On February 3, 2009, the appellant filed a grievance against his supervisor, claiming that, in issuing him the Written Admonishment, she had violated the collective bargaining agreement. IAF, Tab 5, Subtab 4g at 1-2. On May 26, 2009, the parties entered into a settlement agreement which provided, inter alia, that the agency would immediately expunge the Written Admonishment. *Id*., Subtab 4b.

¶5 On May 30, 2009, the appellant filed an Individual Right of Action (IRA) appeal in which he claimed that the agency issued the Written Admonishment in retaliation for his having made the protected disclosures he alleged in his OSC complaint. IAF, Tab 1. He requested a hearing. *Id*. at 2. The agency argued that the appellant was not entitled to a hearing because he did not nonfrivolously allege that he made a protected disclosure and that any such disclosure was a contributing factor in the agency's issuance of the Written Admonishment. *Id*., Tab 5, Subtab 1 at 3-4. The agency also argued that the Board lacked jurisdiction over the appeal because the appellant had earlier elected to file a grievance in this matter, and under 5 U.S.C. § 7121(g)(2), his election precluded his filing a Board appeal over the same matter. *Id*. at 5-6. The agency also urged that the Board lacked jurisdiction because the appellant's activity was covered not by 5 U.S.C § 2302(b)(8), which prohibits retaliation for whistleblowing, but by § 2302(b)(9), which prohibits retaliation for lawfully assisting others in the exercise of any appeal, complaint, or grievance guaranteed by law, rule, or regulation. *Id*., Tab 6 at 8. Additionally, the agency pointed out that, at the time the appellant filed his appeal, he was aware that the agency had already rescinded the Written Admonishment, the alleged retaliatory action cited in his appeal. *Id*. at 8-9.

¶6 The administrative judge scheduled a hearing, *id*. Tab 8 at 1, but then cancelled it, *id*., Tab 10. He rescheduled it, *id*, Tab 15, but then ordered the

appellant to show why his appeal should not be dismissed under 5 U.S.C. § 7121(g)(2), as the agency urged, *id.*, Tab 18 at 1-2. The administrative judge also set out the appellant's burden of proof in his IRA appeal, in the event it was not dismissed under § 7121(g)(2). *Id.* at 2-3.

¶7 The appellant responded that he filed his OSC complaint before he filed the grievance, and that § 7121(g)(2) did not bar his appeal before the Board. *Id.*, Tab 22 at 4-5. Upon review, the administrative judge decided that the hearing would proceed as scheduled. *Id.*, Tab 23. However, the agency filed a motion to dismiss the appeal for lack of jurisdiction, arguing, as it had earlier, that the appellant had failed to exhaust his remedy before OSC since his claim fell under 5 U.S.C. § 2302(b)(9), and OSC lacked authority to review it. *Id.*, Tab 24. Based on the parties' written submissions, the administrative judge again canceled the scheduled hearing. *Id.*, Tab 26.

¶8 In his ID dismissing the appeal for lack of jurisdiction, the administrative judge found that, at the time the appellant filed his Board appeal alleging that the agency had issued him a Written Admonishment in retaliation for his whistleblowing activity, the Admonishment had, in fact, been rescinded and destroyed, and that, therefore, he had failed to nonfrivolously allege Board jurisdiction over his appeal "on any basis." ID at 3, IAF, Tab 31.

¶9 In his petition for review, the appellant argues that the administrative judge erred in not convening a hearing because he did establish Board jurisdiction over his appeal. PFR File, Tab 1 at 5-7. He further argues that the administrative judge, in effect, dismissed his appeal as moot, and that he erred in doing so without providing the appellant an opportunity to address that issue. *Id.* at 8-13. He also contends that the administrative judge abused his discretion in denying his motion to compel discovery, *id.* at 7-8, and erred in not considering his final submission below which included three exhibits which he has also included with his PFR, *id.* at 4-5 & Exhibits Q, R, S.

¶10 The agency has responded in opposition to the appellant's PFR. *Id.*, Tab 3.

ANALYSIS

¶11 Because the administrative judge cited no authority for his conclusion that the appellant failed to establish the Board's jurisdiction over his IRA appeal, we address that matter first. 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). A disclosure is protected if the employee who discloses the information reasonably believes it evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A). To meet the nonfrivolous standard, an appellant need only plead allegations of fact which, if proven, could show that he made a protected disclosure that was a contributing factor in the agency's decision to take a personnel action. *See Simone v. Department of the Treasury*, 105 M.S.P.R. 120, ¶ 8 (2007). Whether allegations are nonfrivolous is determined on the basis of the written record. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003); *Crenshaw v. Broadcasting Board of Governors*, 104 M.S.P.R. 475, ¶ 8 (2007).

¶12 The record reflects that the appellant exhausted his administrative remedies before OSC. IAF, Tab 21, Exhibit A at 19-31, 88. He alleged that he disclosed to the IG that named management officials granted Eclipse Aviation a Type Certificate even though it was not in compliance with various airworthiness regulations, and that accommodating Eclipse Aviation in this manner essentially allowed that company to show regulatory compliance at a future date, even though FAA orders require companies to show compliance before the Type Certificate is issued for airplane design data. IAF, Tab 21, Exhibit A at 19-31; *see id.*, Tab 1 at 6-13. The appellant's position as an Aerospace Engineer

afforded him personal knowledge of the information that formed the basis for his disclosures, *see Schlosser v. Department of the Interior*, 75 M.S.P.R. 15, 22 (1997), and, while that circumstance does not establish that the appellant's disclosures are protected, it does provide support for his claim that he reasonably believed that the information he disclosed evidenced a violation of law, rule, or regulation and a substantial or specific danger to public safety. We therefore find that he made a nonfrivolous allegation of a protected disclosure.[1]

¶13 The appellant must also nonfrivolously allege that the agency subjected him to a personnel action. The Board has held that an admonishment is a personnel action. *Cochran v. Department of Veterans Affairs*, 67 M.S.P.R. 167, 174 (1995). Regardless of whether the agency placed the Written Admonishment in the appellant's Official Personnel Folder or not, he has nonfrivolously alleged that the agency subjected him to a covered personnel action when it issued him the Written Admonishment.

¶14 The remaining jurisdictional requirement is that the appellant nonfrivolously allege that his whistleblowing activity was a contributing factor in the agency's decision to issue him the Written Admonishment. To satisfy this criterion, he need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Santos v. Department of Energy*, 102 M.S.P.R. 370, ¶ 10

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[1] We reject the agency's claim that the appellant's actions are not protected by 5 U.S.C.§ 2302(b)(8) because another provision, § 2302(b)(9), prohibits retaliation for cooperating with an IG investigation. While it is true that § 2302(b)(9) prohibits retaliation on that basis, *see Special Counsel v. Department of the Air Force*, 61 M.S.P.R. 229, 230 (1994), § 2302(b)(8) also prohibits such retaliation if the disclosures made to the IG rise to the level of whistleblowing, *Schlosser*, 75 M.S.P.R. at 21. We have found that the appellant nonfrivolously alleged that he made protected disclosures because he reasonably believed that the agency's actions with regard to Eclipse Aviation evidenced a violation of law, rule, or regulation and a substantial and specific danger to public safety.

(2006). To this end, Congress established a knowledge/timing test that allows an appellant to demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See* 5 U.S.C. § 1221(e)(l)(A), (B); *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006).

¶15 Here, the appellant alleged that, in December 2008, in his role as union representative, he represented certain employees during their interviews that the IG was conducting in connection with its investigation into the Eclipse Aviation matter. IAF, Tab 4 at 1-2. He also alleged that his supervisor was one of a number of agency officials whose name was mentioned during the IG investigation, *id*., Tab 1 at 11, and that, when she questioned him about what he was doing "in the room with the IG," he told her that he was representing employees, *id*., Tab 4 at 2. The appellant further alleged that his supervisor issued him the Written Admonishment on or about January 16, 2009. *Id*. at 3. We find that the appellant has made nonfrivolous allegations that satisfy the knowledge/timing test.

¶16 In his PFR as noted above, the appellant asserts that the administrative judge's dismissal of his appeal for lack of jurisdiction may have been a dismissal for mootness on the basis that the agency rescinded the Written Admonishment before the appellant filed his appeal. To the extent that the administrative judge considered the appeal to be moot on that basis, he erred. Where an agency cancels an action after the appellant files a request for corrective action with OSC, but prior to the filing of his IRA appeal, that cancellation does not necessarily divest the Board of jurisdiction. *Mangano v. Department of Veterans Affairs*, 104 M.S.P.R. 316, ¶ 15 (2006); *Lachenmyer v. Federal Election Commission*, 92 M.S.P.R. 80, ¶ 7 (2002); *Schlosser*, 75 M.S.P.R. at 24. The

record reflects that the agency rescinded the Written Admonishment pursuant to a settlement agreement signed by both the appellant and the agency. IAF, Tab 5 (Vol. 2), Subtab 4b. However, that agreement expressly states that it "does not constitute a waiver of any right guaranteed by law, rule, regulation or contract on behalf of either Party." *Id*. Thus, the appellant did not thereby consent to divest the Board of jurisdiction over his whistleblower claim.

¶17 Moreover, the appellant argues that the agency has not completely rescinded the Written Admonishment. PFR File, Tab 1 at 10-12. He argues that, although his immediate supervisor told him, when she issued it, that it would "stay" with her, she provided a copy to Labor Relations personnel, *id*. at 10-11; *see* IAF, Tab 21, Exhibit B at 1, and there is no proof that the Labor Relations office purged the Written Admonishment and related documents from its records after it was rescinded. The appellant further argues that he never received notice that his personnel or performance file had been corrected or amended. PFR File, Tab 1 at 11. And, he questions how, if the Written Admonishment was rescinded and destroyed, the agency was able to provide a copy of it in the file it submitted to the Board. *Id.* at 12. These allegations constitute a nonfrivolous claim that the agency has not, as it asserts, completely rescinded the Written Admonishment. *See, e.g.*, *Marren v. Department of Justice*, 55 M.S.P.R. 1, 3 (1992).

¶18 The Board has further held that, even when the agency has completely rescinded the action at issue in an IRA appeal, the appeal is not moot if the appellant has outstanding, viable claims for consequential damages or corrective action. *Walton v. Department of Agriculture*, 78 M.S.P.R. 401, 403-04 (1998). In his OSC complaint, the appellant requested the imposition of disciplinary action against his immediate supervisor for her part in this matter. IAF, Tab 21, Exhibit A at 23. He made a similar request in his appeal, *id*., Tab 1 at 14, and he has renewed the request in his PFR, PFR File, Tab 1 at 13. In addition, he has stated that, if he prevails, he will seek consequential damages. *Id*., Tab 1 at 9. The Board may order both consequential damages and disciplinary actions as a

result of an action brought by OSC at the request of an employee. *See* 5 U.S.C.§§ 1214(g)(2), 1215(a)(3). Moreover, the Board may refer matters raised in an IRA appeal to OSC for further investigation, 5 U.S.C. § 1221(f)(3), and it may order "any . . . reasonable and foreseeable consequential damages" in its decision on such an appeal, 5 U.S.C. § 1221(g)(l)(A)(ii). Therefore, even if the agency completely rescinded the Written Admonishment, the appellant's outstanding claim for consequential damages and other corrective action would preclude the dismissal of his appeal as moot. *See Newcastle v. Department of Treasury*, 94 M.S.P.R. 242, ¶ 8 (2003) (a request to impose discipline on an agency official can preclude dismissing an IRA appeal as moot); *Walton*, 78 M.S.P.R. at 403-04 (in light of the appellant's claim for consequential damages, and for corrective action in the form of an attorney fee award and discipline against any official who may have retaliated against her, her IRA appeal was not moot).

¶19 Because the appellant exhausted his administrative remedies before OSC, and in his written submissions nonfrivolously alleged that he engaged in whistleblowing activity by making a protected disclosure that was a contributing factor in the agency's decision to issue him a Written Admonishment, we find that he has established Board jurisdiction over his IRA appeal, and that he is entitled to a hearing on the merits of this claim.[2] *See Drake v. Agency for International Development*, 103 M.S.P.R. 524, ¶ 13 (2006).

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[2] In his PFR, the appellant alleges that the administrative judge failed to consider his final submission, consisting of argument and three exhibits, even though he submitted it before the close of the record below. PFR File, Tab 1 at 4-5 & Exhibits Q, R, S. In fact, the appellant's submission was received in the regional office on the date the administrative judge set for the record to close. IAF, Tab 30 at 6-13; *see id.*, Tab 26. To the extent this submission and/or exhibits bear on the merits of the appellant's claim, the administrative judge shall consider them on remand. The appellant also argues that the administrative judge abused his discretion in denying the appellant's motion to compel discovery. PFR File, Tab 1 at 7-8; *see* IAF, Tab 12; *id.*, Tab 18 at 2. On remand, the appellant may resubmit the motion, to the extent it bears on the merits of his appeal, and the administrative judge should rule on it, either granting it in whole or

ORDER

¶20 Accordingly, we REMAND this appeal to the regional office for a hearing and a decision on the merits of the appellant's IRA appeal.

FOR THE BOARD:

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

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in part, or again denying it. If he denies the motion, however, he shall provide the appellant an explanation for the denial.