UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 15

Docket No. CH-1221-11-0498-W-1

Francis A. Mithen,

Appellant,

v.

Department of Veterans Affairs,

Agency.

February 19, 2013

Kurt Cummiskey, Esquire, St. Louis, Missouri, for the appellant.

Paul Petraborg, Esquire, St. Louis, Missouri, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that denied his request for corrective action in his individual right of action (IRA) appeal. For the reasons discussed below, we GRANT the petition for review, VACATE the initial decision's findings concerning protected disclosure and clear and convincing evidence, AFFIRM the initial decision's finding concerning

contributing factor, and REMAND for further adjudication consistent with this Opinion and Order.[1]

BACKGROUND

¶2 The appellant has been a full-time employee at the St. Louis, Missouri Veterans Administration Medical Center (VAMC) and Saint Louis University (SLU), a VAMC affiliate, since July 1, 1983.[2] Initial Appeal File (IAF), Tab 31 at 5 (Parties' Joint Stipulations). He was the professional supervisor of Neurology (known as either Chief of Neurology or Program Manager of Neurology) at VAMC between July 1994 and April 2011. *Id.* at 5. He performed collateral duties as the VAMC Residency Program Coordinator for Neurology between July 1994 and September 2010. *Id*. at 6.

¶3 In September 2010,[3] SLU Neurology & Psychiatry Chairman Dr. Henry Kaminski wrote letters informing VAMC Chief of Staff Dr. Nathan Ravi and Associate Chief of Staff for Education Dr. Laura Kroupa of medical residents' complaints against the appellant. IAF, Tab 12 at 17-19, Tab 31 at 4, 6. The agency convened an Administrative Investigative Board (AIB) to investigate the complaints. *Id.*, Tab 12 at 93-95, Tab 31 at 5-6. During the AIB investigation, the appellant, at the agency's direction, abstained from his collateral duties as VAMC Residency Program Coordinator for Neurology but continued as Program

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[2] The appellant explained that, although he works at SLU only 4 to 5 hours a week, he is considered a full-time employee because SLU pays him more than $5,000 a year and that is SLU's definition of full-time employee for the purposes of the benefits it provides. Hearing Transcript (HT) at 179.

[3] Although the parties incorrectly identified the year as 2011, IAF, Tab 31 at 4, they subsequently correctly identified the year as 2010, *id.* at 6

Manager for Neurology. *Id.*, Tab 31 at 5-6. In its January 24, 2011 report, the AIB concluded as follows: 1) Communications and interactions between the appellant and some residents were generally poor during the SLU rotations at the VAMC; 2) unreasonable expectations of some trainees by the appellant were found in some instances; 3) poor customer service was a concern in some instances; and 4) unprofessional conduct was a concern. IAF, Tab 12 at 181-83.

¶4 On March 2, 2011, the VAMC Executive Board approved a reorganization, effective March 27, 2011, which would dissolve Specialty Care (which included the Neurology program). IAF, Tab 12 at 187, 191-92. The Executive Board also planned to make the Program Manager of Neurology, or Chief of Neurology, and the Chief of Psychiatry and Anesthesiology free-standing positions that would report directly to the Chief of Staff. *Id.* Moreover, through the reorganization, the Executive Board combined the professional head of neurology and the Residency Coordinator position. *Id.* The name of the appellant's position was being changed to Chief of Neurology and the "new" position was going to be advertised for applicants. IAF, Tab 31 at 6-7.

¶5 On March 24, 2011, Acting Chief of Staff Dr. Barbara Temeck[4] and Specialty Care Associate Chief of Staff Elliot Katz, the appellant's supervisor, met with the appellant to discuss the AIB's recommendations and to develop a "performance improvement plan"[5] for him, although the agency stated that it would not propose any disciplinary action as a result of the AIB investigation. IAF, Tab 31 at 6-7, Tab 33, Subtab J. The next day, Temeck reminded the appellant that he was to have no interaction with medical residents or students.

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[4] Temeck testified that she became Acting Chief of Staff in mid-October 2010, when the appellant was already not having interactions with SLU residents and students because of the AIB investigation. HT at 104-07; *see* IAF, Tab 1 at 5.

[5] This plan consisted of instructing the appellant to view four video presentations to improve his communication skills. IAF, Tab 33, Subtab J at 2-3.

Id., Tab 31 at 5, Tab 33, Subtab O. On March 28, 2011, Kaminski memorialized his discussion with Temeck from the previous day informing her that SLU was restricting its residents' activities at the VAMC Neurology Department. *Id.*, Tab 33, Subtab G. Specifically, Kaminski stated that neurology and rotating residents would not be assigned to perform inpatient service and would limit the hours and number of consultations the residents perform. *Id*.

¶6 On April 5, 2011, the agency notified the appellant that, effective April 6, 2011, he would be detailed from Program Manager of Neurology to a staff neurologist position, and it relieved him of any responsibility related to the Neurology Residency Program. IAF, Tab 12 at 218. SLU thereafter apparently changed its decision regarding residents at VAMC. *Id.* at 210-14; HT at 80, 125-26.

¶7 The appellant filed an IRA appeal alleging that the agency indefinitely detailed him from Program Manager of Neurology to Staff Neurologist effective April 6, 2011, in reprisal for whistleblowing. IAF, Tab 1. He identified his whistleblowing as a March 25, 2011 memorandum entitled "Improper Influence" addressed to the Human Resources Manager.[6] *Id.* at 5-6; *see id.*, Tab 7 at 2, Exhibit (Ex.) A. He sent copies of the memorandum to VAMC Director RimaAnn Nelson and Temeck. IAF, Tab 31 at 7. In the memorandum, he asserted that: (1) Kaminski caused an unsubstantiated investigation of him; and (2) Kaminski had improper influence, as indicated by Temeck informing the appellant that Kaminski held "veto power" over the selection of the Chief of Neurology at the St. Louis VAMC and that the appellant could apply for the position but would not be selected. IAF, Tab 7, Ex. A. During the proceedings below, the administrative judge found that the appellant had established jurisdiction over his appeal. *Id.*, Tab 30 at 3; *see id.*, Tab 3 at 2.

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[6] The "Human Resources Manager" was Marie Lewis. IAF, Tab 12 at 219, Tab 31 at 7.

¶8 Following a hearing, the administrative judge found that the appellant failed to show that he made a protected disclosure. IAF, Tab 37, Initial Decision (ID) at 5-9. After considering the evidence concerning the first disclosure regarding the alleged improper investigation, she concluded that the agency had the authority to convene the AIB; the agency did not discipline the appellant as a result of the conclusions in the AIB's report; and, based on the above, the appellant failed to establish by preponderant evidence that he reasonably believed his disclosure evidenced a violation of law, rule, regulation, gross mismanagement, a gross waste of funds, or abuse of authority. *Id.* at 5-7. After considering the evidence concerning the second disclosure regarding Kaminski's allegedly improper influence, she concluded that SLU's participation in the selection process of the VAMC Residency Program Coordinator was well known, citing the agency's standard operating procedure and SLU Senior Associate Dean Dr. Robert Heaney's testimony that university participation is a requirement of the Accreditation Council for Graduate Medical Education (ACGME) for the residency program to remain accredited. The administrative judge thus found, citing *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000), that, because the appellant did not report information that was concealed or not publicly known, he failed to establish by preponderant evidence that he reasonably believed his disclosure regarding Kaminski's participation in the selection process or veto power evidenced a violation of law, rule, regulation, or abuse of authority. ID at 7-9. Accordingly, the administrative judge found that the appellant failed to make a protected disclosure.

¶9 Still, the administrative judge found that, assuming that the appellant made a protected disclosure, he met his burden of showing that a reasonable person could conclude that his disclosure was a contributing factor by meeting the knowledge/timing test. ID at 10. The administrative judge found, however, that the agency showed by clear and convincing evidence that it would have detailed the appellant even absent the disclosure. *Id.* at 11-14. Specifically, the

administrative judge found as follows: The record clearly established that the agency had strong evidence in support of its decision to reassign the appellant. From September 2010 through the appellant's April 6, 2011 reassignment, Heaney and Kaminski had registered verbal and written complaints to VAMC that the appellant was adversely affecting the learning environment of the medical residents and that they were concerned regarding accreditation of the residency program. Although Temeck may have had a motive to retaliate against the appellant because she was the subject of his disclosure, no evidence was presented that Nelson, who decided to reassign the appellant, had any motive to retaliate against him. Rather, Nelson's primary motive was to retain the same schedule and number of medical residents assigned to neurology. There was no evidence that the agency treated the appellant any differently than it treats similarly situated employees who are not whistleblowers.[7] *Id.*

¶10 The appellant has filed a petition for review. Petition For Review (PFR) File, Tab 1. The agency has filed a response opposing the petition for review. *Id.*, Tab 3.

ANALYSIS

The Standard for Proving the Merits of an IRA Appeal

¶11 In reviewing the merits of an IRA appeal, the Board must examine whether the appellant proved by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) and that such whistleblowing activity was a contributing factor in an agency personnel action. If so, the Board must order corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same

[7] The administrative judge also found that the Board does not have jurisdiction over an alleged constructive demotion claim because the appellant did not allege that the agency reduced his pay or grade by reassigning him to nonsupervisory duties. ID at 14.

personnel action absent the disclosure. *See, e.g.*, *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 18 (2010).

Contributing Factor/Personnel Action

¶12 We agree with the administrative judge's finding, ID at 10, that the appellant established that his disclosure, assuming it was protected, was a contributing factor in his detail. The agency detailed the appellant less than 2 weeks after his March 25, 2011 memorandum, and both Temeck and Nelson knew of the memorandum. *Id.*; IAF, Tab 7, Ex. A, Tab 12 at 218, Tab 31 at 7; HT at 84, 141-43. Thus, the appellant established contributing factor under the knowledge/timing test.[8] *See, e.g.*, *Schnell*, 114 M.S.P.R. 83, ¶¶ 21-22. We further agree with the administrative judge's implicit finding that a detail is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iv). *See, e.g.*, *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 15 n.4 (2010).

Protected Disclosure

¶13 The administrative judge set forth the proper test for determining whether an employee made protected disclosures. ID at 4-5. Specifically, to establish that he made a protected disclosure under the Whistleblower Protection Act[9], the appellant must demonstrate by preponderant evidence that he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A). The proper test for determining whether an employee had a reasonable belief that his disclosure was protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable

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[8] Accordingly, we find it unnecessary to address the appellant's argument, PFR at 27-29, concerning contributing factor.

[9] This standard is the same under the Whistleblower Protection Enhancement Act of 2012 (WPEA), which took effect on December 27, 2012.

by the appellant could reasonably conclude that the actions of the government evidenced one of the categories of wrongdoing triggering whistleblower protection. *See, e.g.*, *Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, ¶ 9 (2011).

¶14 The appellant asserts that he made a protected disclosure to Nelson, Temeck, and Lewis by disclosing an abuse of authority in that a nonfederal employee was being allowed to make a selection decision in filling a federal service position.[10] PFR File, Tab 1 at 5, 19, 26-30. He contends that the initial decision erroneously concluded that he did not show by preponderant evidence that he reasonably believed his disclosure evidenced an abuse of authority, asserting that both Nelson and Temeck admitted that giving a nonfederal employee "veto power" concerning the selection decision for the Chief of Neurology position was inappropriate. *Id.* at 5, 27, 29-30. He asserts that the initial decision erroneously concluded that he was disclosing something known and not concealed because he did not report that SLU had influence over the choice of the Chief of Neurology or Program Manager of Neurology, but that SLU officials who had made extremely serious allegations against him that proved to be "wildly exaggerated" had "veto power" and "improper influence" over whether he could be selected to continue in his long-time position as Chief of Neurology. *Id.* at 28-29. He contends that the administrative judge failed to make required credibility determinations under *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), on this issue because he testified that Temeck told him that Kaminski had veto power over the selection, but Temeck denied making that statement. PFR File, Tab 1 at 5-6, 27.

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[10] The appellant has not specifically contested the administrative judge's finding that his first disclosure, i.e., that Kaminski caused an unsubstantiated investigation of him, did not constitute protected whistleblowing. Therefore, we have not further considered the issue. *See* 5 C.F.R. § 1201.115 (stating that the Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review).

¶15 We find that *Meuwissen*, as cited in the initial decision, is not dispositive in determining whether the appellant made a protected disclosure. The Board distinguished *Meuwissen* and declined to give a broad reading to it in *Askew v. Department of the Army*, 88 M.S.P.R. 674 (2001). *See Stiles*, 116 M.S.P.R. 263, ¶ 11. In *Askew*, the Board found that the appellant made a protected disclosure when she reported accounting irregularities to the Office of Inspector General (OIG), even though they were longstanding and well-known to management and to the OIG. *See Stiles*, 116 M.S.P.R. 263, ¶ 11. In any event, as the appellant asserts, he did not disclose that SLU officials had influence over the selection for the VAMC Chief of Neurology position, which was arguably known; rather, he disclosed that they had improper influence.[11] We agree with the appellant that a disclosure that a nonfederal employee had veto power over the selection of an individual for a federal position would constitute a protected disclosure of an abuse of authority. *Cf. Hedman v. Department of Agriculture*, 915 F.2d 1552, 1554 (Fed. Cir. 1990) (noting that, under 5 U.S.C. § 2105(a)(1), a federal employee must be appointed by the President, Congress or a member thereof, a member of the uniformed services, a federal employee, the head of a government controlled corporation, or the adjutant general designated under § 709(c) of title 32); *Berkowitz v. Department of the Treasury*, 94 M.S.P.R. 658, ¶ 11 (2003) (finding that a claim that the agency manipulated the creation and promotion process of a GS-14 Drug Enforcement Coordinator position, so that only certain employees were eligible for selection, constituted a nonfrivolous allegation of a protected disclosure concerning abuse of authority); *Simmons v. Department of Agriculture*, 80 M.S.P.R. 380, ¶ 10 (1998) (stating that, in order to be an "employee," the appellant must have been appointed by and must work under the supervision of a federal official). Indeed, the administrative judge found that

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[11] We note that, under the WPEA, a disclosure of information previously disclosed is not excluded from coverage. 5 U.S.C. § 2302(f)(1)(B).

Nelson and Temeck acknowledged that it would be improper for Kaminski to make the final decision for the Chief of Neurology position.[12] ID at 8; *see* HT at 123. We further find that, because the appellant made his disclosure to Human Resources Manager Lewis, as well as to the alleged wrongdoers, his disclosure could be protected whistleblowing.[13] *See, e.g.*, *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 30 (2010); *Groseclose v. Department of the Navy*, 111 M.S.P.R. 194, ¶ 23 (2009).

¶16 We cannot determine whether the appellant proved by preponderant evidence that he made a protected disclosure, however, because the administrative judge failed to make credibility determinations concerning whether Temeck told the appellant that Kaminski had veto power over the selection for the position. In that regard, Temeck denied telling the appellant that Kaminski had veto power over the selection and that the appellant would not be selected for the position. HT at 121, 123, 144. The appellant, in contrast, specifically testified, as stated in his March 25, 2011 memorandum, that Temeck told him that Kaminski had veto power over the selection and that he could apply, but would not be selected. HT at 187-89. Additionally, Heaney testified that SLU has a great deal of influence over the selection of the agency's resident supervisor and that it expected the agency to change the program to accommodate its wishes. HT at 48-49. Nelson similarly testified that SLU has a significant role in the

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[12] Despite the administrative judge's finding concerning Nelson's testimony, the transcript reflects that Nelson apparently did not know whether Kaminski had veto power over the selection. HT at 84-88.

[13] Because the appellant made his disclosure to Lewis in addition to the alleged wrongdoers, we need not determine whether the WPEA should be applied retroactively to this case. Under the WPEA, a disclosure to the alleged wrongdoer will not preclude an IRA claim. 5 U.S.C. § 2302(f)(1)(A). This overrules prior case law, which held that, under the Whistleblower Protection Act, when an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a "protected disclosure" of misconduct. *See, e.g.*, *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001).

selection process. *Id.* at 84-88. The conflicting testimony created a credibility issue that the administrative judge was required to analyze and resolve. *See, e.g.*, *Miller v. U.S. Postal Service*, 117 M.S.P.R. 557, ¶¶ 18-19 (2012). On remand, the administrative judge should make explained credibility determinations in deciding whether Temeck informed the appellant that a nonfederal employee was being allowed to select the individual to fill a federal service position. The administrative judge should further determine whether, based on testimony or other evidence, the appellant held a reasonable belief that a nonfederal employee had a dispositive role in making the selection at issue.

Clear and Convincing Evidence

¶17 As the administrative judge found, in determining whether the agency proved by clear and convincing evidence that it would have taken the same actions against the appellant, even absent any protected disclosures, the Board and the U.S. Court of Appeals for the Federal Circuit have stated that they will consider all of the relevant factors, including the following: (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 agency officials 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. ID at 7; *see Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Schnell*, 114 M.S.P.R. 83, ¶ 23.

¶18 The appellant asserts that the agency failed to establish by clear and convincing evidence that it would have taken the same action even absent his protected disclosures. PFR File, Tab 1 at 6. After the administrative judge issued her initial decision and the appellant filed his petition for review, our reviewing court issued *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), which provides further guidance regarding the Board's consideration of the evidence presented by an agency in an effort to meet its clear and convincing evidence burden. In *Whitmore*, the court stated that "[e]vidence only

clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Id.* at 1368. The court further determined that "[i]t is error for the [Board] to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately." *Id.* Upon its review in *Whitmore*, the court found that the administrative judge had taken an unduly dismissive and restrictive view on the issue of the existence and strength of any motive to retaliate by the agency, *id.* at 1370–73, and that remand for further fact finding was necessary, *id.* at 1372, 1377.

¶19 We similarly find it necessary to remand this case. Here, the administrative judge did not make adequate findings concerning whether the agency proved, by clear and convincing evidence, that it would have detailed the appellant even absent his protected disclosures. The overall testimony of Nelson and Temeck does appear to support the administrative judge's conclusion that the agency detailed the appellant because of SLU's threat to withdraw its residents and students from VAMC if the appellant was not removed from his position and not because of his March 25, 2011 memorandum. *See, e.g.*, HT at 77-79, 89-91, 102, 124, 127, 150-52, 157. However, even if the Board did not consider the appellant's testimony, these officials, as well as others, gave conflicting evidence on the reason for the action. *See, e.g.*, HT at 84-88, 121, 123, 144. The administrative judge failed to make required credibility determinations that would allow the Board to determine whether Nelson and Temeck's testimony on this point was credible.

¶20 For example, as the appellant asserts, Heaney did not testify that individuals from ACGME related to him that residents and students reported that they were experiencing a hostile work environment caused by the appellant. PFR File, Tab 1 at 38-39; HT at 24-28, 34. Rather, Heaney testified that he relied on Kaminski's verbal report of the appellant creating a hostile environment. HT at

33-34, 38-39. Similarly, SLU Neurology Residency Program Director Richard Callison testified that he was not aware of ACGME blaming specific individuals and instead that it was Kaminski and Heaney that attributed the hostile work environment to the appellant. HT at 58-61.

¶21 Moreover, as the appellant contends, Nelson admittedly did not provide the appellant with the reasons for his detail until the hearing. PFR File, Tab 1 at 6, 34-35, 39-40; HT at 98. Indeed, Nelson testified that she did not respond to the appellant's request because she stated that she did not want to be influenced in making a final decision in the matter. HT at 97. She further stated that SLU "would have pulled out the students from the program which would have basically shut down our service." HT at 79-80. This position, however, was contrary to Temeck's testimony that she did not say that SLU was going to pull out all of the residents. HT at 126-27. Furthermore, Katz testified that he did not know why the appellant was detailed at that time; that Katz became Acting Chief of Neurology even though he is an endocrinologist, not a neurologist; and that he was supposed to try to keep the service together administratively on a temporary basis. HT at 169-71.

¶22 Given the conflicting evidence and testimony, we find that the administrative judge's conclusions on the clear and convincing evidence factors do not meet the standard recently set forth in *Whitmore*. *See, e.g., Massie v. Department of Transportation*, 118 M.S.P.R. 308, ¶¶ 6-8 (2012).

Conclusion

¶23 We find that the appellant established that his disclosure, assuming it was protected, was a contributing factor in a personnel action under the knowledge/timing test. However, we are unable to determine whether the appellant proved by preponderant evidence that he made a protected disclosure absent required credibility determinations by the administrative judge. Similarly, we are unable to determine whether the agency proved by clear and convincing evidence that it would have taken the same personnel action, even absent a

protected disclosure, under the *Whitmore* standard and absent required credibility determinations by the administrative judge.

ORDER

¶24 On remand, the administrative judge must determine whether the appellant proved by preponderant evidence that he made a protected disclosure and whether the agency proved by clear and convincing evidence that it would have taken the personnel action, even absent the appellant's protected disclosure. In analyzing these issues, the administrative judge should make required credibility determinations. In analyzing whether the agency presented clear and convincing evidence, the administrative judge shall, consistent with the guidance provided by the court in *Whitmore*, reconsider the record as a whole and make thoroughly reasoned findings that address both the evidence supporting her conclusions and the countervailing evidence.

FOR THE BOARD:

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