

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

GEORGE HEATH,
Appellant,

DOCKET NUMBER
DA-1221-12-0654-W-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: September 11, 2013

THIS ORDER IS NONPRECEDENTIAL *

George Heath, Los Angeles, California, pro se.

Allen Thomas, Esquire, Fort Bliss, Texas, for the agency.

BEFORE

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

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge denying his request for corrective action under the Whistleblower Protection Act (WPA). For the reasons discussed below, we GRANT the appellant's petition for review and

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

REMAND the case to the regional office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant's individual right of action appeal is remanded following the Board's decision in *Day v. Department of Homeland Security*.

The appellant, an Animal Health Technician, alleges that he made two protected disclosures to the Chairman of the Institutional Animal Care and Use Committee concerning the actions of his supervisor, Major Todd Collins. *See* Initial Appeal File (IAF), Tab 3 at 84-97. The appellant alleges that he made a protected disclosure concerning the unauthorized actions of Major Collins during a surgical procedure he performed on three goats and that he made a second disclosure concerning an abuse of authority, gross waste of funds, and gross mismanagement when he disclosed that Major Collins falsified data for a pilot study. *Id.* at 91-93. In his complaint to the Office of Special Counsel (OSC), the appellant maintained that he was stripped of his supervisory duties in reprisal for his protected disclosures. *Id.* at 94.

The appellant filed a complaint with OSC and thereafter commenced the instant individual right of action (IRA) appeal alleging whistleblower reprisal and seeking the restoration of his supervisory responsibilities. IAF, Tab 1. Concluding that the appellant made nonfrivolous allegations of jurisdiction over his claims, the administrative judge held a hearing and issued an initial decision denying the appellant's request for corrective action on the ground that the appellant's disclosures were part of his normal job duties and responsibilities and did not qualify as protected disclosures under *Huffman v. Office of Personnel Management*, [263 F.3d 1341](#) (Fed Cir. 2001). IAF, Tab 42, Initial Decision (ID) at 6-7. The appellant has filed a petition for review, which the agency has opposed. *See* Petition for Review (PFR) File, Tabs 1 and 3.

Based upon our recent decision in *Day v. Department of Homeland Security*, 2013 MSPB 49, the appellant's IRA appeal must be remanded to the administrative judge for further adjudication. In *Day*, we determined that the Whistleblower Protection Enhancement Act (WPEA) clarified the scope of what constitutes a protected disclosure under the WPA and held that the WPEA's clarified definition of a protected disclosure applies to cases pending before the Board. *See* 2013 MSPB 49, ¶¶ 22, 26. Pursuant to the WPEA, disclosures made to alleged wrongdoers and disclosures made in the normal course of one's job duties are not excluded from the definition of a protected disclosure. *See* [5 U.S.C. § 2302\(f\)\(1\)-\(2\)](#); *Day*, 2013 MSPB 49, ¶¶ 18-19. Thus, whether or not the appellant made his disclosures within the normal course of his job duties, the appellant's disclosures are not barred by *Huffman*.

Because the administrative judge made no further findings with regard to whether the appellant's disclosures were a contributing factor in the agency's decision to take the challenged action and whether the agency had a clear and convincing reason for taking the challenged actions, remanding the IRA appeal to the administrative judge for further adjudication of the remaining elements is warranted, including, if necessary, the rendering of credibility determinations. *See, e.g., Shibuya v. Department of Agriculture*, 2013 MSPB 44, ¶ 37 (citing *Whitmore v. Department of Labor*, [680 F.3d 1353](#), 1368 (Fed. Cir. 2012)). Upon remand, the administrative judge should determine whether either further briefing or a supplemental hearing is necessary to her assessment of the remainder of the appellant's whistleblower reprisal claim. *See Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 15 (2012).

Disposition of remaining motions.

Following the filing of the appellant's petition for review, the appellant filed a request for a stay of a notice of proposed removal issued by the agency. *See* PFR File, Tab 5. A stay request of a personnel action, however, must be

submitted to one of the Board's regional or field offices, not to the full Board on petition for review. *See* [5 C.F.R. § 1209.8](#). Moreover, the appellant has since been removed from federal service, and he has filed an initial appeal with the Board challenging his removal under chapter 75. *See* Initial Appeal File in MSPB Docket No. DA-0752-13-0408-I-1. The appellant's request for a stay in this appeal is DISMISSED.

Lastly, citing to the Board's decision in *Vaught v. Department of the Air Force*, [56 M.S.P.R. 554](#) (1993), the agency has moved to dismiss the appellant's petition for review citing the appellant's filing of a complaint in federal district court challenging similar acts at issue in the instant IRA appeal. *See* PFR File, Tab 10. The agency's motion is DENIED. *Vaught* does not stand for the proposition asserted by the agency on review, and, contrary to the agency's argument, the filing of a complaint in federal district court does not divest the Board of jurisdiction over an IRA appeal. *See* [5 U.S.C. § 7703\(b\)](#).

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.