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

**2013 MSPB 92**

Docket No. DE-1221-10-0530-W-3

**William C. Hugenberg, Jr.,**

**Appellant,**

**v.**

**Department of Commerce,**

**Agency.**

December 4, 2013

William C. Hugenberg, Jr., Grand Junction, Colorado, pro se.

Tyree Ayers Jackson, Washington, D.C., for the agency.

**BEFORE**

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

## OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that denied his request for corrective action in this individual right of action (IRA) appeal. For the following reasons, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.[1]

[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. We

## BACKGROUND

¶2 The appellant filed an IRA appeal alleging that the agency terminated him from his position as Local Census Office Manager (LCOM) for the Grand Junction Local Census Office (GJLCO) in retaliation for his protected whistleblower disclosures. Initial Appeal File (IAF-1),[2] Tab 1. The appellant was appointed on September 28, 2009, as a Schedule A, excepted service, temporary appointment with a not-to-exceed date of September 25, 2010. IAF-1, Tab 11, Tab 13, Subtab 2. The GJLCO was supervised by the Regional Census Center (RCC) located in Denver, Colorado. *See* IAF-1, Tab 11, Subtab 3. As the LCOM, the appellant's duties were to oversee all office and data collection activities and manage the GJLCO's planning, development, and successful implementation of census operations, including recruiting job applicants, testing and appointing employees, quality control, payroll administration, cost control, and reporting progress to the agency's Denver RCC. IAF-1, Tab 11, Subtab 7. It is undisputed that the appellant supervised five assistant managers and was required to work with a Regional Technician (RT), who was assigned by the RCC to provide technical and administrative guidance to the GJLCO. IAF-3, Tab 4 at 5. The appellant's first- and second-level supervisors were the Regional Manager for Quality Assurance (RMQA) and the Assistant Regional Census Manager (ARCM), who both worked at the Denver RCC. *Id.*; IAF-2, Tab 30 at 4.

¶3 The agency terminated the appellant on February 23, 2010, prior to the end of his term appointment, based on unacceptable conduct and performance. IAF-1, Tab 11, Subtab 2. Specifically, the agency alleged that his termination was based on his inability to successfully manage the selection activities for the Update

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further note that, if the appellant files a new petition for review after remand, the page limitations set forth in 5 C.F.R. § 1201.114(h) will apply.

[2] We note that the administrative judge twice dismissed this case without prejudice subject to automatic refiling. Initial Decision at 1 n.1. We have identified the record citations based on the case filing in which the record evidence is located.

Leave operation and unprofessional conduct directed toward Census Bureau Regional Census Center staff. *Id*. The appellant subsequently filed a whistleblower reprisal complaint with the Office of Special Counsel (OSC), and he filed this timely IRA appeal after receiving OSC's closure letter. *See* IAF-1, Tab 6, Subtab 15. On appeal, the appellant claimed that the RCC caused the problems that prevented him from successfully selecting, enrolling, hiring, and training employees and that he was "being set up as a scapegoat" in retaliation for making two whistleblowing disclosures. IAF-1, Tab 1. Specifically, the appellant claimed his first disclosure was a letter dated February 20, 2010, which he sent to the agency's Office of the Inspector General (OIG), with copies to the Census Bureau Director (Director), Senators Michael Bennett and Mark Udall, and Congressman John Salazar. *See* IAF-1, Tab 1, Exhibit 3. In the letter, the appellant requested an investigation into "poor prior planning and software defects noted in [OIG's February 2010 Quarterly] report," and he asserted that, due to problems with the agency's payroll software, the GJLCO was unable to meet hiring goals and certain GJLCO employees were being underpaid. *Id*.

¶4 The appellant claimed his second disclosure concerned complaints he made to the RMQA from December 2009 through February 2010 regarding the RT. *See* IAF-3, Tab 5 at 14-17. The appellant indicated that he had observed the RT's disheveled and unkempt appearance and erratic behavior. He also contended that the RT had been involved in inappropriate relationships with females in the GJLCO, which violated sexual harassment rules, significantly interfered with hiring, and, in one instance, caused a safety issue when a female staffer's boyfriend became aware of the RT's purported affair with the staffer. *Id.*

¶5 The administrative judge found that the appellant exhausted the procedures before OSC with respect to both disclosures. Initial Decision (ID) at 5. The administrative judge also found that the appellant made nonfrivolous allegations that he made protected disclosures and that at least one of his disclosures was a contributing factor in the agency's decision to take or fail to take a personnel

action. Thus, the administrative judge found that the Board has jurisdiction over this IRA appeal. *Id*.

¶6 The administrative judge then found with regard to the appellant's February 20, 2010 letter that, while the disclosure was protected because the appellant alleged that the agency violated applicable laws related to properly paying employees, the evidence showed that the letter "was not received and disseminated by the OIG (or any of the other recipients) prior to February 23, 2010, when the appellant's employment was terminated." *Id.* at 6, 8. Thus, the administrative judge found that the letter could not have been a contributing factor in the decision to terminate him. *Id.* at 8-9.

¶7 With regard to the appellant's disclosures to the RMQA regarding the RT, the administrative judge found that the appellant made a protected disclosure, that the appellant's supervisors knew of the disclosure, and that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. ID at 9-10. However, the administrative judge found that the agency proved by clear and convincing evidence that it would have terminated the appellant in the absence of his disclosures regarding the RT. *Id*. at 10-15. Thus, the administrative judge denied the appellant's request for corrective action. *Id*. at 15.

¶8 The appellant has filed a petition for review in which he describes what he considers to have been the operational problems at the GJLCO and the RCC while he was employed as the LCOM, and which he asserts were the problems raised in the February 20 letter to the OIG. Petition for Review (PFR) File, Tab 1. The appellant also provides his version of what led up to his termination, and he asserts that the agency committed due process violations and prohibited personnel practices. In addition, the appellant challenges the administrative judge's legal, factual, and credibility findings, and he argues that the administrative judge erred by refusing to allow him to call certain individuals as witnesses during the

hearing. *Id*. The agency has filed a response to the appellant's petition for review. PFR File, Tab 4.

## ANALYSIS

¶9 An employee may seek corrective action under the Whistleblower Protection Act with respect to any "personnel action" taken, or proposed to be taken, against him as the result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(a); *Mattil v. Department of State*, 118 M.S.P.R. 662, ¶ 14 (2012). In an IRA appeal, the appellant must first prove that the Board has jurisdiction over the appeal by proving that he exhausted his administrative remedies before OSC and nonfrivolously alleging 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. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 7 (2011). Once the appellant successfully proves jurisdiction, he must establish a prima facie case of whistleblower reprisal by proving, by preponderant evidence, that he made a protected disclosure that was a contributing factor in a personnel action taken against him. *Mattil*, 118 M.S.P.R. 662, ¶ 11.

¶10 If an 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 even in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *Ryan v. Department of the Air Force*, 117 M.S.P.R. 362, ¶ 12 (2012). In determining whether the agency has carried its burden, the Board will consider all the relevant facts and circumstances, including: (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. *Carr v. Social Security Administration*, 185

F.3d 1318, 1323 (Fed. Cir. 1999); *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 15 (2004).

¶11 As noted above, the administrative judge found that both of the appellant's disclosures were protected. ID at 6, 9. However, he found that the appellant only established that his disclosure concerning the RT was a contributing factor in the termination action. *Id.* at 8-10. Thus, the administrative judge only considered whether the agency met its burden with regard to the disclosure concerning the RT and found that the agency proved by clear and convincing evidence that it would have terminated the appellant in the absence of his disclosures regarding the RT. *Id.* at 10.

Further proceedings are required to determine whether the appellant's February 20, 2010 letter was a contributing factor in his termination.

¶12 An employee may demonstrate that a disclosure was a contributing factor in a covered personnel action through circumstantial evidence, such as the acting official's knowledge of the disclosure and the timing of the personnel action. *Shibuya v. Department of Agriculture*, 119 M.S.P.R. 537, ¶ 22 (2013). The administrative judge found that the appellant's February 20, 2010 letter could not have been a contributing factor in his termination because the appellant failed to demonstrate that it was "received and disseminated" prior to his termination on February 23, 2012. ID at 8-9.

¶13 The appellant asserts on review that the initial decision fails to address when the copy of his February 20 letter sent to the OIG and Census Bureau Director was received by the agency. PFR File, Tab 1 at 4. Specifically, the appellant asserts that the initial decision does not preclude finding that his February 20 letter was received on February 23, 2010, as the Post Office confirmed it should have been, and "that its contents were relayed to the Bureau's Field Division (and/or its Director . . .), which then instructed the [RCC] to summarily terminate Appellant" without informing the appellant's supervisors of the existence of the February 20 letter. *Id.* The appellant also challenges the

administrative judge's decision to deny two of his requested witnesses, even though the agency identified those two individuals as participating in the decision to terminate him. *Id*. The appellant contends that, because the administrative judge denied these individuals as witnesses, he was unable to determine if either of them had knowledge of when the agency received the copy of the February 20 letter addressed to the Director and how the agency handled the information disclosed therein. PFR File, Tab 1 at 4-5; IAF-2, Tab 28 at 4.

¶14 We find that the appellant's argument regarding receipt of the copy of the February 20 letter addressed to the Director has merit. We have reviewed the extensive file in this case and have found no evidence showing when the agency received the copy of the letter addressed to the Director. Without any evidence as to when it was actually received and by whom,[3] we are unable to determine from the record whether the letter was a contributing factor in the appellant's termination.

¶15 We note that the administrative judge's November 22, 2010 Order and Summary of Telephonic Status Conference states that at issue in this appeal is "whether the OIG received and could have disseminated the disclosures before the appellant was removed." IAF-1, Tab 22. Similarly, in his May 27, 2011 Order and Summary of Telephonic Prehearing Conference, the administrative judge indicated that "an important issue as to the protected disclosures contained in the appellant's February 20, 2010 letter to the agency [OIG] is whether the OIG received and disseminated the disclosures before the appellant was

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[3] The agency asserts in its May 20, 2011 "Agency's Response in Opposition to Appellant's Motion for Contempt Sanctions" that "[a]ll correspondence that is addressed to [the Director] is forwarded to the Census Bureau's Congressional Affairs Office ('CAO') for processing purposes. . . . Here, [Correspondence Quality Assurance Staff] reviewed Appellant's correspondence and identified the relevant program office within the Bureau that had information to respond to the inquiries. Given that Appellant worked as a [LCOM] with the [GJCLO], his correspondence was directed to the Field Division." IAF-2, Tab 25 at 2.

terminated." IAF-2, Tab 28 at 2. Consistent with the language in these orders, the initial decision states that, "in order to show that this disclosure was a contributing factor in his removal, the evidence, as developed at hearing would have to reveal that the OIG received and disseminated the February 20 letter before the appellant was terminated." ID at 6.

¶16 However, the administrative judge failed to consider the possibility that information from the February 20 letter was disseminated to someone other than the appellant's first- or second-level supervisor, as the appellant asserts. Thus, the administrative judge did not inform the appellant that he could also establish that the February 20 letter was a contributing factor in his termination by showing that the Director, or anyone else at the agency, received the copy of the February 20 letter and disseminated the disclosures contained therein to an agency official who could have influenced the decision to terminate the appellant on February 23. In addition, the administrative judge failed to address the fact that a copy of the letter was sent directly to the Director, when the letter was received by the Director or the agency's Congressional Affairs Office, which the agency claims receives all mail addressed to the Director, and when the letter (or the information in it) was forwarded to the Field Division.

¶17 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). Here, the administrative judge was aware of the copy of the letter sent to the Director, but he did not address the impact of that copy of the letter on the appellant's ability to satisfy the knowledge-timing test, which is one method of satisfying the contributing factor criterion. *See Mason*, 116 M.S.P.R. 135, ¶ 26. Rather, the administrative judge found that the appellant's first- and second-level supervisors "testified straightforwardly that they first learned of the appellant's February 20 letter to

the OIG in early March 2010." ID at 8. Relying on this testimony, the administrative judge found that the preponderance of the evidence, "as developed at the hearing, shows that the appellant's February 20, 2010 letter was not received and disseminated by the OIG (or any other recipient) prior to February 23, 2010, when the appellant's employment was terminated. Thus it could not have been a contributing factor in the decision to terminate him." *Id*.

¶18 In addition, we find that the administrative judge improperly excluded as "irrelevant or repetitious" the testimony of two of the appellant's requested witnesses, which precluded the appellant from establishing whether either of them had any knowledge, prior to the appellant's termination, of the copy of the appellant's letter or the information therein. IAF-2, Tab 28. The appellant was entitled to offer this testimony in an attempt to show that his February 20 letter was received at the agency and disseminated prior to his termination on February 23. Accordingly, because the administrative judge failed to identify all the issues and denied relevant witnesses, we find it necessary to remand this case to the administrative judge for further adjudication. *See Spithaler*, 1 M.S.P.R. at 589.

On remand, the administrative judge should make any necessary additional findings with respect to the appellant's disclosures concerning the RT in order to comply with *Whitmore*.

¶19 With regard to the appellant's disclosures concerning the RT, the administrative judge found that the agency proved by clear and convincing evidence that it would have terminated the appellant in the absence of his disclosures concerning the RT. ID at 10. The appellant contends that the administrative judge misapplied the clear and convincing evidence standard, and he argues that the administrative judge was required to make additional specific findings and provide additional rationale.[4]

[4] We note that the appellant also argues that the administrative judge erred by referring to him as a "probationary employee" and by finding that the agency's stated reason for terminating him was a "facially legitimate reason for termination." The administrative

¶20 We note that our reviewing court has provided 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." *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012). The court further held 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.* Here, the administrative judge on remand shall make findings on the clear and convincing evidence issue in accordance with *Whitmore*.

¶21 The administrative judge did not have the benefit of the court's decision in *Whitmore* when he issued the initial decision. Therefore, on remand, the administrative judge should make whatever additional findings are necessary with respect to the disclosures regarding the RT in order to comply with *Whitmore*.

¶22 The appellant also argues that the administrative judge improperly excluded additional relevant witnesses. PFR File, Tab 1 at 29, 33, 37, 46. In light of our determination to remand this case for further testimony and adjudication under *Whitmore*, the administrative judge shall revisit his findings and determinations with regard to the relevancy of the remaining proposed

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judge noted in the initial decision that the appellant was a probationary employee because he held a temporary appointment and had not completed a year in that or a similar position. ID at 12. The administrative judge then found that the agency has "great latitude in assessing whether to retain [a probationary] employee" during the probationary period. *Id.* While the administrative judge correctly characterized the appellant's employment status, we clarify that, even where the appellant is a probationary employee, the evidentiary burden on the agency with respect to a whistleblower reprisal claim is no less than where the appellant is a tenured employee. The agency must still show by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing.

witnesses, and, if he determines that any should be excluded, he shall provide reasoning for the exclusion of such witnesses.

The Board lacks jurisdiction over the appellant's other claims.

¶23 The appellant argues that the agency denied him due process and committed harmful procedural error when it terminated him. *See* PFR File, Tab 1 at 75, 81-98; IAF-2, Tab 26 at Exhibit (Ex.) R at 5, 15, 17. Specifically, the appellant contends that the agency failed to complete Form D-282 prior to terminating him as agency officials were required to do by the procedures set forth in the RCC manual and that the administrative judge erred in finding otherwise. *See* PFR File, Tab 1 at 75, 81-98; IAF-2, Tab 26 at Ex. R at 5, 17.

¶24 However, it is undisputed that the appellant, a preference eligible who had no prior federal service, was appointed on September 28, 2009, to a Schedule A, excepted service, temporary appointment, with a not-to-exceed date of September 25, 2010. IAF-1, Tab 11, Subtab 1. Thus, he was not an "employee" with chapter 75 appeal rights at the time of his termination in February 2010. *See* 5 U.S.C. § 7511(a)(1)(B)(i) (defining "employee" in relevant part as "a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions in an Executive agency"). The appellant's arguments that the agency denied him due process and committed harmful procedural error may not be heard in the context of his IRA appeal. *See McCarthy v. International Boundary and Water Commission*, 116 M.S.P.R. 594, ¶ 27 (2011).

¶25 The appellant is also requesting the Board to order corrective action with respect to alleged prohibited personnel practices. Specifically, the appellant contends that the agency failed to enforce merit systems principles when the management group, which was influenced by "personal favoritism," arbitrarily terminated him, and because his termination was in reprisal for lawful disclosure of what he reasonably believed to be a violation of law. PFR File, Tab 1 at 86-89. The appellant is claiming that his termination violated the merit system

principles enumerated in 5 U.S.C. § 2301(b)(8) and (b)(9) and thereby constitutes an action prohibited by 5 U.S.C. § 2302(b)(12) (it is a prohibited personnel practice to "take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit systems principles in section 2301 of this title"). Because "the Board has jurisdiction to entertain such allegations only in the context of a 'corrective action proceeding' brought by the Special Counsel" pursuant to 5 U.S.C. § 1214, the Board lacks jurisdiction to consider the appellant's claims under 5 U.S.C. § 2302(b)(12) in this appeal. *See Perez v. Army and Air Force Exchange Service*, 680 F.2d 779, 787-88 (D.C. Cir. 1982); *Merzweiler v. Office of Personnel Management*, 100 M.S.P.R. 442, ¶ 8 (2005).

## ORDER

¶26 Accordingly we VACATE the initial decision and REMAND this appeal 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.