UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

62 M.S.P.R. 361

Docket Number DC1221910778W1

DANIEL MOELLER, Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS, Agency.

Date: May 11, 1994

Daniel Moeller, Rohrersville, Maryland, pro se.

Joseph M. Vallowe, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member
Chairman Erdreich issues a dissenting opinion

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on December 31, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

DISSENTING OPINION OF CHAIRMAN ERDREICH

Daniel Moeller v. Department of Veterans Affairs MSPB Docket No. DC1221910778W1

The appellant petitions for review of an initial decision denying his individual right of action (IRA) appeal. Although I agree with the majority that the petition for review should be DENIED for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115, I would REOPEN this case on our own motion under 5 C.F.R. § 1201.117, REVERSE the initial decision, and GRANT corrective action.

BACKGROUND

The events surrounding the appellant's disclosure and subsequent suspension have been stipulated. See Appeal File, Tab 14 (List of Agreed Upon Facts). The appellant is a GM-13 Loan Specialist/Realty in the agency's Central Loan Guaranty Office. On September 8, 1989, the appellant's supervisor instructed him to prepare and submit a draft circular regarding the agency's use of title insurance. The appellant submitted a draft circular to his supervisor on August 19, .1990. Sometime later, the appellant's supervisor returned the draft circular to the appellant, deleting the discussion of efficient title review procedures. The appellant decided that the title review discussion should be distributed to the agency's regional offices, notwithstanding his supervisor's objection. On February 16, 1991, on his own time and at his own expense, the appellant mailed a copy of the draft circular, without the changes recommended by his supervisor, to 46 agency field offices throughout the country. The circular included a cover letter stating:

> 1. At my own expense, I am sending a proposed circular that was prepared on August 10, 1990.
>
> 2. Because the VA's Loan Guaranty Program is decentralized, you decide how certain aspects of the program are administered.
>
> 3. LESS THAN 1 CENT OF EVERY DOLLAR VA PAYS FOR TITLE INSURANCE IS RETURNED TO VA IN CLAIMS PAID BY THE INSURANCE COMPANIES.
>
> 4. Please review the proposed circular and determine if you are receiving title evidence timely and at minimum costs.

Appeal File, Tab 1 (emphasis in original). The attached draft two-page circular entitled "Title Evidence satisfactory to the Secretary," stated that it was "to advise field stations of various cost-effective procedures that are presently being used to obtain title evidence." id. The circular also stated as follows:

> Each field station that accepts title insurance policies as satisfactory evidence of title should determine if the costs associated with obtaining this type of title evidence can be reduced and should act accordingly.

Id. Included with the draft circular was a letter concerning a Desert Storm educational fund).[1] The appellant intended the regional office recipients to take action individually to determine if title reviews were being done in a timely fashion at minimum costs. *See* Appeal File, Tab 14 at 6, #7.

The appellant's supervisors discovered his distribution of the draft circular within 4 days after it was sent, or by February 20, 1991. On April 10, 1991, the agency proposed the appellant's 14-day suspension for violating three agency standards of ethical conduct. *See* Agency File, Tab 4g. The deciding official found that the appellant only violated two standards of ethical conduct and suspended him for 5 days beginning on June 24, 1991, for mailing the circular and cover letter to the agency's regional offices.[2] *See id*., Tab 4c; *see also* Appeal File, Tab 14, #18.

Thereafter, the appellant sought corrective action from the Office of Special Counsel, asserting that the suspension was taken in reprisal for his "whistleblowing" disclosures. By letter dated July 8, 1991, the Office of Special Counsel declined to seek a stay of the suspension and closed the appellant's case. Appeal File, Tab 1. The appellant then filed this IRA appeal.

The administrative judge found that the appellant's disclosure was protected under 5 U.S.C. § 2302(b)(8) because the appellant °reasonably believed° that the circular disclosed gross mismanagement and gross waste of funds in the VA's Loan Guarantee Program. Initial Decision (I.D.) at 4-9. He then found, however, that the disclosure was not a contributing factor in the agency's action. I.D. at 9-11. He reasoned that the suspension was not effected in reprisal for the appellant's disclosure of his opposition to the agency's title review policies, but rather was appropriate discipline for his bypassing official channels to distribute, without authorization, an agency circular which had the appearance of official policy. I.D. at 10-11.

In his petition for review, the appellant argues that the First Amendment protects both the content and distribution of his written disclosure. He also asserts that no person of average intelligence could have thought that his circular was an official agency document, and that he therefore did not need his superior's permission to distribute the unofficial circular. Thus, he argues, he could not have violated his office's chain of command. The agency opposes the appellant's petition.

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[1] The agency does not allege that the mailing of the Desert Storm educational fund letter was improper.

[2] Specifically, the deciding official found that the appellant violated 38 C.F.R. § 0.735-10(b)(5), which states that employees shall avoid any action which might create the appearance of making a government decision outside of official channels and 38 C.F.R. § 0.735-10(d), which states that an employee shall not attempt to accomplish indirectly any activity that he is prohibited from doing directly.

ANALYSIS

I would reopen this appeal on the Board's own motion to address the merits of the appellant's claim under the Whistleblower Protection Act of 1989 (WPA).[3]

In an IRA appeal, an employee must prove by preponderant evidence that a disclosure described in 5 U.S.C. § 2302(b)(8) was a contributing factor in the personnel action[4] that was taken against him. *Braga v. Department of the Army*, 54 M.S.P.R. 392, 396 (1992), aff'd, 6 F.3d 787 (Fed. Cir. 1993) (Table). If the employee makes this showing, the Board will order corrective action. unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure. *See* 5 U.S.C. § 1221(e); 5 C.F.R. § 1209.7; 135 Cong. Rec. H747 (daily ed. Mar. 21, 1989); *Braga*, 54 M.S.P.R. at 396.

I would find that the appellant reasonably believed that his disclosures evidenced gross mismanagement and a gross waste of funds.

The WPA prohibits an agency from taking, failing to take, or threatening to take or fail to take a personnel action because of:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) 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).

In *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 393 (1993), the Board found that a "gross waste of funds constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government." The Board further found in Nafus that "[g]ross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Id*. at 395.

In this appeal, the administrative judge found that, although neither the cover letter nor the draft circular explicitly charged the agency with mismanagement or waste of funds, they did constitute allegations of mismanagement and waste of funds because of the subject matter expertise of the recipients, the capitalized portion of the cover letter questioning the cost-effectiveness of title insurance, and the indirect suggestion that the

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[3] I note that it is unnecessary to address the appellant's argument, raised for the first time on petition for review, that his disclosure was protected by the First Amendment. *Banks v. Department of the Air Force,* 4 M.S.P.R. 268, 271 (1980). In any event, the Board lacks jurisdiction to consider in this IRA appeal the claim of constitutional protection. *Marren v. Department of Justice,* 51 M.S.P.R. 632, 638-41 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table).

[4] A suspension is a personnel action covered by the WPA. 5 U.S.C. § 2302(a) (2) (A) (iii) .

agency was not receiving title evidence at the lowest cost. I.D. at 6. He also found that, while the allegations did not include a dollar value, because of the large number of field offices and properties involved, the appellant's statements constituted an allegation of gross mismanagement and a gross waste of funds. *Id*.

The administrative judge also found that the appellant reasonably believed the truth of the disclosure. *Id*. He noted that a 1989 General Accounting Office report made a recommendation similar to the appellant's disclosure and that some field offices followed the policy suggested by the appellant. *Id*.

The agency did not petition for review of the administrative judge's finding that the appellant reasonably believed that his disclosure evidenced gross mismanagement and a gross waste of funds. Although the administrative judge did not have the benefit of the Board's decision in *Nafus* when he made his finding, I believe that his finding is consistent with that decision. Accordingly, I would affirm the administrative judge's determination that the appellant's disclosure is protected under 5 U.S.C. § 2302(b)(8).

I would find that the appellant's protected disclosure was a contributing factor in the agency's action suspending him

To make a prima facie showing of whistleblower reprisal, and thus shift the burden to the agency to show by clear and convincing evidence that it would have taken the same action absent the appellant's protected disclosure, the appellant in an IRA must show by preponderant evidence only that retaliation was a contributing factor in the personnel action. It need not be the significant or predominant factor. 5 U.S.C. § 1221(e)(1); *Rychen v. Department of the Army,* 51 M.S.P.R. 179, 183 (1991*); Gergick v. General Services Administration*, 43 M.S.P.R. 651, 659 (1990).

The Board has held that one of the ways to prove by preponderant evidence that a protected disclosure was a contributing factor is to show that the agency official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. Caddell v. Department of Justice, 57 M.S.P.R. 508, 515 (1993); *Rychen*, 51 M.S.P.R. at 183; *Gergick*, 43 M.S.P.R. at 661. In *Clark v. Department of the Army,* 997 F.2d 1466, 1472 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994), however, the United States Court of Appeals for the Federal Circuit found that neither the closeness in time between a protected disclosure and the initiation of an adverse action nor the proposing and deciding officials' knowledge of the protected disclosure create a per se rule that the protected disclosure was a contributing factor in the adverse action. The court specifically found, however, that such factors may be considered in making a finding that a protected disclosure was a contributing factor in an adverse action. *Id*.

In this appeal, the proposing and deciding officials were aware of the appellant's disclosure by February 20, 1991, and the agency proposed the appellant's suspension on April 10, 1991, 49 days later. In addition, both the proposing and deciding officials were directly involved in the program that was the subject of the protected disclosure and were both officials required to respond to matters raised by the protected disclosure. Thus, they both had reason to react negatively to the appellant's disclosure and to take reprisal against him. Accordingly, based on the totality of the circumstances

in this appeal, I believe that the appellant has shown by preponderant evidence that his disclosure was a contributing factor in the agency's decision. *See Caddell*, 57 M.S.P.R. at 515.

I would find that the agency has not shown by clear and convincing evidence that it would have suspended the appellant absent his protected disclosure.

As noted above, if an appellant shows that his protected disclosure was a contributing factor in an agency personnel action, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure. Clear and convincing evidence is °that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(d); *see Gergick*, 43 M.S.P.R. at 662-63.

The legislative history of the WPA makes clear that, while Congress sought to protect whistleblowers, it did not intend to preclude legitimate disciplinary actions against them. During the House floor debate Representative Sikorski stated as follows:

> Whistleblowing should never be a factor that contributes in any way to an adverse personnel action.
>
> At the same time, however, this new test will not shield employees who engage in wrongful conduct merely because they have at some point "blown the whistle" on some kind of purported misconduct. In such cases the agency will, of course, be provided with an opportunity to demonstrate that the employee's whistleblowing was not a contributing factor in the personnel action.

Cong. Rec. H747 (daily ed. Mar. 21, 1989) (statement of Representative Sikorski). Thus, whistleblowing does not shield an employee from discipline which is not motivated by retaliation for the protected disclosure. Under certain circumstances, therefore, an employee may be. disciplined for the manner in which a protected disclosure is made.

Here, the proposing and deciding officials testified that it was not the substance of the material distributed by the appellant, but his violation of the chain of command and the distribution of a proposed circular which had the appearance of being official policy that led to the discipline. Hearing Tapes 8 and 9, Testimony of Ronald Pedigo and Harold Gracey. Both witnesses also testified that the material distributed by the appellant caused confusion in the agency's field offices and that a number of field office employees contacted headquarters to inquire about the draft circular. *Id*.

The fundamental purpose of the WPA is to encourage disclosures of what an employee reasonably believes is government wrongdoing. See 5 U.S.C. § 2302(b)(8): *Kent v. General Services Administration*, 56 M.S.P.R. 536, 543 (1993). The Board has held that statements made in the context of an appeal, complaint, or grievance are not protected disclosures under the WPA. *See Coffer v. Department of the Navy*, 50 M.S.P.R. 54 (1991) (unfair labor practice complaints); *Ruffin v. Department of the Army*, 48 M.S.P.R. 74 (1991) (Merit Systems Protection Board appeals*); Fisher v. Department of Defense,* 47 M.S.P.R. 585 (1991) (grievances*); Williams v. Department of Defense,*

46 M.S.P.R. 549 (1991) (equal employment opportunity complaints). Similarly, the WPA does not authorize the disclosure of certain confidential information where such disclosure is specifically prohibited by law. 5 U.S.C. § 2302(b)(8); *Kent*, 56 M.S.P.R. at 543-46. The appellant's disclosure in this appeal was not made in the context of an appeal, complaint, or grievance and there is no suggestion that he disclosed confidential information specifically prohibited by law. Therefore, I discern no reason to find that the appellant's disclosure was .not protected. I note further that whistleblowing, by its very nature, frequently does not occur through authorized channels and through the normal chain of command, and to find that a disclosure was not protected because it was not made through authorized channels or through the chain of command would emasculate the WPA.

In this appeal, the agency clearly undertook the appellant's suspension because of his violation of the chain of command in distributing the draft circular containing the protected disclosure. The agency can still prevail, however, if it can demonstrate by clear and convincing evidence that it would have suspended the appellant for sending material to the field offices, in the form chosen by the appellant, regardless of its content.

The agency argues in this regard that it would have suspended the appellant regardless of the content of the circular because the circular had the appearance of being official policy and caused confusion in some agency field offices. The proposing official, Pedigo, testified that he received an unspecified number of telephone calls from the field offices indicating that they were not sure what to make of the material distributed by the appellant. Hearing Tape 8. Gracey, the deciding official, testified that he received one telephone call asking what the material was. Hearing Tape 9. Gracey also testified that the disclosure required the field office employees who received it to °read and analyze it and try to figure out what it was, whether it was real or not, whether it was direction or not." *Id*. He further testified that it could have been viewed as official policy. *Id*. Another agency employee testified that he also received telephone calls from field offices inquiring what the appellant's material was all about. Hearing Tape 3, Testimony of Leonard Levy. The agency did not, however, present any additional testimony setting forth the nature of the alleged confusion. Nor did the agency present the testimony of any field office employees who contacted headquarters.

I would find that the cover letter that the appellant sent with the draft circular should have indicated to the recipients that the draft circular was not official agency policy. The cover letter clearly stated that the "proposed" circular was being sent at the appellant's own expense. Appeal File, Tab 1. The fact that the Desert Storm educational fund letter accompanied the draft circular and its cover letter further suggests that these matters are not official.

Thus, viewing the record in a light most favorable to the agency, I would find that some field office employees may have been confused regarding why they received the material from the appellant, what it was, and what, if anything, they should do about it. There is no indication that any employees acted on the appellant's suggestions, altered their operations, expended government funds, or took improper action as a result of receiving the materials. The appellant's conduct therefore appears to have had only minor consequences on the agency's operations. Further, other than testimony

regarding customary procedures, the agency has not presented any evidence of an agency rule or guideline specifically prohibiting the internal disclosure of draft circulars.

Accordingly, I would find that the agency has not met its significant burden of proof -- clear and convincing evidence -- that the agency would have suspended the appellant for distributing the circular in the absence of the protected disclosure that it contained. *See Braga*, 54 M.S.P.R. at 396.

CONCLUSION

I would find that the appellant has shown by preponderant evidence that he made a protected disclosure which was a contributing factor in the agency's decision to suspend him. I would also find that the agency has failed to demonstrate by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure. Therefore I would grant the appellant's request for corrective action.

MAY 11, 1994

Ben L. Erdreich Chairman