UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF REGIONAL OPERATIONS

THOMAS F. DAY,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DC-1221-12-0528-W-1

DATE: December 14, 2012

ORDER AND CERTIFICATION FOR INTERLOCUTORY APPEAL

The appellant has filed an individual right of action (IRA) appeal, alleging that the agency took a number of personnel actions in retaliation for whistleblowing activity. As set forth in my June 28, 2012 jurisdictional Order, to establish Board jurisdiction over such an IRA appeal, the appellant must raise nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), i.e., that he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; (2) based on the protected disclosure, the agency took a personnel action as defined by 5 U.S.C. § 2302(a)(2); and (3) he raised the whistleblower issue before the Office of Special Counsel (OSC), and proceedings before OSC have been exhausted. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1142 (Fed. Cir. 1998).

The appellant provided a copy of a whistleblowing complaint and supporting documentation filed with OSC on September 30, 2011. AF, Tab 1,

Vols. 1-9. The appellant also provided a copy of OSC's March 16, 2012 notice that it was terminating its inquiry regarding his complaint. AF, Tab 1, Vol. 1.

In his complaint to OSC, the appellant listed, among other alleged disclosures, his July 1, 2010 verbal communication with Scott Palmer, Chief of the Office of Contract Operations. The appellant explained that he became aware of another employee's disclosure of unallowable costs regarding the acquisition of a Maritime Patrol Aircraft (MAP), and that he then

> disclosed his concurrence with Mr. Wood's position to Mr. Palmer…in an undocumented meeting in Mr. Palmer's office. Since Mr. Day had been the Contract Price/Cost Analyst (CPCA) for this project, he was aware of the potential impact on USCG mission requirements and felt that Mr. Palmer, as the Office Chief, should be made aware of this potential problem. This was an informational meeting without an effort to obtain Mr. Palmer's agreement with Mr. Wood's position.

AF, Tab 1, Vol. 3, p. 54. The appellant further stated that, as a result of this disclosure, he was subjected to retaliation by members of his "supervisory chain," who were implicated in the alleged improper costs associated with the acquisition of the MAP.

Although the appellant has nonfrivolously alleged that his July 1, 2010 communication to Mr. Palmer disclosed information he reasonably believed evidenced a violation of law, because it appeared this disclosure might nonetheless be excluded from protection under the Whistleblower Protection Act (WPA) pursuant to principles set forth by the U.S Court of Appeals for the Federal Circuit in *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed.Cir. 2001), I directed the appellant to provide evidence and argument on this question by Order dated November 20, 2012. Both parties have responded and I have considered their submissions.

In *Huffman*, the Court held that disclosures made as part of an employee's normal duties, and through normal channels, are unprotected under the WPA, explaining that "[w]hile the language of the Act is ambiguous as to whether

normal duties are covered, the core purposes of the WPA are simply not implicated by such reporting. Extending the WPA's protections to such situations would be inconsistent with the WPA's recognition of the importance of fostering the performance of normal work obligations and subjecting employees to normal, non-retaliatory discipline." *Huffman*, 263 F.3d at 1352.

The Court further found that complaints made to supervisors regarding their own alleged wrongdoing also do not constitute protected disclosures WPA, explaining as follows:

> When an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a "disclosure" of misconduct. If the misconduct occurred, the wrongdoer necessarily knows of the conduct already because he is the one that engaged in the misconduct. The policies of the WPA hardly require a different result. The purpose of the statute is to encourage disclosures that are likely to remedy the wrong. *Horton*, 66 F.3d at 282; *Willis*, 141 F.3d at 1143. The wrongdoer is not such a person. Extending the WPA to cover reports to a supervisor of the supervisor's own misconduct would also have drastic adverse consequences. As we stated in *Willis*, "[d]iscussion and even disagreement with supervisors over job-related duties is a normal part of most occupations." *Willis*, 141 F.3d at 1143. If every complaint made to a supervisor were considered to be a disclosure protected under the WPA, virtually every employee who was disciplined could claim the protection of the Act. Although Congress intended that the WPA's coverage be broad, we think it unlikely that Congress intended the Act to extend that far, and we hold that it did not.

Id. at 1350.

Accordingly, to the extent the appellant's July 1, 2010 communication with Mr. Palm constitutes a disclosure made as part of his normal duties, through normal channels, and to an alleged wrongdoer, it is not protected under the WPA. In his July 13, 2012 response on jurisdiction, the appellant appeared to indicate his own belief that this communication was part of his normal duties:

> I had been assigned as the [Contract Price/Cost Analyst] until I was assigned to the NSC5 LLTM evaluation team. I was never removed

> from the MPA evaluation team and was able to work on this evaluation or any other acquisition if time permitted. After he came onboard, Mr. Wood was assigned to the MPA evaluation team and shortly afterwards obtained direct confirmation from DCAA that the offeror had included unallowable costs in their proposal. As co-workers assigned to the same evaluation, it was appropriate for Mr. Wood to discuss his findings with me….I concurred with Mr. Wood's findings and was sufficiently concerned that I reported the problem of the unallowable costs to Mr. Palmer….When Mr. Palmer…assigned me to the NSCF LLTM evaluation in December of 2010, he did not remove me from the MPA evaluation….As late as March of 2010, Mr. Palmer was aware that I was still being asked to perform work on the MPA….Since I was never removed from the MPA evaluation, I was acting within the scope of my assignments to consult and discuss the issue of the unallowable costs with Mr. Wood. Again this confirms that my management chain to include Mr. Palmer, was fully aware of my involvement with the MPA.

AF, Tab 11, p. 7-10.

In his November 30, 2012 response to my November 20, 2012 Order, the appellant acknowledged that "[t]o the casual observer," this prior description of his disclosure "would indicate that I was acting in the capacity of my normal duties…." AF, Tab 15, p. 16. The appellant argues, however, that in passing on the disclosure first made by Mr. Wood, he was, in fact, acting outside his normal duties, citing the difference between "what it means to be assigned to a project and what it means to be assigned to a Source Selection." *Id.* The appellant further explained that "[a] Source Selection is a layered group of individuals with different tasking. The function of the Contract Price/Cost Analyst is to chair the Cost/Price Evaluation Team (CPET) with the duty to evaluate the price/cost proposals in response to a solicitation. Mr. Wood was serving in this capacity for the MPA." *Id.* at 16-17. The appellant indicated that although he had himself formerly been the Contract Price/Cost Analyst for the MPA, and continued to be part of the "Source Selection" for that project, the issue of "unallowable costs" was not "source selection information," and therefore it would not have been

customary for him to have discussed it with either Mr. Wood, or, subsequently, with Mr. Palmer. *Id.* at 17-18.

The appellant has, thus far, failed to make clear whether or not, given the nature of his asserted role with the MPA project, his July 1, 2010 disclosure was made pursuant to his normal duties, and/or through normal channels. Clouding matters further, the appellant himself elsewhere argues that this disclosure, alerting his supervisor that "a potential violation of law was at hand" in time to avert it, "should be viewed appropriately as the performance of one's duties." *Id.* at 7.

The question of whether Mr. Palmer constitutes the alleged "wrongdoer," with respect to the appellant's disclosure of unallowable costs associated with the MPA, remains similarly opaque. The appellant stated that "[t]he agency has not provided any conclusive evidence that Mr. Palmer was not the "wrongdoer". AF, Tab 15, p. 7. However, the appellant bears the burden on this and other jurisdictional issues. Moreover, although the appellant cited the agency's "ludicrous misrepresentation that a supervisor is a 'wrongdoer' merely by being a supervisor," *id.*, the agency, in fact, plausibly asserted that Mr. Palmer would have been implicated in the appellant's disclosure of unallowable costs, given his status "as the highest Supervisory Contract Specialist in CG-912," responsible for all projects within that group, including the MPA project. AF, Tab 14, p. 5.

On the other hand, the appellant indicates that, at the time of his July 1, 2010 disclosure, Mr. Palmer was unaware that unallowable costs had been authorized as part of the MPA contract. AF, Tab 15, p. 7. If so, and even assuming it is the appellant's position that Mr. Palmer failed to avert this alleged violation, and subsequently played a part in the retaliatory actions taken against him, he would not constitute the alleged wrongdoer with respect to the appellant's July 1, 2010 disclosure.

As noted, the appellant bears the ultimate burden of proving by preponderant evidence that his July 1, 2010 communication with Mr. Palmer is

protected under the WPA. For purposes of establishing Board jurisdiction over this and other elements of his IRA appeal, however, the appellant need only raise nonfrivolous allegations; moreover, any doubt or ambiguity regarding such allegations should be resolved in favor of finding jurisdiction. *See Ingram v. Department of the Army*, 114 M.S.P.R. 43, 48 (2010). Accordingly, given the degree of ambiguity which persists regarding these questions, I find that the appellant has nonfrivolously alleged that this July 1, 2010 communication constituted a protected disclosure.

As I advised the parties, Congress amended the WPA through passage of the Whistleblower Protection Enhancement Act of 2012 (WPEA), which was signed into law on November 27, 2012. Among other provisions, the WPEA expressly repeals the above-referenced disclosure restrictions set forth by the Federal Circuit in *Huffman*. Accordingly, I must determine whether its terms, including those overturning the *Huffman* principles, apply retroactively to pending cases, such as this one, or only to those involving conduct which occurred on or after the Act's effective date. Put another way, the question is whether the Board should apply the law in effect at the time of the alleged retaliation at issue in this appeal, or the law in effect at the time that appeal is decided.

Section 202 of the WPEA, entitled "Effective Date," provides as follows: "Except as otherwise provided in section 109, this Act shall take effect 30 days after the date of enactment of this Act." Section 109, states that its provisions, governing "Prohibited Personnel Practices Affecting the Transportation Security Administration" (TSA), "shall take effect on the date of enactment of this section." By operation of its express language, therefore, the Act's provisions related to TSA appeals are effective on November 27, 2012, while all other provisions are effective on December 27, 2012. The Act is silent regarding any retroactive operation of its terms.

The U.S. Supreme Court considered the question of statutory retroactivity in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), which involved amendments to the Civil Rights Act of 1964 by the Civil Rights Act of 1991. The language at issue in *Landgraf* was similar to that used here: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." *Id.* at 257. As the Court noted, "[t]hat language does not, by itself, resolve the question before us. A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Id.*

In resolving the question of retroactivity left open by the 1991 Act itself, the Court first addressed the need to reconcile the "apparent tension" between generally applicable rules of statutory interpretation:

> The first is the rule that "a court is to apply the law in effect at the time it renders its decision," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). The second is the axiom that "retroactivity is not favored in the law," and its interpretative corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

Id. at 264.

The Court noted the canon of interpretation in favor of retroactive application, cited by Professor Llewellyn, which states that "remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction. *Id.* at 262, n.16 (quoting Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed, 3 Vand. L. Rev. 395 (1950). The Court further acknowledged that "[i]t will frequently be true, as petitioner and *amici* forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully." *Id.* at 285. The Court also noted the

principle that "the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one." *Id.* at 276.

The Court found, however, that such considerations were not sufficient to rebut the presumption against statutory retroactivity, absent express language dictating that result, a principle which is

> deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than a Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'

Id. at 265 (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S 827, 855 (1990)).

The Court further held that even in an era where "constitutional impediments to retroactive civil legislation are now modest," and courts are prepared to approve such legislation where that is the clear Congressional intent,

> ….prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

Id. at 272-273.

Consistent with these findings, the Court set out a framework for determining whether a statute should be given retroactive effect. The Court stated that a tribunal must first determine whether Congress has expressly prescribed the statute's temporal reach. *Id.* at 280. If the new statute does not

contain any such express prescription, the tribunal must determine whether it would have actual "retroactive effect," that is, whether its provision "attaches new legal consequences to events completed before its enactment[,]" *id.* at 270, or would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. The Court concluded that if retroactive application of the new statute would have the above-cited effects, it would apply "our traditional presumption" against retroactivity, "absent clear congressional intent favoring such a result." *Id.* *See also Parker v. Office of Personnel Management*, 90 M.S.P.R. 480, 486 (2002).

As previously noted, the WPEA contains no express prescription of retroactivity. Its legislative history, moreover, is contradictory and inconclusive. The version passed by the House of Representatives, House Report 3289, states that "[r]ights in this Act shall govern legal actions filed after its effective date," expressly declaiming any retroactive application. By contrast, the Senate's version, Senate Report 743, states as follows:

> This section states the Act would take effect 30 days after the date of enactment. The Committee expects and intends that the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

The Senate Report's use of the phrase, "proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date," is difficult to parse. Nonetheless, read together with its reference to correcting erroneous decisions and removing wrongfully imposed burdens of the past, broadly suggestive of an intent to give the Act a wider, rather than a narrower temporal

scope, I find it was indeed designed to apply the Act retroactively to pending cases involving conduct occurring prior to its effective date. As such, however, it remains but one legislative precursor of the actual Act, and one which is opposed on this point by the express terms of the other legislative version. As the Court noted in *Landgraf*, "[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Landgraf*, 511 U.S. at 286.[1] Given this ambiguous history, and the absence of express language in the WPEA itself, I find that it evidences no clear Congressional intent in favor of retroactivity.

I further find that the WPEA, in eliminating the disclosure restrictions set forth in *Huffman*, enlarged the category of conduct subject to the WPA, thereby "attach[ing] new legal consequences to events completed before its enactment." Accordingly, I conclude that its application to pending cases, such as the present one, would have actual retroactive effect, as defined by the Court in *Landgraf*, and that therefore the presumption against statutory retroactivity applies in this case. *See Caddell v. Department of Justice*, 96 F.3d 1367, 1371 (Fed.Cir. 1996)(The 1994 amendment to the WPA, which included decision to order psychiatric testing as a personnel action, enlarged conduct subject to WPA, and would have retroactive effect if applied to conduct occurring prior to effective dated of amendment; in the absence of express legislative intent, presumption

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[1]As also previously noted, the WPEA expressly provides that its provisions take effect 30 days after the date of enactment, except for TSA cases, which are governed by the WPEA immediately upon enactment. If Congress intended the WPEA to apply retroactively to all pending appeals, there was seemingly no reason to include a separate provision making it effective in TSA cases 30 days sooner than other cases. *See Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 261 (2006)("'A cardinal principle of statutory construction" [provides] that 'a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'")(quoting *TRW, Inc. V. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed2d 339 (2001)).

against statutory retroactivity therefore barred application of amended version of WPA in pending case). *See also Lapuh v. Merit Systems Protection Board*, 284 F.3d 1277, 1281-82 (Fed.Cir.2002)(Veterans Employment Opportunities Act of 1998 (VEOA), in creating new procedures for veterans seeking redress for violations of veterans' preferences, "impose[d] new duties with respect to transactions already completed," and therefore presumption against retroactivity precluded Board jurisdiction over alleged violations of veterans' preferences occurring prior to effective date of VEOA); *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, 244 n.12 (2007)(In the absence of clear Congressional intent to the contrary, presumption against retroactivity governed 2004 amendments to VEOA, affording broader class of veterans the right to file complaints with the Department of Labor, as such amendments, if applied retroactively, would "impose new duties with respect to transactions already completed"). *Compare Watkins v. U.S. Postal Service*, 85 M.S.P.R. 141, 144-45 (2000)(Rule in effect at time of Board decision, that there is no deadline for filing a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) with the Board, did not constitute an impermissible retroactivity when applied to conduct occurring prior to the effective date of that rule, because it would not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed").

As I advised the parties in my November 20, 2012 Order, my ruling regarding the retroactive applicability of the WPEA is subject to certification for interlocutory review by the Board, upon my own motion, or the motion of either party. Such an interlocutory appeal is appropriate for review of a ruling involving "an important question of law or policy about which there is substantial ground for difference of opinion[,]" and where "[a]n immediate ruling will materially advance the completion of the proceeding…." 5 C.F.R. § 1201.92(a), (b).

In their responses, both parties requested that this issue be certified to the Board for interlocutory review. AF, Tabs 14 and 15. Because I find the question of whether the provisions of the WPEA, including its elimination of the *Huffman* disclosure criteria,[2] may be applied retroactively to pending cases involving conduct occurring prior to its effective date, is appropriate for review under the criteria set forth under 5 C.F.R. § 1201.92, the parties' joint request for certification of an interlocutory appeal is GRANTED.

Pursuant to 5 C.F.R. § 1201.93(c), I hereby stay all further proceedings while the interlocutory appeal is pending with the Board.

FOR THE BOARD: _____/S/_____
Ronald J. Weiss
Administrative Judge

[2] "[T]here is no special reason to think that all the diverse provisions of [an Act] must be treated uniformly…" when considering their retroactive effect. *Landgraf*, 511 U.S. at 280. "To the contrary, we understand the instruction that the provisions are to "take effect upon enactment" to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." *Id.*

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail — Thomas F. Day

Agency Representative

Electronic Mail — Lorna J. Jerome
Department of Homeland Security
Commandant (CG-0944), Attention: Paralegal, U. S. Coast Guard,
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December 14, 2012
(Date)

/S/
Talethia Owens
Paralegal Specialist