

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

JEFFREY FUDIN,
Appellant,

DOCKET NUMBER
NY-0752-02-0116-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: May 14, 2002

Ronald G. Dunn, Esquire, Albany, New York, for the appellant.

Douglas Bender, Albany, New York, for the agency.

BEFORE

JoAnn M. Ruggiero
Administrative Judge

INITIAL DECISION

INTRODUCTION

By timely appeal, Jeffrey Fudin challenged the agency's decision to remove him from the position of Pharmacist (Clinical Specialist), GS-13, Department of Veterans Affairs Medical Center, Albany, New York. See Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over the appeal. See 5 U.S.C. §§ 7511(a)(1)(C), 7512(1), 7513(d), and 7701(a). At the appellant's request, I held a hearing. See IAF, Tabs 3 and 13. For the reasons explained below, the agency's decision is REVERSED.

ANALYSIS AND FINDINGS

The burden of proof

In an adverse action, the agency has the burden of proving its charges by a preponderance of the evidence¹. See *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). The agency also must show that there is a nexus between the sustained charge or charges and the efficiency of the service. See 5 U.S.C. § 7513(a). Further, the agency must show that the penalty is within the limits of reasonableness. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981).

The removal action

On October 25, 2001, Wesley Robbins, then Pharmacy Manager for the Veterans' Integrated Service Network 2, proposed the appellant's removal from the agency. The proposal was based on two charges: (1) prescribing Temazepam, a controlled substance, without authorization to do so and (2) failing to follow a direct order not to prescribe controlled substances. See IAF, Tab 4, Subtab 4k. The appellant responded to the proposal orally and in writing. *Id.*, Subtabs 4f and 4i. On December 7, 2001, Donald Stuart, Acting Director of the Medical Center, issued a decision. Mr. Stuart sustained the two charges and determined that the appellant should be removed. *Id.*, Subtab 4c. This appeal followed. *Id.*, Tab 1.

Background

The appellant began working for the agency in the early 1980's. See IAF, Tab 4, Subtab 4b. He is regarded as an expert in pain management. See Hearing Tapes (HT) 1A, 3A (Day 1)². In 1998, he helped set up a pain clinic at the Medical Center. *Id.*, 1A (Day 2).

¹ "Preponderance of the evidence" is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. See 5 C.F.R. § 1201.56(c)(2).

² The hearing was held on April 1, 2002 and April 2, 2002. "Day 1" refers to the April 1, 2002 session; "Day 2" refers to the April 2, 2002 session.

Charge 1—Prescribing Temazepam without authorization to do so

This charge involves the appellant's work in the pain clinic on August 3, 2001. In the specification under the charge, Dr. Robbins, the proposing official, alleged:

On August 3, 2001 you prescribed a controlled substance when you electronically signed a prescription for Temazepam, 15 mg. for patient D1032. You are not authorized to prescribe controlled substances.

See IAF, Tab 4, Subtab 4k.

Certain matters are not in dispute. On the morning of August 3, 2001, a patient who is identified as "D1032" was seen by the appellant and Marjorie Barrows, a nurse practitioner, in the pain clinic. The appellant was not authorized at that time to prescribe controlled substances, but Ms. Barrows was. See HT 1A (Day 1), 1A, 1B (Day 2). When the patient left the clinic, he went to the outpatient pharmacy and told Michael Barr, a staff pharmacist, that he (the patient) had difficulty sleeping because of shoulder pain. Mr. Barr then called the clinic and spoke with the appellant. Mr. Barr recommended that medication be prescribed that would enable the patient to sleep. The appellant told Mr. Barr that he would confer with Ms. Barrows. At that point, the telephone conversation between the appellant and Mr. Barr terminated. A short time later, a prescription for a ten-day supply of Temazepam (also known as Restoril) appeared on the computer monitor in the pharmacy. *Id.*, 4A (Day 1).

The record contains a printout of the prescription. The appellant's name is indicated in the prescriber block. See IAF, Tab 4, Subtab 4s. Mr. Barr testified that, at the time in question, he did not notice that the appellant was indicated as the prescriber. Mr. Barr testified that he filled the prescription and another pharmacist checked it before the medication was released to the patient. See HT 4A (Day 1).

Weeks passed without incident, but it eventually came to the appellant's attention that questions were raised about the matter. He testified that he was

I do not know how the prescription was entered under Dr. Fudin's name. I do know it was a busy morning, we had 1 examination room, and there were 3 of us, including Ms. Winter in and out of that room. The computer could have been logged off/on multiple times with the various clinic members. Could Dr. Fudin have restarted the computer, and I erroneously entered the Restoril and forgot to sign it? Certainly that is possible. I do know that it was clearly our intention to give this patient his medication for sleep, and to do it "legally", as has been documented in the EMR.

See IAF, Tab 4, Subtab 4j.

Ms. Barrows testified that she approved Temazepam for the patient at the time that Mr. Barr called the clinic. She testified that she probably entered the prescription into the computer, but the appellant's name appeared on the prescription because he signed onto the computer. See HT 1A, 1B (Day 1).

Dr. Robbins, the proposing official, was asked whether he had any doubt that the patient was given the appropriate medication. He testified that he did not view the matter from that standpoint and that the quality of the care was not the issue. *Id.*, 2A (Day 1).

Having reviewed the record, I do not find that the appellant prescribed Temazepam on August 3, 2001. Ms. Barrows, Mr. Barr, and the appellant provided credible testimony. I find that the appellant discussed with Ms. Barrows what Mr. Barr told him; Ms. Barrows approved Temazepam for the patient; and the appellant, by merely hitting a key on the computer, unwittingly gave the impression that he was the prescriber. Based on the foregoing, Charge 1 is NOT SUSTAINED.

Charge 2—Failing to follow a direct order not to prescribe controlled substances

In the specification under this charge, Dr. Robbins alleged:

On or about February 2, 2000 I met with you and the other Clinical Pharmacists at the Albany VA Medical Center. The purpose of the meeting was to issue each Clinical Pharmacist in attendance their (sic) respective scope of practice documents. During that meeting I ordered you and the other Clinical Pharmacists not to write prescriptions for controlled substances. At the time I ordered that a physician or other authorized

provider must sign prescriptions for controlled substances.

See IAF, Tab 4, Subtab 4k.

This charge cannot be sustained. There is no allegation as to how or when the appellant failed to follow the order; the charge merely indicates that the appellant was given an order on or about February 2, 2000. *Id.* Even if one were to find that the charge is based on what occurred on August 3, 2001, it would be duplicative of the first charge which is not sustained. Accordingly, Charge 2 is NOT SUSTAINED.

Retaliation for whistleblowing activities

Whistleblowing is the disclosure of information by an employee (or former employee or employment applicant) that he or she reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. See 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b).³

To establish the affirmative defense of retaliation for having engaged in whistleblowing activities, an appellant must show that: (1) he made a disclosure protected under 5 U.S.C. § 2302(b)(8) and (2) the disclosure was a contributing factor in the agency's personnel action. See *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 626 (2001). An appellant may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence such as evidence indicating that the official who took the personnel action knew of the disclosure, and the personnel action occurred within such a period of time that a reasonable person could conclude the disclosure was a contributing factor in the personnel action. *Id.* at 626-27.

³ Whistleblowing does not include a disclosure that is specifically prohibited by law or required by executive order to be kept secret in the interest of national defense or foreign affairs unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it. See 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b).

If the appellant establishes a *prima facie* case of reprisal for whistleblowing, the burden shifts to the agency to show by clear and convincing evidence⁴ that it would have taken the same personnel action in the absence of the disclosure. *Id.* at 627.

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of the whistleblowing, the Board considers the following factors: the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence indicating that the agency takes similar actions against employees who are not whistleblowers but who are similarly situated. *Id.*

The appellant in the instant case alleged that the removal action was taken in retaliation for disclosures he made during the 1990's about the conduct of ██████████ M.D., an oncologist at the Medical Center. *See* IAF, Tab 1. The appellant made allegations that Dr. ██████████ endangered patients' lives by administering medication that was not approved by the Food and Drug Administration; that Dr. ██████████ falsified research data; and that Dr. ██████████ used research funds inappropriately. *Id.*, Tab 15.

I find that the appellant did not make out a *prima facie* case of retaliation for whistleblowing. Much of what he alleged appeared to be essentially his opinion. Even if he had a reasonable belief that what he alleged evidenced any of the improprieties set forth in 5 U.S.C. § 2302(b)(8), he did not demonstrate that his allegations were a contributing factor in the removal action. Granted, he and Dr. Robbins had an ongoing dispute regarding his (the appellant's) scope of practice. However, the appellant did not demonstrate a causal connection between

⁴ "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. It is a higher standard than preponderance of the evidence. *See* 5 C.F.R. § 1209.4(d).

the removal action and his allegations about Dr. [REDACTED] It turns out that Mr. Stuart, the deciding official, was not even aware of the appellant's allegations regarding Dr. [REDACTED] until the appellant told him during the oral reply. See IAF, Tab 4, Subtab 4f. I note that, during the hearing, neither Dr. Robbins nor Mr. Stuart was even questioned about the appellant's allegations against Dr. [REDACTED]

NOTE: THIS IS BECAUSE THE JUDGE REFUSED TO ALLOW SUCH A DISCUSSION!

Based on the above, I find that the affirmative defense of retaliation for having engaged in whistleblowing activities was not established.

DECISION

The agency's action is REVERSED.

ORDER

I order the agency to cancel the removal and to retroactively restore the appellant effective December 14, 2001. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I order the agency to pay the appellant by check or through electronic funds transfer for the appropriate amount of back pay with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I order the appellant to cooperate in good faith with the agency in its efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I order the agency to pay the appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. The appellant may then file a petition for enforcement with this office to resolve the disputed amount.


I order the agency to inform the appellant in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

INTERIM RELIEF

If a petition for review is filed by either party, I order the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:


JoAnn M. Ruggiero
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final (June 18, 2002) is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on June 18, 2002 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance and a statement showing that a copy of the petition was either mailed or hand delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Jeffrey Fudin
34 Wakefield Court
Delmar, NY 12054

Appellant's Representative(s)

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Agency's Representative(s)


Douglas Bender
Department of Veterans Affairs
Stratton VA Medical Center
Attn: Human Resources-Mail Code 05
113 Holland Avenue
Albany, NY 12208

Other

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

May 14, 2002

(Date)



Sonja R. Maxwell
Paralegal Specialist