

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
New York Field Office

In the Appeal(s) of	:	
	:	
JEFFREY FUDIN	:	DOCKET NUMBER
	:	NY-1221-06-0112-W-1
Appellant,	:	
	:	Agency Hearing Submissions
v.	:	
	:	(Administrative Judge Ruggiero)
DEPARTMENT OF VETERANS	:	
AFFAIRS,	:	
	:	
Respondent Agency	:	

AGENCY CLOSING STATEMENT

Appellant Jeff Fudin (hereafter Appellant) comes before this Court by way of individual right of action (IRA). He claims reprisal for alleged whistleblowing activities. Appellant is a Clinical Pharmacy Specialist at the Albany Stratton VA Medical Center. Specifically, he alleged he was improperly denied authorized absence (AA) to attend a non-VA conference held on October 25-27, 2004, for the American College of Clinical Pharmacy (ACCP) annual meeting. He further alleged that and later in December 2004 his swipe card access to the pharmacy was suspended during his detail and subsequent transfer to another Careline outside of the Pharmacy Service.¹

After Appellant establishes MSPB jurisdiction over his IRA appeal he has the initial burden to establish: (1) he made a protected disclosure; (2) the agency has taken or threatened to take a "personnel action" which (3) could have been retaliation under the circumstances; and (4) there is a genuine nexus between the alleged retaliation and the personnel action. See, 5 U.S.C. § 1221(e), 5 CFR § 1209.7, and in general, *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986); *Crist v. Department of the Navy*, 50 M.S.P.R. 35, 38 (1991); see also *Burroughs v. Department of Health and Human Services*, 49 M.S.P.R. 644, 651 (1991).

Appellant is required to make a nonfrivolous claim that he engaged in whistleblowing activity, that the disclosure is protected under the Whistleblower Protection Act (WPA), and that his disclosure was a contributing factor in the agency's decision to

¹ Appellant was detailed from out of the D&T (Diagnostic and Therapeutic) Careline at the Stratton VA Medical Center (this service oversees the pharmacy) in December 2004 and later transferred permanently to the Medical VA Careline (MVAC). MVAC is the medical/surgical service. See, Agency Exhibits 4d and 4e.

take or fail to take a protected personnel action. *See, Flores v. Department of the Army*, 98 M.S.P.R. 427 (2005). In order to establish a case of whistleblower reprisal, Appellant must show that he disclosed information he reasonably believed evidenced 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. These disclosures must be specific and detailed; they cannot be vague allegations of wrongdoing regarding broad or imprecise matters. *See*, 5 U.S.C. § 2302(b)(8).

It is the Agency's position that Appellant did not engage in protected whistleblowing activities. Contrary to his assertions, Appellant's entire testimony about his alleged whistleblowing activities were vague and without specific detail whatsoever. Appellant's testimony was that he disclosed "evidence of gross mismanagement, waste or fraud" mimicking the language of the regulations, but he never gave specific and detailed testimony that would establish that he made recent protected disclosures. Nor did he establish by convincing evidence a genuine nexus between the alleged retaliation and the personnel action.

The allegations Appellant testified to in this matter about waste, fraud and abuse are the same allegations he made a decade ago and have already been reviewed by the MSPB. An appeal to the MSPB is not in and of itself a disclosure. *See, Ruffin v. Department of the Army*, 48 M.S.P.R. 74, 78 (1991); *Metzenbaum v. Department of Justice*, 54 M.S.P.R. 32, 36 (1992).

Appellant's entire testimony about his alleged disclosures went back in time to allegations he made starting in 1993, which were fully litigated in Appellant's prior MSPB cases. Your Honor ruled on his previous IRA and did not find that he was a whistleblower. However, Appellant attempts to characterize his alleged whistleblowing activities in the instant matter as "a long and well documented recent history of protected activity...as documented in MSPB Docket Number NY 1221-01-0075-W-1." That case was an action commenced by Appellant as IRA appeal also alleging retaliation. We note that your Honor dismissed the appeal for lack of jurisdiction making no finding of protected activity. Appellant brought another complaint of retaliation in NY-0752-02-0116-I-1. In that case he appealed his removal from the Agency and Agency lost and was required to reinstate Appellant. However, your Honor, in addressing Appellant's claim for retaliation for whistleblowing activities, found that he failed to make a prima facie case.

Appellant also tries to bootstrap his alleged whistleblower activities to his private website (www.painddr.com), which cites local newspaper articles from March 2003 as evidence that he has engaged in whistleblower activity. It appears that Appellant's argument is that he is a whistleblower simply because he has a website that states that he is a whistleblower. His website cites various newspaper articles that contain decade-old allegations and are in reality the same claims from his previous MSPB claims. These articles cite issues Appellant had in 1993 with a former VA doctor, Dr. [REDACTED]. Appellant now somehow tries to tie his old allegations to an investigation at the Albany VA in 2002 involving Drs. Kornack and Holland. They are not related. Not only are most of the articles about issues starting ten years earlier, even the newspaper articles state that

Appellant's allegations from a decade earlier are not in anyway connected to the investigation of Kornack and Holland. *See*, Appellant's MSPB Submissions. Even so, the Kornack-Holland investigation started in 2002 and the articles Appellant cites are publications from 2003, well over a year before the issues of AA or swipe card access that he is now complaining about.

Testimony by Agency witnesses, Medical Center Director [REDACTED] and D&T Careline Manager and Pharmacy Supervisor [REDACTED] clearly established that Appellant's website had no bearing in the decision to deny Appellant AA to attend the ACCP conference. Both testified that they viewed Appellant's website, but not until after 2004. Further, they both testified that while they may have read some of the newspaper articles when they were first published, this information in no way influenced the decision to deny Appellant AA or swipe card access. Appellant presented no evidence to refute their statements.

Appellant also claimed that the denial of AA to attend the non-VA conference came immediately after Medical Center [REDACTED] met with a local Assemblyman and was in retaliation because Appellant was going to testify at a public hearing before this Assemblyman. It is not clear what the substance of this hearing was. However, the testimony of Director [REDACTED] and Supervisor [REDACTED] was that neither knew about any relationship or hearing with Assemblyman Tocci. Director [REDACTED] testified that she did not know about Appellant's request for AA until after she met with Tocci and she did not discuss Appellant in any way when she met with the Assemblyman on September 27, 2004. Director [REDACTED] testified that she first became aware of the AA issue after October 5, 2004, when Appellant emailed her on October 7th "to keep her in the loop with this situation." *See*, Appellant's submissions, pgs.47 and 77. More importantly, Director [REDACTED] and [REDACTED] both testified that between themselves, they never discussed her meeting with Tocci. A newspaper article dated October 21, 2004 (three weeks later), corroborates the Director's testimony stating, "Tocci said he does not recall discussing Fudin or any other VA employee who might be asked to testify before the [hearing] panel." *See*, Agency Exhibit 7. Appellant did not produce any evidence that anyone in the Medical Center had any knowledge of Appellant's alleged participation in this hearing, which actually never took place. Additionally, Director [REDACTED] testified that she had met with Appellant shortly after she became Director and asked him whether he had any new issues regarding any type of abuses, mismanagement, etc. (other than the old allegations), and Appellant stated he did not. Appellant did not refute this testimony.

By law, Appellant must also prove that the Agency has taken or threatened to take, or that it has not taken or threatened not to take, a "personnel action" within the meaning of the WPA. *Supra*. Appellant must establish that an "adverse personnel action" concerned pay, benefits, or awards or concerning education or training likely to lead to an appointment, promotion, performance evaluation, or other personnel action. It is the Agency's position that its decisions regarding AA (official government time), and swipe card access were not adverse personnel actions.

First, AA must be distinguished from annual leave (AL). The granting of AA is a discretionary management determination. Appellant was granted and did take AL to attend the ACCP meeting. Denial of AA is not the denial of a "benefit" under the WPA unless the Agency has a policy of granting such leave in the same circumstances. *See, Arauz v. Department of Justice*, 89 M.S.P.R. 529 (2001). In *Marren v. Department of Justice*, 50 M.S.P.R. 369, 373 (1991), the Board found that an agency's denial of a request for AL to prepare a petition for review in a Board appeal was a decision concerning a benefit, and that it therefore constituted a personnel action under 5 U.S.C. § 2302(a)(2)(A)(ix). The Board also found, however, that the agency's denial of a request for **official time** did not constitute such a decision or personnel action. *Id.* at 372-73. In making these findings, it noted that while AL was a benefit provided by law that accrued automatically, the appellant had failed to show that he was entitled to the official time he had requested. *Id.* at 373. Indeed, the MSPB has found that failing to send an appellant to a conference was not a prohibited personnel action. In *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 326 (1991), the MSPB found that the conference was not a regularly recurring event, was not a training event that constituted a personnel action, and that it was primarily held for the benefit of field agents, not for someone in the appellant's position.

Authorized absence is a discretionary determination and as such, the testimony was clear that Pharmacy Supervisor [REDACTED] made his decision based upon the information provided by Appellant. Contrary to Appellant's assertion, it is not incumbent upon his supervisors to seek out the necessary information in order to determine whether or not AA is appropriate. Rather, Appellant had a duty to provide such information. The testimony by Agency witnesses was that Appellant at various times provided changing rationale for attending the conference and did not submit the actual brochure for the ACCP conference until well after the decision to deny AA (but grant AL) had been made. *See*, Agency Exhibit 6. The testimony by [REDACTED] and other Agency witnesses was that determinations for AA were done on a case-by-case basis and indeed, Appellant has been granted AA to attend conferences before and after the ACCP meeting. *See*, Agency Exhibit 8. Significantly, Appellant's own witness, Oncology Pharmacist David Kupiak, testified that he had been denied AA to attend a similar conference by [REDACTED] (prior to appellant's denial of AA) because the conference was not for the benefit of the Agency but rather was of a personal benefit to the employee. This is contrary to Appellant's statement that no pharmacist had ever been denied AA to attend a conference. Thus, the Agency has taken prior similar actions against similarly situated employees who are not alleged whistleblowers.

Appellant testified that due to his specialty in Pain Management it was difficult for him to get clinical education (CE) credits as required by his license. Despite this assertion, the Agency is not required to provide official government time, AA, every time an employee wishes to attend a conference in order to get CE credits. Again, and in accordance with Agency testimony, a valid rationale for denying AA to attend a conference is whether the benefit is for the Agency or is of a personal benefit for the employee. Appellant's own submissions (*see*, ACCP brochure) and testimony indicate that a good part of the conference was for personal and business purposes. Appellant was the outgoing Chair of the Pain PRN committee for ACCP, and in that capacity, he attended a "PRN

Business Meeting and Networking Forum.” Appellant was a “moderator” at a pain management “focus session” and he presented at a workshop on the subject of “whistleblowing” -- both subjects not of direct benefit to the Agency which would justify the use of official government time. Rather, they were of personal benefit to Appellant even had he timely provided this information. Appellant’s own testimony was that he was given free tuition (a value of \$380 to \$520, depending on time of registration) because of his status as a chair of the Pain PRN committee. Clearly, Appellant’s attendance at the meeting for these purposes was of a personal nature.

Suspension of Appellant’s swipe card access to the pharmacy was not initiated as a special rule just for him as he alleged. Rather rules and regulations found in VA Handbook 0730/1 and M-2, Part VII, Chapter 1 address physical security and access to VA pharmacies. See, Agency Exhibits 4c, 15 and 16. M-2, Part VII, 1.05, “Security” (b) requires the Pharmacy Chief to keep security cards to a minimum and section (b)(1) further requires that security cards or combinations “must be changed when employees with these security cards cease to be employed by the Pharmacy Service.” (emphasis added) See, Agency Exhibits 16 at p.1-9. That is what occurred here when Appellant was detailed and later permanently transferred from the Pharmacy Service, Diagnostic D&T Careline to the MVAC Careline. ████████ testified about numerous pharmacy employees including Pharmacy students that had transferred out of the Pharmacy Service D&T Careline and had their swipe card access removed.²

It should be noted that Appellant continues to have access to the pharmacy by simply “ringing the bell.” Appellant testified that continued swipe card access was necessary for various reasons including meetings with students, accessing records, etc. However, testimony by Appellant’s own witness, Pharmacist Mandy Torres established that she did not need to go to the pharmacy to precept her pharmacy students as she was able to meet with them in her office. Additionally, Agency testimony established that all medical records are electronic and Appellant could access any pharmacy records he might need from any appropriate computer site. Appellant is not disadvantaged in any way from performing the functions of his job by not having swipe card access. Being a pharmacist is not in and of itself a justification for a swipe card.

² Appellant testified that the transfer from the D&T to MVAC Carline was not voluntary. However, testimony by Agency witnesses was that in May 2002, Appellant initiated a request to Dr. Eina Fishman, then Chief of Staff, requesting that his position as Clinical Pharmacist be transferred to the MVAC Careline. See, Agency Exhibit 4f. Over the course of the next two and one-half years, discussions were held to consider the merit of Appellant’s request. Appellant actively participated in these discussions, even creating the job description for same. Following substantial coordination, the position was approved on a trial basis. See, Agency Exhibits 10 and 11. It should be noted that Appellant never raised this allegation of transfer from Carelines with the OSC and it was not part of his IRA appeal therefore there is no jurisdiction to review this allegation. See, *Heining v. General Services Administration*, 61 M.S.P.R. 539, 547 (1994); see, also, *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 525 (Fed. Cir. 1992); *Knollenberg v. Department of the Navy*, 47 M.S.P.R. 92, 97 (1991) *aff’d sub nom. Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623 (Fed. Cir. 1992).

Appellant must establish that the Agency took an adverse personnel action against him in reprisal for his alleged protected activity. The personnel actions covered are *inter alia* decisions concerning pay, benefits, or awards or concerning education or training likely to lead to an appointment, promotion, performance evaluation, or other personnel action; or any other significant change in duties, responsibilities, or working conditions. See, 5 U.S.C. §§ 2302(a)(2)(A)(i)-(xi). The suspension of a security clearance does not fall within the statutory definition of a "personnel action," under 5 U.S.C. § 2302(a) (2) (A) (ix), *Roach v. Department of the Army*, 82 M.S.P.R. 464 (1999); *Hesse v. State*, 82 M.S.P.R. 489 (1999), aff'd 217 F.3d 1372 (Fed. Cir. 2000), cert. denied 531 U.S. 1154 (2001).

Moreover, the MSPB has also held that it will not find a presumption of connection where the timing of the personnel action is mandated by statute or regulation and thus is outside the control of the deciding official. See, *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337, 346 (1991); *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 455 (1992). This same principal holds true where, regardless of actual knowledge and timing, an agency is merely taking an action that it is required to do by statute, regulation, or policy. *Jackson v. Department of Veterans Affairs*, 95 MSPR 152, 158 (2003). In the instant matter, swipe card access to the Pharmacy is governed by VA rules and regulations. See Agency Exhibits 4c, 15 and 16. The Agency submits that the testimony from other pharmacists about swipe card access is irrelevant. This is a matter of VA regulation and not personal convenience.

Appellant must show his alleged protected disclosures were a contributing factor to the Agency's decisions not to grant him AA or swipe card access. Again, the evidence establishes otherwise. As mentioned, withdrawal of swipe card access was in accordance with VA regulations. Regarding denial of AA, the testimony by Agency witnesses, [REDACTED] and [REDACTED] was that the Agency considered his request and based on the merits using the general guidelines of the VA Handbook 5011, Part III, Chapter 2 and opinions from Human Resources and Regional Counsel it was decided that AA would not be granted in this instance. The Agency did not grant Appellant AA, at first because of ethical concerns raised by Appellant's statements about being a presenter (thus the ACCP registration fee was waived) and his intent to accept not to an "honorarium" from ACCP, but would request reimbursement from ACCP to defray travel or hotel expenses. Appellant statement that he would use Albany College of Pharmacy (non-VA) funds to pay the difference for the conference also raised ethical concerns. See, Appellant's submissions, p.31. Appellant could not accept funds in the manner he described and use official government time as this would violate ethics rules. After that, Appellant had various modifications of his request to attend the meeting including that he could get CE or that he was recruiting students. These arguments did not persuade Agency officials.

Mr. Plitnick testified that he was new in his position at the VA when Appellant first made his request for AA to attend the ACCP conference. Plitnick then inquired of his supervisor, [REDACTED] about the rules and regulations for granting AA. Plitnick testified that he emailed Appellant and inquired about financial information (monetary or otherwise) that might be provided to Appellant regarding his presentation and/or travel for the conference. He also advised Appellant that he would have to "go higher up" for

approval as the request was for more than one hour. *See*, Appellant's submissions, p.32. Based upon the specifics of Appellant's responses, Mr. Plitnick testified that his supervisor, D&T Careline Manager [REDACTED] requested advice and opinions from Human Resources and Regional Counsel. Plitnick testified that in late September 2004, he advised Appellant that he could not recommend AA to the D&T Careline Manager, but that Appellant could request AL or restored leave which would be approved. *See*, Appellant's submissions at p. 29. Kerry Johnston testified that he determined after receiving opinions from Human Resources and Regional Counsel that attending the meeting was primarily of a personal benefit to Appellant. Appellant's attendance at the conference was found to be more of a personal business function. *See*, Agency Exhibit 3. Appellant's own words from his prehearing submissions state that this was a "business function" -- whereby the agency was justified in finding that his attendance was more of a personal benefit than a benefit for the VA. Johnston also testified that he never asked Appellant to recruit students at the ACCP conference and that the Albany VA actually did not recruit at ACCP as they did not accredit the VA. Johnston also testified that obtaining CE in and of itself was not a determinative factor in this decision, as there were a number of ways for pharmacists to get CE in the required 3 year time period.

Lastly, the Agency demonstrated by clear and convincing evidence that it would have taken the actions of denying AA and swipe card access whether or not Appellant was a whistleblower. Agency witness testimony attested to the strength of the Agency's evidence in support of their actions; their lack of any motive to retaliate on the part of managers involved in the denial of AA and swipe card access; and, evidence that the agency had taken similar actions against similarly situated employees who are not alleged whistleblowers. It should be noted that Johnston has been Appellant's supervisor since 1999 and has previously granted Appellant AA prior to and after this request. The testimony of [REDACTED] Johnston and Plitnick and also by Appellant's own witnesses Mandy Torres and David Kupiac clearly established that the Agency would have taken the same actions and had indeed taken similar actions to deny both AA and swipe card access to other employees. *See, Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999); *Larson v. Department of the Army*, 91 M.S.P.R. 511, 515 (2002).

Consequently, the Agency respectfully requests that Appellant's whistleblower IRA appeal be dismissed.

Dated: Syracuse, New York
June 21, 2006

DEPARTMENT OF VETERANS AFFAIRS

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2006, I sent the foregoing Agency Closing Statement via Fax and U.S. mail to the following address:


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