

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

JEFFREY FUDIN,

Appellant,

against

DEPARTMENT OF VETERANS AFFAIRS,

Agency.

DOCKET NUMBER
NY-1221-06-0112-W-I

APPELLANT'S CLOSING BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief is submitted on behalf of Appellant Dr. Jeffrey Fudin ("Dr. Fudin"). Dr. Fudin has a well documented, very public, well known history as a whistleblower at the Stratton Veterans Hospital in Albany, New York ("Stratton VA"). As we detail below, the record facts reveal that the management of the Stratton VA retaliated against Fudin for his protected whistleblowing activity. This is demonstrated by the classic types of circumstantial evidence

found in whistleblower cases. This includes both closeness in time of the retaliatory act to the protected activity, direct comments made by the responsible officials evidencing animus and the constantly shifting and ultimately false reasons provided by the Agency in an attempt to justify their retaliatory acts.

LEGAL STANDARD

The legal standard applied to analyzing a retaliation case under the Whistleblower Protection Act (“WPA”) 5 U.S.C. §2302 is neither novel nor new. To prevail, Dr. Fudin must show that:

- 1) he made a protected disclosure;
- 2) the deciding official had actual or constructive notice of the disclosure;
- 3) an adverse employment action occurred; and
- 4) there is a nexus or connection between the protected disclosure and the adverse employment action. The nexus may be proven with either direct or circumstantial evidence. See Powers v. Dept. of Navy, 97 MSPB 554 (2004); Conrad v. Dept. of Justice, 99 MSPB 636 (2005).

To establish that he made a protected disclosure under the WPA, the employee need only show that he had a reasonable belief that there was evidence of a violation of any law, rule or regulation. See WPA 5 U.S.C. §2302(b)(8)(A)(i) and Conrad v. Dept. of Justice, Id.

Once an appellant proves that a protected disclosure was a contributing factor in a particular personnel action, the agency has the opportunity to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. See Conrad v. Dept. of Justice, Id.

In determining whether an agency has made such a showing, the Board will consider the following factors: the strength of the agency’s evidence in support of its 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 otherwise similarly situated. See Conrad, Id.

It is against this straightforward legal standard that we view the evidence here.

STATEMENT OF FACTS

Appellant, Jeffrey Fudin (“Dr. Fudin”) is a nationally known expert on pain management. He regularly consults and lectures on pain management for health professionals throughout the Country, both inside and outside the federal system. (Fudin Direct Testimony)¹

Dr. Fudin is a Clinical Pharmacist Specialist at the Stratton Veterans Hospital in Albany, New York (“Stratton VA”). His specialty is in pain management. He is the only Clinical Pharmacist in the Veterans Affairs Nationwide that is Board certified in this specialty. Simply put, Dr. Fudin, by reputation, knowledge, training and experience is a pre-eminent expert in the field of pain management. (Fudin Direct Testimony)

This case involves two separate instances where the Albany VAMC retaliated against Dr. Fudin for his “protected activity.”

WHISTLE BLOWING ACTIVITY

Dr. Fudin has been a very public whistleblower. Among other things, Dr. Fudin maintains publicly accessible websites that republish a series of protected disclosures. All of these disclosures of waste, fraud and mismanagement at the Stratton VA are well known to the administration of the Stratton VA and the decision makers involved in this case. The complete list of public disclosures and protected activity at issue in this case is attached to Dr. Fudin’s MSPB Appeal Form.

Even a cursory review of these disclosures reveals in no uncertain terms that Fudin has repeatedly disclosed waste, fraud and mismanagement.

¹ Testimony will be referred to by the witness’ name. Exhibits will be referred to as Appellant or Agency Exhibits.

At the hearing the Stratton VA Director, [REDACTED] admitted that she was well aware of virtually all of Dr. Fudin's prior disclosures both from the website and because she read the source documents listed on the website. She was also involved in the earlier disclosures as described by Dr. Fudin. (Dr. Fudin Direct Testimony)

[REDACTED] actually called Dr. Fudin into a meeting just after Fudin was named a Co-Grand Marshall at the Albany Memorial Day parade for his whistleblowing activity. At the meeting there was specific discussion of Fudin whistleblowing. (Fudin Direct Testimony, [REDACTED] Cross Examination) Clearly, the decision makers at the Stratton VA had actual knowledge of Fudin's protected activity and ongoing efforts to address waste, fraud and mismanagement at the VA.

In addition, Dr. Fudin was scheduled to be a witness at a New York State Legislative Hearing that was to be held in Albany to discuss issues of waste and mismanagement at the Stratton VA. On September 27, 2004, Stratton VA Hospital Director [REDACTED] met with New York State Assemblyman Tocci to discuss the proposed hearing. (See [REDACTED] Cross Examination) Shortly after this meeting, the Stratton VA engaged in two separate acts of retaliation for this whistleblowing activity. During the course of the discussions surrounding the first retaliatory incident, Dr. Fudin revealed his intention to file a complaint with the Office of Special counsel and to contact his Congressional Representative. These two separate, additional protected acts elicited still another act of retaliation.

FUDIN'S REQUEST FOR ANNUAL LEAVE

The first event concerns a request for training put in by Dr. Fudin. The training was a Continuing Education ("CE") program offered by American College of Clinical Pharmacy ("ACCP"). This is an association consisting of Clinical Pharmacy practitioners throughout the United States. Membership is not automatic. It requires approval by a board of directors based

on a demonstrated record of achievement in the field. By reputation, this is considered one of the preeminent organizations in the United States for Clinical Pharmacists. (Fudin Direct Testimony)

Dr. Fudin is a member of ACCP, and at the time (all of calendar year 2004) Dr. Fudin was the Chair of the Pain Practice Network Group, which is a practice specialty group within the ACCP. The meeting Dr. Fudin was seeking to attend was the annual meeting which had both a business function and a Continuing Education function. Dr. Fudin has been attending this annual meeting since 1998 when he first became a member. Prior to that, he attended similar meetings put on by other, albeit less prestigious, associations. In all prior instances he was permitted to attend while on authorized absence. (Fudin Direct Testimony)

Importantly, in each prior year Dr. Fudin's direct supervisor presumably applying the exact same standard applied in 2004, approved Dr. Fudin's requests. (See Applicant Exhibit F attached to Appellant's Prehearing Submission.)

One of the topics covered at this symposium "Applying Balance to Chronic Opioid Use and Urine Toxicology Screening," which Dr. Fudin moderated as Chair of the Pain Practice Network Group, is particularly relevant for the VA population Dr. Fudin serves. As Dr. Fudin explained, since his patients quite frequently are on long term controlled substances, abuse is a constant concern. Simply put, any suggestion that Dr. Fudin's participation in this symposium does not provide real value to Stratton VA and its patients/clients is completely absurd.

A second topic of the symposium was Tales from the Front: Doing the Right Thing in the Workplace - Whistleblowing: Jeffrey Fudin PharmD.....". Dr. Fudin was on the panel for both topics. (See Symposium brochure attached to MSPB Appeal Form)

As a condition of maintaining his license, Dr. Fudin is required to receive 45 hours of Continuing Education on a three-year cycle. He just started a new cycle on September 27, 2004, one month prior to the meeting. Thus, the CE credits Dr. Fudin would earn is required both as a condition of his licensure, but more importantly as part of his required VA performance description (Exhibit A attached to Appellant's Prehearing Submission)

In addition, Dr. Fudin's scope of practice in Pain Management requires that he maintain board certification as a Diplomat to the American Academy of Pain Management. That requires him to attend 100 hours of Continuing Education in pain management over a four-year cycle.

Both the conference as a whole and the two panels Dr. Fudin was scheduled to speak on qualify for Continuing Education credits.

The program Dr. Fudin was seeking leave to attend is not the only program that provides Continuing Education. However, because of the ACCP's stature, it is considered one of the most valuable and appropriate Continuing Education programs in this field.

The Agency suggests that Dr. Fudin could obtain Continuing Education in other ways either by attending local symposiums or by using various VA sponsored continuing education. While this is technically true, because Dr. Fudin is considered a national expert in a highly specialized practice area, as a practical matter, to obtain actual education that provides useful information he needs to attend highly specialized CE. That is why the ACCP is so valuable and so appropriate.

Dr. Fudin explained the practical problem with his testimony that because of his expertise, whenever there is locally based CE on pain management, he is almost always the principal speaker.

Also, one of Dr. Fudin's functional descriptions and performance standards requires that he make presentations at "local, state, regional and/or national meetings". (See Exhibit A to Appellant's Prehearing Submission) Clearly, his attendance and his participation as a panel member worked towards fulfilling all these varied requirements.

Dr. Fudin's request for authorized absence to attend the conference was denied. The denial was inconsistent with prior practice at the Stratton VA, inconsistent with how other clinical pharmacists in the VA system generally were treated and inconsistent with the rules and regulations for "approved absence" published by the VA.

The Agency argues that it had a legitimate business-related reason for denying Dr. Fudin's request to use authorized absence to attend the conference. The difficulty with the Agency's position is that they had a series of stated reasons that were rolled out one after another. Each of them is demonstrably wrong. More importantly, because the reasons were rolled out one after another, it creates the circumstantial proof that the Agency was motivated to deny Dr. Fudin's request, not because of the business reasons, but because of its desire to retaliate against him for his protected activity.

Initially, the Agency claimed that Dr. Fudin could not obtain authorized absence because as a speaker at the conference he would receive some form of honorarium. The difficulty with this analysis is that [REDACTED] admitted she knew and understood that the whatever issues had been raised about honorariums had been satisfactorily resolved prior to the time that Fudin attended the conference and she had actual notice that Fudin was committed to doing whatever was necessary to be in complete compliance with both the

letter and the spirit of the VA's rules on honorarium. (See Fudin Direct Testimony and [REDACTED] Cross Examination)

Next, the Agency claimed that the reason that Fudin was denied authorized absence is that Dr. Fudin took more authorized absence over the prior years than other pharmacists. This too has been proven to be pretextual and false.

As an initial matter, the conference occurred at the beginning of the fiscal year. Literally, Dr. Fudin had taken no authorized absence in 2004 at the time that he made the request.

Secondly, the reality is that there are no written standards whatsoever setting forth an allowable amount of authorized absence. Indeed, the point of authorized absence is not the amount but rather the quality of the absence, as the Agency's own policies and procedures make clear.

The VA Handbook provides in relevant part:

12. AUTHORIZED ABSENCES

- a. **General.** An employee may be given authorized absence without charge to leave when:
 - (1) The activity is considered to be of substantial benefit to VA in accomplishing its general mission or one of its specific functions, or
 - (2) The activity will clearly enhance an employee's ability to perform the duties of the position presently occupied or may be expected to prospectively occupy, or
 - (3) The bases for excusing the employee is fairly consistent with prevailing practices of other Federal establishments in the area concerning the same or similar activities.

* * *

h. Conferences or Conventions

* * *

(2) Attendance at Meetings

- (a) The opportunity for development afforded by participation in professional, administrative, or technical meetings is a significant factor in creating the kind of working atmosphere which helps to attract and retain competent personnel, and improve the work of the agency. Attendance at gatherings of scientists, or other professional, technical, or administrative persons is a positive means of facilitating effective communication of ideas and information in areas of significant agency need. Therefore, a scientist, or other professional or administrative, or technical employee of any kind who desires to attend a professional, technical, or administrative meeting is encouraged to request approved absence for this purpose. Such requests will be processed as expeditiously as possible and reasonable efforts will be made to distribute opportunities for attendance widely among those who are eligible.

- (b) Employees may be excused without charge to leave to attend meetings which are concerned with the functions or activities of VA, or which will contribute to improved conduct, supervision, or management of those functions or activities. This will include meetings, conventions (religious retreats in the case of Chaplains) or conferences of recognized professional technical, or administrative organizations and of private organizations if attendance at the meetings will contribute to improved conduct, supervision, or management of the functions or activities of VA. However, representatives of labor organizations may not be granted excused absence for meetings concerning internal labor organization matters.

(See VA Handbook attached to Agency Answer as Exhibit 3-G)

Each of the reasons found in the Handbook for authorized absence are met in this case. First, clearly this conference was a professional meeting as defined in the

Handbook. Second, it provided great value for the VA and Dr. Fudin's patients. Indeed, Dr. Fudin's actual patient base and specialty of pain management is directly related to the topics that were both covered at the conference and for which Dr. Fudin was specifically being asked to speak. (See Fudin Direct Testimony and summary of the conference attached as an attachment to MSPB Appeal). Nor can the Agency get past this damning evidence. Based on Dr. Fudin's own survey, every single VA clinical pharmacist in the country that was at the conference that responded to the survey was granted authorized absence to attend the same conference that Dr. Fudin was denied authorized absence to attend. While this is not conclusive proof, it is powerful evidence that every other VA entity that considered this question approved authorized absence for attendance at the conference, all save Stratton, which denied it, only for Dr. Fudin. That disparate treatment is also discussed in the VA Handbook.

The fact that the Agency has consistently granted Dr. Fudin authorized absence to attend this same conference year after year is again powerful evidence that it was motivated in 2004 by a desire to retaliate against Dr. Fudin. (See Exhibit F attached to Appellant's Prehearing Submission)

The Agency attempted to buttress its decision by testimony from Mr. [REDACTED] to the effect that he had denied authorized absence in the past for other clinical pharmacists to attend similar conferences. As was made clear by the testimony of both [REDACTED] and the affected clinical pharmacists, that is simply not true. Indeed, of the two instances that [REDACTED] testified about, in the one case, the clinical pharmacist actually did receive authorized absence to attend the conference and in the second case the reason why the

authorized absence was denied was because it involved lobbying, rather than some other purpose that fit the Agency's criteria for authorized absence. (See Kupiak testimony)

The Agency attempted to avoid culpability by suggesting that [REDACTED] made the decision and he did so because Dr. Fudin did not provide him with the appropriate information about the purpose of the conference. First, this is inconsistent with Dr. Fudin's testimony,. Second, it is incredible to suggest that Mr. [REDACTED] did not understand that the ACCP conference provided state of the art training and CE for Dr. Fudin. That is particularly true since he signed off on Dr. Fudin's request for authorized absence to attend the same ACCP conference the prior year. (See Exhibit F to Appellant's Prehearing Submission. Finally, [REDACTED] herself admitted she had the ultimate responsibility to determine whether Dr. Fudin's request was handled correctly; not Mr. [REDACTED]

DENIAL OF PHARMACY ACCESS PRIVILEGES

Once Dr. Fudin's authorized absence was denied, he met with Stratton VA management and informed them that he would pursue a review of the denial with his Congressional Representative and with the Office of Inspector General shortly after that meeting. Dr. Fudin had his pharmacy swipe card access removed. The stated reason was that Dr. Fudin had a change in his reporting relationship. Dr. Fudin's new assigned duties did not justify the revocation of his Pharmacy access. The proof shows that Fudin's duties did not change because of the detail. They remained essentially the same. The VA informed Dr. Fudin that it felt by removing him from the Pharmacy, he could devote 100% of his time to his core duties including

expanded education of primary care clinicians in better treatments for pain. The reality is that Dr. Fudin has always done these duties. (Fudin Direct Testimony)

There are three other clinical pharmacists at the VA. Dr. Fudin is the only one who had his Pharmacy privileges removed. Each of the other clinical pharmacists had the same level of need for access as Fudin, no more and no less. Yet only Fudin had his privileges removed.

There are two clinical pharmacists who work at the VA without compensation as part of a program with the Albany College of Pharmacy. Their pharmacy access was not removed.

There are two main reasons why Dr. Fudin needed continued access to the Pharmacy consistent with his duties at the VA. The first is that he has supervisory responsibilities for student/interns who serve clerkships at the VA. They are required to work in the Pharmacy as part of their internship.

Second, Dr. Fudin has the responsibility for mentoring a Pharmacy Resident. The project requires access to records that are kept in the Pharmacy.

Both of these duties require regular meetings in the Pharmacy and regular access for records stored in the Pharmacy.

There were no current policies at the VA which otherwise precluded Dr. Fudin's access to the Pharmacy. However, the VA did create a special rule created for Dr. Fudin and Dr. Fudin alone to justify the denial of access. That evidence, created after the fact, is itself powerful proof of the VA's animus.

The VA raised a series of obstacles in an attempt to justify both the denial of authorized absence and the removal of pharmacy access. The real reason for denial of authorized absence and removal of pharmacy access was in retaliation for whistle blowing.

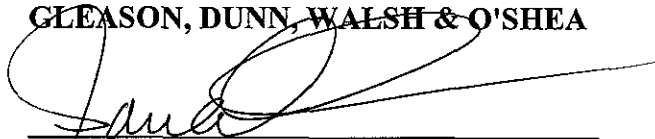
CONCLUSION

**THE APPEAL SHOULD BE GRANTED AND THE
AGENCY SHOULD BE DIRECTED TO MAKE DR. FUDIN
WHOLE.**

Dated: Albany, New York
June 21, 2006

GLEASON, DUNN, WALSH & O'SHEA

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