

**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 REPLY TO AGENCY'S CLOSING BRIEF

INTRODUCTION

This reply brief is submitted on behalf of the Appellant, Dr. Jeffrey Fudin ("Dr. Fudin") in response to the June 21, 2006 brief submitted by the Agency, Department of Veteran's Affairs, Stratton VA Medical Center ("Agency" or "Stratton VA").

In its brief, the Agency claims that Dr. Fudin has made an inadequate showing that he was in fact disclosing information he reasonably believed evidenced a violation of law, rule or regulation; gross mismanagement, a gross waste of funds; or an abuse of authority or substantial and specific danger to public health or safety.

With all due respect to the Agency's understandable desire to avoid liability, it strains credulity to suggest that disclosures related to patient health and safety such as those made by Dr. Fudin do not fall within the definition of protected activity. As Dr. Fudin testified to specifically in the hearing, he has had a series of disclosures, internally at the Stratton VA and externally to the FBI, the VA Inspector General, the State Legislature, the New York State Office of Professional Discipline, the New York State Assembly, the United States Attorneys Office and the United States Congress, that Stratton VA had over a long period of time allowed veterans to be inappropriately used in research studies, and that incoming research funds were misappropriated to offset institutional operating expenses. This specifically put the veterans' health and safety at risk and almost certainly resulted in, if not the actual patient death, at least the likelihood of patient death.

As Dr. Fudin testified to, and as is corroborated by the documents and record, copies of which are attached to the appeal itself, Dr. Fudin's disclosures were ignored by responsible officials at the VA. Ultimately, they have resulted in the criminal prosecution by the United States Justice Department and repeated investigations by Congress, the FBI, the Veterans Affairs Inspector General and the United States Attorneys Office.

Moreover, Dr. Fudin has brought these issues to both the New York State Legislature, and the United States Congress. Finally, Dr. Fudin has brought forth allegations to the Office of Special Counsel.

Dr. Fudin's website is relevant not as the vehicle for the initial disclosure. That disclosure was done appropriately and directly with VA officials. Rather, it serves to neatly summarize all the disclosures and as evidence of the actual notice to both [REDACTED] and [REDACTED] of Fudin's long and well documented history.

Under any reasoned definition of protected activity, all of these comfortably fit.

The Agency also suggests that the deciding officials, here [REDACTED] and [REDACTED] [REDACTED] were somehow unaware of these disclosures. It is patently false and completely inconsistent with the record. Indeed, [REDACTED] specifically admitted on cross examination that she had actual notice of all of Dr. Fudin's disclosures both by her viewing of the documents on the website and with direct knowledge from Dr. Fudin himself in a series of meetings she held with him both in the 1990s and in 2003.

Dr. Fudin's testimony also established that [REDACTED] had actual notice of his disclosures. Indeed, in Dr. Fudin's testimony that [REDACTED] admitted to him "Jeff, I wish I did not know what I know; you should get out while you still have a good reputation," when he was a party to the retaliatory acts against Dr. Fudin is powerful evidence that not only was he aware of the protected activity but he knew full well that he was given the job as a pawn in an effort to retaliate against Dr. Fudin to discourage future protected activity and to punish him for past protected activity.

Similarly, Dr. Fudin testified about the forced meeting with [REDACTED] and Dr. E [REDACTED] [REDACTED] wherein they made abundantly clear to Dr. Fudin that she was well aware of his protected disclosures. Piché also testified that in the 11/24/03 meeting, Dr. Fudin explicitly stated that he intended to continue certain protected activities until all VA administrators directly or indirectly responsible for patient harm, patient death, cover-ups, and retaliation were held accountable.

The Agency also suggests that the refusal to grant authorized absence is not an adverse employment action. That too is simply wrong. The Agency continues to argue that it has the discretion to either grant or deny authorized absence. While that may well be true, the Agency is also governed by various written policies and procedures. Those written policies and procedures make it abundantly clear that the reasons for Dr. Fudin's requested authorized absence fits squarely within the confines of when authorized absence should be granted.

To suggest that a speaking assignment and attendance at a conference where the subject is in the precise area that Dr. Fudin practices is personal and has no benefit to the VA is simply absurd.

Finally, the Agency mistakenly states that the record provided evidence that other clinical pharmacists had been denied authorized absence under similar circumstance. Indeed, the record has no such finding. What the record does reflect was that one pharmacist, considered an ally of Dr. Fudin by [REDACTED] (see Dr. Fudin testimony), was denied authorized absence to go to two events. He challenged the first and that challenge was upheld, allowing him authorized absence simply because it fit within the guidelines of the purpose for authorized absence. The second authorized absence was denied not because it was continuing education, and not because it was for a purpose consistent with his duties, but rather because it was for a lobbying campaign, which is not a stated purpose for authorized absence. The reality is that the Agency was not able to show any instances where other clinical pharmacists had been denied authorized absence to go the type of job related continuing education that Dr. Fudin was requesting.

The Agency's response to the removal of swipe access to the pharmacy also misses the point of Dr. Fudin's claim. While it may well be true that Dr. Fudin's access to the Agency is specifically required to be removed by a Stratton policy, the policy was only introduced after Dr. Fudin engaged in protected activity announcing he would contact Congress and the Office of Special Counsel, in order to justify the removal of the swipe card access.

It is also disingenuous for the Agency to suggest that Dr. Fudin's transfer to the Medical VA Careline (MVAC) was at his request. As Dr. Fudin made clear, he made a suggestion to Dr. Fishman more than two years earlier that since his practice brought him into direct patient care, that perhaps it might make more sense for him to report through that line. There were no other discussions with Dr. Fudin about that until the Agency announced unilaterally that he would be so transferred. That unilateral announcement took place within days after he told [REDACTED]


██████ that he would file with the Office of Special Counsel and notify Congress that the Stratton VA was retaliating against him by refusing him authorized absence because of his protected activity.

It was only then that the Agency pushed ahead with its effort to introduce obstacles to Dr. Fudin by way of access to the pharmacy. The irony is that all of this has the bizarre result that a long term employee of the VA whose specialty is in clinical pharmacy and who needs constant access to pharmacy records is denied the access to the pharmacy while non-employees have easy access. The irony is at the heart of Dr. Fudin's claim that this case presents a classic example of retaliation for a protected activity.

CONCLUSION

**THE RELIEF REQUESTED BY THE APPELLANT
SHOULD BE GRANTED AND HE SHOULD BE MADE
WHOLE.**

Dated: Albany, New York
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