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2015-3149

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

TROY W. MILLER,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

Appeal from the Merit Systems Protection Board
Case No. DA-1221-11-0401-W-3

**RESPONDENT'S PETITION FOR
PANEL REHEARING AND ADDENDUM**

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March 3, 2017

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**RESPONDENT’S PETITION FOR
PANEL REHEARING AND ADDENDUM**

Pursuant to Rule 40 of the Rules of this Court, respondent, the Department of Justice (DOJ), respectfully petitions for panel rehearing in this case.

**POINTS OF LAW OR FACT OVERLOOKED
OR MISAPPREHENDED BY THE COURT**

The Panel’s decision reflects its understanding that the Office of the Inspector General (OIG) “purportedly directed the Warden to reassign Mr. Miller,” *Miller v. Dep’t of Justice*, 842 F.3d 1252, 1262 (Fed. Cir. 2016), and that there was “no evidence to explain how Mr. Miller . . . could either compromise or be a target of an investigation into the very type of activities that he reported,” *id.* at 1260. *See also Carr v. Social Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

This overlooks or misapprehends the record in this case about both Mr. Miller's and OIG's role in the investigation.

Specifically, Mr. Miller—who was given *Miranda* warnings and repeatedly questioned in the presence of attorneys from the U.S. Attorney's Office, JAppx328–29—was a target of a criminal investigation concerning the improper manufacturing and testing of military helmets. JAppx543; JAppx581. The investigation was triggered by the whistleblowing of another employee, Melessa Ponzio.¹ JAppx578–79. Based upon Ms. Ponzio's disclosure, OIG conducted an onsite inspection of the factory. Only then—after the warden instructed him to leave the factory at OIG's request—did Mr. Miller disclose his belief that helmet manufacturing was “sabotaged.”² JAppx475–77; JAppx544–545. Further, following OIG's request for Mr. Miller's removal from the factory, OIG notified

¹ Ms. Ponzio was one of two relators who filed a *qui tam* action concerning the improper manufacturing of helmets at the factory. See *United States ex rel Melessa Ponzio and Sharon Clubb v. Rabintex Industries Ltd., et al.*, No. 1:10-cv-588 (E.D. Tex.). Mr. Miller was a named defendant in that lawsuit. The *qui tam* action was sealed initially. It was unsealed in June 2013. *Id.* (docket entry 16). The *quit tam* action was dismissed by order on April 6, 2016, following a settlement by the parties. *Id.* (docket entry 36). The claims brought against Mr. Miller were dismissed without prejudice to the United States. *Id.* (docket entry 35, stipulation of dismissal). The *qui tam* action was not referenced in the board proceeding, which began in April 2011.

Ms. Ponzio was incorrectly identified as Melissa in the record on appeal.

² We acknowledge that Mr. Miller had made a protected disclosure regarding the separate issue of the financial management of the helmet program before learning of OIG's investigation.

the warden that Mr. Miller was using his access to inmates “to gain information about,” JAppx550, and “hamper[] the investigation,” JAppx547. The warden then assigned Mr. Miller alternative duties, in one case after the warden confirmed that Mr. Miller was interfering in the investigation by selectively monitoring recordings of calls from inmates who worked at the factory.

The Panel decision also overlooks or misapprehends critical facts and the law regarding (1) the role of OIG vis-à-vis agency managers during active criminal investigations in general and, more specifically, (2) the role OIG and Mr. Miller played in this case with regard to the investigation and the warden’s personnel decisions. OIG is an independent and objective unit of DOJ, separate and apart from agency management. OIG’s independence flows from its mission of investigating allegations of misconduct, fraud, waste, and abuse within DOJ. Consistent with its independent role and statutory authority, OIG does not direct personnel actions. Rather, as the dissent recognized, during its investigation, OIG “request[ed]” that the warden reassign Mr. Miller from a prison factory. *See* 842 F.3d at 1265. The warden made his own decision to cooperate with OIG’s initial and subsequent requests to reassign Mr. Miller. JAppx545; JAppx547–50.

The Merit Systems Protection Board (MSPB or board) properly decided that Mr. Miller would have been reassigned even if he had not made any disclosure. Accordingly, the Panel should rehear this appeal and affirm the board’s decision.

Alternatively, the Panel should remand this appeal for the board to clarify the nature and significance of OIG's communications. We acknowledge that the parties may have mistakenly led the Panel to misapprehend the nature of OIG's communications with the warden. On appeal, Mr. Miller repeatedly emphasized the administrative judge's use of the word "directed" to describe the nature of OIG's communications, arguing that the warden's testimony was hearsay. Pet. Br. at 15, 17 (quoting JAppx137, JAppx143), 19, 21. Our response focused on that hearsay argument, and unfortunately repeated Mr. Miller's characterization of OIG's action as "directing" the warden to reassign Mr. Miller. Resp. Br. at 4, 8, 11, 16, 22–23.

Given the Panel's concerns regarding an OIG "direction"—including questions about Mr. Miller's role in the investigation, as well as OIG's role and motivation—the Panel should, at a minimum, remand this appeal for the board to clarify the nature and significance of OIG's communications.

ARGUMENT

I. The Panel Overlooked Or Misapprehended The Law And Facts Regarding The Role Of OIG Vis-À-Vis Agency Managers, And The Specific Circumstances In This Case

A. As An Independent Unit Within DOJ, OIG Cannot "Direct" Any Personnel Action

The Panel's decision overlooks or misapprehends the role of Inspectors General in the Government. The Inspector General Act of 1978 (the Act) created

an OIG in each major Federal agency. 5 U.S.C. app. 3 § 1 *et seq.* As the dissent explains, “OIGs are, by congressional design, objective units independent from the respective agencies.” 842 F.3d at 1269 (citing 5 U.S.C. app. 3 § 2). Under the Act, each agency’s Inspector General reports to, and is under the general supervision of, the agency head; at DOJ, this is the Attorney General. 5 U.S.C. app. 3 § 3(a); *see also* 28 C.F.R. § 0.29a(a). However, each Inspector General also reports directly to Congress, 5 U.S.C. app. 3 § 4(a)(5), and the agency head may not “prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation,” *id.* § 3(a), that is, “in the judgment of the Inspector General, necessary or desirable[.]” *id.* § 6(a)(2).

Congress made OIG’s independence paramount, and for good reason. It is crucial to OIG’s statutory duty to investigate allegations of misconduct, fraud, waste, and abuse within Federal agencies. And, as the dissent correctly explains, “[a] requirement that OIG disclose anything to the agency it is investigating has the potential to damage an ongoing investigation.” 842 F.3d at 1269 n.4.

Although the Act grants OIG extensive powers to carry out its investigatory functions, *see* 5 U.S.C. app. 3 § 6, OIG cannot take action against Federal employees on behalf of the agency. *See NASA v. Fed. Labor Relations Auth.*, 527 U.S. 229, 253 (1999) (Thomas, J., dissenting) (“OIG has no authority over persons employed within the agency outside of its Office and . . . no authority under the

Inspector General Act to punish agency employees, to take corrective action with respect to agency programs, or to implement any reforms in agency programs that they might recommend on their own.”).

Rather, as an independent entity within DOJ, OIG “works cooperatively with other [DOJ] components to assure that allegations of employee misconduct are investigated by the appropriate entity.” 28 C.F.R. § 0.29e(a). If OIG finds potential criminal misconduct or civil liability, then OIG will refer the matter to the appropriate authority for further action. *Id.* § 0.29e(b). If OIG finds potential administrative misconduct, then OIG will report the matter to the agency component’s management for appropriate action. *Id.* § 0.29e(d). Thus, OIG reports its investigative findings to agency managers or other authorities; OIG does not—indeed cannot—direct personnel actions.

B. The Warden Cooperated With OIG’s Investigation By Reassigning Mr. Miller Under Circumstances Suggesting Mr. Miller’s Own Culpability In, And His Active Interference With, OIG’s Investigation

OIG and the warden acted consistently with their respective roles in this particular case. The record, as a whole, demonstrates that the warden, as Mr. Miller’s supervisor, decided to cooperate with OIG’s requests. This decision was supported by evidence that Mr. Miller was a target of, and was interfering with, a criminal investigation into the fraudulent manufacturing and testing of helmets at a factory supervised by Mr. Miller. JAppx543; JAppx579; JAppx581.

In early October 2009, Mr. Miller made the first of his two disclosures. JAppx132. Mr. Miller alleged financial mismanagement of the ballistic-helmet program and improper purchasing of materials for the helmets. JAppx234–35; JAppx463–67.

Ms. Ponzio complained to OIG around the same time. JAppx539; JAppx541; JAppx578–579; JAppx581. Unlike Mr. Miller, however, Ms. Ponzio alleged that helmets were being manufactured at the factory in a manner that jeopardized the lives of soldiers. JAppx539; JAppx541; JAppx578–579; JAppx581. Ms. Ponzio’s complaint triggered OIG’s investigation. JAppx539; JAppx541; JAppx578–79.

Shortly thereafter, OIG informed the warden of its investigation of the improper manufacturing and testing of helmets. JAppx539; JAppx541–42; JAppx582. The warden then informed his senior staff, including Mr. Miller, that there was an investigation into the factory. JAppx324–25. OIG also informed the warden that Mr. Miller was a subject of OIG’s investigation, and that the investigation could result in criminal charges, although the warden could not recall exactly when OIG passed along this information.³ JAppx542–43.

³ After oral argument in this case, OIG publicly released an investigative summary, marking the completion of its investigation. *See* DOJ OIG, *Investigative Summary: Findings of Fraud and Other Irregularities Related to the Manufacture and Sale of Combat Helmets by the Federal Prison Industries and ArmorSource, LLC, to the Department of Defense* (Aug. 2016),

On December 15, 2009, in connection with an onsite inspection, OIG asked the warden to remove Mr. Miller from the factory to allow investigators to interview staff outside Mr. Miller's presence. JAppx273; JAppx325; JAppx360; JAppx568; JAppx582. The warden cooperated with that request. JAppx542–543. Mr. Miller was the only one asked to leave the factory in connection with the inspection. JAppx582–83.

The following day, on December 16, 2009, Mr. Miller returned to the factory. JAppx273; JAppx359–60. It was only then—after learning of OIG's inspection—that Mr. Miller made his second disclosure, alleging that helmets were “sabotaged” during manufacturing. JAppx475–77; JAppx544–545. This disclosure mirrored Ms. Ponzio's earlier complaint. JAppx585; *see also* JAppx581 (describing Ms. Ponzio's allegations). Recognizing this similarity, the warden testified that he found Mr. Miller's belated, duplicative disclosure “odd.” JAppx585–86.

That same day (although unclear from the record whether before or after Mr. Miller's second disclosure), the warden, in conjunction with other agency managers, decided that Mr. Miller would need to be reassigned “until this kind of played itself out.” JAppx545.

<https://oig.justice.gov/reports/2016/i1608.pdf>. Due to privacy considerations, OIG's public investigative summary does not identify individuals by name nor describe their roles or culpability.

Thereafter, Mr. Miller performed a variety of tasks outside the factory. In his subsequent assignments involving contact with inmates, however, he interfered with OIG's investigation. OIG determined that, while on duty in the cafeteria, Mr. Miller asked inmates about the investigation. JAppx546-47; JAppx552-53. OIG also determined that, while monitoring inmate telephone calls, Mr. Miller selectively listened in on the calls of inmates who worked in the prison factory. JAppx549-50. Each time OIG informed the warden of Mr. Miller's attempt to intrude upon its investigation and asked that Mr. Miller be reassigned, the warden agreed. JAppx547; JAppx550.

The warden almost uniformly testified that OIG's communications were, in fact, requests. *See* JAppx542-45; JAppx547; JAppx549-50; JAppx565. In one instance, however, the warden adopted the administrative judge's use of the word "directed," but immediately followed that with the word "asked":

Q: Okay. And I'm a bit confused as to what happened to the factory. I think you testified that around the time that they [OIG] showed up in December, they directed – they directed that – they directed you to tell [Mr. Miller] that he needed to be removed from the factory?

A: Yes, sir. They asked for him to be removed because of their investigation, they felt that his presence might compromise the integrity of that investigation.

JAppx582.

These are the circumstances under which the warden reassigned Mr. Miller.

II. This Court Should Affirm Or, In The Alternative, Remand This Appeal To The Board

As demonstrated above, the board's decision is supported by substantial evidence, demonstrating by clear and convincing evidence, that Mr. Miller would have been reassigned even if he had not made any disclosure. As the board found, and the dissent would have held, the warden reassigned Mr. Miller "to other job duties at OIG's request so as not to interfere with an official investigation." 842 F.3d at 1265. Accordingly, the Panel should affirm the board's decision.

In the alternative, to the extent the Panel views the record as unclear regarding OIG's role in the warden's reassignment of Mr. Miller, the Panel should remand this appeal to the board to clarify the nature and significance of OIG's communications and their effect, if any, on the board's analysis of the *Carr* factors. Remand will permit the administrative judge to make the factual findings and credibility determinations, as well as develop any additional evidence that may be necessary.

More specifically, we note that, although the record as a whole demonstrates that OIG requested, rather than directed, Mr. Miller's reassignment to other duties, the initial decision is imprecise when describing OIG's communications. In the sentences quoted by Mr. Miller in his brief, the administrative judge states that OIG "directed" Mr. Miller's reassignment. JAppx137; JAppx143. Elsewhere in his 18-page initial decision, however, the administrative judge refers to "Warden

Upton’s decision to reassign” Mr. Miller, JAppx140, and describes OIG’s communications as requests. JAppx137 (stating that OIG agents “asked” that Mr. Miller be removed”); JAppx139 (describing the warden’s testimony regarding “OIG’s request to remove” Mr. Miller); JAppx142 (same); JAppx143 (quoting the warden’s testimony); JAppx145 (same).

The board’s final order does not address this lack of precision. Although the board consistently refers to “OIG’s requests,” implicitly reflecting an accurate understanding of those communications, the board did not explicitly acknowledge or resolve the ambiguity in the administrative judge’s decision. *See* JAppx123; JAppx124; JAppx126. Moreover, because the board denied Mr. Miller’s petition for review, the board adopted the administrative judge’s initial decision. JAppx122; 5 C.F.R. § 1201.113(b). Although the board’s description of those communications as “requests” more accurately reflects the warden’s testimony considering the record as a whole and OIG’s role vis-à-vis agency managers, the board ultimately left unresolved the ambiguity concerning the nature of OIG’s communications with the warden.

The Panel majority and the concurrence highlight the significance of an OIG “direction,” calling into question OIG’s role in Mr. Miller’s reassignment. Although we disagree that any inquiry into OIG’s motives would be proper, the Panel should nonetheless remand to allow the board to clarify the nature and

significance of OIG's communications, and allow the board to develop additional evidence and make any factual findings or credibility determinations that the board deems necessary, as well as assess what effect, if any, those findings have on analysis of the *Carr* factors and the ultimate determination regarding whether DOJ carried its burden of proof.

CONCLUSION

For the foregoing reasons, we respectfully request that the Panel reconsider its decision.

Respectfully submitted,

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