UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

TIMOTHY L. KORB, Appellant, v. MERIT SYSTEMS PROTECTION BOARD, Agency.	DOCKET NUMBER: MB-1221-14-0002-W-1 **INITIAL DECISION** DATE: MARCH 2, 2016

On September 25, 2015, I issued my Interim Findings in this matter, which may be found as Attachment A to this Initial Decision.[1] After considering all evidence in the record, I concluded that Appellant made a protected disclosure and engaged in a protected activity. While these were not the sole factors in the Agency's decision to take personnel actions against him, they were nevertheless contributing factors and the Agency did not prove by clear and convincing evidence that it would have taken the same personnel action in the absence of any protected activity or disclosure.

I determined that the record must be supplemented before I could issue an order directing an appropriate remedy, and therefore issued Interim Findings instead of an Initial Decision. After I issued the Interim Findings, the parties indicated that they wished to engage in settlement discussions on the issue of remedy. On November 9, 2015, the parties filed a Joint Stipulation outlining, among other things, the corrective actions the Agency had already taken. These corrective actions were:

1. Effective October 5, 2015, production of the MSPB Case Reports was restored to Appellant and his performance standards were adjusted to reflect what they had

[1] The name of a witness has been redacted from the attachment to prevent unnecessary disclosure of sensitive personal information.

been prior to removal of that duty; and

2. The Agency ensured that no official personnel records within its contemplation and control, including but not limited to Appellant's Official Personnel File and MSPB security records and files, contain the September 25, 2013 Notice of Proposed Suspension. The MSPB has assured the Appellant that it is not aware of anyone within MSPB providing the September 25, 2013 Notice of Proposed Suspension to any agency outside the MSPB.

The stipulations did not cover issues such as compensatory damages and attorney fees.

Appellant filed a Motion for Initial Decision and Initiation of Formal Process on November 23, 2015. The Agency opposed this motion on December 3, 2015. Appellant filed a Reply on December 8, 2015. On January 20, 2016, I held a prehearing conference to discuss the issues raised by the parties.

After the prehearing conference, I issued a Memorandum Memorializing Prehearing Conference, detailing the procedures for moving this case forward. I stated that the parties should intensify their settlement discussions and report their progress, if any, to my staff by February 3, 2016. If no settlement was reached, I required Appellant to submit his Request for Damages by February 5, 2015 and allowed the Agency fifteen (15) days to file a responsive pleading. I stated I would then issue an Initial Decision, and the issues of consequential damages and attorney's fees would be addressed in an addendum hearing.

Appellant's counsel informed my staff that their client would not engage in further settlement discussions prior to the issuance of an Initial Decision, and that the addendum proceedings should be initiated. I have received both Appellant's Request for Damages and the Agency's response, thus the Initial Decision is ripe for issuance.

Both parties should carefully note the administrative and judicial review process. The parties should refer to the standard review rights attached to this Initial Decision, bearing in mind that the Board's regulations contain special provisions for cases involving MSPB employees. In general, this means "the Board will not disturb initial decisions in [appeals by Board employees] unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law." 5 C.F.R. § 1201.13.

DECISION

Appellant alleged that the Agency took retaliatory personnel action after he made protected disclosures and engaged in a protected activity. After hearing the testimony and considering all the evidence in the record, I find that while most of the alleged disclosures were policy disputes, Appellant made a protected disclosure and engaged in a protected activity. It is uncontroverted that the Agency subsequently took two personnel actions involving Appellant. Based on the law and Board precedent, Appellant's protected actions are considered contributing factors to 1) the Agency's decision to propose a 21-day suspension against Appellant for altering portions of the boilerplate in Petition for Review templates and 2) the Agency's decision to remove the Case Report duties from Appellant. The Agency was required to prove by clear and convincing evidence that it would have taken the same personnel actions in the absence of any protected activity or disclosure, and I find it has not done so. Accordingly, Appellant is entitled to an appropriate remedy. My full findings are set out in my Interim Findings, dated September 25, 2015 and included here as Attachment A.

Relief and Damages

The parties have stipulated to certain appropriate relief, including the return of the Case Report duties and the removal of any references to the proposed suspension from all personnel records under MSPB's contemplation and control. Appellant has filed notice of the compensatory damages and consequential damages he is seeking, and the Agency has filed a response. These matters and proceedings concerning attorney fees will be considered in addendum proceedings pursuant to 5 C.F.R. §§ 1201.203 and 1201.204, provided Appellant initiates these proceedings using the procedures described in Subpart H of 5 C.F.R. Part 1201.

ORDER

The Agency is directed take the following corrective action:

1. To restore production of the MSPB Case Reports to Appellant and to adjust his performance standards to reflect what they had been prior to removal of that duty. It is understood that effective October 5, 2015, production of the MSPB Case Reports was restored to Appellant and his performance standards were adjusted to reflect what they had been prior to removal of that duty; and

2. To ensure that no official personnel records within its contemplation and control, including but not limited to Appellant's Official Personnel File and MSPB security records and files, contain the September 25, 2013 Notice of Proposed Suspension. The Agency has assured Appellant that no official personnel records within its contemplation and control, including but not limited to Appellant's Official Personnel File and MSPB security records and files, contain the September 25, 2013 Notice of Proposed Suspension and that it is not

aware of anyone within MSPB providing the September 25, 2013 Notice of Proposed Suspension to any agency outside the MSPB.

FOR THE BOARD,

GEORGE J. JORDAN
ADMINISTRATIVE LAW JUDGE

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **April 6, 2016** unless a petition for review is filed by that date. 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 you prove that you received this initial decision 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. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. 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.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

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

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge’s credibility determinations when they are based,

explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The

page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross 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. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

DAMAGES

The Board may, in a case in which it orders corrective action under 5 U.S.C. § 1221 as a result of a prohibited personnel practice described in 5 U.S.C. §§ 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D), award "reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)." 5 U.S.C. § 1221(g)(1)(A)(ii). *See, e.g.*, *Porter v. Department of the Treasury*, 80 M.S.P.R. 606 (1999); *Walton v. Department of Agriculture*, 78 M.S.P.R. 401 (1998).

Consequential damages may be awarded for pecuniary losses to reimburse the appellant for specific losses and expenses resulting from the unjustified retaliatory conduct. They may include the payment of back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable pecuniary losses. Consequential damage awards do not include nonpecuniary injuries such as emotional or mental distress. All compensable losses must be directly or proximately caused by the retaliatory agency action at issue.

Consequential damage awards for pecuniary losses are to reimburse a victim for actual monetary harm and are limited to the losses proven to have been caused by the retaliatory action. An appellant must submit proof of pecuniary damages which are quantifiable and usually can be objectively documented.

Compensatory damages may be awarded for all pecuniary losses and some nonpecuniary losses. All compensable losses must be directly or proximately caused by the retaliatory agency action at issue.

Nonpecuniary losses are not subject to precise quantification and include, but are not necessarily limited to, emotional pain, suffering, inconvenience, mental anguish, injury to character and reputation, and loss of enjoyment of life. There are no formulas for determining the amount of nonpecuniary losses, but such awards should reflect the extent to which the retaliatory act caused the harm in relation to the extent other factors might also have caused the harm. An award should also take into consideration the nature, severity, and duration of the harm.

If pecuniary or nonpecuniary damages are claimed, appellant must submit proof of them. Pecuniary damages are quantifiable and usually can be objectively documented. Nonpecuniary damages may be established by documentary evidence, but also by statements from appellant and others including family members, friends, health care providers, counselors, or clergy. Per 5 C.F.R. § 1201.204(e)(1), a motion for initiation of an addendum proceeding to decide a request for consequential, liquidated, or compensatory damages must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, the motion must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, the motion must be filed with the Clerk of the Board. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

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.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of this decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this decision only after it becomes final by filing in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date on which this decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of

competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

http://www.fedcirbar.org/olc/pub/LVFC/cpages/misc/govt_bono.jsp

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

ATTACHMENT A

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

TIMOTHY L. KORB, Appellant, v. MERIT SYSTEMS PROTECTION BOARD, Agency.	DOCKET NUMBER: MB-1221-14-0002-W-1 **INTERIM FINDINGS** DATE: SEPTEMBER 25, 2015

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I. PROCEDURAL HISTORY

This is an Individual Right of Action (IRA) appeal to the Merit Systems Protection Board (MSPB).[1] Timothy Korb (Appellant) is employed by the Agency as an attorney-advisor. He has alleged that the Agency retaliated against him for engaging in protected whistleblowing activity, namely making disclosures about the handling of petitions for review and engaging in union activities. *See* Initial Appeal File (IAF). Based on a thorough review of the law and parties' initial filings, I found jurisdiction existed; I also found the existence of genuine issues of material fact warranted a hearing on the merits of Appellant's claim. After the parties completed discovery, I held a hearing in Washington, DC on December 9-11, 2014. Both parties received the transcript of the hearing and subsequently submitted closing arguments.

After a thorough analysis of the entire record, I find Appellant has shown that he made one protected disclosure and engaged in one protected activity. The Agency took three personnel actions that impacted Appellant - (1) non-selection for a GS-15 position of Associate Director (Team Leader); (2) a threatened 21-day suspension; and (3) a significant change in duties, responsibilities, and working conditions. Appellant has not shown that his protected actions were contributing factors to the non-selection for the Team Leader position, and the Agency has not demonstrated by clear and convincing evidence that it would have taken the other personnel actions in any event.

[1] The term "Agency" is used when referring to MSPB's role as Appellants employer and as the Appellant Agency in these proceedings. The term "MSPB" is used when referring to the MSPB' s general capacity as a governmental adjudicatory organization. The term "Board" is used when referring to the three-member, presidentially-appointed panel that makes final decisions on cases brought before the MSPB.

II. BACKGROUND AND FACTS

A. Structure of the MSPB

The MSPB is comprised of several offices that work together to effectuate the mission of upholding the Merit Systems Principles, 5 U.S.C. § 2301. *See* 5 U.S.C. § 1204(h) and (j); 5 C.F.R. § 1200.10. Several of those offices have direct involvement in this case, including the Presidentially-appointed Board (the Board), the Office of Appeals Counsel (OAC), and the Office of the Clerk of the Board (Clerk's Office).

The top level of the MSPB is the Board itself, which consists of a chairman, vice-chairman, and member. Each Board member has a chief counsel and additional staff members who provide legal advice and assist in reviewing cases forwarded for the Board's approval. Decisions issued by the Board are final agency action, and some are designated as Precedential Decisions, creating binding precedent for future MSPB cases. Since 2010, the Board has issued Non-Precedential Final Orders (NPFOs) in lieu of the brief summary decisions it previously issued in non-precedential cases. NPFOs are stylistically more formal than summary decisions, and the Board's reasoning is more fully explained. Hearing Transcript (HT) Vol. I at 30-31.

MSPB Administrative Judges (AJs) are hearing officials who make the initial decisions in most MSPB cases. Appeals from AJs' decisions go to the OAC. HT Vol. I at 28-29. The OAC is mainly comprised of attorneys who review these appeals and prepare decisions on behalf of the Board. After a decision is drafted, it is forwarded to the Board for review and each of the three members either gives approval or orders revisions. OAC attorneys are routinely assigned to other offices on a temporary basis, known as a "detail." HT Vol. I at 162, 167. The OAC is managed by the Director and her staff of four Associate

Directors, who are usually referred to as Team Leaders. These Team Leaders are GS-15 attorneys who each supervise a group of attorney-advisors, assign cases, and review proposed decisions. HT Vol. I at 160; IAF Tab 9 at 45-48.

The Clerk's Office is responsible, among other duties, for reviewing every decision prior to issuance to ensure proper grammar, style, citations, and consistency with MSPB precedent and general legal precedent. HT Vol. III at 709. After the Board determines a decision is ready for release, the Clerk's office takes the final steps to issue it.

B. Appellant's Role at MSPB

Appellant is a GS-14 Attorney-Advisor. IAF Tab 1 at 1. He currently serves in the OAC and his Team Leader is Raymond Angelo. HT Vol. I at 28. In addition to his years of service as an OAC attorney, Appellant previously served as an attorney in the Clerk's Office and as Acting Chief Counsel for two different Board members; he has also been an Acting Team Leader in the OAC. HT Vol. I at 61, 209, 315. He is an officer with the MSPB's Professional Association (PA or union) and attends Labor Management Council meetings. HT Vol. I at 165. Appellant is noted for being passionate about his work and outspoken about his opinions on MSPB-related matters. HT Vol. II at 384, 439-40, 533-34.

In addition to his decision-writing duties at OAC and the duties he performed during his various details, for many years Appellant also had the responsibility for preparing a periodic summary report of recently-issued MSPB cases. Creating the case summary report took approximately twenty percent of Appellant's work week. Because of this ancillary duty, Appellant's case load of OAC draft decisions was reduced.

C. Timeline of Events

In 2009, the Board decided it would soon begin issuing non-precedential decisions

as NPFOs rather than summary decisions, and started doing so in 2010. Prior to the adoption of NPFOs, experienced OAC attorneys had the authority to forward decisions in cases of average and below-average complexity directly to Board member's offices, without a full review by a Team Leader. HT Vol. I. at 69-70. The drafting attorney's Team Leader does simultaneously receive a copy of the decision, allowing a brief opportunity for review prior to any Board member actually reading it. The Team Leader can pull it back if there are deficiencies. *Id.* A memorandum highlighting particular areas of interest for the Board members is attached to each decision. HT Vol. I at 36. Under the direct-forward scheme, the drafting attorney is ultimately responsible for the work product, even if his or her Team Leader has decided to review the decision. HT Vol. I at 73. However, with the introduction of NPFOs, direct forwarding authority was suspended and Team Leaders were tasked with reviewing every NPFO before it was sent to the Board for final review.

OAC attorneys prepare NPFOs using an electronic program called HotDocs. This program contains auto-populating boilerplate language that has been collectively approved by the Board members. HT Vol. I at 37, 52, 154, 310, 314; Vol. II at 409, 603, 621, 629; Vol. III at 713, 717. The boilerplate consists of a heading and introductory and closing paragraphs. The rest of the decision is drafted by the OAC attorney. The drafting attorney must modify certain sections of the boilerplate to reflect the type of case and the ultimate result. The second sentence of the introductory paragraph contains the Board's statement of the criteria used to determine whether a petition for review should be granted under 5 C.F.R. § 1201.115. This regulation was amended in 2012 and the boilerplate concerning the standard of review was amended to reflect the changes.

After multiple requests from the OAC staff, a pilot program to reinstate direct

forwarding authority began in May 2012, and a Memorandum of Agreement regarding the restoration was signed by management and the PA in July 2013. IAF Tab 42 at 5-11. By this time, the Board felt the attorneys had adjusted to drafting NPFOs and Team Leader review was no longer necessary for every case. Team Leaders continue to give a cursory review to direct-forwarded cases and a thorough review to cases where the drafting attorney does not have direct forwarding authority or the case is deemed more complex than usual. HT Vol. I at 69-72.

During a meeting of the MSPB's Labor Management Council on March 7, 2013, Appellant presented a Case Production Graph. IAF Tab 1 at 18, Tab 7 at 37. The graph shows an increase in both the backlog of pending petitions for review (PFRs) and in the average case processing time for PFRs during the period from late 2009 to early 2013. The data was drawn from agency sources, and similar data was reported to Congress in the MSPB budget submissions.

The minutes of the March 7 meeting stated that the PA distributed two documents, the first of which Appellant identified as a list of changes that OAC unit members had compiled in response to inquiry by facilitators the previous summer. The second was a graph entitled "PFR Receipts and Pending Cases at HQ." The PA emphasized that this is a problem that needs urgent attention, and suggested that the OAC subcommittee of the LMC be reconvened for this purpose. Management agreed. The Chairman indicated she would share the list of proposals with the other Board members. IAF Tab 8 at 113-21.

MSPB posted a vacancy application for an OAC team leader on May 1, 2013. IAF Tab 9 at 45-48. Appellant applied for that position. The selection panel was comprised of the three current Team Leaders and the OAC Director, who was the selecting official. HT

Vol. I at 273.

On May 28, 2013, Appellant and other PA representatives met with the OAC Director and OAC Team Leaders to discuss ways in which the PFR backlog and associated case processing time could be reduced. They presented a document entitled "Basic Principles for OAC Attorneys regarding PFR Adjudication." IAF Tab 1 at 19-20, Tab 7 at 38-39. The document argued that, rather than conducting a full review of the record, OAC attorneys should prioritize "arguments made on review that make a colorable (plausible) case for reversing, vacating, or modifying the initial decision" and spend very little time on "arguments that do not make a colorable claim of reversible error." Appellant states that the OAC Director and the Chairman refused to adopt or endorse this core recommendation. IAF Tab 1 at 8.

At the same meeting, the PA asked that "movement between writing attorneys in OAC and reviewers be tracked in the MSPB's case management system, so that there would be a way to know who was responsible for delays in processing draft decisions in OAC. We suggested that OAC supervisors were responsible for significant unjustified delays." IAF Tab 1 at 8. The OAC did not implement this suggested tracking system.

The selection committee conducted interviews for the vacant OAC team leader position on June 26, 2013. Appellant was among those interviewed. However, the OAC Director as the selecting official, in agreement with the other members of the committee, offered the position to an attorney from an outside agency with personnel law experience. The selection was made on July 10, 2013 and formally announced on July 18, 2013.

On July 18, 2013, Appellant, along with other PA officials, met with MSPB management for another scheduled Labor Management Council meeting. At this meeting,

Appellant distributed a document entitled "Significant Delays by OAC Managers" which described 14 cases that Appellant believed were delayed by the actions or inactions of specific Team Leaders. IAF Tab 1 at 23-26; Tab 33 at 9-12.

The same day, Appellant in his capacity as First Vice-President of the PA filed a Step 1 grievance on behalf on an OAC attorney who had been placed on a performance improvement plan (PIP) as a result of her poor case production. IAF Tab 1 at 27-29; Tab 33 at 13-15. On July 22, 2013, the OAC management official designated to respond under the collective bargaining agreement issued a decision denying the grievance on procedural grounds, as untimely filed, without any consideration of its merits. HT Vol. I at 128-30, 144; IAF Tab 8 at 99-100.

On September 12, 2013, Molly Leckey, who is Legal Counsel to the Clerk of the Board, was reviewing the NPFO in a case called *Reese v. Department of the Treasury*. IAF Tab 8 at 86-87; HT Vol. II at 707, 712, 719. Ms. Leckey noticed that the standard, Board-approved paraphrase of the regulatory criteria for granting a PFR had been changed. She alerted the Chief Counsels to the Board Members—Lynore Carnes, Bernie Doyle, and Jim Read—by email and sought their instruction on whether to leave the changes in place or revert to the standard language. HT Vol. I at 85, Vol. II at 718-20; IAF Tab 8 at 85-87.

Mr. Read subsequently called a meeting with Mr. Angelo and Ms. Swafford, Appellant's direct and second-level supervisors, regarding the changed language. Consistent with Mr. Read's suggestion, and upon Ms. Swafford's instruction, Mr. Angelo investigated the matter. HT Vol. II at 306-07. When Mr. Angelo confronted Appellant with his findings on September 17, 2013, Appellant admitted he intentionally changed the standard of review language in three cases he had directly forwarded to the Board because

he did not like the boilerplate language and believed his was better. HT Vol. I at 88, 95; IAF Tab 8 at 7. None of the three cover memoranda reflected that Appellant had made these changes, nor did he specifically mention them to anyone.

Appellant sent Mr. Angelo an email the following day, reiterating that he made the changes:

> I felt that this language would be an improvement over the HotDocs language, in that it was more concise and better conveyed the philosophy behind the specific criteria listed in section 1201.115. I did not create this language; as indicated in the citation, it is taken directly from the Board's notice of final rulemaking on October 12, 2012. (Clicking the link that I included with the citation takes the reader directly to the pertinent spot in the Federal Register notice.)

IAF Tab 8 at 79. He also stated that he viewed the threat of discipline for what he considered to be totally appropriate actions as retaliation for protected activity, including "disclosing during the July 18 Labor-Management Partnership Meeting what I reasonably believe to be instances of gross mismanagement and abuse of authority in OAC." IAF Tab 8 at 81.

On September 25, 2013, Mr. Angelo proposed by email that Appellant be issued a 21-day suspension for "unacceptable conduct." IAF Tab 8 at 4-81, Tab 33 at 22-38; HT Vol. I at 33-34, 89. Mr. Angelo prepared the proposed suspension in consultation with OGC. HT Vol. I at 90. The proposal focused on Appellant's replacement of standard, Board-approved boilerplate language setting forth the regulatory criteria for review in *Reese* and two other NPFO decisions Appellant had drafted and sent to the Board for review and disposition. IAF Tab 8 at 4-7, Tab 33 at 22-25; HT Vol. I at 34, 92-93. The proposal states:

> Your conduct of changing the approved standard statement of the criteria for review inserted into NPFOs by DMS during the document assembly process is very serious. It strikes at

> the very core of the primary duty of your position and undermines my confidence in your ability and/or willingness to prepare decisions for the Board consistent with the Board's desires. The principal duty of attorneys in the Office of Appeals Counsel is to prepare proposed decisions for the three Board members. While attorneys have substantial discretion in the drafting of decisions, it is the Board members who decide on the final language in each case. You acknowledge that the changes you made were not accidents or inadvertent errors, and that you deliberately altered the Board's language because you thought your language was better.
>
> * * *
>
> In deciding what penalty to impose for your misconduct, I have consulted the Board's Table of Penalties. While unacceptable conduct of this kind is not specifically listed as an offense on the Board's Table of Penalties, I note that the penalty for a deliberate refusal to comply with rules is a letter of reprimand to removal.

Mr. Angelo noted that Appellant had raised the issue of retaliation and stated that it played no part in his decision. IAF Tab 8 at 9, Tab 33 at 26. He apparently refers to the July 18, 2013 disclosure by stating – "I do not attend LMC meetings, and I have no idea to what topics you alluded in your email." *Id.*

Appellant submitted a response setting out the reasons he should not be suspended. IAF Tab 7 at 81-94. He also notified other OAC attorneys of the proposed suspension and asked them to demonstrate to the deciding official that OAC had no policy regarding the alteration of HotDocs language; in fact, certain sections of the template routinely had to be amended. A number of attorneys made submissions to the OAC Director on Appellant's behalf. IAF Tab 7 at 95-111.

On November 8, 2013, Ms. Swafford dismissed the proposed suspension in its entirety. IAF Tab 7 at 78-80. After being "presented with statements from numerous Office

of Appeals Counsel staff attorneys that explained in a general way that they had been confused about what type of language they could or could not change," Ms. Swafford decided there was a notice issue, therefore Appellant should not be suspended and the best course of action was to dismiss the matter. HT Vol. I at 309; IAF Tab 7 at 78. Because of this, she did not reach the issue of whether Appellant had committed misconduct, as the term of art is used. HT Vol. I at 224; IAF Tab 7 at 78.

On November 12, 2013, after the proposed suspension had been dismissed, Mr. Angelo gave Appellant an "outstanding" performance rating for the period from February 25, 2013 through September 30, 2013. HT Vol. I at 133-34; IAF Tab 33 at 17-20. An "outstanding" is the highest available rating. HT Vol. I at 135; IAF Tab 33 at 17. Ms. Swafford, as Appellant's second-level supervisor, recommended a $1,800 performance award. IAF Tab 33 at 17. Appellant's performance rating contained no mention of the proposed suspension or of the conduct upon which it was based, as performance ratings generally do not include conduct-related issues. IAF Tab 7 at 60-63.

On February 20, 2014, Appellant's Team Leader notified him that as of March 1, 2014, responsibility for the preparation of the MSPB Case Reports was being transferred to the Office of General Counsel (OGC). IAF Tab 10 at 79. MSPB Executive Director James Eisenmann had determined that the Case Reports, weekly summaries of recent Board decisions, should be created by the OGC rather than the OAC. The task of creating the Case Report has historically been performed by a single individual, and is not part of the OAC Attorney Position Description. However, Appellant had sole responsibility for preparing the Case Reports for 7 years, a duty that occupied 20% or more of his work time while working in the Clerk's Office and OAC. From March 1, 2014 to the present, OGC staff has prepared

the Case Report. HT Vol. I at 218.

Appellant filed a complaint with the Office of Special Counsel (OSC) on November 26, 2013, alleging the Agency had retaliated against him for whistleblowing. IAF Tab 4 at 5-6. The OSC made a preliminary determination not to take action on the complaint on February 11, 2014 and finalized this decision on March 4, 2014. IAF Tab 1 at 17. Subsequently, Appellant filed this action.

III. PRINCIPLES OF LAW

The Whistleblower Protection Act of 1989 (WPA), Pub. L. 101-12, was enacted to protect federal employees who report agency misconduct. In response to court decisions that had gradually narrowed the scope of the WPA, Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. 112-199, to restore and expand the protections. Since each of the alleged protected actions here took place after 2012, this case falls entirely under the WPEA. I note that much of the applicable case law derives from and refers to the WPA; except in cases where it has been superceded by the WPEA, it is generally still good law.

A federal employee who alleges his or her employing agency has taken prohibited personnel actions as a result of the employee's whistleblowing or other protected activity must first exhaust his or her administrative remedies before the Office of Special Counsel (OSC). If the OSC declines to take action on the complaint, the employee may file an IRA appeal to the MSPB. *See* 5 U.S.C. § 2302(b)(8)(A); 5 C.F.R. § 1201.3(b)(2), 5 C.F.R. Part 1209. To establish Board jurisdiction over an IRA appeal, an appellant must exhaust administrative remedies before the Office of Special Counsel (OSC) and make non-frivolous allegations that: (1) the appellant engaged in whistleblowing activity by making a

protected disclosure, or engaged in other protected activity as specified below; and (2) the disclosure or activity was a contributing factor in the agency's decision to take or fail to take a personnel action. *See Mudd v. Dep't of Veteran's Affairs*, 120 M.S.P.R. 365, 370 (2005) (citing *Smart v. Dep't of the Army*, 98 M.S.P.R. 566, *aff'd* 157 Fed. Appx. 260 (Fed. Cir. 2005), *cert. denied* 547 U.S. 1059 (2006)).

A. Definitions

Federal agencies are prohibited from taking any personnel action against an employee as a result of the employee's disclosure of information that the employee reasonably believes evidences any 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)(A).

A "disclosure" is statutorily defined a "formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee . . . reasonably believes that the disclosure evidences (i) any violation of law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety." 5 U.S.C. § 2302(a)(2)(D).

"Gross mismanagement" is a decision that creates a "substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Coons v. Dep't of the Navy*, 63 M.S.P.R. 485, 488 (1994); *see also Mc Corcle v. Dep't of Agric.*, 98 M.S.P.R. 363, 371 (2005). The definition of gross mismanagement excludes management decisions which are merely debatable. *See Ormond v. Dep't of Justice*, 118 M.S.P.R. 337, 342 (2012).

An employee discloses an "abuse of authority" when he alleges that a federal

official has arbitrarily or capriciously exercised power which has adversely affected the rights of any person or has resulted in personal gain or advantage to himself or to preferred other persons. *See Linder v. Dep't of Justice*, 122 M.S.P.R. 14, 22 (2014); *Chavez v. Dep't of Veterans Affairs*, 120 M.S.P.R. 285, 296 (2013); *McCollum v. Dep't of Veterans Affairs*, 75 M.S.P.R. 449, 455–56 (1997).

To determine whether a person had a "reasonable belief" that a disclosure was protected, the ALJ must decide "whether a disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the employee could reasonably conclude that the actions evidenced a violation of law, rule, or regulation." *Mudd*, 120 M.S.P.R. at 369; citing *Mason v. Dep't of Homeland Sec.*, 116 M.S.P.R. 135 (2011). "Any doubt or ambiguity as to whether an appellant raised a nonfrivolous allegation of a reasonable belief should be resolved in favor of a finding that jurisdiction exists." *Mudd* at 370 (citing *Smart*, 98 M.S.P.R. at 572).

If an appellant proves by preponderance of the evidence that he made a protected disclosure protected or engaged in protected activity, and that such whistle-blowing activity was a contributing factor in a personnel action, an agency may establish a rebuttal by clear and convincing evidence showing it would have taken the same personnel action in the absence of the disclosure(s). 5 U.S.C. § 1221(e)(2); *see also Chavez*, 120 M.S.P.R. at 294. This sets a relatively low bar for the appellant, since a preponderance of the evidence means the fact-finder has, after considering all the evidence in the record, determined it is more likely than not an allegation is true. *Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Greenwich Collieries v. Dir., Office of Workers' Comp. Programs*, 990 F.2d 730, 736 (3d Cir. 1993). The standard the agency must meet if the appellant successfully shifts the burden is much

higher: clear and convincing means the fact-finder must, after considering the evidence, have "a firm belief" as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). The agency's burden is higher because the employee has already shown the agency's action was "tainted," and also because the agency is in control of most of the relevant documents, records, and witnesses. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (quoting 135 Cong. Rec. H747–48 (Mar. 21, 1989)).

In determining whether the agency would have taken the same action in the absence of the protected disclosures, the Board may consider several factors, including: (1) the strength of the agency's evidence in support of its personnel action when whistleblowing is excluded; (2) the existence and strength of any motive to retaliate on the part of the agency officials involved; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

B. Summary of Appellant's Allegations

Appellant claims he made protected disclosures and engaged in other protected activities from March through July 2013. He asserts three protected activities related to the same matter, the adjudication of petitions for review. These activities included (1) disclosure of gross mismanagement; (2) disclosure of an abuse of authority; (3) oral and written communications that resulted in his being perceived as a whistleblower by senior MSPB officials and OAC managers. He avers that these disclosures showed how the actions and inactions of senior MSPB officials and OAC managers seriously undermined the MSPB's ability to meet its statutory adjudication function and resulted in a threefold increase in both the backlog of pending petitions and case processing times. He also claims to have engaged in another protected activity, filing a grievance on behalf of a co-worker

that alleged wrongful action by his first and second-level supervisors.

Appellant alleges that three covered personnel actions were taken in retaliation for these protected activities: (1) non-selection for the GS-15 position of Associate Director (Team Leader); (2) a threatened 21-day suspension without pay; and (3) a significant change in duties, responsibilities, and working conditions when the preparation of the MSPB Case Reports was taken away from him.

C. Summary of Agency's Arguments

The Agency argues Appellant's "opinions or views on managerial decisions - or policy decisions entrusted to the Board's politically appointed officials - are not protected disclosures under the Whistleblower Protection Enhancement Act. A policy dispute or a difference of opinion as to the proper procedure for processing draft NPFO decisions does not constitute a protected disclosure." The Agency also calls meritless Appellant's assertion that it perceived him as a whistleblower because he voiced his opinions on the data regarding processing delays. The Agency argues that Appellant's filing of a Step 1 grievance on behalf of a bargaining unit member did not constitute protected activity under 5 U.S.C. § 2302(b)(9) because his "assistance" was untimely and the grievance was dismissed. Finally, the Agency argues it would have proposed Appellant's suspension, selected Ms. Rowe as Team Leader instead of Appellant, and transferred the Case Summary responsibility in the absence of any protected disclosures or activity.

IV. ANALYSIS

The first issue I must address is whether Appellant has proved by a preponderance of the evidence that he made a disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). *Webb v.*

Dep't of Interior, 122 M.S.P.R. 248 (2015). "The proper test for determining whether an employee had a reasonable belief that she made protected disclosures is this: Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act?" *Ray v. Dep't of the Army*, 97 M.S.P.R. 101, 116 (2004); *see also Schneider v. Dep't of Homeland Sec.*, 98 M.S.P.R. 377 (2005).

If I find that Appellant made a protected disclosure or engaged in a protected activity, I must next consider whether Appellant has shown his actions were a contributing factor in a personnel action against him. The burden on Appellant is relatively low; "[r]ather than being required to prove that the whistleblowing disclosure was a 'significant' or 'motivating' factor, the whistleblower under the WPA . . . must evidence only that his protected disclosure played a role in, or was "a contributing factor" to, the personnel action taken . . ." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).[2] If any weight is given to a protected disclosure, whether alone or in combination with other factors, the "contributing factor" test can be satisfied, and the employee "need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Id.* at 1141.

An appellant may use circumstantial evidence, such as the acting officials' knowledge of the protected disclosure or activity and the timing of the personnel action, to meet the "contributing factor" standard. *Shibuya v. Dep't of Agric.*, 119 M.S.P.R. 537, 549

[2] Although *Marano* was decided under the WPA, the employee's burden of proof has not changed under the WPEA.

(2013). This is known as the "knowledge-timing" test. There are many possible ways aside from the knowledge-timing test to satisfy the contributing factor standard. *See Powers v. Dep't of Navy*, 69 M.S.P.R. 150 (1995). However, the knowledge-timing test is the most common. *Agoranos v. Dep't of Justice*, 119 M.S.P.R. 498 (2013). If Appellant shows the protected activity was a contributing factor to a personnel action, the Agency must then rebut Appellant's case by showing it would have taken the same actions in the absence of any protected activity.

Appellant claims that his protected activities resulted in three different personnel actions: (1) a non-selection for a position, (2) a proposed suspension, and (3) a significant change in duties, responsibilities, and working conditions. I must determine whether these alleged actions constitute "personnel actions" within the meaning of the WPEA. *Rumsey v. Dep't of Justice*, 120 M.S.P.R. 259 (2013), *as corrected* (Nov. 4, 2013).

1. Three Alleged Disclosures Were Not Protected

The first alleged disclosure was a document Appellant introduced at the March 7, 2013 Labor-Management Council Meeting. This document contains a graph depicting how the backlog of cases pending review by the board had grown from Fiscal Year 2004 through the first four months of Fiscal Year 2013. IAF Tab 1 at 18.

A backlog in pending cases standing alone does not evidence a violation of law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. The existence of this backlog was well-known, was a matter on the agenda of the March 7, 2013 meeting, and had been the subject of previous meetings. Moreover, the information was generated using MSPB data and was similar to what MSPB annually provided to Congress. HT Vol. I at

195, 250. Appellant's document may have highlighted the issue and caused some discussion among management and staff, but he did not prove that he disclosed any information that management, other employees, various government officials, and even interested members of the public were previously unaware of. I find that the March 7, 2013 document does not constitute a protected disclosure.

Appellant's second alleged protected disclosure took place on May 28, when he presented a document entitled "Basic Principles for OAC Attorneys regarding PFR Adjudication." IAF Tab 7 at 38. This document proposed that, rather than conduct a full review of the record in all cases, "an OAC attorney should focus on, and spend the vast majority of his or her time on, arguments made on review that make a colorable (plausible) case for reversing, vacating, or modifying the initial decision. Very little time should be spent on arguments that do not make a colorable claim of reversible error." Management did not adopt this proposal.

I find that this paper does not constitute a protected disclosure under section 2302(b)(8), but rather embodies Appellant's policy disagreement with the methods by which OAC attorneys must conduct reviews. "The Board has held that the statutory protection for whistleblowers is not a weapon in arguments over policy or a shield for insubordinate conduct. Even under the expanded protections afforded to whistleblowers under the [WPEA], general philosophical or policy disagreements with agency decisions or actions are not protected unless they separately constitute a protected disclosure of one of the categories of wrongdoing listed in section 2302(b)(8)(A)." *Webb v. Dep't of Interior*, 122 M.S.P.R. 248 (2015) (internal citations omitted).

At the July 8, meeting Appellant presented a third document, entitled "Request for

Reconsideration: Case Tracking Within OAC." IAF Tab 1 at 21, Tab 7 at 40. In it, he urged OAC management to reconsider its decision not to implement the union's proposal to use Law Manager to track all movement of cases between staff attorneys and OAC managers. I find that this document also constitutes a policy disagreement. While it notes the often-lengthy delays in Team Leaders' offices, it does not evidence 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 and safety. It argues for improved case tracking and attempts to refute management's decision not to implement the union's proposal, but it does not separately constitute a protected disclosure of one of the categories of wrongdoing listed in section 2302(b)(8)(A).

Since Appellant's first, second, and third alleged protected disclosures are not protected under the WPEA, they cannot form the basis for a personnel action against Appellant. I therefore do not need to continue the analysis as to these three issues.

D. One Disclosure and One Activity Were Protected

The fourth alleged disclosure occurred on July 18, when Appellant submitted a document entitled "Significant Delays by OAC Managers." IAF Tab 1 at 23, Tab 7 at 42. In this document, Appellant asserted that "OAC managers have in many instances delayed processing of appeals for substantial periods without a good reason. These delays can be contrasted with our historical experience, in which OAC managers either suggested or required changes of a particular sort or moved a case forward within a short period of time. The significant delays in recent years can be chalked up to excessive micro-editing and indecision by OAC managers." *Id.* He also summarized the delayed cases.

Unlike the previous documents, this document is more than a policy disagreement: it

evidences delays on the part of specific Team Leaders in OAC. The information was also not well-known outside OAC; Appellant's colleague testified at the hearing that when Appellant was compiling the list, he spoke to individual OAC attorneys to learn whether they had any delayed cases and the specifics of those cases, such as the docket number, name of the case, main issue involved, and where the case was at procedurally. HT Vol. II at 587. This information is not readily available, in fact, multiple witnesses testified that the computer systems at the MSPB do not track the movement of cases between attorneys and their supervisors within OAC, but only track when the case is assigned to OAC by the Clerk's Office and when it is forwarded out of OAC to the Board. HT Vol. I at 172-73, 178-79; Vol. II at 445, 505, 584-85. It is clear that the only way a person could create a document such as the "Significant Delays by OAC Managers" report is by doing independent research and compiling that data by hand.

"If an employee has a reasonable belief that the disclosed information evidences the kinds of misconduct listed in section 2302(b)(8), rather than a policy disagreement, the disclosure is protected." S.Rep. No. 112–115 at 10–11, 2012 U.S.C.C.A.N. 589, 598–99 (emphasis added). Appellant claims the document shows both abuse of authority and gross mismanagement. However, the abuse of authority claim fails. The document revealed that managers held cases for long periods of time without either explaining the delays to the writing attorneys or moving the cases along to the Board members. While this may have affected the rights of appellants to speedy dispositions of their petitions for review, delay alone does not equal an arbitrary or capricious exercise of power by a federal official. Moreover, there is no evidence that these actions resulted in a personal gain or advantage to any Team Leader or other person. Accordingly, I find that based on this record, a

reasonable person in the employee's position would not believe these inactions evidenced an abuse of authority.

The gross mismanagement claim, on the other hand, has merit. I have considered whether the alleged management action or inaction created a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission and determined that it did. *See Francis v. Dep't of Air Force*, 120 M.S.P.R. 138 (2013). A reasonable person in Appellant's position could believe the inactions on the part of Team Leaders—their failure to move cases—could negatively impact the MSPB's ability to accomplish its mission of adjudicating cases in a timely and efficient manner.

The disclosure also reflects poorly on the OAC Director's ability to supervise the people she had chosen as first-line supervisors within her department. Ms. Swafford's testimony at the hearing is inconclusive about her level of knowledge about the number of delayed cases within OAC and the reasons those cases had not yet been sent to the Board. At one point, she said she was aware that some of the 14 cases had been sitting for long periods and had already spoken to Team Leaders about them, but was unaware of others. HT Vol. I at 183. When questioned further about whether she knew the reasons for the delays, though, she said she "presumed that if the case had been with someone for a period of time, that there was a reason for it." HT Vol. I at 189-90. She also testified that she would occasionally run reports and ask Team Leaders about cases that looked particularly old. HT Vol. I at 198-99. Ms. Swafford did not explain why, if she had been running these reports, she was nevertheless unaware of some cases listed on the "Significant Delays" document. She also did not say what steps she took—if any—to facilitate movement of cases delayed by the Team Leaders rather than by circumstances beyond MSPB's control.

Finally, I note that after receiving the "Significant Delays by OAC Managers" document from Appellant, Ms. Swafford did not investigate whether there were more delayed cases in addition to the 14 described there. HT Vol. I at 197.

It is clear the MSPB perceived a need to eliminate the case backlog and, over time, took steps to significantly reduce it. However, the evidence shows OAC management's concern over the overall volume of the backlog did not necessarily extend to the relatively few cases that had been on its docket the longest. While the "Significant Delays" document is anecdotal in nature, it implies certain delays were both systemic and directly attributable to individuals within the OAC's management structure. The evidence in the record does not contradict this. Accordingly, I find that Appellant could reasonably believe gross mismanagement was occurring within OAC, and this disclosure is protected.

Finally, Appellant asserts that he engaged in a protected activity when he filed a grievance on behalf of a co-worker. Under the WPEA, "the Board now has jurisdiction over claims of retaliation for lawfully assisting a coworker in a grievance proceeding." Prior cases decided under the WPA that held the Board lacks jurisdiction over such claims are superseded by the statutory change. *See Carney v. Dep't of Veterans Affairs*, 121 M.S.P.R. 446 (2014). The question here is whether filing an untimely grievance constitutes "lawfully assisting an employee" or whether a greater degree of activity is required.

Although *Carney* is on point regarding this issue, neither Appellant nor the Agency has discussed it in their briefs. I note that in *Carney*, "the appellant alleged that he represented an agency employee during an informal grievance meeting." The Board found that "[s]uch an activity clearly falls within the protective umbrella of the WPEA." *Id.* at 450-51. Here, Appellant has established that he filed a grievance on behalf of a co-worker

who was placed on a Performance Improvement Plan. The Agency asserts this was a simple, ministerial action that does not qualify under the WPEA, and points out that the grievance was rejected as untimely and no appeal or further action was taken.

The statute states that a protected activity includes testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation. 5 U.S.C. § 2302. It does not require that the assistance lead to a favorable outcome for the grievant; assistance given in a case decided in favor of the employing agency is still covered under this statute. The record here shows Respondent participated meaningfully in the grievance process by working in his capacity as a union representative to assist his co-worker in preparing and filing the grievance. He did more than merely sign a form, and his actions were not purely ministerial.

The WPEA has broadened the scope of protected activity. Assisting in the preparation of an appeal, complaint, or grievance clearly falls within that scope, and the fact that Appellant's co-worker did not ultimately prevail does not render his assistance moot. I find the actions he took with respect to the Step 1 Grievance sufficient to be considered a protected activity.

E. Were the Protected Disclosure and/or Protected Activity Contributing Factors in a Personnel Action?

2. Non-Selection for the Team Leader Position

Non-selection for a position is clearly a personnel action. *See Embree v. Dep't of Treasury*, 70 M.S.P.R. 79, 86 (1996); *Wuchinich v. Dep't of Labor*, 53 M.S.P.R. 220, 223-24(1992). The record shows that Appellant applied for the position of Team Leader, was interviewed, and was not selected. Therefore, this qualifies as a personnel action.

Appellant has not shown that his protected actions were contributing factors to this personnel action, though. The timeline of events clearly shows that MSPB officials had completed the selection process and decided to hire Geraldine Rowe on July 10, 2013. Management made an announcement to the OAC staff about the decision to hire Ms. Rowe on July 18, 2013, which was the same day Appellant both made a protected disclosure and engaged in protected activity. Under the knowledge-timing test, I find the hiring decision could not have been premised on Respondent's protected actions because the official selection was made more than a week prior to him taking those actions.[3] I find no other theory that could support Appellant's allegations that the non-selection was based on his whistleblowing activity. Thus, while the Agency presented evidence that it would have selected Ms. Rowe for the Team Leader position in any event because she was better qualified for the job, this evidence is redundant in light of the timing issue.

3. Proposed 21-Day Suspension

The next alleged personnel action is the suspension proposed for Appellant's alterations to the standard of review language in the NPFO template. Under 5 U.S.C. § 7512, any action under 5 U.S.C. Chapter 75 or other disciplinary or corrective action is a personnel action. This includes suspensions of more than 14 days. It is undisputed the Appellant's Team Leader proposed a 21-day suspension for neglect of duty. It is also undisputed that the Team Leader's supervisor, the OAC Director, cancelled the suspension before it went into effect.

Under the knowledge-timing test, I find Appellant has shown that his protected

[3] Appellant's colleague did testify that Appellant was gathering information to use in his "Significant Delays by OAC Managers" document around May 2013, which was prior to the selection of Geraldine Rowe as a Team Leader. HT Vol. II at 587. However, there is no evidence that OAC management was actually aware of this information until he presented the document on July 18.

actions were a contributing factor to the proposed suspension. The Agency argued that Mr. Angelo, the Team Leader who proposed the suspension, had no knowledge of the protected disclosure or protected activity, and that Appellant himself brought the issue to Mr. Angelo's attention in an email reply. In the proposal, Mr. Angelo wrote, "I do not attend LMC meetings, and I have no idea to what topics you alluded in your email." Mr. Angelo also testified he had not seen the July 18, 2013 document entitled "Significant Delays by OAC Managers prior to proposing the suspension. HT Vol. I at 111-12. Ms. Swafford, who did receive the document, testified that she looked into the delays but that she could not recall whether she had talked to Mr. Angelo or any particular Team Leader about them. HT Vol. I at 189-90.

While I accept Mr. Angelo's testimony that he had not actually seen the "Significant Delays" document before he proposed the suspension, I find that it more likely than not that he was aware complaints had arisen about delays on the part of Team Leaders and that Appellant was the source. Ms. Swafford did not explain how she could have looked into the delays without making the Team Leaders at least generally aware of the issue. Two months passed between the disclosure and the date of the proposed suspension, and it strains credibility that Mr. Angelo remained oblivious to the delay issue for that long; the testimony of multiple OAC employees in this matter shows it became common knowledge around the office. Moreover, Appellant directly stated in his September 18, 2013 email that he considered the threat of discipline to be retaliation for "disclosing during the July 18 Labor-Management Partnership Meeting what I reasonably believe to be instances of gross mismanagement and abuse of authority in OAC." Mr. Angelo proposed the suspension one week later, on September 25. Even assuming he had no knowledge of Appellant's

disclosure until he received the email, he had to be at least generally aware when he finalized and sent his proposal.

The record also shows that Mr. Angelo was aware Appellant had assisted a colleague with filing a grievance. Mr. Angelo was the management official who devised a performance improvement plan for the grievant and also decided to deny the grievance as untimely. The decision was forwarded to the grievant through Appellant and Edie McGee, another union representative, and was signed by Mr. Angelo. Like the protected disclosure, this protected activity occurred on July 18. Mr. Angelo knew of the grievance and Appellant's involvement well before he proposed that Appellant be disciplined.

4. Removal of MSPB Case Report Duties

Since 1994, the WPA includes as a personnel action any significant change in duties, responsibilities, and working conditions. 5 U.S.C. 2302(a)(2)(ix). *See* Pub. L. 103-94 (Oct. 6, 1993). Prior to this amendment, the term only covered "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.'' The Board has recognized that Congress's intent was for the term "personnel action" to be interpreted broadly and determined by a case-by-case analysis. *Shivaee v. Dep't of the Navy*, No. 74 M.S.P.R. 383 (1997); *see also Covarrubias v. Soc. Sec. Admin.*, 113 M.S.P.R. 583, 588 n. 4 (2010).

The Board has not given specific guidance on how to determine whether a change is "significant." Some changes have not been considered personnel actions. *See Shivaee* (a change in duty site does not necessarily constitute a personnel action); *Mattil v. Dep't of State*, 118 M.S.P.R. 662 (2012) (the failure of an agency to provide a valid position description is not a significant change in working conditions); *Hawkes v. Dep't of Agric.*, 95

M.S.P.R. 664 (2004) *vacated and remanded*, 116 F.App'x 264 (Fed. Cir. 2004) (the denial of consideration for a "mini-grant" is not a significant change in duties, responsibilities, or working conditions).

However, the Board has determined that other types of actions on the part of an agency are "significant." For instance, an agency's failure to process an EEO complaint in its usual manner may constitute a significant change in working conditions. *See Mattil* at 573. Likewise, an appellant's claim that the agency changed its normal procedures for processing worker compensation claims and providing "standard" post-deployment psychological counseling could also be broadly construed as a significant change in working conditions. *Id.* Actions in undermining an Appellant's supervisory authority constituted a significant change in duties, responsibilities, or working conditions. *McDonnell v. Dep't of Agric.*, 108 M.S.P.R. 443 (2008). The Board also found that the cancellation of an appellant's telework agreement constituted a significant change in working conditions and constituted a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii). *Rumsey v. Dep't of Justice*, 120 M.S.P.R. 259 (2013), *as corrected* (Nov. 4, 2013).

Appellant alleges that his duties were changed when the task of preparing the MSPB Case Reports was taken away from him. Preparing the MSPB Case Report was part of Appellant's official duties, though not contained in his position description. HT Vol. I at 137, 212. Appellant alleges, and the Agency does not dispute, that the report occupied a substantial amount of his work time. Appellant had also performed this duty for many years, including during his details to positions outside OAC. I have not found a Board decision that specifically deals with the removal of duties not contained in the position description but acknowledged to be official duties. However, in light of the cases discussed

above, it is clear the removal of the Case Report falls into the latter category and constituted a significant change in Appellants duties.

I also find that Appellant has shown his protected activity was a contributing factor in the removal of the Case Report duties. He was notified that he would no longer be responsible for preparing the Case Report in February 2014, well after he made his protected disclosure and engaged in a protected activity.

The Agency made clear at the hearing that the ultimate decision about moving the Case Report preparation from OAC to the General Counsel's office was made by the MSPB Executive Director, Jim Eisenmann. However, Mr. Eisenmann testified that he had little knowledge of the day-to-day duties of individual attorneys, their pay grades, or other personnel issues. Ms. Swafford characterized the decision to move the Case Report duties to the General Counsel's office as coming entirely from Mr. Eisenmann, HT Vol I at 213-18, but his testimony contradicts hers: Mr. Eisenmann testified he became aware of Appellant's ancillary duty when Ms. Swafford brought it to his attention. HT Vol. III at 757. He said Ms. Swafford did not specifically request the duty to be moved outside OAC, but she did indicate "that Mr. Korb could do more in terms of producing cases that would then go to the front office. And one of the things that he was doing that kept him from producing cases was the case summary." *Id.*

Mr. Eisenmann then made the decision to move the duty to the OGC. He testified that he believed OGC was better equipped, from a staff and resource standpoint, to absorb this ancillary duty, since OAC staff attorneys are required to produce a certain number of cases per year and the OAC's directorate-wide case age goal had not been met, resulting in a draft decision "backlog." HT Vol. III at 757-59; IAF Tab 9 at 49-118, Tab 10 at 4-40, Tab

10 at 57-63. He said Appellant's union activity and any disclosures he may have made about the backlog did not affect his decision. HT Vol. III at 760. It is not clear whether Mr. Eisenmann had any knowledge of Appellant's protected actions, but Ms. Swafford clearly knew about them. Though she was not the decision-maker when it came to reassignment of the Case Report, she was certainly an integral part of the process; Mr. Eisenmann's testimony shows he did not independently come up with the idea of moving the Case Report duties. I find his testimony more credible than Ms. Swafford's, and I find the knowledge-timing test satisfied.

F. Would the Agency have taken the same personnel action in the absence of such disclosure?

If the employee establishes a prima facie case of reprisal for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken "the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e); *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). Here, the Agency asserts that it would have taken both personnel actions regardless of whether Appellant had made protected disclosures or engaged in protected activity.

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 whistleblowing, the MSPB 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 that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). All the

pertinent evidence in the record must be evaluated to determine whether it is sufficiently clear and convincing to carry this burden; the presiding official cannot only look at evidence that supports the conclusion reached and must also consider evidence that detracts from the conclusion. "It is error for the MSPB to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately." *Whitmore* at 1368.

1. Proposed 21-Day Suspension

The Agency based the proposed suspension on Appellant's unauthorized changes to language in the non-precedential decision template. In asserting it would have taken the same action regardless of whether whistleblowing activity had occurred, the Agency points to its desire to maintain consistency across its decisions. OAC attorneys are tasked with analyzing petitions for review and drafting the Board's decisions. The attorneys may exercise their own judgment and discretion, but are limited by law, regulation, and precedent. Each decision subsequently undergoes several layers of review within MSPB before it is issued.

The Board's desire for consistency is understandable, and it can and should expect the OAC attorneys to draft decisions that are not only legally correct, but also comply with its stylistic guidelines. One method the MPSB uses to maintain consistency is a computer-generated template that OAC attorneys use in drafting decisions. The OAC attorney drafts the body of the decision and also frequently amends certain portions of the boilerplate.

Prior to issuance, the decision is reviewed by the attorney's supervisor unless the attorney has direct-forward authority. It is then forwarded to the Board members and their chief counsels for their review. Once all the Board members have given approval, the

finalized version is read for quality control purposes by attorneys in the Clerk's Office and then issued by the Clerk of the Board.

The OAC also issued guidance documents in July and August 2013 to assist the attorneys in drafting decisions. These documents contain a mixture of explanations about the function and purpose of each section of the decision and its accompanying memorandum, instructions relating to specific sections of the template, general stylistic preferences, and recommendations about best practices when drafting a decision. IAF Tab 42 at 12-25. However, a great deal is left up to the drafting attorney's discretion and professional judgment. Of significance here, the guidance document points out certain sections of the automatically-generated template language that should be customized, and instructs attorneys to delete the standard of review if a petition for review is granted, but does not forbid attorneys from making any other changes to the boilerplate.

As previously discussed, when the Board began issuing NPFO decisions instead of summary decisions, an NPFO template in HotDocs was created that consists primarily of a heading, opening paragraph, and ending paragraph. The template initially used a standard of review based on the iteration of 5 C.F.R. § 1201.115(d) (2011) in force at the time.[4] After the MSPB procedural rules underwent a major revision in 2012, which clearly expanded the Board's authority to consider a broad range of issues,[5] the Board revised the standard of

4 The previous language was, "We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115)." *See, e.g., Wade v. Dep't of Veterans Affairs*, No. DC-752S-07-0744-I-1, 2007 WL 8426006, at *1 (M.S.P.B. Dec. 17, 2007).

5 The 2012 rulemaking set the following criteria for consideration of personnel actions:

> The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:
> (a) The initial decision contains erroneous findings of material fact.

review language in the NPFO template to read as follows:

> Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. See Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).
>
> IAF Tab 8 at 46-47.

It is undisputed that Appellant amended the standard of review boilerplate in three NPFO decisions. The question is whether the Agency has credibly shown that his actions in doing so warranted the disciplinary proposal that followed, though it was not ultimately implemented. The Clerk's Office noticed Appellant's change during its final review of one

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(1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.
(2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.
(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.
(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.
(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.
(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

5 C.F.R. § 1201.115.

decision, after the decision had been approved by the Board members and their staff. The attorneys in the Clerk's Office then searched and discovered two more decisions where Appellant had changed the language. In one decision, Appellant wrote as follows:

> Generally, we grant petitions such as this one only upon a showing that the initial decision was wrongly decided or that the adjudication process was so unfair that the petitioner did not have an appropriate opportunity to develop the record. See Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115); 77 Fed. Reg. 33663, 33668 (2012).
>
> IAF Tab 8 at 35-36.

In two other decisions, he changed the language to read:

> Generally, we grant petitions for review only when the petitioner shows that the initial decision was wrongly decided on the existing record, that new and material evidence or argument is available that was not previously available despite the petitioner's due diligence, or that the petitioner did not get a full and fair adjudication process. See Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115); 77 Fed. Reg. 62349, 62369 (2012).
>
> IAF Tab 8 at 15-16 and 23-24.

Appellant said he changed the language because he believed his versions were clearer than the boilerplate version. When confronted by management, he stated that he did not create the language but rather took it from the rulemaking preamble that explained the purpose of 5 C.F.R. § 1201.115, and cited the source in the Federal Register. A review of the relevant Federal Register publications shows Appellant did draw from them in creating his amended statement of the standard of review. The language he used in the decision citing to the proposed rule almost exactly mirrors the summary of proposed amendments in the preamble to the Notice of Proposed Rulemaking, which reads:

> The proposed amendments set forth here address the

> criteria for granting petitions and cross petitions for review. The Board will grant a petition for review whenever the petitioner demonstrates that the initial decision was wrongly decided, or that the adjudication process was so unfair that the petitioner did not have an appropriate opportunity to develop the record. The proposed regulation lists the 4 most common situations in which a petition or cross petition for review will be granted, but specifies that this listing is not exhaustive.
>
> 77 Fed. Reg. 33663 (June 7, 2012).

The language he used in the two decisions citing to the final rule is an altered version of the preamble explaining the intent of 5 C.F.R. § 1201.115, which states:

> The general intent of the regulation is to grant a petition for review whenever the petitioner shows that: (1) The case was incorrectly decided based on the existing record; (2) new and material evidence indicates that the outcome should be different than in the initial decision; or (3) the petitioner did not get a full and fair adjudication process. As written, the regulation tries to capture the most common situations in which these conditions are present, but it could not capture all such circumstances.
>
> 77 Fed. Reg. 62349, 62358 (Oct. 12, 2012).

I must note, though, that neither the boilerplate standard of review language in the NPFO template nor Appellant's two versions fully describe the Board's authority. The regulation clearly states that the Board may grant a petition for review for reasons that "include, but are not limited to," those set out in 5 C.F.R. § 1201.115(a)-(d). It then gives the Board broad authority to grant petitions for review in any case where the Board believes review is warranted: "the Board reserves the authority to consider any issue in an appeal before it." 5 C.F.R. § 1201.115(e). Both the template and Appellant's versions appear to describe the Board's internal policy on when to grant petitions for review, which is permissible under the regulations, but also risk giving appellants the false impression that

the regulations prescribe a narrow and limited scope of review.

Additionally, I note that the standard of review language in Board decisions differs based on the disposition of a petition for review and the type of order issued. The language at issue in this case appears mainly in NPFOs where the Board has decided to deny the petition for review. In precedential orders, the Board typically does not include standard of review language at all, but may on rare occasions use a differently-worded statement. HT Vol. III at 695-96. In NPFOs where the Board remands a case or grants a petition for review, the Board often does not state the standard of review. HT Vol. III at 714-15. Indeed, the OAC drafting guidance instructs attorneys to delete the standard of review if granting the petition. Finally, the standard of review is not applicable in some types of cases like untimely filed petitions, requests for review of arbitration decisions, and compliance referral matters. HT Vol. III at 694-715.

Although the OAC had issued drafting guidelines to the attorneys, the record is clear that, at the time Appellant made these changes, OAC management had not informed them that the standard of review language in the NPFO template could not be changed. The guidance documents only discussed areas where the language was supposed to be changed, and it does not automatically follow that only those sections *could* be changed. Nor had the attorneys been told that the Board explicitly approved the boilerplate language. Although most attorneys who testified at the hearing had not edited the standard of review language, this was because they did not see a need to change it and not because they felt they lacked discretion to do so.

It is clear that chief counsels to the Board members were very concerned with Appellant's decision to amend the standard of review language. At least one counsel

demanded that OAC conduct an investigation, and said he believed Appellant was up to no good. OAC management was certainly within its rights to correct Appellant's work if the Board felt his language was inappropriate.

However, there is no evidence that Appellant's actions constituted misconduct. When Appellant met with Mr. Angelo, his Team Leader, he acknowledged the changes he made to the three cases in question and said he was unsure whether there were others. Subsequently, Appellant identified four more cases containing altered language which had already been issued by the Clerk's Office; it seems that either the Clerk's Office did not notice the changes in those cases or did not believe they necessitated action. Appellant also told Mr. Angelo that, having now been directed not to make further amendments to the language, he would comply.

OAC management's decision to investigate the issue and inform Appellant about the Board's legitimate expectations was reasonable. Instead of giving Appellant the opportunity to demonstrate compliance, though, Mr. Angelo chose to immediately propose a 21-day suspension. To justify his proposal, Mr. Angelo equated the amendments to a deliberate refusal to comply with rules. He wrote in his proposal:

> In deciding what penalty to impose for your misconduct, I have consulted the Board's Table of Penalties. While unacceptable conduct of this kind is not specifically listed as an offense on the Board's Table of Penalties, I note that the penalty for a deliberate refusal to comply with rules is a letter of reprimand to removal. Because your misconduct is so closely related to your job responsibilities and so directly calls into question your judgment and trustworthiness, there are circumstances a penalty of removal would be appropriate. Thus, this proposal is consistent with the agency's table of penalties. I have never seen any other OAC attorney engage in similar misconduct under circumstances.
>
> IAF Tab 8 at 8-9.

Employees of federal agencies are expected to respect authority and to follow the orders of supervisory officials. An employee's deliberate refusal to follow supervisory instructions constitutes serious misconduct that cannot properly be condoned. *Redfearn v. Dep't of Labor*, 58 M.S.P.R. 307, 316 (1993); *Parbs v. U.S. Postal Serv.*, 107 M.S.P.R. 559 (2007) *aff'd*, 301 F.App'x 923 (Fed. Cir. 2008). However, the record does not support a deliberate refusal to comply in this case because "[w]illful intent presupposes knowledge of the order." *Bonanova v. Dep't of Educ.*, 49 M.S.P.R. 294 (1991).

Here, the OAC attorneys, including Appellant, were unaware that they were prohibited from changing the standard of review language at the time Appellant made the alterations. Indeed, the recent writing guidance issued in July and August 2013 required them to remove that language in orders granting petitions for review and stated that the guidance document was general in nature and required professional judgment to be exercised. IAF Tab 42 at 13, 20. There is no evidence that Appellant continued to amend the language after being directed not to. When the OAC Director reviewed the proposed suspension, she acknowledged the notice issue and therefore dismissed the proposed suspension. She then issued a formal policy to the OAC attorneys limiting the changes that could be made to this particular text.

Finally, one of the major concerns the Agency expressed at the hearing is that a judge hearing an appeal of a Board decision may be confused if different cases contain different scope of review language. This argument is seriously undermined by the fact that the Board has not standardized its language between NPFOs and precedential decisions, and indeed, does not even state the standard of review in most precedential decisions. HT Vol. III at 694-715. Moreover, the standard of review language in the template is apparently not

required when the Board grants a petition for review, nor is it required to be included in numerous other types of decisions. *Id.* While the Board's desire for the language in certain types of decisions to remain consistent is legitimate, the Agency has not made a convincing argument that the confusion this would cause a reviewing court is any greater than that which could ensue because of the difference between NPFOs and precedential orders.

In light of the facts that 1) OAC attorneys had not been told what portions of the boilerplate they were or were not permitted to change; 2) the changes Appellant made did not constitute a misstatement of the law even if they differed from the Board's preferred version; and 3) the Board uses a different statement of the standard of review in different types of decisions, if it appears at all, despite 5 C.F.R. § 1201.115 being applicable to *all* cases before the Board, I find the Agency has not made a strong argument that it would have proposed a 21-day suspension in any event.

I must also consider the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision. *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Appellant's protected disclosure about case delays reflected poorly on OAC management, including both the Director and the Team Leaders. Ms. Swafford testified that she looked into why the decisions had been delayed, and even if the Team Leaders did not have direct knowledge of the July 18 disclosure, they were likely aware that their capabilities as managers had been called into question. The question of retaliation in a situation like this has been addressed in *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1370-71 (Fed. Cir. 2012):

> Those responsible for the agency's performance overall may well be motivated to retaliate even if they are not directly implicated by the disclosures, and even if they do not know the whistleblower personally, as the criticism reflects on them

in their capacities as managers and employees.

As *Whitmore* noted, the Board previously found motive to retaliate when disclosures reflected poorly on the high-level proposing and deciding officials, who could be seen as representatives of the agency's interests. *See Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17, 55 (2011). It reached the same conclusion where comments critical of agency leadership "would reflect poorly on" officials "responsible for monitoring the performance of the field staff and making sure that agency regulations are carried out correctly and consistently." *Phillips v. Dep't of Transp.*, 113 M.S.P.R. 73, 83 (2010).

Mr. Angelo, the Team Leader who proposed discipline, had several delayed cases in his office. HT Vol. I at 111. Although Mr. Angelo may not have known the total number of cases or other detailed information included in Appellant's report, he was at least generally aware that he had been accused of contributing to significant delays. The proposing official therefore had motive to retaliate against Appellant, the person who had compiled and disseminated that information. Ms. Swafford testified that she had not taken any action against Team Leaders with significantly delayed cases in their offices, and indeed had not even spoken to the Team Leaders about all of those cases. Thus, Mr. Angelo's motivation to retaliate may not have been as strong as it would have been if he had been reprimanded or otherwise disciplined for having delayed cases. However, it is reasonable that some degree of motivation would exist.

The third factor I must consider is whether there is evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. Neither party presented any evidence that other OAC attorneys had been disciplined—or that discipline had even been considered— for making alterations to NPFO

template language. In fact, each OAC attorney who testified said that, prior to the distribution of the OAC-wide policy directive, they believed they were able to change boilerplate language as they deemed appropriate.

In light of this, OAC management's reaction to Appellant's changes appears unreasonable. In evaluating whether a penalty is reasonable, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or frequently repeated. *See Parbs v. U.S. Postal Serv.*, 107 M.S.P.R. at 571.

As I previously discussed, the changes Appellant made to the boilerplate were not misstatements of law. Moreover, Appellant had no prior disciplinary record, and has received generally good performance reviews and been awarded significant performance bonuses even after the incident. Mr. Angelo's decision to immediately propose a lengthy suspension without allowing Appellant time to comply with his directions appears harsh and retaliatory on its face. Mr. Angelo wrote in the proposed suspension, "It is sufficient to note that it is my job to investigate apparent employee misconduct, and to initiate appropriate corrective action when confirm it. Your assertions and/or alleged protected activity have had no role whatsoever in my decision to investigate your misconduct and/or to propose this discipline." He reiterated this during his testimony. HT Vol. I at 132. However, aside from these bare assertions, there is nothing in the record to support the Agency's position that it would have taken the same action against any other employee who made similar changes to the NPFO template.

The record does not contain a great deal of evidence on the issue of whether Appellant's assistance to his co-worker in the grievance process affected the decision to

propose a suspension. Although Mr. Angelo was the official who received the grievance and dismissed it as untimely, he testified he saw it as part of a standard process and it played no role in the proposed suspension. HT Vol. I at 130-32. Aside from Mr. Angelo's testimony, nothing in the record reflects the extent to which the grievance may have affected a MSPB official's decision-making. There is also nothing in the record to show how the Agency has dealt with other employees who assisted co-workers in filing grievances, or if it has taken any actions which could be linked to other grievances with which Appellant assisted.

It is less likely that an Agency official would have motive to retaliate against Appellant for the grievance than for the "Significant Delays" document; while the affected employee and the union officials clearly disagreed with Mr. Angelo's actions, this would not be expected to cause embarrassment or the potential for reprimand or discipline that the delayed cases might. However, the Agency has the relatively high burden of proving by clear and convincing evidence that it would have taken the same actions even in the absence of protected activity, and the scanty evidence in the record does not begin to refute any link between the grievance and the suspension.

I find the Agency has not met its burden of proving by clear and convincing evidence that it would have proposed this suspension in any event. Appellant met his burden of proof in showing that his actions were contributing factors, and the Agency has not successfully rebutted this by showing that neither action played a role in the proposed suspension.

2. Removal of Case Report Duties

In February 2014, Appellant learned that he would no longer be performing his

duties as regards the weekly Case Summary Report. The MSPB Executive Director and former General Counsel, Mr. Eisenmann, transferred the Case Report function from OAC to the Office of General Counsel (OGC). Mr. Eisenmann testified that he made this decision because OAC was under pressure from Board members to produce cases for adjudication and he wanted to ensure that OAC focused exclusively on that task. HT Vol. I at 137, 210, 212-13; Vol. III at 757. Mr. Eisenmann testified that his decision was based solely on the goal of having OAC increase its production and was not influenced by Appellant's union activity or anything he raised with respect to a "backlog" at any point. HT Vol. III at 760.

Under 5 U.S.C. 7106(a)(2)(B), an agency retains the right to assign work and determine the manner in which it conducts its operations. The weekly report was not a specific element in Appellant's job description. However, he had been performing the function for many years while serving in the Clerk's Office as well as in OAC. This report took approximately twenty percent of Appellant's work week. Because of that ancillary duty, Appellant had a reduced case load for preparing opinions. Mr. Angelo testified that Appellant was required to produce ten decisions and ten petitions for review in order to achieve an "outstanding" rating on his evaluation, whereas most OAC attorneys without ancillary duties prepared about fifty cases. HT Vol. I at 138-39.

Mr. Eisenmann testified that the Board was looking to increase decision production. Removing ancillary duties from OAC attorneys is a legitimate method to accomplish that goal. Absent any competing evidence, his decision to have OAC attorneys focus their time and energy on preparing decisions for the Board to review would appear reasonable.

In its closing brief, the Agency says there is no evidentiary support for any assertion that Mr. Eisenmann retaliated against Appellant. The Agency argues that "none of

Appellant's disclosures or his PA activity were a contributing factor in Mr. Eisenmann's decision to transfer responsibility for the Case Report from OAC to OGC." IAF Tab 35 at 48.The argument continues, "Mr. Eisenmann testified that he did not in any way consider any of Appellant's submissions at the LMC meetings in making his decision. HT Vol. III at 760. Moreover, there is no evidence in the record that would indicate that Mr. Eisenmann was aware of, or played any role in, Appellant's representation of [redacted] ." *Id.*

Mr. Eisenmann is the MSPB's Executive Director. In this capacity, he performs multiple functions, including running day-to-day operations, supervising the various office directors, and reporting directly to the Chairman of the Board. HT Vol. III at 755-56. With the exception of the Chairman, Mr. Eisenmann sits at the top of the MSPB's organizational structure and is the second link in its chain of command. He is the former General Counsel to the MSPB and, prior to that, represented federal sector employees in employment-related matters. HT Vol. III at 755.

Mr. Eisenmann testified that he does not know the pay grades of specific OAC attorneys, or what specific tasks have been allocated to them. Nevertheless, "an agency official's merely being outside that whistleblower's chain of command, not directly involved in alleged retaliatory actions, and not personally named in the whistleblower's disclosure is insufficient to remove the possibility of a retaliatory motive or retaliatory influence on the whistleblower's treatment." *Whitmore v. Dep't of Labor*, 680 F.3d at 1371.

Here, the OAC Director played a role in the process of having the Case Report duty moved outside OAC. The idea did not originate with Mr. Eisenmann. He testified:

> I made that decision after talking to Susan Swafford, the director of OAC, because Mr. Korb had been writing those case summaries. The Office of Appeals Counsel was under pressure to produce more cases for the front office – meaning

> the board members when I say front office – to produce more cases for the front office, to adjudicate. And in discussions with Susan Swafford, the indication was that Mr. Korb could do more in terms of producing cases that would then go to the front office. And one of the things that he was doing that kept him from producing cases was the case summary.
>
> HT at Vol. III 757.

As I previously discussed, Appellant's protected disclosure reflected poorly on not just the Team Leaders, but also the OAC Director. She was then responsible for suggesting the MSPB would benefit if certain duties were transferred away from Appellant. While Mr. Eisenmann may not have had any motive to retaliate against Appellant, it is plausible that Ms. Swafford did.

The record is clear that the Board was looking for ways to increase production, but the evidence in the record does not establish that management specifically discussed any individual attorney's workload except Appellant's. Although Ms. Swafford testified that attorneys on detail to other MSPB offices were recalled to their original positions, neither side presented evidence about whether other OAC attorneys performed ancillary duties and also had those duties removed. The practice of detailing attorneys to the Board and other offices has resumed, but the Case Report has not been returned to Appellant and there are no plans to do so. HT Vol. I at 218.

The record reflects that Mr. Eisenmann is charged with broad-based responsibilities and is not generally involved in the minutiae of personnel issues. The decision to transfer a duty such as the Case Report from one office to another was appropriately his, though, since the heads of those offices report to him. The evidence is also clear that an official with a possible retaliatory motive made Mr. Eisenmann aware of the opportunity to transfer the Case Report. Moreover, the record contains no evidence about whether Appellant was the

only employee whose ancillary duties were removed, thus the Agency did not show that it took comparable actions against similarly-situated employees who are not whistleblowers. Accordingly, the Agency has not established by clear and convincing evidence that it would have taken this action in any event.

V. CONCLUSION

After hearing the testimony and considering all the evidence in the record, I have found that Appellant made a protected disclosure and engaged in a protected activity. Based on the law and Board precedent, these are considered contributing factors to the personnel actions described above. However, the record also establishes that Appellant is consistently outspoken and has had numerous policy disputes with MSPB management. He is an active member of the union, and his position there necessarily places him at odds with management at times. Antipathy between Appellant some members of MSPB management appears to have built for some time prior to the proposed suspension and the removal of the case report duties.

The Agency's personnel actions were likely the result of a combination of factors, and the record does not show that they were based solely, or even mainly, on Appellant's protected disclosure or protected activity. However, the Agency was required to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of any protected activity or disclosure, and it has not done so. Accordingly, Appellant is entitled to an appropriate remedy.

VI. REMEDY

The hearing in this matter was limited to the merits of whether Appellant made protected disclosures or engaged in protected activities; whether the Agency took personnel actions against him in retaliation for protected disclosures or activities; and whether the Agency would have taken the same actions absent the disclosures. *See Dick v. Dep't of Veterans Affairs*, 290 F.3d 1356, 1363-64 (Fed. Cir. 2002). Having found that the Agency based personnel actions against Appellant at least in part on protected actions, I must determine an appropriate remedy. Appellant has not specified what remedy he seeks, and the parties did not present any evidence or argument on this issue at the hearing. I will therefore contact the parties to schedule a telephonic conference to discuss an appropriate method for taking argument and evidence. This may be either by written briefing, a telephonic hearing, or an in-person hearing. If they choose, the parties may also engage in discussions prior to the conference and stipulate to an appropriate remedy.

FOR THE BOARD,

GEORGE J. JORDAN
ADMINISTRATIVE LAW JUDGE