UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

CHRISTOPHER P. MARCUS,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
AT-0714-19-0656-I-1

DATE: December 13, 2019

Adam Jerome Conti, Esquire, Atlanta, Georgia, for the appellant.

Dana C. Heck, Esquire, St. Petersburg, Florida, for the agency.

Lois F. Prince, Esquire, Nashville, Tennessee, for the agency.

BEFORE
Christopher G. Sprague
Administrative Judge

INITIAL DECISION

On July 19, 2019, the appellant timely filed this appeal to contest his removal from the position of Health System Administrator, GS-0670-13, from the Department of Veterans Affairs' (VA or agency) Chattanooga, Tennessee location, effective July 16, 2019. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal. 38 U.S.C. § 714; 5 U.S.C. § 7701(b)(1). On October 17, 2019, the appellant withdrew his hearing request and asked for a decision on the written record. AF, Tab 21. For the reasons set forth below, the agency's action is REVERSED.

Background

Expect as noted herein, the following facts are undisputed. The VA's mission is:

> To fulfill President Lincoln's promise 'To care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's Veterans.

AF, Tab 30.

After retiring from the U.S. Air Force as a Lieutenant Colonel, the agency initially appointed the appellant on August 26, 2012. AF, Tab 14, p. 4; AF, Tab 15, p. 4. On January 26, 2014, the agency placed the appellant in the position of Administrative Officer, GS-12, at the Tennessee Valley Healthcare System's (TVHS) Outpatient Clinic in Chattanooga, Tennessee. AF, Tab 26, p. 4. On September 30, 2018, the agency competitively selected the appellant to the newly created position of Health System Administrator, GS-13, at the TVHS's "Chattanooga Hub," where he remained until his removal. AF, Tab 14, p. 4; AF, Tab 15, p. 5.

Previously, most services and organizations at the Chattanooga Hub reported through their respective service lines to TVHS managers located in Nashville or Murfreesboro, Tennessee; but, with the creation of this new position, the majority of services and organizations at the Chattanooga Hub reported directly to the appellant. AF, Tab 26, pp. 4–5. The primary reason for this reorganization was because many of these Chattanooga entities had extensive histories of substandard performance, employee relations issues, and conduct problems. *Id.* at p. 5. Upon his appointment to Health Systems Administrator, the Chief of Staff for the TVHS charged the appellant with improving veteran customer service, streamlining processes, improving efficiency, enforcing standards, and holding staff accountable for their performance. *Id.*

The appellant had no record of prior discipline. AF, Tab 26, p. 4. For the four years immediately preceding his removal, the agency rated the appellant's performance "outstanding," the VA's highest performance rating. AF, Tab 24, p. 22.

On June 14, 2018, one of the appellant's direct reports, Ms. Tina Barrier, then Business Manager for the Outpatient Clinics, sent an email to the TVHS Executive Leadership Team, including Ms. Jennifer Vedral-Baron, Senior Executive Service, the TVHS Director and the deciding official in this case, describing excessive clinic wait times for veterans and requesting resolution of this issue. AF, Tab 15, pp. 35–36. This email was also addressed to Ms. Suzanne Jene, TVHS Deputy Director, and to Dr. John Nadeau, TVHS Chief of Staff, and copied the appellant. *Id.* This email followed an email sent by Ms. Barrier the prior week to Dr. Nicole Salloum, the Assistant Chief of Staff for Ambulatory Care at TVHS and the proposing official in the appellant's removal, regarding excessive wait times for veterans and identifying the doctors most at fault by name. *Id.* at 36-37. The June 8, 2018 email, entitled "Excessive Wait Times," reads:

> Good afternoon, I wanted to bring to your attention the issue in Chattanooga of excessive wait times. I have included a few emails regarding extensive wait times over the last week[;] this is an apparent issue that has been going on for quite some time. Almost daily, my clerks are coming to me regarding patients furious at the front desk because they have waited hours to see their pcp with a scheduled appointment. Most of our providers are timely and always take care of their walk-ins, scheduled appointments, and other taskers in a timely manner. We have 3 providers that are always hours behind, meaning at least 2 to 3 hours behind daily. They are:
>
> Dr. [H]
> Dr. [B]
> Dr. [G]
>
> The above listed providers have patients rescheduling daily due to excessive wait times[;] I am constantly talking to the same patients every visit about their wait times with these providers. I would like to bring this to your attention in hopes that we can get some resolve with the excessive wait times. Thank you for allowing me to bring this to your attention.

Id. The June 14, 2018 email forwarding the email above to the TVHS Executive Leadership Team reads:

> Good morning, I wanted to first say thank you for taking the time to host our employee & veteran town hall and bring to light all of the new things happening in THVS. Per our discussion yesterday evening in regards to excessive wait times for our patients in our clinic, I have attached the email that I sent to primary care leadership requesting assistance with this issue. I am amazed at the reputation that follows Chattanooga after such incidents occur. We owe it to our nation[']s heroes to provide excellent and timely care to each and every one of them. Over the last few months our wait times have increased tremendously for our scheduled patients, some will say this is due to walk-ins and other unexpected occurrences throughout the day. I will tell you that the excessive wait times begin as early as the 1st 8 am patient in some clinics, this is due to providers not going in to see the first patient until after the second patient arrives. This causes a delay throughout the entire day. Some providers such as Dr. [H] [spend] more than an hour with every patient she sees, causing a multitude of patients to reschedule daily. The frustration really begins to set in when those patients that have rescheduled a multitude of times [begin] to walk-in because the service is faster walking in for those particular providers than it is with a scheduled appointment. As the picture is painted, you can begin to see the sadness and incivility that goes along with this type of care for our nation[']s heroes. I believe it is [imperative] that we have a new leadership team that is about getting things accomplished, resolving issues, boosting morale, generating a positive culture in the workforce, but most importantly delivering top notch care to our nation's heroes. I want to thank you for taking the time to read my email and certainly for the opportunity to be a part of the change!

Id.

Following the appellant's selection to the Health System Administrator position, he selected Ms. Barrier as his Administrative Officer in December of 2018. AF, Tab 26, p. 5. On January 24, 2019, Ms. Barrier sent a memorandum to Dr. Salloum regarding a potential ethical violation involving an agency doctor in

the Chattanooga outpatient clinic. AF, Tab 24, pp. 38–39. According to the memo, Dr. L treated her husband at the Chattanooga outpatient clinic; Dr. L and her husband have different last names; Dr. L failed to disclose to the VA her relationship with this patient and failed to identify this patient as her husband in her treating notes; Dr. L apparently scheduled her husband's appointments by sidestepping VA protocol and policy; Dr. L's husband had filed a suit against his employing Federal agency; and Dr. L was called as a witness in this suit to attest to his injuries. *Id.* This memorandum further indicates that Ms. Barrier disclosed these concerns to the Chair of the Ethics Committee, Chaplain Sexton. *Id.*

During a March 2019 visit to the Chattanooga Hub by Ms. Marianne Myers, Assistant Director of TVHCS, employees complained about the appellant and Ms. Barrier, making allegations of a hostile work environment. AF, Tab 7, pp. 78–81; AF, Tab 25, p. 4. In response, Director Vedral-Baron ordered the initiation of an Administrative Fact Finding (AFF) to investigate Ms. Barrier and the appellant on March 19, 2019. AF, Tab 7, pp. 78–81; AF, Tab 25, p. 4. Director Vedral-Baron deemed the AFF "urgent" and mandated a deadline of seven business days from initiation to final report. AF, Tab 7, pp. 78, 80. On March 12, 2019, prior to the AFF, the agency detailed the appellant out of his position and removed his supervisory responsibilities. AF, Tab 15, p. 49.

The AFF team received responses from 42 individuals, forming the full list of interviewees based on suggestions from those interviewed. AF, Tab 7, p. 82. The team interviewed only one of the three individuals the appellant suggested. *Id.* The vast majority of the interview queries consisted of yes/no questions. *Id.* at 80–81. The AFF concluded that the appellant and Ms. Barrier created a hostile work environment and recommended that the VA not allow Ms. Barrier and the appellant to return to the Chattanooga outpatient clinic in leadership positions and that the VA reassign them elsewhere. *Id.* at 87–88.

On May 8, 2019, Dr. Salloum proposed the appellant's removal based on one charge of conduct unbecoming (four specifications). *Id.* at pp. 74–76. On

May 23, 2019, the appellant offered a "third option" to Ms. Vedral-Baron in regards to his removal, offering to use his accrued leave and then resign. AF, Tab 14, p. 26. In response to his suggestion, the proposal to remove the appellant was rescinded by the agency. AF, Tab 7, p. 217. When the appellant clarified that he had not said he was departing and had merely asked a question to spark a discussion, the agency reissued the notice of proposed removal. AF, Tab 14, p. 27; AF, Tab 7, p. 69. The appellant provided a written reply on July 4, 2019, referencing his May replies. AF, Tab 6, pp. 5–8; AF, Tab 7, pp. 4–15. On July 12, 2019, Ms. Vedral-Baron sustained all four specifications of the charge against the appellant and removed him. AF, Tab 5, pp. 10-12. This appeal timely followed.[1]

ANALYSIS AND FINDINGS

Burdens of Proof

To remove an employee under 38 U.S.C. § 714, the agency must prove its charge by substantial evidence. "Substantial evidence" is "the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." 5 C.F.R. § 1201.4(p). This standard is a lighter evidentiary burden than preponderant evidence and authorizes a less intrusive review of the agency's decision. *See Lisiecki v. Federal Home Loan Bank Board*, 23 M.S.P.R. 633, 640 (1984), *aff'd*, 769 F.2d 1558 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986). The preponderant evidence standard, on the other hand, requires proof that a fact is more likely true than not true. 5 C.F.R. § 1201.4(q). In other words, the agency is not required to provide evidence regarding the appellant's conduct and performance that is more persuasive than that presented by the

1 The agency correctly notes that both parties submitted prehearing submissions, and neither party objected to these submissions. AF, Tab 23. These exhibits are therefore accepted into the record, and I have considered them in rendering this decision.

appellant. *See Leonard v. Department of Defense*, 82 M.S.P.R. 597, ¶ 5 (1999). If the agency proves its charge, the Board has no authority to mitigate the penalty. 38 U.S.C. § 714(d)(2)(B).

However, for the reasons detailed below, I find that the appellant established that he engaged in activity protected under the Whistleblower Protection Enhancement Act (WPEA) and that this activity was a contributing factor in his removal. Therefore, as further detailed below, I utilize this substantial evidence standard only in assessing the strength of the agency's misconduct evidence under the WPEA's burden shifting framework.

The appellant proved by preponderant evidence that he made disclosures protected under the WPEA, that salient management officials perceived him as a whistleblower under the WPEA, and that this protected activity was a contributing factor in his removal.

To prove a prima facie case of retaliation for whistleblowing or other protected activity, the appellant must prove by preponderant evidence that: 1) he engaged in activity protected by 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (B), (C), or (D); and 2) it was a contributing factor in the personnel action being appealed. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). One such disclosure protected by the WPEA is gross mismanagement. 5 U.S.C. § 2302(b)(8)(A)(ii). Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *White v. Department of Air Force*, 63 M.S.P.R. 90, 95 (1994). Another disclosure protected under the WPEA is one that reveals "a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A)(ii). The WPEA also protects disclosures of an abuse of authority. *Id.* An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or an action resulting in personal gain or advantage to himself or to

preferred other persons. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, 241, ¶ 13 (2001). Finally, the WPEA protects employees against reprisal when they disclose violations of a law, rule, or regulation. 5 U.S.C. § 2302(b)(8)(A)(i).

Alternatively, an appellant may gain whistleblower status by proving by preponderant evidence that the agency perceived him as a whistleblower. For example, an appellant may gain perceived whistleblower status if he can demonstrate that the agency knew of his intention to blow the whistle, although he had not done so, *see Mausser v. Department of Army*, 63 M.S.P.R. 41 (1994), or if the appellant disagreed with a public position of the agency but expressed that only within the agency and did not intend for his expression of disagreement to constitute a whistleblowing disclosure but the acting official saw his view as dangerous. *See Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569 (1991); *see also Holloway v. Department of Interior*, 82 M.S.P.R. 435, ¶ 15 (1999) (finding perceived whistleblower status where a newspaper reported, with no discussion of the particulars, that the appellant had disclosed "fraud, waste and abuse," and the appellant showed that the agency acted because of the report). In cases of perceived whistleblowing, the analysis focuses on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302(b)(8). In those cases, whether the appellant actually made protected disclosures is immaterial to both the jurisdictional and merits issues of the appeal. *King v. Department of Army*, 116 M.S.P.R. 689, ¶¶ 8–9 (2011).

The most common way of proving the contributing factor element is the "knowledge/timing" test. *Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, 621, ¶ 12 (2009), *aff'd*, 353 Fed. App'x 434 (Fed. Cir. 2009). Under that test, an appellant can prove the contributing factor element through evidence that the official taking the personnel action knew of the whistleblowing

disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, 258–59, ¶ 19 (2008). "Once an appellant has satisfied the knowledge/timing test, he has demonstrated that a protected disclosure was a contributing factor in a personnel action." *Id.* at ¶ 20.

If the appellant meets this burden, the agency must prove by clear and convincing evidence that it would have taken the same action even absent the disclosure or other protected activity. *Horton v. Department of Navy*, 66 F.3d 279, 283–88 (Fed. Cir. 1995).

i. Unsecured Medical Documentation

The appellant asserts, and the agency does not dispute, that, as part of his role as the Chattanooga Hub's Administrator, he performed inspections of the facilities with another employee; that "The Joint Commission" (TJC) of the VA requires these inspections as part of a facility accreditation evaluation; that they found unsecured medical documentation that anyone could access who was in the building; that these violations were routine for Dr. L in her examination room; that unsecured medical documentation is a violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA); that he reported these violations six times between July of 2017 and September of 2018; that, after repeated warnings to Dr. L and her supervisor, he began reporting these violations to, *inter alia*, Dr. Salloum and the TVHS Chief of Staff, Dr. Nadeau. AF, Tab 26, p. 12, ¶ 17. The appellant alleges that, despite his reports, no action was ever taken against Dr. L. *Id.*

The rebuttal affidavits of Director Vedral-Baron and Dr. Salloum fail to address this issue at all. AF, Tab 28, pp. 18–20. Additionally, the agency does not argue that the disclosures detailed above did not occur or that they fail to disclose a violation of a law. *Id.* at p. 12. Rather, the agency appears to argue that these were somehow Ms. Barrier's disclosures, and not the appellant's. *Id.*

Based on the appellant's unrebutted sworn statement, I find that he was the source of the unsecured medical documentation disclosures. I further find that these disclosures evidence violations of HIPAA's implementing regulations. 45 C.F.R. § 164.530(c) (requiring safeguards to ensure the privacy of protected health information). Therefore, I find that the appellant's HIPAA violation disclosures are protected under the WPEA. 5 U.S.C. § 2302(b)(8)(A)(i).

Since Dr. Salloum does not deny that the appellant disclosed these violations to her, since Dr. Salloum was the proposing official in the appellant's removal, and since the latest of these disclosures occurred less than a year prior to her proposing his removal, I find that the appellant proved his disclosures were a contributing factor in his removal. *See Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, 45, ¶ 19 (2014) (applying "cat's paw" theory to WPEA appeals), citing *Staub v. Proctor Hospital*, 562 U.S. 411 (2011); *Gonzalez*, 109 M.S.P.R. at ¶ 26 (finding a slightly more than one-year time period to meet the timing aspect of the knowledge/timing test).

ii. Food & Drink in Patient Care Areas

The appellant asserts that the VA and the Office of Safety and Health Administration (OSHA) have policies prohibiting food and drink in patient care areas; that, between September of 2017 and May of 2018, he found significant violations of this policy in the Mental Health area; that he sent discrepancy reports to the Mental Health's leadership; that Mental Health's leadership informed him that they would not enforce the policy; that he reported these violations and the response of Mental Health's leadership to the TVHS Chief of Staff and to the TVHS Assistant Director. AF, Tab 26, p. 13, ¶ 18.

Dr. Salloum acknowledges that the appellant informed her about food in areas where food was prohibited. AF, Tab 28, pp. 19–20; ¶¶ 7 & 9. Director Vedral-Baron concedes that food in unauthorized areas is "clearly a violation of standards," but does "not recall any specifics related to this" and "does not recall the appellant making any disclosure to me regarding this issue." *Id.* at p. 22, ¶ 7.

However, Director Vedral-Baron does "vaguely recall being told there was an unauthorized microwave," but could not recall where. *Id.* at p. 23, ¶ 9.

Since it is undisputed that food is prohibited in patient care areas by VA policy, I find that the appellant's disclosures are protected under the WPEA. 5 U.S.C. § 2302(b)(8)(A)(i). Since Dr. Salloum admits that the appellant informed her about his concerns and since the latest of the appellant's disclosures occurred one year before Dr. Salloum proposed the appellant's removal, the appellant proved under the knowledge/timing test that his disclosures were a contributing factor in his removal. *Gonzalez*, 109 M.S.P.R. at ¶ 26.

iii. Excessive Patient Wait Times

I find that Ms. Barrier's June email detailed above to, among others, Dr. Salloum, and her follow up email to, among others, Director Vedral-Baron, about certain doctors' considerable delays in seeing scheduled VA patients at the Chattanooga VA and how those delays caused other veteran patients' scheduled appointments to have to be rescheduled for another day to evidence gross mismanagement. *White*, 63 M.S.P.R. at 95. I further find that TVHS's inaction[2] to hold the doctors accountable for delaying these VA patients' care had a significant negative impact on Veterans receiving timely medical care – a core VA mission. *Id.* I further find that these emails disclose a substantial and specific danger to public health or safety because delayed healthcare can exacerbate a veteran's existing conditions. 5 U.S.C. § 2302(b)(8)(A)(ii).

In their rebuttal affidavits, both Dr. Salloum and Director Vedral-Baron appear to assert that someone other than Ms. Barrier or the appellant was the source of the disclosure for excessive veteran wait times. AF, Tab 28, p. 20, ¶ 8 & p. 22, ¶ 8. However, for the reasons detailed below, I find that both Dr.

2 At the time of these emails, these doctors reported to the TVHS Chief of Staff, not the appellant. AF, Tab 26, p. 4, ¶¶ 5–7.

Salloum and Director Vedral-Baron perceived the appellant to be a whistleblower about excessive veteran patient wait times.

First, it is undisputed that the appellant supervised the sender of these emails, Ms. Barrier, who was the Business Office Manager of the Chattanooga Outpatient Clinic when she sent these emails. AF, Tab 24, p. 40. It is also undisputed that the appellant directed Ms. Barrier to send the emails about the doctors' habitual lateness and the corresponding effect that misconduct had on veteran patient wait times. AF, Tab 26, p. 13, ¶ 19. It is further undisputed that each TVHS Executive Leadership Team recipient of the emails about the excessive veteran patient wait times was aware that the appellant directly supervised Ms. Barrier. Based on those undisputed facts, I find it was more likely than not that, by copying her supervisor, the recipients of this email would have understood that the appellant was aware of the issues Ms. Barrier raised and approved her transmission of this message.[3]

Second, the evidence strongly indicates that the TVHS Executive Leadership Team treated the appellant and Ms. Barrier as a single unit. Director Vedral-Baron's AFF targeted both the appellant and Ms. Barrier for their alleged creation of a hostile work environment in Chattanooga, both the appellant and Ms. Barrier were detailed out of their positions on the same day, and the agency proposed both of their removals on the very same day: May 8, 2019. Additionally, as further detailed below, all of the charges in the appellant's proposal directly involve Ms. Barrier: specification one involves the hostile work environment he and Ms. Barrier allegedly created; specification two involves his alleged failure to properly discipline Ms. Barrier; specification three involves alleged favoritism for Ms. Barrier about a shift change; and specification four

3 In contrast, had Ms. Barrier not copied the appellant, but instead included him as a direct recipient of the email, other recipients may have inferred that the appellant was receiving this message for the first time.

involves the appellant's handling of an employee who did not receive the promotion for which the appellant selected Ms. Barrier. AF, Tab 7, pp. 74–75. Finally, the agency alleged that the AFF showed the appellant and Ms. Barrier had an "inappropriately close relationship" with one another, and the agency's closing submissions include an affidavit from the Chief Medical Officer for the Chattanooga Outpatient Clinic alleging that the appellant and Ms. Barrier "were always together" and had a "dysfunctional" relationship. AF, Tab 25, pp. 9–10, 19–22. Based on the foregoing, I find that Ms. Barrier and the appellant were so closely associated by the TVHS Executive Leadership Team that they treated both as a single unit.

Third, while it is undisputed that Director Vedral-Baron received the email about excessive veteran wait times, her affidavit fails to address the email chain in any meaningful way. AF, Tab 24, pp. 21–23. On excessive veteran wait times, her affidavit asserts as follows:

> While visiting the Chattanooga CBOC on 02 May 2018 the Voluntary Assistant, Ms. [C] relayed finding a Veteran waiting many hours past his appointment. This was not mentioned to me by Mr. Marcus. We relayed it to him.

Id. at ¶ 8. This statement addresses only one isolated incident of an excessive wait time, not the "habitual" problem the email detailed above is clearly disclosing and the late doctors who were causing this problem. Similarly, while it is undisputed that Dr. Salloum received Ms. Barrier's initial email about excessive veteran patient wait times, Dr. Salloum's affidavit fails to address Ms. Barrier's emails at all. *Id.* at pp. 18–20.

Based on the foregoing, I find that the Executive Leadership Team, including both the proposing and deciding officials, perceived the appellant as disclosing the excessive veteran wait times in coordination with his subordinate, Ms. Barrier. I further find that, because these disclosures occurred within one

year of the appellant's removal, the appellant proved that these disclosures were a contributing factor in his removal. *Gonzalez*, 109 M.S.P.R. at ¶ 26.

iv. Dr. L Ethics Issues

Regarding the January 24, 2019 ethics memorandum to Dr. Salloum about Dr. L detailed above, I find that this memorandum unequivocally discloses an abuse of authority because it documents Dr. L's attempts to surreptitiously use her position as a VA physician to treat her husband in violation of VA policy. *Wheeler*, 88 M.S.P.R. at ¶ 13. Moreover, the agency has not disputed these accusations about Dr. L. Therefore, I find that this memorandum is a protected disclosure under the WPEA.

Regarding this ethics memorandum, Dr. Salloum states as follows:

> I am aware of the concerns communicated by Ms. Barrier about Dr. [L]. Once again, I did not associate this communication with the Appellant. At no time did he indicate to me that this communication was from him. These issues were addressed….

AF, Tab 28, p. 19, ¶ 6. Regarding Dr. L, Director Vedral-Baron states:

> On 06 February 2019, Mr. Joseph Dassaro (Chief ELR TVHS) called me… to notify me the state of Tennessee was investigating Dr. [L]. He reported she allegedly had provided care to her husband to include prescriptions for controlled substances. He also said it was alleged she was attempting to boost her husband's medical disability rating claims through the care and encounters.

AF, Tab 28, p. 22, ¶ 6. The appellant asserts that, after Ms. Barrier informed him of Dr. L's ethical issues, he directed Ms. Barrier to inform her supervisor, Dr. Salloum, and that, after no corrective action appeared to have occurred, he directed Ms. Barrier to provide Dr. Salloum and the Chair of the Ethics Committee a report on these issues: the January 29, 2019 memorandum detailed above. AF, Tab 26, p. 13, ¶ 21. Ms. Barrier states that the appellant encouraged her to address these concerns with higher management. AF, Tab 24, p. 42, ¶ 12.

For the reason detailed below, I find that both Dr. Salloum and Director Vedral-Baron perceived the appellant as disclosing Dr. L's wrongdoing in coordination with Ms. Barrier. Dr. Salloum, the recipient of this ethics memorandum, was indisputably aware that her subordinate, the appellant, directly supervised Ms. Barrier. Based on that reporting relationship, I find that, by addressing the ethics memorandum to Dr. Salloum as her second-level supervisor, Dr. Salloum would have understood that Ms. Barrier vetted her concerns about Dr. L with the appellant prior to elevating this issue through a written memorandum and that Dr. Salloum, and anyone else on the Executive Leadership team, would have understood these concerns emanated from Ms. Barrier with the appellant's blessing. Additionally, for the reasons detailed above, I find that the TVHS's Executive Leadership Team treated the appellant and Ms. Barrier as a single unit.

There is no direct evidence that Director Vedral-Baron either received this ethics memorandum or was made aware of its disclosures. However, for the reasons detailed below, I find sufficient circumstantial evidence makes it more likely than not that Director Vedral-Baron was aware of this ethics memorandum. First, I note that Director Vedral-Baron's rebuttal affidavit merely describes a single contact about Dr. L from the Chief ELR TVHS – it does not affirmatively state that this Chief's communication to her was the <u>first time</u> she became aware of any ethical issues about Dr. L. and it does not affirmatively state that she lacked <u>any</u> awareness of the concerns raised by the January 24, 2019 ethics memorandum. Given the seriousness of this January 24, 2019 ethics memorandum's accusations and given the fact that this memorandum was also addressed to the Chair of the Ethics Committee, I find that it is more likely than not that Director Vedral-Baron either personally reviewed the memorandum or someone on the Executive Leadership Team briefed her on the content of this memorandum. Moreover, I note that Dr. Salloum's statement that Dr. L's ethics issues "were addressed" is quite vague, failing to provide any detail as to how

these issues were addressed, who was consulted about how to address these issues, and on whose authority these issues were ultimately addressed. Given her position, I find it is more likely than not that the ethics issues raised by this memorandum "were addressed" either by Director Vedral-Baron or by someone in her chain of command with her approval. Finally, I find that, because Director Vedral-Baron was aware the appellant was Ms. Barrier's direct supervisor and because of the evidence that she treated the two of them as a single unit, I find that she would have perceived the appellant to have been disclosing Dr. L's ethics issues.

Based on the foregoing, I find that both the proposing and the deciding official perceived the appellant to have disclosed Dr. L's wrongdoing in coordination with Ms. Barrier. Since this disclosure occurred within less than a year of his removal, I find that the appellant proved that it was a contributing factor in his removal. *Gonzalez*, 109 M.S.P.R. at ¶ 26.

The agency failed to prove by clear and convincing evidence that it would have removed the appellant in the absence of his disclosures and 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 Board will consider all the relevant factors, including the following: 1) the strength of the agency's evidence in support of its action; 2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and 3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 36 (2011). "Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all pertinent evidence in

the record, and despite the evidence that fairly detracts from that conclusion." *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012).

1. The strength of the agency's evidence supporting its removal of the appellant is threadbare.

The agency's conduct unbecoming charge has four specifications. In order to prove conduct unbecoming, the agency must show that: a) the employee engaged in specified conduct; and b) the conduct was unprofessional. *Cross v. Department of Army*, 89 M.S.P.R. 62 (2001).

Specification one alleges:

> On or about March 28, 2019 an Administrative Fact Finding (AFF) was conducted regarding the following allegations:
>
> 1. A hostile work environment, incivility, disrespect.
> 2. Unprofessional negative, bullying, misleading, disrespectful, hostile, intimidating, or offensive comments.
> 3. Lack of appropriate counseling by management.
>
> The allegations of unprofessional negative, bullying, misleading, disrespectful, hostile, intimidating, or offensive comments were sustained. Additionally, the allegation of lack of appropriate counseling by management was sustained. This conduct is considered unbecoming of a federal supervisor. Therefore, you are charged with conduct unbecoming.

Appeal File (AF), Tab 7, p. 69. After issuing an Order to Show Cause, I did not sustain this specification as a matter of law because it was entirely conclusory, lacked any factual basis, and failed to give the appellant a meaningful opportunity to respond as required by due process. AF, Tabs 16, 18 & 20. Therefore, I find that this evidence supporting agency's removal of the appellant is quite weak.

Specification two alleges:

> On or about March 5, 2019 Dr. Michael Sims emailed you about the incident that happen[ed] on or about February 22, 2019 involving Tina Barrier and staff of the Chattanooga Dental Clinic. You indicated that you will address this with Tina Barrier. This failed to happen as you were asked during the AFF if you had formally counseled Tina Barrier for any of the allegations the AFF were

> investigating and you answered "No". Therefore, you are charged with conduct unbecoming.

AF, Tab 7, p. 69.

The agency provided the appellant's March 5, 2019 email to Dr. Sims in which the appellant wrote that he would address an incident with Ms. Barrier, apparently as evidence that he was required to formally counsel Ms. Barrier.[4] AF, Tab 7, p. 174. Dr. Sims accused Ms. Barrier of raising her voice and interrogating Dr. White in front of Dr. White's staff and veterans about the protocol for seeing a patient requiring triage. *Id.* The agency justified upholding this specification with the AFF's conclusion, which found that the appellant did not, but apparently should have, formally counseled Ms. Barrier. *Id.* at 86.

The appellant concedes that he did not formally counsel Ms. Barrier, yet points to the fact that his email to Dr. Sims did not say that he *would* formally counsel her. AF, Tab 26, p. 8; AF, Tab 7, p. 174. The appellant argues that he was within his managerial discretion to handle the situation as he saw fit, that he was not required to heed directives from Dr. Sims because he was Dr. Sims' superior, and that he did address the issue by providing verbal feedback to Ms. Barrier. AF, Tab 26, pp. 8–9. The appellant cites several reasons for choosing informal feedback over formal counseling, concluding that, after investigating the issue, the incident did not warrant formal counseling. *Id.* at 8. Ms. Barrier's affidavit confirmed that he did address the matter with her. AF, Tab 24, p. 41.

Based on the foregoing, I find that the agency's specification is baseless: the appellant was charged with conduct unbecoming for not doing something he was not required to do, was not asked or ordered to do, and never said he would do. Indeed, I find that the appellant, using the managerial discretion inherent in

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4 Regarding the incident in this specification, the email from Dr. Sims states, "I would ask that you review the visit of Ms. Barrier…." AF, Tab 7, p. 174. The appellant's response reads: "Thank you for sending this Dr. Sims. I'll address it with Tina. Please send my apologies to anyone offended by the incident." *Id.*

his position, handled the situation entirely appropriately and professionally. I find that the agency failed to provide any evidence showing that, by declining to formally counsel Ms. Barrier, the appellant failed to "address" the issue with her as charged. Therefore, I find that the agency's evidence pertaining to this specification does not support a misconduct finding at all and fails entirely even under a lighter substantial evidence standard.

Specification three alleges:

> On or about September 5, 2018 you sent an email that set standard tours from 8:00 am-4:30 pm for the Admin Office effective October 1, 2018. On or about March 26, 2019 the AFF was made aware of a request from an employee to request to change their tour to 7:30 am-4:00 pm for a family situation and this request was denied. When Tina Barrier requested her shift to 7:00-3:30 for a family situation you approved her request. This was seen as preferential treatment. Therefore, you are charged with conduct unbecoming.

AF, Tab 7, p. 69.

The agency provided Ms. VanPelt's affidavit which stated that, after the appellant set a new tour of duty for all Program Support Assistants (PSAs) in October 2018, she requested permission to remain on her then-current schedule of 7:30am-4:00pm in order to keep a prior commitment and that the appellant granted this request, allowing her, a GS-5 PSA, to remain in her old schedule until her commitment was complete. AF, Tab 28, pp. 24–25. Ms. VanPelt claimed that, in February of 2019, she requested a tour of duty change for the entire summer of 2019 to coach a cheer team and the appellant denied that request. *Id.* Ms. VanPelt claimed that the appellant did not enforce the new schedule requirement on any staff except the PSAs. *Id.*

Ms. VanPelt alleged in her affidavit that, two weeks after her request to change her schedule for the summer was denied, the appellant approved Ms. Barrier's request to alter her tour of duty to 7:00am-3:30pm because of a situation regarding her son. *Id.* Ms. VanPelt asserted that Ms. Barrier maintained this schedule until she was relieved of her duties. *Id.*

The appellant contends that he is not aware of any tour of duty change request from Ms. VanPelt regarding the summer of 2019 and points to the fact that the AFF lacks any documentation supporting the agency's charge. AF, Tab 26, pp. 9–10. He agreed with the agency that he did allow Ms. VanPelt to postpone the implementation of the new start time in the fall of 2018 due to her prior commitments. *Id.* The appellant stated that his implementation of a uniform schedule, which TVHS leadership approved, affected only the five PSAs in order to mirror the clinic's regular operating hours. *Id.*; AF, Tab 26, p. 9. The appellant points to his September 5, 2018, email to the affected staff as evidence that the change was only intended to affect the PSAs and that all PSAs were treated the same. *Id.*; AF, Tab 7, p. 198.

The appellant also did not deny that he approved a temporary tour of duty change for Ms. Barrier, which lasted approximately one month; however, he points out that Ms. Barrier, a GS-11 Supervisor, and Ms. VanPelt, a GS-5 PSA, were not similarly situated and that, even if he had approved one request and denied another, it was not favoritism but an exercise of managerial discretion given the current needs of the organization. AF, Tab 26, pp. 9–10.

Based on the foregoing, I find that the agency has not proven that the conduct alleged in this specification is conduct unbecoming. Presuming, without deciding, that the appellant denied Ms. VanPelt's tour of duty change request in February of 2019, I find that the appellant provided sound reasoning for doing so because these employees had different roles in the office and were not similarly situated to each other. Ms. VanPelt was a GS-5 and a member of the group that the appellant specifically directed should be present during clinic operating hours; in contrast, Ms. Barrier was a GS-11 supervisor and was not subject to the appellant's PSA tour of duty directive. I further note that, unlike Ms. VanPelt's tour change, a directive which TVHS leadership approved, the agency presented no evidence as to why the appellant's grant of a temporary tour change to Ms. Barrier would hinder the agency's mission. Therefore, I find that the appellant's

exercise of managerial discretion regarding the situations of two dissimilarly situated employees is neither favoritism nor misconduct.[5] I correspondingly find that the agency's evidence for this specification would not support a misconduct finding even under a substantial evidence standard.

The final specification is as follows:

> On or about March 27, 2019 an employee was questioned by the AFF if they had any additional information that would help them in their investigation. The employee provided an email dated December 7, 2018 sent to the Health System Director seeking clarification in the selection of the Administrator Officer Position for the Chattanooga Hub facilities. Upon learning about this email, you confronted the employee in an intimidating tone and expressing frustration about why the email was sent to the Health System Director. You stated to the employee "Let me tell you just how busy I am" or words to that effect. Your actions toward the employee were unprofessional. Therefore, you are charged with conduct unbecoming.

AF, Tab 7, p. 70.

The agency's evidence for this specification is based upon the affidavit of Ms. Cox, a Voluntary Service Specialist and the appellant's subordinate. On December 3, 2018, Ms. Cox emailed the appellant to ask him to help her understand why the appellant selected Ms. Barrier for the Administrative Officer position and not her. AF, Tab 25, p. 32. Ms. Cox took issue with the fact that the appellant encouraged her to apply and that she was referred to the hiring manager, but not interviewed or selected: "I do not understand – please help me to." *Id.*

Three minutes after Ms. Cox sent her email, the appellant replied, "I'm in Nashville for the next few days but I'll be happy to explain when I return, and we can talk in person." *Id.* at 31. Four days later, on December 7, 2018, Ms. Cox forwarded this email exchange to the TVHS Executive Leadership Team,

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5 I further note that the agency presented no evidence that the appellant denied a requested change to their tour of duty for a similarly situated GS-11 or other supervisory employee.

including Director Vedral-Baron, complaining that "it has been two days since [the appellant's return from Nashville] and he hasn't" spoken with Ms. Cox about her concerns. *Id.* Ms. Cox also expressed her concern that she was "intentionally patronized and lied to" when the appellant encouraged her to apply for a job when Ms. Cox "knew on the front end that [Ms. Barrier] was most likely the person to be chosen…." *Id.*

Ms. Cox alleged that, during her meeting with the appellant to discuss her concerns, he explained the hiring process and told her that he was not required to interview candidates for the Administrative Officer position, which Ms. Cox responded negatively to because she had not known that policy. *Id.* at 33. Ms. Cox stated that, when the appellant told her that she should not have emailed the Director to deal with a "little issue," she told him that she "had no problem reporting unethical issues." *Id.* at 33–34. According to Ms. Cox, the two disagreed on whether his hiring practices were unethical and then the appellant said, "Let me tell you how busy I am here." *Id.* at 34.

Ms. Cox described the appellant as speaking "in a very authoritative voice and with a flushed face," when he told her that he was trying to hire for multiple positions and was a busy person. *Id.* She alleged that the appellant made her cry when speaking to her like that. *Id.* Ms. Cox stated that the appellant asked that she give him more time to meet in the future and she agreed. *Id.*

The appellant points to the fact that he did respond to Ms. Cox's initial email, but asserts he did not have "a realistic opportunity to address her concerns" before she emailed members of the Executive Leadership Team. AF, Tab 26, pp. 10–11. He asserts, without contradiction from the agency, that, between December 3, 2018, when Ms. Cox sent him her initial email, and December 13, 2018, when they met about her concerns, he was traveling for work each day except December 6, when he tried to catch up on some work, and December 11-12, when he was "consumed by Business Office supervisor interviews." *Id.* at 10.

The appellant states, and the agency does not dispute, that he was unaware "that [his] subordinate had established a secret two-day time limit" for him to meet with her, but that he did tell Ms. Cox how busy he had been due to his travel schedule and other responsibilities so she would understand why the meeting had not taken place sooner. *Id.* at 10–11. The appellant stated that this conversation occurred in the context of explaining the hiring process to Ms. Cox and advising her that she could have made a second attempt at contacting him if she felt the matter was time-sensitive before jumping the chain of command. *Id.* at 11. The appellant asserted that he was not using an "intimidating tone," but was using his regular tone of voice and attempting to be "especially sensitive" because Ms. Cox entered the meeting very emotional and combative. *Id.*

Based on the foregoing, I find that the agency failed to prove that the appellant's statement to the effect of "let me tell you how busy I am" was unprofessional. Presuming, without deciding, that the appellant employed an authoritative tone when uttering this phrase, this statement occurred after Ms. Cox had not given the appellant a reasonable opportunity to address the issue with her before going to the Director, nor had she informed him of her 48-hour suspense for this meeting. Additionally, according to Ms. Cox's statement, she had just questioned the appellant's ethics. I find that, when a supervisor is placed in this situation, it is not unprofessional to use an authoritative tone to voice displeasure with being called unethical by a subordinate and to explain to a subordinate why he was unable to see her on her demanded, unreasonable, and unnoticed schedule. Indeed, the appellant had every right to explain why he was not able to meet with Ms. Cox according to the short-fused, arbitrary timeline she set – which she had no authority to do. Finally, I note that the specification alleges that, "Upon learning of this email, you confronted [Ms. Cox]…." Reading this passage, one might conclude that the appellant immediately sought Ms. Cox out in anger. However, it is clear from the affidavits detailed above that this issue of his responsiveness and his reaction to it only arose after Ms. Cox pressed the

issue with the appellant during the meeting she initiated. Based on the foregoing, I find that the agency would not have been able to establish the appellant committed misconduct even on the lighter substantial evidence standard and that the strength of the evidence for this specification is abysmally weak.

Finally, having addressed the agency specifications, I make the following additional findings regarding the evidence. I find that the AFF's timeline, set as "urgent" by Director Vedral-Baron, was unreasonably quick: ten days from initiation to completion. Given that there is no specific act, much less serious misconduct, attributed to either the appellant or Ms. Barrier at the AFF's initiation that would have created a sense of urgency, it is difficult to surmise why Director Vedral-Baron deemed this AFF urgent. I further note the following deficiencies in the AFF which further detract from the strength of the agency's evidence against the appellant: 1) the AFF's questions were almost entirely leading as opposed to open-ended; and 2) the AFF failed to interview many of the employees the appellant proffered. Additionally, I find that the appellant's reply to the proposed removal not only thoroughly and convincingly explains why discipline was not warranted, but is also indicative of one who sincerely honors the VA's mission and core values. Yet, the decision letter summarily sustained all specifications. That fact leads me to believe that the deciding official did not even consider the appellant's reply, terminating an employee that the VA should be seeking to retain and promote instead of removing.

In sum, I find the feebleness of agency's evidence supporting its action to tip the scales almost insurmountably in favor of the appellant.

2. Director Vedral-Baron had an institutional motive to retaliate.

For the reasons detailed below, I find that the second *Carr* factor, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, weighs against the agency.

First, according to the TVHS organizational chart operative at the time of the excessive veteran wait time disclosure, doctors reported directly to the TVHS

Chief of Staff, who was Dr. Nadeau in June of 2018. AF, Tab 33, p. 4. As detailed above, the cause of the excessive veteran wait times, which the agency has not disputed, was habitual lateness by certain doctors at the Chattanooga clinic. I find that the doctors' habitual lateness directly implicates a failure of the Chief of Staff to manage and hold these employees accountable. I further find that this failure implicates the Chief of Staff's supervisor, the TVHS Director, for an issue that goes to the core of the VA's mission: timely veteran care, and an issue that could garner the VA considerable negative notoriety. *See Whitmore*, 680 F.3d at 1370–71 (finding appellant's criticisms cast the agency, and by implication all of the responsible officials, in a highly critical light by calling into question the propriety and honesty of their official conduct); *Ayers v. Department of Army*, 123 M.S.P.R. 11, 24, ¶ 29 (2015) (finding criticisms reflecting on an official's capacity to manage to establish a "substantial retaliatory motive"); *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, 300, ¶ 33 (2013) (same); *Chambers v. Department of Interior*, 116 M.S.P.R. 17, 55, ¶ 69 (2011) (finding motive to retaliate because the appellant's disclosures reflected on the responsible agency officials as representatives of the general institutional interests of the agency); *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, 23 (2010) (finding that comments generally 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). Indeed, these criticisms are aimed at arguably the VA's most valuable asset: physicians.

Second, regarding the ethics memorandum about Dr. L, these accusations, like the excessive veteran wait times, do not directly impute either Dr. Salloum or Director-Vedral Barron. However, I find that the ethics accusations do implicate a lack of oversight by the Executive Leadership Team. Additionally, if these accusations were to gain public notoriety, I find that they would likely cast the Executive Leadership Team in an unfavorable light.

Based on the foregoing, I find that Ms. Vedral-Baron had an institutional motive to retaliate against the appellant. Finally, I note that the appellant surmises that, given his steadfast reporting of infractions at the Chattanooga clinic and given upper management's apparent failure to address these infractions, the Executive Leadership Team may have been concerned the appellant would elevate his findings to the TJC. AF, Tab 26, p. 13, ¶ 22. Given the paucity of the evidence Director Vedral-Baron used to justify the appellant's removal, I am hard pressed to disagree.

3. The agency failed to meaningfully present evidence that it removes employees similarly situated to the appellant who are not whistleblowers.

The third and final *Carr* factor is whether the agency presents any evidence that it takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. In its closing submissions, the agency provides only a list of five Board docket numbers to support its assertion that the agency "does take action against individuals who have engaged in conduct unbecoming a federal employee." AF, Tab 25, p. 16. However, the agency entirely fails to explain why these other five employees' conduct was similar to the appellant's. Indeed, the generic charge of "conduct unbecoming" covers quite a broad range of misconduct. For example, it is arguably conduct unbecoming when an employee lacks manners, such as publically scoffing at a coworker's idea. Conduct unbecoming could encompass rape or murder. Additionally, the agency fails to identify whether the five proffered employees are whistleblowers or not. As it is well-settled that it is the agency's burden under *Carr*, and not the Board's, to present clear and convincing evidence, it is my view that the Board is not responsible for researching its docketing system to find support for the agency's position. If the agency cannot clearly support its claims with coherent factual and legal arguments, I find that it has failed to meaningfully carry its burden of producing clear and convincing evidence.

Based on the foregoing, I lack a firm conviction that the agency would have removed the appellant in the absence of his protected status. Correspondingly, I find that the agency's evidence falls well short of it burden under *Carr* and that the appellant is entitled to corrective action.[6]

Decision

The agency's action is REVERSED.

ORDER

I **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **July 16, 2019**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

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6 The appellant also raised the affirmative defenses harmful procedural error and a due process violation. AF, Tab 20. Because this Initial Decision provides the appellant with relief under the WPEA, I find it unnecessary to reach these affirmative defenses. The appellant also challenges the constitutionality of 38 U.S.C. § 714. However, the Board is without authority to determine the constitutionality of Federal statutes. *May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988).

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

As part of interim relief, I **ORDER** the agency to effect the appellant's appointment to the position of Health System Administrator, GS-670-13. The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the

agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: /S/
Christopher G. Sprague
Administrative Judge

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

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 **January 17, 2020**, 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 one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. 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 eAppeal website (https://eappeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

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.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. 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 OF APPEAL rights

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a courtappointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. 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** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST CONSEQUENTIAL AND/OR
COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.204.

In addition, the Whistleblower Protection Enhancement Act of 2012 authorized the award of compensatory damages including interest, reasonable expert witness fees, and costs, 5 U.S.C. §§ 1214(g)(2), 1221(g)(1)(A)(ii), which you may be entitled to receive.

If you believe you are entitled to these damages, you must file a motion for consequential damages and/or compensatory damages with this office WITHIN 60 CALENDAR DAYS OF THE DATE THIS INITIAL DECISION BECOMES FINAL.

	DFAS CHECKLIST **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.

3. Election forms for Health Benefits and/or TSP if applicable.

4. Statement certified to be accurate by the employee which includes:

a. Outside earnings with copies of W2's or statement from employer.
b. Statement that employee was ready, willing and able to work during the period.
c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.

5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.