UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 7

Docket Nos. DC-1221-04-0616-M-2
DC-0752-04-0642-M-2

Teresa C. Chambers,

Appellant,

v.

Department of the Interior,

Agency.

January 11, 2011

Paula Dinerstein, Esquire, Washington, D.C., for the appellant.

Deborah S. Charette, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a concurring opinion.

OPINION AND ORDER

¶1 This case is on remand from the U.S. Court of Appeals for the Federal Circuit, which affirmed the Board's decision sustaining three charges underlying the appellant's removal, but reversed the Board's decision to sustain one additional charge. *See Chambers v. Department of the Interior*, 602 F.3d 1370, 1373 (Fed. Cir. 2010). The court remanded the case to the Board for consideration of the penalty as well as the issue of whether the agency presented clear and convincing evidence that it would have taken the same personnel actions based on the sustained charges in the absence of the appellant's protected

disclosures. For the following reasons, we REVERSE the initial decision, GRANT the appellant's request for corrective action, and ORDER the agency to cancel the appellant's placement on administrative leave and removal.

BACKGROUND

¶2 The appellant was employed as Chief, U.S. Park Police (USPP). Initial Appeal File (IAF), MSPB Docket No. DC-0752-04-0642-I-1 (752 File), Tab 3, Subtab 4b at 1. On December 2, 2003, the Washington Post published an article quoting and otherwise describing statements the appellant allegedly made concerning her organization's need for additional resources. IAF, MSPB Docket No. DC-1221-04-0616-W-1 (Individual Right of Action (IRA) File), Tab 9, Subtab 4e. At 6:20 p.m. the same day, her immediate supervisor, Donald Murphy, the Deputy Director of the National Park Service, sent her an e-mail message instructing her that she was "not to grant anymore [sic] inerviews [sic] without clearing them with [him] or" the appellant's second-level supervisor, Fran Mainella, the Director of the National Park Service. *Id.*, Subtab 4f at 1; *see* IRA File, Tab 25, Exhibit (Ex.) J at 9; *id.*, Ex. H at 34-35.

¶3 On December 5, 2003, Mr. Murphy placed the appellant on paid administrative leave "pending the completion of a review of [her] conduct," and on December 17, 2003, he proposed to remove her based on the following charges: (1) Making improper budget communications with a United States House of Representatives (House) Interior Appropriations Subcommittee staff member, Deborah Weatherly; (2) making public remarks regarding security on the federal mall, in parks, and on the parkways in the Washington, D.C. metropolitan area; (3) improperly disclosing budget deliberations to a Washington Post reporter; (4) improper lobbying; (5) three specifications of failing to carry out a supervisor's instructions; and (6) failing to follow the chain of command. IRA File, Tab 8, Attachment G (notice of placement on administrative leave); 752 File, Tab 3, Subtab 4c at 1-5. In a notice issued on

July 9, 2004, Deputy Assistant Secretary of the Interior for Fish and Wildlife and Parks Paul Hoffman informed the appellant of his decision to sustain all of the charges and to remove her. 752 File, Tab 3, Subtab 4b at 1, 8.

¶4 The appellant had filed a January 29, 2004 complaint with the Office of Special Counsel (OSC) alleging that her placement on administrative leave and the proposal to remove her constituted reprisal for disclosures she made to Ms. Weatherly mentioned in the first charge, to the Washington Post, and to Ms. Mainella during the period from November 3 through December 2, 2003. IRA File, Tab 1.[1] On June 28, 2004, 11 days before the decision to remove her was issued, the appellant filed an IRA appeal with the Board's Washington Regional Office challenging the agency's decision to place her on administrative leave and propose her removal. IRA File, Tab 1 at 1, 5.[2] In a subsequent submission, she indicated that the actions she was challenging in her IRA appeal included a "gag order" the agency had issued to her on December 2, 2003, i.e., the order mentioned above in which Mr. Murphy instructed her not to grant any more interviews without his prior approval or that of Ms. Mainella. IRA File, Tab 8 at 13. On July 12, 2004, 2 days after the July 10, 2004 effective date of her removal, the appellant filed a Board appeal of that action. 752 File, Tab 1.

¶5 After a hearing, the administrative judge dismissed the IRA appeal for lack of jurisdiction and affirmed the removal action. IRA File, Tab 46. The administrative judge sustained four of the six charges, i.e., the charges of making

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[1] According to the administrative judge, the appellant stated in her OSC complaint that the agency placed her on administrative leave and proposed her removal in reprisal for a November 3, 2003 disclosure of information to Ms. Weatherly, a November 20, 2003 disclosure to the Washington Post, and a December 2, 2003 disclosure to Ms. Mainella. IRA File, Tab 1.

[2] Although OSC's investigation of the appellant's complaint had not been completed when the IRA appeal was filed, OSC subsequently notified the appellant, by letter dated July 9, 2004, that it had closed the investigation because of the filing of the appeal. IRA File, Tab 8, Subtab C.

public remarks regarding security in public areas (charge two), improperly disclosing budget deliberations (charge three), failing to carry out a supervisor's instructions (charge five), and failing to follow the chain of command (charge six). *Id.* at 17-40. She also found that: (1) Although the appellant's placement on administrative leave and her proposed removal were personnel actions that could be challenged in an IRA appeal, the "gag order" was not; (2) the appellant failed to establish that she made any disclosures protected under 5 U.S.C. § 2302(b)(8);[3] and (3) even if the appellant had made protected disclosures and those disclosures were contributing factors in her placement on administrative leave and proposed removal, the agency established by clear and convincing evidence that it would have taken those actions in the absence of her alleged protected disclosures. *Id.* at 4-17, 41-43. The administrative judge found the appellant's other affirmative defenses unsubstantiated and held that the penalty of removal was reasonable in light of the sustained charges and other relevant factors. *Id.* at 49-51.

¶6 The appellant petitioned for review of the initial decision. Petition for Review File, Tab 7. Two Board members affirmed the initial decision as modified, finding that the appellant had failed to show any material error in the administrative judge's findings and conclusions concerning the merits of the charges. *Chambers v. Department of the Interior*, 103 M.S.P.R. 375, ¶¶ 1, 12-13 (2006), *aff'd in part, vacated in part, and remanded*, 515 F.3d 1362 (Fed. Cir. 2008). The Board majority also concurred in the administrative judge's conclusion that the appellant had not made protected disclosures, found that a

[3] The administrative judge found that a December 2, 2003 e-mail from the appellant to Ms. Weatherly contained information about the effect of a "staffing and resource crisis" on the ability of the USPP to prevent "loss of life or the destruction" of one of the monuments. IRA File, Tab 46 at 8 n.3; *id.*, Tab 9, Subtab 4i. She found that it was unnecessary to determine whether the disclosure of this information was protected whistleblowing activity because the appellant did not show that she had exhausted her administrative remedy by bringing it to the attention of OSC. IRA File, Tab 46 at 8 n.3.

disclosure not addressed by the administrative judge was not protected, found that the appellant had not shown material error in the administrative judge's analysis of the appellant's other affirmative defenses, and found the penalty of removal reasonable. *Id.*, ¶¶ 14-43. The Board majority also noted that, in light of its conclusion that the appellant did not make a protected disclosure, it did not reach the question of whether the "gag order" was a personnel action under 5 U.S.C. § 2302(a)(2)(A). *Id.*, ¶ 32 n.5. In a dissenting opinion, Member Barbara J. Sapin asserted that the agency did not prove any of its charges and specifications and that the order restricting the appellant's contact with the news media, her placement on administrative leave, and her removal constituted reprisal for protected whistleblowing. 103 M.S.P.R. 375, dissenting opinion, ¶ 2.

¶7 The appellant then filed a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit. *Chambers v. Department of the Interior*, 515 F.3d 1362, 1365 (Fed. Cir. 2008) (*Chambers I*). The court affirmed the Board majority's decision concerning the merits of the charges and the reasonableness of the penalty. *Id.* at 1365, 1370. The court found, however, that the Board had applied an incorrect standard in evaluating the appellant's claim that her removal was reprisal for her alleged protected disclosures to the Washington Post reporter and the House staffer of a danger to public safety. *Id.* at 1367-68. The court therefore vacated the Board's decision in part and remanded the appeals for application of the correct standard with respect to those potential disclosures. *Id.* at 1365, 1368-69, 1371. The court held that "[a]s to all other aspects of the Board's decision, however, we affirm." *Id.* at 1371.

¶8 On remand, the two-member Board affirmed as modified the initial decision sustaining the appellant's removal and denying her request for corrective action. *Chambers v. Department of the Interior*, 110 M.S.P.R. 321 (2009). The Board first noted that, by remanding the case the court had reinstated the appellant's arguments regarding the nature and effect of her public-safety-related statements, and that "[a]ll other issues in these appeals have been resolved." *Id.*,

¶ 9. The Board denied the appellant's motion to reopen its previous decision and to reconsider the merits of the sustained charges apart from the whistleblowing issue. *Id.*, ¶ 11. The Board also rejected her whistleblowing claims. Although the two Board members agreed on the disposition of the case, they did not agree on the reasoning. *Id.*, ¶ 10. Thus, the Board affirmed the initial decision as modified by the Opinion and Order, still sustaining the appellant's removal and denying corrective action. *Id.*, ¶ 12. Chairman Neil A.G. McPhie, in a separate concurring opinion, would have found that the appellant made some protected disclosures, but that the agency presented clear and convincing evidence that it would have taken the same actions in the absence of those disclosures. *Id.*, ¶ 10. Vice Chairman Mary M. Rose, in a separate concurring opinion, would have found none of the appellant's disclosures to be protected, and thus did not reach the issue of whether the agency would have taken the same actions absent the alleged protected disclosures.

¶9 The appellant again appealed the Board's decision to the court. This time, the court held that although the Board properly sustained charges three, five, and six, it should not have sustained charge two, making public remarks regarding security on the federal mall, in parks, and on the parkways in the Washington, D.C. metropolitan area, because the sole specification for charge two was grounded in a protected disclosure, namely, that traffic accidents had increased on the Baltimore-Washington Parkway, which often had two officers on patrol instead of the recommended four, and because that disclosure evidenced a substantial and specific danger to public health or safety. *Chambers*, 602 F.3d at 1378-80 (*Chambers II*). The court further held that this disclosure was a contributing factor in the agency's decision to take adverse action against the appellant, and that the remaining issues in the case were whether removal remained a reasonable penalty in light of the dismissal of charge two, and whether the agency proved by clear and convincing evidence that it would have taken the same personnel actions against the appellant in the absence of the

protected disclosures. *Id*. at 1380. The court remanded the case to the Board for further consideration, including whether the penalty of removal was reasonable in light of the three remaining sustained charges – charges three, five, and six – and whether the agency established by clear and convincing evidence that it would have removed the appellant based on the sustained charges. *Id*. at 1381-82. The court ordered the Board to receive briefing from the parties, consider whether a remand to the administrative judge was appropriate, and "address the other two actions as well [i.e., her placement on administrative leave and the agency's restriction of the appellant's access to the media] to see if corrective action is warranted." *Id*. at 1381-82 & n.11.

¶10 On remand from the court, the Board solicited briefs from the parties on the following issues: (1) Is the penalty of removal reasonable for the three sustained charges; (2) did the agency prove by clear and convincing evidence that it would have removed the appellant in the absence of her protected whistleblowing; (3) what corrective action, if any, should be ordered for the appellant's having been placed on administrative leave and having had her media access restricted; and (4) is a remand to the administrative judge appropriate. Court Remand File, Tab 4 at 1. The Board also requested the parties to brief an additional issue regarding penalty in light of 5 U.S.C. § 7701(c)(2)(B), but we find it unnecessary to reach this additional issue because of the findings we reach today. The parties have filed briefs and reply briefs addressing all the relevant issues.

¶11 In reaching our decision, we find it unnecessary to remand the appeal to the administrative judge. The administrative judge conducted a full hearing on all material issues in the appeal including, among other things, the merits of the agency's charges and the appellant's allegations of reprisal for protected whistleblowing activity. We therefore find the record sufficiently well-developed to resolve the issues remanded to us by the court. *See Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994) (remand is unnecessary to resolve conflicts

in the evidence when the record is sufficiently well-developed to address the contested issues on review and the Board's findings are not based on witnesses' demeanor), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995); *see also Booker v. Department of Veterans Affairs*, 110 M.S.P.R. 72, ¶ 7 (2008) and *Gregory v. Federal Communications Commission*, 84 M.S.P.R. 22, ¶ 6 (1999), *aff'd*, 232 F.3d 912 (Fed. Cir. 2000) (Table). We note that the administrative judge's terse "clear and convincing" analysis did not rely on the demeanor of witnesses in finding that the agency proved by the higher clear and convincing evidence standard that it would have placed the appellant on administrative leave and proposed her removal. IRA File, Tab 46 at 16-17; *see Haabe v. Department of Justice*, 288 F.3d 1288, 1301-02 (Fed. Cir. 2002) ("When the demeanor-based deference requirement is not in play, the MSPB is free to reweigh the evidence and substitute its own decision as to the facts or law"). Further, this clear and convincing analysis was premised on the incorrect conclusion that the appellant had not engaged in protected whistleblowing activity. IRA File, Tab 46 at 16-17. We also note that the administrative judge made no findings at all related to "clear and convincing evidence" and the agency's removal *decision*. *Id*. at 40-43. For all of these reasons, we find it appropriate to adjudicate the remanded appeal at the Board level.

ANALYSIS

¶12 The Whistleblower Protection Act (WPA) prohibits any employee with the authority to take, direct others to take, recommend, or approve any personnel action from taking, failing to take, or threatening to take or fail to take, any personnel action because of the disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes evidences 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 or safety. 5 U.S.C. § 2302(b)(8). In an appeal before the Board, the

employee or applicant must establish by preponderant evidence that she made a protected disclosure and that the disclosure was a contributing factor in a personnel action. 5 U.S.C. § 1221(e)(1). If the employee or applicant meets that burden, the Board shall order such corrective action as it considers appropriate unless the agency shows by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(1)-(2); *see Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

¶13 The court in this case has held that the agency proved three of the original six charges it brought against the appellant: Improperly disclosing budget deliberations to a Washington Post reporter; three specifications of failing to carry out a supervisor's instructions; and failing to follow the chain of command. *Chambers II*, 602 F.3d at 1373 n.1, 1381. The court has also held that the appellant made at least one protected disclosure and proved that the disclosure was a contributing factor in the appellant's placement on administrative leave and removal. *Id*. at 1380. Because we find, as set forth below, that the agency did not meet its burden of proving by clear and convincing evidence that it would have placed the appellant on administrative leave and removed her in the absence of her disclosures, and that the agency would in fact have taken no action against the appellant in the absence of her protected disclosures, we need not address whether removal is a reasonable penalty in light of the dismissal of charge two by the court. *See Stevens v. Department of the Army*, 73 M.S.P.R. 619, 630 n.2 (1997) (upon finding that the appellant proved disability discrimination and reversing the removal, the Board held that it did not need to address the penalty); *Marren v. Department of Justice*, 29 M.S.P.R. 118, 120 n.1 (1985), *overruled on other grounds by Hougens v. U.S. Postal Service*, 38 M.S.P.R. 135, 144 n.10 (1988); *cf. Wills v. U.S. Postal Service*, 84 M.S.P.R. 90, ¶ 8 (1999) (in light of the Board's determination that the agency did not prove its charge, the Board did not need to address arguments concerning the reasonableness of the penalty).

¶14 Although the court in *Chambers II*, 602 F.3d at 1371 n.11, indicated that "[o]n remand, the Board should address the other two actions as well to see if corrective action is warranted," we do not interpret this instruction by the court as finding, or requiring the Board to find, that the restriction of the appellant's media access was a covered personnel action under 5 U.S.C. § 2302(a)(2)(A). As explained above, the administrative judge initially found that the agency's action in this regard was not an appealable personnel action. The Board affirmed that finding when it affirmed the initial decision as modified. In *Chambers I*, the court held that, except for the incorrect standard the Board applied in determining whether the appellant made a protected disclosure in connection with her removal, "all other aspects" of the Board's decision were affirmed. 515 F.3d at 1371. On remand from the court, the Board therefore noted that all issues, except for the appellant's arguments regarding the nature and effect of her public-safety-related statements, had been resolved. Thus, two full Board decisions and one court decision have upheld the initial decision's determination that the restriction on media access was not a personnel action. We therefore decline to revisit our previous ruling on this issue.[4]

¶15 In any event, the record reflects that the appellant did not exhaust her remedy with OSC with respect to the agency's order that she obtain prior approval before granting media interview requests. *See* IRA File, Tab 8, Subtab A at 10-11; *id.*, Tab 1, OSC Complaint at 9-10, 18 (the appellant's OSC complaint indicating that the personnel actions she was challenging included a

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[4] We do not find any conflict in the court's two decisions regarding the media access issue. The Board is thus bound by the Federal Circuit's *Chambers I* decision on this issue pursuant to the "mandate rule," a specific application of the "law of the case" doctrine. *Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 552 (1993). To the extent there may be a conflict, the earlier panel decision in *Chambers I* controls. *See Johnston v. IVAC Corp.*, 885 F.2d 1574, 1579 (Fed. Cir. 1989) (if the holdings in two Federal Circuit panel decisions cannot be reconciled, the earlier panel decision remains controlling unless and until the court overrules it en banc).

December 5, 2003 placement on administrative leave and a December 17, 2003 notice of proposed removal); IRA File, Tab 8, Subtab C (OSC's letter closing its investigation of her complaint "regarding your placement on administrative leave and proposed removal"); *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992) (to satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action).

Protected Disclosures

¶16 In finding that charge two, "Making public remarks regarding security on the Federal mall, and in parks and on the Parkways in the Washington, D.C., Metropolitan area," could not be sustained because its sole specification was grounded in a protected disclosure, the court in *Chambers II*, 602 F.3d at 1379, found it unnecessary

> for present purposes to examine all of Chambers' statements to the Washington Post reporter as we agree with Chairman McPhie that Chambers' first statement that traffic accidents have increased on the Baltimore-Washington ('BW') Parkway, which often had two officers on patrol instead of the recommended four, was protected under the WPA as evidencing a substantial and specific danger to public health or safety.

The court held that an increase in traffic accidents was a significant and serious danger to public safety, that the appellant's statement detailed the specific consequences that had already resulted from the diversion of officers from the BW Parkway – more traffic accidents – and that the statement included the specific details as to the cause of the increased danger, namely, the reduction from four officers to two. *Id*. The court found that the alleged danger was not vague or speculative and was more than likely to occur, given that it had, in fact, already occurred. *Id*. The court also held that the appellant's belief that traffic accidents presented a substantial danger and that the diversion of Park Police from the BW Parkway was the cause of the increase in traffic accidents, was

reasonable, given Mr. Murphy's acknowledgement that a change in police staffing to patrol the highways could affect traffic safety, as well as the appellant's expertise in public safety. *Id*.

¶17 The court recognized that the appellant had argued that "certain statements she made to the *Washington Post* as well as statements she made to the House staffer were protected under section 2302(b)(8) because they constituted disclosures of information she reasonably believed evidenced a substantial and specific danger to public safety." *Chambers II*, 602 F.3d at 1377. Nevertheless, the court held that it was not necessary for "present purposes" to examine any of the appellant's alleged protected disclosures beyond the one it found protected. *Id*. at 1379. There is no indication in the court's decision that it intended to preclude the Board from finding on remand that other disclosures relating to public safety and identified in the court's decision were protected. In fact, the court referred to the plural "disclosures" in its instructions to the Board, thus suggesting that there might be other protected disclosures in addition to the one it found protected "for present purposes." *See Chambers II*, 602 F.3d at 1373 ("[W]e remand to the Board for reconsideration of whether . . . the agency has presented clear and convincing evidence that it would have taken the same personnel actions . . . in the absence of her protected disclosures"), 1380 ("[T]he remaining issues are whether removal remains a reasonable penalty . . . and whether the agency has proved by clear and convincing evidence that it would have taken the same personnel actions . . . in the absence of the protected disclosures"). Accordingly, we address whether the statements raised before the court, which the appellant made to the Washington Post reporter and the House staffer, constitute protected disclosures.

¶18 The administrative judge in this case concluded that the appellant made the following statements to the Washington Post reporter:

- "The U.S. Park Police department has been forced to divert patrol officers to stand guard around major monuments," resulting in "declining safety in parks and on parkways."
- "[T]raffic accidents have increased on the Baltimore-Washington Parkway, which now often has two officers on patrol instead of the recommended four."
- "In neighborhood areas . . . residents are complaining that homeless people and drug dealers are again taking over smaller parks."
- "Well, there's not enough of us to go around to protect those green spaces anymore."
- "[M]any officers have remained on 12-hour shifts, with only limited bathroom breaks for those guarding monuments."
- "My greatest fear is that harm or death will come to a visitor or employee at one of the parks, or that we're going to miss a key thing at one of our icons."

IRA File, Tab 46 at 12, 25-26.

¶19 The court in *Chambers I* set forth the factors that guide the Board in determining "when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA." 515 F.3d at 1369. These are: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm – the potential consequences. *Id*. In light of these factors and prior cases, we find protected the appellant's statement concerning the diversion of Park Police patrol officers from national parks and the resulting increase in drug dealing in smaller national parks. This statement describes a specific consequence that the appellant alleged had already resulted from the diversion of Park Police patrol officers from the smaller national parks. This consequence, an increase in drug dealing, is an objectively significant and serious danger to public health and safety. The appellant's belief that it was so is, therefore, reasonable. Moreover, this resulting peril was not merely speculative or imminent; rather, it had already occurred. It was therefore not vague or speculative, but was specific and actual. In the context of this specific allegation, the appellant's more general reference to "declining safety in parks"

and her claim that "there's not enough of us to go around to protect those green spaces anymore" are also protected. Those statements summarize and are supported by her more detailed statements addressing the same subject matter.

¶20 We further note that the appellant had expertise in public safety and was familiar with the areas under her jurisdiction. *Chambers II*, 602 F.3d at 1379. Her belief that increased crime in the smaller national parks was attributable to a reduction in police patrols was therefore reasonable. For the foregoing reasons, we find that the appellant's statements concerning decreased police patrols and the diversion of park police from national parks, and the resultant increase in drug dealing constituted a protected disclosure under 5 U.S.C. § 2302(b)(8).

¶21 Other statements attributed to the appellant in the Washington Post article, however, do not constitute protected disclosures under the *Chambers I* factors and in light of the relevant case law. Officers being required to remain on duty for 12-hour shifts without bathroom breaks might create the potential for fatigue and distraction that would undermine an officer's effectiveness. But in the absence of a specific example illustrating a substantial public health or safety consequence of the long shifts, or a manifestation of such fatigue, the statements standing alone are insufficient. Also insufficiently specific are the appellant's stated fear of "harm or death com[ing] to a visitor or employee at one of the parks, or that we're going to miss a key thing at one of our icons." These vague and conclusory allegations standing alone are unprotected. In addition, they are not supported by more specific allegations that would evidence a reasonable basis for her stated fears. Although the appellant pointed to the specific danger of increased numbers of drug dealers in the parks, her statements do not evidence a reasonable basis from which to conclude that the threats of "harm or death" are likely to befall a park visitor or employee as a result. These conclusory statements therefore differ from the ones relating to declining safety in the parks and on the parkways, which we and the court have found to be protected because they were supported by more specific statements evidencing their reasonableness.

¶22 The second communication acknowledged by the court was the e-mail message the appellant sent on December 2, 2003, to House Interior Appropriations Subcommittee staff member Ms. Weatherly. This disclosure was raised in connection with the appellant's removal, but was not raised in her OSC complaint with respect to the other personnel actions at issue in her IRA appeal. *See Chambers*, 103 M.S.P.R. 375, ¶¶ 14-15. In the e-mail, the appellant complained in relevant part that inadequate funding had resulted in inadequate staffing, and then identified several alleged consequences. These are: (1) "Not only are our most recognizable parks in jeopardy, so are the people who travel to and from Washington, D.C., on our parkways"; (2) "we generally have only two officers working at any one time on the George Washington Parkway, a situation that also occurs on our other parkways"; (3) "[w]e have had to turn our backs on drunk drivers, since making an arrest would require two officers off the street"; (4) the "staffing and resource crisis . . . will almost surely result in the loss of life or the destruction of one of our nations [sic] most valued symbols of freedom and democracy"; and (5) "the National Park Service's ability to protect these precious historical icons . . . or our guests who visit them or any of our other parks is increasingly compromised." IRA File, Tab 9, Subtab 4i.

¶23 Under the *Chambers I* factors and Federal Circuit and Board precedent, we find that most of these statements are not protected. The appellant's general pronouncements that the national parks are "in jeopardy," and that the National Park Service's ability to protect historical icons and visiting guests "is increasingly compromised," are too vague and nonspecific to be protected. The appellant's prediction that inadequate staffing will result in the loss of life or destruction of a monument is too speculative. These statements are divorced from any additional information by which the appellant's predictions can be judged. There may well be a staffing level below which reasonable predictions of likely harm could be made, but there is nothing in the appellant's statements to indicate she reasonably believed that level had been reached.

¶24 On the other hand, the appellant's statements that patrolling the George Washington (GW) Parkway with only two officers had already required the USPP to "turn [their] backs on drunk drivers" in order to avoid requiring the officers to abandon their posts, identifies the specific cause of a substantial and specific danger to public safety that has already occurred. It is objectively reasonable to believe that a failure by Park Police officers to arrest suspected drunk drivers presents a substantial danger to other drivers and pedestrians on the GW Parkway. Her statement that "people who travel to and from Washington, D.C., on our parkways" are "in jeopardy" is also protected because it summarizes in conclusory form her identification of the specific and substantial threat of lax drunk driving enforcement. Accordingly, we find that the appellant's statements in the December 2, 2003 e-mail concerning the number of officers patrolling the GW Parkway, the consequent decision not to arrest suspected drunk drivers, and the resulting jeopardy to parkway travelers, are protected under 5 U.S.C. § 2302(b)(8). The appellant's other statements in the e-mail are not protected.[5]

Contributing Factor

¶25 As set forth above, in order to prevail on a claim of reprisal for making disclosures protected under 5 U.S.C. § 2302(b)(8), an appellant must show by

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[5] The Board's reviewing court has held that disclosures made through normal channels as part of the disclosing employee's normal duties are not protected under 5 U.S.C. § 2302(b)(8). *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001). The record shows that the appellant communicated with Ms. Weatherly in the course of her work, and that her predecessor also occasionally talked to Ms. Weatherly regarding USPP needs. *See* Hearing Transcript, Sept. 8, 2004 (HT-1), at 223, 242. We see no indication, however, that communications such as the e-mail message at issue here, i.e., appeals to a subcommittee staff member for increased funding and expressions of concern to her regarding the effects of a failure to obtain that increase, made up part of the appellant's normal duties. Moreover, the fact that information an employee disclosed is closely related to the employee's day-to-day responsibilities does not remove the disclosure of that information from protection under section 2302(b)(8). *See Marano v. Department of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993).

preponderant evidence that the disclosures were a contributing factor in the agency's personnel action. *See* 5 U.S.C. § 1221(e)(1). An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id*.

¶26 The court in *Chambers II*, 602 F.3d at 1380, held that the administrative judge considered the contributing factor issue and found that the appellant's statements that had been reported in the Washington Post were a contributing factor in her placement on administrative leave and removal. The administrative judge based this finding on the timing of the actions in relation to the disclosure and on evidence that Mr. Murphy was aware of the appellant's statements to the reporter at the time he placed the appellant on administrative leave and proposed her removal. IRA File, Tab 46 at 15. The court noted that the agency did not challenge this finding and that the disclosure it found protected was a contributing factor in the agency's decision to "take adverse action" against the appellant. *Id*. For the same reasons expressed by the court and the administrative judge, we find that the appellant's disclosure to the Washington Post reporter concerning the diversion of Park Police patrol officers from national parks and the resulting increase in drug dealing in smaller parks was also a contributing factor in her placement on administrative leave and removal.[6]

¶27 We further find that the appellant's December 2, 2003 e-mail to Ms. Weatherly, which we have found constitutes a protected disclosure, was a contributing factor in the appellant's removal. The record includes a copy of an

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[6] Mr. Hoffman learned of these protected disclosures on the morning of December 2, 2003, when he read the Washington Post article. IRA File, Tab 25, Ex. I, Hoffman Deposition at 33.

e-mail that Ms. Weatherly sent to Mr. Murphy on December 4, 2003, referring to an e-mail the appellant had sent her "[j]ust the other day," and indicating that the appellant's e-mail had been forwarded to Mr. Murphy under separate cover. IRA File, Tab 9, Subtab 4d. Ms. Weatherly acknowledged at the hearing that the message to which she was referring was "[p]erhaps" the December 2 e-mail from the appellant, Hearing Transcript, Sept. 8, 2004 (HT-1) at 243, and the description of the message she provided to Mr. Murphy leaves little room for doubt that she was referring to that message, *compare* IRA File, Tab 9, Subtab 4d (Ms. Weatherly's December 4, 2003 e-mail describing message from the appellant as one in which the appellant "requests more money and staff and contends that most of the NAPA recommendations have been implemented")[7] *with id.*, Subtab 4i (the appellant's December 2, 2003 e-mail message to Ms. Weatherly informing her that fiscal challenges made it uncertain as to whether recruit classes would be hired, and that fourteen of the twenty NAPA recommendations had been fully implemented). Mr. Murphy acknowledged that he received, probably on December 4, 2003, or the next day, the appellant's December 2, 2003 e-mail message to Ms. Weatherly that had been forwarded to him by Ms. Weatherly. IRA File, Tab 25, Ex. J, Murphy Deposition at 323-28. Thus, we find by preponderant evidence that the appellant's December 2, 2003 e-mail to Ms. Weatherly was a contributing factor in her December 5, 2003 placement on administrative leave and her removal, which was proposed by Mr. Murphy on December 17, 2003. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).[8]

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[7] The "NAPA recommendations" refer to a review of the USPP issued by the National Academy of Public Administration and were another topic mentioned in the appellant's December 2 message. *See* IRA File, Tab 9, Subtab 4i at 1.

[8] It is unclear whether Mr. Hoffman was aware of the appellant's December 2, 2003 protected disclosure to Ms. Weatherly when he decided to remove the appellant. However, an appellant can show that a protected disclosure was a contributing factor by

Clear and Convincing Evidence

¶28 Because the appellant made protected disclosures that were a contributing factor in her placement on administrative leave and removal, the remaining issue is whether the agency met its burden of proving by clear and convincing evidence that it would have taken the same actions in the absence of the protected disclosures. *See* 5 U.S.C. § 1221(e)(2); *Chambers II*, 602 F.3d at 1380. In particular, the court instructed the Board to determine whether the agency established by clear and convincing evidence that it would have removed the appellant based on the sustained charges three, five, and six, absent her protected disclosures relating to public health and safety. *Chambers II*, 602 F.3d at 1382 (in making this determination, the agency cannot rely on the conduct underlying charges one, two, and four, which have been set aside). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). It is a higher standard than a "preponderance of the evidence," which is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *Id.*; *see* 5 C.F.R. § 1201.56(c)(2). As explained by one of the sponsors of the WPA, "clear and convincing evidence" is an intentionally high standard of proof:

> "Clear and convincing evidence" is a high standard of proof for the Government to carry. It is intended as such for two reasons. First,

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proving that the acting official was influenced by an individual with actual knowledge of the disclosure. *See, e.g., Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 23 (2010). We find that Mr. Hoffman was influenced by Mr. Murphy's decision to propose the appellant's removal, had imputed or "constructive" knowledge of this protected disclosure, and acted within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the removal. *See id.*, ¶ 24; *Visconti v. Environmental Protection Agency*, 78 M.S.P.R. 17, 24 (1998); *see also* IRA File, Tab 25, Ex. I, Hoffman Deposition at 35 (Mr. Hoffman considered Mr. Murphy a colleague and friend).

> this standard of proof comes into play only if the employee has proven by a preponderance of the evidence that whistleblowing was a contributing factor in the action against him or her – in other words, that the agency action was tainted. Second, this heightened burden of proof on the agency recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bears a heavy burden to justify its actions.

135 Cong. Rec. S2780 (Mar. 16, 1989) (statement by Sen. Levin); *see also* 135 Cong. Rec. H747 (Mar. 21, 1989) (similar statement by Rep. Sikorski); *Fulton v. Department of the Army*, 95 M.S.P.R. 79, ¶ 9 (2003).

¶29 In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel actions in the absence of whistleblowing, the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence 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).

Strength of the Agency's Evidence

¶30 When examining the strength of the agency's evidence, the Board will look at the evidence the agency had before it when it took the alleged retaliatory action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1372 (Fed. Cir. 2001); *Russell v. Department of Justice*, 76 M.S.P.R. 317, 326 (1997). If the agency fails to investigate a charge sufficiently before bringing an action, such a failure might indicate an improper motive. *Social Security Administration v.*

Carr, 78 M.S.P.R. 313, 335 (1998), *aff'd*, 185 F.3d 1318 (Fed. Cir. 1999).[9] However, if relevant facts are developed on appeal to the Board that the agency had no prior reason to know, the Board will not find that such facts undercut the agency's otherwise sufficiently clear and convincing evidence that, at the time of the action, its decision would have been the same absent the whistleblowing. *Id.* It behooves an agency, when faced with the "clear and convincing evidence" standard, to fully explain all of its potentially questionable actions to meet that burden. *Cosgrove v. Department of the Navy*, 59 M.S.P.R. 618, 625-26 (1993); *see also Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶¶ 23-24 (2010) (general statements by agency officials that they did not retaliate insufficient to establish clear and convincing evidence).

Charge Three

¶31 The Board and the court sustained this charge of improperly disclosing budget deliberations. The agency alleged that the appellant violated section 22.1 of the Office of Management and Budget (OMB) Circular A-11 (2003), which it quoted as follows:

> The nature and amounts of the President's decisions and the underlying materials are confidential. Do not release the President's decisions outside of your agency until the budget is transmitted to Congress. Do not release any materials underlying those decisions, at any time, except in accordance with this section . . . . Do not release any agency justifications provided to OMB and any agency future plans or long-range estimates to anyone outside the executive branch, except in accordance with this section.

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[9] After the appellant submitted her written reply to the proposal notice, Mr. Hoffman conducted interviews with five agency employees and Ms. Weatherly. 752 File, Tab 3, Subtabs 4e - 4j. Mr. Hoffman also considered an affidavit from John Wright and comments prepared by Randolph Myers. *Id.*, Subtabs 4d, 4k; *see* IRA File, Tab 25, Ex. I, Hoffman Deposition at 129-30. However, Mr. Hoffman did not seek any additional information from the appellant after she had submitted her reply to the proposed removal, even though such additional information may have helped him to fairly resolve contested issues of material fact.

752 File, Tab 3, Subtab 4c at 3. The agency asserted that the President had not transmitted the 2005 budget to Congress, that the appellant had informed the Washington Post reporter, during the same interview mentioned above, that she had "asked for $8 million more for next year," and that making this statement before the President transmitted the 2005 budget to Congress constituted an improper disclosure of 2005 federal budget information in violation of section 22.1 of OMB Circular A-11. *Id.*

¶32 The Washington Post article provided, in relevant part,

> The Park Police's new force of 20 unarmed security guards will begin serving around the monuments in the next few weeks, Chambers said. She said she eventually hopes to have a combination of two guards and two officers at the monuments.
>
> Though such guards have worked inside the Washington Monument and the White House Visitor Center, Chambers said they had not previously been used outside monuments in place of a police officer.
>
> She said a more pressing need is an infusion of federal money to hire recruits and pay for officers' overtime. She said she has to cover a $12 million shortfall for this year and has asked for $8 million more for next year. She also would like $7 million to replace the force's aging helicopter.
>
> But leaders in Congress are not inclined to go along. Instead, they have backed a 2001 report by the National Academy of Public Administration, which found that Park Police spent about 15 percent of their time on activities that "often are extraneous to the park service mission."

752 File, Tab 3, Subtab 4m at 66. The agency had before it interview testimony from the National Park Service's Budget Director, Charles Bruce Schaefer, indicating that the USPP had requested from OMB $8 million for fiscal 2005. 752 File, Tab 3, Subtab 4h at 3, 14. In her response to the proposal notice, however, the appellant alleged that her statement regarding the $8 million figure was reported inaccurately, and that she was in fact responding to a question from the reporter about how much money was *needed*, rather than how much she or the

agency had *requested*. 752 File, Tab 3, Subtab 4l at 19.[10] The agency does not deny – and in fact, Mr. Murphy has conceded, IRA File, Tab 25, Ex. J, Murphy Deposition at 251 – that employees are entitled to publicly express their beliefs as to the resources the agency needs to meet its goals. In fact, the record shows that Mr. Murphy had previously made statements to the press that are similar to the statements allegedly made by the appellant to the Washington Post. *See* IRA File, Tab 1, "Charge 3" Subtab at 35 (Mr. Murphy described in Arizona Star article as saying "he's pushing Congress to spend $4 million to $7 million to install 32 miles of the barrier at Organ Pipe"). Moreover, the frequency with which correction notices appear in newspapers demonstrates that factual errors like those described by the appellant here are not uncommon. *See* 5 C.F.R. § 1201.64 (official notice may be taken of matters of common knowledge).

¶33 The Washington Post article itself does not strongly support the charge. As indicated above, it includes a statement that the appellant said she had "asked for $8 million more for next year." The sentence in which this statement is made, however, immediately follows a sentence in which the appellant is described as having said that "a more pressing need is an infusion of federal money to hire recruits and pay for officers' overtime." IRA File, Tab 9, Subtab 4e. The article therefore could be read as indicating that the $8 million to which the appellant referred represented an amount that would cover only two components of the budget increase to which she referred, i.e., money to hire new employees and money to pay overtime. It is also followed immediately by a statement that the appellant "also would like $7 million to replace the force's aging helicopter," and

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[10] This statement by the appellant in her response to the proposal notice was consistent with her deposition and hearing testimony. IRA File, Tab 38, Appellant's Deposition at 73, 88; Hearing Transcript, Sept. 9, 2004 (HT-2) at 102-03. As noted in footnote 9 above, although the deciding official interviewed other individuals after receiving the appellant's response to the proposed removal, he made no additional inquiries of the appellant that may have resolved conflicts in the evidence.

preceded by a statement that she needed to "cover a $12 million shortfall" for the year. *Id*. Thus, the article could be interpreted as indicating that the appellant referred to an increase of at least $15 million – nearly twice the size of the overall net increase in USPP funding that the agency actually had requested. In fact, the Washington Post published another article by the same reporter 4 days after the article at issue here, and that article described the appellant's statement regarding the $8 million figure in a manner consistent with the appellant's allegation, i.e., it indicated that the appellant had said "that her department had a $12 million shortfall this year and that $8 million was *needed* for next year." IRA File, Tab 1, "Charge Three" Subtab at 9-10 (emphasis added). In any event, the December 2 article is hearsay evidence, and, while relevant hearsay evidence is admissible in Board proceedings, the Board generally favors live testimony over hearsay. *Bledsoe v. Department of Justice*, 91 M.S.P.R. 93, ¶ 17 n.4 (2002), *review dismissed*, 60 F. App'x 803 (Fed. Cir. 2003).

¶34 The deciding official obtained a declaration from John Wright, the agency's senior public affairs officer. Mr. Wright's declaration indicates only that Mr. Wright read to the reporter statements that the reporter attributed to the appellant, asked the reporter "whether in connection with the aforementioned statements that appeared in The Washington Post on December 2, 2003, he had accurately quoted" the appellant, and that the reporter "stated that he had accurately quoted [the appellant] and that The Washington Post stands behind what was written in the December 2, 2003, story." IRA File, Tab 43, Ex. 1 at 1-2. However, as noted above, this hearsay statement from Mr. Wright regarding the reporter's account of what the appellant told him is inconsistent with the article published by the same reporter 4 days after the December 2, 2003 article that formed the basis for this charge. Moreover, Mr. Hoffman did not interview Mr. Wright or the Washington Post reporter. Mr. Wright later indicated in his deposition that he had not "go[ne] into the details of" the alleged statement at issue here, that when he tried to question the reporter further concerning the

appellant's statements, the reporter declined to provide further information and referred Mr. Wright to his editor, IRA File, Tab 43 at 53-54, and that when he called the editor and attempted to ask further questions, the editor declined to provide any answers and instead referred him to someone he believed was counsel for the newspaper, *id*. at 54-55.[11] It appears, therefore, that the reporter declined to answer specific questions about the accuracy of the particular statement at issue here and that Mr. Hoffman could have learned this information if he had interviewed Mr. Wright and asked him more probing questions.

¶35 Mr. Murphy testified that he knew that Jeff Capps, chairman of the Fraternal Order of Police (FOP) Labor Committee for the USPP, provided some information to the Washington Post reporter before the reporter spoke with the appellant, but Mr. Murphy did not make an inquiry to determine what information Mr. Capps or the FOP might have given to the Washington Post for the December 2, 2003 article. IRA File, Tab 25, Ex. J, Murphy Deposition at 365. Mr. Murphy testified that it did not occur to him at the time that some of the statements in the article might have had as their source Mr. Capps or the FOP, and not the appellant. *Id*. at 365-66. There was no inquiry done at Mr. Murphy's direction to try to sort out which of the Washington Post article statements came from the FOP and which came from the appellant. *Id*. at 366. This information could have been available to Mr. Hoffman at the time he made his decision had a sufficient investigation been conducted. Similarly, Mr. Hoffman testified that it was not important to him to "determine, in [his] role as the deciding official to know how [the appellant] came to talk about these three figures in the Washington Post, in other words, what was asked by the reporter and what did she say?" IRA File, Tab 25, Ex. I, Hoffman Deposition at 72. Mr. Hoffman did not ask the media office to determine whether the reporter might have asked the appellant how

[11] Mr. Wright testified that he did not call the person identified by the editor. IRA File, Tab 43 at 54.

much money she needed to perform her job, he did not know whether the reporter asked her what she needed and whether she said in response what she needed, he did not know whether she told the reporter that the total amount needed was $27 million, and as far as Mr. Hoffman was concerned that was "irrelevant." *Id*. at 73.

¶36 Thus, when the agency made its decision, the appellant's position regarding the nature of her statements to the reporter was unrebutted by any other person present during her interview with the reporter. Under the above circumstances, we find that the evidence in support of charge three that was before the agency when it removed the appellant was not particularly strong.

Specification One of Charge Five

¶37 Charge five, failure to carry out a supervisor's instructions, was supported by three specifications. In the first specification, the agency alleged that Mr. Murphy instructed the appellant to detail a member of her staff, Pamela Blyth, to the Office of Strategic Planning, that the appellant stated that she was unwilling to do so because Ms. Blyth was too valuable to lose, that after the appellant continued to object, Mr. Murphy informed her that he was giving her a specific order to effect the detail, that the appellant continued to express her unwillingness to detail Ms. Blyth, that Mr. Murphy offered to permit the detail to be served in increments acceptable to the appellant, and that the appellant nevertheless failed to detail Ms. Blyth. 752 File, Tab 3, Subtab 4c at 4.

¶38 The appellant responded to this specification by asserting that she never received and never refused to carry out an instruction to detail Ms. Blyth. *Id*., Subtab 4l at 28. She claimed that, although she voiced opposition to the detail, she did not fail to follow an instruction because Mr. Murphy was going to detail Ms. Blyth and she "never understood that she received an order to effectuate a detail herself." *Id*. In this regard, the appellant informed the agency that Mr. Murphy informed her of *his* intent to detail Ms. Blyth, never provided the appellant with a starting date for the detail, told the appellant that he would speak

further with Ms. Blyth to work out the specifics, engaged the appellant in a "healthy, professional disagreement and debate" about this and other topics, and told the appellant that he "could" order the appellant to detail Ms. Blyth, but never gave her such an order. *Id*. at 28-30. The appellant claimed that after she learned from Ms. Blyth on August 21, 2003, that the detail would begin on Monday, August 25, 2003, she sent an e-mail to Mr. Murphy describing the projects Ms. Blyth was working on and thanking Mr. Murphy for identifying a schedule that would allow Ms. Blyth to stay focused on those tasks while still on the detail. *Id*. at 31; *see* 752 File, Tab 3, Subtab 4m at 122-23 (August 21, 2003 e-mail from the appellant to Mr. Murphy, presented as supporting documentation to her written reply to the notice of proposed removal). Mr. Murphy's response to that e-mail, dated August 22, 2003, suggests that he was satisfied with the steps the appellant had taken up to that point. 752 File, Tab 3, Subtab 4m at 122 (thanking the appellant for her message and referring to another matter). The appellant also submitted to the agency an undated memorandum from the "Deputy Director," i.e., Mr. Murphy, to Ms. Blyth indicating that, "[t]o assist you in meeting these goals and to provide you with additional on-the-job training in fundamental areas of strategic planning, I am detailing you for 120 days to the Office of Strategic Planning . . . effective . . . ." *Id*. at 125. This memo suggests that Mr. Murphy viewed it as his responsibility to effect the detail of Ms. Blyth.

¶39 When asked during the agency's investigatory interview what instructions or orders he gave the appellant regarding Ms. Blyth's detail, Mr. Murphy testified that "I gave her instructions that Pamela Blyth was to do a – what amounted to, I believe, 120-day detail at the Office of Strategic Planning," and provided a long, detailed explanation as to why he believed the detail was justified. 752 File, Tab 3, Subtab 4j at 9 (transcript pages 57-60). He testified that he called the appellant in and "gave her instructions that I had taken this up the chain and that we had agreed that this was important" and that he "clearly communicated to her this was going to happen." *Id*. at 9 (transcript pages 60, 62). He testified that he

"gave her very clear instructions," and she "understood that this was to happen." *Id*. at 10 (transcript page 63). When asked if he could elaborate on how it was absolutely clear that the appellant was to carry out an instruction to implement the detail, as opposed to the appellant's allegation that Mr. Murphy was going to effect the detail himself, Mr. Murphy replied, "Sure. I communicated to the chief that it was her responsibility to have Pamela report for the detail on Monday." *Id*. (transcript pages 63-64). When asked, however, whether he "sen[t] a memo to Ms. Blyth because [he] thought it was [his] responsibility to put her on detail or because [he] believed that [the appellant] was not going to put Ms. Blyth on the detail," Murphy stated that this was an "interesting question," and that the answer was "[p]robably a little of both." *Id*. (transcript pages 68-69).

¶40 As set forth above, the appellant acknowledged in her response to the proposal notice that she expressed objections to the detail and attempted to persuade Mr. Murphy not to effect it. These objections and efforts, however, would not necessarily support this specification. *See Berube v. General Services Administration*, 30 M.S.P.R. 581, 592 (1986) (as long as senior executives perform their assigned responsibilities and do not engage in actionable misconduct, their disagreements with policy decisions may not form the basis for adverse actions against them), *vacated on other grounds*, 820 F.2d 396 (Fed. Cir. 1987). Instead, the question raised by this specification was whether Mr. Murphy instructed the appellant to take some action or actions to effect the detail and, if so, whether the appellant failed to take the action or actions as instructed.

¶41 As set forth above, the agency did not seek any additional input from the appellant regarding this specification after she had replied to the proposed removal. In addition, it did not interview Ms. Blyth to learn who communicated with her regarding the effecting of the detail. In fact, when questioned about the basis for his belief that the appellant failed to comply with his instructions regarding the detail, Mr. Murphy referred to the appellant's conversation with J. Steven Griles, Deputy Secretary of the Interior, and to the subsequent decision of

Mr. Griles to cancel the detail. When Mr. Hoffman asked him whether the appellant's "going to Griles [had] any bearing on [his] determination that [the appellant] was willfully disobeying your order to detail" Ms. Blyth, Mr. Murphy replied that it did. 752 File, Tab 3, Subtab 4j at 14 (transcript pages 98-99). The pleasant tone of the August 2003 e-mail messages between the appellant and Mr. Murphy that are cited above, in which it appeared that the appellant had not failed to follow any instruction regarding the detailing of Ms. Blyth, contrasts sharply with that of an e-mail message Mr. Murphy sent to the appellant a few days later, after learning that the detail would not be effected as scheduled. In the latter message, Mr. Murphy described the appellant's communication with Mr. Griles as "unacceptable," "a breach of supervisory protocol," and "totally inappropriate"; he stated that he could "only assume [the appellant's] intentions were nefarious"; and he asserted that her "obtaining the Deputy Secretary's okay in the absence of [Mr. Murphy's] input only [made her] insubordination all the more egregious." IRA File, Tab 1, "Charge 6" Subtab at 11. Even if Mr. Murphy was annoyed by the appellant's earlier efforts to dissuade him from effecting the detail, there is no indication that he expressed this level of anger previously or – more importantly – that he previously accused the appellant of insubordination.

¶42 Thus, the appellant's communication with Mr. Griles and the email communication between the appellant and Mr. Murphy appear to have occurred only after Mr. Murphy had arranged the specifics of the detail and informed Ms. Blyth about it. Moreover, the decisions to postpone and eventually cancel the detail were made by Mr. Murphy's superiors and not by the appellant. In sum, the communications and documentary evidence mentioned above do not strongly support a finding that the appellant failed to follow any instructions by Mr. Murphy to effect the detail in question.

Specification Two of Charge Five

¶43 The second specification of charge five concerns a request by OSC, which had been investigating the propriety of the hiring of Ms. Blyth, Deputy Chief

Barry Beam, and Deputy Chief Dwight Pettiford. *See* 752 File, Tab 3, Subtab 4c at 4. The agency noted that OSC had asked for proof that Mr. Beam and Mr. Pettiford had undergone medical and psychological evaluations, and it alleged that Mr. Murphy had instructed the appellant, on or about June 12, 2003, to direct those employees to undergo the required evaluations. *Id*. It also alleged that the appellant had responded by "protest[ing] that, for various reasons, [the] evaluations were not necessary," that Mr. Murphy explained to the appellant that none of her reasons had merit, that he "[t]hereafter" instructed the appellant for a second time to direct the employees to undergo the evaluations, and that the appellant failed to do so, instead challenging the propriety of the instructions and "openly express[ing her] unwillingness to comply with them." *Id*.

¶44 In her response to the proposal notice, the appellant asserted that Mr. Murphy, as of June 11, 2003, believed that the tests for Mr. Beam and Mr. Pettiford had been waived, and indicated that he would be meeting with the solicitor's office the next day. 752 File, Tab 3, Subtab 4l at 33-34. The appellant claimed that during a conversation on June 12, 2003, Mr. Murphy informed her that it would be best if these employees took the tests, she replied that the final decision was his but asked him to consider the issue one last time, Mr. Murphy listened patiently then told her that he would call in the employees and explain to them in person what he had decided to do and why he had changed his mind, and she thought that was a good idea and would tell the employees to expect such a meeting. *Id*. at 34. The appellant informed the agency that, instead of having a meeting, Mr. Murphy prepared memoranda for Mr. Beam and Mr. Pettiford that directed them to make arrangements to take the tests, and instructed the appellant to give the memoranda to those employees. *Id*. As part of her response to the proposal notice, the appellant submitted copies of those June 16, 2003 memoranda, giving the employees 2 weeks to schedule their psychological examinations. 752 File, Tab 3, Subtab 4m at 136-38. The appellant asserted that she gave the memoranda to the employees, thus complying with the only order

given to her on this issue, and instructed them to comply with the provisions in the memoranda. *Id*., Subtab 4l at 34. The appellant presented evidence that on June 29, 2003, Mr. Beam sent an e-mail to the appellant indicating that he had scheduled the required examination but was challenging it through the grievance and equal employment opportunity (EEO) processes. *Id*., Subtab 4m at 139.

¶45 The agency appears to have had before it a signed, December 4, 2003 memorandum written by Mr. Murphy that provides as follows:

> On or about June 1st I was informed by . . . the solicitors office that the investigators from the Office of the Special Counsel were concerned about the hiring process of the two USPP deputy chiefs, Barry Beam and Dwight Pettiford. The job announcement required that a psychological test and physical exam be passed by the candidates selected before they could be hired. Neither Beam nor Pettiford completed the testing.
>
> The OSC became involved because a whistle blower alerted them to the "illegal" hiring. The OSC informed the DOI [Department of the Interior] solicitors office that it would be a good idea for Beam and Pettiford to complete the tests, even though they had already been hired.
>
> I immediately informed [the appellant] that Beam and Pettiford must take the tests. She protested that this was not necessary, that it would give the "snipers" who did not like her new management policies a victory, and besides both Pettiford and Beam had passed tests as young officers previously. I gave her a direct order to have them complete the tests. I also notified Beam and Pettiford that they had to take the test.
>
> I informed the chief that the OSC had a great deal of authority in these matters and that they could order the dismissal of Beam and Pettiford and the re-advertisement of the positions. The chief did not understand the seriousness of this investigation. She subsequently stalled the testing process by not following through on my direct order to have Beam and Pettiford take the tests. The tests were not taken until sometime in September after I reissued my order to Beam and Pettiford in writing and met with them to further explain why it was important that they comply. During this period, the chief cooperated reluctantly and was not supportive of my position.

Id. at 163.

¶46 During his interview with Mr. Hoffman, Mr. Murphy testified in response to a question about the appellant's assertion that he agreed to take responsibility for telling Mr. Beam and Mr. Pettiford of his decision that they undergo the evaluations. Mr. Murphy indicated,

> [t]hat's unequivocally false and a total mischaracterization of what is the . . . case. I directed Chief Chambers to have Beam and Pettiford undergo these – the psychological testing. It came to my attention a few months later, again I believe through the solicitor's office, that it had not been done. And I called Chief Chambers in to the office to find out why it had not been done. And, again, to make a long story short, right back into the discussion about the snipers and the people out to get her and her command staff. She didn't believe it was necessary and no adequate explanation had been given as to why. That's when I had to intervene finally and it's ironic because I'm intervening to protect her and to protect her command staff from possible problems from the Office of the Special Counsel. So I intervened at her request. She said well, will you talk to Beam and Pettiford and let them know why this is important and communicate it that it's you that wants this done, which I did and they appreciated me talking to them and giving them an explanation. Again, I'm trying to be cooperative with the chief. I mean, at that point, I could have slapped her with again being insubordinate right there. I'm here being cooperative and trying to understand her point of view, giving her the benefit of the doubt. So I talked to Beam and Pettiford and explained to them why this is important to be done and they said they would comply.

752 File, Tab 3, Subtab 4j (transcript pages 82-84). His willingness to talk to Beam and Pettiford was partly motivated because she "refused to carry it forward," and she "said she wouldn't do it." *Id*. (transcript pages 84-85).

¶47 While Mr. Murphy's December 4, 2003 memorandum and his testimony during the interview provide some support for this specification, the memorandum is unsworn and written approximately 6 months after the events in question and only 1 day before he placed the appellant on administrative leave. The agency also had before it evidence indicating that the appellant did not fail to follow any instructions from Mr. Murphy, that progress relating to the examinations for Mr. Beam and Mr. Pettiford was being made, and that any

delays were not the result of any "stall[ing]" by the appellant. For example, the appellant submitted to the agency a July 23, 2003 letter from Mr. Murphy to Mr. Beam responding to Mr. Beam's grievance relating to the psychological examination and informing Mr. Beam that "[o]nce you provide the information regarding the personal relief you are requesting, I will provide you with my written decision regarding your grievance." 752 File, Tab 3, Subtab 4m at 142-43. She further submitted August 20, 2003 e-mails from Mr. Murphy to Mr. Beam and Mr. Pettiford informing that "[i]t was good to meet with [them] regarding [his] earlier letter directing [them] to complete [their] psychological testing," that he was pleased that they agreed to complete the testing "immediately," and that he would assist them by attempting to expedite the scheduling of the tests "once you have received and answered the list of questions." *Id*. at 156-57. Mr. Murphy instructed Mr. Beam and Mr. Pettiford to "[p]lease keep Chief Chambers informed of your progress." *Id*. The appellant sent an August 30, 2003 e-mail to Mr. Murphy informing him that Mr. Beam had an interview scheduled for September 3, 2003, informed him on September 17, 2003, that Mr. Beam had completed the requirements, and informed him on November 10, 2003, that Mr. Pettiford had completed his medical and psychological tests, but had not heard from anyone "on the status." *Id*. at 158-61.

¶48 The testimony cited above, along with other evidence in the record, suggests that Mr. Murphy may have confused the appellant's actions prior to the issuance of his memoranda to the deputy chiefs with her actions following the issuance of those memoranda. The record includes another document written by Mr. Murphy that suggests such confusion. In that document, which is headed "Notes on Chief of Police," Mr. Murphy made the following statement:

> As a result of recommendations made by [the solicitor's] office and consultation with OSC it was concluded that [the deputy chiefs] should take the . . . examination. I directed them by memo to do so. The chief objected and frustrated our efforts to resolve this serious issue. It was not until recently that we received her cooperation and

> that of the deputy chiefs. They have finally complied. It is my belief, however, that the chief deliberately advised the deputy chief's [sic] to disobey my direction to them.

IRA File, Tab 28, Agency Hearing Ex. 3 at 1. It is not clear, however, how the appellant allegedly "stalled" or "frustrated" the process. Once Mr. Murphy directly ordered, by means of the June 16, 2003 memoranda, Mr. Beam and Mr. Pettiford to take the tests, it would appear that any failure to complete the process would have been their failure to follow Mr. Murphy's instructions, not the appellant's failure to do so. Moreover, the agency did not specifically charge the appellant with any action or inaction following Mr. Murphy's issuance of his memoranda to the deputy chiefs. In sum, much of the evidence before the agency indicated that any delay in completing the testing was not due to any action or inaction on the part of the appellant, but was instead the result of the interactive process between Mr. Murphy and Mr. Beam/Mr. Pettiford relating to such matters as grievance and EEO procedures, Mr. Beam and Mr. Pettiford's receipt and answering a list of questions presented by Mr. Murphy, and their scheduling, taking, and waiting for the results of the examinations.

Specification Three of Charge Five

¶49 The last specification of charge five concerns the "tractor man" incident at Constitution Gardens, which seriously disrupted traffic in Washington, D.C., in early 2003. *See* 752 File, Tab 3, Subtab 4c at 4. According to the agency, the Organization of American States (OAS) had complained that armed USPP sharpshooters had been deployed on the grounds of its headquarters during the incident and that this action had violated a treaty. *Id*. at 4-5. The agency also alleged that Randolph Myers, an attorney in the agency's solicitor's office, needed to meet with the appellant to assess whether the USPP had violated any treaties and whether it had complied with its own General Orders requiring contacting the Department of State. *Id*. It alleged further that Mr. Myers had asked the appellant to discuss the complaint with him, that the appellant had

failed to respond to this request, and that this failure constituted a violation of instructions by Mr. Murphy "to fully cooperate with and work with attorneys in the Solicitor's Office in connection with any information and/or assistance they needed regarding the ['tractor man'] incident." *Id*.

¶50 In her response to the proposal notice, the appellant asserted that Mr. Murphy did not instruct her to fully cooperate and work with attorneys in the solicitor's office regarding the incident and that she did not recall ever having a conversation with Mr. Murphy about the "tractor man" incident except to invite him to the "after-action critique" and to discuss the written report as to the findings in that critique. 752 File, Tab 3, Subtab 4l at 39. She asserted that a meeting with Mr. Myers had been scheduled but cancelled, and that she did not recall the reason for the cancellation or who had cancelled it. *Id*. The appellant claimed that Lt. Phil Beck tried several times, at the appellant's request, to reschedule the meeting with Mr. Myers, but a mutually available time was not agreed upon, and asserted that "[a]t no time did anyone convey an urgency to the Chief that she needed to meet with Mr. Myers immediately," and "[a]t no time did she consider that she was not fulfilling an obligation or following an order." *Id*. The appellant asserted that she was "never aware that Mr. Murphy believed she failed to carry out his instructions regarding any issue relating to this matter until the charge appeared in the proposal for removal." *Id*. at 41.

¶51 When he was asked during the agency investigation to describe the instructions he gave the appellant regarding the OAS matter, Mr. Murphy testified that he did not "recall speaking with [the appellant] directly about this instance." 752 File, Tab 3, Subtab 4j at 13-14 (transcript pages 92-94). When questioned further about the matter, he testified that his "memory [was] just really sketchy on that," and although he seemed to indicate at times that he provided some sort of instructions to cooperate, he stated that he was "being ambivalent" because he knew he was testifying under oath, that his "memory [was] just failing him," and that he would "have to go back and check." *Id*. at 14

(transcript pages 94-95). Furthermore, although during the interview he was asked to submit a written, signed, and dated statement summarizing his recollection and providing any supporting documents, as well as a statement summarizing how his instructions were given and in what time frame, *id*. (transcript pages 95-96), Mr. Murphy conceded at the Board hearing that he had submitted nothing in that regard, HT-1 at 195. As previously noted, Mr. Hoffman did not interview the appellant. Moreover, he did not interview Lt. Beck, who could have corroborated the appellant's account. The agency did not produce any written order from Mr. Murphy instructing the appellant to cooperate with Mr. Myers,[12] nor did it produce any contemporaneous writings from Mr. Murphy relating to such an instruction.

¶52 In sum, the agency had little evidence to conclude if and what Mr. Murphy had instructed the appellant to do with Mr. Myers, or if the appellant had failed to follow any instruction given by Mr. Murphy. Its evidence to support specification three of charge five was therefore weak. Although the Board and the court sustained charge five, for all the reasons just discussed, we find that the agency's evidence supporting the charge at the time it took its removal action was not particularly strong.

Charge Six

¶53 The last charge, failure to follow the chain of command, is related to the matter at issue in the first specification of charge five, i.e., to Ms. Blyth's scheduled detail to the Office of Strategic Planning. In this charge, the agency alleged that, during the week of August 18, 2003, when Mr. Murphy was absent from the office, the appellant appealed to Deputy Secretary Griles and convinced him to "cancel [Mr. Murphy's] instructions that Ms. Blyth be detailed . . . ." 752

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[12] Mr. Myers testified about his attempts to meet with the appellant, but he did not provide any probative evidence about what Mr. Murphy may have instructed the appellant to do.

File, Tab 3, Subtab 4c at 5. The agency asserted that, by appealing Mr. Murphy's instruction to Mr. Griles, rather than to her second-level supervisor, Ms. Mainella, the appellant failed to follow the chain of command. *Id*.

¶54 In her response to the proposal notice, the appellant acknowledged that she did not contact Ms. Mainella before contacting Mr. Griles, who was her fourth-level supervisor. *See* 752 File, Tab 3, Subtab 4l at 41. Nevertheless, the appellant asserted that she did not violate any law, regulation, or policy, her actions were welcomed and condoned by Mr. Griles and consistent with the actions of others throughout the agency, and Mr. Griles's determination to cancel the detail showed that the charge did not promote the efficiency of the service. *Id*. at 41, 43. The appellant further claimed that she did not consult with Ms. Mainella because Ms. Mainella had told her that she would support whatever decision Mr. Murphy rendered regarding the detail of Ms. Blyth and that after she informed Mr. Capps about the detail and the fact that certain projects would not move forward as planned, Mr. Capps left a telephone message for Mr. Griles urging him to contact the appellant. *Id*. at 41-42. The appellant indicated that she contacted Mr. Griles the night before Ms. Blyth's detail was scheduled to begin after she was unable to reach her third-level supervisor, Assistant Secretary Craig Manson, and she had not heard from Mr. Griles after the call was placed by Mr. Capps. *Id*. at 42. After she explained to Mr. Griles her concerns regarding the detail, Mr. Griles subsequently called the appellant later that evening and informed her that the detail had been "reversed." *Id*.

¶55 The appellant's contacting Mr. Griles without first actually talking to Mr. Murphy, Ms. Mainella, and Mr. Manson could be regarded as taking her concerns regarding the detail of Ms. Blyth outside the chain of command. Going outside the chain of command may constitute a basis for disciplinary action. *See Brown v. U.S. Coast Guard*, 10 M.S.P.R. 573, 578 (1982). Nevertheless, the agency identified no agency instruction or similar authority prohibiting the appellant

from taking the action she took here, and the record before the agency includes some evidence that such actions were considered acceptable.

¶56 For example, Mr. Manson indicated during his interview that it was not unusual for the appellant to call him directly about various matters, and when he heard the appellant's voicemail message about the detail of Ms. Blyth he did not think that it was unusual that she was calling him about any particular subject. 752 File, Tab 3, Subtab 4f at 16. During its interview, however, the agency did not ask Mr. Manson whether it was inappropriate for the appellant to have contacted Mr. Griles under these circumstances.[13] When asked during the agency investigation whether the appellant's communicating with him outside the chain of command was something he welcomed or condoned, Mr. Griles testified that he did not condone or particularly encourage it, but

> [a]s I do with most career people in the Department, if they have something to say to me, I talk to them. On this particular occasion, she felt that there was something that she committed to do for the Assistant Secretary, myself, and that it was going to be inhibited by the detail of the employee away from her.

752 File, Tab 3, Subtab 4e at 6-7. Mr. Griles indicated that he dealt with the chain of command issue by having a meeting in his conference room in which all

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[13] In fact, when Mr. Manson was asked such a question during his deposition, he indicated that it would have been appropriate for Mr. Murphy to have reminded the appellant that she should start at the lowest level of the chain of command, and that, while he did not know whether disciplinary action would have been proper because he did not know what previous conversations Mr. Murphy may have had with the appellant about that subject, it "wouldn't have been appropriate for [Mr. Murphy] to respond in any hostile manner" to the appellant's "having gone to [him] or Mr. Griles to cancel [Ms. Blyth's] detail," and he could think of no specific conditions that would justify disciplining the appellant for contacting him or Mr. Griles in connection with the detail. IRA File, Tab 42, Manson Deposition at 112-15. He also testified that it was "[q]uite common" for subordinates to come to him outside the presence of their immediate supervisors, that such actions did not cause him concern, that he knew of no document or training indicating that employees were prohibited from raising concerns with second-level supervisors in the absence of first-level supervisors, and that he found such practices to be "quite efficient." *Id*. at 119-20.

of the chain of command was present, as well as a discussion at that time regarding how the appellant should work within the chain of command. *Id*. at 12-13. He also acknowledged that he "perceive[d] a problem regarding . . . the whole detail matter," and testified that "it appeared to [him] that that would have been an arbitrary decision by [Mr. Murphy] to detail [Ms. Blyth] at a time when the [appellant] was relying on her for a budget preparation." *Id*. at 13-14. When asked whether the appellant's contacting him outside the chain of command was "inappropriate," Mr. Griles did not describe the action as inappropriate; instead, he responded that

> [i]t was unusual for an employee to call me like that. I have had other employees stop me and talk to me, or at meetings voice issues to me about things that may be going on that we weren't aware of. But the direct approach that she made to me in terms of this issue, particularly the detailee, was a little unusual.

Id. at 14-15.

¶57 Although the Board and the court have found that the agency proved this charge by preponderant evidence, we find, under the circumstances described above, that the agency did not have strong evidence when it issued its decision notice that the appellant acted improperly in bringing her concerns regarding the detail of Ms. Blyth to the attention of Mr. Griles.

Motive to Retaliate

¶58 One of the factors to consider in ruling on whether the agency met its burden of proof is the strength of any retaliatory motive on the part of the officials who were involved in the decision in question. *See Carr*, 185 F.3d at 1323-24. Because direct evidence of a retaliatory motive is rare, petitioners may rely on circumstantial evidence giving rise to an inference of impermissible intent. *See Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009); *Russell*, 76 M.S.P.R. at 327 (relying on circumstantial evidence to find a strong motive to retaliate). A proposing official's strong motive to

retaliate may be imputed to a deciding official. *See Miller v. Department of Veterans Affairs*, 92 M.S.P.R. 610, ¶¶ 19-20 (2002).

¶59 We have found that the appellant made protected disclosures of substantial and specific dangers to public health or safety that are reflected in the December 2, 2003 Washington Post article in which she indicated that traffic accidents had increased on the BW Parkway, which often had two officers on patrol instead of the recommended four, and that the diversion of USPP patrol officers from national parks resulted in an increase in drug dealing in smaller national parks. In addition, the appellant made a protected disclosure in her December 2, 2003 e-mail to Ms. Weatherly concerning the number of officers patrolling the GW Parkway, the consequent decision not to arrest suspected drunk drivers, and the resulting jeopardy to parkway travelers. Underlying these disclosures were the appellant's statements indicating that the substantial and specific dangers existed because the USPP did not have sufficient staffing or funding. In fact, the court has already held that one of the agency's charges could not be sustained because it was grounded in protected whistleblowing activity.

¶60 We find that there is ample evidence in the record suggesting that the acting officials were motivated to place the appellant on administrative leave and remove her in reprisal for her protected disclosures. First, we note that the agency placed great importance on its relationship with the House of Representatives Interior Appropriations Subcommittee, and more specifically with Ms. Weatherly, a staff member for that subcommittee. Mr. Murphy testified during his interview with Mr. Hoffman that when the appellant "first came on board I said that *Debbie Weatherly was a person that she needed to talk to and to get to know* and she should make contact and that I would make sure that she got to do that. *And I said she's a very important person in Congress*." 752 File, Tab 3, Subtab 4j at 3 (transcript pages 12-13) (emphasis added).

¶61 Ms. Weatherly testified that she was concerned that the appellant was communicating to Congress, in the next to last paragraph of her December 2, 2003 e-mail, that she perceived there to be a crisis that might result in loss of life or destruction of a monument because several years earlier, before the appellant came to the USPP, there was gross fiscal and day-to-day mismanagement at the USPP to the degree that they were on the borderline of being anti-deficient, a very serious offense. HT-1 at 227-29. She testified that Congress had been very generous to the USPP over the last 8 years, giving them larger increases than the National Park units as a whole. HT-1 at 229. She further testified that after the National Academy of Public Administration (NAPA) made its findings and recommendations, the committee took the position that until the fiscal and management problems were under control, the USPP budget would only be adequate but not cut, and Congress would not look at their day-to-day needs. *Id*. Ms. Weatherly testified that she was "irritated to the extent that I felt like there should have been a lot more progress, particularly on the most important, most serious recommendations of NAPA . . . ." HT-1 at 229-30. She testified that the appropriations committee was hoping for more progress in implementing NAPA's recommendations before additional funds would be allocated for the USPP. HT-1 at 230-31. She testified that NAPA felt that the USPP officers were performing duties that were not core to their mission, and that that was directly related to how the committee might view additional appropriations. HT-1 at 231.

¶62 Ms. Weatherly testified that she and Mr. Murphy talked about the appellant's comments in the press and that she could not say whether that was at her initiative or Mr. Murphy's, but that

> *[t]he committee is always concerned when it's represented in the media by anyone where the inference [is that] Congress isn't doing its job properly, not supplying enough money,* and it's the feeling of the - - the members that we have done more than an adequately [sic] job, given the current circumstances, with the Park Police.

HT-1 at 239 (emphasis added). In addition, the transcript reflects the following testimony from Ms. Weatherly:

> MR. HARRISON: Well, I take it from your prior testimony that if Ms. Chambers said to the Washington Post that she needed X amount of money for protecting the parks or a monument, that other than what you've already explained, which you were hoping for implementation of NAPA before more money was requested, you weren't necessarily taking a position on the - - the substance of her comment that, you know, here's how much money we need to do this job.
>
> MS. WEATHERLY: *It was an inappropriate forum.*
>
> MR. HARRISON: I don't understand your answer.
>
> MS. WEATHERLY: *That's not the proper forum to go through -*
>
> MR. HARRISON: -- to –
>
> MS. WEATHERLY: We have hearings where people come and testify. You can submit testimony.
>
> MR. HARRISON: Okay. And Ms. Chambers could testify to your committee on this matter?
>
> MS. WEATHERLY: We have had the Park Police chief on occasion in the past over the years, rarely.
>
> MR. HARRISON: Okay. But it's not prohibited?
>
> MS. WEATHERLY: It's not prohibited.
>
> MR. HARRISON: Okay.
>
> So, did you think it violated some rule for Ms. Chambers to talk to the press about these matters, what she felt was needed?
>
> Do you know of any rule that was violated?
>
> MS. WEATHERLY: I don't know of any - - I mean I don't - - can't speak for the executive branch.
>
> MR. HARRISON: Okay. It didn't violate any rule of Congress, I take it.
>
> MS. WEATHERLY: No.
>
> MR. HARRISON: Okay.
>
> MS. WEATHERLY: Obviously.

> MR. HARRISON: *So, what you're saying is you would have preferred that the communication come to your committee rather than going through the media?*
>
> MS. WEATHERLY: *Absolutely*.

HT-1 at 240-41 (emphasis added).

¶63 Ms. Weatherly expressed her concerns regarding the appellant's actions to the agency. One day before Mr. Murphy placed the appellant on administrative leave, Ms. Weatherly sent Mr. Murphy a December 4, 2003 e-mail indicating that, "*in light of the inaccurate news reports this week*," she wanted to remind Mr. Murphy about their conversation several weeks ago regarding her November 3, 2003 telephone conversation with the appellant, which related to the events underlying charge one that was brought by the agency, Weatherly wanted to work with him to "*correct this situation as soon as possible*," and hoped the information she provided him "will be helpful." IRA File, Tab 3, Subtab 4d (emphasis added); *see* IRA File, Tab 25, Ex. J, Murphy Deposition at 311, 313, 316-18, 320-21 (emphasis added). According to Mr. Murphy, her reference to inaccurate news reports referred to the December 2, 2003 Washington Post article and various interviews on television. IRA File, Tab 25, Ex. J, Murphy Deposition at 318. Mr. Murphy described Ms. Weatherly's December 4, 2003 e-mail as expressing concern that the USPP had been asking for additional funding when Congress had been quite generous, and Ms. Weatherly did not understand why they were again being asked for additional funding and "was extremely concerned about that and expressed her, her angst over that." *Id*. at 35-36, 57-58. According to Mr. Murphy, Ms. Weatherly asked him in a December 3, 2003 telephone call, "*what's going on with the chief, why is she saying those things in the media, they're just not true. Congress has been very generous to the Park Police. I don't understand why she feels that way*." *Id*. at 319 (emphasis added).

¶64 Regarding the appellant's placement on administrative leave, Mr. Murphy testified that his concern was that she was

> sending a message that others were reading, particularly Congress, who felt that they had been quite generous and supportive of the United States Park Police, and these kinds of statements, rather than helping a particular agency or division or office get additional funding, often have the opposite effect, and that's why communicating the right message and the way you communicate it is so important, and that was the motivation here.

Id. at 262-63. He also testified at the hearing, when asked why he believed placing the appellant on administrative leave was proper, that "some of the things that were being communicat[ed] and represent[ed] were actually having a negative impact on our ability . . . to effectively negotiate our budget and complete the budget process for the National Park Service." HT-1 at 88. When asked whether he was concerned about the relationship between the agency and Ms. Weatherly, Mr. Murphy testified, "Yes, very - - very much so," and explained that his concern was that

> this is the senior staffer for the appropriations committee for the Department of Interior that oversees our - - our budget, and when that staff person has a lack of trust and doesn't believe that the department is willing to follow its instructions or we don't have the ability to supervise our - - our personnel to comply with congressional directives, that's often reflected negatively in the budgeting process for the National Park Service.

HT-1 at 27. Mr. Murphy testified that after he called Ms. Weatherly following Ms. Weatherly's call to Ms. Mainella and Mr. Schaefer in connection with the events surrounding charge one, Ms. Weatherly "felt that it was totally inappropriate and she was kind of ranting, as she has a way of doing, that this was inappropriate and she couldn't understand why we couldn't control our senior staff and that this was not a good thing to have happen." 752 File, Tab 3, Subtab 4j at 3 (transcript pages at 15-16).

¶65 Mr. Hoffman testified that it was important to him to determine whether the appellant's conversation with Ms. Weatherly on November 3, 2003, caused Ms. Weatherly "great anxiety." IRA File, Tab 25, Ex. I, Hoffman Deposition at 131-32. He determined that Ms. Weatherly "*was very upset by [that]*

conversation." *Id*. at 132 (emphasis added). When asked, during the hearing, if he was motivated to remove the appellant because she "dared to criticize the Department or the administration," Mr. Hoffman testified that, "[w]ell, I don't know that I would put it that way." HT-2 at 15. He testified that the Washington Post article wherein the appellant "said that she needed a force of 1,400 officers in order to properly protect all of the areas she's responsible for was the exact opposite of the Department and the National Park Service policies that had been communicated to her on numerous occasions," and that "[w]hat it said to me was that she was not capable of communicating Department policy or adhering to Department policy when she communicated the exact opposite message in the media." *Id*. Mr. Hoffman testified that, with respect to the appellant's statements to the Washington Post reporter, "I would expect her to communicate the policies and positions of the Department of the Interior and not her own personal policies and positions." HT-2 at 16. Thus, it appears that Ms. Weatherly believed that the appellant's disclosures to the Washington Post were made in an "inappropriate" forum and caused her and the committee "concern[]" because the appellant had been inferring that Congress wasn't "doing its job properly," and that Ms. Weatherly conveyed those concerns back to the appellant's superiors at the agency, who ultimately shared those beliefs and acted to allay these concerns and protect the agency's budget by placing the appellant on administrative leave and removing her, thereby demonstrating that it could "control [its] senior staff."

¶66 The timing of the appellant's placement on administrative leave and removal, shortly after the Washington Post published its December 2, 2003 article and the appellant sent her December 2, 2003 e-mail to Ms. Weatherly, also suggests that the agency was motivated to retaliate against her based on those disclosures. Mr. Murphy testified that after he read the Washington Post article by noon on December 2, he called Steve Krutz from human resources to his office prior to noon or "thereabouts" and directed Mr. Krutz to draft a disciplinary document that was "so pressing" for Mr. Murphy that Mr. Krutz stayed until 8

p.m. that very day to work on it. HT-1 at 105-07. Mr. Murphy testified that some of his concerns about the appellant dated to August and September 2003, but he did not initiate disciplinary action against her until December 2, 2003, after the publication of the Washington Post article. *Id*. at 117-18. Mr. Murphy testified that he decided to place the appellant on administrative leave effective December 5, 2003, after his telephone conversation with Ms. Weatherly on December 4, 2003. 752 File, Tab 25, Ex. J, Murphy Deposition at 355.

¶67 We note that the conduct alleged by the agency in charge six and in specification one of charge five occurred prior to August 25, 2003, when Ms. Blyth's detail was scheduled to begin. IRA File, Tab 1, "Charge 6" Subtab at 11. The conduct at issue in the second specification of charge five occurred around June 16, 2003, when Mr. Murphy issued his memoranda to the deputy chiefs instructing them to undergo evaluations. *Id*., "Charge 5-2" Subtab at 9. Finally, the conduct at issue in the third specification of charge five is said to have occurred sometime during the period from July through September 2003. 752 File, Tab 3, Subtab 4c at 4. Thus, Mr. Murphy placed the appellant on administrative leave on December 5, 2003, and proposed her removal on December 17, 2003, approximately 6 months after the events underlying the earliest of the sustained charges and 3 months after the latest incident underlying these charges. 752 File, Tab 3, Subtab 4c at 1. There is no indication that Mr. Murphy or anyone in the agency had been planning any discipline against the appellant based on any of the conduct underlying charge five or charge six before she made her protected disclosures. *Cf.* 752 File, Tab 3, Subtab 4j at 2-3 (transcript pages 7-10) (testimony of Mr. Murphy that before the publication of the Washington Post article he had planned to discipline the appellant in connection with charge one, a charge that was ultimately not sustained).

¶68 The record includes evidence that the actions that formed the basis of charge six, i.e., the appellant's having communicated with Mr. Griles concerning Ms. Blyth's scheduled detail, caused Mr. Murphy to be quite angry. On

August 25, 2003, Mr. Murphy sent the appellant an e-mail message in which he described her communication with Mr. Griles as unacceptable and inappropriate, accused her of insubordination, and stated that obtaining Mr. Griles's "okay in the absence of [his] input only [made] her insubordination all the more egregious." IRA File, Tab 1, "Charge 6" Subtab at 11. This message appears to have been sent prior to the meeting at which Mr. Griles approved the "resolution . . . that satisfied the needs of the agency . . . ." *See id*. (Mr. Murphy's reference in his e-mail message to the appellant to his plan to give Mr. Griles "a thorough briefing on this issue"). Nevertheless, nothing in the record indicates that Mr. Murphy took any further action related to this matter until after the Washington Post article was published. Moreover, we see no evidence that Mr. Murphy took any action with respect to the other matters at issue here until after that article was published or that he even expressed any anger regarding the alleged actions underlying the other charges prior to that publication.

¶69 Any argument that Mr. Murphy and Mr. Hoffman were not implicated in or harmed by the appellant's protected disclosures, or did not have a personal motive to retaliate, ignores the fact that Mr. Murphy was the National Park Service Deputy Director directly responsible for the Park Police, and Mr. Hoffman was a high-level political appointee in the Department of the Interior. The appellant's disclosures clearly reflected on both of them as representatives of the general institutional interests of the agency by addressing the inability of the USPP to effectively perform its mission to protect the public and the failure of the administration to seek sufficient funding for it to do so. *See Carr*, 185 F.3d at 1322-23 (finding motive to retaliate based on criticisms of the management of the office for which the acting official had responsibility). In addition, as set forth above, the appellant's disclosures appeared to indirectly pose a threat to the funding for the USPP and the National Park Service, an issue that we find caused concern for Mr. Murphy and Mr. Hoffman.

Treatment of Similarly-Situated Non-Whistleblowers

¶70 The agency has not presented evidence showing that it took similar actions against employees who were not whistleblowers but who were otherwise similarly situated to the appellant. Under these circumstances, the agency's failure to do so supports a finding that the agency failed to prove by clear and convincing evidence that it would have taken the same actions against the appellant in the absence of her protected disclosures. *See Brewer v. Department of the Interior*, 76 M.S.P.R. 363, 371 (1997); *Russell*, 76 M.S.P.R. at 327-28; *see also Fulton*, 95 M.S.P.R. 79, ¶ 9 (quoting a statement by Sen. Levin from the Congressional Record to the effect that the heightened "clear and convincing evidence" burden of proof on the agency under the WPA recognizes that, when it comes to proving the basis for the agency's decision, the agency "controls most of the cards," including records that could document whether similar personnel actions have been taken in other cases).

¶71 In sum, we find that the agency's evidence in support of its actions was not strong at the time it took the actions,[14] the record demonstrates that the acting officials had a significant motive to retaliate against the appellant, and the agency did not show that it took similar actions against similarly-situated non-whistleblowers. We therefore find that the agency has not met its burden of proving by clear and convincing evidence that it would have placed the appellant on administrative leave and removed her in the absence of her protected

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[14] We have relied, in assessing this factor, on some evidence that was not actually before the agency when it took its actions, but that we find the agency had prior reason to know if it had investigated the charges sufficiently. *See infra* ¶¶ 30, 32-35, 49-52, 54; *Carr*, 78 M.S.P.R. at 335. We find that even in the absence of our consideration of this evidence, however, we would reach the same conclusion, i.e., that the agency's evidence in support of its actions was not strong at the time it took those actions, and that in light of this factor and the other relevant factors, the agency otherwise did not prove by clear and convincing evidence that it would have placed the appellant on administrative leave and removed her, or taken any action against her at all in the absence of her protected whistleblowing.

disclosures. In fact, we are simply not left with a "firm and definite conviction" that the agency would have taken any action based on the sustained charges in the absence of her protected disclosures. *Cf. Miller*, 92 M.S.P.R. 610, ¶ 23 (evidence in support of taking some disciplinary action was far outweighed by the strong motive to retaliate by agency officials who were involved in the disciplinary actions and the lack of evidence showing that the agency took similar actions against otherwise similarly-situated non-whistleblowers).

¶72 Deciding official Hoffman testified that charges two, three, and five considered together ("aggregated") would warrant removal and that he would not have removed the appellant if all 3 charges were not sustained. IRA File, Tab 46 at 49-50; transcript pages 17-18. Given that the Federal Circuit has found the conduct alleged in charge two to be protected whistleblowing activity, the undisputed record plainly establishes that the agency would not have removed the appellant in the absence of her protected whistleblowing disclosures. Moreover, for all of the reasons discussed above, especially when Hoffman's testimony is considered with the significant taint on Hoffman's removal decision because of Murphy, the weakness of the charges and timing of the removal action, as well as Murphy's and Hoffman's strong motives to retaliate for the appellant's protected whistleblowing activity, we find that the agency failed to establish by clear and convincing evidence that it would have taken any action against the appellant in the absence of her protected disclosures.

ORDER

¶73 Accordingly, we ORDER the agency to cancel the appellant's December 5, 2003 placement on administrative leave, cancel the appellant's July 10, 2004 removal, and restore her effective July 10, 2004. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶74 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶75 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶76 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶77 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. The agency is ORDERED 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.

¶78 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL 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. §§ 1201.202, 1201.202 and 1201.204. If you believe you meet these requirements, you must file a motion for consequential damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE PARTIES

A copy of the decision will be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on

the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(f)(3).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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 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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information 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.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.

CONCURRING OPINION OF MARY M. ROSE

in

Teresa C. Chambers v. Department of the Interior

MSPB Docket Nos. DC-1221-04-0616-M-2 & DC-0752-04-0642-M-2

¶1 The appellant challenges her removal from the position of Chief of the United States Park Police. It has already been established that she committed misconduct when she: Told a newspaper reporter that she was seeking an additional $8,000,000 in funding for the Park Police at a time when Office of Management and Budget rules prohibited public discussion of budget deliberations (Charge 3); failed to carry out a supervisor's instructions with regard to detailing a subordinate employee, ensuring that two Park Police officers underwent medical assessments required for their positions, and meeting with an agency attorney who was trying to quell a controversy stemming from her deployment of sharpshooters in apparent violation of a treaty (Charge 5); and circumventing her chain of command with regard to the aforementioned detail (Charge 6). *See* Initial Appeal File (IAF) (1221), Tab 8, Attachment G; IAF (0752), Tab 3, Subtab 4C; *Chambers v. Department of the Interior*, 515 F.3d 1362, 1369-70 (Fed. Cir. 2008). In addition, the appellant had previously been reprimanded for repeatedly violating agency rules by using her government vehicle for personal trips out of town and condoning similar violations by her subordinate employee. IAF (1221), Tab 9, Subtab 4N; *see Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (in general, an employee's prior discipline is an aggravating factor in determining the penalty for misconduct). The appellant, as a supervisory law enforcement officer, was subject to a very high standard of conduct. *See Luongo v. Department of Justice*, 95 M.S.P.R. 643, ¶ 13 (2004), *aff'd*, 123 F. App'x 405 (Fed. Cir. 2005). Clearly the agency could have supported the appellant's removal.

¶2 The question, however, is whether the agency has shown by clear and convincing evidence that it *would have* taken action against the appellant in the absence of her disclosures. 5 U.S.C. § 1221(e)(2). I agree with my colleagues that the agency has not met its heavy burden in this regard.

¶3 I write separately to address the anomaly at the heart of this case. Again, the appellant was the Chief of the United States Park Police. Ordinarily an agency head serves at the pleasure of the President or a cabinet Secretary, and is expected to carry out the Administration's policies faithfully.[15] Here, among other things, the appellant publicly disagreed with the Administration's budgetary priorities and its plan to redirect some Park Police resources toward securing the National Capital Region from terrorist attacks. Instead of working to further the Administration's lawful and carefully-considered program for the Park Police,[16] the appellant chose to be an obstacle and to state her opposition publicly. For an agency head to behave in this way is extraordinary and, in all similar instances of which I know, is not tolerated.

¶4 An employee whose position has been excepted from the competitive service because it is "of a confidential, policy-determining, policy-making, or policy-advocating character" is excluded from statutory tenure and appeal-rights coverage. 5 U.S.C. § 7511(b)(2). The decision to except a position from the

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[15] The heads of some independent agencies have a certain degree of autonomy, but the Park Police is not an independent agency. Rather, it is a division of the National Park Service, which itself is a component of the Department of the Interior. *See* 16 U.S.C. § 1a-6(b).

[16] *See* S-1 File, Tab 1, Ex. 67 (Office of Management and Budget (OMB) report finding that increases in the Park Police budget should not be pursued "until the Park Police improves its financial management, clearly defines its mission, focuses resources on core responsibilities, and takes steps to control costs as recommended by Congress, OMB, the IG [Inspector General], and NAPA [National Academy of Public Administration]"); IAF (1221), Tab 5, Ex. X at 3 (Inspector General report noting the urgent need for the Park Police to "adapt its mission and priorities to reflect its new security responsibilities and commitment to the enhanced protection of our nation's most treasured monuments and memorials from terrorism").

competitive service on one of these grounds may be made by the President, the Office of Personnel Management, or the head of an agency, *id*., and once made is the kind of "discretionary judgment call" that is not reviewable by the Board, *Stanley v. Department of Justice*, 423 F.3d 1271, 1273 (Fed. Cir. 2005). For the section 7511(b)(8) exclusion to be effective as to a particular individual, the appropriate official must designate the position in question as confidential, policy-determining, policy-making, or policy-advocating before the individual is appointed. *Thompson v. Department of Justice*, 61 M.S.P.R. 364, 369 (1994).

¶5 What makes the present case unique is that, despite the appellant's status as head of an agency, she was a tenured employee in the competitive service with the right to appeal her removal to the Board. The agency has never argued that the position of Park Police Chief was designated as confidential, policy-determining, policy-making, or policy-advocating before the appellant was appointed to it, and the record indicates that in fact such a designation was never made. IAF (0752), Tab 3, Subtab 4A. In other words, the appellant had the same rights vis-à-vis her employment as Chief of the Park Police -- including the right to appeal her removal and to claim protection from whistleblower retaliation, *see* 5 U.S.C. §§ 7513(d), 7701(c)(2)(B) -- that rank and file civil servants have with respect to their employment. The "discretionary judgment call" to give her these rights was made by others, not by the Board.

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Mary M. Rose
Member