

DISSENTING OPINION OF BARBARA J. SAPIN

in

Teresa C. Chambers v. Department of the Interior

MSPB Docket Nos. DC-1221-04-0616-W-1 and DC-0752-04-0642-I-1

¶1 In an interview published in the Washington Post on December 2, 2003, the appellant, then Chief of the U.S. Park Police (USPP), expressed concerns about insufficient staff and declining safety in the parks and parkways. She stated that her “greatest fear [was] that harm or death [would] come to a visitor or employee at one of our parks.” Dec. 2 Post Article, Appeal File, Docket No. DC-1221-04-0616-W-1 (IRA File), Tab 9, Subtab 4e. On the day this interview was published, the agency ordered the appellant not to grant any more interviews without prior clearance from her superiors. On December 5, the agency placed the appellant on administrative leave pending a review of her conduct and on December 17, proposed her removal. On July 9, 2004, the agency issued a decision removing the appellant.

¶2 It is undisputed that the appellant’s statements in the Washington Post interview were a contributing factor in the agency’s actions against her. The central dispute is over whether the appellant’s statements are a disclosure of information that she “reasonably believes evidences ... a substantial and specific danger to public ... safety” under the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302 (b)(8). The majority finds that the statements are not protected disclosures because they simply reflect a policy disagreement, and that the budget-related decisions that led to the allegedly unsafe conditions disclosed by the appellant represented legitimate choices made by authorized policymakers. I disagree with imposing this policy analysis on disclosures concerning public safety. Because policy is routinely involved in public safety matters, this analysis could take virtually any disclosure concerning public safety outside the protection of the WPA. Yet, surely Congress intended to protect covered

employees from reprisal for expressing reasonably based concerns about substantial and specific danger to public safety regardless of how that perceived danger came about. For the reasons stated below, I find that the appellant's statements are protected disclosures; that her removal, her placement on administrative leave, and the agency's order restricting her communications with the news media constitute reprisal for those disclosures; and that the agency has not proven the charges and specifications sustained by the administrative judge.

Protected Disclosures of Safety-Related Information

¶3 Under 5 U.S.C. § 2302(b)(8), an agency may not take a personnel action in reprisal for the employee's disclosure of information that she "reasonably believes evidences ... a substantial and specific danger to public ... safety." For the reasons stated below, I would find that the appellant made protected disclosures in the statements she made to the Post reporter on the occasion mentioned above and in the e-mail message she sent to a congressional subcommittee staff member on December 2, 2003.

Disclosures to the Washington Post

¶4 As the majority opinion indicates, the appellant stated to the Post reporter that USPP had "been forced to divert patrol officers to stand guard around major monuments"; that this diversion contributed to "declining safety in parks and on parkways"; that traffic accidents had increased on a parkway for which USPP was responsible; that resource problems had led to complaints "that homeless people and drug dealers [were] again taking over smaller parks"; that there were not enough USPP personnel "to go around to protect [areas for which USPP was responsible] anymore"; that USPP personnel needed to be more than doubled "[i]n the long run"; that many officers had "remained on 12-hour shifts"; that additional funding was needed to correct these problems; and that her "greatest fear [was] that harm or death [would] come to a visitor or employee at one of our

parks” Dec. 2 Post Article, IRA File, Tab 9, Subtab 4e.⁶ She also provided statistical information supporting her statements regarding the increased rate of traffic accidents, as well as information on the declining number of arrests USPP had been making. *Id.*

¶5 At least some of the information the appellant conveyed to the Post reporter was a matter of public record. Nothing in the file on this case, however, suggests that the public was generally aware of the effects of resource constraints on the public safety matters addressed in the remarks quoted above. The Post’s publication of the article, and the other media attention that followed this publication, provide further evidence that the appellant’s statements to the reporter disclosed information not previously known to the general public. *See* IRA File, Tab 28, Agency Exhibit 5 (transcript of radio report, Dec. 4, 2003). I would find, therefore, that those statements constituted a “disclosure,” as that term is used in connection with 5 U.S.C. § 2302(b)(8). *See Horton v. Department of the Navy*, 60 M.S.P.R. 397, 402 (1994), *aff’d*, 66 F.3d 279 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996). Moreover, whether it was “an attempt to pressure the agency” or others for an increase in the budget, as the administrative judge found, Initial Decision at 15, IRA File, Tab 46, is immaterial, since it is the nature of the disclosure, and not the employee’s motivation in making it, that determines whether the disclosure is protected. *See Horton*, 66 F.3d at 282-83.

¶6 I also note that the potential dangers identified in the appellant’s statements – including fatalities and other harm that traffic accidents and increased drug-

⁶ The majority opinion suggests that the appellant objected to agency decisions intended to increase security at monuments and memorials on the National Mall by reducing the resources devoted to traffic and drug enforcement on parkways and in other areas “outside the national capital core.” *See* Majority Opinion ¶ 19. In fact, the appellant expressed concern about security on the Mall and in other “national icon” parks, as well as in other areas. *See* Dec. 2 Post Article (describing the appellant as saying that she “would also want to have officers in plainclothes or able to patrol” outside the monuments, “rather than simply standing guard in uniform,” and that her “greatest fear is that ... we’re going to miss a key thing at one of our icons”).

related crimes could cause to visitors and others in federal parks – are substantial. Moreover, the statements in the Post article that are quoted or described above show that the appellant identified with a considerable degree of specificity the circumstances that she believed increased those dangers. *See* S. Rep. No. 95-969, at 21 (1978) (statement, in report on legislation proposing section 2302(b)(8), that “general criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected,” but that “an allegation by an Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower protections”). The disclosures therefore meet the requirement of 5 U.S.C. § 2302(b)(8) that the danger to public safety that is believed to be evidenced by a disclosure be “substantial and specific.”

¶7 Finally, the record shows that the appellant’s belief that she was disclosing evidence of a danger to public safety was reasonable. Two reports the agency’s Office of the Inspector General issued shortly before the appellant was interviewed by the Post reporter address security issues in the “icon parks” for which the National Park Service (NPS) was responsible. *See* IRA File, Tab 25, Exhibit (Ex.) O, Ex. X. While the reports reflect concerns about the manner in which USPP was managing the resources it had been given, they also reflect safety concerns similar to those expressed by the appellant. *See* IRA File, Tab 25, Ex. O at 2 (the assessment that was the subject of the report “certainly raises grave concerns for the security and public safety at [certain NPS] facilities”); *id.* at 16-17 (expressing “concern about the long-term effectiveness of the protection staff and the officers who operate under ... intense conditions,” such as those requiring them to work 12-hour shifts for extended periods). The testimony of various officials familiar with park security issues also indicates that the appellant’s concerns about the adequacy of USPP resources were reasonable. For example, Craig Manson, the Assistant Secretary for Fish, Wildlife, and Parks, testified that the risk of a terrorist attack on the national

monuments was “a real risk,” and not an imagined one, Manson Deposition at 264, IRA File, Tab 42; and Donald Murphy, the appellant’s immediate supervisor and the Deputy Director of NPS, acknowledged that a change in “police staffing to patrol the highways” could have an impact on traffic safety and even traffic deaths, Hearing Transcript for Sept. 8, 2004 (HT-1) at 122.

¶8 For the reasons stated above, I would find that the appellant reasonably believed that the statements she was making to the Post reporter evidenced a substantial and specific danger to public safety, and that those statements accordingly are protected under 5 U.S.C. § 2302(b)(8). *See Braga v. Department of the Army*, 54 M.S.P.R. 392, 398 (1992), *aff’d*, 6 F.3d 787 (Fed. Cir. 1993) (Table); *Gady v. Department of the Navy*, 38 M.S.P.R. 118, 121 (1988) (a librarian’s complaint that an agency policy allowing smoking in the library threatened the health of the staff and constituted a fire hazard was a protected disclosure under section 2302(b)(8)).

Disclosures to Congressional Staff Member

¶9 The appellant also alleges that she made protected disclosures in her e-mail message of December 2, 2003, to a congressional subcommittee staff member. As the majority has indicated, the administrative judge declined to determine whether that message was protected, stating that doing so was unnecessary because the appellant had not shown that she had exhausted her administrative remedy by bringing the matter to the attention of the Office of Special Counsel (OSC). Initial Decision at 8 n.3. I agree with the majority that the appellant was not required to exhaust her OSC remedy in order to have the Board consider this disclosure in connection with her removal. I do not concur, however, in the majority’s finding that the disclosure was not protected.

¶10 Some of the content of the December 2 message overlaps with the disclosures the appellant made to the Post reporter. December 2 E-Mail Message, IRA File, Tab 9, Subtab 4i at 1. If the recipient of the message had already read the Post article by the time she read the message, the appellant could not be said

to have disclosed this overlapping information to her. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001) (the term “disclosure” means, in the context of 5 U.S.C. § 2302(b)(8), “to reveal something that was hidden and not known”). However, the e-mail message includes other information that was not included in the Post article. For example, it includes more specific information about the effects of 2005 funding levels on the ability to fund hiring, about the effect this could have on staffing levels, about the level of patrol staffing on a parkway other than the one mentioned in the Post article, and about the effects this staffing level had had on enforcement of laws against drunk driving. December 2 E-Mail Message at 1-2. This information, like the information the appellant provided to the Post reporter, was not generally known; it concerned matters that could have substantial and specific effects on public safety; and documentary and testimonial evidence indicates that the appellant’s belief that those matters posed a public safety threat was reasonable. I therefore would find that the appellant made protected disclosures in her December 2 e-mail message.

Reliance on *White and Braga*

¶11 In finding that the appellant in this case made no protected disclosures, the majority relies on *White v. Department of the Air Force*, 361 F.3d 1379 (Fed. Cir. 2004). *See* Majority Opinion ¶¶ 20-23 & n.4. Specifically, it describes the *White* court as holding that a “policy disagreement can serve as the basis for a protected disclosure only if the legitimacy of a particular policy choice ‘is not debatable among reasonable people.’” *Id.* ¶ 20. The majority finds that the budget-related decisions that led to the allegedly unsafe conditions described by the appellant in her interview with the Washington Post reporter represented legitimate choices made by authorized policymakers, and states that they “were the result of the lawful, ordinary give and take among executive and legislative officials.” *Id.* ¶¶ 21-23.

¶12 As the majority acknowledges, the *White* court stated the holding described above while addressing a claim that the employee had disclosed information he reasonably believed evidenced gross mismanagement; it was not addressing a claim that he had disclosed information evidencing a danger to public safety. *Id.* ¶ 20 n.4; *White*, 361 F.3d at 1381-84. Although the majority asserts that “the *White* analysis is equally applicable” to this appellant’s statements regarding public safety, ¶ 20 n.4; it provides no support for this assertion, and none is apparent to me. Moreover, I note that the holding on which the majority relies is expressly limited to disclosures of information allegedly believed to evidence gross mismanagement. *See White*, 391 F.3d at 1382 (“for a lawful agency policy to constitute ‘gross mismanagement,’ an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people”) (emphasis added). The court also specifically stated that the requirement that differences of opinion concerning policy matters be “non-debatable ... does not, of course, apply to” a certain other category of disclosures protected under 5 U.S.C. § 2302(b)(8), i.e., disclosures of information allegedly evidencing violations of law, rule, or regulation. *Id.* at 1382 n.2.

¶13 The *White* court did not refer specifically to the kind of disclosures addressed here, i.e., to public-safety-related disclosures. Its reasoning, however, suggests that those disclosures also are outside the reach of the holding on which the majority relies. That reasoning is based largely on the history of the “gross mismanagement” provision. That is, the court noted that 5 U.S.C. § 2302(b)(8) had in the past protected disclosures of information the employee reasonably believed evidenced “mismanagement,” and that in 1989 Congress had amended the provision by limiting its coverage to “gross mismanagement.” *Id.* at 1381-82. The holding on which the majority relies therefore appears to reflect the court’s understanding of the effect on the “gross mismanagement” provision of the addition of the term “gross” as requiring a more restrictive interpretation of

mismanagement. Under these circumstances, I see no basis for applying the *White* holding to disclosures related to public safety dangers.

¶14 The majority also attempts to distinguish the present case from *Braga*, 54 M.S.P.R. at 398, in which the Board found that 5 U.S.C. § 2302(b)(8) protected an employee's expression of his concern that the equipment he had been asked to design would not protect soldiers from death or maiming. According to the majority, *Braga* differs from the present case in that the record in *Braga* did not include "evidence ... that the individual who made the disclosure was expressing disagreement with considered judgments reached by policymakers after extensive study and discussion." Majority Opinion ¶ 24.

¶15 I see nothing in *Braga* that suggests that the agency did not give sufficient consideration to the equipment standards the employee in that case considered inadequate. That decision simply includes no information at all about the extent of the "study and discussion" that led the agency to set the standards the employee considered inadequate. *Braga* also includes no information about the soundness of the policies on which the equipment standards presumably were based.

¶16 There is a very good reason for the absence of this information from the Board's decision in *Braga*. By enacting the public-safety-related provision of 5 U.S.C. § 2302(b)(8), Congress was not seeking to empower employees to overturn inadequately considered or unwise decisions and policies made by the executive or legislative branches of the federal government. It also was not authorizing the Board to evaluate the wisdom of management decisions and policies or the sufficiency of the deliberations that led to them. See *Garrison v. Department of Defense*, 101 M.S.P.R. 229, ¶ 8 (2006) (an employee need not prove that the information he disclosed established wrongdoing of a kind listed in 5 U.S.C. § 2302(b)(8)). Instead, its purpose was to enable employees to disclose information they believed provided evidence of public safety dangers without suffering reprisal for their statements.

¶17 The majority’s holding in this case is not consistent with this purpose. It indicates that employees such as the appellant in the present case must show not only a reasonable belief that the information they disclosed evidenced substantial and specific dangers to public safety, but also that their agencies or other responsible authorities failed to give adequate consideration to matters related to the alleged danger. This additional requirement – which has no basis in statute, legislative history, or case law – can only discourage employees from making the disclosures Congress sought to encourage them to make. *See* S. Rep. 100-413, at 13 (1988) (“The [Senate] Committee [on Governmental Affairs] intends that disclosures be encouraged.”); *id.* (“The [Office of Special Counsel (OSC)], the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing.”). Moreover the effects of the majority’s holding could be significant. Policy decisions underlie virtually all matters at issue in disclosures related to public safety dangers, and even the most extensive and thorough consideration cannot preclude any possibility of substantial and specific dangers to public safety.

Personnel Actions

¶18 In an IRA appeal, an employee may challenge an action that meets the definition of a “personnel action” in 5 U.S.C. § 2302(a)(2)(A). *See Arauz v. Department of Justice*, 89 M.S.P.R. 529, ¶ 4 (2001). That definition includes “any ... significant change in duties, responsibilities, or working conditions.” 5 U.S.C. § 2302(a)(2)(A)(xi).

¶19 The administrative judge found that the appellant’s placement on administrative leave was a “personnel action” that could be the subject of an individual right of action (IRA) appeal. The agency has not challenged that finding, and I see no error in it. The administrative judge also found, however, that the “gag order,” in which Mr. Murphy instructed the appellant not to grant any more interviews without his prior approval or that of his own immediate

supervisor, Fran Mainella, was not a personnel action. I would find, for reasons stated below, that this action constituted a personnel action.

¶20 The record includes persuasive evidence that the appellant had not been expected to obtain prior approval of her supervisors before participating in interviews. Not only did the appellant testify at the hearing that she “spoke to the press on a regular basis,” Hearing Transcript for Sept. 9, 2004 (HT-2) at 154, but her testimony is supported by her position description, which describes her as being responsible for making “statements clarifying or interpreting Service or Force policies and objectives through speeches ... and the news media,” IRA File, Tab 25, Ex. MM at 3. The agency also has asserted the appellant “was required ... to have frequent contact with Congressional staff, the media, and other law enforcement entities,” and it has referred repeatedly to the appellant as “an Agency spokesperson,” Appeal File, Docket No. DC-0752-04-0642-I-1 (752 File), Tab 3, Subtab 1 at 15, 18, 19. In addition, the record shows that the appellant carried out this responsibility in a largely independent manner. John Wright, the agency’s senior public affairs officer, indicated that he was “not aware that there was anything that would have precluded” the appellant from engaging in interviews with the media. Wright Deposition at 99-100, IRA File, Tab 43; *see also* 752 File, Tab 3, Subtab 1 at 18 (agency’s statement, in addressing the appellant’s communications responsibilities, that the appellant “was required to work, to a large extent, independently”).

¶21 In addition, I note that the December 2 “gag order” seems to have had an almost immediate effect on the appellant’s duties and responsibilities. The morning after it was issued, the appellant asked for permission to participate in a live television interview on the Ellipse regarding the Pageant of Peace. IRA File, Tab 43 at 13 (e-mail message from the appellant to Murphy). Although the appellant has indicated without contradiction that such interviews were conducted by the same television station every year, Mr. Murphy denied the request by

return e-mail message, stating only, “The prohibition on interviews includes all interviews, this one requested by channel 9 may not be granted.” *Id.*

¶22 In light of the evidence described above, I would find that the appellant was responsible for communicating with the news media on a regular basis, that she routinely did so without prior approval, that the imposition of a requirement that she obtain advance approval for such communications was a significant change in her duties and responsibilities, and that the imposition of the December 2 order therefore is a personnel action subject to review in an IRA appeal.

Contributing Factor

¶23 Even though she had not found any of the appellant’s disclosures protected, the administrative judge found that the appellant could show that the statements that were reported in the December 2 newspaper article were a contributing factor in the appellant’s placement on administrative leave and in her removal. Initial Decision at 15-16. She 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. *Id.* at 15. The agency has not challenged this finding in a cross petition for review, and I see no error in it.

¶24 I have noted above that I would find the appellant’s disclosures in her December 2 e-mail protected. Because the appellant did not exhaust her OSC remedy with respect to those disclosures, I would not reach the issue of whether they were a contributing factor in the appellant’s “gag order” or her placement on administrative leave. I would, however, find that the disclosures the appellant made to the Post reporter were a factor in the “gag order.” There is no doubt that Mr. Murphy was aware, at the time he issued that order, of the disclosures that were described in the December 2 Post article. In his order, he told the appellant that she was not to “reference the President’s 05 budget under any circumstances.” IRA File, Tab 9, Subtab 4f. In a follow-up e-mail on the same day Mr. Murphy advised the appellant that the “reference to the 05 budget was

made in the second column of the” December 2 Post article. Clearly, Mr. Murphy’s reference in the “gag order” to “the President’s 05 budget” was prompted by the Post article.

¶25 The appellant’s December 2 e-mail message which was issued shortly before Mr. Murphy proposed the appellant’s removal was a contributing factor in that removal. The record shows that Mr. Murphy was aware of the message at the time he proposed the removal. The record includes a copy of an e-mail message the subcommittee staff member mentioned above sent to Mr. Murphy on December 4, 2003, referring to an e-mail message the appellant had sent her “[j]ust the other day” IRA File, Tab 9, Attachment 2. The staff member acknowledged in her hearing testimony that the message to which she was referring was “[p]erhaps” the December 2 message from the appellant; and the description of the message she provided to Mr. Murphy leaves little room for doubt that she was referring to that message. *See id.* (describing the 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 HT-1 at 243.

¶26 The record does not appear to show whether Mr. Murphy had received or read a copy of the appellant’s December 2 e-mail message by the time he took the actions mentioned above. The staff member’s December 4 message to Mr. Murphy refers to the content of the appellant’s message, however; it is quite critical of the appellant; and it includes a statement that the “Committee has been extremely generous in increasing the National Park Police budget over the last several years” *Id.* I would find that these statements were sufficient to put Mr. Murphy on notice that the appellant had communicated her dissatisfaction with funding to the staff member, and that Mr. Murphy’s receipt of the

⁷ The “NAPA recommendations” were another topic mentioned in the appellant’s December 2 message. *See* IRA File, Tab 9, Subtab 4i at 1.

December 4 e-mail message 13 days before he proposed the appellant's removal therefore is sufficient to establish that the appellant's disclosures to the subcommittee staff member were a contributing factor in her removal. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995) (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), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

Clear and Convincing Evidence

¶27 When an employee has established that her protected disclosures were a contributing factor in personnel actions taken against her, the Board will order corrective action with respect to those personnel actions unless the agency proves, by clear and convincing evidence, that it would have taken the same actions in the absence of the disclosures. *See* 5 U.S.C. § 1214(b)(4)(B). As the majority notes, Majority Opinion ¶ 10, the administrative judge found that the agency had presented sufficient proof that it would have done so. She based this finding primarily on the agency's evidence supporting the charges against the appellant, most of which she sustained. *See* Initial Decision at 16-17.

¶28 I would find that the agency has failed to present clear and convincing evidence that it would have removed the appellant in the absence of her disclosures. One of the bases for this finding is the absence of persuasive evidence that the appellant engaged in the misconduct with which she was charged. As I have explained below, the agency has simply failed to support any of its charges and specifications by preponderant evidence.

¶29 In affirming the administrative judge's findings regarding the merits of the charges and specifications, the majority states that those findings "are based either on undisputed facts or, in significant part, on her assessment of the ...

credibility” of the appellant and other witnesses. Majority Opinion ¶ 13. The majority also cites *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002), and other cases in support of the proposition that “the Board must give deference to an administrative judge’s credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing,” and that it “may overturn such determinations only when it has ‘sufficiently sound’ reasons for doing so.” Majority Opinion ¶ 13.

¶30 This case differs from *Haebe*. The findings at issue here are not based on the administrative judge’s observation of any witness’s demeanor. Although the administrative judge expressly made credibility findings four times in the initial decision, two of those findings applied partly or entirely to the credibility of testimony provided in a deposition – a proceeding the administrative judge could not have observed. *See* Initial Decision at 29, 39. Moreover, to the extent the administrative judge relied on hearing testimony, her findings were expressly based on the alleged consistency or inconsistency of that testimony with other statements. *See, e.g., id.* at 22, 29.⁸ Because neither these nor any other findings in the initial decision were based – either expressly or implicitly – on the administrative judge’s observation of any witness testifying before her, neither *Haebe* nor any other authority on which the majority relies supports the deference the majority gives to those findings.

⁸ In addition, I note that one of the latter two findings was made in the administrative judge’s analysis of a charge she did not sustain, Initial Decision at 22, and that, as I have explained below in connection with charge three, the remaining credibility finding – a finding that the appellant had presented inconsistent testimony on the subject of budget increases – is based on the administrative judge’s misreading of the allegedly inconsistent deposition testimony with which she compared the hearing testimony.

Charge 2

¶31 The first charge the administrative judge sustained is charge two, i.e., making public remarks regarding security in public areas. Initial Decision at 23-26. This charge is based on the interview with the Post reporter that is addressed above. See Proposal Notice at 2, 752 File, Tab 3, Subtab 4c. Specifically, the agency alleged that the appellant had said, as reported in the Post, that “traffic accidents ha[d] increased on the Baltimore-Washington Parkway, which now often ha[d] two officers on patrol instead of the recommended four”; that there were “not enough of us to go around to protect [the Park Service’s] green spaces anymore”; that USPP’s “new force of 20 unarmed security guards [would] begin serving around the monuments in the next few weeks”; and that she “eventually hope[d] to have a combination of two guards and two officers at the monuments.” *Id.*

¶32 In her initial decision, the administrative judge noted the appellant’s allegation that the reporter had mischaracterized her statement regarding the number of unarmed security guards who would be serving at monuments, and her assertion that she had not indicated that there would be only 20 such guards. Initial Decision at 25. The administrative judge also noted, however, that the record included a declaration in which Mr. Wright, who had contacted the reporter who wrote the newspaper article mentioned above, stated that the reporter had said that the Post stood behind its story. She stated further that the appellant had failed to support her own allegations by calling corroborating witnesses such as the reporter and Scott Fear, USPP’s press officer who was the other agency official present during the reporter’s interview of the appellant. *Id.* at 25-26. Based on these considerations, the administrative judge concluded that the appellant had made all the statements the agency attributed to her in connection with this charge. *Id.*

¶33 The appellant’s failure to call the reporter or Mr. Fear does not serve as a proper basis for the adverse inference that seems to have been drawn against her.

The agency has the burden of proving the charge against the appellant. *See* 5 U.S.C. § 7701(c)(1). The agency also had an opportunity to call Mr. Fear and the reporter, and it failed to call either of them. Under circumstances such as these, the appellant's failure to call these witnesses is irrelevant. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 82 (1981); *see also Bradley v. Department of Veterans Affairs*, 78 M.S.P.R. 296, 299 (1998) (where the absence of a witness affects the probative weight of the agency's evidence, the appellant's failure to call the witness is irrelevant).

¶34 I also note that the appellant, during her deposition, testified under oath that the statement in the newspaper article that she had said that 20 unarmed security guards would be serving at national monuments was inaccurate. Appellant's Deposition at 38-39, IRA File, Tab 38. She testified further that the information she was reported to have provided was in fact inaccurate, that "many, many more" would be needed because of the need for 24-hour protection of the monuments, and that the figure of 20 represented the number of guards who were in training that week alone. *Id.* at 39.

¶35 The agency has not challenged the accuracy of the appellant's assertion that the statement attributed to her was factually incorrect; it has not denied that the appellant knew that such a statement would be incorrect; and the appellant's statement regarding the need for a far greater number of guards seems reasonable. These circumstances raise significant doubts about the accuracy of the statement attributed to the appellant.

¶36 I note further that the Wright declaration on which the administrative judge relied provides little support for the agency's claim that the reporter quoted the appellant accurately with respect to the particular statement at issue here. That declaration indicates only 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." Wright Declaration, IRA File, Tab 43, Ex. 1 at 1-2. However, Mr. Wright indicated in his deposition that he had not "go[ne] into

the details of” the alleged statement at issue here. He testified 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. Wright Declaration at 53-54. Mr. Wright testified further that the editor declined to provide any answers to his questions. *Id.* at 54-55. It is apparent, therefore, that the reporter declined to answer any specific questions about the accuracy of the particular statement at issue here.

¶37 Under the circumstances described above, I would find that the agency has not shown by preponderant evidence that the appellant disclosed the number of unarmed security guards who would “begin serving around the monuments in the next few weeks.”

¶38 The appellant has acknowledged making the other statements attributed to her. Appellant’s Deposition of Aug. 18, 2004, at 38-39, IRA File, Tab 38. The agency has argued that the information the appellant provided could not be gathered easily, and that doing so would require “a reconnaissance ... done by someone on foot day and night to observe at what times and places the officers, armed and unarmed, were present or would be present” Hearing Transcript for Sept. 14, 2004 (HT-3) at 80. The appellant is not alleged to have provided any information about variations in staffing levels at different times, however, and she was not charged with disclosing information about the extent to which the agency employed plainclothes personnel. Instead, she was charged, in connection with the last of the four statements quoted above, with providing only general information about the presence of certain categories of personnel whose uniforms would make them visible to members of the public who visited the monuments. Moreover, she referred only to the numbers of those uniformed personnel she “eventually hope[d] to have.”⁹

⁹ The administrative judge, who found that the appellant had disclosed the number of unarmed security guards who would soon begin serving around the monuments, also agreed with the agency that this action was improper because the information was the

¶39 While the appellant provided somewhat more specific information regarding the number of police officers patrolling the Baltimore-Washington Parkway, I am not persuaded, that the information she provided had the effect that the agency alleges, i.e., the effect of “clearly indicat[ing] to those who are disposed to break the traffic laws [that they] need only count [the] two officers [patrolling] and then feel free on that parkway to do ... whatever they chose to do, knowing that the likelihood that any other officer would be patrolling is remote,” HT-3 at 81. Rather than identifying the number of officers who were on patrol duty at any given time of the day, the appellant said only that there “often” were two officers patrolling the road. This information would appear to be no more helpful to potential lawbreakers than information other agency officials have provided to the news media. *See, e.g.*, 752 File, Tab 3 (agency response to appellant’s appeal), Subtab 4m at 97 (newspaper report in which the appellant’s predecessor is described as saying that USPP radio frequencies were not secure, and that officials suspected that protesters had jammed their frequencies); *id.* at 184 (news report in which agency law enforcement officials are said to have indicated that only two law enforcement rangers were on duty at a time in the agency’s Indiana Dunes park); *id.* at 187 (news report, based on information provided by acting chief ranger of Shenandoah National Park, that “rangers are often on their own inside the park borders,” and that the “park’s antique radio system is riddled with

type of information contained in a document submitted by the agency labeled “law enforcement sensitive.” Initial Decision at 26. As noted above, I would not find that the appellant made this disclosure. Moreover, to the extent the agency’s argument applies to the disclosures the appellant has admitted making, I would find that argument unpersuasive. The document in question, which was included in the record under seal, includes information related to security and staffing at the monuments to which the agency refers as “icons.” HT-3 at 80; *see* Sealed Document, IRA File, Tab 28. Because of the sensitive nature of the document, and because the document is under seal, I will not describe its contents specifically. However, it does include far more detailed information which is substantially different from that included in the appellant’s statements concerning “icon” staffing. Sealed Document at 10-11, 13, 15-20.

dead zones, so if a ranger needs help, he may not have the opportunity to ask for it”); *id.* at 189 (report, based on information provided by Park Service ranger, that the ranger “sometimes patrols half a million acres by himself,” and the area where he worked was “a great place for people to cross with drug loads and illegal aliens because we have so few people and so many miles to patrol”). Nothing in the record indicates that the agency viewed any of these statements by other officials to be improper.

¶40 The remaining two statements by the appellant are no more damaging to the agency’s security efforts than the ones addressed above. I can see no basis for concluding that the appellant’s statement regarding traffic accidents on the Baltimore Washington Parkway compromised security or public safety. Moreover, the appellant’s statement that there were “not enough of us to go around to protect [the Park Service’s] green spaces anymore” is simply an expression of opinion not unlike some of the opinions quoted in the preceding paragraph of this opinion. As noted in that paragraph, the agency does not appear to have considered those opinions improper.

¶41 For the reasons stated above, I do not believe the agency substantiated its allegations in charge two.

Charge 3

¶42 In the second sustained charge, i.e., charge three, the agency alleged that the appellant violated section 22.1 of 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.

Id. at 3. The agency asserted further 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.*

¶43 The agency has presented testimony, by NPS’s Comptroller, that it requested an \$8 million increase in USPP funding for fiscal 2005, HT-2 at 212; the appellant acknowledged in her deposition that an increase of this amount had been requested, Appellant’s Deposition at 70-71; and the December 2 Washington Post article mentioned above indicated that the appellant told the reporter she had “asked for “\$8 million more for next year,” Dec. 2 Post Article. The appellant has alleged, however, that her statement regarding that figure was reported inaccurately, that she was in fact responding to a question about how much money was needed, rather than how much she had requested, and that the \$8 million to which she referred did not even cover the same expenses covered by the \$8 million increase to which the agency refers. Appellant’s Deposition at 73, 88; Appellant’s Response to Proposal Notice at 19, 752 File, Tab 3, Subtab 4l.

¶44 The administrative judge found that the appellant presented inconsistent, and therefore incredible, testimony regarding this charge. Initial Decision at 28-29. In support of this finding, she stated that the appellant had testified at her deposition that she knew during the interview that the agency had requested an \$8 million increase, and that she “tried to retract [this] admission” at the hearing by testifying that USPP had requested a \$42 million increase. *Id.* at 28. The administrative judge also stated that the latter testimony was inconsistent with that presented by agency witnesses. *Id.* at 28-29.

¶45 The administrative judge’s credibility finding is not based on her observation of witnesses’ demeanor. It is based instead on her misreading of the

appellant's testimony. The appellant's testimony regarding an \$8 million increase concerned the request for USPP resources that the Department of the Interior ultimately included in its budget proposal, while her testimony regarding a \$42 million increase concerned a request USPP had asked the Department to include in the proposal it submitted to OMB. *See* HT-2 at 103, 212, 216; Appellant's Deposition at 70-71. Furthermore, this finding concerns a matter immaterial to the merits of this charge; the appellant does not deny that she knew of the requested \$8 million increase at the time she was interviewed.

¶46 I note further that the Post Article's quote of "\$8 million more for next year" was followed immediately by a statement that the appellant "also would like \$7 million to replace the force's aging helicopter." *Id.* Therefore, the article indicates 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 had requested. In addition, another article by the same reporter was published in the Post 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; that is, it indicated that the appellant had said "that \$8 million was needed for next year." IRA File, Tab 1, "Charge Three" Subtab at 9-10 (emphasis added).

¶47 Finally, I note that the amounts of money described in the article do not even match the amounts the appellant, as Chief of USPP, had asked her agency to request during the budget process. While the record reflects some uncertainty and disagreement concerning the exact amount of the increase requested by the appellant's organization, nothing in the record indicates that the increase matched any totals mentioned in the December 2 Post article. *See* HT-2 at 212 (Comptroller's testimony that the USPP proposal "showed an increase need of some \$12 million, if I recall"); *id.* at 103 (the appellant's testimony that the USPP had requested an increase of \$42 million).

¶48 The record shows that the appellant referred to a total increase amount that was nearly twice the amount requested by the agency, that the amount to which she referred also was significantly different from the amount she had requested in her capacity as Chief of USPP and that she was referring during the interview to her own wishes rather than to any budget request covered by the OMB circular. The agency does not deny – and in fact, Mr. Murphy has conceded, 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, Mr. Murphy appears to have made similar statements to the press. *See* IRA File, Tab 1, “Charge 3” Subtab at 35 (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”).¹⁰

¶49 For the reasons stated above, I would find that the agency has failed to prove, by preponderant evidence, that the appellant violated section 22.1 of OMB Circular A-11. I therefore would not sustain charge three.

Charge 5

¶50 Charge five, failure to carry out a supervisor’s instructions, was supported by three specifications, each of which the administrative judge sustained. In the first of these specifications, the agency alleged that Mr. Murphy instructed the appellant to detail a member of her staff, Pamela Blyth, to the Office of Strategic Planning (OSP); that the appellant stated that she was unwilling to take that action; 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

¹⁰ This article, like the December 2 Post article, was published at a time when the release of agency budget requests and underlying information would, according to the agency, have been prohibited. *See* IRA File, Tab 1, Appendix B at 1 (indicating that article was published on September 8, 2002); 752 File, Tab 3, Subtab 4i at 24-25 (Mainella’s testimony that agency budget requests and related information could be released only after the proposed budget was submitted to Congress, and that this transmission occurred in early February).

to express her unwillingness; 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 as instructed. Proposal Notice at 4.

¶51 The appellant has acknowledged that she expressed objections to the detail, and that she attempted to persuade Mr. Murphy not to effect it. *E.g.*, Appellant’s Deposition at 98, 117-21. Neither these objections and efforts nor testimony reflecting her continued belief that the detail was unwise, however, necessarily supports 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).¹¹ Instead, the question raised by this specification is whether Mr. Murphy instructed the appellant to take some action or actions to effect the detail, and whether, if so, the appellant failed to take the action or actions.

¶52 The appellant does not claim that she issued any document by which she instructed Ms. Blyth to report for her detail, or that she took any other action to effect the detail. She has denied, however, that Mr. Murphy instructed her to effect the detail; and she has testified that he instead authorized her to “alert Ms. Blyth to the fact that he ... would be contacting her,” that she contacted Ms. Blyth “that night,” and that Ms. Blyth subsequently told her that she had met with Mr. Murphy at his request, as well as with the head of OSP, to whom she

¹¹ In sustaining this charge, the administrative judge relied on the appellant’s “admission” that Mr. Murphy very likely told her he had decided to detail Ms. Blyth. Initial Decision at 33. Nothing in that statement, however, is inconsistent with the appellant’s claims. As indicated further below, the appellant does not deny that she was aware of Mr. Murphy’s plan to detail Ms. Blyth. The administrative judge’s finding therefore is irrelevant to, and provides no support for, the merits of this charge.

was to report during her detail, HT-2 at 88-89, 98; Appellant's Deposition at 145-47.

¶53 The bases for the agency's apparent position that Mr. Murphy had instructed the appellant to take additional actions related to the detail are unclear. The proposal notice indicates only that Mr. Murphy had instructed the appellant to detail Ms. Blyth, and that the appellant had failed to do so. Proposal Notice at 4. Moreover, when the agency representative questioned Mr. Murphy about "the nature of any instruction" he gave to the appellant, the witness simply said that Ms. Blyth was to be detailed to OSP. HT-1 at 57. In addition, when the representative asked what the appellant "was supposed to actually do" as a result of the instruction, Mr. Murphy referred to a general practice he said was followed in detailing employees, and he seemed to indicate that he expected that the same practice would be followed in connection with Ms. Blyth's detail. *See* HT-1 at 57. The practice he described, however, was one in which "[y]ou go directly ... to the head of office, division, or whatever agency," and "you work out the details, reporting times, dates, length of time, those sorts of things" *Id.* While this practice may be the normal procedure when the directors of the originating and receiving offices are responsible for determining the terms of a detail, Mr. Murphy apparently did not consider the appellant free to set or modify those terms. *See, e.g.*, 752 File, Tab 3, Subtab 4j at 14 (Murphy's statement, during the investigation the agency deciding official conducted before issuing his decision, that if the appellant "had a problem with the scheduling [of the detail] ... she was to come to me and I was willing to be flexible and to work that out"); Proposal Notice at 4 (Murphy's statement that he had instructed the appellant to detail Blyth to OSP for 120 days). Mr. Murphy's responses to the agency representative's questions, therefore, shed little light on the nature of the actions the appellant allegedly was instructed or expected to take.

¶54 Even when the administrative judge intervened and asked Mr. Murphy what he had told the appellant "to do, if anything, to accomplish this detail," the

witness responded by referring to the procedures he had described previously. HT-1 at 58-59. That is, he indicated that he expected the appellant “to communicate ... to Ms. Blyth that I had instructed her ... to go on a detail with the Office of Strategic Planning,” and that the appellant “would have then subsequently contacted the [head of OSP] and begun to negotiate reporting dates, times, and to, you know, write up whatever agreement ... they thought necessary between them ... to effect the detail.” HT-1 at 58-59. Mr. Murphy then described this process as “standard procedure,” and said that he “simply expected her to follow ... the established procedures.” *Id.* at 59. Finally, when asked what he “actually [said] to [the appellant] that communicated to her that she was supposed to accomplish this detail as she had in the past,” Mr. Murphy testified, “Well, I said specifically to her that this detail ... is going ... to take place and I expect you to communicate to Ms. Blyth that ... this detail is going to be effected with the Office ... of Strategic Planning.” *Id.* at 60.

¶55 In light of the testimony described above, it appears that the instructions Mr. Murphy provided to the appellant regarding this matter consisted only of instructions that the appellant inform Ms. Blyth that she would be detailed. The appellant has indicated consistently that she did inform Ms. Blyth that Mr. Murphy planned to detail her and would provide her with further information regarding the assignment. *E.g.*, Appellant’s Deposition at 148-49; HT-2 at 88. Nothing in Mr. Murphy’s testimony or elsewhere in the record rebuts that testimony.

¶56 It appears that Mr. Murphy’s claim or belief that the appellant failed to follow his instructions to detail Ms. Blyth is based on events that occurred after arrangements had been made for the detail. The appellant evidently believed or assumed, at the time the e-mail messages cited above were sent, that Ms. Blyth would be permitted to continue some of her USPP work during the detail. *See* 752 File, Tab 3, Subtab 4m at 120-21. Ms. Blyth informed her, however, either late on the Friday before the detail was to begin or on the following day, that no

such accommodation would be made. *See* Appellant's Deposition at 227-29. The appellant then informed J. Steven Griles, the Deputy Secretary of the Interior, of her concerns regarding this matter; the detail was postponed pending consideration of these concerns; a meeting was held to discuss the situation; and the detail eventually was cancelled. HT-3 at 6-10 (Griles testimony); Manson Deposition at 108-09, IRA File, Tab 42.

¶57 When questioned about the basis for his belief that the appellant had failed to comply with his instructions regarding the detail, Mr. Murphy repeatedly referred to the appellant's conversation with Mr. Griles, and to the subsequent cancellation of the detail. For example, when the deciding official asked him whether the appellant's "going to Griles [had] any bearing on [his] determination that [the appellant] was willfully disobeying [his] order to detail" Ms. Blyth, Mr. Murphy replied that it did, Murphy Investigation Testimony at 98-99, 752 File, Tab 3, Subtab 4j; and when the agency representative asked him at the hearing when he discovered that the appellant had not complied with his instructions, he testified that it was when he was informed by telephone of the decision to "put this detail on hold," HT-1 at 54-55.

¶58 The propriety of the appellant's bringing her concerns to the attention of Mr. Griles is a matter separate from this charge. I note, however, that the appellant's communication with Mr. Griles occurred only after Mr. Murphy had arranged the detail and informed Ms. Blyth about it. Moreover, the decisions to postpone and eventually to cancel the detail were made by Mr. Murphy's superiors, and not by the appellant. The communications mentioned above therefore cannot support a finding that the appellant failed to follow any instructions by Mr. Murphy to effect the detail in question. For the reasons stated above, I would not sustain specification one of charge five.

¶59 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* Proposal Notice at 4. The

agency noted that OSC had asked for proof that Messrs. Beam and 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 two 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.*

¶60 Mr. Murphy and the appellant discussed OSC’s request on two telephone conversations. Mr. Murphy testified at the hearing that, during his first conversation with the appellant, he had advised her that “the best course of action to take ... was to ... have [the deputy chiefs] take ... their examinations ... as requested.” HT-1 at 62-63. With respect to the second conversation, he stated that the subject of his advising the deputy chiefs himself of the need for the evaluations was raised, by the appellant and that she had told him that he was “going to have to write ... a memo” conveying this information. *Id.* at 65.

¶61 Mr. Murphy did not testify specifically that he instructed the appellant on either occasion to order the deputy chiefs to undergo the evaluations. He also seemed somewhat uncertain about whether the appellant had complied with any instructions he might have given on the subject. When asked whether the appellant had complied, he initially responded, “Not immediately,” *id.* at 63; and he responded in the negative only after further prompting by the agency representative, *see id.* at 63 (Murphy responded “No,” after the agency representative asked, “What makes you say not – did she ever comply with your instruction?”). Moreover, while he wrote a note dated September 3, 2003, in which he expressed his dissatisfaction with the appellant’s actions related to the evaluations, he made no mention in that note of any failure on her part to carry

out instructions given before his written memorandum was delivered to the deputy chiefs. *See* IRA File, Tab 28, Agency Hearing Ex. 3.

¶62 In addition, Mr. Murphy has acknowledged repeatedly that he agreed during the second conversation that he, and not the appellant, would be the one to advise the deputy chiefs of the evaluation requirement. 752 File, Tab 3, Subtab 4j at 12; HT-1 at 65. Mr. Murphy testified that he communicated his decision on the evaluation requirement directly to the deputy chiefs in an effort “to be cooperative with the” appellant, and as part of an effort “to understand her point of view, giving her the benefit of the doubt.” 752 File, Tab 3, Subtab 4j at 12. Mr. Murphy also testified he did not recall the appellant’s saying that she would not advise the deputy chiefs herself. *See* HT-1 at 65. Mr. Murphy’s testimony as a whole, therefore, provides very little support for this specification.

¶63 In sustaining the specification, the administrative judge relied in part on a statement Mr. Murphy had written regarding events related to the evaluation requirement. Initial Decision at 35; IRA File, Tab 9, Subtab 4c. She indicated in her decision that the statement corroborated Mr. Murphy’s testimony. Initial Decision at 35. I see little in the statement that corroborates Mr. Murphy’s testimony, and even less that supports the specification at issue here. While it indicates that the appellant “protested that [the evaluation requirement] was not necessary” and was otherwise undesirable, IRA File, Tab 9, Subtab 4c, the appellant does not deny that she tried to persuade Mr. Murphy to waive the requirement, and the agency has not alleged that her efforts to do so constituted misconduct. *Cf. Berube*, 30 M.S.P.R. at 592.

¶64 More important, the statement does not indicate that Mr. Murphy instructed the appellant to tell the deputy chiefs to undergo their evaluations, or that the appellant acted inappropriately when she failed to advise the deputy chiefs of that requirement. Instead, it indicates that Mr. Murphy faulted the appellant for failing to ensure – after he issued his memoranda to the deputy chiefs – that the deputy chiefs underwent the evaluations as he had ordered. *See* IRA File, Tab 9,

Subtab 4c. (after referring to a period during which he allegedly “reissued [his] order to [the deputy chiefs] in writing and met with them to further explain why it was important that they comply,” Murphy stated that the appellant “cooperated reluctantly and was not supportive of [his] position.”)

¶65 The statement cited above suggests that Mr. Murphy has 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. Yet, the appellant has not been charged with any action or inaction regarding the evaluation requirement that followed Mr. Murphy’s issuance of his memoranda to the deputy chiefs, and Mr. Murphy himself conceded during his hearing testimony that he did not blame the appellant for any delay that occurred after he issued those memoranda.¹² HT-1 at 192; *see* Proposal Notice at 4.

¶66 For the reasons stated above, I would find that the evidence presented by the agency concerning this specification is unpersuasive. I would not sustain the specification.

¶67 The last specification of charge five concerns the “tractor man” incident at Constitution Gardens, which seriously disrupted traffic in in early 2003. *See* Proposal Notice 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. Proposal Notice 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 in order to assess whether 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

¹² The delay following the issuance of the memoranda appears to have been the result of a delay in scheduling appointments required to complete the evaluations. *See* Appellant’s Deposition at 194-95.

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.*

¶68 The appellant has unequivocally denied that Mr. Murphy ever instructed her to cooperate with the solicitor’s office regarding the “tractor man” incident, Appellant’s Deposition at 197-99; *see also id.* at 218; HT-2 at 150; and the only evidence that those instructions were given consists of statements made by Mr. Murphy. Moreover, Mr. Murphy’s statements are vague. He testified that he did not “remember explicitly [sic] what [he] said”. *See* HT-1 at 67. Perhaps most important, 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 15-16. When questioned further about the matter, he testified that his “memory [was] just really sketchy on that,” 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.* Furthermore, although he was asked following these responses to submit a signed statement and supporting documentation, *id.*, he conceded at the hearing that he had submitted nothing, HT-1 at 195.

¶69 I would find that the agency has failed to establish, by preponderant evidence, that Mr. Murphy gave the appellant the instructions it has charged her with violating.¹³ I would, therefore not sustain this specification. In addition,

¹³ In sustaining this charge, the administrative judge relied on a similarity she believed existed between the appellant’s alleged failure to cooperate on the OAS matter and her alleged failure to cooperate with an investigation the agency’s Inspector General conducted concerning the same “tractor man” incident. Initial Decision at 39. She cited a memorandum in which the agency’s Inspector General was highly critical of the appellant’s response to his own inquiry regarding the incident. *Id.* at 38. *see*

because (as explained above) the agency also has failed to substantiate the other specifications of charge five, I would not sustain this charge.

Charge 6

¶70 The last charge sustained by the administrative judge, a charge of failure to follow the chain of command, is related to a matter at issue in the first specification of charge five, i.e., to Ms. Blyth's scheduled detail to OSP. In this charge, the agency alleges 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" Proposal Notice at 5.

¶71 As indicated above, the appellant evidently assumed that Ms. Blyth would be allowed to continue working on USPP work during her detail; it was only after the weekend preceding the scheduled effective date of the detail had begun that she learned that this arrangement had not been made; she informed Mr. Griles of her concerns regarding Ms. Blyth's unavailability for any USPP work during the detail; and the detail subsequently was postponed and eventually cancelled altogether.

¶72 The appellant acknowledges that she did not contact her first- or second-level supervisors, Mr. Murphy and Ms. Mainella, before contacting Mr. Griles,

Appellant's Deposition, Ex. 2. The appellant testified, however, that the Inspector General's statements were based on his mistaken belief that a document she had sent him—a document that consisted only of responses to "a very narrow set of questions"—represented her office's final response to the inquiry. Appellant's Deposition at 220-24. The appellant also testified that she subsequently talked with the Inspector General, and that the Inspector General complimented her on her work. *Id.* at 221-22. This testimony is un rebutted. Moreover, the appellant has presented un rebutted testimony that Mr. Murphy asked her in November to contact another official of the solicitor's office, that she contacted him within 30 seconds of that request, and that she and that official met later that month. *Id.* at 224-25. In light of this un rebutted evidence, I see no basis for finding that the appellant's actions under similar circumstances support a finding that she failed to comply with instructions to cooperate.

who was her fourth-level supervisor. *See* Appellant's Deposition at 231. Moreover, although she called her third-level supervisor, Judge Manson, and left a message for him, she has acknowledged, in effect, that she talked to Mr. Griles before Judge Manson returned her call. *See* 752 File, Tab 3, Subtab 4i at 33 (Mainella's testimony that she reported to Manson); Appellant's Deposition at 244-45.

¶73 The appellant's contacting Mr. Griles without first talking to Mr. Murphy, Ms. Mainella, and Judge Manson could be regarded as taking her concerns regarding the Blyth detail outside the chain of command. *See Webster's Third New International Dictionary* 370 (1993) (defining "chain of command" as "a series of executive positions or of officers and subordinates in order of authority") (emphasis added). Moreover, going outside the chain of command may constitute a basis for disciplinary action. *See Tyler v. City of Mountain Home, Arkansas*, 72 F.3d 568, 569-71 (8th Cir. 1995); *Bartlett v. Fisher*, 972 F.2d 911, 912, 917-18 (8th Cir. 1992); *Brown v. United States Coast Guard*, 10 M.S.P.R. 573, 578 (1982).

¶74 The appellant's actions in this case, however, differ significantly from those in the cases cited above. Unlike the employees in *Brown* and *Tyler*, the appellant did not take or order an action that she did not have the authority to take or order; instead, she brought her concerns to the attention of an official who unquestionably had the authority to overrule Mr. Murphy's decision. *Compare Tyler*, 72 F.3d at 569 (police sergeant's letter to a sheriff's department official, criticizing sheriff's deputies' actions and instructing the recipient to take corrective action, violated requirement that letters on official stationery be cleared by police chief in advance), *and Brown*, 10 M.S.P.R. at 578 (employee was charged with asking his personnel branch to terminate a detail, instead of directing his concerns about the detailee's performance to his supervisor), *with* Appellant's Deposition at 246 (appellant's testimony that, in raising her concerns with Griles, she was hoping he would cancel the detail, but she knew she

“couldn’t control that”). Unlike the employee in *Bartlett*, the appellant did not raise her concerns outside the agency or damage the agency’s reputation. *Cf. Bartlett*, 972 F.2d at 912-13, 917 (state trooper’s letter to the governor criticizing an alleged ticket quota system, and his dissemination of the letter to other political leaders, damaged the agency’s reputation, created significant political problems, and brought discredit to the highway patrol, and his suspension for reasons allegedly related to the letter therefore did not violate the First Amendment). Instead, she raised her concerns privately within her agency, and her actions led, in Mr. Griles’s words, to “a resolution ... that satisfied the needs of the agency, as well as the [training] needs of Ms. Blyth” HT-3 at 12.

¶75 I also note that the agency has identified no agency instruction or similar authority prohibiting the appellant from taking the action she took here, and that the record includes persuasive evidence that such actions were considered acceptable. Judge Manson testified that 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,” Manson Deposition at 112-13, and he testified that he could think of no specific conditions that would justify disciplining the appellant for contacting him or Mr. Griles in connection with the detail, *id.* at 114-15. 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 not to raise concerns with second-level supervisors in the absence of first-level supervisors, that he did not consider the appellant’s calling him directly “about various matters” unusual, and that, when he heard the appellant’s voice-mail message, he did not “think that it was unusual that she was calling [him] about any particular subject.” *Id.* at 119-20; 752 File, Tab 3, Subtab 4f (Manson’s sworn testimony during agency investigation).

¶76 Mr. Griles provided similar testimony. He testified that he had spoken with the appellant in the past in the absence of her more immediate supervisors, that

he had done so with other employees, and that he was not offended by employees' approaching him in the absence of their immediate supervisors. HT-3 at 7-8. Mr. Griles further testified that he had never expressed any objection to the appellant's talking to him on the occasion at issue here. *Id.* at 7.

¶77 Under the circumstances described above, I would find that the agency has failed to prove, by preponderant evidence, that the appellant acted improperly in bringing her concerns regarding the scheduled detail of Ms. Blyth to the attention of Mr. Griles. Therefore, I would not sustain this specification.

¶78 I have indicated above that the agency has failed to substantiate any of the charges and specifications the administrative judge sustained. Two additional charges were found unsubstantiated below, as the majority has noted, and the agency has not challenged the administrative judge's findings with respect to them. Under these circumstances, the agency cannot meet its "clear and convincing evidence" burden by relying on the evidence it has presented regarding the appellant's alleged misconduct.

¶79 I note further that three of the six charges brought against the appellant, i.e., charges two, three, and four, are based on statements to the Post reporter that I believe are protected under 5 U.S.C. § 2302(b)(8), i.e., on statements regarding the alleged inadequacy of the resources provided to USPP, and regarding the effect of this alleged inadequacy on the public safety. *See* Proposal Notice at 3. Moreover, these three charges are the only ones that concern misconduct that appears to have occurred within 4 weeks before the first of the personnel actions at issue here, i.e., the "gag order" of December 2, 2003. The conduct at issue in charge six and in the first specification of charge five occurred prior to August 25, 2003, when Ms. Blyth's detail was scheduled to begin, *see* IRA File, Tab 1, "Charge 6" Subtab at 11; the conduct at issue in the second specification of charge five occurred no later than June 16, 2003, when Mr. Murphy issued his memoranda to the deputy chiefs, instructing them to undergo evaluations, *see id.*, "Charge 5 – 2" Subtab at 9; and 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, *see* Proposal Notice at 4. Although Mr. Murphy sent the appellant an e-mail message on August 25, 2003, regarding the appellant's raising the Blyth detail with Mr. Griles, nothing in the record indicates that he took any other action with respect to any matters at issue here until after the December 2 Post article was published.

¶80 Under the circumstances described above, and in the absence of any persuasive evidence that the agency would have taken the same personnel actions against the appellant in the absence of her protected disclosures,¹⁴ I would conclude that the agency has failed to meet its burden of proof in this matter, and that the appellant has substantiated her claim of reprisal under 5 U.S.C. § 2302(b)(8).

First Amendment

¶81 After the initial decision in this case was issued, the U.S. Supreme Court issued a decision holding that the U.S. Constitution “does not insulate ... from employer discipline” statements employees make “pursuant to their official duties.” *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). I agree with the majority that the appellant made her disclosures to the Post reporter and to the subcommittee staff member while carrying out her official responsibilities, and that, under *Ceballos*, her communications with those individuals therefore are not protected.

¶82 I do not concur in the majority's alternative finding regarding this matter. *See* Majority Opinion ¶¶ 35-40. Because *Ceballos* is dispositive of the

¹⁴ I have indicated above that the December 2 e-mail message cannot be considered in connection with the appellant's claim that the “gag order” and her placement on administrative leave constituted reprisal. The timing of those personnel actions in relation to the December 2 Post article, however, the strong evidence that the Post article was a contributing factor in the actions, and the absence of evidence that the agency would have taken the actions in the absence of the article preclude a finding that the agency has met the “clear and convincing evidence” burden described above.

appellant's First Amendment claims, however, I regard the alternative finding as dictum and do not address it.

Conclusion

¶83 For the reasons stated above, I would sustain none of the agency's charges and specifications, and I would find that the appellant's removal, her placement on leave, and the order restricting her contact with news media constituted reprisal in violation of 5 U.S.C. § 2302(b)(8).

Barbara J. Sapin
Member

CERTIFICATE OF SERVICE

I certify that this Opinion and Order was sent today to each of the following:

Electronic Mail	Mick G. Harrison, Esq. Environmental Center 521 W. Kirkwood Avenue, Suite 1 Bloomington, IN 47401
Electronic Mail	Mr. Richard E. Condit, Esq. Public Employees for Environmental Responsibility 2001 S Street, NW, Suite 570 Washington, DC 20009
U.S. Mail	Teresa C. Chambers P.O. Box 857 Huntingtown, MD 20639
U.S. Mail	Deborah S. Charette, Esq. Department of the Interior Office of the Solicitor Division of General Law 1849 C Street, NW, MS 3458 Washington, DC 20240
U.S. Mail	Jacqueline Jackson, Esq. Department of the Interior Office of the Solicitor 1849 C Street, N.W. Mail Stop 7308 Washington, DC 20240
U.S. Mail	Elaine Kaplan Senior Deputy General Counsel National Treasury Employees Union 1750 H Street, N.W. Washington, DC 20006

September 21, 2006

(Date)

Dinh Chung

Case Management Specialist