**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**WASHINGTON REGIONAL OFFICE**

ROBERT J. MACLEAN,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DC-1221-20-0235-W-2[1]

DATE: February 7, 2023

David A. Karman, Esquire, Gary M. Gilbert, Esquire, Kevin L. Owen, Esquire, Thomas Devine, Esquire, Silver Spring, Maryland, for the appellant.

Agatha Swick, Esquire, Christina L.P. Bui, Esquire, Michael W. Gaches, Esquire, Sarah I. Grafton, Esquire, and Steven Lewengrub, Arlington, VA, for the agency.

**BEFORE**
Melissa Mehring
Administrative Judge

## INITIAL DECISION

The appellant filed an individual right of action (IRA) appeal with the Board in which he alleged the agency took several personnel actions against him in retaliation for his protected disclosures and activity. AF, W-1, Tab 1. The

[1] The appellant filed his appeal on December 16, 2019. That appeal was docketed DC-1221-20-0235-W-1 (W-1). The appeal was dismissed without prejudice to refiling on August 31, 2020. Appeal File (AF), W-1, Tab 51. The appeal was subsequently refiled with a new docket number DC-1221-20-0235-W-2 (W-2). AF, W-2, Tab 1.

Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 1214(a)(3), 1221(a), (e). I held a 19 -- day hearing over the course of several months. AF, W-2, Tabs 37-39, 40, 43-45, 48, 52, 55-56, 62-64. 67, 81-82, and 90-91. For the reasons discussed below, the appellant's request for corrective action is DENIED.

## PART I

## BACKGROUND

The appellant prevailed in his litigation against the agency in a Supreme Court decision decided January 21, 2015. *Department of Homeland Security v. MacLean*, 574 U.S. 383 (2015). Thereafter the agency reinstated the appellant to his Federal Air Marshal (FAM) position at the I-Band level and the appellant filed a Petition for Enforcement (PFE), SF-0752-06-0611-C-1. PFE File, Tab 1 at 64, Tab 64 at 23, 28. In the decision that followed, the Board determined that the agency properly reinstated the appellant to the I-Band. PFE File, Tab 64 at 22-30. During this time, the appellant applied for two Lateral Ground Based Assignments (GBA), GBA #15-30 and GBA #16-10. AF, W-1, Tab 29, 4z, 4bb.

The appellant applied for a Voluntary Lateral Transfer to the Washington Field Office (WFO) and his request was granted by email dated July 20, 2015. AF, W-1, Tab 29, 4cc. The appellant was taken off of flying assignments at the end of February 2016. AF, W-2, Tab 37. There is additional discussion on this topic in the Assignment to VIPR section below.

The appellant's first Ground Based Assignment (GBA) was to the Emergency Preparedness Section (EPS). AF, W-1, Tab 29, 4w; AF, W-2, Tab 37. Thereafter, he was reassigned to Visual Intermodal Prevention and Response (VIPR) within the WFO. *Id.* While in that position, the appellant had two different first line supervisors Supervisory Federal Air Marshal (SFAM) MH (July 2016 through February 2017) and SFAM SM (January 2017 through the appellant's removal). AF, W-2, Tabs 44, 64. His second line supervisor was Assistant Special Agent in Charge (ASAC) KT, while his third line was Deputy

Special Agent in Charge (DSAC) RM, and the Special Agent in Charge (SAC) BB was his fourth line supervisor. AF, W-2, Tabs 38, 48, 90. The appellant's fifth line supervisor was Regional Director (RD) DT. AF, W-2, Tab 52. DT was in the position from June 2015 until June 2019. *Id.*

Among the issues noted in the Board's Compliance Decision regarding the appellant's assignment was the July 27, 2016 decision to assign the appellant to VIPR. PFE File, Tab 26 at 25-26. As a result of this reassignment the appellant withdrew his claim that he should be reassigned to a GBA filled by #16-19 Lateral Reassignment Opportunity. PFE File, Tabs 23, 26. The Administrative Judge's initial decision in the appellant's PFE became the final Board order when neither party appealed.

The appellant sought further review of the Board's compliance decision before the U.S. Court of Appeals for the Federal Circuit, SF-0752-06-0611-L-3. Litigation File (LF), L-3, Tab 1. In its decision, the court affirmed the Board's compliance decision. *MacLean v. Department of Homeland Security*, Slip op. 2018-1068 (October 24, 2018).

While the appellant was pursuing his petition for enforcement, he resumed his employment with the agency. He filed the instant IRA appeal based on alleged retaliation following his reemployment. AF, W-1, Tab 1.

Jurisdictional Finding

Following the appellant's initial appeal, I addressed the Board's jurisdiction in numerous orders.[2] The appellant exhausted his administrative remedies by seeking redress before filing his Board appeal. AF, W-1, Tab 1. The Office of Special Counsel (OSC) terminated its investigation on October 30, 2019, based on the appellant's decision to file an IRA appeal. *Id.* at 16-17. The appellant timely filed his Board appeal on December 16, 2019. AF, W-1, Tab 1.

---

[2] For a thorough discussion of the Board's jurisdictional rulings please see AF, W-1, Tabs 31, 34, 36, 46, 49.

I summarized my jurisdictional findings in the Order and Summary of Status Conference issued on August 17, 2020. AF, W-1, Tab 49 at 1-4. I find the Board had jurisdiction as follows:

Protected disclosures

1. Allegation of sexual misconduct, which evidenced government wrongdoing to include preferential treatment. AF, W-1, Tab 31 at 11-12. The appellant made disclosures on this subject in his August 17, 2018 response to his proposed removal, and in his April 1, 2019 submission to OSC. AF, W-1, Tab 11 at 72-99, 238; AF, W-1, Tab 31 at 11-12. I found jurisdiction did not extend to the appellant's allegations that merely claimed extramarital affairs and statements and/or posts that were merely an attack on co-workers meant to ridicule and demean them. AF, W-1, Tab 31 at 12-15.
2. Allegation regarding the continued use of inward-opening doors to flight decks, made to OSC on February 10, 2016. AF, W-1, Tab 14 at 27-28, Tab 31 at 15-16.
3. Allegations regarding "closing the body scanner loophole" made to Congress on June 9, 2015. AF, W-1, Tab 16 at 101; AF, W-1, Tab 31 at 16.
4. Allegation that there was a failure to install secondary barriers to protect flight decks made June 9, 2015 to Congress, April 12, 2016 to OSC, and March 7, 2019 to "The President," "Congress," and OSC. AF, W-1, Tab 12 at 115-16; AF, W-1, Tab 11 at 155-211; AF, W-1, Tab 16 at 105; AF, W-1, Tab 31 at 16-17.
5. Allegation that in 2001 a Federal Air Marshal left a gun in a plane restroom made on February 10, 2016 to OSC, and on March 30, 2016 to TSA Office of Investigations and TSA Office

of Civil Rights. AF, W-1, Tab 14 at 28; AF, W-1, Tab 31 at 20. In the pleading to OSC, the appellant stated that he was the perceived whistleblower for the disclosure to media in 2002. AF, W-1, Tab 14 at 28.

6. Allegation that trucks transporting religious food were not searched and therefore they were a security risk, made to a supervisor on September 26 and December 4, 2017 to SM, as well as in his August 17, 2018 response to his proposed removal. AF, W-1, Tab 11 at 121; AF, W-1, Tab 15 at 30; AF, W-1, Tab 31 at 22.

7. Allegation regarding the lack of barriers at Terminal A of DCA airport made to CS, MH, "and others" in December 2016, and in his response to his proposed removal dated August 17, 2018. AF, W-1, Tab 11 at 5, 133; AF, W-1, Tab 31 at 22-23. The appellant also made the disclosure to the TSA Inspection hotline on July 8, 2018 and to OSC on October 29, 2018. AF, W-1, Tab 14 at 8, AF, W-1, Tab 31 at 22-23.

8. Allegation that airlines were vulnerable to synthetic opioid attacks because they did not have antidote kits onboard, made on August 7 and October 29, 2018 to OSC. AF, W-1, Tab 11 at 138-39; AF, W-1, Tab 12 at 48-86; AF, W-1, Tab 31 at 24.

AF, W-1, Tab 49 at 2-4.

Protected activity

The Board has jurisdiction over the appellant's protected activity regarding his prior Board appeal, which was also adjudicated by the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court. AF, W-1, Tab 14 at 26. The litigation took place between April 11, 2011 and July 18, 2017. *Id.* The

appellant also engaged in protected activity when he filed his OSC complaint on February 10, 2016. AF, W-1, Tab 14 at 25.

Further, the appellant asserted to OSC in an October 29, 2018 letter, that he was the impetus for, and was involved in, the DHS OIG investigation regarding sexual misconduct that closed on April 25, 2014, but was subsequently reopened to interview additional witnesses. AF, W-1, Tab 14 at 7, 12. This is also sufficient to constitute a nonfrivolous allegation of protected activity. AF, W-1, Tab 49 at 3.

Personnel actions

The Board has jurisdiction over the following personnel actions:

1. The appellant's removal dated March 21, 2019. AF, W-1, Tab 31 at 27-28.
2. Nonselection for a lateral reassignment, I-Band Vacancy No. 15-30, June 30, 2015. AF, W-1, Tab 46 at 4-5.
3. Nonselection for lateral reassignment Vacancy No. #16-07, January 2016. *Id.* at 6.
4. Order to undergo a fitness for duty examination, October 2017. *Id.* at 9. AF, W-1, Tab 49 at 3-4.
5. Hostile work environment claim. AF, W-1, Tab 31 at 26.

Summary of Personnel Actions

*Nonselections*

The appellant stated that he applied for two lateral assignments, No. GBA-15-30 and No. GBA-16-07, and was not selected for either assignment. AF, W-2, Tab 37; AF, W-1, Tab 29, 4z. The appellant alleged that he was not selected for these two vacancies because of his protected disclosures and activity. AF, W-1, Tab 44 at 7-9, AF, W-1, Tab 29, 4z.

*Fitness For Duty Evaluation*

After revealing that he was prescribed anti-depressants and anti-anxiety medication following his receipt of a Cease and Desist Order on October 6, 2017, the agency ordered the appellant to undergo a fitness for duty (FFD) evaluation. AF, W-1, Tab 29, 4n; AF, W-2, Tab 24, Ex. T at 4; AF, W-2, Tab 44. FAMS Medical has a policy that FAMs must report changes to their prescription medications. AF, W-2, Tab 23, Ex. 14. After FAMS Medical was notified of the change, they placed the appellant in a non-duty status. AF, W-2, Tab 44. FAMS Medical then informed the appellant that an evaluation to examine his fitness for duty had to be completed before he could fully return to duty. AF, W-2, Tab 24, Ex. T at 4; AF, W-2, Tab 44. The appellant asserted it took two months to find a doctor to perform the examination. AF, W-2, Tab 38. The appellant was on sick leave until the agency cleared him for return. AF, W-2, Tab 24, Ex. S.; AF, W-2, Tab 52.

*Hostile Work Environment Personnel Action*

The appellant listed several individual personnel actions that collectively could be considered a nonfrivolous allegation of a hostile work environment. AF, W-1, Tab 31 at 26. These individual personnel actions included the appellant's claims regarding two cease and desist letters issued on October 4, 2017 and August 2, 2018 and the allegedly retaliatory investigations from April 2016 and September 12, 2017. *Id.*

*Removal*

The appellant was removed from service following the TSA Office of Inspections[3] (OOI) investigation into his alleged misconduct. AF, W-2, Tab 48. The investigation and how it commenced will be discussed in further detail in The Investigation section below. Further, I have included a summary of the

---

[3] The office was previous named the Investigations Divisions, but throughout this decision it will be referred to as OOI. AF, W-1, Tab 29, 4e n.2.

appellant's OOI statements and interviews in a background section. The remainder of the relevant information related to the appellant's removal will be included in the Decision section of the decision.

The appellant's removal was based on three charges of misconduct: Charge 1, Inappropriate Comments; Charge 2, Inappropriate Conduct During an Investigation; and Charge 3, Misuse of Government Property. AF, W-1, Tab 29, 4a. In the Proposal section below, I detail the charges and specifications as set forth in the proposal notice. AF, W-1, Tab 29, 4e.

CP was the deciding official and reviewed the appellant's 511-page response to the agency's proposed removal action. AF, W-1, Tab 29, 4c. CP ultimately found that all three charges in the proposal were supported by a preponderance of the evidence and that the appellant's response to the proposal did not successfully rebut any of the charged misconduct. *Id.* In the decision letter, CP noted that the aggravated penalty range for each of the charges included the penalty of removal, and he found removal warranted because he found the appellant incapable of rehabilitation. AF, W-1, Tab 29, 4a at 14-16. A summary of the appellant's response and the decision will be included in the Decision section and I will not include a separate background section for this.

Decision Organization

Because of the tremendous amount of information included in this appeal, I have attempted to organize the decision into a chapter-like format. Before reaching the legal analysis at issue in this appeal, I have added four additional sections under the background portion of the decision (Part I). The appellant alleged that the actions taken against him were not taken solely by named acting agency officials, but rather the retaliation he suffered was a coordinated effort by many agency officials across many offices. Thus, to ensure that all arguably relevant evidence is included in the decision, I have included a background section regarding the appellant's time in the WFO entitled "Assignment to the

VIPR Team," and a section entitled "The Investigation." The Investigation section provides a summary of information that is relevant to the determination of the prima facie case to include the determination about whether the appellant's claim of a hostile work environment was a personnel action. Further, I have included a section dedicated to the appellant's statements and interviews during the OOI investigation and a separate section summarizing the proposal notice.

After Part I, I discuss the appellant's prima facie case in Part II which includes sections on the applicable law, the appellant's alleged protected disclosures and activity, knowledge by agency officials and the timing of agency actions, and the alleged personnel actions taken against him. I conclude with a section discussing the contributing factor part of the prima facie test.

Part III is dedicated to each of the appellant's alleged personnel actions over which he has established a prima facie case. These include his Nonselection for Lateral Reassignment to GBA #15-30, the Ordered Fitness for Duty Evaluation, and the appellant's Removal.

I held a 19-day hearing in this case over the course of several months. AF, W-2, Tabs 37-39, 40, 43-45, 48, 52, 55-56, 62-64, 67, 81-82, and 90-91. In reaching my decision in this case, I have considered all of the record evidence to include pleadings, orders, documents, and testimony. I note I have not cited to all record evidence that I considered, but instead have attempted to limit the decision to relevant evidence.

## ASSIGNMENT TO THE VIPR TEAM

The appellant applied for and was granted a voluntary transfer from Los Angeles to Washington, DC, DT testified. AF, W-2, Tab 52. DT averred he would have been the appellant's fifth or sixth level supervisor and that he was notified of the appellant's transfer from his supervisor DH. AF, W-2, Tab 52. This was the normal process when a FAM moved into his region. *Id.* It was DT's understanding that the transfer was voluntary. *Id.*

Even prior to the appellant's assignment to VIPR, SFAM MH testified he met the appellant in the summer of 2015. AF, W-2, Tab 64. MH averred that the appellant spoke to him about the promotion process as MH was in charge of the J-Band promotion process. *Id.* According to MH, he assisted the appellant with that process. *Id.* Thereafter, the appellant was assigned to MH's VIPR team. *Id.*

There is some dispute as to why and how the appellant stopped flying. The appellant asserted that it was based on a report from SFAM TS about terrorists targeting FAMs, and because of the appellant's notoriety and media coverage he would be a potential target. AF, W-2, Tabs 37, 90. According to the appellant, the agency tasked TS with trying to remove the appellant's identifying information from the internet, which the appellant believed was impossible. *Id.* Thereafter, the appellant contacted his attorney, Congressional investigators, OSC, and the Security Services and Assessment office (SSA). AF, W-2, Tab 90. The appellant was not sure of the order in which he made those contacts. *Id.*

On cross examination, the appellant acknowledged that MM from SSA sent him an email in early February 2016 regarding his threat concerns. AF, W-2, Tab 90. In the email, the appellant testified that MM informed the appellant there was no threat against him or TSA FAMs in general, but the appellant asserted he disagreed with this conclusion. *Id.* Further, the appellant testified that the email recommended that all Federal employees reduce their social media presence. *Id.* The appellant testified that he did not do anything to reduce his public social media presence in response to the email. *Id.* Although the appellant stated that he did not want to fly because of safety concerns, he also testified that he did not want to fly even absent those concerns because he believed the program was ineffective. *Id.* The appellant believed he should have been given a GBA based on his record. *Id.*

WFO SAC BB testified he believed he was informed in February 2016 by DT that OSC requested that the appellant be taken off flight status. AF, W-2, Tabs 38, 43. BB averred that he would have discussed the appellant's change in

duty status with DSAC RM so he could take the appellant off of the flying schedule. *Id.* According to BB, this was his only experience with a FAM who was cleared to fly, but was not flying based on an OSC request. *Id.* In his OOI interview, BB stated that he was told that the decision for the appellant not to fly was based on an ongoing case involving the agency and OSC. AF, W-1, Tab 29, 4f at 193.

Prior to that, BB testified, he treated the appellant like any other FAM, but when he could no longer fly he was different than other FAMs, and therefore treated differently. AF, W-2, Tab 38. BB testified that he first assigned the appellant to the Emergency Preparedness Section (EPS) and then VIPR which was where the appellant remained until his removal. *Id.* Initially, BB testified the appellant performed administrative duties before becoming an operational member on VIPR. *Id.* BB testified that he did not have a problem with the appellant being assigned to VIPR, because no alternative was better. *Id.* It was BB's testimony that he made the decision to assign the appellant to VIPR, but that he would have discussed it with the DSAC and ASACs. AF, W-2, Tabs 38, 43. On the stand, BB went through the other GBAs that he had within WFO, and BB averred the appellant did not possess the requisite skills and/or required certifications to fill those positions. AF, W-2, Tab 43.

Further, BB explained that the appellant was not happy about being put on VIPR, but there was no other place where the appellant could be placed. AF, W-2, Tab 38. As in his testimony, BB stated during his OOI interview that he gave the appellant the choice of a 45-day detail to EPS or VIPR, and the appellant chose EPS, because the appellant stated he did not support the VIPR mission. AF, W-1, Tab 29, 4f at 193; AF, W-2, Tab 38. BB testified that no one told him how to manage the appellant or where to assign him. AF, W-2, Tab 43.

The appellant testified that BB gave him two choices, VIPR or EPS. AF, W-2, Tab 37. The appellant averred that he was initially not interested in the VIPR team because he perceived it as a "dog and pony show." *Id.* The appellant

further averred that he did not believe the VIPR team did much, but rather was merely there to look good for the public. *Id.* The appellant stated he, therefore, opted to join the EPS, which was supervised by SFAM RT. *Id.*

The appellant asserted he was assigned to EPS for 45 days. AF, W-2, Tab 37. While assigned to that section, the appellant testified, he was given a few busy work assignments, but no substantive duties. *Id.* While in that position, SFAM SS asked the appellant to provide a memorandum about a video he showed to RT. AF, W-1, Tab 32 at 31, 26-34, 30-35; AF, W-2, Tab 37. Based on the memorandum, RT complained that the video was racist, which the appellant denied. AF, W-1, Tab 32 at 30-35; AF, W-2, Tab 37. The appellant alleged that the request for the memorandum and the allegations by RT were retaliation for his prior whistleblowing. AF, W-1, Tab 32 at 32-34.

The appellant alleged that after he completed his 45-day assignment, he was reassigned to the WFO "bullpen," which is an area with numerous cubicles where FAMs go to unassigned computers. AF, W-1, Tab 32 at 32-34. The appellant testified that assignments to this area last about a week. *Id.* While there, the appellant testified that he received assignments from SFAM TS, who told the appellant he would be involuntarily assigned to VIPR. *Id.* According to the appellant, SFAM RW approached him in the bullpen and stated that they were getting body armor and a belt for the appellant. *Id.* Further, BB told the appellant that MH would be his supervisor within VIPR. *Id.* For the first 3 weeks, the appellant averred he was not permitted to deploy, but after the appellant made several complaints about not deploying with VIPR, the appellant testified, he was allowed to deploy. *Id.*

After the detail to EPS, BB assigned the appellant to VIPR and initially the appellant was given administrative duties, but later was allowed to deploy with the team. AF, W-2, Tab 38. According to BB, he made the decision for the appellant to deploy with VIPR and could have done so at any time while the appellant was in his chain of command. *Id.* Further, BB testified that there were

steps required for the appellant to deploy such as getting him equipment. AF, W-2, Tab 43.

BB told OOI and testified that he learned of the appellant's displeasure regarding deployment from the appellant's radio interview and maybe a news article. AF, W-2, Tab 43. The appellant refreshed BB's recollection with his OOI interview, and BB stated that he was also aware of the appellant's complaint to Congress about his assignments and working situation, but had no current recollection about it. AF, W-1, Tab 29, 4f at 193; AF, W-2, Tab 43. It was after the media reports that BB testified he met with the appellant on July 26, 2016. AF, W-1, Tab 29, 4f at 193; AF, W-2, Tab 43. Prior to this, BB testified the appellant had not wanted to deploy with VIPR, but after his complaints, BB averred he understood the appellant did want to do so and BB allowed it. AF, W-1, Tab 29, 4f at 193; AF, W-2, Tab 43.

Former DSAC RM, who is currently on military leave until October 1, 2022, testified that he was the appellant's third line supervisor. AF, W-2, Tab 90. RM could not initially recall who made the decision that the appellant would not deploy with VIPR upon his assignment. *Id.* Following refreshment of RM's recollection with his deposition, however, RM testified that it might have been above BB and perhaps headquarters. *Id.* Still, RM testified he did not know who made the decision. *Id.* RM explained that BB could have decided who was on a VIPR team, but decisions regarding the criteria for ability to deploy would be a headquarters level decision. *Id.* The qualifications such as legal, medical, firearms, security clearance, and the like are administered by headquarters level support entities, and BB could not override them, RM testified. AF, W-2, Tab 90. RM testified that he did not speak to headquarters about the appellant's deployment, but just assumed BB had. *Id.* When asked if his recollection was better at the deposition or the day of his hearing testimony, RM asserted it was better at the hearing because he had had the opportunity to review old emails

before the hearing and had not done so before the deposition. *Id.* Later in his testimony, however, RM stated that his memory was clearer at the deposition. *Id.*

In one such email, RM wrote to BB on May 24, 2016 about the appellant's lack of deployment. AF, W-2, Tab 24, Ex. E. In the email, RM stated the appellant had requested a GBA, and the appellant had indicated that he could not fly, and "HQ confirmed this." *Id.* Based on the appellant's limitations of not being able to fly or deploy, RM suggested that his current assignment was not appropriate unless the situation changed. *Id.*

When asked about the assignment of the appellant to VIPR, RM testified that he made a statement to the EEO office in 2016, and he believed that statement was the most accurate because it was the closest in time to the events at issue. AF, W-2, Tab 90. In that statement, RM testified he recommended the appellant's assignment to VIPR and BB concurred. *Id.*

SM and MH testified that a typical VIPR team was comprised of six FAMs and a supervisor. AF, W-2, Tabs 44, 64. Having a seventh member, SM averred, was unusual. *Id.* He asserted that having more employees can be good and bad, in that there are more people to do the work, but it is also more difficult to supervise and to divide a larger group of employees into equal teams. *Id.* SM claimed he mentioned the odd number to KT and she said this is the way it is and move forward, which is what he testified he did. *Id.*

On the stand, SM explained that he understood the appellant was assigned as an extra VIPR team member because he could not fly based on an agreement between the agency and appellant's counsel. AF, W-2, Tab 44. SM testified he could not recall who told him about the agreement. *Id.* It was SM's understanding that the appellant could not fly because of his notoriety, but then SM testified it still did not make sense to SM to put the appellant on a VIPR team. AF, W-2, Tab 44. SM explained that VIPR teams deploy in public wearing a uniform, while flying FAMs are covert missions. *Id.* Yet, SM testified that it was not his decision. *Id.*

The appellant testified that the seven members of VIPR Team C were FAMs TF, TA, NC, CC, TH, WY, MN, JL, and the appellant and the SFAMs were MH, SM, and sometimes TC. While on the VIPR team the appellant asserted that some team members did not wear body armor in the vehicle.[4] AF, W-2, Tab 44. In making this allegation, the appellant referenced JL, but SM testified at his deposition that it was true of multiple people and did not believe it was only JL. *Id.*

SM testified that VIPR provides additional security at transportation venues such as airports to include DCA and IAD, and train stations such as Union Station. AF, W-2, Tab 44. While at venues, VIPR assigned FAMs work in teams and sometimes work with stakeholders or independent of them. *Id.* Stakeholders included Amtrak, Metro Transit Police, and Metropolitan Washington Airports Authority (MWAA). *Id.* They worked with stakeholders pursuant to an agreement, and only had legal authority in terrorism related matters. *Id.* Therefore, SM testified that stakeholder relationships were extremely important. *Id.*

It was KT's testimony that she learned that the appellant was in her chain of command assigned to WFO when she was reviewing the non-flight status employees and saw there was an extra person on VIPR. AF, W-2, Tab 48. She testified that to the best of her recollection she was told that the appellant was in a non-flight status because of an agreement among the appellant's attorney, OSC, and the agency. *Id.* KT could not recall specifically who told her or the exact conversation. *Id.* Following the assignment, KT testified she heard from other FAMs who were on the waitlist to join VIPR that they believed the appellant was getting preferential treatment, which she acknowledged appeared to be the case.

---

[4] I found this disclosure was not protected in my jurisdictional order dated March 27, 2020. AF, W-1, Tab 31 at 21.

*Id.* KT testified that the waitlist time for a spot on a VIPR team was a year or two. AF, W-2, Tab 48.

MH also testified that there was a list of people waiting to be selected for a position on a VIPR team and the appellant was selected over those on the list. AF, W-2, Tab 64. On the stand, MH stated that he was asked about the assignment, but could not recall by whom. *Id.* MH averred that the appellant said he believed he was being subjected to retaliation by initially being given support work, but MH asserted this was a misperception on the part of the appellant. *Id.* Instead, MH averred that the office had a limited number of ballistic vests and did not have any that fit the appellant. *Id.* MH testified that the appellant could not deploy to a venue with the team without the vest and getting one took time. *Id.* This conclusion was echoed by TE. AF, W-1, Tab 29, 4f at 365.

KT testified that when she became the appellant's second line supervisor she spoke to MH, who at the time was the appellant's first line supervisor. AF, W-2, Tab 48. This was at the beginning of the fiscal year in October, she testified, and at that time she spoke to all of the supervisors and discussed all employees. *Id.* She had approximately 60-100 subordinate FAMs and KT testified she relied on her squad supervisors. *Id.* According to KT, MH raised the issue that the appellant was very negative in his views about the organization, and was always talking about his Supreme Court case which was off-putting to some team members. *Id.* MH indicated that as a result there was a lack of team cohesion, KT testified. *Id.* Further, KT testified that MH reported the appellant was not actively participating with the team at Union Station, but was instead sitting in the car on the phone. *Id.* KT continued in her testimony that MH said the appellant indicated he was getting calls from a Congressperson. *Id.* When the appellant took these calls, MH stated the appellant would sit in the car for long periods and not participate in operations. *Id.* KT testified that she interpreted MH's statements to her as the appellant bragging, but she could not

recall the exact words used 4 years prior. *Id.* KT averred that she told MH to pay closer attention to what was being said so if there was negativity or other things that should be addressed he would be able to address them not just with respect to the appellant but with regard to the whole team. *Id.* KT's testimony was consistent with her OOI interview and statement. AF, W-1, Tab 29, 4f at 154-72.

MH testified that he spoke to KT about the appellant because of the appellant's assertive behavior and because he was not responding to his verbal cues. AF, W-2, Tab 64. According to MH, he believed the appellant received preferential treatment because of his past experience and explained that the agency would have removed anyone else from the team if they behaved as the appellant had. *Id.* It was MH's testimony that the issues he discussed with KT initially were complaints from JL and MN who wanted to leave the team to get away from the appellant. *Id.* Among the appellant's alleged comments they reported to MH, MH testified, was that women were not qualified for the VIPR team work and that without military experience they could not do the job. *Id.* Further, MH testified he reported to KT that it was alleged that the appellant would take personal phone calls for more than a half hour at a time and would walk off while on the job. *Id.* MH averred that he repeatedly asked the appellant not to do these things during a VIPR function because part of the purpose of the VIPR team is to be a visible presence. *Id.* Moreover, MH testified that his absence during patrols was a safety concern as officers needed to stay with at least one other officer. *Id.* According to MH, if the appellant had an unscheduled call that could not be rescheduled, he would have worked to give the appellant the time he needed as he did many times. *Id.* MH testified that he raised these issues with KT because she was his supervisor and she never requested that he look to find misconduct on the part of the appellant. *Id.* Any counseling MH provided the appellant, he averred, was to improve the work environment and assist the appellant. *Id.* MH acknowledged that he did not put

these asserted complaints into writing or submit an ITR, but rather felt the solution was to counsel the appellant to effect change. *Id.*

KT testified that she heard about the appellant from both supervisors and co-workers, and the information from both sources was consistent. AF, W-2, Tab 48. KT stated she did not receive a report of daily activities. *Id.* Instead, KT testified that matters of concern were reported to her, such as when the team was walking a patrol beat but the appellant was in the car rather than participating. *Id.* Moreover, she testified that she received notice of things like emails that were sent to senior leadership, the report to FAM Medical about the appellant, and other similar items. *Id.* KT testified she reported these types of things as well. *Id.*

Based on the information she received from MH, KT testified, she directed MH to conduct an interim appraisal, which is a tool to discuss performance issues. AF, W-2, Tab 48. At the time there was a transition of supervision from MH to SM, KT explained and she was going to be out on maternity leave. *Id.* During her leave, KT testified that RBu filled in for her. *Id.* Prior to taking leave, KT testified she met with SM to welcome him and discuss team issues which included telling him about giving the appellant's interim appraisal. *Id.* KT believed she left to the supervisors' discretion whether the substance of the interim appraisal should be oral or in writing. *Id.*

When KT returned from leave, she testified she learned the interim appraisal was not given. AF, W-2, Tab 48. KT testified, however, that she learned, although she was not certain from whom, that she would not be making those decisions, but that instead the decisions would be made by higher leadership. *Id.* Upon having her recollection refreshed with her OOI statement, KT testified that it was RBu who told her that the interim appraisal should not be in writing. *Id.* Further, KT believed, although again she was unsure, it was also at that time she understood she needed to pass things up the chain before doing

anything. *Id.* According to KT, it was her understanding the agency wanted to be sure the appellant was treated fairly and objectively. *Id.*

DT echoed this in his testimony. AF, W-2, Tab 52. DT stated they tried to give the appellant the benefit of the doubt in every situation. *Id.*

DT testified he did not request the interim performance appraisal for the appellant, and it was not typical for him to receive one about a FAM. AF, W-2, Tab 52. According to DT, however, it was rare that anyone was not meeting expectations. *Id.* Therefore, he testified that if it was the case that the appellant was not meeting expectations, he believed it would not be unusual for him to receive the interim report. *Id.* This is because, DT testified, he is part of the review process and as such it would be appropriate for him to be aware of those having performance issues. *Id.* DT averred that the performance system is designed to help raise any employee's performance to a successful level. *Id.* If there was a significant performance issue and he did not learn about it until the end of the year, DT testified he would be upset. *Id.*

DT testified this was not the first time he heard of performance concerns regarding the appellant. AF, W-2, Tab 52. Instead, DT stated he previously learned of issues when he was asked to get information for Congress, and called Congressional taskers. *Id.* DT testified he was asked to provide information regarding the appellant's work assignments. *Id.* On inquiry, DT testified he learned that when the appellant was first assigned to WFO and assigned to EPS and then VIPR, the appellant was regularly unavailable, did not perform assigned work, and complained about the work assigned to him. *Id.*

The interim rating, DT testified, concerned the appellant's issues getting along with his peers, and making calls in the VIPR car when on duty without taking leave. *Id.* DT explained that an employee cannot merely excuse himself from performing his work duties, and instead could take leave, including administrative leave when called away. *Id.*

Based on the information he received, DT testified that he spoke to BB. AF, W-2, Tab 52. DT averred that he believed the notice to the appellant through the interim appraisal was sufficient.[5] *Id.*

Further, KT testified that JL came to her while the appellant was assigned to VIPR and claimed the appellant was creating a hostile work environment. AF, W-2, Tab 48. It was KT's testimony that normally you would separate the employees at that point, but they did not in this case. *Id.* She did not recall anyone using the term "special case" but she did testify that at some point she was made to understand, perhaps by BB or RM though she was not sure whom, that if anything arose regarding the appellant, management wanted to ensure that no one violated the appellant's rights based on his whistleblower status. *Id.* Thus, before doing anything that might impact the appellant, KT testified that she understood she was to consult with leadership and/or OCC. *Id.* On the stand, KT could not recall how much she passed up the chain. *Id.* Further, KT testified she was not told specifically what to pass along, but understood she should forward any type of complaint. *Id.*

SM's supervision of the appellant ended when he moved to a different VIPR team sometime in late 2017. AF, W-2, Tab 44. SM testified that he requested of KT and BB that the appellant be moved temporarily following the July 2017 incident. *Id.* SM explained that the incident involved JL reporting to him the appellant's posts on the FP FB page regarding MD. *Id.* SM averred that JL was very upset about the post and SM wanted to separate the two until the incident was resolved. *Id.*

SM testified that he informally separated the appellant and JL after the investigation started, and SM rode with the appellant most of the time. AF, W-2, Tab 44.

---

[5] Greater detail about the counseling that was given is included in the Decision section under the *Douglas* factor regarding notice and in the Hostile Work Environment section.

## THE INVESTIGATION

As discussed in Part III of the decision, I find the investigation was not unreliable based on animus or bias. The appellant claimed that the investigation was tainted by retaliatory animus, and thus cannot be relied upon. Further, the appellant claimed that the investigation was part of a hostile work environment claim. During the hearing, both of the primary investigators, KP and RY, testified. AF, W-2, Tabs 39, 45, 67, 81. Although there were 4 days of testimony by the investigators, I find that testimony was largely not relevant to the analysis required for making a determination of whether the appellant was subjected to a personnel action and/or whether the appellant's whistleblowing was a contributing factor in a personnel action.

Although the investigation was the basis for the appellant's removal, the investigators merely assembled the information based on a complaint and information that arose during the investigation. Further, the proposing and deciding officials relied primarily on the appellant's statements and testimony which we summarize in a separate section. Nevertheless, I have included information in this section about the initiation of the investigation and limited information about the investigation itself. While I reviewed and considered all of the record evidence in drafting this section, I have included only those portions that I believe to be relevant to the issues before me.

<u>How the investigation started</u>

*The Appellant's Posts to FP*

The appellant made two posts to FP with photos and emojis that appeared to be about MD's sexual relationships in July 2017. AF, W-2, Tab 44. The first post included a picture of a woman under a desk with the following text:

> WOW!!! NOW one of my National Advisory Council filed office reps – this chair –marshall [http://bit.ly/2swAEB1]3 spent most of her FAMS career unemployed, in remedial training, in noncompetitive GBAs (because her gun was revoked), and performing other sloppy floor-tasks [https://goo.gl/1CS2Da]4

> [emojis - smiling face with tongue out, baguette, water droplets and angry face …

AF, W-1, Tab 29, 4e at 3; AF, W-1, Tab 29, 4f at 24.

The second post purportedly about MD stated that she was a "trainwreck" and therefore not allowed to fly with her weapon. AF, W-1, Tab 29, 4f at 30. The appellant continued:

> Surprised she was not more relaxed, because "Newport Beach SAC" [FD] had flown out there to shack up in her hotel room… [emojis - baguette, smiley face with tongue hanging out, water droplets … angry face].

AF, W-1, Tab 29, Tab 4f at 30.

SM testified that JL came to him in July 2017 very upset about the appellant's post on the FP FB page about MD. AF, W-2, Tab 44. According to SM, he was not a member of the FB page, and therefore did not have access to it nor did he know who was a member. *Id.* At the time JL brought the post to his attention, SM testified JL showed him the post, he believed, on her phone. *Id.* SM testified that JL felt the post was unbecoming and harassing in nature because it looked like the appellant was alleging MD was sleeping her way to the top. *Id.* SM testified he could not recall whether MD was specifically associated with the post, but SM averred that he would have had the same reaction regardless of whether the post identified MD. *Id.*

Thereafter, SM testified he shared the information with KT who told him to draft an ITR and submit it to her, which he did. AF, W-2, Tab 44. They also discussed separating the appellant and JL. *Id.* Furthermore, SM testified he told JL the matter was being investigated, and therefore, no further discussion was necessary. *Id.*

KT testified that JL came to her in July 2017 and claimed the appellant was creating a hostile work environment and engaging in harassment. AF, W-2, Tab 48. According to KT, this was not the first time JL came to her about the appellant, but instead that had happened in November or December 2016. *Id.* It

was KT's testimony that it was not unusual for a second level subordinate to come and speak to her. *Id.* During the first discussion, which included WY, MN and JL, KT testified, they complained about the appellant and their complaints mirrored that of what she had heard from MH. *Id.* Thereafter, KT averred she passed the information along to BB and likely DT and RM as she would have with any employee. *Id.* KT testified that she spoke to BB and RM daily about a lot of issues to include things such as a death in someone's family and 4 years later she cannot recall every communication. *Id.* KT could not recall on the stand whether BB gave her any instructions about what to do. *Id.*

KT explained she wanted to keep the matter at the lowest level possible, and therefore MH was addressing the concerns in an interim performance discussion. AF, W-2, Tab 48. On December 22, 2016, KT sent an email to MH and RB to provide guidance and specifically to ensure that MH would tie the issues to the appellant's performance standards. AF, W-1, Tab 29, 4f at 176; AF, W-2, Tab 48. KT testified that this was to let the appellant know his performance objectives and help him to meet them. AF, W-2, Tab 48. She did not create an ITR because the allegations were based on vague information and she did not believe it was warranted. *Id.* Nevertheless, she testified she kept her supervisory chain informed, and was having it addressed. *Id.* KT explained that VIPR teams serve in public positions and perceptions are important. *Id.* In this situation it was reported that the appellant was not actively participating but instead was sitting in the car, and expressing negative comments about the agency in public. *Id.* This caused concern, KT testified, because part of the purpose of VIPR is to build public confidence. *Id.*

KT testified it was not until after she received the second complaint about the appellant in July 2017 that she had SM file an ITR. AF, W-2, Tab 48. She explained because JL feared being the appellant's "next target," she felt an ITR was appropriate based on the latter incident. *Id.*

At some point, KT testified that SM said the team had met and things had calmed down. AF, W-2, Tab 48. KT was not sure exactly when that conversation took place, but it could have been in between the November/December 2016 report and the July 2017 complaint. *Id.*

Still, KT testified that she had another meeting with JL in March 2017, which she recalled after being shown her OOI interview. AF, W-1, Tab 29, 4f at 164-65. KT could not recall the specifics of the conversation beyond what she included in her statement, and she did not submit an ITR as a result. AF, W-2, Tab 48. KT averred that she did not leave the meeting with the belief that either MN or JL felt harassed, and they stated they did not feel an immediate threat. *Id.* While KT could not recall whether she discussed the matter with BB and/or RM, she testified that she probably would have based on her belief that she should report matters involving the appellant to them. *Id.* Again, KT testified she spoke to BB and RM daily and she could not recall every conversation. *Id.*

KT explained the difference between the November /December report and the July one. AF, W-2, Tab 48. In the first complaint, KT testified, there were three people with generalized complaints talking about team cohesion. *Id.* KT averred they were seeking leadership intervention, but there was not an allegation at that time of harassment but rather just a negative environment. *Id.* KT testified that she believed it was a performance issue and could be addressed at the lowest level through an interim discussion and thus bring cohesion back to the VIPR team. *Id.*

On the contrary, in the July meeting with JL, KT testified, JL brought a FB posting, which KT reviewed and instructed SM to write an ITR. AF, W-1, Tab 29, 4f at 18-34; AF, W-2, Tab 48. KT testified that she has typically filed an ITR when she has received a complaint of a hostile work environment. AF, W-2, Tab 48. Indeed, KT testified it was her understanding that she had an obligation to report allegations of harassment or a hostile work environment regardless of

the complainant's wishes. *Id.* KT added that the appellant's status as a whistleblower was not a consideration in filing the ITR. *Id.*

Based on an email from JL, KT testified that she probably asked JL to put her allegations in writing for inclusion with the ITR. AF, W-2, Tab 24, Ex. L; AF, W-2, Tab 48. This may have come in response to a request from IACT, KT testified as the ITR was written on July 5, 2017 and the statement on July 24, 2017. AF, W-1, Tab 29, 4f at 18; AF, W-2, Tab 24, Ex. L; AF, W-2, Tab 48. KT testified that she also spoke to BB or RM either the same day or the day after speaking to JL, which she stated she would have done regardless of who the complaint was about. *Id.*

KT testified that she was not sure whether she informed JL of the ITR initially, but did say she would be addressing it formally and that she would have to participate. AF, W-2, Tab 48. KT recalled on the stand, that JL feared that the appellant would learn she had complained and would come after her. *Id.* KT averred she contacted leadership to inform them of JL's concerns and also JJ in the Office of Civil Rights and Liberties. *Id.* The reason KT testified she contacted JJ was to ensure that she was doing everything she should be based on the harassment policy. *Id.*

DT testified that he believed he was copied on the ITR regarding the appellant's posts on the FP page of FB. AF, W-2, Tab 52. DT stated he could not recall discussing it with BB. *Id.* DT averred that he is normally not involved in an investigation, but is only made aware of allegations that may lead to an adverse action. *Id.* DT explained that he is not generally involved in the decision to submit an ITR, but rather will generally receive notice as was the case here to the best of his recollection. *Id.* Further, he testified that he would receive periodic case status briefs on a number of open cases, but did not receive specific information. *Id.* DT explained that he got very limited information regarding pending investigations, including that the investigation was open, the issue, the office involved, and how long the case was pending. *Id.*

It was KT's testimony that normally you would separate the employees at that point, but they did not in this case, which was not her choice. AF, W-2, Tab 48. She did not recall anyone using the term "special case" but she did testify that at some point she was made to understand that should anything arise, management wanted to ensure that no one violated the appellant's whistleblower status. *Id.* Thus before doing anything that might impact the appellant she was to consult with leadership and/or legal. *Id.* Regarding the reassignment, KT testified she did not believe it was appropriate to move JL so as not to punish her for bringing a complaint forward, and the appellant could not fly so there were limits on where he could be moved. *Id.* Regardless, KT testified the decision was not hers. *Id.* KT testified that she stated in her OOI interview she believed this was preferential treatment because normally the alleged harasser would have been moved during the investigation. *Id.*

DT testified that he could not specifically recall discussing moving the appellant during the investigation, but did recall discussing how to manage the workforce. AF, W-2, Tab 52. According to DT the situation was made difficult by the limitations of where they could assign the appellant, but they also needed to worry about the appellant's presence in the workplace and the impact on other employees. *Id.* Moving an employee during a pending investigation, DT testified, is done all the time, but there were limitations based on an OSC agreement and other restrictions. *Id.* DT added it was an incredibly difficult situation. *Id.*

BB testified that JL and KT came to speak to him together about the post. AF, W-2, Tab 38, 43. This was the first harassment claim BB averred he had received. AF, W-2, Tab 38. During that conversation, BB testified JL was very frustrated and angry. AF, W-2, Tab 43. It was BB's impression that JL and MD were friends. *Id.* Further, BB testified that JL was nervous about what would happen if the matter was further reported, namely that the appellant would start to attack her, and initially she was hesitant to make a report. *Id.* Further BB

testified that but for JL's complaint he would not have known about the post. AF, W-2, Tabs 38, 43. BB continued, however, that there is a zero tolerance policy for not reporting harassment and he could have been disciplined for not reporting the allegations JL made. AF, W-2, Tab 43. When asked why he had such a clear memory of this meeting when he could not recall so much, BB testified that it was a pretty powerful meeting because JL was very upset. Further, BB explained that he found it very frustrating to have this happening in his office and he felt a responsibility regarding the matter. *Id.*

RM testified that he discussed the ITR with SFAM SK, regarding the email request for a statement from FAMS management. AF, W-2, Tab 24, Ex. K; AF, W-2, Tab 90. RM averred this was normal for FAMS to supply information to that office because that headquarters office tracked ITRs. *Id.*

KP worked in the Office of Investigations (OOI) as a Transportation Security Specialist, 1801 job series, not a criminal investigator, from May 2016 until she retired on December 21, 2020. AF, W-2, Tabs 39, 45. The investigation into the appellant's alleged misconduct had the investigation number I17-0414, and took place from September to January 2018. *Id.*

KP was the lead investigator, but it was her first misconduct investigation since joining the office. AF, W-2, Tab 39. KP testified that RY was the second investigator assigned to the investigation, but that he was the more experienced investigator. *Id.* KP further testified that she was involved in approximately six misconduct investigations. *Id.* Because of his greater experience, RY was a Special Agent Criminal Investigator, and KP testified that RY provided guidance and advice during the investigation. AF, W-2, Tab 45. KP also testified that she deferred to RY when appropriate. *Id.*

RY is currently the Deputy Special Agent in Charge (DSAC), Detroit Field Office. AF, W-2, Tab 67. Prior to that, he was a Criminal Investigator with OOI from 2015 – March 2020, and he testified he has a total of 15 years of experience as a Criminal Investigator. *Id.* Further, RY testified that he has led 100s of

investigations, to include participating in about 200 cases at the agency and leading approximately 90 percent of those. *Id.* RY has seen OOI investigate Inappropriate Comment allegations many times during his 6 years in that office. *Id.*

RY explained that once a complaint is received it is often returned to the referring office for additional information or other reasons, which happened here. AF, W-2, Tab 67. In this case as in others, that office, here FAMS, asked OOI to conduct the investigation. *Id.* This happens when there is a serious issue, the office feels it is too close to the matter and/or wants to ensure the matter is handled independently. *Id.* According to RY, that is a common occurrence. *Id.*

KP testified that JB, her supervisor, was concerned that there were others that should have been included in the initial complaint as subjects, but only the appellant was referred. AF, W-2, Tab 39. According to KP, JB notified FAMS and they created ITRs for those 4-5 additional individuals as well. *Id.* KP testified, however, others were quickly determined not to merit investigation based on a review of the complaint and looking at posts given to her. AF, W-2, Tab 45. In addition, KP testified that some former employees were potentially involved, but KP stated that OOI does not investigate former employees. *Id.*

KP denied that anyone asked her to find misconduct in this case or any other. AF, W-2, Tab 39. This included JB. AF, W-2, Tabs 39, 45. Further, KP denied that any one in any way conveyed to her that they had already determined that the appellant's conduct was improper. AF, W-2, Tab 39.

The appellant questioned KP about an email thread regarding the initiation of the investigation. AF, W-2, Tab 24 at Ex. M; AF, W-2, Tab 39. The thread started with the ITR being forwarded to 36IncidentTrackingReport@tsa.gov, and then forwarded to the IACT office by OOI Special Agent JLa. AF, W-2, Tab 24 at Ex. M.

Based on the email, JLa asked IACT to return the appellant's ITR to the Washington Field Office (WFO) for additional information regarding the

allegation. AF, W-2, Tab 24, Ex. M. Assistant SFAM JA sought additional information from the WFO. *Id.* That office referred OOI to the original complaint. *Id.* JA then wrote to IACT that:

> FAMS management has determined that the attached documentation constitutes misconduct on the part of FAM MacLean and would like to move forward with this ITR please provide the following to support the management allegation:
>
> Signed memo(s) from FAMS management outlining the alleged misconduct perpetrated by the FAM.
>
> Signed memo from the individual who reported the alleged misconduct.
>
> Include in the package any additional information deemed relevant by FAMS management or OCC which support the allegation of misconduct.
>
> Signed memo from the FAM addressing the allegations of misconduct that have been put forth against him by FAMS management and/or OCC.
>
> Copy of OMS 1112 acknowledgement.
>
> Once FAMS management is satisfied with the information obtained please package for OPR submission.

*Id.* Thereafter, JL sent the email thread to KP outlining the process by which the matter came to OOI and a concluding statement that, "[u]nfortunately it was determined that OOI should look in to it." *Id.*

According to KP, JL was not her supervisor and he did not issue her orders or direct her investigations. AF, W-2, Tab 45. Further, KP averred she did not consider JL's email to be guidance. *Id.* Instead, KP averred that when she was assigned an investigation, she received an allegation of misconduct and she was obligated to investigate it as well as other misconduct if it was related. *Id.* This included, KP testified, if possible misconduct was uncovered during the investigation. *Id.*

KP testified that she did not understand from the email chain, described above, that a decision had been made; rather, it was her belief that OOI had primary responsibility for investigating misconduct. AF, W-2, Tab 39. Further,

she understood what information they wanted her to collect from FAMS in conducting the investigation from the email. *Id.* Still, KP testified on cross-examination that no one from the FAMS told her how to investigate or what evidence to search for, or what to find. AF, W-2, Tab 45. KP testified she did not perceive a difference between collecting evidence to support a finding of misconduct and conducting an investigation into the alleged misconduct. AF, W-2, Tab 39.

KP pointed to the use of the word alleged in the email to indicate that no conclusion had been reached. *Id.* She explained the last sentence as JL indicated that OOI rather than FAMS management would investigate the matter. *Id.* According to KP, she did not understand the email to indicate that a decision had already been made. *Id.*

KP testified that she disagreed with the appellant that the conclusion of the investigation was predetermined. AF, W-2, Tab 45. Yet she did agree that FAMS management would not have forwarded the allegations if they did not believe that the allegation could be misconduct. *Id.*

RY testified that no one told him what to look for or what the outcome of the investigation should be. AF, W-2, Tab 67. He acknowledged that the ITR referenced B5 from the Table of Penalties. AF, W-1, Tab 29, 4f at 18, AF, W-2, Tab 67. RY explained that the B5 reference was just what the FAMS thought was at issue, but did not indicate a finding. AF, W-2, Tab 67. In addition, RY testified that the purpose of the investigation was to prove or disprove the allegations. *Id.* OOI, RY testified, was not responsible for making any proposal of discipline and played no role in determining a penalty. *Id.* Instead, RY averred they only collect the evidence. *Id.*

According to KP, she investigated the allegation of possible misconduct. AF, W-2, Tab 45. If she found exculpatory evidence she would have included it in the investigation. *Id.* She explained when gathering information you do not know whether it will be incriminating or exculpatory. *Id.*

The investigation

According to KP, each person who signed a statement included what they wanted to include based on the interview. AF, W-2, Tab 45. KP explained that they did not tell witnesses what to write in their statements, and did not edit out irrelevant information. *Id.*

RY testified that at the conclusion of the investigation he reviewed the ROI as the first line review to make sure there were no concerns and it was consistent with agency standards. AF, W-2, Tab 81. Further, RY explained he would have made sure that the ROI was clear and fact based and did not include opinions. *Id.* According to RY, he made edits and corrections to the ROI. *Id.* The ROI then proceeds through the review process which includes OCC and sometimes OPR, RY explained. *Id.* Following the completion of an ROI it is forwarded to the OCC and that office conducts a review, RY testified. AF, W-2, Tab 81. RY testified that OCC reviews the ROI for legal sufficiency. *Id.* If the matter involved a law enforcement officer (LEO) and/or a GS-14 level employee or higher, the case would also go to OPR for review. *Id.*

RY averred that he communicated with OCC twice during the investigation. AF, W-2, Tab 81. The first time involved a question about possible SSI and the second the First Amendment. *Id.* RY testified that the SSI conversation was on October 3, 2017 and was confirmed in an email dated October 4, 2021. *Id.*

There was extensive testimony about why certain information was included in the ROI while other information was not. AF, W-2, Tabs 39, 45, 67, 81. Further, there were questions directed at KP and RY regarding why they did not interview certain individuals or seek evidence of bias on the part of certain witnesses. *Id.* Both responded that they were responsible for collecting information relating to the information contained in the referral as well as material directly related to or that grew out of the investigation. *Id.* Upon investigation, OOI found that the appellant also made disparaging comments

about Director RA and KPi. AF, W-1, Tab 29, 4f at 4. In addition, issues arose surrounding the appellant's phone usage. *Id.* They did not, however, go beyond that scope nor did they believe that was what they were assigned to do. AF, W-2, Tabs 39, 45, 67, 81.

The post about RA included a close up picture of a man, but the man is not specifically identified. AF, Tab 29, Tab 4f at 141. In addition he wrote:

> Any thoughts on assignment today's "Temporary Assignment" of our fearless [emojis] Brazil TSA-paid Party Trip Advisor? Friday bad news dump?

AF, Tab 29, Tab 4f at 141.

The post about KPi included a picture of an unnamed man and the following text:

> I'm sure other agencies also promote steaming wet turds [poop emoji] … But I never heard of any agency that has so many of its QUALITY leadership self-demote. Pathetic and sad.

AF, Tab 29, Tab 4f at 140.

*Inappropriate Comments*

For example, KP was asked why she did not include that several witnesses testified they did not know who MD was or what the emojis included in the posts meant. AF, W-2, Tab 45. KP responded by stating that she knew what the emojis meant based on the appellant's testimony. *Id.*

The appellant questioned KP about the finding that MD's work performance was impacted by the appellant. AF, W-2, Tab 45. He asked if it was not OOI that caused the disruption because MD had not seen the posts prior to her interview. *Id.* KP responded she was not sure, but acknowledged that MD was not a member of the FP page. *Id.* KP also acknowledged that she based her finding on JL's and MD's interviews but also on the appellant's statements. *Id.*

RY testified about the RA post, which he believed was provided by JL. AF, W-1, Tab 29, 4f at 141; AF, W-2, Tab 67. He stated he did not create the document included in the ROI. AF, W-2, Tabs 67, 81. It was RY's recollection

that KP cut and pasted the post and put it on a new document, without changing the content. AF, W-2, Tab 67. RY explained that the purpose of the process was to protect the identity of JL who took the screen shot on her phone. *Id.* This was done according to RY, by trimming the background to delete anything in the background. *Id.* RY averred there was no reason to change the content of the post and he would not have allowed it. *Id.* RY acknowledged there were comments under the post, which they scrolled through but did not see anything of interest. *Id.* Still, RY testified nothing was altered from the picture or the text of the post. *Id.* RY acknowledged that the post from the ROI and the one found in the appellant's exhibits contained the same post, but appeared to come from two different devices. AF, W-1, Tab 29, 4f at 141; AF, W-2, Tab 24, Ex. DDD at 8; AF, W-2, Tab 81. Further, the one from the ROI contained comments underneath, while the one from the appellant's exhibit did not. AF, W-1, Tab 29, 4f at 141; AF, W-2, Tab 24, Ex. DDD at 8. RY testified that based on reviewing both documents, he surmised that there was nothing relevant on the page preceding the post of page 7 of Ex. DDD and that the page actually goes between pages 8-9. AF, W-2, Tab 81. Therefore, RY opined that is why only the comments from pages 8-9 appeared in the ROI underneath the post. *Id.* Further RY explained that the ROI version appeared to be taken from a phone and did not have the same detail as the laptop version. AF, W-1, Tab 29, 4f at 141; AF, W-2, Tab 24, Ex. DDD at 8; AF, W-2, Tab 81. According to RY, they only had the mobile version and not a desktop version of the post. AF, W-2, Tab 81. RY testified that editing out extraneous and unrelated information was not inappropriate. *Id.* Instead, it was RY's opinion that they were only required to include relevant evidence. *Id.*

The appellant alleged that the merging of documents and the apparent alterations were evidence of misconduct. AF, W-2, Tab 37. Further, the appellant alleged that neither of the provided posts included all comments. *Id.*

*Inappropriate Conduct During an Investigation*

Unlike the charge of inappropriate comments, the charge of Inappropriate Conduct During the Investigation arose out of the investigation. Therefore, the testimony and evidence related to this charge are provided in greater detail in the investigation section. Again, the appellant's OOI statements and interviews are included in a separate section.

*Access to the Freedom Center*

There was a great deal of testimony about the appellant's access to the Freedom Center[6] when he arrived for his interview on September 17, 2017. RY testified that the Freedom Center is a high security facility that also has a Sensitive Compartmented Information Facility (SCIF). AF, W-2, Tab 67. They held the appellant's interview at the Freedom Center, because RY's office is located in that facility. *Id.* RY explained that there is a formal process for people coming to the Freedom Center for an interview. *Id.* First, they complete an online form. *Id.* Next, when the interviewee arrives they first have contact with the security guard stationed at the gate outside the building. *Id.* Then, upon entry at the main entrance, the interviewee gives his name which is vetted while he waits in a small office. *Id.* From there, the agent is called to come and escort the interviewee, RY testified. *Id.*

According to RY, members of the public who were on the visitor log list would have no reason to be in the security office. AF, W-2, Tab 67. RY stated that the badge access system is located in that office, and therefore someone seeking badge access would have a reason to be in that office. *Id.* This would include new employees. *Id.* RY averred there may be other reasons for someone to go to that office, but he was unsure. *Id.*

---

[6] Freedom Center is also referred to as the Transportation Security Operations Center (TSOC). AF, W-2, Tab 67.

RY also explained the visitor log during his testimony. AF, W-2, Tab 67. He explained that it is a type written list of individuals with appointments and was not a sign in list to the best of his recollection. *Id.* RY acknowledged that there was an issue with the list being out in the open, and stated that the practice changed after the incident with the appellant. *Id.*

On the day of the appellant's interview, RY testified he had planned to go and pick up the appellant from the lobby. AF, W-2, Tab 67. The appellant's badge, which had once enabled him to enter the Freedom Center, had been deactivated because he no longer worked at that location, RY averred. *Id.* Therefore, RY testified he was surprised when the appellant called him from the OOI office space and indicated that he was there and had not waited for an escort. *Id.*

The appellant questioned RY's version of events during RY's testimony. AF, W-2, Tab 81. At the hearing, the appellant played the first 5 minutes of the appellant's interview on September 17, 2017. AF, W-1, Tab 29, 4l part 1 at 0:00 – 5:25; AF, W-2, Tab 81. From the audio, it is clear, and RY confirmed, that the appellant was not present when the audio began. AF, W-1, Tab 29, 4l part 1 at 0:00 – 5:25; AF, W-2, Tab 81. RY believed that the appellant was perhaps in the restroom where he would have been allowed to go unescorted. AF, W-2, Tab 81. In addition, RY testified that he did not know whether the appellant was armed, and therefore needed to put his gun in a lock box. AF, W-2, Tab 81. After 4:30 minutes, RY stated he was going to go check on the appellant. AF, W-1, Tab 29, 4L part 1. When RY returned the appellant was with him and they began the interview. *Id.* at 5:20. RY testified that he could not recall exactly what transpired, but asserted he expected to get a call when the appellant arrived downstairs, and RY intended to escort him to the interview. AF, W-2, Tab 81. Instead, RY recalled the appellant called RY when he was already in the OOI workspace. *Id.*

It was not until later, that RY learned how the appellant had gotten into the office space, RY testified. AF, W-2, Tab 67. The issue came to his attention when witness FAM CK told another investigator that there was a list or roster with information about who was involved in the case. *Id.*

The appellant testified that SM told him to report to the Freedom Center at 9:00 a.m. the next day, September 20, 2017, which the appellant averred RY also told him. AF, W-2, Tab 37. According to the appellant's testimony, SM talked to the appellant after speaking to RY. *Id.* During that conversation, the appellant testified, SM told the appellant that he had brought this on himself because he would not let go of his disclosures about the barriers at DCA Terminal A. *Id.*

The appellant testified he went to the Freedom Center on September 20, 2017 for his interview at 9:00 a.m. AF, W-2, Tab 37. Further, the appellant testified that he did not speak to RY until the appellant called him to let him know he was there. *Id.*

On the stand, the appellant explained the process for arriving at and entering the Freedom Center. AF, W-2, Tab 37. He averred that he drove his personal vehicle to the TSOC, where prior to admission he passed through a perimeter fence and guarded gate. AF, W-2, Tabs 37, 40. Once there he was admitted by an outside guard after running his PIV card. AF, W-2, Tab 37. The appellant testified that the guard asked the purpose of his visit and the appellant said he was meeting with RY. *Id.* After making a call, the appellant testified, the guard lowered the blockade and admitted the appellant into the parking lot. *Id.* The appellant acknowledged that he was not able to enter with just his PIV card but that the guard also made a call prior to admission. AF, W-2, Tabs 40, 90.

After parking, the appellant entered the Freedom Center, he testified, where there was a magnetometer and two more guards. AF, W-2, Tab 37. The appellant testified that he had previously worked at the TSOC, but his detail had ended in April 2016. AF, W-2, Tab 90. The appellant testified that he attempted to use his PIV card to swipe in, which he asserted he thought was possible based on his

entry into the parking lot. AF, W-2, Tab 40. The appellant asserted that he told the guard he was there to meet with RY and he was then directed to the security office which was adjacent to the foyer through an open doorway. AF, W-2, Tab 37. The appellant testified he believed he was in the office to code his PIV card, and asserted he had never been in the security office before. AF, W-2, Tab 40. The appellant acknowledged that he was not assigned to the work at the Freedom Center in September 2017. *Id.*

When he arrived, the appellant testified that GC was there and the appellant handed him his badge and PIV card. AF, W-2, Tab 37. The appellant reported that he told GC that he had an appointment with RY, but denied that he said it was a social appointment. *Id.* Still, the appellant testified he could not remember whether he said he had an interview with OOI. AF, W-2, Tab 90. On the stand, the appellant stated that his name was on the visitor log next to RY, and therefore he assumed those manning the Freedom Center knew the purpose of his visit. *Id.*

The appellant denied that he ever said his PIV card was not working. AF, W-2, Tab 90. He testified that GC was working on his computer after the appellant gave GC his PIV card, but he did not know what he was doing. *Id.* The appellant averred that he could not recall the exact conversation with GC, but stated that in order to help GC he might have told GC that he had been assigned to the Freedom Center in the past. AF, W-2, Tab 90. It was the appellant's testimony that because he was not escorted, he believed he was entitled to access the building. *Id.* In the appellant's opinion, he testified that he could still have been in the system to have unescorted access, but he recognized that without special access an escort was required. *Id.* The appellant stated that was not his focus, but instead he merely wanted to let guards and GC know he was armed. *Id.*

The appellant testified that he called RY while he was with GC as shown on his cell phone records. AF, W-1, Tab 29, 4c at 401; AF, W-2, Tab 37. The appellant testified that he believed he called RY twice. AF, W-2, Tab 40. Still,

the appellant averred that RY did not come to get him downstairs, but rather he found the appellant after he was already past security. AF, W-2, Tab 40. The appellant averred that he was "fairly certain" that he spoke to RY while he was still in the visitor center at 9:08 a.m. AF, W-2, Tab 90. The recording of the appellant's interview was started at 9:11 a.m., with the appellant entering after 9:16 a.m. AF, W-2, Tab 90; AF, W-1, Tab 29, 4L part 1 at 5:25. The appellant testified that he told RY that he was checking in and was not told to wait, but instead the appellant averred that he told RY he would be right over. AF, W-2, Tab 90. Next, the appellant testified that he went to the bathroom and then to the OOI section and saw RY and began the interview. *Id.* The appellant testified that he met RY in the OOI workspace. AF, W-2, Tab 40.

The appellant testified that he did not intend to deceive anyone and he did not know whether his PIV card would still give him access. AF, W-2, Tab 90. Still, the appellant acknowledged on the stand that he was pretty sure at the parking lot guard checkpoint that he did not have access because the arm did not raise like it did when he had worked there. *Id.*

When GC was back at the computer, RY testified, the appellant took another photograph. AF, W-2, Tab 67. It was RY's belief that the appellant had his badge reactivated and by so doing was able to enter the Freedom Center unescorted. *Id.*

According to RY, the public does not have access to the security office space. AF, W-2, Tab 81. Instead, if one did not have badge access, RY averred, they would wait in chairs outside the office where there are two security guards and a metal detector. *Id.*

*Photograph – taking and sending*

While in the visitor center/security office, KP testified that the appellant took a picture of the visitor log which included witnesses in the investigation. AF, W-2, Tab 39. RY testified that when he learned the appellant had taken a

photograph of the visitor log he went to the security office to obtain additional information. AF, W-2, Tab 67. Upon arriving in the security office, RY stated, he saw that there was a camera and he asked for the video. *Id.* According to RY, the video showed the appellant in the office and then GC turned to the badge access computer. *Id.* The appellant had a phone and he looked over, then looked again, and took a picture. *Id.*

Further, RY explained that the visitor log the appellant photographed is created daily by the security officer, GC, who then provides the list to the security guards. *Id.* RY reported that GC provided a statement and asserted that he felt he had been duped by the appellant. *Id.*

The appellant proceeded to send the photograph to other individuals, KP and RY averred. AF, W-2, Tabs 39, 67. KP stated that RY was notified about the matter, but she did not know by whom, and together they decided to expand the investigation. *Id.* RY testified that a witness informed him of the photograph being forwarded and also said that the appellant asserted he was not the subject of the investigation, but rather the witness was. AF, W-2, Tab 67. In addition to sending the visitor log photograph to other individuals, the appellant told RY, RY testified, that he had put the photograph up online for a period of time. AF, W-2, Tab 67.

The visitor log did not include a place for signing in nor did it state the purpose of the visit. AF, W-1, Tab 29, 4f at 402. According to KP, she believed they changed the practice of leaving the visitor log out after the incident with the appellant. AF, W-2, Tab 45.

KP testified that what was significant was not that the appellant took the photograph, but instead what he did with it/them. AF, W-2, Tab 45. What he did, according to KP, was send them to potential witnesses. *Id.* Further, KP noted that the appellant stated that his purpose was to be able to prove who made the complaint against him. *Id.* Moreover, the appellant told three potential witnesses, SD, DM, and SE that they were the subject of the investigation. *Id.*

KP and RY also testified that in addition to the photograph, the appellant communicated with witnesses involved in the investigation and informed some that they were under investigation because of their FB posts. AF, W-2, Tabs 45, 67.

The appellant testified that he took a photograph of a list of names that was left on the counter in full view of the public. AF, W-2, Tab 38. The appellant averred that he did not try to deceive GC, and he did not know whether GC saw him take the picture. *Id.* On the stand, the appellant stated that he took two pictures. AF, W-2, Tab 40. The appellant denied that GC's back was turned and instead asserted that the work station was right in front of him. AF, W-1, Tab 29, 4g; AF, W-2, Tab 40. In the video it appeared that the appellant was speaking with GC when GC walked away. AF, W-1, Tab 29, 4g. Thereafter, the appellant took out his phone and took a picture and then put the phone away. AF, W-1, Tab 29, 4g. Eventually, GC escorted the appellant out of the room. *Id.* The appellant did not appear to make a phone call, and it appeared GC handed the appellant a PIV card. *Id.* Next on the video one sees the appellant on his phone, then put the phone away and walk out of the camera frame. *Id.* When the appellant walked back in the frame, he took out his phone and took another picture while looking at items on the desk. *Id.* At that time, it again did not look like the appellant was making a call because he never put the phone to his ear. *Id.* Slightly later, the appellant could be seen to be speaking as his mouth was moving. *Id.*

The appellant explained that his motive for taking the picture was to prove that JL was motivated to file her complaint because of the appellant reporting that she had not worn body armor as required. AF, W-2, Tab 90. He did not consider his actions to be retaliatory, the appellant testified. *Id.* The appellant testified he told OSC about the picture and they were unconcerned. *Id.* The appellant also testified that he showed the picture of the log to his attorneys. *Id.* Yet, the

appellant testified he did not tell OOI about the photograph, although he did allege to OOI that JL was retaliating against him. *Id.*

On the stand, RY explained that the purpose of the NDA is to protect individuals and the integrity of the investigation. AF, W-2, Tab 67. RY testified that it would have been improper for the appellant to tell others that OOI had asked him about the posts after signing the NDA. AF, W-1, Tab 29, 4h; AF, W-2, Tab 67. RY added that the obligation to cooperate with an investigation goes beyond the NDA, and includes the obligation provided for in Management Directive 1100.73-5(F)(1). AF, W-1, Tab 29, 4RR at 13, AF, W-2, Tab 81. This directive, RY testified is broader than the NDA. AF, W-2, Tab 81.

It was RY's recollection that the investigators learned of the appellant's alleged improper communications through witnesses who said the appellant had contacted them. AF, W-2, Tab 67. The witnesses, when interviewed, knew how the investigation had started, RY testified. *Id.*

Initially, RY did not recall participating in the interview with CK, but after refreshing his recollection with the MOI, he did recall it. AF, W-1, Tab 29, 4f at 306; AF, W-2, Tab 67. RY testified that CK stated that the appellant told CK that he was the subject of the investigation and not the appellant. AF, W-1, Tab 29, 4f at 306; AF, W-2, Tab 67. Specifically, CK stated in his OOI interview that the appellant contacted him and said: "OOI is after you and they are coming after you." AF, W-1, Tab 29, 4f at 307, 310. Further, CK reported that the appellant recommended he retain counsel. *Id.* at 311. Thereafter, CK informed KP and RY that he deleted the information. *Id.* According to CK, his first contact from the appellant occurred on September 19 or 20, 2017. *Id.* CK stated he had never met the appellant. *Id.* Still, after his interview, CK wrote in his statement to OOI, the appellant sent him "intimidating Facebook Messenger messages and emails to [his] personal email account." *Id.* According to CK, the emails continued until approximately October 15, 2017. *Id.* CK stated that he requested that the appellant delete all communication between them if he believed he was the

subject of an investigation. *Id.* CK explained he made this suggestion in order to calm the appellant who was "extremely agitated" but asserted there was nothing "incriminating" in their correspondence. *Id.* Further, CK wrote that the appellant referred CK to a former FAM and current FBI employee. *Id.* The FBI employee told CK, CK wrote, that the appellant sent him information all the time, but he did not do anything with it, but merely served as a place for the appellant to "vent." *Id.*

The appellant testified that he did not correct the record regarding who he sent the visitor log photograph to in response to the proposal notice because he had very limited time to respond. AF, W-2, Tab 90. The appellant testified that he provided an affidavit for his response, and his attorneys filed a response in writing as well as making an oral reply. *Id.*

GC signed a statement on October 4, 2017 about his interaction with the appellant on September 20, 2017 at the TSOC. AF, W-1, Tab 29, 4f at 400-01. According to GC, upon entering the main gate at the Freedom Center the appellant informed the officer that his badge was "suspended" and GC said the appellant should be sent to the security office and GC would assist the appellant. *Id.* at 400. Although GC offered to call RY, who the appellant stated he was there to meet, the appellant said he would do it and appeared to make a call. *Id.* GC stated that the appellant explained he had gotten a new PIV card, and GC said he would update it for the appellant which he did. *Id.* The appellant did not wait for RY, but instead, asserted he knew where RY was located and thus went in unescorted. *Id.* At the time, GC stated he was unaware that the appellant had taken a photograph because he had done so while GC was updating the appellant's PIV card. *Id.* GC explained that the appellant had indicated he was there for a social visit. *Id.* at 400-01.

*Looking for Rat or Snitch*

JL sent an email to KT on September 20, 2017. AF, W-2, Tab 24, Ex. O. JL included two screen shots as attachments which indicated an effort to learn who had reported the appellant's posts. *Id.* at 2-3. The appellant did not make the posts, nor is his name listed in the comment section. *Id.*

KT testified that JL came to management, perhaps her, her supervisor or another supervisor about additional posts which mentioned the "rat" and JL stated she was scared that the appellant and others had learned her identity as the complainant. AF, W-2, Tab 24, Ex. O; AF, W-2, Tab 48. When KT received email communication about it, she forwarded it to BB, KT testified. AF, W-2, Tab 24, Ex. O; AF, W-2, Tab 48. She explained that she forwarded it based on the fact that she had an employee who was scared and feared being targeted. AF, W-2, Tab 48. Based on the posts, KT did not make a determination of wrongdoing by the appellant or anyone else, but rather she was merely informing leadership of the situation. *Id.* KT recounted on the stand that SM told her that JL was visibly shaken and KT was concerned. *Id.* Still, KT testified that she had told JL initially that the appellant could learn she made that complaint and JL expressed concern that she would become a target of his. *Id.*

BB testified that SM told him that the appellant was aware of the investigation and, in front of others, said that he would find the person who filed the complaint. AF, W-2, Tab 43. BB could not recall on the stand who SM reported this to and whether they directly spoke about it. *Id.* It was BB's impression that the appellant was trying to intimidate and create further anxiety within the group. *Id.* BB acknowledged that he could have learned of SM's allegation through an email that SM sent to KT who then forwarded it to him. AF, W-2, Tab 24, Ex. R; AF, W-2, Tab 43.

The email addressing the appellant's asserted comments was dated September 26, 2017 and was written by SM and sent to KT. AF, W-2, Tab 24, Ex. R. In the email, SM wrote that in response to a question if the appellant was

back in the office, the appellant responded, "[y]es, I still have my weapon, job and I have to head back over there tomorrow to be interrogated again." *Id.* SM then stated the appellant made the statement in the public area of the office and it was loud enough to be overheard by the six VIPR team members present to include JL. *Id.* Further, SM stated that he was concerned about the potential for workplace violence based on his training and would "keep a very close eye on the situation." *Id.*

Upon learning of the appellant's comments from SM, BB testified that he did not take any action or request that SM document the interaction. *Id.* BB could not recall whether the cease and desist letter was related to this and added it was a long time ago. *Id.* Beyond being aware that a cease and desist letter was being prepared, he had no involvement, BB averred. AF, W-2, Tab 43. Further, BB testified he did not know who was involved. *Id.*

The appellant sent an email to RY and copied KP on December 10, 2017. AF, W-1, Tab 29, 4f at 405-06. In the email, the appellant stated that he was concerned about a lack of candor charge and admitted that he learned that JL was "again retaliating against [him]" when he was in the Freedom Center on September 20, 2017, and saw her name on the visitor log. *Id.* The appellant stated that he told several individuals that JL was on the log to include: SFAM SM, FAM SE, FAM CK, DM, FP moderator, SS as well as retired FAM SR. *Id.* The appellant added that there were potentially three others to whom he may have made the disclosure ASAC CK, TSA employee DL, and FAM TE. *Id.* The appellant seemed to justify his reporting about JL by asserting the disclosure was to people who had information about the alleged disclosure regarding a January 10, 2009 incident at DCA. *Id.*

In a subsequent email, the appellant wrote to deny that he disclosed to SS that JL was the FP member who made the report. AF, W-1, Tab 29, 4f at 407.

The appellant acknowledged that he signed an NDA and explained that RY indicated that it was a condition of employment. AF, W-2, Tab 37.

The appellant denied that he ever posted a message on the FP site in which he tried to find the rat or snitch as alleged in the notice of proposed removal. AF, W-2, Tab 38. Indeed, the appellant averred, he was suspended from the page prior to the posting, and therefore it would have been impossible for him to make the post on September 20, 2017 as alleged. *Id.* The appellant explained that he was suspended by a moderator who said that the appellant's posts were unpopular. *Id.* He posted a lot, the appellant testified, about many controversial subjects. *Id.*

Similarly, the appellant denied in his testimony that he said in the presence of VIPR team members that he was looking for the person who filed the complaint against him that started the investigation. AF, W-2, Tab 38. The appellant testified that he had no reason to say that because he already knew it was JL based on her avatar. AF, W-2, Tabs 38, 40. Still, the appellant acknowledged that prior to learning who made the complaint he might have said he was looking to find out who it was. AF, W-2, Tab 40.

The appellant testified that he did not read the proposal notice in its entirety, and that he was represented by counsel. AF, W-2, Tab 40. Thus, that appeared to be the appellant's explanation for why he did not specifically deny the allegation in response to the proposal. *Id.*

*Misuse of Government Equipment*

During KP's testimony, the appellant inquired why his cell phone was searched. AF, W-2, Tab 39. KP testified that RY made the decision and said it was to determine if there was anything inappropriate related to the investigation done on his government phone. *Id.* Although KP testified that she was the lead investigator, she stated she nevertheless deferred to RY when he suggested looking at the appellant's phone. *Id.* RY testified that there was no specific policy on the subject of when to take a cell phone for analysis. AF, W-2, Tab 67. KP denied that they searched the appellant's phone to conduct a "fishing

expedition." AF, W-2, Tab 45. Instead KP said that they were trying to determine whether any of the inappropriate comments were made from his work phone. *Id.*

CP testified that he did not believe it was inappropriate to search the appellant's work phone given that the allegations against the appellant related to social media posts. AF, W-2, Tab 56. CP asserted that the investigators would have been remiss had they not checked his government issued phone to see if the posts came from it. *Id.*

The appellant testified that RY and KP took his phone, had him put in his password, and never returned it to him. AF, W-2, Tab 37. The appellant testified that RY said not to worry because they were looking to rule out the misuse of his phone and to determine whether the posts were made during work hours. *Id.*

Although the forensic examination showed the appellant had not made the FB posts from his government phone, KP and RY testified it did reveal that there was evidence of a pornographic website on the phone. AF, W-2, Tabs 39, 67.

Regarding the appellant's government cell phone, KP testified that they provided it to an IT employee, MDe, who conducted a forensic analysis. AF, W-2, Tab 39. At the time they provided the phone to MDe, KP asserted they did not have reason to believe he had accessed an inappropriate website or that he was obstructing the investigation. *Id.*

In a memorandum of the interview with MDe, the investigators wrote that based on the forensic report there were cookies found from the website PornHub.com. AF, W-1, Tab 29, 4f at 395. MDe stated to the investigators that "there were only two ways that a cookie from PornHub.com" could have been stored on the appellant's phone. *Id.* One was that the appellant visited the site and the other was by visiting a site that hosted PornHub.com advertisements. *Id.*

KP averred that when asked about it the appellant admitted that he looks at the found website, but added if it was on his government phone it was accidental. AF, W-2, Tab 39. Further, KP and RY reported that MDe explained that the

evidence of the pornographic site could have gotten on the phone through a website that hosted an advertisement for it. AF, W-2, Tabs 39, 67. KP explained that she did not make a determination whether the appellant accessed pornography, but instead asserted it was her job to gather evidence. AF, W-2, Tab 45.

**BIAS/ANIMUS**

KP

The appellant argued that KP was biased and showed a prurient interest in the appellant to the point he alleged that she "cyber stalked him." AF, W-2, Tab 39. When asked about her efforts to learn more about the appellant, KP stated that someone in OOI informed her about the appellant's Supreme Court case. *Id.* KP stated that she understood the information was background. *Id.* Further, KP testified that she discussed the appellant's Supreme Court case and she knew it was a whistleblower case, and she was aware that the government lost and the appellant was returned to work. AF, W-2, Tabs 39, 45.

According to KP, she discussed the appellant with 10-12 OOI co-workers after she was assigned the investigation. AF, W-2, Tab 39 KP testified that there was no policy that precluded OOI employees from discussing cases within OOI. AF, W-2, Tab 45. KP also acknowledged that she mentioned her assigned investigation to others both in OOI and possibly outside who did not have a specific need to know. AF, W-2, Tabs 39, 45.

She denied that she stalked the appellant because she stated that stalking implied harassment to her such as physically following, taking photographs, and the like. AF, W-2, Tab 39. Similarly, while KP admitted to conducting an internet search of the appellant, she denied it was cyberstalking. *Id.* KP testified that she believed cyberstalking involved someone obsessively investigating anything and everything about someone's life. *Id.* Contrary to that, KP averred that she ran an internet search using the appellant's name and from that search

she printed some of the information that appeared to include an Orange County publication and others she could not recall. *Id.* KP claimed that the search was consistent with her official duties. *Id.*

KP also testified that she looked at the appellant's Twitter account. AF, W-2, Tab 39. She stated that she did so after learning from someone, she believed an OOI co-worker, that the appellant had posted information on his Twitter account about the investigation. *Id.* KP acknowledged she conducted the search from her personal computer. *Id.* Because of security, she could not do so with a government computer. *Id.* Yet, KP testified she did not request such access, but instead just used her personal device. *Id.*

Regarding the FP page, KP testified that it existed for a longer period of time than the time period she reviewed, and it was possible that it contained other inappropriate comments. AF, W-2, Tab 39. She stated she could not recall whether the appellant made such allegations and/or whether he alleged that there was classified or sensitive information on the FP page, but stated that if he had they could have expanded the investigation. *Id.* As the questions became more specific, KP recalled on the stand that the topic of where FAMs sit on planes arose, and she believed there was a discussion with the security office regarding the allegation. *Id.* Evidence that KP sent the issue to the counsel's office, TG, is found in an email from KP to TG. AF, W-2, Tab 24, Ex. Q. In her email, KP stated that there were photographs and comments regarding FAMs' seating on aircraft. AF, W-2, Tab 24, Ex. Q. In addition, KP testified after the appellant refreshed her recollection that she spoke to DB, the head of the SSI office, about the website and whether there was potential SSI material on the FPFB page and specifically about the appellant's allegation regarding the seating chart. AF, W-2, Tab 24, at 35, Ex. Q; AF, W-2, Tabs 39, 45.

RY testified the appellant alleged that a FP post included a picture of the seat configuration where FAMs were supposed to be seated. AF, W-2, Tab 67.

RY testified that they sent the allegation to the hotline, and the response was that it was not SSI. *Id.*

KP acknowledged that the investigation could have been broadened and believed if it was perhaps it could have been possible to review the FP page in more detail. AF, W-2, Tab 39. She was, however, unsure whether the agency opened another investigation or not. *Id.* When pressed about why she did not review more of the FP page, KP stated that her focus was the complaint she was assigned to investigate, and she did not request additional access. AF, W-2, Tabs 39, 45. Still, KP testified she might have reviewed other material to include benign posts, but she did not include everything she reviewed in the report. AF, W-2, Tab 39. KP also recollected she found improper posting by one other individual but determined that individual was no longer an agency employee. AF, W-2, Tab 45.

KP also testified that the appellant alleged the agency referral for investigation was retaliatory, and they did not conduct a further investigation of this allegation. AF, W-2, Tab 45. In addition to questioning the bias of JL, the appellant also asked KP about whether other witnesses mentioned the appellant's alleged whistleblowing activity or status as a whistleblower, and she responded she was not sure, but most did. AF, W-2, Tab 45.

KP explained they did not interview the FP page administrators because she believed they were not agency employees at the time. AF, W-2, Tab 45. Also, KP stated they did interview RT because she was a former supervisor. *Id.* KP explained that they were not looking for negative information about the appellant, but instead asked about her experience with the appellant in the office setting. *Id.* The appellant questioned then why KP had not interviewed other former supervisors. *Id.* KP asserted she did not believe it was because TS, RW, or JP had nothing negative to say about the appellant. *Id.*

KP testified she did not recommend charges or adjudicate the matter, but instead that is the role of OPR. AF, W-2, Tab 45. KP averred she never spoke

about the matter to either TJ, the proposing official, or CP, the deciding official. *Id.* Further, KP testified that she did not provide any guidance or tell anyone that the appellant should be disciplined. *Id.*

KP averred that the appellant's status as a whistleblower did not impact her investigation or impact her findings. AF, W-2, Tab 45.

RY

RY stated that he did not do any investigation or research about the appellant prior to starting the investigation. AF, W-2, Tab 67. During the investigation, however, RY testified that he conducted an internet search because he heard the appellant had a whistleblower case go to the Supreme Court. *Id.* RY stated that he used an office computer, but testified he did not recall doing extensive searches. *Id.* RY averred that he learned about this from one of the employees who conduct intake from FAMS. AF, W-2, Tab 67. They did not say anything negative about the appellant, according to RY, but stated that he had worked a few different places, he was removed and reinstated, and had a Supreme Court case. *Id.* Moreover, RY testified that no one asked him to retaliate against the appellant. *Id.*

RY testified that he and DP had conversations about the appellant. AF, W-2, Tab 67. Further, RY acknowledged that some of those conversations included the appellant's assertion that he was a whistleblower, because he raised the issue every time they spoke to him. *Id.* RY testified that the appellant's claim that he was a whistleblower permeated everything for the appellant. *Id.*

RY explained he wanted to get a better understanding of who the appellant was. AF, W-2, Tab 67. This is a way to help him build rapport with someone he is going to interview. *Id.* RY testified he has conducted similar types of research before and indicated his research, in this case, was "standard" and took about 5 minutes. *Id.* Further, RY testified that there is no prohibition about agents

discussing cases, and indeed it is very common. *Id.* He considered it a "force multiplier." *Id.*

In addition, RY testified that he believed he spoke to two individuals outside of OOI regarding the appellant during the investigation. AF, W-2, Tab 67. RY explained that he spoke to the two individuals to ask a question. *Id.* He did not, however, believe he communicated with anyone with FAMS management beyond the interview process before, during, or after the investigation. *Id.* When asked specifically about BB, RY stated he may have spoken to BB to say that we would be calling in a lot of staff, but did not recall this. *Id.*

Regarding exculpatory evidence, RY testified that they collected facts from witnesses and the appellant, and stated that everything that they received was included. AF, W-2, Tab 67. The appellant inquired why RY had asked KT about possible prior counseling for the appellant and his statement was that if it happened in the past he would need to know. *Id.* KT stated that she would check with the appellant's prior supervisor and the one who acted for KT when she was she was on leave. *Id.* RY explained that they needed to determine whether there was prior misconduct, but acknowledged that he could have asked the question differently. *Id.* RY averred that asking a supervisor about past conduct is very common. *Id.*

The appellant questioned RY about the duration of the investigation. AF, W-2, Tab 67. He asked if they already had the posts from the beginning why did it take so long to complete the investigation? *Id.* RY testified that in addition to the information and posts contained in the ITR more information came to light during the course of the investigation. *Id.* Further, RY stated that witness interviews are a standard practice. *Id.* RY specifically identified concerns raised by JL and MN as well as the investigation interference issues that arose including sending the photograph of the visitor log and potentially violating the NDA. *Id.*

In addition, RY noted the PornHub cookies that were found on the appellant's work phone. *Id.*

RY testified they did not initiate a misconduct investigation into GC from the security office at the Freedom Center. AF, W-2, Tab 67. RY did, however, indicate that some of the matters raised during the investigation were referred such as the SSI issue. AF, W-2, Tab 81. In addition, RY testified that the appellant had already referred certain issues to the hotline, like the appellant's claims regarding MD and the alleged favorable treatment she received based on her relationships. AF, W-2, Tab 81. RY testified that he also believed the appellant's allegations about the Brazil trip were previously reported and investigated, and added it would be in the hotline database. *Id.* RY could not recall the outcome of the investigation. *Id.*

During the appellant's OOI interview, RY testified, the appellant raised his asserted whistleblowing. AF, W-2, Tab 67. RY testified that he explained to the appellant the investigation into his alleged misconduct was not a whistleblower investigation. *Id.* Yet, RY testified that the appellant had other options to pursue a whistleblower claim. *Id.* Further, RY averred that the appellant claimed the investigation was retaliatory, and RY assured the appellant his whistleblowing would not interfere with his investigation. *Id.* RY was unsure whether the appellant reported his concerns that the investigation was retaliatory, and therefore he also did not know whether the appellant's allegation was investigated. *Id.* RY averred that he encouraged the appellant to report his allegation to the hotline. *Id.* Further, RY testified that he spoke to the appellant about all sorts of topics during the interview that were not directly related to the investigation. AF, W-2, Tab 81. RY explained it is common place for an investigator to get to know the witness in order to get them to relax. *Id.*

RY testified that during an investigation he used all types of investigative tools including providing evidence to get information or creating a ruse. AF, W-2, Tabs 67, 81. One reason to use a ruse is to help someone feel comfortable,

like they are not alone so they will share information. RY averred that he has been trained on using this method. AF, W-2, Tab 67. Another tool RY discussed in his testimony was asking leading questions. AF, W-2, Tab 81. RY testified that this is a common way of getting reluctant witnesses or victims to open up. *Id.* A similar strategy used is to ask of an individual who feels aggrieved, what would make them whole, RY explained. *Id.* The answers are not always relevant and not always included in the MOIs as was the case with the appellant here. *Id.* Again, the purpose RY averred is to get the individual to relax and talk. *Id.*

The appellant asked KP why RY asked JL about other women who may have information about the appellant. AF, W-2, Tab 45. KP explained what RY meant by referencing the appellant's wrath, stating that it meant the appellant's effort to talk about others in an inappropriate/very negative way. *Id.* KP did not consider this to be beyond the scope of the investigation. *Id.* According to KP, this information was necessary to understand the situation before they spoke to the appellant, which they did by speaking to JL, the complainant. *Id.*

The appellant asked RY why he told JL that the appellant would not be able to see what she provided. AF, W-2, Tab 81. RY testified that OOI does not release information, but he could not say whether it would be released under FOIA because they do not handle that. *Id.* Further, RY asserted that he told JL this because she was a reluctant witness and she was concerned. *Id.* Specifically, she was afraid of the repercussions of providing testimony. *Id.* Still, RY stated that he also told JL that they cannot control the information. *Id.*

RY also explained his statement to JL that she should tell people she was asked about posts, if questioned about her involvement in the investigation. AF, W-2, Tab 81. The appellant asked why this did not violate the NDA JL signed. *Id.* RY averred that if she were to say nothing it would highlight her as being involved, and wanted to ensure JL did not disclose too much. *Id.* Therefore, he told her exactly what she could say. *Id.* While RY testified that the expectation is witnesses would say nothing, in the face of rumors he recognized that was

difficult. *Id.* Therefore, RY testified he wanted to give JL a ready answer that was not inaccurate but not substantive. *Id.*

Further, RY testified that if information pointing to possible misconduct arose during the course of an investigation it was OOI practice to incorporate it into the pending investigation or, if completely unrelated, refer it to the hotline. AF, W-2, Tab 67. Here this included issues relating to the appellant's conduct during the investigation and the inappropriate content on his work phone. *Id.*

RY asserted that while the investigation into the appellant's behavior began with one allegation, they learned through interviewing co-workers, supervisors, and the appellant that there were many more allegations of misconduct. AF, W-2, Tab 67. It was RY's testimony that they identified alleged possible misconduct and referred it to the appropriate office or incorporated it into the open investigation. *Id.*

RY explained that they took the phone for forensic analysis because the investigation dealt with an electronic communication. AF, W-2, Tab 67. RY averred that taking a subject's work phone for analysis is pretty standard practice if the subject of the investigation covers electronic communications. *Id.* He added he has taken phones in other cases as well. *Id.*

RY testified that no one influenced his findings and there was no pressure applied regarding what information to gather. AF, W-2, Tab 67. Further, RY averred that there were no reporting deadlines or updates and the case was handled just like any other case. *Id.* He averred that the appellant's whistleblowing played no role in the investigation, and absent any whistleblowing activity he would have conducted the investigation in the same way. *Id.*

**THE APPELLANT'S OOI INTERVIEW AND SWORN STATEMENTS**

September 17, 2017 Interview

*Flying Pigs Background*

Investigators RY and KP conducted an interview of the appellant on September 17, 2017. AF, W-1, Tab 29, 4L part 1. RY started the appellant's OOI interview by inquiring into the Flying Pigs Facebook group (FPFB). *Id.* Almost immediately, the appellant admitted to making the posts about MD and RA on FPFB. *Id.* at 16:40. The appellant, however, disagreed that his posts were made on an open, public forum. *Id.* at 20:50. The appellant explained that FPFB was a secret group for current and retired FAMs. *Id.* at 21:45-22:10. According to the appellant, group members had to be nominated by someone already within the group to join, and the group administrators vetted new members through the TSA global system. *Id.* at 22:30-22:45. The appellant averred that he had only gained access to the secret group six months prior to his interview. *Id.* at 24:45-24:52.

*Post about MD*

RY asked the appellant what prompted the post that appeared to be about MD. AF, W-1, Tab 29, 4L part 1 at 31:00-31:05. The appellant quickly responded that MD and FD's affair caused a lot of "grief" for him. *Id.* at 31:10-31:45. The appellant added that the affairs were "common knowledge" around the office. *Id.* RY and KP asked whether the post was directed at MD in a malicious way. *Id.* at 33:42. The appellant averred that he was advocating for MD because she "sweeps the floor" and never sees her flying. *Id.* at 33:42-47. The appellant then proceeded to detail MD's long history of failing the training program (TPC) and called her "a joke in the field office." *Id.* at 34:47-34:51.

In detailing the reasons for making the post, the appellant stated he was frustrated following his win at the Supreme Court and the post in question was him "fighting to get back his reputation." AF, W-1, Tab 29, 4L part 1 at 37:30-38:35. When asked if he understood that the post could be maliciously construed by MD and others, the appellant said he had "regret" and "remorse" for

how MD interpreted his post on FPFB. *Id.* at 46:19-46:23. The appellant stated he was not aware that MD saw the posts. *Id.* at 1:56:18.

RY asked the appellant to explain what he meant by "other sloppy floor tasks" in the post. AF, Tab 4L part 1 at 47:20. The appellant blurted that this phrase referred to MD having sex with FD on a gym mat at work. *Id.* at 47:22-48:30. The appellant said that MD's sexual relationship with her superiors was used for preferential treatment to be assigned a ground based assignment (GBA). *Id.* at 48:35-48:38. The appellant noted that GBAs were highly coveted assignments among FAMs because the frequent flying was a stressor for family life. *Id.* Thereafter, the appellant emphasized that MD was a single woman and questioned how she could have landed a GBA. *Id.* at 48:35-48:38, 1:02:40-1:02:49.

The emojis in the post included a smiling face with its tongue out, a baguette, water droplets, and an angry face. AF, W-1, Tab 29, Tab 4e at 3. Moreover, the appellant described the emojis as representing a sex act. AF, W-1, Tab 29, 4L part 1 at 1:32. Specifically, the appellant referred to the emojis as describing MD's "sexual antics" with FD and PS, and that the emojis stood for genitals, bodily fluids, and disgust respectively. *Id.* at 40:05-47:10.

To understand what prompted the appellant's posts, RY asked whether the appellant made the posts on FPFB in response to MD's email about the advisory council. AF, W-1, Tab 29, 4L part 1 at 53:43. The appellant responded in the negative and made denigrating comments about the advisory council. *Id.* at 53:57. Later in the interview, the appellant implied that MD did not deserve to be on the advisory council because, according to him, MD did not do anything in the office. *Id.* at 1:33:34.

The appellant admitted that the post of the woman under the desk represented MD and how she had been "demeaned" and put in "compromising positions." AF, Tab 4L part 1 at 54:40-55:30. When RY asked if the appellant made these posts while on duty, the appellant responded, "there's the potential

that I may have posted things" at work. *Id.* at 56:50-56:56. The appellant noted that he did read things on FPFB while on duty, but he could not "100% deny" posting while on duty. *Id.* at 57:00-57:30. The appellant maintained, however, that he never posted to the group on government equipment. *Id.* at 58:05.

The investigators again asked if the appellant thought about how his posts made other women in law enforcement in the group feel. AF, W-1, Tab 29, 4L part 1 at 1:00:30. The appellant quickly responded that it was his belief that the other women in the group agreed with his posts about MD. *Id.* at 1:00:35-1:00:37. Later in the interview, the appellant vehemently denied that his posts were disparaging towards women because he asserted that the allegations about MD and FD came from CH who is a woman. *Id.* at 1:30:50-1:30:55.

In answering questions from RY and KP, the appellant often circled back to MD and her qualifications. Moreover, the appellant alleged that MD's actions lowered morale in the office. AF, W-1, Tab 29, 4L part 1 at 1:02:40. After claiming to support and stand up for MD, the appellant stated that "she put herself in that position . . . maybe I'm the only one willing to call it out." *Id.* at 1:02:45-1:02:50. Eventually, the appellant admitted that the post of the woman under the desk was "probably not" posted to support MD; rather, that it was posted out of his frustration because of his belief that managers gave her special treatment because of her relationships. *Id.* at 1:03:54-1:03:59.

*Post about RA*

When asked about the post about RA, the appellant stated that he posted it because RA knew MD was having an affair and he helped to facilitate it. AF, W-1, Tab 29, 4L part 1 at 1:44:00-1:46:00. The appellant also maintained that he made this post because of the KPi airport incident. *Id.* at 1:52:25. RY asked the appellant about the intent behind his comments about RA and KPi. *Id.* at 2:15:35. The appellant averred that the purpose of the post was not to demand accountability; he asserted that he "needs to be made whole." *Id.* at 2:15:35-2:20:15. The appellant also stated that he thought his posts on FPFB

would help his situation and support his argument for promotion. *Id.* at 2:20:15. Nevertheless, he added that "my motive was not to be malicious." *Id.* at 2:51:35.

The appellant described the emojis in the RA post as representing the partying and sexual acts involving MD and PS during the Brazil trip that RA allegedly had knowledge of and helped facilitate. AF, W-1, Tab 29, 4L part 1 at 1:44:12.

*Post About KPi*

When asked about the post on KPi's promotion in which the appellant compared KPi to feces, the appellant stated that he made that post because KPi is a coward and stood by waiting for back up while a woman was raped. AF, W-1, Tab 29, 4L part 1 at 1:51:45-1:52:36.

*Comments on JL*

The appellant stated that the administrators of FPFB removed him from the group. AF, W-1, Tab 29, 4L part 1 at 1:57:25. The appellant blamed his loss of access on JL whom he believed saw his posts about MD and complained to management. *Id.* at 2:03:55-2:05:30. The appellant said that he tried to avoid JL but that he went out of his way every day to wish her a good morning. *Id.* at 2:13:28. In describing his interactions with JL, the appellant added that he believed JL and MD were very close. AF, Tab 4L part 2 at 1:08:15. Without any prompting from the investigators, the appellant also added that JL "is not all there" and hypothesized that she might be "bipolar." *Id.* at 1:10:10. In addition, without any evidence to support his claim, the appellant stated that he believed JL and KT are behind his inability to advance in his career. *Id.* Previously, the appellant had used a mocking tone of voice when quoting KT. *Id.* at 59:55.

*General Interview*

It should be noted that the appellant was asked whether he would harbor personal animosity and retaliate against the individuals involved in the complaint against him and he did not directly answer. Specifically, he skated around the

question for around ten minutes. AF, W-1, Tab 29, 4L part 1 at 2:07:55, 02:13:28, 02:45:20. In the latter half of the interview, the appellant stated in a sarcastic tone of voice that he was "probably going to get fired for disparaging a law enforcement officer." AF, Tab 4L part 2 at 52:54.

Follow up investigatory interview, December 7, 2017

At the start of the follow-up interview on December 7, 2017, the appellant got into a heated discussion with RY and questioned why additional witness interviews were solicited after he admitted to all allegations about the three posts on the FP secret group. AF, W-1, Tab 29, 4L part 3 at 13:25-13:50, 19:45. The appellant also noted that following the September 17, 2017 interview, he discussed the investigation with other people. *Id.* at 20:50-20:59. Specifically, during his OOI interview, the appellant stated that MH was probably really upset that the appellant was telling every Tom, Dick, and Harry about BB. AF, W-1, Tab 29, 4L part 3 at 21:23. In addition, the appellant accused RY of shutting down the FPFB. *Id.* at 27:19.

*Photographs of the access log*

On the audio recording of the appellant's December 7, 2017 interview, the appellant admitted that he took pictures of the visitor log on his personal device. AF, W-1, Tab 29, 4L part 3 at 51:38. He stated he took two photographs of the visitor log because he saw JL's name on it and believed that she talked to KT about his MD posts on FPFB. *Id.* at 52:15. The appellant stated that when he saw JL's name on the visitor log, he knew that she was the one who took screenshots of his posts on FPFB and he took the pictures so no one would deny that JL was the person who "violated the rules of the secret group." *Id.* at 56:30-56:45; 57:45-58:30. Later in the interview, the appellant fixated on JL's demotion to evade questions and alleged that it was "pretty evident long before" that JL complained about him. *Id.* at 2:41:50-2:42:26.

The appellant also admitted that he sent the photographs of the visitor log to others, but he tried to evade questions from RY regarding to whom he had sent the photos. AF, W-1, Tab 29, 4L part 3 at 1:05:00-1:13:25. In fact, the appellant repeatedly refused to name the individuals to whom he sent the photographs because he claimed that they were whistleblowers. *Id.* Eventually, the appellant provided the names of some of the FAMs to whom he sent the pictures. *Id.* at 1:13:25. The appellant noted that he sent the photographs of JL's name on the log to other FAMs to show that "she is going to get you too." *Id.* at 1:20:14. The appellant explained that after sending photographs of the visitor log to other FAMs, the appellant told the other FAMs to contact the moderators of FPFB to shut down the secret group or remove JL. *Id.* at 1:22:10-1:22:22.

*Witness Contacts*

RY asked the appellant whether he contacted any other FAMs after the initial interview. AF, W-1, Tab 29, 4L part 3 at 01:31:00. The appellant stated that "yes, I may have." *Id.* at 1:31:25-1:31:31. The appellant openly admitted to contacting several individuals following his initial interview with RY and KP. The appellant admitted to privately messaging "DM Bucks" to ask him not to reveal himself, but the appellant maintained that he did not tell DM Bucks about the investigation. *Id.* at 1:31:30-1:35:00. The appellant also said he contacted SW and SM following the initial investigatory interview. *Id.* at 1:35-40-1:35:47, 1:35:50-1:36:05. The appellant asserted that he notified SM due to issues with JL, including his belief that JL was filing complaints against him. *Id.* at 1:35:50-1:36:05. Thereafter, the appellant stated that he contacted these FAMs so they could protect themselves against whistleblower retaliation. *Id.* at 1:53:38-1:53:42. Nevertheless, the appellant denied witness tampering yet admitted to violating the NDA. *Id.* at 01:55:09-01:55:14, 01:58:50-01:59:30.

*PornHub.com cookies detected on the appellant's government device*

When RY noted that during the investigation into the appellant's government device, they found five hits on PornHub.com, the appellant did not

flatly deny the allegation. AF, W-1, Tab 29, 4L part 3 at 34:00-36:35. Instead, the appellant offered that his laptop could have been "tethered" to his phone through a hot spot or that visiting the website was accidental. *Id.* at 34:15-36:25. The appellant admitted that he was a frequent visitor to the PornHub.com site and that a few clicks on the website in three years were not enough for it to have been intentional. *Id.* at 36:35. Further, in the audio recording of his interview, however, the appellant asserted that he did not know it was an issue to visit an adult website on his government device when he was off-duty. *Id.* at 37:21.

*The Appellant's Demeanor*

Near the conclusion of the interview on December 7, 2017, the appellant admitted that "this ha[d] been an aggressive interview." AF, Tab 4L part 3 at 2:27:20-2:27:27. The appellant began the interview by defiantly picking a fight with RY and accusing him of conducting a criminal investigation into him. Furthermore, the appellant repeatedly referred to RY as "criminal investigator [RY]" throughout the interview despite RY assuring the appellant that this investigation was administrative in nature. *Id.* at 1:21:00-1:21:10. At one point during the interview, the appellant aggressively averred that "it's nice to see the face of the people involved in this conspiracy to retaliate against me . . . the Supreme Court gave me a mandate." *Id.* at 01:23:30-01:23:50. Later in the interview, the appellant compared the investigation to Nuremburg and maintained that he had done nothing but protect the public. *Id.* at 01:45:00-01:45:10. When RY asked the appellant his motivation behind his recent activities, the appellant defiantly stated, "when people come after me, I'm gonna come after you as hard." *Id.* at 02:01:45-02:01:54. After asserting that he advocated for MD in his initial interview, the appellant described MD as "the woman who is having sex to save her job with the guy who fired me." *Id.* at 02:15:00-02:15:08. Further, the appellant attempted to evade RY's questions by mentioning the incident with

RT/KPi in the airport restroom, JL's demotion, and MD's relationship with FD. *Id.* at 02:49:45-02:49:55.

Appellant's Sworn Affidavit

In the appellant's 63 page sworn affidavit included in the OOI ROI, the appellant asserted that the agency's ordered OOI investigation was "frivolous and retaliatory" in response to his protected 2003 disclosures. AF, W-1, Tab 29, 4f at 202, 204. The appellant argued that his posts on FP were legally protected under the Civil Rights Act of 1964, the Whistleblower Protection Enhancement Act, and the First Amendment of the U.S. Constitution. *Id.* at 204.

The appellant detailed some of his OOI complaints that he believed to be "criminal in nature." AF, W-1, Tab 29, 4f at 204. The appellant argued that San Francisco SAC DH helped to derail his application for a lateral assignment and that DH had a motive for retaliating against him because of the appellant's August 2008 disclosures regarding a 2001 incident in which a FAM left his firearm in a bathroom. *Id.* at 205. The appellant also accused SFAM RT of committing criminal perjury. *Id.* Also included in the list of the appellant's OOI complaints was the appellant's disclosure that agency leaders tried to cover up a FAM's failure to intervene in a sexual assault in a bathroom at DCA. *Id.*

In the affidavit, the appellant accused the people who brought complaints against him of "violating the terms of the secret forum." AF, W-1, Tab 29, 4f at 206. The appellant admitted to uploading the July 2, 2017; August 26, 2017; and September 1, 2017 posts on FPFB but argued that his motive was to expose inappropriate conduct by federal law enforcement officers and executives. *Id.* at 207. The appellant, however, emphasized that FPFB was a "secret group" and that prospective members knew about the group's existence only through a member telling them about it. *Id.* at 215. The appellant noted that he first believed he was banned from the group but that he had come to discover that either the group was shut down or that dozens of members had been removed

because his FB friends told him they could no longer see the link to the group's page. *Id.* In shutting down FPFB, the appellant argued that the agency "severed secret relationships and curtailed useful information sharing" that benefitted employees wronged by the agency. *Id.* Further, the appellant explained that many FPFB members did not use their real names and that members used FPFB to "dispel non-factual information orally disseminated by their field office leadership." *Id.* at 216.

The appellant noted that he "begged" to be transferred out of the agency following his reinstatement and that his request was denied. AF, W-1, Tab 29, 4f at 208. In the sworn statement, the appellant referenced his anxiety attacks which occurred after the agency denied his requested transfer and noted that he made agency leaders aware that a psychiatrist prescribed him anti-depressant medication. *Id.* The appellant then accused the agency of attempting to bribe his attorneys to accept a bargain settlement. *Id.* at 209.

In the appellant's affidavit, he expressed that following the Board's determination he had made a whistleblower disclosure under 5 U.S.C. § 2302(b)(8), FAM Director RA was dismissive of the appellant's requests for a promotion and RA and his team never contacted him for further discussions about a global resolution. AF, W-1, Tab 29, 4f at 212.

In detailing his grievances against the agency, the appellant asserted that the agency ignored his many accomplishments yet promoted a "coward to K Band ASAC." AF, W-1, Tab 29, 4f at 236. Specifically, the appellant described his successful pursuit of a man trying to break into homes in Nashville. *Id.* The appellant also mentioned that he tipped off the FBI to a $1.35 million loan modification scam in California. *Id.* at 237. The appellant also noted that he disclosed a recruiter for a South American drug cartel to the U.S. Drug Enforcement Administration. *Id.* In highlighting his accomplishments, the appellant questioned how KPi could be worthy of law enforcement managerial duties. *Id.*

After questioning the merits of KPi's promotion, the appellant circled back to his posts on FPFB. AF, W-1, Tab 29, 4f at 242. The appellant noted that his July 2, 2017 post of a woman under a desk was in reference to MD's relationship with FD. *Id.* The appellant then asserted that while FD was under investigation for his inappropriate relationship with MD, he was the Deciding Official in his case. *Id.* at 243. In the affidavit, the appellant expressed his belief that MD and FD's relationship allowed MD to secure a GBA that had not been announced and for which other FAMs were not given the opportunity to compete. *Id.* The appellant noted that numerous FAMS with families were upset that MD, a single woman, got the GBA because GBAs were desirable for people with families. *Id.* at 244. The appellant asserted, "FAM [MD's] selfish ambitions have yielded her choice assignments and monetary gain. FAM [MD's] unprofessionalism encourages other law enforcement officers to have affairs with their married superiors." *Id.* at 257.

The appellant then accused MD of encouraging employees to file complaints against him to "ingratiate herself with agency Senior Leadership." AF, W-1, Tab 29, 4f at 258. The appellant also acknowledged that even though he did not have evidence, he thought it likely that WFO ASAC KT encouraged JL to lodge complaints against the appellant on MD's behalf. *Id.*

Moreover, the appellant proposed the theory that SAC BB retaliated against him because he was managing WFO operations under duress and coercion. AF, W-1, Tab 29, 4f at 261. The appellant asserted that BB's Transportation Senior Executive Service status should have been revoked, and alleged that he was caught having an inappropriate relationship with a subordinate. *Id.* The appellant noted that BB was "scared to death" of the agency reassigning him to its Arlington, Virginia facility because one of BB's children was undergoing a cancer treatment. *Id.* The appellant maintained that this was the primary reason BB carried out retaliatory orders against him. *Id.*

I have read and considered the entire affidavit; however, I have included only relevant portions in this summary. Throughout the affidavit, the appellant referenced meetings and actions with the agency that took place more than a decade ago to emphasize his belief that the OOI investigation was the culmination of a conspiracy against him for his whistleblowing and protected disclosures. *See* AF, Tab 29, 4f at 200-262.

**PROPOSAL NOTICE**

TJ, Case Manager, Office of Professional Responsibility, issued the Notice of Proposed Removal on June 8, 2018. AF, W-1, Tab 29, 4e at 2. The proposed removal was based on the TSA Office of Inspection's (OOI) Report of Investigation (ROI), which was initiated upon the issuance of an Incident Tracking Report (ITR). In the ITR, the Federal Air Marshal Service (FAMS) alleged that the appellant posted "abusive/offensive comments about a FAM" on the *Flying Pigs* Facebook group page (FPFB). *Id.* The proposal detailed three charges summarized below. *Id.*

Charge 1: Inappropriate Comments

The first charge regarding the appellant's alleged inappropriate comments contained five specifications. AF, W-1, Tab 29, 4e at 3. Specification 1 described the appellant's July 2, 2017 message on FPFB, which included a picture of a woman hiding under a desk with the message "WOW, NOW one of my National Advisory Council field office reps—this chair-marshall . . . spent most of her FAMs career unemployed, in remedial training, in non-competitive GBAs (because her gun was revoked), and performing other sloppy floor tasks . . . ." *Id.* at 3. In addition, the post included a string of emojis that TJ indicated represented sexual activity. *Id.*

Specification 2 detailed the appellant's July 3, 2017 post which read: "Circa 2003 Phase 2: she was such a train wreck that ACY would not let her fly back to the LAFO with her pistol." AF, W-1, Tab 29, 4e at 3-4. This post also

included an emoji string. *Id.* The proposal noted that the appellant admitted to the posts and that they were in reference to MD. *Id.* at 4. The proposal explained that JL reported the appellant's comments to OOI and that the record was clear that the appellant "repeatedly disparaged FAM [MD] to coworkers for years." *Id.*

Specification 3 described the appellant's September 1, 2017 post about RA which included a photo of RA and a message followed by a string of emojis that read, "Any thoughts on today's 'Temporary Assignment' of our fearless Brazil TSA-paid-Party Trip Advisor? Friday bad news dump?" AF, W-1, Tab 29, 4e at 5. The proposal noted that the appellant admitted in his OOI interview that he posted the photo of RA and wrote the accompanying message and string of emojis. *Id.*

Specification 4 related to the appellant's August 26, 2017 post on FPFB wherein the appellant posted a photo of KP which stated, "I'm sure other agencies also promote steaming wet turds." AF, W-1, Tab 29, 4e at 3. The proposal pointed to the appellant's written statement to OOI to show that the appellant was off duty on the day of the posting. *Id.* at 5.

The final Specification under Charge 1, Specification 5, described numerous instances in which the appellant stated to FAMs TE and TH that BB had an affair when he was stationed in Cincinnati. AF, W-1, Tab 29, 4e at 3. TJ wrote in the proposal that FAM TH told the investigators he heard the appellant make "disrespectful and inflammatory comments about others, specifically SAC BB." *Id.* at 5. Further, TJ wrote that FAM TH told investigators that the appellant made a comment that the appellant knew his information was true and that it "would be prove[n] under oath." *Id.* The proposal noted that the appellant did not address these comments in his statement. *Id.*

To justify Charge 1, TJ referred in the proposal to MH's interview with the OOI investigators in which he described the appellant's inappropriate behavior and complaints about the appellant's negative attitude. AF, Tab 29, 4e at 6. In addition, the proposal noted that during a counseling meeting in January 2017,

SFAMS SM and MH advised the appellant that other team members had complained about his negative behavior and told him to refrain from excessively using his personal cell phone. *Id.*

In the proposal, TJ stated that the appellant's conduct violated Section 9.N.(1) of Office of Law Enforcement (OLE) 1112, *Employee Responsibilities and Conduct*, which provides:

> [e]mployees shall not undermine teamwork or public confidence in OLE/FAMS by criticizing or ridiculing other OLE/FAMs, TSA, or DHA employees in a manner that is defamatory, obscene, unlawful, unprofessional, or which constitutes harassment based on gender, race, ethnicity, national origin, sexual orientation, or gender identity, and which impairs the operation or efficiency of the OLE/FAMS, TSA, or DHS.

AF, W-1, Tab 29, 4e at 6.

TJ also alleged in the proposal that the appellant violated Section 9.C.(1) of OLE 1112 which required employees to be "patient, courteous, and respectful when dealing with each other." *Id.* In addition, the proposal cited Section 5.D.(3) of TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, which required employees to "exercise courtesy and tact" in dealing with their colleagues, even in the face of provocation. *Id.* In the proposal, TJ also noted that even if the appellant's comments were true, speech that disrupts official business or adversely affects the efficiency of the agency is prohibited under Section 1 of the Handbook to TSA MD 1100.73-5. *Id.* The proposal referenced Sections K and M of the Handbook which prohibit sexual harassment and misconduct. *Id.* at 6-7.

TJ, the proposing official, found that the appellant's inappropriate comments on FPFB disrupted the workplace and caused at least one colleague to feel harassed. AF, W-1, Tab 29, 4e at 7. Moreover, TJ found that Charge 1 and all of its Specifications were supported by a preponderance of the evidence and warranted discipline. *Id.*

Charge 2: Inappropriate Conduct During an Investigation

Charge 2 detailed the appellant's alleged inappropriate conduct during the OOI investigation and included six specifications. AF, W-1, Tab 29, 4e at 7.

Specification 1 described the appellant's conduct on September 20, 2017, when he went to TSA Freedom Center to be interviewed by the OOI investigators and photographed the official visitor log and provided those photographs to other TSA employees, including potential investigation witnesses. AF, W-1, Tab 29, 4e at 7. TJ stated in the proposal that the appellant admitted to taking two photographs of the visitor log and shared them with others. *Id.* at 8. She noted that the appellant stated that he took the photos of the log because he saw JL's name on it. *Id.* The proposing official wrote that "[this] admission makes clear that [the appellant] took the photographs to identify who filed the complaint with OOI and to share that information with others." *Id.*

In Specification 2, TJ wrote that following the appellant's initial interview with OOI, the appellant contacted retired FAMs SS and SR and SFAM SM to provide them with information about the on-going investigation. AF, W-1, Tab 29, 4e at 7. Specification 3 provided that following the appellant's September 20, 2017 investigative interview, the appellant contacted FAM CK and told him that JL "is going to get you too." *Id.* at 7-8. TJ noted that following CK's interview with OOI, the appellant sent him "intimidating" messages on social media and emails to his personal account. *Id.* at 9.

Specification 4 included the allegation that the appellant contacted FAM DM ("DM Bucks") following the appellant's September 20, 2017 interview with OOI and told him that OOI wanted to "rat" him out and that OOI was "targeting" him as a subject or witness in the investigation. AF, W-1, Tab 29, 4e at 7. TJ noted that as a consequence of the appellant contacting DM about the investigation, DM deleted his "DM Bucks" account on FPFB and contacted the group's administrator, which caused FPFB to be shut down. *Id.* at 9.

Specification 5 described a message posted to FPFB prior to the appellant's September 20, 2017 investigative interview that referenced trying to identify the "rat" or "snitch." AF, W-1, Tab 29, 4e at 7. The proposal attributed this post to the appellant. *Id.* Similarly, Specification 6 is connected to a statement the appellant was alleged to have made in front of his VIPR team members. In that statement, TJ asserted the appellant stated that he was "aware that an investigation had been initiated on [him] and that [he] would find out who had filed the complaint." *Id.*

In the proposal, TJ asserted that the appellant's conduct under Charge 2 violated Paragraph F(1) of the Handbook to TSA MD 1100.73-5, which provides that employees must fully cooperate with all TSA and DHA investigations and inquiries. AF, W-1, Tab 29, 4e at 9-10. The proposal also cited Section 6.E of TSA MD 1100.73-5 which provided that employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, negatively impact its mission, or cause embarrassment to the agency. *Id.*

The proposing official wrote that the appellant's judgment and trustworthiness were called into question when he obtained the names of other FAM witnesses in the investigation and shared that information with potential witnesses. AF, W-1, Tab 29, 4e at 10. Further, TJ found that a preponderance of the evidence supported Charge 2 and all of its Specifications warranted discipline. *Id.*

Charge 3: Misuse of Government Equipment

The third charge in the proposal related to misuse of government equipment and included one specification. AF, W-1, Tab 29, 4e at 10. The agency charged that the appellant "accessed an adult website, PornHub.com, using [his] government-issued iPhone" on or around January 15, 2017. *Id.* TJ explained that the appellant submitted his government-issued iPhone to investigators for forensic examination and during the course of the investigation

they discovered that the appellant accessed PornHub.com on his government phone. *Id.*

In the proposal, TJ wrote that the appellant's conduct under Charge 3 violated TSA 1100.73-5, *Employee Responsibilities and Code of Conduct*, and its related Handbook. AF, W-1, Tab 29, 4e at 10. Further, TJ wrote that Section D(4)(c)(i) of the Handbook prohibited employees from using government-issued phones to store, transmit, collect, or view material that is discriminatory, defamatory, or of a sexual/harassing nature. *Id.* In addition, Section D(4) of the Handbook provided that accessing inappropriate sites is prohibited. *Id.* TJ found that a preponderance of the evidence supported Charged 3 and its Specification warranted discipline. *Id.*

TJ considered the *Douglas* factors to determine the appropriate penalty for the appellant's misconduct. AF, Tab 29, 4e at 11-15. TJ first considered the nature and seriousness of the appellant's misconduct and its relationship to his duties as a FAM and TSA's mission to protect "the Nation's transportation systems to ensure freedom of movement for people and commerce." *Id.* at 11. TJ noted he made numerous inappropriate comments and his comments on FPFB were not the first time his colleagues had complained about his behavior. *Id.* In fact, TJ wrote that employees have requested to be assigned to duties that would not require contact with him because numerous employees have described the appellant as "hostile" and having no respect for fellow colleagues. *Id.*

TJ also noted in the proposal that the appellant's comments affected the opinions of at least one supervisor, MH. AF, W-1, Tab 29, 4e at 11. TJ referred to MH's statement that the appellant's "goal is to bring down the Agency," and that he wanted the Agency to "fail." *Id.* TJ considered SM's statement that the VIPR C team was dysfunctional due to the appellant. *Id.* at 14.

The proposal from TJ noted that as a Law Enforcement Officer, the appellant is held to a higher standard of conduct than non-law enforcement government employees and that he failed to meet the standards of good judgment

and reliability required of FAMs when he made the posts on FPFB and contacted witnesses during an on-going investigation. AF, W-1, Tab 29, 4e at 12. TJ also considered that the appellant was put on notice of the policies he violated because the appellant completed the *TSA Policy on Employee Responsibilities and Code of Conduct*, TSA MD 1100.73-5 in December 2015 and November 2016. *Id.* In 2016, the appellant received a 1 calendar day suspension for failing to maintain possession of his FAMS-issued equipment, which TJ considered in determining the appropriate penalty. *Id.* In addition, TJ considered that the appellant's supervisors had previously instructed him to maintain professional communications with his female colleagues. *Id.*

As for the mitigating factors, TJ considered the appellant's military service and his 26 years of federal service with over 16 years with FAMS. AF, W-1, Tab 29, 4e at 12. TJ also gave weight to the appellant's "Achieved Expectations" rating on his 2017 performance appraisal. *Id.* Although the appellant wrote in his OOI statement that he had "sincere remorse for potentially disparaging" FAM MD on FPFB, TJ did not consider the appellant's statement a mitigating factor because the appellant followed his statement of remorse by continuing to disparage FAM MD. *Id.*

TJ referred to the *TSA Table of Offenses and Penalties* (May 15, 2014) to determine that removal was the appropriate action based on the appellant's misconduct. AF, W-1, Tab 29, 4e at 13. TJ considered the aggravating and mitigating factors and did not find the mitigating factors to be significant enough to overcome the aggravating factors. *Id.* Prior to reaching her decision to propose his removal from service, TJ considered the appellant's potential for rehabilitation and determined he was "unwilling or incapable of correcting [his] behavior to meet the standards expected of any TSA employee." *Id.*

In the proposal, TJ notified the appellant of his right to reply orally and/or in writing within seven calendar days from his receipt of the proposal. AF, W-1,

Tab 29, 4e at 16. On June 14, 2018, the appellant signed an acknowledgment that he received the proposal. *Id.* at 17.

## PART II

## THE APPELLANT'S PRIMA FACIE CASE

### APPLICABLE LAW

To establish Board jurisdiction over an IRA appeal, an appellant must show that he exhausted his administrative remedies before the Office of Special Counsel (OSC) and make non-frivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure, or engaged in other protected activity; and (2) the disclosure or activity was a contributing factor in the agency's decision to take or fail to take a personnel action.

To establish jurisdiction the appellant needs only to nonfrivolously allege that he engaged in protected activity, and that his protected activity was a contributing factor in the agency's decision to take the personnel action. *Yunus*, at 1371; *Carney v. Department of Veterans Affairs*, 121 M.S.P.R. 446 ¶11 (2014). Any doubt as to whether the appellant raised a non-frivolous allegation must be resolved in his favor. *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶8 (2013). For the reasons discussed at length in my March 27, 2020 jurisdictional order, I found the appellant met that burden. AF, W-1, Tab 31.

To prevail on the merits, however, the appellant must establish the elements of his claim by preponderant evidence, i.e., that he engaged in protected whistleblowing which contributed to a covered personnel action. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.4(q). In other words, the appellant must show that it is more likely than not that he engaged in protected activity which contributed to the personnel action at issue.

One way of establishing that protected whistleblowing was a contributing factor in the agency's decision to take a covered personnel action is through the knowledge/timing test. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011). The knowledge/timing test provides for finding a contributing factor if the appellant is able to show that the acting agency official had knowledge of his protected disclosure and/or activity and the timing of the action is such that a reasonable person could conclude that the disclosure was a contributing factor. *Id.* The Board has held that a personnel action taken within approximately 1 to 2 years of the appellant's disclosures satisfies the timing component of the knowledge/timing test. *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 22 (2010). The Board has specifically held that an appellant cannot establish the contributing factor element if he fails to show that an official involved in the challenged personnel actions had knowledge of his protected activity. *See Jones v. Department of the Treasury*, 99 M.S.P.R. 479, ¶ 8 (2005). To establish a prima facie case an appellant must establish by preponderant evidence that the appellant engaged in protected whistleblowing, either under 5 U.S.C. § 2302(b)(8) or (b)(9).

Even if the appellant fails to satisfy the knowledge/timing test, the Board must consider other evidence, such as that pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials and whether those individuals had a desire or motive to retaliate against the appellant. *Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 26 (2013).

Still, an appellant cannot establish the contributing factor element when he fails to show that an official involved in the challenged personnel actions had knowledge of his protected disclosure and/or activity. *See Jones,* 99 M.S.P.R. 479, at ¶ 8. Actual or constructive knowledge is sufficient to satisfy the knowledge requirement. *Nasuti v. Department of State*, 120 M.S.P.R. 588, ¶ 7 (2014). An appellant may establish constructive knowledge by demonstrating

that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Id.*; *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 11 (2012). The Supreme Court has adopted the term "cat's paw" to describe a case in which a particular management official, acting because of an improper animus, influenced an agency official who is unaware of the improper animus when implementing a personnel action. *See id.* (citing *Staub v. Proctor Hospital*, 562 U.S. 411, 415–16, 419–23 (2011) (applying a cat's paw approach to cases brought under the Uniformed Services Employment and Reemployment Rights Act of 1994)).

To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Because the appellant's status as a whistleblower is undisputed, I have relied primarily upon his testimony in reaching my findings in this section of my decision.

## DISCLOSURES

A whistleblowing "disclosure" is defined at 5 U.S.C. § 2302(a)(2)(D)[7] as:

> a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully

---

[7] Congress amended The Whistleblower Protection Act (WPA), Publ. L. No. 101-12, to enhance whistleblower protection and entitled the amended act the Whistleblower Protection Enhancement Act (WPEA), Publ. L. No. 112-119.

> exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences-(i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Moreover, the Board has held that the statutory protection for whistleblowers is not a weapon in arguments over policy or a shield for insubordinate conduct. *See O'Donnell v. Department of Agriculture*, 120 M.S.P.R. 94, ¶ 14 (2013), *aff'd,* 561 Fed.Appx. 926 (Fed. Cir. 2014). Even under the expanded protections afforded to whistleblowers under the Whistleblower Protection Enhancement Act (WPEA), general philosophical or policy disagreements with agency decisions or actions are not protected unless they separately constitute a protected disclosure of one of the categories of wrongdoing listed in section 2302(b)(8)(A). *See* 5 U.S.C. § 2302(a)(2)(D); *see also O'Donnell*, 561 Fed.Appx. at 930 (citing the legislative history of the WPEA).

Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Francis v. Department of the Air Force*, 120 M.S.P.R. 138, ¶ 12 (2013). Excluded under this definition are management decisions that are merely debatable. *Ormond v. Department of Justice*, 118 M.S.P.R. 337, ¶ 11 (2012). Similarly, the Board has held that a "gross waste of funds" is more than a debatable expenditure, and is one that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *McGowan v. Environmental Protection Agency*, 119 M.S.P.R. 9, ¶ 7 (2012). An abuse of authority occurs when a Federal official or employee arbitrarily or capriciously exercises power and adversely affects anyone's rights or causes personal gain or advantage to himself or to someone he prefers. *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 15 (2014).

Disclosures regarding danger to the public must be both substantial and specific to be protected. *Miller v. Department of Homeland Security*,

111 M.S.P.R. 312, ¶ 6 (2009) citing *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). Further, disclosures of wrongdoing by a nongovernment entity may constitute protected disclosures when the government's interests and good name are implicated in the alleged wrongdoing, and the employee shows that he reasonably believed that the information he disclosed evidenced that wrongdoing. *Miller v. Department of Homeland Security*, 99 M.S.P.R. 175, ¶ 12 (2005).

A disclosure of speculative dangers does not meet the test. *Miller v. Department of Homeland Security*, 99 M.S.P.R. 175, ¶ 16 (2005). Factors to be considered in making a determination of whether a disclosure is protected include the likelihood of harm, when the alleged harm may occur, and the potential consequences of the harm. *Id.* Protected disclosures should be precise and unambiguous and constitute a "substantial and specific danger to public health or safety." *Johnston v. Merit Systems Protection Board*, 518 F.3d 905, 909-10 (Fed. Cir. 2008) (holding that a government employee's disclosures regarding training were specific and related to public health or safety because the training involved live fire weapons and explosives and because accidents had happened in the past).

The test to determine whether an individual has a reasonable belief in the disclosure is an objective one: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced 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. *LaChance v. White*, 174 F.3d 1378 (Fed. Cir. 1999). The appellant need not prove that the condition reported established any of the situations detailed in section 2302(b)(8). Rather, the appellant must show that the matter reported was one which a reasonable person in her position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *McCarthy v. International Boundary and Water Commission*, 116 M.S.P.R. 594, ¶ 34 (2011).

The appellant's disclosures

I address below each of the disclosures over which I found the appellant established Board jurisdiction.

*Facebook posts and allegations of extramarital affairs*

I addressed the appellant's posts and allegations about extramarital affairs in the jurisdictional order issued on March 27, 2020.[8] AF, W-1, Tab 31 at 11-15. As an initial matter, I found the appellant's disclosures regarding sexual misconduct and favored treatment based on that sexual misconduct were protected. *Id.* at 11-12. Although the appellant claimed to have made the disclosures after 2010, I found no evidence to support that claim beyond his OSC submission and his response to the proposed removal. AF, W-1, Tab 11 at 72-99, 238. During the hearing, he did not provide any additional evidence on this subject. I find he did not establish by a preponderance of the evidence that he held a reasonable belief his allegation of misconduct related to sexual relationships constituted the type of wrongdoing identified in 5 U.S.C. § 2302(b)(8). Instead, I find the appellant's allegations were conclusory in nature and unsupported by anything more than rumors and innuendo. In the appellant's response to his proposed removal discussed below at pages 174-77, the appellant lists what he considered supporting evidence for his reasonable belief. I find that information was similarly based on rumors and was unsupported by any substantive evidence of favoritism. Thus, while I considered the appellant's argument that his belief was reasonable because it was shared by others, I find it unpersuasive. *See Ayers v. Department of the Army*, 123 M.S.P.R. 11, ¶ 20 (2015) (the fact that others may have shared the appellant's belief is not

---

[8] Herein, I have briefly summarized my reasoning and conclusions. For a fuller discussion of this issue please see the March 27, 2020 Jurisdictional Order. AF, W-1, Tab 31 at 11-15.

dispositive). Therefore, I find the appellant's allegations on this topic were not protected.

Further, in an earlier jurisdictional ruling, I found the appellant's allegations in his 2017 FPFB posts and his statements as cited in Charge 1 of the Decision to Remove were not protected. AF, W-1, Tab 31 at 12-15.[9] Instead, I found the appellant in crude terms ridiculed, demeaned, and used emojis to graphically depict the alleged sexual activity of a co-worker. *Id.* Further, I found this was not the type of communication the WPA and the WPEA were designed to protect. *Id.* I recognized that the Senate in its legislative report regarding the WPEA intended to broaden the definition of a protected disclosure and prevent future narrowing of that definition by the Board and courts. S.Rep. 112-155 at 593. *Id.* Still, the explanation for doing so was to encourage the disclosure of information of government wrongdoing. S.Rep. 112-155 at 593. Moreover, the expansion of the definition to "any" disclosure was to prevent the "chilling effect" that limiting that definition could have on individuals who might otherwise have come forward to make disclosures, but did not due to fear that their disclosure of wrongdoing would not be protected. *Id.* Because the nature of the appellant's 2017 posts and alleged comments about BB were not allegations of government wrongdoing, but instead were disruptive and personal attacks, I found they were not protected. AF, W-1, Tab 31 at 12-15.

Even if a disclosure of information is protected under 5 U.S.C. § 2302(b)(8), an employee's inappropriate conduct surrounding such a disclosure is not. There is no requirement under 5 U.S.C. § 1221(e)(2) that the adverse personnel action be based on facts completely separate and distinct from protected whistleblowing disclosures. *Watson v. Department of Justice*, 64 F.3d

---

[9] I noted that some of the material in the links could potentially be protected, but no further evidence or argument was provided sufficient to cause me to revisit this issue. *See* AF, W-1, Tab 31 at 13.

1524, 1528 (1995). Wrongful or disruptive conduct is not shielded by the presence of a protected disclosure, and the character and nature of a disclosure can still be a legitimate basis for discipline. *Greenspan v. Department of Veterans Affairs*, 464 F.3d 1297, 1305 (Fed. Cir. 2006); *Hamilton v. Department of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 12 (2011). The WPA was not meant to shield employees from their own misconduct. *Carr*, 185 F.3d at 1326.

In *Greenspan*, the court cited *Watson* and adopted its conclusion, but still found the appellant's disclosure protected because the court found the agency's charges were "anchored in the protected disclosures themselves." *Greenspan*, 464 F.3d at 1305. I find the present case is distinguishable from *Greenspan*. The agency in *Greenspan* sought to discipline the appellant based on the content of his disclosure and its alleged falsity. *Id.* at 1304-05. On the contrary, the agency here did not discipline the appellant for disclosing favoritism, which the appellant asserted was the content of his FPFB posts about MD. Instead, the agency disciplined the appellant because of the manner in which he expressed his asserted concern through the use of sexually-charged language designed to denigrate, demean and belittle a co-worker. I will discuss this principle further in Part III of this decision.

*Inward-opening doors to flight decks*

In an earlier order, I found the Board had jurisdiction over the appellant's disclosure. AF, W-1, Tab 31 at 15-16. I based my finding on the appellant's submission establishing that he made the allegation to OSC on February 10, 2016. *Id.*; AF, W-1, Tab 14 at 27-28. In that letter to OSC, the appellant asserted that on December 4, 2015, he disclosed that "TSA had was [sic] not consistently enforcing the ban on flight deck/cockpit doors that open inward toward the flight deck." AF, W-1, Tab 14 at 27. The appellant, however, did not say to whom he had made this disclosure on December 4, 2015. *Id.* While I stated in the jurisdictional order that the appellant made a nonfrivolous allegation of a

protected disclosure, I indicated that burden on the merits would require that he meet the higher burden of proof, preponderant evidence. AF, W-1, Tab 31 at 15-16.

In the appellant's disclosure to OSC, he provided a detailed discussion about the vulnerabilities caused by this design and specifically cited to the events of September 11, 2001. AF, W-1, Tab 14 at 27-28. Further, he specifically identified TSA's role in his disclosure asserting that TSA was not enforcing the ban on such doors. *Id.* Therefore, I find the appellant has established by preponderant evidence that this was a protected disclosure.

*Body Scanner Loophole*

The appellant also testified about the security loophole that allowed individuals to opt out of using the airport security scanning machine. AF, W-2, Tab 37. The appellant asserted that this disclosure was initially included in his June 9, 2015 written Congressional testimony, but was not in the version submitted to the Board. AF, W-1, Tab 16 at 95-120. The appellant explained that there was a request to remove certain material which included the loophole information. *Id.*

At the Board hearing, the appellant testified his disclosure explained that passengers could opt out of scanning machines, without reason, and instead could get patted down and gone over with a magnetometer. AF, W-2, Tab 37. According to the appellant, the latter type of screening could miss a well-hidden device. *Id.* According to the appellant, this policy was overturned within 6 months. *Id.*

The appellant did not provide any information regarding the likelihood of harm, when the alleged harm might occur, and the potential consequences of the harm. AF, W-2, Tab 37; AF, W-1, Tab 16 at 95-120. While this is a close case given the limited information provided, still, I find aviation safety is a public safety issue especially when it involves the ability to pass through security with

prohibited items without detection. Therefore, I find this disclosure was protected.

*Secondary Barriers on Planes*

The appellant alleged that the failure to install secondary barriers to protect flight decks was a danger to public health and safety. AF, W-2, Tab 37. He made this disclosure on June 9, 2015 to Congress, April 12, 2016 to OSC, and March 7, 2019 to "The President," "Congress," and OSC. AF, W-1, Tab 12 at 115-16; AF, W-1, Tab 11 at 155-211; AF, W-1, Tab 16 at 105; AF, W-1, Tab 31 at 16-17; AF, W-1, Tab 32 at 65. The appellant wrote in a memorandum to DHS Secretary JJ dated January 15, 2016, through his entire chain of command, that he first made this disclosure in 2006. AF, W-1, Tab 32 at 51, 65. This included, among others, RA, DT, BB, and RM. *Id.* at 51.

The appellant explained that he made suggestions regarding how to address the issue, and specifically referenced a "'white paper' drafted by the Airline Pilots Association." AF, W-1, Tab 16 at 95-120; AF, W-2, Tab 37. The appellant made this suggestion during his Congressional Hearing testimony on June 9, 2015, at which he was one of four panel members. AF, W-1, Tab 16 at 105; AF, W-2, Tab 37. In his Congressional testimony, the appellant asserted the importance of placing a barrier between the rest of the plane and the cockpit to prevent someone from getting into the cockpit when the door is opened during the flight for the pilots to use the restroom or get food or drinks. AF, W-1, Tab 16 at 105.

Later, on November 19, 2015, the appellant again raised the issue of secondary barriers in a memorandum to Administrator PN, through his chain of command, to include RA, DT, BB, and RM. AF, W-2, Tab 24, Ex. BB. In this document, the appellant referred to the barrier as "[m]y inflight security enhancement proposal" and repeatedly called the device for which he advocated, "my barrier." *Id.* at 2-5. Further, the appellant outlined the problem and his

proposed solution, which he characterized as cost efficient, effective, and necessary. *Id.* at 2-5. This was in contrast, he wrote, to the Airline Pilots Association's proposed solution. *Id.* In the conclusion section of the memorandum, the appellant wrote that he understood "this proposed suggestion is extremely premature" and requested to be detailed to the flight deck secondary barrier (FDSB) program referenced by FAMS Director, RA, during his July 16, 2015 Congressional testimony. *Id.* at 5. Within the memorandum, the appellant included a hyperlink to a video that is no longer available. *Id.*

The appellant testified that based on the 9/11 Report, the evidence showed the hijackers knew that the cockpit door would open shortly after takeoff. AF, W-2, Tab 37. According to the appellant, this was learned in 2003. *Id.* Thereafter, the appellant testified there was a June 2005 CNN report stating secondary barriers were found to be cost and time prohibitive. *Id.* The finding that it was too expensive, the appellant testified, was revealed in a "secret" TSA report from 2005. *Id.* Further, the appellant averred that United Airlines started to create secondary barriers in 2004 on some aircrafts. *Id.* It was the appellant's opinion that if it became standard on all aircrafts there would be no need for FAMs to fly, but instead would free them to engage in investigative and intelligence gathering work. AF, W-2, Tab 24, Ex. BB at 4; AF, W-2, Tab 37.

The appellant testified that the issue of secondary barriers to protect the cockpit has been discussed since 2003. AF, W-2, Tab 37. Further, it was covered by the media, discussed by the Airline Pilots Association, and Congress. AF, W-1, Tab 16 at 95-120; AF, W-2, Tab 37. In the appellant's memorandum on the subject of secondary barriers, the appellant asserted his understanding that his proposal was premature. AF, W-2, Tab 24, Ex. BB at 5. The appellant did not specifically identify the likelihood of harm, or when that harm would occur. Further, the issue the appellant raised was not a new one, but what was new was the appellant's asserted solution for which he was seeking a patent. *Id.* at 2-5. Still, neither motive nor novelty are factors in determining whether a disclosure is

protected. Given the catastrophic events of 9/11, I find the appellant's disclosure regarding airplane safety was sufficient to allege a substantial and specific danger to public health and safety.

*Left weapon on the plane*

The appellant alleged that he disclosed to OSC, TSA OOI, and the TSA Office of Civil Rights that a Federal Air Marshal had left a gun in an airplane restroom in 2002 that was found by a child. AF, W-1, Tab 11 at 5; AF, W-1, Tab 14 at 28; AF, W-1, Tab 31 at 20. The appellant claimed that he made the disclosure to OSC on February 10, 2016 and to the TSA organizations on March 30, 2016, though the agency perceived him to have made that disclosure much earlier, in 2002. AF, W-1, Tab 9 at 11; AF, W-1, Tab 31 at 20. I found this was a nonfrivolous allegation of a violation of law, rule, or regulation. AF, W-1, Tab 31 at 20. Neither party provided additional evidence or argument on this matter. Still, I find the allegation is sufficient to establish that the disclosure was protected.

The appellant alleged that the disclosure involved an individual who tried to cover up the incident, DHl, who was also involved in the selection process for a GBA assignment but he did not specify which one. AF, W-1, Tab 9 at 11; AF, W-1, Tab 14 at 28. I note that the named individual DHl was not identified as a member of the selection panel or a selecting official in any of the selections at issue in this case.

*Food trucks*

I find the appellant did not make a protected disclosure when he alleged that trucks transporting religious food were not searched, and therefore they were a security risk. AF, W-2, Tab 24, Ex. Z. The appellant made this disclosure in an email to SM on September 26, 2017. *Id.* In his email, the appellant alleged that even though they had "orders … to search all vehicles regardless of … consent" with limited exceptions, they were not permitted to break "Flying Foods seals."

*Id.* The direction was given by MWAA. *Id.* The appellant asserted that MWAA stated that certain airlines did not want the seals broken because there was "religiously blessed food inside them and that a private security contractor has already screened the Flying Foods trucks." *Id.* The appellant stated that he disagreed with this policy and asked SM if MWAA's assertions were correct. *Id.*

On October 9, 2017, the appellant again wrote SM. AF, W-2, Tab 24, Ex. Z. In this email, the appellant stated if he did not hear back from "Senior Leadership," "I will need to elevate this disclosure." *Id.* Shortly thereafter, SM forwarded the email to KT and asked to whom he should send the information. *Id.*

SM testified that this occurred at IAD. AF, W-2, Tab 44. Upon receiving the appellant's email on September 26, 2017, SM testified he contacted MWAA police, who reported that the trucks were secured offsite by a security company and the seal could not be broken. *Id.* According to SM, he notified the appellant of the response he received. *Id.*

When the appellant sent the second email, SM testified he forwarded it to "Senior Leadership" and thus had done everything he could. AF, W-2, Tab 44. SM averred by communicating with KT he was attempting to try to address the appellant's concerns. *Id.*

The appellant sent SM another email regarding the food trucks on December 4, 2017. AF, W-1, Tab 15 at 29. Therein, the appellant referenced a phone call between himself and SM on October 11, 2017. *Id.* The appellant reported that in the conversation SM had told him of an "**unwritten** directive – directing law enforcement officers not to peek and/or search inside" the food trucks. *Id.* Further, the appellant stated that SM had said the practice would not change. *Id.* The appellant stated that there was not universal agreement about this decision and noted it was a "potentially dangerous policy." *Id.*

SM testified he did not recall additional updates beyond the information that the vehicle was properly secured according to the stakeholder with whom

they work. AF, W-2, Tab 44. It was SM's position that if the stakeholder says the trucks are secured that is the agency's position as well. *Id.* SM explained that it was clear that MWAA knew the vehicles more intimately than the FAMS, and he concluded the matter was properly addressed. *Id.* SM explained that the VIPR team worked hand in hand with the stakeholder to provide additional support, but ultimately they defer to the stakeholder. *Id.* Moreover, SM testified that the VIPR team was not working the checkpoint and if the truck had been cleared by the stakeholder, the agency was not authorized to search it. *Id.*

(b) (3) (A)

*Id.* In this case, SM testified, the stakeholder was satisfied there was nothing more for the agency to do. *Id.* Further, SM testified if he thought the situation was unsafe he would have elevated the matter further, but he did not believe that was the case. *Id.* Also, SM averred that because the matter involved religious food, breaching the seals could have caused a major issue. *Id.* Given his conclusion that there was no safety concern, SM determined nothing further was required. *Id.* SM explained that his conclusion was based on communications with MWAA police and others and he believed he had done everything he could to address the appellant's concerns. *Id.*

The appellant disputed that MWAA had primary jurisdiction or any authority over VIPR. AF, W-2, Tab 90. The appellant claimed he learned this during a legal training in either late 2017 or early 2018. *Id.*

Although I see this matter as a close question, I find this disclosure is not protected as an allegation of a substantial and specific danger to public health and safety. As stated above, the inquiry into whether a disclosed danger is sufficiently "substantial and specific" to warrant protection under the WPA is guided by several factors, among these: (1) "the likelihood of harm resulting from the danger;" (2) "when the alleged harm may occur;" and (3) "the nature of the harm," *i.e.*, "the potential consequences." *Chambers v. Department of the*

*Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010). Again, as stated above, policy disagreements with agency decisions or actions are not protected unless they separately constitute a protected disclosure of one of the categories of wrongdoing listed in section 2302(b)(8)(A). *See* 5 U.S.C. § 2302(a)(2)(D); *see also O'Donnell*, 561 Fed.Appx. at 930 (citing the legislative history of the WPEA). Consistent with these factors, the outcomes of past cases addressing whether particular disclosures were protected as revealing a substantial and specific danger to public health and safety have depended upon whether a substantial, specific harm was identified, and whether the allegations or evidence supported a finding that the harm had already been realized or was likely to result in the reasonably foreseeable future. Cases in which the employee's burden was found to be satisfied have concerned specific allegations or evidence either of actual past harm or of detailed circumstances giving rise to a likelihood of impending harm.

In the appellant's emails, he did not specify the specific harm he envisioned nor did he assess the likelihood of the danger. AF, W-1, Tab 15 at 29-30. Instead, in his first email he asserted that the "policy does not seem to make sense to me" and asked for clarification about the policy. AF, W-2, Tab 24, Ex. Z. In the second email he did not raise any concerns except that he had not yet received an answer to his inquiry. *Id.* In his third email on the subject he again did not identify a specific danger to public health and safety, but instead referenced the potentially dangerous policy. AF, W-1, Tab 15 at 29. Further, the appellant did not dispute that the food and food trucks were subjected to a security check prior to coming onto airport property.

Based on this analysis, I find the appellant's disclosure about the lack of authority for him to search the food trucks at issue here was not protected. Rather, I find the appellant's concerns were a policy dispute, which as set forth above is not a basis for finding a disclosure protected. *See* 5 U.S.C.

§ 2302(a)(2)(D); *see also O'Donnell*, 561 Fed.Appx. at 930 (citing the legislative history of the WPEA).

*Barriers at Terminal A of DCA*

The appellant made allegations regarding the failure to have adequate barriers at Terminal A of DCA. He made the allegation to CS, Assistant Federal Security Director of Law Enforcement, Reagan National Airport (DCA), MH, "and others" in December 2016, January 2017, and in his response to his proposed removal dated August 17, 2018. AF, W-1, Tab 11 at 5, 133; AF, W-1, Tab 31 at 22-23; AF, W-1, Tab 32 at 96-99. Further, in his testimony the appellant asserted that he also discussed his safety concern with MH, who the appellant alleged expressed surprise. AF, W-1, Tab 32 at 98; AF, W-2, Tab 37. In addition, the appellant made the disclosure to the TSA Inspection hotline on July 8, 2017 and to OSC October 29, 2018. AF, W-1, Tab 14 at 8; AF, W-1, Tab 31 at 22-23.

The appellant testified that he contacted CS because his position had authority over law enforcement and physical security at the airport. AF, W-2, Tab 37. Therefore, the appellant testified, CS was very familiar with DCA. *Id.* Further, the appellant stated that CS's office was located at DCA and he was the most knowledgeable. *Id.*

CS responded to the appellant's initial complaint regarding barriers at DCA Terminal A on December 30, 2016, which was the same day the appellant raised the matter. AF, W-1, Tab 32 at 98-99. CS explained that they used snowplows as barriers. *Id.* at 98. The appellant testified that he was dissatisfied with this response and raised the matter with his supervisor, MH. *Id.*

SM testified that the appellant raised this issue prior to becoming his supervisor. AF, W-2, Tab 44. SM explained that he understood that personnel at DCA were already working to address the issue when SM took over the VIPR C team. *Id.*

The appellant also testified that he raised the matter with SM. AF, W-2, Tab 37. According to the appellant, SM dismissed his complaint and stated that there were people to take care of it and it was not SM's problem. *Id.* The appellant testified that SM paraphrased the response he received from KW and MWAA. *Id.* The appellant reported SM further told the appellant to quit making an issue about it and he was bringing unnecessary attention. *Id.*

In CS's response to the appellant's claim, which he wrote to BB, CS asserted that DCA was making changes that would be completed in 2021. AF, W-1, Tab 32 at 101. The email communication was dated February 16, 2017. *Id.* During the interim, CS explained that the MWAA was taking appropriate action to ensure safety at the airport and set forth what was being done. *Id.* CS stated that he appreciated the appellant raising the issue and requested that management pass on his appreciation to the appellant and the other members of the VIPR team. *Id.* CS copied a number of people on the email, but not the appellant. *Id.* Thereafter, DSAC RM requested that SM forward the response to the appellant, which SM did on February 21, 2017. *Id.* at 100.

The appellant next communicated with the TSA Inspection Hotline about the barrier issue on July 8, 2017. AF, W-1, Tab 32 at 100. In that email, the appellant asserted that barriers were erected but they were located in the wrong place. *Id.* Therefore, the appellant claimed they did not effectively safeguard Terminal A. *Id.* The appellant testified that he copied SM on the communication because SM was his supervisor. *Id.*; AF, W-2, Tab 37.

In another email from CS to the WFO, CS forwarded a complaint about the appellant that had been made to OOI and was returned to be addressed locally. AF, W-2, Tab 24, Ex. EE. Later on April 25, 2018, CS wrote to WFO management, to include BB, SK, and KT. *Id.* The April 25, 2018 email was on the same thread as the earlier email. *Id.* In this email, which was addressed to ASAC KT, CS wrote that FAM Deputy Manager SR was "concerned" about the appellant's tweet in which he claimed to have influenced the decision to add

barriers at DCA's Terminal A. *Id.* CS explained the history of the appellant's allegation about DCA security to the OIG, and CS's response to that complaint back in early 2017. *Id.* This included CS's assertion that there were plans underway to improve security which included the barricades. AF, W-2, Tab 24, Ex. EE. CS added that the appellant was not involved in that decision, and cited to an article from November 2014 regarding the approved construction plan. *Id.*

The appellant disputed the agency's argument that he was not the impetus for the installation of barriers at DCA. AF, W-2, Tab 90. According to the appellant's testimony, MWAA sent him a response to his FOIA request which reflected that the work order for the barriers approximately 3 months after his disclosures was in response to a request from TSA and needed to be done within 2 weeks. *Id.* While the appellant acknowledged that the request did not specifically reference him by name, it was clear to him that they rushed the order because of his complaints. *Id.*

Regardless of the reason for the erection of barriers, I find the appellant's disclosure was protected. In this disclosure the appellant identified the nature of the harm, which was that someone could drive a truck into the terminal unimpeded. AF, W-1, Tab 11 at 5, 133; AF, W-1, Tab 31 at 22-23; AF, W-1, Tab 32 at 96-99; AF, W-2, Tab 37. While the appellant did not specifically address the likelihood of such an action, its consequences are obvious based on instances of truck ramming terrorist attacks in other settings. Further, while it appeared based on the evidence that MWAA, a nongovernmental agency, was responsible for the planning, design, paying for, and erecting the barriers, I find that the government's interests and good name are implicated in the alleged wrongdoing as TSA is associated with airport security. Thus, I find in making his disclosure, the appellant identified a substantial and specific danger to public health and safety. Whether the appellant was the impetus for the action, goes to the issue of possible animus/bias rather than whether the disclosure was protected.

*Lack of antidote kits on airlines in the event of opioid attack*

The appellant made this allegation to OSC on August 7 and October 29, 2018. AF, W-1, Tab 11 at 138-39; AF, W-1, Tab 12 at 48-86; AF, W-1, Tab 31 at 24. The appellant also stated that he made the disclosure to the agency in his response to his proposed removal. AF, W-1, Tab 9 at 13; AF, W-1, Tab 11 at 138-39; AF, W-1, Tab 29, 4b at 1.

In his response, the appellant listed several media and Drug Enforcement Administration articles on the subject of Fentanyl and other opioid issues. AF, W-1, Tab 11 at 138-39. The appellant explained the concern that an attack on airplane personnel using a synthetic opioid would not be able to be reversed because of the lack of NARCAN or other antidotes onboard airplanes. *Id.* Based on the appellant's submission and detailed explanation of the perceived danger, I find the appellant's disclosure was protected. AF, W-1, Tab 11 at 138-39.

**PROTECTED ACTIVITY**

The appellant alleged to OSC on February 10, 2016 and October 29, 2018 that he engaged in the following protected activity:

1. Sought redress for his protected whistleblowing before the Board, the U.S. Court of Appeal for the Federal Circuit, and the U.S. Supreme Court between April 11, 2011 – January 2016. AF, W-1, Tab 14 at 26.

2. Filed a new retaliation claim with OSC in February 2016. *Id.* at 10.

3. On an unspecified date, the appellant stated he filed "retaliation complaints with DHS OIG." *Id.*

The appellant provided a copy of his affidavit to the OIG dated October 16, 2017, in which he set forth his alleged disclosures and alleged retaliation as a result of those disclosures. AF, W-1, Tab 15 at 4-13. The appellant testified that he made this complaint when the agency failed to give him official time to address his fitness for duty issue. AF, W-2, Tab 37. Based on the foregoing, I find the appellant engaged in protected activity.

**KNOWLEDGE**

As detailed below, almost every witness testified that they had knowledge of the appellant's Supreme Court case, communications with Congress, and some if not all of his disclosures. Because the appellant alleged that even those who were not involved in taking a personnel action influenced the decision-makers or process, I allowed evidence from and about several individuals other than acting agency officials. I have included this information in this section, although I have analyzed the knowledge element only as it relates to acting agency officials here as it was sufficient to establish the appellant's prima facie case.

SFAMs – MH, SM, and SK

MH was aware of the appellant's status as a whistleblower dating back to the mid-2000s, he testified. AF, W-2, Tab 64. Further, he testified that he was aware that the appellant made disclosures about other safety issues to include the lack of vehicle barriers at DCA. *Id.* Similarly, SM testified that he was also aware of the lack of vehicle barriers at DCA. AF, W-2, Tab 44.

SM testified that he brought forward the appellant's notice on his LinkedIn page that he was seeking a patent for secondary barriers. AF, W-2, Tab 44. According to SM, he came upon the information because it came up on his feed, and he denied that he regularly looked at the appellant's LinkedIn page. *Id.* SM testified that the appellant was seeking a patent for a mechanical device as a secondary barrier. *Id.* SM testified he was concerned that the information the appellant included may raise safety concerns. *Id.* According to SM, he raised the issue, but was told that it was okay. *Id.*

At the hearing, SM could not recall when the appellant raised the secondary barriers issue. AF, W-2, Tab 44. It was SM's recollection that the issue had been discussed for years before the appellant raised it. *Id.*

SM was also aware of the appellant's disclosure regarding the ability of religious food trucks to transport food delivered to planes without being searched on airport premises. The appellant made the disclosure in an email dated

September 26, 2017. AF, W-2, Tab 24, Ex. Z. In his email, the appellant alleged that even though they had "orders … to search all vehicles regardless of … consent" with limited exceptions, they were not permitted to break "Flying Foods seals." *Id.* On October 9, 2017, the appellant again wrote SM. AF, W-2, Tab 24, Ex. Z. In this email, the appellant stated if he did not hear back from "Senior Leadership," "I will need to elevate this disclosure." *Id.* Shortly thereafter, SM forwarded the email to KT and asked to whom he should send the information. *Id.* The appellant sent SM another email regarding the food trucks on December 4, 2017. AF, W-1, Tab 15 at 29. Therein, the appellant referenced a phone call between himself and SM on October 11, 2017. *Id.*

SM testified he was aware of the appellant's litigation and knew it was about whistleblowing. AF, W-2, Tab 44. According to SM's testimony, he believed he learned this information from the appellant. *Id.* Further, SM testified that he was aware that there was an agreement with OSC for the appellant not to fly, but did not know the details. *Id.*

SK testified that he spoke with the appellant about his lawsuit and Supreme Court case and knew as a result of his Supreme Court case the appellant was reinstated. AF, W-2, Tab 44. Further, SK averred he knew about it from the appellant and believed others knew based on the appellant as well. *Id.* According to SK, it was not something leadership put out to the workforce. *Id.* Still, SK acknowledged that he spoke about the appellant's Supreme Court case with perhaps 10 people. *Id.* SK testified that he also was aware of the appellant's concerns about cockpit barriers and explained it arose when the appellant was discussing his design for a barrier. AF, W-2, Tab 44. The appellant also informed SK that he had testified before Congress, SK averred. *Id.*

AT

AT, Occupational Health Nurse, FAMS, worked in the office that is referenced in this decision as FAM medical. AF, W-2, Tab 52. In his position,

he was involved in the order for the appellant to undergo a psychiatric FFD examination. AF, W-1, Tab 29, 4n; AF, W-2, Tab 52. In an email on October 6, 2017 sent at 11:11 am, AT recommended to BB that the appellant be put on leave until the appellant's FFD was resolved. AF, W-1, Tab 29, 4n at 3.

The appellant sent AT several emails and contacted him by phone. AF, W-1, Tab 29, 4n at 4, 7, 15-37. The first such communication occurred at 11:20 a.m. on October 6, 2017. *Id.* at 4. In several emails and in conversations that AT documented, the appellant referenced his court cases and claims of retaliation for protected whistleblowing. *Id.* at 4, 7, 15-16, 26, 31-32. The first communication in which the appellant mentioned his whistleblowing activity was October 6, 2017 based on the record evidence. *Id.* at 4.

ASAC KT

KT was the appellant's assigned second line supervisor while he was assigned to VIPR, although she was not in the office when he first came. AF, W-2, Tab 48. She testified she knew of the appellant prior to his assignment to her team. *Id.* She stated she heard of him in a Constitutional Law class at American University. *Id.* KT averred she understood his case was based on security concerns he brought forward and that he was reinstated to the agency. *Id.* Further, KT testified that when she worked in public affairs there was a speaking request for the appellant. *Id.*

At the time she instructed SM to initiate the ITR, KT was aware of the appellant's Supreme Court case. AF, W-2, Tab 48. Further, she testified she was aware the appellant raised concerns about secondary barriers. *Id.* According to KT's testimony, during his VIPR training the appellant inspected airplanes at IAD, but it was unclear whether this was on or off-duty. *Id.* KT testified that the appellant was not supposed to be doing work that was not assigned to him and was not permitted to use his secure identification area (SIDA) badge to do it. *Id.* Further, KT explained that the appellant was not assigned to inspect aircraft. *Id.*

She testified that she had not had a similar situation before, and therefore she spoke to her leadership about the situation. AF, W-2, Tab 48.

Similarly, KT testified she had not dealt with a situation in which a FAM posted on his LinkedIn page that he was speaking to a patent attorney about getting a patent for a device to serve as a secondary barrier to protect the cockpit. AF, W-2, Tab 48. She was made aware of it by SM, KT averred, in an email that she passed along to her management. *Id.*

Moreover, KT testified that she knew the appellant raised concerns about the lack of inspection of trucks carrying religious meals delivering food to airlines at IAD. AF, W-2, Tab 48. Further, KT averred that she may have discussed the issue with SM, but did not recall discussing it with her leadership and could not recall sending it to the Office of Chief Counsel (OCC). *Id.* By email dated April 17, 2018, KT sent an email exchange to OCC on the subject that was sent to her from SM on October 9, 2017. AF, W-2, Tab 24, Ex. Z. Even after looking at the document on the stand, KT testified she had no additional recollections to include why she had sent it at that time. AF, W-2, Tab 48. SM wrote in the email that it was not a big issue, and KT testified she did not consider it to be a big issue. AF, W-2, Tab 24, Ex. Z; AF, W-2, Tab 48. She further testified she did not know whether the appellant elevated his concern further as he stated he would if he did not receive a response. AF, W-2, Tab 24, Ex. Z; AF, W-2, Tab 48.

KT testified she was also aware of the appellant raising the issue regarding the installation of barriers at DCA. AF, W-2, Tab 48. She could not recall on the stand how she learned of it; it could have been email or a phone call. *Id.* KT testified that what she remembered was that she eventually saw an email that the appellant posted that included a picture of himself in uniform pointing at the barriers and that someone at DCA complained to CS. *Id.* Further, she recalled that the complaint involved a claim that the appellant took credit for the barriers being installed in a Twitter post. *Id.* She may have known prior but could not

recall and averred she might have been on maternity leave when the issue first arose. *Id.* This was supported by an email exchange from August 2017, when she testified she was out of the office. AF, W-2, Tab 24, Ex. X; AF, W-2, Tab 48. The email thread was then forwarded in March 2018, but KT did not know why it was resent then, she testified. AF, W-2, Tab 48.

KT recollected on the stand that at some point, based on the complaint from the stakeholder, DCA, they had a discussion about moving forward with an ITR. AF, W-2, Tab 48. Further, KT testified she remembered that at some point the stakeholder asked that the appellant not be sent back to DCA to work on VIPR operations there. *Id.* Although she could not remember the specifics of the conversation, KT averred that she was told to request that he take down his post, which she did through his immediate supervisor. *Id.* KT did not know whether he took down the post/tweet. *Id.*

KT explained that they operate at DCA by invitation, and the appellant's post/tweet was an embarrassment and upset the stakeholder. AF, W-2, Tab 48. KT testified that DCA was upset because the appellant was claiming credit for something that the stakeholder had planned for 5 years and its action had nothing to do with the appellant. *Id.* KT testified she was told to draft an ITR about the matter and she believed BB and CP may also have been involved. *Id.* In an email, CP suggested changes to the ITR and the Administrative SFAM accepted them. AF, W-2, Tab 24, Ex. HH. KT testified that she could not recall what the edits were or why they were made, but believed CP thought additional information should be included which she believed was the information included in the middle paragraph. AF, W-2, Tab 24, Ex. HH ; AF, W-2, Tab 48. Counsel asked several more questions on the subject, but KT had little recollection, and she also could not recall the outcome. AF, W-2, Tab 48.

As to the appellant discussing the investigation in the office, KT testified that SM brought the issue to her attention and she reported it to leadership. AF, W-2, Tab 48. She was concerned, KT averred, because JL was present and on the

same team and it could have been seen as harassment. *Id.* In addition, KT testified that JL had already told her that she was afraid, and she needed to ensure a safe environment for employees. *Id.* Moreover, KT testified she wanted to be sure leadership was aware of what was going on because there was an active investigation. *Id.* KT testified she could not recall communicating with BB about the matter, but she sent BB an email for his situational awareness on the issue. AF, W-2, Tab 24, Ex. R; AF, W-2, Tab 48.

Again, based on email communications it appeared that the communication about the appellant's statements regarding the investigation and the religious food trucks were made on the same day, KT testified. AF, W-2, Tab 24, Exs. U, Z; AF, W-2, Tab 48. With respect to the food trucks, KT wrote this was a MWAA issue not a VIPR issue and she was unsure why he was pursuing it. AF, W-2, Tab 24, Exs. U, Z; AF, W-2, Tab 48. KT testified that she sent it to BB and RM from her Blackberry and it was marked "high importance," but she was unsure why and whether it was done by accident. AF, W-2, Tab 48.

SAC BB

WFO SAC BB testified he was aware that the appellant prevailed in his Supreme Court case against the agency and it had something to do with the release of SSI information but nothing more. AF, W-2, Tab 38. Further, BB averred that he believed he was informed in February 2016 by DT that OSC requested that the appellant be taken off flight status. AF, W-2, Tabs 38, 43. In his OOI interview, BB stated that he was told that the decision for the appellant not to fly was based on an ongoing case involving the agency and OSC, which BB confirmed in his testimony. AF, W-1, Tab 29, 4f at 193, AF, W-2, Tab 43.

By memorandum dated January 15, 2015, the appellant notified DHS Secretary JJ about his concerns regarding the secondary barriers, and sent that memorandum through his entire chain of command. In that memorandum, he alleged he first made this disclosure in 2006. AF, W-1, Tab 32 at 51, 65. The

memorandum's addressees included, among others, RA, DT, BB, and RM. *Id.* at 51. Later, on November 19, 2015, the appellant again raised the issue of secondary barriers in a memorandum to Administrator PN, through his chain of command, to include RA, DT, BB, and RM. AF, W-2, Tab 24, Ex. BB.

In addition, BB testified that he knew about the appellant's disclosure regarding the lack of barriers at DCA Terminal A. AF, W-2, Tab 38.

Higher level management

BB averred that he learned of the appellant's change in duty status from DT and would have discussed it with DSAC RM so he could take the appellant off of the flying schedule. AF, W-2, Tabs 38, 43. According to BB, this was his only experience with a FAM who was not cleared to fly based on an OSC request. *Id.*

DT testified that he had heard about the appellant's Supreme Court case. DT testified that he knew the appellant had been absent because of his prior removal, but could not recall how he learned this information. AF, W-2, Tab 52. It may have been from the appellant, who he understood was telling his co-workers about his Supreme Court case. *Id.*

Further, DT testified that he received a number of communications that involved the appellant to include emails on which he was copied on the thread by the appellant and some requests for speaking events. AF, W-2, Tab 52. While DT averred that the volume of information about the appellant was higher than average, he asserted he received a lot about other FAMs as well. *Id.*

DT testified that he received an email from JH SAC of the FAMs liaison section in which JH forwarded an article that involved the appellant. AF, W-2, Tab 24, Ex. G; AF, W-2, Tab 52. JH forwarded press clippings when the agency or a FAM was included in it, DT reported. AF, W-2, Tab 52. DT could not recall on the stand whether he read this particular email or whether he opened the link.

*Id.* It was DT's testimony that he did not read a lot of them as he was very busy. *Id.*

In addition, DT stated he received Congressional inquiries and requests for information from OSC. AF, W-2, Tab 52. These were received in the normal course of business, DT testified, and his role was to provide input and information for a response. *Id.* DT explained that he typically received information by making a request and while the appellant was on VIPR he recalled making that request of RM. *Id.* Further, DT testified that he sort of acted like a mailman, but with sensitive information which caused him to be more discreet. *Id.* The initial inquires related to the appellant's request not to fly and later involved complaints about his work assignments and the lack of a window, DT averred. *Id.* Thereafter, DT testified he received information that the appellant told his attorneys and Congress that he was being treated well. *Id.* Because of the regular inquiries, DT testified that he requested that if anything came up involving the appellant it should be forwarded so he would be able to respond. *Id.* DT averred he did not want to be surprised. *Id.* DT felt he needed to be prepared to respond. *Id.*

While the inquiries came to him in the normal course of business, DT testified, the appellant's situation was different. AF, W-2, Tab 52. Specifically, DT explained OSC directed that the appellant could not fly. *Id.* Therefore, the appellant received deference different than other FAMs. *Id.* DT added that the appellant was given more deference and the agency was very careful in how they managed him because they did not want any retaliation or discrimination which would not have been tolerated. *Id.* For example, the appellant was put in a position that others had to compete to fill. *Id.* This did result in questions from other team members, which DT testified he heard from BB, but DT could not identify the team members who mentioned it. *Id.*

During his testimony, DT stated that he learned about the concerns the appellant raised about food trucks carrying religious food from the appellant.

AF, W-2, Tab 52. It was DT's belief that the appellant was sincere in his concern. *Id.* According to DT, the appellant sent his safety related concerns to many people and DT did not believe he needed to take any further action. *Id.*

DT testified he also learned about the appellant's concerns about secondary barriers on aircraft and specifically that the appellant was urging the installation of them. AF, W-2, Tab 52. Moreover, DT testified that he understood the appellant was seeking a patent for such barriers. *Id.* Based on his recollection, DT stated that he recalled there was an ITR because the appellant used his SIDA badge to inspect planes both on and off-duty which was not authorized. *Id.* DT testified that there are regulations that restrict the use of the SIDA badge. *Id.* In the ITR referring this issue, it referenced the appellant's patent application. AF, W-1, Tab 29, 4b at 16-17.

Regarding the appellant's report of the lack of barriers at Terminal A of DCA, DT testified that he recalled the appellant tweeted that he resolved the issue. AF, W-2, Tab 52. Yet, DT averred that MWAA reported that the new barriers at Terminal A were unrelated to the appellant's reports, but instead were planned for years. *Id.* It was DT's understanding that MWAA was very upset about the appellant's post, and therefore because there were other locations such as Union Station where the appellant could be deployed, management chose not to send him back to DCA in order to preserve that stakeholder relationship. *Id.* DT testified that he felt it was a good idea. *Id.*

<u>Selecting Personnel for GBA positions #15-30 and #16-10</u>

*GBA #15-30*

SMe, SAC, New York Field Office, was the selecting official for this position, and made her selection in July 2015. AF, W-1, Tab 29, 4bb at 2; AF, W-2, Tab 40. NM, SFAM, was on the selection panel. AF, W-1, Tab 29, 4bb; AF, W-2, Tab 43.

SMe testified that she learned of the appellant's Supreme Court case during a staff meeting, and she was also aware of the appellant's specific disclosures. AF, W-2, Tab 40. Likewise, NM was aware of the appellant's litigation against the agency. AF, W-2, Tab 43. NM had worked in the Public Affairs Office from 2007-2011, and in that position responded to media inquiries including those about the appellant's litigation. *Id.*; AF, W-1, Tab 29, 4c at 256-62; AF, W-1, Tab 29, 4f at 93-99. I note the article cited by the appellant in his response to the notice of proposed removal was dated March 22, 2011. AF, W-1, Tab 29, 4c at 256-62; AF, Tab 29, 4f at 93-99.

*GBA #16-10*

The selecting official for GBA #16-10 was JH and on the selection panel were ASACs DS, TK, and RW. AF, W-1, Tab 29, 4z at 4. In support of his jurisdictional pleading, the appellant submitted declarations from DS and JH. AF, W-1, Tab 44 at 26-39. Both JH and DS acknowledged that they read the application packages of the applicants who applied for the position. *Id.* at 28, 36. Further, DS stated that he understood the appellant "sued the agency and got his job back"; and JH wrote that he was aware the appellant had engaged in litigation that was about his alleged wrongful termination and his quest for reinstatement. *Id.* at 28, 35. DS and JH denied any knowledge of the appellant's alleged protected disclosures or the basis for the appellant's litigation. *Id.* at 26-39.

<u>Proposing Official for the appellant's removal</u>

Although TJ did not know of the appellant prior to receiving the case, she testified that she learned during the course of reviewing the information that the appellant was a whistleblower. AF, W-2, Tab 82. She averred that she learned this from the appellant's statements in which he repeatedly mentioned his status as a whistleblower. *Id.*

Further, in his written OOI affidavit, the appellant specifically mentioned his disclosures regarding screening and the opt-out loophole, the weapon left on

the plane in December 2001, and the lack of barriers at Terminal A DCA. AF, W-1, Tab 29, 4f at 205, 210, 214. In addition, throughout the OOI investigative file, the appellant mentioned his litigation against the agency to include his claims that it was based on retaliation for protected whistleblowing. AF, W-1, Tab 29, 4f (while this is a very large document, the appellant and others noted the appellant's litigation too many times to specify).

Deciding Official for the appellant's removal

As stated above, there was extensive information about the appellant's protected whistleblowing in the ROI. AF, W-1, Tab 29, 4f. Further, the appellant included detailed information regarding his whistleblowing activity in his response to the proposal. AF, W-1, Tab 29, 4c. Specifically, this included the appellant's disclosures about the lack of secondary barriers on airplanes, the lack of barriers at DCA Terminal A, the threat posed by an opioid attack, and the lack of an opioid antidote onboard airplanes. AF, W-1, Tab 29, 4c at 74, 77, 79-80. Similarly, the appellant mentioned the same issues during his oral response. AF, W-1, Tab 29, 4d at 1.

CP testified that he first heard about the appellant when he learned that there was an extra person assigned to the VIPR squad. AF, W-2, Tab 63. Thereafter, CP testified he learned that the appellant complained about various public safety concerns. AF, W-2, Tab 55. Among them, CP specifically testified that he was aware of the complaint the appellant made about the religious food trucks not being searched, the ability to opt-out of security screening machines, and barriers at DCA. AF, W-1, Tab 29, Tab 4c at 62, 74; AF, W-2, Tab 55. Further, CP testified that he was aware that the appellant indicated he made these disclosures to Congress. AF, W-1, Tab 29, Tab 4c at 74; AF, W-2, Tab 55. Also in his oral reply, the appellant recited a number of his disclosures, CP testified. AF, W-2, Tab 63. CP also testified that he was aware of the appellant's Supreme

Court case, but could not recall on the stand when he first learned of it. AF, W-2, Tab 55.

Further, CP averred the appellant raised many issues during his March 2018 mediation session regarding his performance evaluation. AF, W-2, Tab 63. CP testified that he did not raise the appellant's misconduct during the mediation. *Id.* It was the appellant who informed CP of much of his whistleblowing activity. AF, W-2, Tab 56. CP testified that the appellant listed his disclosures and activity, which he identified as whistleblowing, during a grievance meeting for his performance evaluation. *Id.* Because the meeting was supposed to be about the appellant's performance, CP testified he tried to redirect the appellant to focus on that. *Id.* CP explained that he does not determine what qualifies as whistleblowing and he did not request information about the appellant's whistleblowing before the grievance meeting. *Id.* Still, he knew about several of the appellant's disclosures through the appellant. *Id.*

As reflected in the section above summarizing the appellant's response to the proposal to remove him, the appellant provided a 74 page affidavit attached to his response. AF, W-1, Tab 29, 4c. The appellant's response was a total of 511 pages, which CP testified was a lot of information, and he did not access the links included in the appellant's attachments. AF, W-1, Tab 29, 4c; AF, W-2, Tab 63. In the affidavit portion the appellant listed his asserted disclosures in his response and included among them were: the inability to search religious food trucks; the ability to opt out of security screening; the lack of barriers at Terminal A of DCA; the need for secondary barriers on aircraft; and the potential danger of a synthetic opioid attack. AF, W-1, Tab 29, 4c at 62, 74, 77, and 79. The appellant also noted his testimony before Congress, his Supreme Court case, and other litigation against the agency. AF, W-1, Tab 29, 4c.

CP was also copied on emails that related to the appellant, CP testified. AF, W-2, Tab 56. According to CP, in his position he received 100s of emails, on many of which he was merely copied. *Id.* One such correspondence was a

request from Legislative Affairs on which CP was notified as were others, that the appellant was requested to speak about his court case. AF, W-2, Tab 24, Ex. FF; AF, W-2, Tab 56.

CP testified he was also aware that the appellant requested time for a speaking engagement. AF, W-2, Tab 55. He learned this from BB and spoke to OCC about the request, CP averred. *Id.* While CP testified he was aware of the appellant, he could not testify regarding his notoriety. *Id.* According to CP, he was responsible for one third of the country and WFO, where the appellant was assigned, was not even the busiest of those regions over which he had oversight. *Id.*

At the time he signed the cease and desist letter in October, CP wrote in an affidavit, he was not aware of the appellant's secondary barrier disclosures. AF, W-1, Tab 44 at 52-57; AF, W-2, Tab 56. CP explained that the email communication stated that the appellant requested to speak about secondary barriers that he was promoting, but did not mention concerns or a specific disclosure. AF, W-2, Tab 56.

CP averred that he is included on a lot of correspondence as notice rather than seeking action. AF, W-2, Tab 56. In searching his emails he did not see the email that was provided to him at the hearing, and did not recall it. *Id.* I note this email was not in the record. CP testified it was possible that he made a mistake, and had seen an email about the appellant's concerns about secondary barriers in April 2017, prior to the October issuance of the cease and desist letter contrary to his affidavit. *Id.*

**PERSONNEL ACTIONS**

I find the appellant established by preponderant evidence that the agency took the following personnel actions: Nonselections for GBA #15-30 and #16-10; Order to Undergo a Psychiatric FFD examination; and Removal. AF, W-1, Tab 29, 4a, 4n, 4z, 4bb.

I find the appellant failed to show that he was subjected to a significant change in duties, responsibilities, or working conditions based on his claim of a hostile work environment. *See* 5 U.S.C. § 2302(A)(2)(xii). I will address this issue at the conclusion of Part II.

**CONTRIBUTING FACTOR**

Further, the appellant has, through the knowledge/timing test shown that his protected disclosures/activity were a contributing factor in the following personnel actions: nonselection for Vacancy No. 15-10; the order to undergo a FFD examination; and the appellant's removal. Nevertheless, I find he failed to make such a showing by preponderant evidence regarding his nonselection for Vacancy No. 16-07.

Lateral Reassignment Vacancy No. 15-10

Both the selecting official, SAC SMe and recommending panel member SFAM NM testified that they were aware of the appellant's Supreme Court litigation and his disclosures. AF, W-2, Tabs 40, 43. SMe testified she learned of the appellant's Supreme Court case in a staff meeting. AF, W-2, Tab 40. I find it more likely than not that the basis for the appellant's case was articulated in the meeting. Therefore, I find SMe had knowledge of the appellant's protected activity regarding his litigation seeking redress for his protected whistleblowing as well as his protected disclosures.

Similarly, I find NM was aware of the nature of the appellant's Supreme Court litigation based on his position in the Public Affairs Office. AF, W-2, Tab 43. Thus, I find he also had knowledge of the appellant's protected activity regarding his litigation seeking redress for his protected whistleblowing and his disclosures. *Id.*

The appellant's Supreme Court case reversing his removal was decided on January 21, 2015. *Department of Homeland Security v. MacLean*, 574 U.S. 383 (2015). The selection was made in July 2015 and thus was within less than a year

of the appellant's protected activity. Therefore, I find the appellant has satisfied the knowledge/timing test with respect to his protected activity. The information regarding the appellant's disclosures was less clear. Still, because I find the appellant has established a prima facie case regarding this selection, I will consider whether the agency is able to meet its burden of establishing that it would have taken the same action even absent the appellant's protected whistleblowing. This will be addressed in Part III of the decision.

FFD Examination

SM and SK referred the appellant to FAM Medical on October 6, 2017. AF, W-1, Tab 29, 4n at 1-2. At the time of the referral, SM and SK testified they were aware of the appellant's Supreme Court litigation and that it was related to his claim of being a whistleblower. AF, W-2, Tab 44. In addition, SM testified that he was aware of the appellant's disclosure regarding a lack of barriers at Terminal A DCA as well as secondary barriers on planes. *Id.* SK similarly testified that he was aware of the appellant's concerns about cockpit barriers. *Id.*

On the contrary, when AT recommended that BB place the appellant on leave based on the need for a medical evaluation, he was not yet aware of the appellant's whistleblowing. AF, W-1, Tab 29, 4n at 2-4. AT requested the appellant contact him and when he did AT informed the appellant about the need for a FFD evaluation. *Id.* at 2-6. It was also during this conversation that the appellant notified AT of his protected disclosures and activity. *Id.* at 4. AT documented the request in an email sent at 12:13 p.m. on October 6, 2017. *Id.* at 6. I find AT had already taken steps to order the appellant to undergo a FFD examination when the appellant informed AT of his protected whistleblowing and indeed it was in response to this order that the appellant informed AT. Because AT's knowledge came after his decision, I find the appellant cannot establish that the order to undergo a FFD examination was retaliatory on the part of AT.

Still, because I find the appellant has satisfied the knowledge/timing test for SM's and SK's referral to FAM Medical, I find the appellant has demonstrated through this test that his protected whistleblowing was a contributing factor in the order to undergo a psychiatric FFD examination.

Removal

TJ proposed the appellant's removal in a letter issued June 8, 2018. AF, W-1, Tab 29, 4e at 2. CP decided to remove the appellant in a letter dated March 21, 2019. AF, W-1, Tab 29, 4a.

I find both TJ and CP had knowledge of the appellant's protected disclosures and activity as it was included in the ROI. AF, W-1, Tab 29, 4f. Specifically, information about the appellant's protected disclosures and activity can be found in the appellant's written statements and the audio of his interviews. AF, W-1, Tab 29, 4f at 196-200. In his written OOI affidavit, the appellant specifically mentioned his disclosures regarding the body scanner opt-out screening loophole, the weapon left on the plane in December 2001, and the lack of barriers at Terminal A DCA. AF, W-1, Tab 29, 4f at 205, 210, 214. Furthermore, throughout the OOI investigative file, the appellant mentioned his litigation against the agency to include his claims that it was based on retaliation for protected whistleblowing. AF, W-1, Tab 29, 4f (while this is a very large document, the appellant and others noted the appellant's litigation too many times to specify).

Further, the appellant included detailed information regarding his whistleblowing activity in his response to the proposal. AF, W-1, Tab 29, 4c. Specifically, this included the appellant's disclosures about the lack of secondary barriers on airplanes, the lack of barriers at DCA Terminal A, and the threat posed by an opioid attack due to the lack of an antidote onboard planes. AF, W-1, Tab 29, 4c at 74, 77, 79-80. Similarly, the appellant mentioned the same issues during his oral response. AF, W-1, Tab 29, 4d at 1. CP confirmed his knowledge

of these matters in his testimony through the means identified here as well as through the appellant's statements during mediation. AF, W-2, Tabs 55, 63.

I find based on the knowledge/timing test, the appellant has established that his protected whistleblowing as identified in this section was a contributing factor in the decision to remove the appellant.

Lateral Reassignment GBA #16-07

The appellant applied for but was not selected for the position identified by GBA #16-07. AF, W-1, Tab 29, 4z. Instead, the agency selected CR. *Id.* I find, based on the record, the appellant failed to establish by preponderant evidence that the management officials involved in the selection process had knowledge of the appellant's protected whistleblowing.

At the jurisdictional stage, the appellant argued that at least two of the agency officials involved in the nonselection for this position had knowledge of his protected activity and disclosures. AF, W-2, Tab 44 at 6. During the jurisdictional phase, I found the appellant made a nonfrivolous allegation that his protected Whistleblowing was a contributing factor in the agency's decision not to select him to fill Vacancy No. #16-07. AF, W-1, Tab 46 at 6-7.

The appellant submitted his resume and a statement for consideration for this vacancy. AF, W-1, Tab 29, 4z. In his narrative statement, the appellant indicated that selection for the position should not be considered for purposes of settling his Merit Systems Protection Board appeal. *Id.* at 12. Further, the appellant stated that he testified before Congress in September 2014 "regarding government oversight and reform." *Id.* at 10-11. He did not, however, detail the substance or specific subject of his testimony. *Id.*

The selecting official for the position was JH and on the selection panel were ASACs DS, TK, and RW. AF, W-1, Tab 29, 4z at 4. In support of his jurisdictional pleading the appellant submitted declarations from DS and JH. AF, W-1, Tab 44 at 26-39. Both JH and DS acknowledged that they read the

application packages of the applicants who applied for the position. *Id.* at 28, 36. Further, DS stated that he understood the appellant "sued the agency and got his job back"; and JH wrote that he was aware the appellant had engaged in litigation that was about his alleged wrongful termination and his quest for reinstatement. *Id.* at 28, 35. DS and JH denied any knowledge of the appellant's alleged protected disclosures. *Id.* at 29-31, 36-39.

While I found the above articulated allegation sufficient for the jurisdictional phase, I find it is not enough to meet the appellant's burden of establishing his allegation of knowledge by preponderant evidence. The appellant did not seek to call as a witness anyone associated with this selection and offered no additional evidence on the subject of knowledge regarding this selection. Both witnesses wrote in their declarations that they were aware that the appellant had sued the agency and prevailed and neither indicated he knew the basis for the appellant's litigation. AF, W-1, Tab 44 at 28, 35.

The reprisal section of 5 U.S.C. § 2302 (b)(9) makes it unlawful to take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of: (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of section 2302(b)(8), discussed in that section; (B) testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or (D) refusing to obey an order that would require an individual to violate a law. Part (A) of section 2302(b)(9), however, contains two subparts, one, section 2302(b)(9)(A)(i), which applies to retaliation for seeking redress regarding section 2302(b)(8), and the other, section 2302(b)(9)(A)(ii), which applies to retaliation for seeking redress for matters "other than with regard to remedying a violation of paragraph (8)." This includes complaints to redress discrimination in

the EEO process. An appellant has the right to seek corrective action from the Board based on all protected activity under section 2302(b)(9) except protected activity covered by section 2302(b)(9)(A)(ii). 5 U.S.C. § 1221(a). Thus, retaliation for engaging in the litigation process to remedy matters other than for the purpose of remedying violations of section (b)(8) are not appealable to the Board pursuant to an IRA appeal. *Id.* Here, while the appellant's litigation was related to (b)(8) protected activity, there is no evidence that either declarant DS or JH knew the basis of the appellant's litigation. Section 2302(b)(9)(A)(i) is clearly intended to protect individuals from retaliation for engaging in adjudicatory processes to protect them from retaliation for making disclosures protected by section 2302(b)(8). Absent a showing that the acting agency officials knew the nature of the appellant's litigation, I find the appellant has failed to demonstrate the agency's action in not selecting him was retaliation for engaging in protected activity covered by 5 U.S.C. § 2302(b)(9)(A)(i).

I allowed the case to move forward on this personnel action because of the low bar for establishing Board jurisdiction, which only requires a nonfrivolous allegation. That bar, however, is higher with respect to establishing a prima facie case which must be done by a preponderance of the evidence. I find the appellant has failed in this regard with respect to Lateral Reassignment GBA #16-07 for the reasons stated above.

**HOSTILE WORK ENVIRONMENT CLAIM**

In the jurisdictional order issued March 27, 2022, I found the appellant listed several personnel actions that individually did not appear to be covered personnel actions, but taken together could be considered a nonfrivolous allegation of a hostile work environment. AF, W-1, Tab 31 at 26. The Board and the Supreme Court have held that such a claim is cognizable as a personnel action. *See Skarada v. Department of Veterans Affairs*, 2022 MSPB 17, ¶ 16 (2022). Further, under this category, I stated I would consider the appellant's

claims regarding the cease and desist letters issued on October 4, 2017 and August 2, 2018; and the alleged retaliatory investigations from April 2016 to September 12, 2017. AF, W-1, Tab 31 at 26. I will first address whether the appellant's claim of a hostile work environment was tantamount to a claim of personnel action under 5 U.S.C. § 2302(A)(2)(xii). In this section, I will also discuss whether the investigation was so tainted by retaliatory animus as to be unreliable. I find neither is the case.

The Board recently held that only agency actions that, individually or collectively, have practical and significant effects on the overall nature and quality of an employee's working conditions, duties, or responsibilities, and are likely to have a chilling effect on whistleblowing or otherwise undermine the merit system will be found to constitute a covered personnel action under section 2302(a)(2)(A)(xii). *Skarada v. Department of Veterans Affairs*, 2022 MSPB 17, ¶¶ 16, 23, 29 (2022).

In addressing a claim that an investigation was a retaliatory personnel action, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that such an investigation must rise to the level of a significant change in duties or working conditions. *Sistek v. Department of Veterans Affairs*, 955 F.3d 948 (Fed. Cir. 2020). Still, the court found routine investigations that involve an interview and stigma that results in a personnel action are insufficient to establish a significant change in duties or working conditions. *Id.*

*Cease and Desist Letters*

I find the agency's action in issuing the appellant two Cease and Desist Letters did not alter his working conditions. Instead, I find the letters were given to provide the appellant with guidance about proper behavior in the workplace. The letter specifically stated that they were nondisciplinary in nature. AF, W-1, Tab 14 at 23-24; AF, W-1, Tab 29, 4f at 388.

In the October 4, 2017 letter, CP instructed the appellant to stop talking about an on-going investigation. AF, W-1, Tab 29, 4f at 388-89. The appellant

acknowledged receipt of the letter on October 6, 2017. *Id.* at 389. The letter was also a reminder of the information contained in the NDA, which the appellant signed during the investigation and admitted during an OOI interview that he violated. AF, W-1, Tab 29, 4L part 3 at 01:55:09-01:55:14, 01:58:50-01:59:30. Further, the October 4, 2017 letter referenced reports that the appellant made inappropriate comments in the presence of co-workers that were perceived to be harassing in nature and made with the intent to intimidate witnesses to the ongoing OOI investigation. AF, W-1, Tab 29, 4f at 388. CP referenced TSA Management Directive (MD) 1100.73-3 *Anti-Harassment Program*, Section G, which requires TSA employees, including FAMs, "to avoid behavior that has the effect of creating an intimidating, hostile, offensive, or abusive work environment for other employees, contractors, or the public." *Id.* In addition, the agency attached TSA MD 1100.73-3 *Anti-Harassment Program* and the associated Handbook as well as TSA MD 1100.73-5 *Employee Responsibilities and Code of Conduct* and its associated Handbook for the appellant to review. *Id.*

JM issued the appellant the second Cease and Desist Letter dated August 2, 2018. AF, W-1, Tab 14 at 23-24. In the letter, JM noted that the agency received reports that on July 27, 2018 the appellant allegedly made inappropriate comments to a co-worker that were harassing and/or intimidating in nature to a witness who provided a statement to TSA OOI during an official investigation. *Id.* The letter acknowledged that the appellant received a similar directive on October 6, 2017. *Id.* The letter directed the appellant to stop making comments to or in the presence of colleagues about any official investigation. Both letters recognized an exception for statements authorized by the Whistleblower Protection Act or any other law or regulation. *Id.*; AF, W-1, Tab 29, 4f at 388. The August 2, 2018 letter reminded the appellant of his obligation to abide by TSA MD 1100.73-3 *Anti-Harassment Program* and TSA MD 1100.73-5 *Employee Responsibilities and Code of Conduct*. AF, W-1, Tab 29, 4f at 388.

The need for the letter was made clear by the appellant's testimony in which he denied that he ever sought to intimidate other FAMs. Thus, it was clear from the appellant's testimony that he did not understand how his behavior was perceived by others. *See* AF, W-2, Tab 40. The appellant first admitted that prior to July 17, 2017, he had been told to stop making derogatory remarks about co-workers. *Id.* Later in his testimony, the appellant denied that he was told not to make derogatory comments, and then after reading his deposition, he admitted that he had been told to stop. *Id.* In making this admission, however, the appellant averred that his disclosures about illegal sexual conduct and the ineffectiveness of FAMs, were not derogatory but rather were protected. *Id.*; AF, W-1, Tab 29, 4f at 388.

I find the appellant failed to articulate how the Cease and Desist Letters impacted his duties, responsibilities, or working conditions. Therefore, I find the appellant has failed to meet his burden of proof to establish that they were a personnel action.

*The investigation*

The appellant alleged that the investigation was retaliatory, but he failed to provide any evidence or argument regarding how it impacted his duties, responsibilities, or working conditions. The appellant had two interviews and provided a lengthy affidavit as part of the investigation, but otherwise there is no evidence regarding how it impacted his working conditions. AF, W-1, Tab 29, 4f at 95-183; AF, W-1, Tab 29, 4L. These are activities that occur in the normal course of an investigation.

Whether the investigation may be relied upon is a separate issue than whether it significantly changed his duties, responsibilities, and working conditions. Here, I find no evidence that the investigation did so. Therefore, I find it was not a personnel action.

Moreover, I find that even considering the Cease and Desist Letters in combination with the investigation does not reach the threshold of a change in

duties, responsibilities, and working conditions. Therefore, I find the appellant has failed to establish by preponderant evidence that he suffered a personnel action based on the alleged creation of a hostile work environment.

## PART III

## CLEAR AND CONVINCING EVIDENCE

Now that I have found that the appellant established his prima facie case, I will evaluate whether the agency can show by clear and convincing evidence that it would have taken the same action even absent the appellant's protected whistleblowing. I will first set forth the legal standard for this portion of the case. Thereafter, I will address each of the personnel actions at issue to include the appellant's nonselection for GBA #15-30, the order that he undergo a psychiatric FFD examination, and lastly his removal.

## LEGAL STANDARD

If, as here, the appellant makes out his prima facie case, the burden of persuasion shifts to the agency to prove by clear and convincing evidence that it would have taken the same action in the absence of the appellant's protected disclosures and/or activity. *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 14 (2015). The Board will consider all of the relevant factors in determining whether the agency has met its burden by clear and convincing evidence, including the following, commonly referred to as the *Carr* factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the challenged personnel action; and (3) any evidence the agency takes similar actions against employees who are not whistleblowers, or who did not engage in similar protected activity, but who are otherwise similarly situated. 5 U.S.C. § 1221(e)(2); *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Alarid*, 122 M.S.P.R. 600, ¶ 14.

Even if a disclosure of information is protected under 5 U.S.C. § 2302(b)(8), an employee's inappropriate conduct surrounding such a disclosure is not. There is no requirement under 5 U.S.C. § 1221(e)(2) that the adverse personnel action be based on facts completely separate and distinct from protected whistleblowing disclosures. *Watson*, 64 F.3d at 1528 (1995). Wrongful or disruptive conduct is not shielded by the presence of a protected disclosure, and the character and nature of a disclosure can still be a legitimate basis for discipline. *Greenspan*, 464 F.3d at 1305; *Hamilton*, 115 M.S.P.R. 673, ¶ 12. The WPA was not meant to shield employees from their own misconduct. *Carr*, 185 F.3d at 1326.

Concerning the first *Carr* factor, the Board recently confirmed that if the personnel action is nondisciplinary in nature, "it is appropriate to consider [] the broader question of whether the agency had legitimate reasons" for the personnel action. *Smith v. Department of the Army*, 2022 MSPB 4, ¶ 23 (citing *Gonzalez v. Department of the Navy*, 101 M.S.P.R. 248 ¶ 13 (2006)). In such circumstances, there may not be "supporting evidence of misconduct," *id*., and instead the Board must consider whether there are legitimate reasons for the agency taking the contested action. *Id*., ¶¶ 23, 26. The first *Carr* factor, moreover, focuses on the evidence as it stood at the time of the action and in light of what agency officials knew at the time they acted. *Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 13 n.5 (2022). Such a consideration, however, should not be to the exclusion of any other evidence leading up to the challenged personnel action that may tend to undermine the strength or legitimacy of the agency's actions by suggesting an improper motive. *Id*. Legal or procedural errors in taking the action, if any, however, do not "shed light" on the legitimacy of the agency's actions in an IRA appeal because the dispositive inquiry is whether the agency would have taken the same course of action in the absence of the appellant's protected whistleblowing. *See Wilson v. Department of Veterans Affairs*, 2022 MSPB 7, ¶ 46. Thus, legal or procedural errors that would have

occurred regardless of the appellant's protected whistleblowing do not provide a basis for granting corrective action under section 1221(e). *Id.*; 5 C.F.R. § 1209.2(c).

As to the second *Carr* factor, a motive to retaliate, the Board looks not only to whether the agency officials involved were directly implicated by the disclosures at issue, but it will also consider whether a retaliatory motive could be imputed more broadly based on the potential of a "professional retaliatory motive." *Soto*, 2022 MSPB 6, ¶ 14. Thus, under this second factor, the Board considers whether the officials involved in the action harbored a motive to retaliate based on both their personal involvement and their professional or institutional role. *Id.*, ¶¶ 14-15; *see also Smith*, 2022 MSPB 4, ¶¶ 28-29. In making this assessment, the Board looks to the nature of the disclosure; whether it was made public or generated negative publicity or notoriety for those involved or the agency, writ large; and whether it reflected poorly on the agency as a whole. *See Smith*, 2022 MSPB 4, ¶ 29 (noting an agency's "general institutional interests" could form the basis of a retaliatory motive).

Finally, concerning the third *Carr* factor, the treatment of comparators, the Board assesses whether the agency has treated similarly situated employees who have not engaged in protected activity the same. *See Wilson*, 2022 MSPB 7, ¶ 67. The risk of producing no evidence on this factor falls on the agency. *Id.* Such a showing could include evidence the agency has taken the same personnel actions against employees who engaged in the same misconduct or actions, but did not engage in similar protected activity. *See Soto*, 2022 MSPB 6, ¶ 17. In *Soto*, the Board held out the possibility that there could be "different reasons why a record in a whistleblowing case might not contain relevant comparator evidence," other than the agency failing to address this element of proof. *Id.*, ¶ 18 n.9.

## NONSELECTION FOR A LATERAL REASSIGNMENT, I BAND VACANCY NO. GBA-15-30

### STRENGTH OF THE EVIDENCE

The appellant applied for and was not selected to fill the position advertised as GBA-15-30. AF, W-1, Tab 29, 4bb. The appellant claimed that his nonselection was the result of whistleblower retaliation.

SMe, who is currently the SAC of the New York Field Office, was the selecting official for GBA-15-30 and at the time was the SAC, Information Coordination Section (ICS). AF, W-2, Tab 40. SMe testified that GBA assignments in ICS were a highly sought after position because they allow for career development outside of flying or other normal agency functions. *Id.* Therefore, SMe asserted that it was common for applicants to be seeking a lateral GBA to the position. *Id.* As the selecting official for the position, SMe testified that her role was very minor. *Id.* Specifically, SMe averred she convened the panel and reviewed the recommendations. *Id.* SMe reported that there were a total of six positions being filled. *Id.* SMe testified that the policy for the selection process was Policy Number 3007. AF, W-2, Tab 23, Ex. 3; AF, W-2, Tab 40. NM, a member of the selection panel, averred they followed the policy. AF, W-2, Tab 43.

SMe testified that as part of the process applicants submitted their resumes and a narrative statement addressing the core competencies of the position. AF, W-2, Tab 40. SMe averred she named a selection panel which included NM, RO, and EK. *Id.* It was SMe's testimony that she requested that the panel pick their top 10 candidates for interviews, and thereafter make selection recommendations. *Id.*

NM testified he presently serves as an SFAM, ICS, TSA Special Events Coordinator. AF, W-2, Tab 43. NM testified that he previously worked in the Public Affairs Office, which was when he first heard of the appellant. AF, W-2, Tab 43. While in the Public Affairs Office, NM was one of five or six

spokespersons, NM testified. *Id.* In that position, NM explained, he drafted responses to requests and took phone calls. *Id.* During the course of his 4 years in that role, NM testified he received and responded to several hundred media inquiries. *Id.* NM recalled on the stand that when he received questions about the appellant his response was no comment because it was the subject of ongoing litigation. *Id.* According to NM, he gave this response a handful of times and did not convey any other information. *Id.* After he left his position in the Public Affairs Office, NM testified, he learned that the appellant prevailed in his case, but he was not sure when he learned it. AF, W-2, Tab 43. NM testified that he learned about the appellant's earlier appeal from his application, and had also heard rumors that the appellant was reemployed. *Id.*

According to NM, they received approximately 70 applications for the vacancy announcement which he averred was more than twice the number of applications normally received. AF, W-2, Tab 43. NM testified that he served on five or six I-Band selection panels such as the one relevant to this appeal as well as approximately 100 for J-Band promotions which do not involve resume reviews or interviews. *Id.*

The vacancy announcement for the position included the duties and the core competencies. AF, W-1, Tab 29, 4bb at 1-2. Further, in the announcement the agency instructed applicants to submit a resume and narrative statement addressing the listed core competencies. *Id.* at 1. The appellant submitted his resume and a narrative statement in his application for the position. *Id.* at 4-8.

Approximately half of the appellant's narrative statement was quoted language from prior supervisors. AF, W-1, Tab 29, 4bb at 6. The appellant also dedicated a paragraph to his Congressional testimony and mentioned how it led to member support in his Supreme Court case. *Id.* In his concluding paragraph, the appellant noted his pending MSPB appeal. *Id.* The appellant averred that he discussed his presentations to Congress as a way of addressing his communications skills with respect to providing information to leadership, and

added that he believed it was a significant and noteworthy accomplishment. *Id.*; AF, W-2, Tab 37. Further, the appellant testified that he believed his Congressional testimony encompassed the idea of accountability, identifying problems as well as proposing positive programs like biometrics. AF, W-2, Tab 37. The appellant averred that these identified qualifications went to Core Competencies 5-6. *Id.* Core Competency 5, labeled "Partnering," was explained as "[d]evelops networks and builds alliances; collaborates across boundaries to build strategic relationships and achieve common goals." AF, W-1, Tab 29, 4bb at 8. Core Competency 6, labeled "Decisiveness (Decision-making)," related to making "well-informed, effective and timely decisions, even when data are limited or solutions produce unpleasant consequences; perceives the impact and implications of decisions." *Id.*

The appellant testified he did not delineate each selection factor or core competency. AF, W-2, Tab 37. He testified, instead, that he thought that the selecting officials would understand his intent. *Id.* Further, the appellant averred that he provided information about his prior supervisor and the selection official could have contacted him if they wanted. *Id.*

The appellant's concluding sentence in the narrative portion of his application stated "I'm exceptionally qualified for this assignment, approval of it shall not be a settlement term in the pending case before the [MSPB], nor a condition under 5 U.S.C. § 3352." AF, W-1, Tab 29, 4bb at 7. In his testimony, the appellant explained that he included this language in all of his requests and applications because he did not want the agency to use it against him in his litigation. AF, W-2, Tab 37.

The appellant's resume did not show a break in service. W-1, AF, Tab 29, 4bb at 4. During his testimony the appellant emphasized certain experiences from his resume to include graduating in the first class of FAMs, starting the Field Office in Las Vegas Nevada, and his experience as a Border Patrol Agent. AF, W-2, Tab 37. Further, the appellant testified about his awards and

accomplishments as noted on his resume. AF, W-1, Tab 29, 4bb at 5; AF, W-2, Tab 37. The appellant specifically highlighted his designation as a National Whistleblower Liaison for the Federal Law Enforcement Officers Association. AF, W-1, Tab 29, 4bb at 5; AF, W-2, Tab 37.

NM testified the selection criteria for the position were listed at AF, W-1, Tab 29, 4bb at 8-10. AF, W-2, Tab 43. That document listed the core competencies for the position, the duties of the position, the preferred criteria and how to evaluate the applicant's experience. AF, W-1, Tab 29, 4bb at 8-10. NM averred this was the only criteria used. AF, W-2, Tab 43. NM explained the document was intended to be a tool to assist the panel in the selection process. *Id.*

At the top of the evaluation method page is subject line – "CCAR Method: Challenge-Context-Action-Result." AF, W-1, Tab 29, 4bb at 8. Below the subject is an explanation of each item. *Id.* NM testified this is a standardized way of preparing and evaluating resumes. AF, W-2, Tab 43. Further, NM averred that they reviewed applications to see if the applicant did what was asked. *Id.* NM testified he was very familiar with the CCAR model and it is a tool, not a requirement. *Id.*

NM agreed that most FAMs do not have a lot of experience with applying for higher level, more competitive positions. AF, W-2, Tab 43. NM testified that any FAM may seek assistance with resume and interview preparation through the Employee Assistance Program. *Id.* Still, NM acknowledged that the majority of FAM applicants do not use the CCAR method, and stated this can "handicap" the applicant. *Id.* NM explained this is because if the applicant does not include relevant information, it cannot be included in the evaluation. *Id.* For example, NM testified that applicants write their job title, but fail to explain the job or their results in it. *Id.* NM further explained that the more specific information provided detailing experiences the better an applicant was likely to score. *Id.* NM averred that while applicants do not always use the CCAR method, he still

gives credit for experience included even when it is not presented in that format. *Id.* It was NM's testimony that SMe did not provide instruction regarding how to rate and rank applicants, nor did they discuss any applicants. *Id.*

NM explained his role on the selection panel was as the administrative supervisor on the panel. AF, W-2, Tab 43. In this capacity, he testified he sent the list of qualified applicants and selection criteria to EK. AF, W-2, Tab 24, Ex. A; AF, W-2, Tab 43. NM averred that the criteria were agreed upon with RO who was the senior panel member and created that panel. AF, W-2, Tab 43.

As a panel member, NM testified, he reviewed the applications and in coordination with the other panel members they decided which of the best qualified candidates to interview. AF, W-2, Tab 43. NM testified that each panel member did his own evaluation of the applications and then they compared. *Id.*

Each panel member reviewed the applicants using the criteria provided, NM testified. AF, W-2, Tab 43. He did not, however, review the worksheets of the other panel members. *Id.* NM testified that he rated each candidate without comparison to other applicants. *Id.*

NM's worksheet for evaluating applicants was comprised of the candidates in alphabetical order and then a number ranking of 1-3 for each of the seven core competencies. AF, W-2, Tab 24, Ex. VV. The last column was the total score. *Id.* The appellant's score was 19 out of a possible 24. *Id.* NM testified that he arrived at the scores using the information supplied by the applicants. AF, W-2, Tab 43. During his testimony, NM was asked to look at the appellant's application for the position. AF, W-1, Tab 29, 4bb at 4-7; AF, W-2, Tab 43. Based on the appellant's application, NM averred the appellant did not have experience in ICS or any of the listed preferred criteria, but averred he had some relevant experience for which he was credited. AF, W-1, Tab 29, 4bb at 4-7; AF, W-2, Tab 43. Further, NM testified that the appellant's resume and narrative were very general in nature and not tailored to the position at issue. AF, W-1, Tab 29, 4bb at 4-7; AF, W-2, Tab 43.

NM explained he recommended the applicants whom he evaluated as having the highest scores. AF, W-2, Tab 43. NM stated he spent time to evaluate each applicant and was confident in the scores he gave each, which was based on the criteria provided. *Id.* It was NM's opinion that there was a lot of nuance in evaluating the top tier of candidates which for example included looking at advanced degrees or experience with off-site partners. *Id.* NM denied that he spoke to any candidate outside of the process. *Id.* NM testified the process was completed 6 years prior to the time of his testimony, and therefore he was unsure whether he could recall his specific evaluations of each application. *Id.*

After the panel individually completed their application reviews they came up with a list of names to be interviewed, a total of 10, NM averred. AF, W-2, Tab 43. The number to be interviewed was determined at the outset of the process by RO, NM averred. *Id.* NM testified that the panel discussed each panel member's top choices, but did not discuss the other applicants. *Id.* NM did not recall having spoken about the appellant during the selection process. *Id.* At the hearing, NM could not recall each panel member's top choices. *Id.* Further, NM explained that when there was a disagreement about a candidate, they pulled up their resume and discussed the individual. *Id.* According to NM, their discussion did not include personal knowledge of the candidates, but instead they relied solely on the application packages. *Id.* NM testified that they reached consensus through discussion and in the end reached agreement as to whom they would interview. *Id.*

DB was a candidate, like the appellant, with a score of 19 on NM's list. AF, W-2, Tab 24, Ex. VV. According to NM, he did not recommend DB for an interview, but he was not the only panel member, and others could have rated DB higher. AF, W-2, Tab 43. This was in contrast to other candidates who NM rated as 20 and higher but were not interviewed. AF, W-2, Tab 24, Ex. VV; AF, W-2, Tab 43. During examination by agency counsel, NM testified about several other applicants and was able to articulate why he rated them as he had. AF, W-1,

Tab 29, 4bb at 26-49; AF, W-2, Tab 43. Again, through the process of discussion, the panel reached a consensus on whom to interview, NM testified. AF, W-2, Tab 43.

Following the panel's selection of 10 candidates for interview, SMe testified that the panel sent her the list. AF, W-1, Tab 24, Ex. B; AF, W-2, Tab 40. SMe was not sure whether the appellant was among the interviewed applicants. AF, W-2, Tab 40. Further, she testified she did not review the application material because she had confidence in the panel. *Id.* SMe averred she instructed the panel to proceed with the interviews. *Id.* This is supported by her email dated July 20, 2015 to NM in which she stated she agreed with the list and asked NM to schedule the interviews. AF, W-1, Tab 24, Ex. B.

As the administrative supervisor on the panel, NM testified he prepared packages for the interviews and scheduled the interviews. AF, W-2, Tab 43. NM testified that one applicant was erroneously included in the interview list, MR, who scored a 16, in lieu of a different candidate, AS, based on a clerical error. *Id.*

Like the appellant, AS had a score of 19. AF, W-2, Tab 24, Ex. VV. Unlike the appellant, she received a 1 under preferred criteria, while the appellant received no points in this category. *Id.* NM testified that he looked at the overall score and the preferred criteria did not garner extra weight. *Id.*

NM testified that they realized the error of interviewing MR rather than AS during the interview. AF, W-2, Tab 43. Although, they recognized the error, NM testified, they did not go back and interview AS because they felt they had enough good candidates. *Id.* Further, NM averred he did not notify SMe of the error, and was unsure whether the other panel members did so. *Id.*

Following the interviews, NM testified that the panel selected the strongest candidates and ranked them. AF, W-2, Tab 43. This process did not include returning to his original rating list, NM testified, but instead they evaluated how the applicant performed in the interview. *Id.* As with the decision regarding

whom to interview, NM averred the panel reached a consensus on their preferred candidates for selection. *Id.* The panel then forwarded the ranked list to SMe, NM testified. *Id.*

SMe testified that the panel referred candidates for selection after the interview process. AF, W-2, Tab 40. On the stand, SMe could not recall the total number referred and whether it was just a list of ranked candidates. *Id.* SMe explained she sought 10 names for 6 positions to ensure if someone did not accept she would have sufficient applicants from which to choose. *Id.* SMe testified that she did not deviate from the panel's recommendation. *Id.* She added that she did not discuss any candidate with anyone, and no one attempted to influence her besides the panel through its assigned role. *Id.*

SMe testified she was aware of the appellant's protected disclosures and activity, but could not recall the specific disclosures. AF, W-2, Tab 40. She learned this information, she testified, during a senior staff meeting at which it was reported the appellant had prevailed in his case and would be reinstated. *Id.* SMe could not recall when the announcement was made, and stated she did not discuss the appellant and has never done so. *Id.* Further, SMe testified she did not know the nature of the appellant's case. *Id.*

The agency provided the list of qualified candidates with columns for whether the applicant was selected and the rank order of selections. AF, W-1, Tab 29, 4bb at 11-13. Beside the rank number was the name of the office to which the applicant was assigned at the time of their selection according to NM. *Id.*; AF, W-2, Tab 43. NM explained the applicant's office assignment was relevant to whether the agency would pay moving costs for the position which was located in Herndon, VA. AF, W-2, Tab 43. It was NM's recollection that all six recommended candidates were accepted. *Id.*

Neither NM nor SMe knew whether any other candidate had engaged in making protected disclosures or activity. AF, W-2, Tabs 40, 43. The appellant asked NM about FD who was previously the SAC of the LAFO. AF, W-2,

Tab 43. NM testified that in his position in Public Affairs he provided information about FD, but he was unsure whether it was related to the appellant. *Id.* The appellant then attempted to refresh NM's recollection with specific articles dating back more than 10 years. AF, W-1, Tab 29, 4c at 256-262; AF, W-1, Tab 29, 4f at 93-99. NM had no specific recollection about the article even after it was shown to him. AF, W-2, Tab 43.

NM testified that generally because the appellant's case was in litigation his response, when asked questions about the appellant, was not to comment. AF, W-2, Tab 43. In this case, however, it appeared the reporter asked a question about FD, which he could answer, NM testified. *Id.* NM added that the information about FD was a matter of public record, i.e., his positions, etc. *Id.* Further, in answering a question about the appellant, NM's statement was quoted in the article as "TSA is unable to comment on ongoing investigations and ongoing litigation." AF, W-1, Tab 29, 4c at 259; AF, W-1, Tab 29, 4f at 96.

NM also testified that while he worked in the Public Affairs Office first as a FAM and then as an SFAM from 2007-11, he reviewed published articles and created a daily package of relevant ones. AF, W-2, Tab 43. NM testified that the above-referenced article from March 22, 2011 could have been included in his daily package, but he did not recall. *Id.* The daily package could be as few as 5 or as many as 30-40, NM averred. *Id.* The package distribution list was the TSA leadership router, NM averred.

In response to a Board jurisdictional order, the appellant wrote in an affidavit that FAM EK informed him the panel members never "considered [the appellant] for the position due to the nearly ten years of law enforcement experience [he] missed as a result of the Agency's retaliatory termination." AF, W-1, Tab 11 at 4. The appellant stated that he received notice of his non-selection on August 7, 2015. *Id.* The appellant did not request EK as a witness and there was no evidence solicited on this point.

Here, I find the agency had strong evidence supporting its selection process. Further, based on the testimony and documentation of the selection process, I find it was organized and completed in accordance with the policy. The NM carefully and thoroughly explained the selection process. Even though the appellant failed to follow the preferred process for drafting his narrative statement, NM gave him credit for his experience and ranked the appellant higher than many applicants. AF, W-2, Tab 24, Ex. VV. If NM had wanted to retaliate or completely eliminate the appellant's chances at consideration, he could have rated the appellant much lower, but there was no evidence that he did. Instead, NM's process was well reasoned and methodical.

**ANIMUS/BIAS**

I find there was no evidence of personal bias or animus toward the appellant to include such based on his protected whistleblowing. While SMe and NM were both aware of the appellant's protected activity and specifically his MSPB and Supreme Court litigation, neither was involved in that litigation or the appellant's disclosures. Further, at least two of the appellant's disclosures occurred after the appellant's nonselection to include his disclosures about barriers at DCA Terminal A and the lack of NARCAN on planes.

Moreover, there was no allegation that either SMe or NM were in the appellant's chain of command or supervised a program implicated by the appellant's disclosures. Still, as agency managers, I find they could have a professional motive to retaliate based on their positions within the agency. *See Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 14 (2022).

**COMPARATORS**

The comparators in the nonselection were all of the other applicants. Because there was no evidence to suggest any were whistleblowers, I have assumed for the purposes of this analysis that the applicant pool did not include any whistleblowers other than the appellant.

Only 10 out of the 69 candidates were interviewed. AF, W-2, Tab 24, Ex. B, Ex. VV. Not interviewed in addition to the appellant were 10 applicants who NM rated higher than the appellant. In addition, there were at least two interviewed applicants rated either equally or lower than the appellant who were interviewed. AF, W-2, Tab 24, Ex. B, Ex. VV.

Based on NM's undisputed testimony, the panel reached a consensus on whom to interview. AF, W-2, Tab 43. There was no evidence that during any discussion, did the panelist discuss the appellant or his protected whistleblowing. In short, I find there is no evidence that the appellant was treated differently than applicants who had not engaged in protected activity or made protected disclosures.

Instead, I find SMe and NM participated in the selection process for GBA-15-30 and followed the agency procedures for doing so. NM was able to explain the reasons for his rating of applicants, which was also uncontested. SMe merely accepted the recommendations of the panel and therefore I find she did not make any critical evaluation of the applicants. While SMe and NM may have had a professional motive to retaliate, I find they did not have a personal motive nor was there any evidence produced to suggest one. Further, I find non-whistleblowers were evaluated using the same criteria as was used in evaluating the appellant and some were higher rated than the appellant and some lower.

Thus, I find based on the record evidence, the agency has shown through the strength of the presented evidence that it would have taken the same action in not selecting the appellant for GBA-15-30 even absent his protected activity and disclosures. Therefore, I find the appellant has failed to establish his entitlement to corrective action based on his nonselection for this position.

**ORDER TO UNDERGO A FITNESS FOR DUTY EXAMINATION, OCTOBER 2017.**

After revealing that he was prescribed anti-depressants and anti-anxiety medication following his receipt of a Cease and Desist Order on October 6, 2017,

the agency ordered the appellant to undergo a fitness for duty (FFD) evaluation. AF, W-1, Tab 29, 4n; AF, W-2, Tab 24, Ex. T at 4; AF, W-2, Tab 44. The appellant alleged that he was ordered to undergo the FFD examination in retaliation for his protected whistleblowing. The appellant's medical situation was referred to FAM Medical by SFAM SM and ASAC SK. AF, W-1, Tab 29, 4n at 1-2. At FAM Medical, the appellant's FFD determination was handled by nurse AT in consultation with medical staff. AF, W-1, Tab 29, 4n; AF, W-2, Tab 52.

**STRENGTH OF THE EVIDENCE**

SM testified that the appellant self-disclosed that he was prescribed anti-depressants and anti-anxiety medication, but SM could not recall whether the appellant stated he was prescribed the medication or was taking it. AF, W-2, Tab 44. The appellant made the self-disclosure, SM averred, during the delivery of a Cease and Desist letter. *Id.* SM reported that the letter came from FAMS and OOI, in other words headquarters, and not from SK or BB. *Id.* When the appellant read the letter, SM testified, the appellant was visibly upset and asked to take sick leave. *Id.* They granted the request, SM testified, and he left. *Id.*

In another incident two days before, SM testified, the appellant had a panic attack, but did not mention any medication. AF, W-2, Tab 44. Therefore, SM asserted, he did not believe reporting was necessary at that time. *Id.*

SK testified that he issued the Cease and Desist letter at the direction of BB. AF, W-2, Tab 44. SK testified he was an ASAC in the Washington Field Office, but was not in the appellant's chain of command. *Id.* SK averred that he did not draft the letter or have any input into the content of it. *Id.* On the stand, SK said he gave the appellant the letter and afforded him the opportunity to read and sign it. *Id.* SK testified that the appellant was shaking and had trouble signing the letter because of it. *Id.* Moreover, SK perceived that the appellant was upset and stressed. *Id.* The appellant asked to say something, SK testified,

and then told SM and SK that he was seeing someone and had been prescribed medication because of stress. *Id.* Thereafter, SK testified, SM asked him if he needed to take the rest of the day off. *Id.* SK explained that SM told him he was concerned about the appellant due to an incident that had occurred 3 days earlier when the appellant reported he was having a panic attack while in the office. *Id.*

After the appellant left, SK testified he asked SM if he knew about the medications, and SM responded that he did not. AF, W-2, Tab 44. Therefore, SK averred the medications had to be reported to FAM Medical, based on the potential for impairment. *Id.* SK testified that he instructed SM to make the report. *Id.* Further, SK explained he assumed if he were prescribed medication, he was taking it. *Id.*

SM testified that he and SK contacted FAM Medical by phone. AF, W-2, Tab 44. Thereafter, SM testified that he memorialized the contact in an email after the appellant refreshed his recollection. AF, W-1, Tab 29, 4n at 1; AF, W-2, Tab 44. In the email, dated October 6, 2017, SM referenced the phone conversation and summarized the interaction from earlier that day. AF, W-1, Tab 29, 4n at 1. Specifically, SM noted the appellant's reporting that he was "on anti-depression and anti-anxiety medications." *Id.* Further, SM wrote he "revealed that he had made several visits to the hospital due to the stress associated with the on-going investigation." *Id.* SM also reported that 3 days earlier the appellant stated he was having a panic attack while in the office. *Id.* He declined SM's offer to call 911, but took sick leave for the remainder of the day. *Id.* SM wrote he was unaware of him having a panic attack in the office before this incident. *Id.* SM copied SK and KT on the email. *Id.*

SK also wrote an email to FAM Medical on October 6, 2016 and copied his supervisor BB and SM. AF, W-1, Tab 29, 4n at 2. SK explained that he copied BB because he was the head of the field office and needed to know. AF, W-2, Tab 44. Further, SK testified that he told BB about the appellant's self-disclosure when he informed BB that he had delivered the Cease and Desist letter. *Id.*

Like SM, SK summarized the issuance of the Cease and Desist and what followed in his email. AF, W-1, Tab 29, 4n at 2. He wrote that after the appellant received the letter he was "upset and was shaking." *Id.* SK reported that the appellant reported that "he was on anti-anxiety and anti-depression medications and that he had also been to the hospital a few times 'over this.'" *Id.* SK wrote that he agreed when SM offered sick leave for him to take, and the appellant then took sick leave and left work. *Id.* Thereafter, SK wrote he asked SM if he knew about the appellant's medication and SM responded he did not. AF, W-2, Tab 44. SK asserted he instructed SM to contact FAM Medical and specifically Nurse AT as "required by policy." *Id.* SK testified that he wrote the email after receiving a call from AT, who asked for information about the interaction among SM, SK, and the appellant. *Id.* According to SK's testimony, the email was an accurate summary of what took place, and his memory at the time was better than his memory at the hearing. *Id.*

SM asserted that it was his understanding that the matter had to be reported. AF, W-2, Tab 23, Ex. 14; AF, W-2, Tab 44. On the stand, SM gave the example that following his knee surgery when he was on medication he had to give notice. AF, W-2, Tab 44. The FAM Medical reporting policy specifically includes mandatory reporting when there are changes to an employee's prescription medication. AF, W-2, Tab 23, Ex. 14. Therefore, SM averred they contacted AT with FAM Medical once the appellant notified them of his anti-anxiety and anti-depression prescriptions. AF, W-2, Tab 44. According to SM, he did not believe they contacted KT or BB about notifying FAM Medical because they knew what was required and did it. *Id.* SM testified that he had made other reports to FAM Medical and to his knowledge those reports did not involve whistleblowers. *Id.*

SK testified that he also had made other referrals to FAM Medical, or has directed that such reports be made. AF, W-2, Tab 44. He added that this occurred more than 20 times. *Id.* SK could not recall on the stand whether AT

had previously asked for additional information following a referral. *Id.* SK testified he was unaware if any of his other referrals had been whistleblowers. *Id.*

Following notification of FAM Medical, SM testified, the process was to instruct the employee to contact that office, the same process SM followed after his surgery. AF, W-2, Tab 44. Thereafter, SM testified he was copied on email traffic between the appellant and FAM Medical, but was not directly involved. *Id.* FAM Medical, and specifically AT, sent an email placing the appellant in a non-duty status, SM testified. *Id.* SM also asserted he was not involved in that decision. *Id.* SM did, however, send the appellant information regarding medical standards on October 28, 2017, which he "was advised to forward to [the appellant]." AF, W-2, Tab 24, Ex. T at 4. SM could not recall who sent him the information to forward to the appellant. AF, W-2, Tab 44. At that point, SM testified the appellant was still on sick leave as he had been since October 6, 2017. *Id.* SM had difficulty recalling the email exchange, but stated he recollected the appellant was seeking clarification on the process. *Id.* SM testified that FAM Medical required an evaluation and gave him a timeline for providing it, which was 30 days as written in the policy. AF, W-2, Tab 24, Ex. T at 4; AF, W-2, Tab 44. SM averred he had no authority over the process or the timelines imposed. AF, W-2, Tab 44. Further, SM testified he did not recall having any further communication with FAM Medical. *Id.* According to SM, he reminded the appellant to provide the medical documentation, but he testified he could not recall whether anyone told him to do so. *Id.*

The appellant responded to SM's email and asked whether he had 30 days from the date of SM's email to provide an evaluation. AF, W-2, Tab 24, Ex. T at 3. The appellant wrote several times that he did not object to the requirement that he obtain an evaluation, but did object to being compelled to use his sick leave. *Id.* The appellant added that obtaining the evaluation was challenging. *Id.* In response, SM wrote that the 30-day time limit for providing the information was to begin on the day of that email, October 30, 2017. *Id.* at 2-3.

On November 22, 2017, SM reminded the appellant of the deadline for providing the evaluation, and informed the appellant how to seek an extension if one was needed. *Id.* at 1-2. The appellant testified that he found the process unnerving, confusing and awful. AF, W-2, Tab 37. Further, he averred that neither SM nor AT were giving him written directions. *Id.* It was the appellant's perception, he testified, that they did not want to put anything in writing. *Id.* Still, the appellant testified that eventually SM did send an email. *Id.*

The appellant responded, this time with an apparent allegation of retaliation for raising with SK a January 10, 2009 incident at DCA involving a "friend" of SKs. AF, W-1, Tab 24, Ex. T at 1. The appellant also reasserted his displeasure with having to use his sick leave and noted that his medical issue was not reported after the first incident on October 3, 2017. *Id.* Moreover, the appellant stated that neither SM nor SK revoked the appellant's authorization to carry a firearm or restricted the appellant's duties. *Id.* These allegations were also included in the appellant's OIG complaint of October 16, 2017. AF, W-1, Tab 15 at 4-13.

Shortly after the appellant sent the email, SM forwarded it to his supervisor KT. AF, W-2, Tab 24, Ex. T at 1. SM testified he did not forward all emails to KT, and could not recall specifically why he forwarded this one. AF, W-2, Tab 44. He testified that he assumed he forwarded it because KT had asked when the appellant was returning to work. *Id.* He added it was also possible that someone asked whether the appellant was going to comply with the requirement that he provide a medical evaluation. *Id.*

While SM testified he was unaware of the need to notify FAM Medical prior to the appellant's self-disclosure regarding medications, he did state in his OOI interview that the appellant had stalked MD, and SM was unsure how far the appellant could be pushed. AF, W-2, Tab 44. SM noted that he did not know whether the appellant was going to shoot someone. *Id.* SM explained that the appellant appeared to be under some stress, but there was no specific indication

he would shoot anyone at that point. *Id.* Moreover, SM testified he was not aware the appellant had engaged in intentional intimidation other than the information contained in an ITR. *Id.* SM could not recall the date of the incident, but described the situation. SM alleged that the appellant made a statement that he still had his gun and job and was going to be interrogated, which was reported by other FAMs. *Id.*

SM testified that he had no authority to decide whether the appellant would be charged sick or administrative leave. AF, W-2, Tab 44. Both SM and SK testified that, because it was a personal medical issue, sick leave or another form of personal leave would be appropriate, and SM added he was not aware of it being handled differently than similar cases. *Id.* Further, SM testified he was not aware of a situation in which the agency paid for a medical examination related to a personal medical issue. *Id.* SM and SK denied that they reported the appellant to FAM medical because of his whistleblowing. *Id.*

AT testified that he was an Occupational Health Nurse and had been with FAMS for 11 years at the time of the hearing. AF, W-2, Tab 52. In his position, AT testified, among other things, he reviews medical documentation in conjunction with a physician. *Id.* This is done based on FAM Medical standards. AF, W-2, Tab 23, Ex. 14; AF, W-2, Tab 52. The medical standards require immediate reporting of a change in medical condition to include a change in prescribed medication. AF, W-2, Tab 23, Ex. 14 § (5)(C)(2). Further, reporting of a changed medical condition is required regardless of whether the change is temporary or permanent. *Id.* According to AT, it also is not relevant whether the individual prescribed medication takes it or even whether he filled the prescription, because if a doctor concludes that it was appropriate to prescribe a new or different medication, it indicates a change in condition. AF, W-2, Tab 52. An important focus, AT averred is the symptoms. *Id.* Therefore, AT testified an individual who has a new or changed prescription must report it and submit supporting documentation indicating what has changed, when it changed and

why. *Id.* AT explained that FAM are responsible for public safety and their team as well as for making split second decisions that can affect either or both. *Id.* He added they carry a gun. *Id.* Further, AT stated that FAMs in GBAs are still under the same medical standards, and a position such as the appellant's on the VIPR team is a Law Enforcement position with Law Enforcement duties. *Id.* AT confirmed this with the appellant in a series of emails dated October 6, 2017. AF, W-1, Tab 29, 4n at 9-12.

AT testified that when he receives a report of a change in medical status, to include a new prescription, he first determines whether the change requires restriction. AF, W-2, Tab 52. If it does, AT explained, he sends the employee the necessary documentation and guidance regarding what is needed to obtain the appropriate clearance, which is intended to help guide the doctor. *Id.* Further, AT testified that FAM Medical will typically request additional documentation and evaluation from a doctor. *Id.* Except in certain situations not present here, this is done at the employee's expense consistent with agency policy. AF, W-2, Tab 23, Ex. 14 § (5)(E); AF, W-2, Tab 52.

In the instant case, AT testified that SM contacted him in October 2017, to report that the appellant had alerted him of having a panic attack that day, and an earlier attack a few days prior. AF, W-2, Tab 52. In addition, AT averred SM reported that the appellant said he was prescribed anxiety and anti-depression medication and that he had been hospitalized during the past year. *Id.* It was AT's assertion that it was common to get such reports and he had been contacted 100s of times for similar reports including 100s of reports regarding panic attacks. *Id.*

Following his conversation with SM, AT testified, he requested that SM document the details of the incident, which he did. AF, W-1, Tab 29, 4n at 1; AF, W-2, Tab 52. SM sent the email on October 6, 2017 at 11:06, a.m. shortly after the interaction. AF, W-1, Tab 29, 4n at 1. Also at AT's request, he averred, SK submitted a written statement, which SK sent at 12:38 p.m. AF, W-

1, Tab 29, 4n at 2; AF, W-2, Tab 52. In both SM's and SK's reports, AT testified, the appellant indicated he did not feel well enough to work and went home. AF, W-1, Tab 29, 4n at 1-2; AF, W-2, Tab 52.

In between the two email reports, AT sent BB an email and stated that he had spoken to SM and SK, but had been unable to reach the appellant. AF, W-1, Tab 29, 4n at 3. AT wrote FAM Medical recommended taking the appellant's weapon and credentials. *Id.* Furthermore, he stated that FAM Medical recommended against clearing the appellant for any duty status pending additional review. *Id.* Yet, AT testified, he does not have any involvement in determining leave or pay status. AF, W-2, Tab 52.

In AT's practice note, he wrote that he was first contacted by SM at 10:30 a.m. on October 6, 2017. AF, W-1, Tab 29, 4n at 4. At 11:00 a.m., AT documented that he called the appellant's work and personal cell phones, received SM's email, and that he sent BB an email about the situation. *Id.* AT testified that sending the recommendation to the SAC, SFAM, and counsel was done in the normal course of business as was recommending the agency secure the appellant's weapon and credentials. AF, W-2, Tab 52.

Thereafter at 11:20 a.m., AT wrote that the appellant returned his call and discussed both the prior panic attack on October 3, 2017 as well as the one that occurred earlier on October 6, 2017, which left the appellant feeling it was not safe for him to work as a Law Enforcement Officer on those days. AF, W-1, Tab 29, 4n at 4-5. According to his notes and testimony, AT stated he also reported insomnia, paranoia shortness of breath, and dizziness. *Id.* at 4; AF, W-2, Tab 52. Although he acknowledged being prescribed medication, he denied that he was taking either the anti-depressant or anti-anxiety medication that was prescribed to him. AF, W-1, Tab 29, 4n at 4. After speaking to the appellant, AT believed that it was appropriate to have him receive a medical evaluation to enable a medical determination regarding his duty status. *Id.* at 5. Therefore, AT wrote he sent him a "[m]ental health letter." *Id.* AT sent that letter by email

at 12:15 p.m. on October 6, 2017, and instructed him to have the necessary documentation completed by a "licensed psychologist or psychiatrist based on a current evaluation." *Id.* at 6, 39-41. In his testimony, AT stated that the appellant supported the reporting to FAM Medical. AF, W-2, Tab 52.

After the initial contact with the appellant, AT testified that the appellant sent multiple emails and contacted him by phone. AF, W-1, Tab 29, 4n at 15-37. In several conversations and emails, the appellant referenced his court cases and claims of retaliation at times going into great detail about his allegations. *Id.* at 4, 7, 15-16, 26, 31-32. In AT's notes from the conversation on October 10, 2017, AT wrote that he kept asserting that he was "different than other FAM[s]." *Id.* at 7. AT asserted he told the appellant they were interested only in his health and "as medical professionals cannot and do not treat patients any differently." *Id.* AT added that the process is the same for all FAMs. *Id.* According to AT, he began to feel uncomfortable speaking to the appellant who "made many accusations and veiled threats." *Id.* Among the things AT quoted the appellant as saying was "'be careful, to be very careful' about what [AT said] because he 'has proof.'" *Id.* AT wrote that he found the appellant's statements "insulting" and his "demeanor" threatening. *Id.* AT added his belief he was trying to intimidate him. *Id.* Because of this discomfort, AT wrote in his practice notes he requested the appellant communicate with AT through email thereafter. *Id.* At the bottom of his notes, AT wrote he believed the appellant was recording him without his permission. *Id.* During his testimony, AT explained he felt the appellant telling him to be careful about what he said and asserting that he had proof, led him to this conclusion. AF, W-2, Tab 52. He asserted that he found the appellant's statements very threatening. *Id.* AT further explained that the appellant's behavior and statements were consistent with the appellant's stated symptom of paranoia. *Id.*

AT confirmed his perception of intimidation during his testimony at which AT averred that the appellant was very confrontational and made accusations

against AT that he was conspiring with the appellant's supervisors. AF, W-2, Tab 52. Further, AT asserted that the appellant kept saying "don't you know who I am?" *Id.*

The next day, October 11, 2017, the appellant sent AT a lengthy email and raised his litigation history and claims of retaliation. AF, W-1, Tab 29, 4n at 15-16. He also outlined his issues with obtaining the required medical evaluation and asserted he was seeking to clarify conflicting information he was given. *Id.*

Among the issues the appellant inquired about was the due date for his evaluation. AF, W-1, Tab 29, 4n at 7, 14. AT wrote that he did not give a due date. *Id.* at 7, 14. Instead, AT referred the appellant to his supervisor. *Id.* at 14.

Also during this time, the appellant inquired about his leave status from SM. AF, W-1, Tab 29, 4n at 18-19. Later on November 7, 2017, the appellant sent an email to another member of the FAM Medical team, Registered Nurse CL. *Id.* at 26. In that email, the appellant stated that he had already provided all relevant medical information and that his brief "faint-spell" on October 3, 2017 was not significant. *Id.* The appellant expressed his opinion that the report was made in retaliation for his raising an allegation regarding an incident in 2009. *Id.* The appellant alleged to CL that the person about whom he made the disclosure worked with SK in 2002. *Id.* In closing, the appellant thanked CL for her clarification of the evaluation form about which the appellant alleged his doctor had "concerns." *Id.* This was based on the appellant's communications with CL during AT's absence. AF, W-1, Tab 29, 4n at 30.

KT testified that the appellant asked the agency about leave while awaiting a FFD examination, and she stated she had not dealt with this type of situation before. AF, W-2, Tab 48. She was not in a decision-making position regarding the appellant's request and she provided the information to BB. *Id.*

AT testified he does not make recommendations about employees. AF, W-2, Tab 52. Instead, decisions are made in consultation with Dr. DW. *Id.* AT

averred that DW was not in the office when AT first received the appellant's medical report which was dated November 28, 2017. *Id.*; AF, W-1, Tab 29, 4n at 39-44. Therefore, AT asserted that he sent the information in an email. AF, W-1, Tab 29, 4n at 27; AF, W-2, Tab 52. In the email dated November 30, 2017, AT asked DW to review the appellant's evaluation. AF, W-1, Tab 29, 4n at 27. Thereafter, AT testified that DW cleared the appellant for light duty until he had a chance to review the full record and make a determination about reinstatement to full duty. AF, W-1, Tab 29, 4n at 45; AF, W-2, Tab 52. AT notified both the appellant and his supervisory chain in emails also dated November 30, 2017 about the appellant's clearance to return in a light duty capacity. AF, W-1, Tab 29, 4n at 28-29. DW completed his review and cleared the appellant to return to full duty on December 4, 2017. AF, W-1, Tab 29, 4n at 47-48, 51-52.

DT testified that he was made aware of the referral to FAM Medical for adjudication and that the appellant was on sick leave while the matter was being resolved. AF, W-2, Tab 24, Ex. S; AF, W-2, Tab 52. DT averred that FAM Medical makes the duty status determination, and if it is based on a personal medical condition the employee must use their own leave until it is resolved. *Id.* DT testified FAM Medical generally notifies him of these situations so he knows which of his employees are out of the office. *Id.*

The appellant testified that at the meeting at which he received the Cease and Desist letter, his voice was cracking and he was shaking and distraught. AF, W-2, Tab 40. Further, the appellant averred that he told SM and SK that he was prescribed medication, he had been to the emergency room, and had a panic attack. *Id.* As of October 6, 2017, he testified he had not reported all of his prescribed medication to FAM Medical. *Id.* Among the prescribed medications were Klonopin, which the appellant testified he was prescribed for depression. *Id.* The appellant testified he believed it was unnecessary to report the new medication because he was not taking it. *Id.*

The appellant testified that SM informed him he needed to undergo a psychological evaluation after the meeting. AF, W-2, Tab 37. After being given the Cease and Desist Letter, the appellant testified he was asked if he needed to take the rest of the day off and he said yes. *Id.* Further, he testified he asked if they wanted to take his firearm and they said no. *Id.* When he got home, the appellant reported he received a call from AT and the appellant stated that he told AT that the retaliation against him was getting extreme. *Id.* The appellant averred he told AT that he was not taking medication, which was AT's focus. *Id.* While he was on the phone with AT, the appellant testified SM called and said he needed to take the appellant's gun and badge based on the direction of FAM Medical. *Id.* After the call, AT sent a form for the appellant to take to a doctor, the appellant testified. *Id.* The appellant testified that he believed the psychiatric evaluation was unnecessary. *Id.* Still, if it was required, the appellant believed it should have been completed at the agency's expense and he should not have been required to use his leave while awaiting the examination. *Id.*

In response to the request for a psychological evaluation, the appellant testified, he called numerous clinics but it took him 2 months to find someone to perform the examination. AF, W-2, Tab 37. The appellant testified that SM told him to see anybody. *Id.* The appellant averred that he was out for a little more than a month. *Id.*

Based on the appellant's own testimony and the agency policy, I find strong evidence supported the agency decision to order the appellant to undergo a psychiatric FFD examination. AF, W-2 Tab 23, Ex. 14; AF, W-2, Tab 37. Specifically, the appellant acknowledged that he informed SM and SK that he was prescribed medication, had suffered panic attacks and had seen a doctor. AF, W-2, Tab 37. Consistent with the policy, I find a report was required. AF, W-2, Tab 23, Ex. 14 § (5)(c)(2). The policy required for the report of any change in a medical condition that could impact performance. *Id.* I agree with AT that this included the prescription for new medication even if the appellant chose not to

take it, because it represented a change in his medical condition. That FAMS Medical policy also provided that the employee bear the costs of the required examination. AF, W-2, Tab 23, Ex. 14 at 5.

AT, SM, and SK testified without contradiction that the appellant's situation was handled in the same manner as other similar cases. I find no basis for finding otherwise.

**BIAS/ANIMUS**

As stated in Part II, SM and SK were aware of the appellant's disclosures related to aviation and airport safety concerns as well as the appellant's litigation.

SM

SM testified that the appellant kept raising the food truck issue even after he had received a proper answer and there was nothing more to do. AF, W-2, Tab 44. I find this is not evidence of retaliatory animus under the WPEA because his disclosure regarding the food trucks was not protected for the reasons stated above.

SM also testified that he believed the appellant raised numerous complaints in an effort to receive a promotion, even though the appellant did not state that was the purpose. AF, W-2, Tab 44. Nevertheless, SM testified that when the appellant raised issues to him, he generally reported it up his chain of command. *Id.* This included the appellant's disclosure about barriers at DCA, the food trucks, the appellant's allegation about BB having an inappropriate relationship with a Field Office staff member as well as the appellant's allegations about KPi and RA. *Id.* SM testified he believed the latter two allegations he made to KT orally. *Id.*

SM asserted his belief that the appellant received preferential treatment because he was a whistleblower. AF, W-2, Tab 44. He explained that the appellant was not able to fly because of his notoriety as a whistleblower, and therefore was given a position on a VIPR team which was a coveted assignment

pursuant to an agreement with his counsel. *Id.* SM testified that a lot of FAMs do not want to fly because GBA assignments generally have better work schedules. *Id.* SM added that when he wanted to separate JL and the appellant again another employee would have been reassigned to cover flights, but because the appellant was a whistleblower, he received preferential treatment. *Id.*

In addition, SM testified the appellant was allowed to keep pushing matters even after he received an answer. AF, W-2, Tab 44. SM believed this was in contrast to other employees who SM averred would have been asked to stop after they received an answer. *Id.* While SM testified that the appellant had every right to raise questions and concerns, it was his persistence after receiving a response with which SM took issue. *Id.*

SM testified he did not know the specifics of the agreement surrounding the appellant not flying. AF, W-2, Tab 44. On the stand SM stated it was the appellant who informed him of the agreement between FAMS and OSC. *Id.* SM asserted that he did not know why anyone would agree to that arrangement. *Id.* SM was unclear in his testimony regarding exactly what he knew when. *Id.*

It was SM's opinion that KT and BB were not getting appropriate support. AF, W-2, Tab 44.

SM testified that he was present when ASAC SK issued the appellant a Cease and Desist letter based on his FPFB post regarding MD. AF, W-2, Tab 44. This was his only involvement with such a letter, SM testified. *Id.*

Evidence of SM's concerns about retaining both JL and the appellant on the same team was demonstrated in a September 26, 2017 email SM sent to KT who then forwarded it to BB for his "situational awareness." AF, W-2, Tab 24, Ex. R. In the email, SM wrote that he was concerned about the "high level of tension due to the ongoing investigation between all members of the VIPR C and [the appellant]." *Id.* SM wrote that he believed such tension could "lead to individuals doing unnecessary and uncharacteristic things." *Id.* SM explained that his opinion was informed by his experience as a Workplace Violence

Coordinator at a previous posting. *Id.* SM added that MN and JL "were especially nervous today" following the appellant's remarks about still having his job and weapon, while also mentioning the ongoing investigation. *Id.*

SM testified he believed the appellant's comments were inappropriate and unnecessary because he mentioned the investigation, as well as his possession of a firearm and his retention of his position with the agency, notwithstanding that investigation. AF, W-2, Tab 44. It was SM's opinion that if the appellant had been moved during the investigation as was normal the potential issue with co-workers would have been avoided. *Id.* Thus, SM testified his purpose in writing to KT was to have the appellant moved during the investigation. *Id.*

SM testified that he was not told how to manage the appellant and no one in his chain of command told him to report misconduct or to keep an eye on the appellant. AF, W-2, Tab 44. SM averred he did not scrutinize the appellant more closely than others. *Id.*

Similarly, SM testified that he has counseled more than 10 employees in addition to the appellant and has filed at least 10 ITRs, but could not recall the exact number. AF, W-2, Tab 44. SM was unsure how many of the counseling sessions he documented after the fact. *Id.* SM also could not recall whether any of those he counseled or wrote ITRs about were whistleblowers. *Id.* SM also testified that he reported other FAMs to FAM medical and to his knowledge the others were not whistleblowers. *Id.*

It was clear from SM's testimony that he was frustrated with what he perceived as the appellant's special treatment and additional consideration that he was given because of his status as a "whistleblower." I find that this could have served as motive to retaliate against the appellant.

Further, based on the appellant's regular complaints and continued litigation against the agency, I find it possible that SM had a professional retaliatory motive as a member of FAMS management. *See Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 15 (2022). Still, there was no evidence to

suggest that SM was personally implicated or affected by any of the appellant's disclosures or protected activity.

SK

SK testified that he spoke with the appellant about his lawsuit and Supreme Court case and knew as a result of his Supreme Court case the appellant was reinstated. AF, W-2, Tab 44. SK testified he knew about it from the appellant, and believed others knew based on the appellant's statements in the workplace. *Id.* According to SK, it was not something leadership put out to the workforce. *Id.* Still, SK acknowledged that he spoke about the appellant's Supreme Court case with perhaps 10 people. *Id.* SK testified that he also was aware of the appellant's concerns about cockpit barriers and explained it arose when he was discussing his design for a barrier. *Id.* The appellant also informed SK that he had testified before Congress, SK averred. *Id.*

SK testified he was never in the appellant's chain of command. AF, W-2, Tab 44. Still, SK averred that he may have signed the appellant's performance appraisal as a reviewing official as there was a point when he signed for all 250 staff. *Id.* According to SK, he believed as a reviewing official his role was to ensure that the write-up and the scoring were in alignment. *Id.*

SK testified that because he was not in the appellant's chain of command he normally disregarded the appellant's emails on which he was copied. AF, W-2, Tab 44. Similarly, he testified he did not focus on emails that were not specifically addressed to him that may have addressed the appellant. *Id.* One such email was written by KC, who SK testified was the administrative SFAM and sent a lot of emails related to the office. AF, W-2, Tab 24, Ex. FF; AF, W-2, Tab 44. The April 26, 2018 email, on which SK was copied, included pictures of the appellant's Twitter posts regarding his asserted role in security measures at DCA. AF, W-2, Tab 24, Ex. FF at 1-4. The email was directed to IACT--Admin,

and included an ITR about the appellant's posts. *Id.* at 1-22. SK testified he took no action related to this email. AF, W-2, Tab 44.

With respect to the Cease and Desist Order, SK testified he was told to issue it. AF, W-2, Tab 44.

Like SM, there was no evidence that SK was implicated or affected by the appellant's protected disclosures or activity. Further, SK was not within the appellant's chain of command and did not appear to interact with him regularly, and therefore his motivation to retaliate was likely less than SMs. Still, SK like SM was a member of FAMS management and thus consistent with recent case law, I find he had a professional motive to retaliate. *Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 15 (2022).

On the contrary, I find AT made his decision to recommend a FFD examination prior to knowing anything about the appellant's protected activity or disclosures. It was only after he began engaging in the process with the appellant that the appellant made him aware of his situation and claims of retaliation. I note there was no evidence that any agency official or manager ever communicated with AT about the appellant's whistleblowing activity. Further, it was the appellant who AT felt attempted to intimidate and harass him into specific actions and not agency officials attempting to persuade AT to act against the appellant. Therefore, I find AT had no motive to retaliate.

**COMPARATORS**

Neither party provided any evidence of comparators. The appellant implied through questions of CP on the stand that MD was a comparator. AF, W-2, Tab 56. Specifically, the appellant asked CP about why MD was not referred for a FFD after learning from the ROI that she had considered self-harm when she was in the LA office based on KT's statement. AF, W-1, Tab 29, 4f at 166; AF, W-2, Tab 56. CP testified he did not know whether it was reported or not. AF, W-2, Tab 56. CP testified that he received the report 6 months after the statement

was taken. *Id.* Further, he testified he did not know when MD considered self-harm, and there was nothing in the ROI that caused him to be concerned about MD's health at the time. AF, W-2, Tab 63.

KT reported in her OOI statement that MD told her that because of the appellant's bullying and harassment, she had gone through some "dark times" in the LAFO. AF, W-1, Tab 29, 4f at 166. KT continued stating that MD reported that she was much stronger than when she had contemplated suicide in her prior time serving in LAFO. *Id.*

I find this situation was not comparable to the appellant's situation. MD was reporting a past situation while the appellant was experiencing a present and observed medical condition.

Based on the foregoing, I find the agency has shown by clear and convincing evidence that it would have ordered the appellant to undergo a FFD examination even absent his protected disclosures and protected activity. Specifically as articulated above, I find strong evidence supports the referral to FAM Medical, which includes witnessing the appellant's physical state and his stated condition of having a panic attack. This evidence, coupled with his disclosure that he was prescribed medication to address anxiety and depression, made the decision to order a FFD examination appropriate and consistent with agency policy. The agency returned the appellant to duty very quickly after he complied with the order, and did not seek to delay his return to duty.

There was no evidence that anyone within the office of FAM Medical had any motive to retaliate, and instead AT testified without contradiction that the appellant's situation was handled in the same manner as other similarly situated FAMs. While I find that SM and SK had a professional motive to retaliate, and SM expressed frustration with the agency's lenient treatment of the appellant, I find this was insufficient to overcome the strong evidence in support of the agency's action. Therefore, I find the appellant failed to show that he is entitled

to corrective action with respect to the agency order that he undergo a FFD examination.

**DECISION TO REMOVE**

CP, SAC Management Branch, was the deciding official. AF, W-1, Tab 29, 4a. The decision to remove was dated March 21, 2019. *Id.* He testified that it was his decision to remove the appellant, and he received drafting assistance from OPR. AF, W-2, Tab 62. In addition, CP stated that he believed he requested that OPR provide him with a comparator list, but he was unsure if he received one. *Id.* CP testified that OCC assisted as well. *Id.* Still, it was CP's testimony that it was his decision alone and no one attempted to influence his decision. AF, W-2, Tab 63.

CP testified he considered all of the material relied upon to include the appellant's written and oral responses. AF, W-2, Tab 63. The appellant was granted an extension of time to respond, CP averred. *Id.* At the oral response, CP took notes. AF, W-1, Tab 29, 4d; AF, W-2, Tab 63. He testified that the appellant had counsel at the oral reply and both spoke. AF, W-2, Tab 63. Moreover, CP averred that other than Charge 3, the appellant did not deny any of the allegations contained in the proposal notice. *Id.*

While CP acknowledged he was aware of the appellant's protected disclosures and activity, he attested that they did not play a role in his decision. AF, W-2, Tab 63.

In this section, I first discuss the issue raised by the appellant that the investigation was unreliable because it was tainted by retaliatory animus. Thereafter, I discuss the proposal and then the appellant's response thereto. In the sections that follow, I provide a discussion of both evidence and analysis regarding the decision to remove him. My analysis includes information from Parts I and II, as well. For clarity, I have attempted to address each *Carr* factor under its own heading: Strength of the Evidence; Animus/Bias; and Comparators.

The investigation

During the cross examination of investigators KP and RY, the appellant attempted to demonstrate a bias in the investigative process. AF, W-2, Tabs 39, 45, 15, 81. Further, the appellant seemed to imply that the referral of the matter for investigation was similarly tainted by bias and animosity toward him by JL, KT, BB, and others. AF, W-2, Tabs 37, 38, 40, 43, 48, 52, 90.

Among the issues raised by the appellant regarding all of the agency's witnesses was the lack of recollection on the stand. Given the length of time between the events in this case, many of which date back to 2015 and the last of which took place in 2018, I find it unsurprising that memories have faded and accurate recollection was challenging 3-6 years after the fact. The appellant testified the events in question were seared into his memory, which is understandable given that the matters at issue were personal to him. AF, W-2, Tab 37. Yet for the other witnesses, several of whom had positions supervising many employees, working in several positions since working with the appellant, as well as having their own lives outside of work, it is not evidence of bias or animus that their memories as they relate to him have faded.

*How the investigation started*

It is undisputed that JL, a member of the FPFB group, viewed and reported the appellant's posts about MD. AF, W-1, Tab 29, Tab 4e at 3; AF, W-1, Tab 29, 4f at 18, 24, 30; AF, W-2, Tabs 44, 48. This report was the basis of the ITR dated July 5, 2017 that initiated the investigation into the appellant's alleged misconduct. AF, W-1, Tab 29, 4f at 18.

Prior to the ITR, MH, SM, and KT worked together to address the appellant's behavior and performance at the lowest level, first through general supervision by MH and then through a counseling and an interim performance review. AF, W-2, Tabs 44, 48, 64. Yet, when the appellant's behavior escalated to posting inflammatory material about a co-worker on the FPFB page, JL complained and SM and KT supported by BB took appropriate action to address the appellant's conduct by reporting it in an ITR. *See* AF, W-1, Tab 29, 4f at 18-34. I note this was after KT had two prior discussions with VIPR team members about the appellant's behavior. AF, W-2, Tab 48. I find that the failure to do so would have been inappropriate. As KT and SM testified, they had an obligation to protect others in the workplace and not merely to ensure the appellant's rights were protected. When JL reported the appellant's posts about MD she believed the post was harassing and SM agreed. AF, W-1, Tab 29, 4f at 102-03. I find this was not based on the appellant's disclosures or protected activity, but instead was based on the appellant's actions in making the post. Further, JL's conclusion regarding what the appellant's post meant was supported by the appellant's own OOI statements and the audio of his interview, which was that he intended to imply that MD engaged in sex with management officials. *Id.*; AF, W-1, Tab 29, 4L part 1 at 40:05-47:10; 47:22-48:30, 1:32. Thus, I find it was proper for JL to report the posts, and the referral was also appropriate.

Moreover, by including the appellant's chain of command in the decision-making as well as the OCC, I find the agency took extra care to ensure the appellant was protected from unwarranted action. The appellant throughout

the litigation sought to imply this was evidence of retaliation, but I find the contrary. Instead, I find had the agency failed to exercise care in its decision-making process as it related to the appellant, it would have shown an absence in good judgment. While it is true this meant the agency treated him differently, he was different, and indeed they afforded the appellant more consideration than other employees, and not less.

Specifically, the appellant was different in that he was physically capable of flying, but based on an agreement with OSC and his counsel he did not fly. AF, W-2, Tabs 38, 43, 48, 52. Further, the appellant regularly reported normal management decisions and actions to OSC, Congress, and the media and informed his third level supervisor that he would continue to do so. AF, W-2, Tabs 38, 43. Thus, I find the agency took extra care to ensure it made correct decisions, even routine ones, by going through the chain of command and OCC. AF, W-2, Tabs 44, 48. In this regard, I find the appellant got greater deference and consideration than other employees who were not whistleblowers. Even the appellant recognized that GBAs were coveted assignments, and he received one based on an agreement with the agency while others had to compete for them and often wait to receive such an assignment. AF, W-1, Tab 29, 4L part 1, 48:35-48:38; AF, W-2, Tab 48. I find such treatment is not a basis for finding retaliation.

Another example of deference given to the appellant was that he was not immediately moved during the course of the investigation. This was true even though KT and SM believed he should have been. AF, W-2, Tabs 44, 48. Further, DT asserted that was a normal practice, but in this case it was made difficult by the limitations of where they could assign the appellant. AF, W-2, Tab 52.

Moreover, I find it is not evidence of retaliation that KT requested for JL to provide supplemental written information for inclusion in the record 10 days after the initial ITR. *See* AF, W-1, Tab 29, 4f at 18; AF, W-2, Tab 24, Ex. L; AF, W-

2, Tab 48. Creating a complete record can take time. Nevertheless, it is important, and therefore going back to the source of the complaint to ensure accuracy and thoroughness is appropriate. RY testified that going back to the referring office for additional information or for other reasons is not unusual, and there was no evidence provided to the contrary. AF, W-2, Tab 67. Furthermore, FAMS management predicated its decision to forward the ITR on the finding of misconduct. AF, W-2, Tab 24, Ex. M. If FAMS management did not believe there was misconduct they would not have submitted the complaint. Yet even if that was FAMS management's conclusion, OOI still conducted the investigation, and management's conclusion was not a finding. AF, W-2, Tab 39. In addition, it was not the basis for the agency's actions in this case beyond referring the matter to OOI. AF, W-2, Tab 45.

I note that even though JL had reservations about the matter moving forward to an investigation, KT and BB correctly stated that it was their duty to report such allegations and KT did so by having SM draft an ITR as well as contacting JJ in the Office of Civil Rights and Liberties. AF, W-2, Tab 48.

*The investigation was not retaliatory or so tainted as to be unreliable*

KP and RY testified that they were aware of the appellant's Supreme Court case and knew it was a whistleblower case both through research and the appellant himself. AF, W-2, Tabs 39, 45, 67. Indeed, RY testified that the appellant's status as a whistleblower permeated everything for the appellant and he raised it constantly during his interviews, which is evidenced by the appellant's OOI statement and interviews. AF, W-2, Tab 67; AF, W-1, Tab 29, 4f at 201-62; AF, W-1, Tab 29, 4L.

Both KP and RY conducted some research into the appellant's past, which they testified was normal and not prohibited. AF, W-2, Tabs 39, 67. RY explained that knowledge of a subject is important to building a rapport with the witness. AF, W-2, Tab 67. Moreover, even if the research was conducted

because of the novelty of a subject having won a Supreme Court case, I find it is not evidence of animus, but rather curiosity. As the appellant intimated throughout the litigation, winning before the Supreme Court is a big deal. I agree. Thus, I find it is not unusual that anyone hearing about it would be curious and seek to learn about the case. Contrary to the appellant's assertion, I do not believe it is accurate to consider KP's internet searches regarding the appellant as "cyberstalking." AF, W-2, Tab 39. Moreover, there was no evidence that it impacted the investigation beyond making KP and RY capable of understanding the issue when the appellant raised it during his interview, which he did repeatedly. AF, W-1, Tab 29, 4L.

Thereafter, when the matter was being investigated, there is no evidence of improper or prohibited influence from the appellant's supervisory chain. DT testified that he was aware of the pending investigation, but not the details, which was normal. AF, W-2, Tab 52. RY and KP both testified that no one attempted to influence the outcome of the investigation, and that OOI ran the investigation independent of outside influences. AF, W-2, Tabs 39, 45, 67.

The appellant questioned why exculpatory witnesses were not sought out or interviewed. AF, W-2, Tabs 39, 45, 67, 81. RY and KP explained that they were assigned a matter to investigate and they questioned the witnesses they believed had relevant information regarding the matter being investigated. *Id.* I find the appellant's allegation that they failed to interview relevant witnesses on the matter being investigated to be without support. Yet, even if they had, he has had ample opportunity to submit such information throughout the process, including in his 63-page declaration included in the ROI. *See* AF, W-1, Tab 29, 4f at 201-62.

As further evidence of retaliation, the appellant alleged that KP and RY improperly broadened the investigation to include matters that arose during the investigation. This included the appellant's taking photographs at the Freedom Center and sending them to potential witnesses, speaking about the investigation

after being told not to do so, allegations about other posts, statements about BB, and misuse of his government phone.

Much of the information which led to the expansion of the investigation was based on statements from witnesses. For example, CK and DM both reported that the appellant contacted them about the investigation after his OOI interview. AF, W-1, Tab 29, 4f at 307, 310-11, 318, 321-22. Further, JL indicated she believed he also posted about another FAM he was "after," KPi. *Id.* at 329. According to RY, based on learned information during the investigation, they either incorporated it into the open investigation if it was related or referred it to the appropriate office. AF, W-2, Tab 67. I believe this was the appropriate response. Still, even if it would have been better to do something different such as ignore the information or seek to initiate investigation into others, I find following up on information related to the investigation while referring other information to other agency entities was not evidence of a retaliatory motive. Moreover, the appellant was free to seek redress and report matters he believed should be reported and he did so.

In addition, the appellant acknowledged that it was possible that he made the posts at issue in the investigation while at work. AF, W-2, Tab 29, 4L part 1 at 56:50-56:56. Therefore, I find the search of the appellant's phone was a legitimate avenue of investigation, and not evidence of a "fishing expedition" as the appellant alleged. *See* AF, W-2, Tab 45.

Based on the record evidence as discussed above I find no basis for concluding that the investigation was so tainted with retaliatory animus that it was unreliable. Further, even if the investigation's conclusions were unreliable it was not the basis for the action as discussed below. Instead, the majority of findings supporting the appellant's removal were based on the appellant's own statements made under oath. Therefore, even if the investigation was not without issues, I find that it does not undermine the strength of the evidence in support of the appellant's removal as to require a finding for the appellant.

Proposal

The proposing official in this case was TJ. AF, W-1, Tab 29, 4e at 2; AF, W-2, Tab 82. TJ worked in the Office of Professional Responsibility (OPR). AF, W-2, Tab 82. In her position, TJ testified, she is responsible for reviewing matters of alleged misconduct to determine whether there is a preponderance of the evidence to support taking disciplinary action. *Id.* If she finds the record supports taking action, she proposes discipline. *Id.* TJ averred that she has been the proposing official in over 500 cases and over 400 of those cases involved FAMs. *Id.* Further, TJ testified that of the 400 FAMs, she proposed that approximately 40 be removed from service. *Id.*

The proposal was dated June 8, 2018, and was issued to the appellant on June 14, 2018. AF, W-1, Tab 29, 4e at 2. TJ testified she based the decision on her review of the ROI and its attachments. AF, W-2, Tab 82. She averred the only audio recording in the ROI was the appellant's, and the rest of the statements were written. *Id.* TJ acknowledged in her testimony that the ROI witness statements indicated that there was an audio recording, but they were not included and she did not request them. *Id.*

TJ testified she requested, however, a copy of the appellant's signed NDA. AF, W-2, Tab 82. *Id.* She explained she wanted to be sure the appellant had signed it. *Id.*

Prior to receiving the case, TJ testified, she had not heard of the appellant. *Id.* In determining the appropriate action, TJ testified she considered the entirety of the ROI including his audio interview. *Id.*

TJ testified the appellant's behavior was very serious, especially for a law enforcement officer. AF, W-2, Tab 82. An additional consideration, TJ testified, was that the agency had previously counseled him in 2017, as well as the number of charges and specifications. *Id.* TJ averred that no one influenced her decision to propose the appellant's removal. *Id.*

*Charge 1: Inappropriate Comments*

Regarding the appellant's posts to social media, TJ testified she relied on the appellant's admissions. AF, W-2, Tab 82. TJ asserted she would have removed the appellant for Charge 1 Specifications 1-4, without more. *Id.* In sustaining Charge 1 Specification 5, TJ explained, she relied on the statements from TH and TE. AF, W-2, Tab 82.

In the proposal, TJ noted that JL reported to OOI that the appellant's inappropriate comments about MD introduced negativity into the workplace and that his comments caused a disruption to the operations of the office. AF, W-1, Tab 29, 4e at 4. In addition, TJ pointed to the extensive record of the appellant repeatedly disparaging MD to other coworkers for years. *Id.* Specifically, TJ cited statements from JL, MN, MH, TH, and TE in which they relayed that the appellant consistently spoke about MD and rumors pertaining to her sexual relationships. *Id.*; AF, W-1, Tab 29, 4f at 103, 338, 347, 369, 374. TJ also noted he made offensive posts on FPFB a few months after he had been counseled by his supervisors regarding his inappropriate behavior toward his colleagues. AF, W-1, Tab 29, 4e at 6.

In addition, TJ referenced MD's signed, sworn statement to OOI in which she indicated that she felt "demeaned," "humiliated," and "sickened" by the appellant's comments about her. AF, W-1, Tab 29, 4e at 5; AF, W-1, Tab 29, 4f at 289.

In the proposal, TJ stated that the appellant's conduct described in the Specifications violated agency policy. AF, W-1, Tab 29, 4e at 6. In particular, the appellant's conduct violated Section 9.N.(1) of Office of Law Enforcement (OLE) 1112, *Employee Responsibilities and Conduct*, which provides that,

> "[e]mployees shall not undermine teamwork or public confidence in OLE/FAMS by criticizing or ridiculing other OLE/FAMs, TSA, or DHA employees in a manner that is defamatory, obscene, unlawful, unprofessional, or which constitutes harassment based on gender, race, ethnicity, national origin, sexual orientation, or gender identity,

> and which impairs the operation or efficiency of the OLE/FAMS, TSA, or DHS."

AF, W-1, Tab 29, 4e at 6.

TJ stated in the proposal that the appellant had also violated Section 9.C.(1) of OLE 1112, which requires employees to be "patient, courteous, and respectful when dealing with each other." AF, W-1, Tab 29, 4e at 6. In addition, TJ cited Section 5.D.(3) of TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*, which requires employees to "exercise courtesy and tact" in dealing with their colleagues, even in the face of provocation. *Id.* Further, TJ noted that even if his comments were true, speech that disrupts official business or adversely affects the efficiency of the agency is prohibited under Section 1 of the Handbook to TSA MD 1100.73-5. *Id.* Moreover, TJ referenced Sections K and M of the Handbook, which prohibit sexual harassment and misconduct. *Id.* at 6-7.

*Charge 2: Investigation Interference*

TJ testified she similarly found the appellant engaged in Inappropriate Conduct During the Investigation, Charge 2, based predominantly on the appellant's statements and the video from the Freedom Center. AF, W-2, Tab 82. Specifically, TJ testified the appellant admitted to contacting potential witnesses, and he covertly took a photograph in the security office. *Id.* For the first specification under Charge 2, TJ testified the appellant admitted to the charged misconduct. AF, W-1, Tab 29, 4e at 7; AF, W-2, Tab 82. For specification 4 under Charge 2, TJ averred she relied on the appellant's admission that he contacted administrators of FPFB, of which DM was one, as well as the statement from DM. AF, W-1, Tab 29, 4f at 282, 321; AF, W-2, Tab 82.

It was TJ's opinion that the appellant should not have taken the photograph of the visitor's log, but she also focused on the appellant's distribution of the photograph during her testimony. AF, W-2, Tab 82. Further, TJ testified that she believed the appellant engaged in a pretense to obtain the photograph as she

stated in the proposal because he waited until the other person in the security office was not looking. *Id.* TJ explained that it was the totality of the situation that caused her to charge the appellant as she had regarding the photograph. *Id.*

In the proposal, TJ referenced the appellant's admission that he had taken photographs of the Freedom Center's visitor's log because he saw JL's name in the log. AF, W-1, Tab 29, 4e at 8. TJ wrote that "[this] admission makes clear that you took the photographs to identify who filed the complaint with OOI and to share that information with others." *Id.* TJ also noted that while the appellant alleged that others in the Agency lie "with impunity," he engaged in a pretense to obtain the photographs of the visitor's log. *Id.*

Similarly, for Specification 2, TJ testified she relied on the appellant's statement. AF, W-2, Tab 82. While for Specification 3, TJ explained she relied on the appellant's admission as well as CK's statement. *Id.* Specifically, in the proposal, TJ pointed to CK's statement that since his interview with OOI, the appellant sent him "intimidating" messages on social media and emails to his personal account. AF, W-1, Tab 29, 4e at 9.

For Specification 5, TJ averred that the appellant posted on the FPFB page that he was looking for the rat. AF, W-2, Tab 82. In addition, TJ testified that she relied on the statement by KT or BB in which she stated that SM contacted KT following a report from JL that there was a new post on the FPFB page about trying to find the snitch, although she did not say it was the appellant. *Id.* It was TJ's testimony that JL went to SM because she stated that she feared the appellant would retaliate against her. *Id.* Moreover, TJ averred, the appellant acknowledged in his statement he was trying to find out who had made the complaint in violation of FPFB rules, and that was why he had taken the picture. *Id.* Still, TJ testified she did not recall seeing the FPFB post about seeking the rat or snitch, but she averred she did not believe she needed to see the post to sustain the specification by a preponderance of the evidence. *Id.* TJ averred that it was

her assumption that the appellant had made the post based on the record evidence even though no one attributed it to him. *Id.*

In addressing Specification 6 during the hearing, TJ stated that she relied on BB's statement. AF, W-2, Tab 82. In that statement, TJ averred BB reported that SM told BB that the appellant conveyed that he was going to find out who had complained about him. *Id.*

Again, TJ testified that she would have proposed the appellant's removal based solely on Charge 2. AF, W-2, Tab 82. It was TJ's opinion that the appellant should have been upholding the agency's rules and not trying to interfere with the investigation. *Id.* She was especially concerned that the appellant did not appear to think he had done anything wrong. *Id.* According to TJ, she would have moved forward with the removal proposal even without Specification 5 of Charge 2. *Id.*

In the proposal, TJ asserted that the appellant's conduct under Charge 2 violated Paragraph F(1) of the Handbook to TSA MD 1100.73-5, which provides that employees must fully cooperate with all TSA and DHA investigations and inquiries. AF, W-1, Tab 29, 4e at 9. TJ also cited Section 6.E of TSA MD 1100.73-5, which provides that employees are expected to conduct themselves in a manner that does not adversely reflect on TSA, negatively impact its mission, or cause embarrassment to the agency. *Id.*

TJ expressed that the appellant's judgment and trustworthiness were called into question when he obtained the names of other FAM witnesses in the investigation and shared that information with potential witnesses. AF, W-1, Tab 29, 4e at 10.

*Charge 3: Misuse of Government Property*

In making the determination that the appellant misused his government equipment, TJ testified she relied on the appellant's statement and the forensic examination report. AF, W-2, Tab 82. In her testimony, TJ mentioned that the appellant said he was a connoisseur of PornHub, he visited the site frequently,

and he could have done so by accident. *Id.* TJ testified that the most important evidence was the appellant's own written and orally recorded statements. *Id.*

TJ reviewed the forensic report included in the ROI on the stand and agreed that the report indicated there were two ways the cookies on the appellant's phone from PornHub could have gotten on his phone. AF, W-1, Tab 29, 4f at 395; AF, W-2, Tab 82. One way was to visit the site directly, and the other was through a hosted ad on another site, TJ testified. AF, W-1, Tab 29, 4f at 395; AF, W-2, Tab 82. TJ averred she determined he visited PornHub.com, even if the appellant claimed that the adult material may have been a pop-up advertisement because a site like Sesame Street or Waze would not host an ad for PornHub.com. AF, W-2, Tab 82. In her testimony, TJ returned to his claim that it could have been a mistake, and his admission that he regularly visited the site. *Id.*

Specifically, TJ averred the appellant admitted to the misconduct and did not initially express remorse. *Id.* Even later in the process, when the appellant stated he was remorseful, TJ testified she doubted his sincerity. *Id.*

In sum, TJ testified the appellant admitted to committing much of the charged misconduct. AF, W-2, Tab 82. In instances in which the appellant did not admit to the misconduct, there was other supporting evidence and in most instances the appellant did not deny the allegations that were included in the proposal notice. *Id.*

Although TJ did not know of the appellant prior to receiving the case, she testified she learned during the course of reviewing the information that the appellant was a whistleblower. AF, W-2, Tab 82. She averred that she learned this from his statements in which he repeatedly mentioned his status as a whistleblower. *Id.* TJ testified, however, this knowledge did not influence her decision and she stated she did not click on links that were in the appellant's 62-page statement to the investigators that was included in the ROI. *Id.* She testified she did not believe it was a mitigating factor and was no evidence that he

did not engage in the charged misconduct. *Id.* Further, while TJ acknowledged on the stand that the appellant believed the investigation was retaliatory, she did not see any evidence to support that allegation. *Id.* TJ also did not believe that it would excuse the appellant's misconduct, she testified. *Id.* According to TJ's testimony, the appellant in his statement was focused on the past rather than on the conduct at issue in the investigation. *Id.* It was TJ's position, that she does not conduct investigations but rather her role is to review the ROI and determine whether to propose discipline. *Id.*

In the proposal, TJ considered numerous factors to determine the penalty for the appellant's conduct. AF, W-1, Tab 29, 4e at 11-15. TJ first considered the nature and seriousness of the appellant's misconduct and its relationship to his duties as a FAM and TSA's mission to protect "the Nation's transportation systems to ensure freedom of movement for people and commerce." *Id.* at 11. TJ noted that the appellant made numerous inappropriate comments and that his comments on FPFB were not the first time his colleagues complained about his behavior. *Id.* In fact, TJ wrote that employees have requested to be assigned to duties that would not require contact with him because numerous employees have described him as "hostile" and having no respect for fellow colleagues. *Id.*

TJ also noted in the proposal that the appellant's comments affected the opinions of at least one supervisor, MH. AF, W-1, Tab 29, 4e at 11. TJ referred to MH's statement that the appellant's "goal is to bring down the Agency," and that he wants the Agency to "fail." *Id.* TJ considered SM's statement that the VIPR C team was dysfunctional due to the appellant. *Id.* at 14.

The proposal from TJ noted that the appellant is held to a higher standard of conduct than non-law enforcement government employees and that the appellant failed to meet the standards of good judgment and reliability required of FAMs when he made the posts on FPFB and contacted witnesses during an on-going investigation. AF, W-1, Tab 29, 4e at 12. TJ also considered that the appellant was put on notice of the policies he violated because he completed the

*TSA Policy on Employee Responsibilities and Code of Conduct*, TSA MD 1100.73-5 in December 2015 and November 2016. *Id.* In 2016, the appellant received a 1-calendar day suspension for failing to maintain possession of his FAMS-issued equipment, which TJ considered in determining a penalty. *Id.* In addition, TJ considered that the appellant's supervisors had previously instructed him to maintain professional communications with his female colleagues. *Id.*

As for the mitigating factors, TJ considered the appellant's military service and his 26 years of federal service with over 16 years with FAMS. AF, W-1, Tab 29, 4e at 12. TJ also gave weight to his "Achieved Expectations" rating on his 2017 performance appraisal. *Id.* Although he wrote in his statement that he had "sincere remorse for potentially disparaging" FAM MD on FPFB, TJ did not consider the appellant's statement a mitigating factor because he followed his statement of remorse by continuing to disparage FAM MD. *Id.*

TJ referred to the *TSA Table of Offenses and Penalties* (May 15, 2014) to determine that removal was the appropriate action based on the appellant's misconduct. AF, W-1, Tab 29, 4e at 13. TJ considered the aggravating and mitigating factors and did not find the mitigating factors to be significant enough to overcome the aggravating factors. *Id.* Prior to reaching her decision to propose removal from service, TJ considered the appellant's potential for rehabilitation and determined that the appellant was "unwilling or incapable of correcting [his] behavior to meet the standards expected of any TSA employee." *Id.*

TJ testified that she researched similarly situated cases by looking at those charged with similar misconduct. AF, W-2, Tab 82. She could not recall on the stand the specific charges she used to identify comparators, but concluded that none were the same as the appellant regarding the totality of the charged misconduct. *Id.*

In citing the table of penalties, TJ could not explain why she referred to the Title VII related section for Charge 1, Specification 4, but rather indicated it was

appropriate for the charged misconduct overall. AF, W-2, Tab 82. TJ conceded that section of the table of penalties may not apply to Specification 4 of Charge 1. *Id.*

TJ acknowledged during her testimony that she received edits from her supervisor DK and the Office of Chief Counsel (OCC). AF, W-2, Tab 82. She could not, however, recall any specific edits, but stated any changes were not substantive, and added she did not recall anyone adding or subtracting any charges or specifications. *Id.* As to her lack of recollection, TJ testified that she drafted the proposal almost 4 years ago. *Id.* Receiving feedback on drafts from her supervisor and OCC was part of the normal review process for issuing proposals. *Id.*

The proposal provided the appellant with information regarding re-employment and the Employee Assistance Program. AF, W-1, Tab 29, 4e at 15-16. Also included in the proposal was a statement of the appellant's rights to include his right to reply orally and/or in writing within seven calendar days from his receipt of the proposal. *Id.* at 16. On June 14, 2018, the appellant signed an acknowledgment that he received the proposal. *Id.* at 17.

DT testified after having his recollection refreshed that he received notice that the agency issued the appellant a proposal notice. AF, W-2, Tab 52. Further, DT averred he knew that the appellant was taking extended leave, which was not usual but the appellant had a lot of carry over leave from the time he had been out. *Id.* Moreover, DT testified he knew the appellant was on restricted duty, but he again reiterated he did not know what discipline was proposed. *Id.*

The appellant testified that when he received the notice of proposed removal he was asked to and did surrender his gun, badge, and credentials. AF, W-2, Tab 37. According to the appellant, he read and signed the notice, and left the next day for a family vacation. *Id.*

The appellant's Response to Proposed Removal

The appellant responded to the proposed removal on August 17, 2018.[10] AF, W-1, Tab 29, 4c. The appellant attached a 74-page affidavit to his response along with numerous other attachments.[11] *Id.* In addition, he provided an oral response. AF, W-1, Tab 29, 4d.

In sum, the appellant argued that the proposed termination was an illegal abuse of authority by the agency. AF, W-1, Tab 29, 4c at 3. Moreover, he maintained that the agency's action violated the Whistleblower Protection Act WPA. *Id.*

Charge 1: Inappropriate Comments

In response to Charge 1, Inappropriate Comments, the appellant argued that his statements about FAM MD were true and that the agency did not provide evidence that his posts were inaccurate and that "statements about alleged misconduct cannot be irresponsible if proven true with numerous testimony from unimpeachable current and former Federal law enforcement officers." *Id.*

The appellant argued that the *Agency's Employee Responsibilities and Conduct* policy against verbally harassing colleagues was an NDA policy without the required addendum to clarify that it did not apply to disclosures of wrongdoing. AF, W-1, Tab 29, 4c at 4. Moreover, the appellant argued that it would be a violation of 5 U.S.C. § 2302(b)(13) to enforce the policy against him because he perceived his comments to be protected disclosures. *Id.* The appellant argued that even if an addendum existed, the agency could not

---

[10] Included in the appellant's response was information regarding his FFD examination. I have not included a discussion of this information in the FFD section as at the time he was removed that action had already occurred.

[11] The Board reviewed all of the more than 500 pages of the appellant's response to include his attachments. I note that at times it was hard to follow as the attachments were not accurately labeled. In addition, I note many of the documents were duplicates. *See, e,g.*, AF, W-1, Tab 29, 4c at 88-104.

demonstrate a violation of policy without first proving that his comments were not protected under 5 U.S.C. § 2302(b)(8).

The appellant asserted that all of his posts to FPFB were protected speech under the WPA because he believed that agency leaders violated the law. AF, W-1, Tab 29, 4c at 4. Specifically, the appellant asserted that MD and senior agency leaders engaged in a sexual quid pro quo that violated Title VII of the Civil Rights Act. *Id.* at 3. In his response, the appellant accused the agency of ignoring the existence of evidence with regard to MD and KPi.[12] *Id.* at 4.

The appellant referred to numerous attachments throughout his affidavit in an attempt to prove that MD's alleged affair with FD was true and that his disclosure was protected speech. In the affidavit, the appellant referred to emails from Supervisory Border Patrol Agent, JR, in which he allegedly witnessed MD and FD engaging in sexual activity in the mat room. AF, W-1, Tab 29, 4c at 86. The appellant noted that he provided his FB messages with JR to numerous investigators, including OSC and TSA's Office of Inspection Special Agents. AF, W-1, Tab 29, 4c at 4.

In the appellant's attachments, he included numerous emails in which he actively solicited information about MD's relationships and her qualifications for her transfer to the Office of Training & Development at FAMs headquarters. AF, W-1, Tab 29, 4c at 108. In an email sent to JP on February 27, 2010, the appellant noted that JP was a member of the training staff at the LA office and asked if he had any background on how MD could have landed the GBA. *Id.* JP responded that he never had an opportunity to see MD in training but that he could not recall hearing of a vacancy announcement when MD took the job in DC and noted that he would have wanted the opportunity to compete for it. *Id.* JP

---

[12] In the response, the appellant included numerous attachments related to KPi and the incident at the DC National Airport. I find the attachments offered by the appellant are not relevant to the case at bar as even if true, they do not address the charged misconduct. Therefore, I have not included a discussion of this information.

added, "[w]hen I heard that one of the qualifications for the position was sleeping with the SAC, I suddenly lost interest." *Id.* The appellant solicited information from JP again with an email on June 25, 2018 which asked JP to tell him whether MD was non-competitively selected for a GBA. *Id.* at 107. In response, JP added, "[p]retty much everyone at LAFO, definitely all of the training staff, knew that [MD] was involved in an affair with SAC [FD] . . . The whole [MD] issue was just a clown show." *Id.* The appellant also included JW's OPR complaint referral about a quid pro quo promotion between FD and MD. *Id.* at 166-67.

Similarly, the appellant attached email chains between himself and numerous other individuals to discover information about MD and FD's purported affair. AF, W-1, Tab 29, 4c at 147-67. In an email from February 26, 2010, the appellant asked PM whether he knew of MD's qualifications for the GBA in northern Virginia. *Id.* at 147. PM responded that "it was immediately understood among us instructors on staff that she won the position and was sent to DC in order to get away from [FD] . . . She was known to be—arguably—our most incompetent FAM." *Id.* The appellant sent a similar email to BK on July 11, 2011 in which he asked about MD's "mysterious 2004 'midnight transfer' from the LAFO to FAMS HQ training division." *Id.* at 149. BK provided a response similar to PM. *Id.* at 148. The appellant also included a series of emails between KB and the appellant in which KB gave the appellant leads on who to speak with regarding the alleged affair. *Id.* at 152. In these emails, the appellant demonstrated a pattern of soliciting negative information about MD. AF, W-1, Tab 29, 4c at 147-67.

The appellant also attached a February 2, 2016 email from JR that previewed a later complaint by the appellant about the 2007 Interpol conference in Brazil at which it was alleged GP was removed and "replaced with the live-in girlfriend (FAM [MD]) of former FAMS Deputy Assistant Director (DAD) PS." AF, W-1, Tab 29, 4c at 374. The email stated that RA was aware that MD "had no affiliation with Interpol liaison duties." *Id.* The email argued that allowing

MD to go to the conference was a "blatant malfeasance and waste of government money and resources." *Id.*

In the appellant's response, he attached his email to the Senate Committee on Homeland Security & Governmental Affairs in which he alleged that the SAC of the LAFO, AD, secretly had a baby with Atlanta FAM CW. AF, W-1, Tab 29, 4c at 402. The email sent on May 11, 2017 highlighted that AD was fired by the Drug Enforcement Administration for sexual relations with a subordinate. *Id.* The appellant attached the final decision in the case against AD from the Merit Systems Protection Board. *Id.* The appellant also included an email from April 2011 notifying agency employees that AD had been selected for promotion. *Id.* at 410.

*Comments about alleged BB affair*

In the appellant's response, he attached an email from February 13, 2017 in which he contacted DHS OIG and Congressional staffers about BB having an inappropriate relationship with a subordinate. AF, W-1, Tab 29, 4c at 481. Specifically, the email explained that CC told the appellant that MH told him that he caught BB in an inappropriate relationship at the Cincinnati Field Office which was why BB "never challenge[d] bad decisions from Headquarters officials." *Id.* In an email from a few days earlier, the appellant alleged that BB's inappropriate relationship was linked to why BB "detailed [him] to work for a historically troubled SFAM in some Freedom Center section where no other detailee ha[d] been needed." *Id.* at 482.

*Social Media Policy*

Also in his response, the appellant argued that the agency's social media policy did not apply to his FPFB posts. AF, W-1, Tab 29, 4c at 5. Moreover, he argued that FPFB was not a form of social media because it was a "restricted chat group" that disqualified it from standard social media policies. *Id.* With respect to MD and KPi, the appellant contended that he did not intend to confront them through his posts and that he did not actively try to make them see what he had

posted. *Id.* The appellant emphasized that other members of the secret group shared his posts with MD and KPi. *Id.*

In the affidavit, the appellant openly questioned JL's credibility due to her past history of demotions. AF, W-1, Tab 29, 4c at 32. The appellant asserted that JL violated FPFB rules when she reported his posts about MD to agency leadership. *Id.*

Charge 2: Investigation Interference

In response to the agency's charge that the appellant distracted GC to take an unauthorized photograph of the Freedom Center's visitor log, the appellant denied GC's accusation that the appellant fooled him upon entrance into the Freedom Center. AF, W-1, Tab 29, 4c at 5. In addition, the appellant asserted that GC made an empirically false accusation against the appellant when he stated that the appellant told him that he was coming into Freedom Center to socially meet TSA OOI Special Agent RY. *Id.* The appellant argued that he had no reason to say that he was paying RY a social visit because he was following orders to cooperate with the OOI investigation. *Id.* The appellant also stated that contrary to GC's statement, he actually called RY when he was in Freedom Center's visitor office.[13] *Id.* at 6. Further, the appellant accused GC of not being a credible witness. *Id.* at 6.

The appellant, however, did not deny taking a photograph of the visitor's log with his personal cell phone. AF, W-1, Tab 29, 4c at 5-6. His response noted that if he had not taken those photographs, he would not have evidence of the false allegations by two agency employees that he accused of violating the law.

---

[13] The appellant attached an email exchange with RY on September 19, 2017. AF, W-1, Tab 29, 4c at 392. The emails demonstrated a back and forth between the appellant and RY. *Id.* RY noted that he would call the appellant later that day to fill him in on the investigation. The appellant also included a call log from September 20, 2017. *Id.* at 401. The call log showed that the appellant received two incoming calls at 2:34pm from two different numbers. *Id.* The appellant spoke with the (301) area code caller for 8 minutes. *Id.*

*Id.* In his affidavit, he noted that he had seen other FAMs take photographs of documents on their phones. [14] *Id.* at 49. Further, he argued the agency did not allege any legally valid misconduct because he was just trying to learn who his accusers were and to communicate with witnesses to advance his defense during a potential criminal investigation. *Id.* at 6. The appellant maintained that under the due process clause of the U.S. Constitution, he believed he had a right to know and confront his accusers. *Id.*

The appellant attached a FB private exchange between himself and SS from September 19, 2017 in which he told SS that he had been "ordered" by a TSA-OOI Special Agent to be interrogated the next day for making "disparaging comments" on FPFB. AF, W-1, Tab 29, 4c at 138. In the message sent a day before the appellant's interview with OOI, the appellant gave SS RY's name and asked him to tell him the date and time of his post about RA on FPFB. *Id.*

In addition, the appellant attached to his response an email chain between EA and RY that EA had forwarded him on October 17, 2017. AF, W-1, Tab 29, 4c at 206-209. EA's October 8, 2017 email to RY accused him of conducting more than an "administrative inquiry" into the appellant's misconduct. *Id.* In a subsequent attachment, the appellant included an email between himself and RY and noted that he made numerous verbal and written sworn statements that RT "categorically lied in her November 10, 2016 affidavit."[15] *Id.* at 434.

The appellant also argued that Section 6.E of TSA MD 1100.73-5 is a restriction on speech that would make every whistleblowing disclosure grounds for termination. AF, W-1, Tab 29, 4c at 6. As such, the appellant argued that the

---

[14] The appellant recounted that he witnessed agency employees take photos of agency documents with their personal smartphones hundreds of times.

[15] The appellant included numerous attachments accusing RT of committing criminal perjury. The appellant's attachments about RT were considered and are not relevant to this appeal.

lack of an anti-gag addendum made the agency's charge an illegal prohibited personnel practice. *Id.*

In his attachments, the appellant included an October 4, 2017 Cease and Desist Directive issued by CP that ordered him to stop talking to his colleagues about ongoing OOI investigations. AF, W-1, Tab 29, 4c at 210-11. In the directive, CP noted that he received reports that the appellant made inappropriate comments to, or in the presence of, colleagues that were perceived to be harassing in nature and/or made with the intent to intimidate witnesses to an ongoing OOI investigation. *Id.* The directive referred the appellant to Section G of the TSA MD 1100.73-3 *Anti-Harassment Program*, which requires TSA employees, including FAMS, to avoid behavior that has the effect of creating an intimidating or hostile work environment. *Id.* The directive also noted that the appellant had to adhere to TSA MD 1100.73-5 *Employee Responsibilities and Code of Conduct*. *Id.*

Charge 3: Misuse of Government Property

In response to Charge 3, viewing pornography on his government-issued cell phone, the appellant asserted that he was not in possession of the government-issued cell phone during the time the OOI investigators accused him of viewing PornHub.com. AF, W-1, Tab 29, 4c at 6-7. The appellant noted that during the time he was allegedly viewing pornography, he was driving a government car on duty while his travel companion had possession of the phone for Waze navigation. *Id.* The appellant further argued that the agency lacked reproducible evidence to support the allegation and that the amount of time he was charged with viewing pornography was trivial. *Id.* at 7. The appellant noted that he frequently visited PornHub.com off duty and that visiting the website for approximately six seconds out of two years and four months did not warrant discipline. *Id.*

VIPR Assignment

With his response, the appellant attached TSA's interim response to the August 12, 2016 Congressional inquiry regarding his assertions of whistleblower retaliation. AF, W-1, Tab 29, 4c at 437. The TSA's interim response explained that the appellant's assertion that he was assigned to an empty room with no duties since February 26, 2016 was inaccurate and did not correctly portray his assigned duties. *Id.* at 441. Moreover, the TSA response noted he was assigned to temporary duty assignments because he had desired to be removed from flight status. *Id.* The response then enumerated his job duties and assignments while he worked on assignment at the TSA Emergency Preparedness Section and the WFO VIPR team. *Id.* at 441-42.

Whistleblower Retaliation Claims

In his response, the appellant expressed that the September 12, 2017 OOI investigation was taken due to his WPA protected activity. AF, W-1, Tab 29, 4c at 7. Specifically, the appellant argued that his posts on FPFB were disclosures about sexual misconduct and that he made "identical" disclosures to the media, FBI, DHS-OIG, OSC, Congress, MSPB, the U.S. Court of Appeals to the Federal Circuit, and the Supreme Court. *Id.* The appellant further argued that the opening of the OOI investigation constituted three prohibited personnel practices by violating 5 U.S.C. § 2302(b)(8), and 5 U.S.C. § 2302(b)(9)(A)(i) and (C). *Id.*

The appellant argued that retaliatory investigations are actionable under the WPA due to their "chilling effect and for setting the stage to terminate or otherwise act against the employee." AF, W-1, Tab 29, 4c at 8. The appellant argued that the TSA-OOI investigation's mission was to investigate him due to his disclosures and that the investigative report became the basis to terminate him for misconduct. *Id.* Therefore, the appellant argued, the agency's proposal to terminate is actionable under 5 U.S.C. § 2302(a)(2)(A)(iii). *Id.*

Moreover, the appellant argued that his FPFB posts were protected activity under § 2302(b)(8) because he had a reasonable belief that his posts evidenced illegality and abuse of authority. AF, W-1, Tab 29, 4c at 8. While the appellant argued that the FPFB posts about MD were the contributing factor for TSA-OOI's investigation, the appellant referenced his other WPA disclosures on 17 different topics. *Id.* at 9.

The appellant then argued that there is a strong nexus between his purported WPA protected disclosure about MD and KPi and the OOI investigation. AF, W-1, Tab 29, 4c at 9. The appellant asserted that OOI's stated reason for existing was to investigate his disclosures on KPi and MD. *Id.* In addition, he stated that all of his disclosures since his May 3, 2015 reinstatement were within two years of the September 12, 2017 OOI investigation. *Id.* The appellant also pointed to his "win" at the Supreme Court and the numerous Congressional investigations that he sparked as circumstantial evidence that the agency had a motive to retaliate against him. *Id.* at 10.

The appellant also argued that the agency pursued discriminatory treatment against him because other agency personnel distributed the FPFB posts outside of the restricted chat group but none to his knowledge were placed under investigation, disciplined, or admonished. AF, W-1, Tab 29, 4c at 10. Moreover, he argued that the agency promoted rather than disciplined his colleagues who "violated chat room secrecy." *Id.* More significantly, he argued the agency waited roughly six months after the issuance of the TSA-OOI's Report of Investigation and after the final OSC mediation settlement negotiations began to propose termination. *Id.* at 11. Thus, the appellant hypothesized that the agency had a motive to issue the proposed termination as a "pressure tactic" for him to waive or agree to a lesser relief. *Id.*

In the attachments to the appellant's response, he included a May 24, 2016 Letter of Counseling (LOC) to TS for inappropriate and unprofessional conduct. AF, W-1, Tab 29, 4c at 201. The purpose of the LOC was to make TS aware of

policies he needed to follow after sharing an inappropriate video with the appellant who shared it with others who found it offensive. *Id.* The LOC was not a formal disciplinary action against TS. *Id.* at 202. The appellant also attached his award letter from April 28, 2004 when he was nominated for an On the Spot Award. *Id.* at 322. He also included a Special Recognition Award given to him in October 2017 when he helped law enforcement chase a murder suspect. *Id.* at 480.

The appellant attached several email chains between himself and HP which show that HP also helped to spread rumors and collect information about MD and FD. AF, W-1, Tab 29, 4c at 386-88. HP, however, did not spread the FPFB posts around the office. *Id.* On February 21, 2010, HP sent an email to numerous FAMs and expressed that "the Office of Special Counsel and the LA FBI Political Corruption Unit [] are looking for anyone and everyone with more to add to the story" about MD and FD's alleged affair. *Id.* at 387. In an email sent from HP to the appellant a few days later, HP stated that everyone is "so deathly afraid" of speaking about MD and FD's relationship. *Id.* at 151. HP's email detailed the alleged "sushi dinner" in which FD's wife learned of MD and her affair with FD. *Id.*

In the appellant's affidavit, he claimed that the agency was under "exceptional" pressure to fire him due to his whistleblower disclosures in 2003 that caused the current Secretary of DHS, KN, to respond to "congressional outrage." AF, W-1, Tab 29, 4c at 13. The appellant also alleged that SAC BB had an extramarital affair with KN and that he has been his primary retaliator since his reinstatement in 2015. *Id.* at 14.

Protected Disclosures

In the appellant's affidavit, he claimed he made seventeen protected disclosures for which the agency retaliated against him. AF, W-1, Tab 29, 4c at

62. I made findings about the appellant's Protected Disclosures as discussed in Parts I and II of this decision.

*Sexual Misconduct and Quid Pro Quo*

In the attachments, the appellant included his OSC complaint from 2010 in which he alleged an "[i]mproper fraternization between the most senior manager and a journeyman federal law enforcement officer, a conspiracy among high-level managers and senior executives to cover-up unethical and/or illegal activity and quid pro quo arrangements, sexual harassment . . ." AF, W-1, Tab 29, 4c at 187. The appellant also attached an email sent to OSC on August 1, 2018 in which he detailed a new sexual assault charge against PS and linked it to PS's alleged affair with MD, which he asserted is directly related to Charges 1 and 2 of his proposed removal. *Id.* at 399. The appellant attached an email to OSC in which he explained that he solicited information from JC in Boston and complained that RT was retaliating against him. *Id.* at 430. Then, the appellant included an email from May 7, 2018 to RY and KPi in which he alleged that RT committed perjury and noted that the agency is looking to promote her. *Id.* at 431-32.

*Lack of Barriers at Terminal A DCA*

The appellant asserted that he made a disclosure to CS on December 30, 2016 regarding the lack of barriers at Terminal A of DCA airport. AF, W-1, Tab 29, 4c at 74. The appellant also made the disclosure to the TSA Inspection hotline on July 8, 2018 and to OSC on October 29, 2018. *Id.* In the affidavit, the appellant claimed that the agency retaliated against him using the same actions detailed in the first disclosure. *Id.* The appellant also noted that MH told him that the TSA Headquarters ignores disclosures from the appellant. *Id.* at 75.

*Synthetic Opioids Ability to Incapacitate an Aircraft*

The appellant alleged that on February 15, 2018, the appellant disclosed via email the potential for synthetic opioids to incapacitate a commercial aircraft. AF, W-1, Tab 29, 4c at 79.

*Body Scanner Loophole*

In his response, the appellant noted that six months after his concerns about passengers bypassing security checkpoints were emailed to Congress, airline passengers were not able to opt out of security machine screening checkpoints. AF, W-1, Tab 29, 4c at 74. The appellant argued that he experienced retaliation after making this disclosure to Congress. *Id.* *Inward Opening Cockpit Doors*

The appellant testified before Congress regarding safety issues with inward-opening flight deck doors without a secondary barrier. AF, W-1, Tab 29, 4c at 77. The appellant connected this disclosure to retaliation against him. *Id.*

Oral Response Summary

CP summarized the appellant's oral response. AF, W-1, Tab 29, 4d. In his oral response, the appellant enumerated his disclosures including his concerns about the lack of secondary barriers and the lack of vehicle barriers at Terminal A DCA. *Id.* at 1. In his oral response, the appellant also alleged that the OOI investigation and ordered psychological exam were retaliation for his disclosures. *Id.*

In response to Charge 1 – Inappropriate Comments: The appellant asserted that the agency failed to determine whether his posts about MD and FD were inaccurate and that he had a reasonable belief that his posts were accurate. AF, W-1, Tab 29, 4d at 2. He also responded that he engaged in protected speech. *Id.*

In response to Charge 2 – Investigation Interference: The appellant alleged one of the witnesses lied under oath. AF, W-1, Tab 29, 4d at 3. The appellant also noted that he was "ordered" to attend the OOI interview at the Freedom Center. *Id.* He also stated that he merely took a picture of the visitor log and that it was not that big of a deal. *Id.*

In response to Charge 3 – Misuse of Government Property: The appellant averred that he was not in possession of his phone at the time because he was

driving and his partner was using the WAZE app for navigation. AF, W-1, Tab 29, 4d at 4. He also noted that the link was only active for six seconds so it was not something he should be punished for. *Id.*

**STRENGTH OF THE EVIDENCE**

The first *Carr* factor focuses on the evidence as it stood at the time of the action and in light of what agency officials knew at the time they acted. *Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 13 n.5. Such a consideration, however, should not be to the exclusion of any other evidence leading up to the challenged personnel action that may tend to undermine the strength or legitimacy of the agency's actions by suggesting an improper motive, which is the second *Carr* factor. *Id.* Legal or procedural errors in taking the action, if any, however, do not "shed light" on the legitimacy of the agency's actions in an IRA appeal because the dispositive inquiry is whether the agency would have taken the same course of action in the absence of the appellant's protected whistleblowing. *See Wilson,* 2022 MSPB 7, ¶ 46. Thus, legal or procedural errors that would have occurred regardless of the appellant's protected whistleblowing do not provide a basis for granting corrective action under section 1221(e). *Id.*; 5 C.F.R. § 1209.2(c).

Moreover, even if a disclosure of information is protected under 5 U.S.C. § 2302(b)(8), an employee's inappropriate conduct surrounding such a disclosure is not. *See Kalil v. Department of Agriculture*, 479 F.3d 821, 825 (Fed. Cir. 2007) (the character of the disclosure supplied the evidence supporting the agency action); *See also Duggan v. Department of Defense*, 883 F.3d 842, 846-47 (9th Cir. 2018) (employer may require "basic civility" even in the context of communications that could potentially be protected; and disruptive or disrespectful communications may form the basis for discipline). There is no requirement under 5 U.S.C. § 1221(e)(2) that the adverse personnel action be based on facts completely separate and distinct from protected whistleblowing

disclosures. *Watson*, 64 F.3d at 1528. Wrongful or disruptive conduct is not shielded by the presence of a protected disclosure, and the character and nature of a disclosure can still be a legitimate basis for discipline. *Greenspan*, 464 F.3d at 1305; *Hamilton*, 115 M.S.P.R. 673, ¶ 12. The WPA was not meant to shield employees from their own misconduct. *Carr*, 185 F.3d at 1326.

*Charge 1 - Inappropriate Comments*

*Specifications 1-2 Posts related to MD*

The posts at issue in these specifications were detailed in Part I at page 23. CP testified that he found it improper that the appellant posted derogatory sexual information on social media that demeaned and ridiculed MD, and added that MD felt harassed. AF, W-2, Tab 55. Moreover, CP averred that other women took offense to the post, including JL who reported and believed the posts were demeaning to women. *Id.* CP asserted that the post was very offensive for any TSA employee. *Id.*

CP testified he was not familiar with emojis and absent an explanation in the investigation he would not have known. AF, W-2, Tab 55. Yet, CP explained that the dialogue that followed the post was so clear that the meaning of the post was understood. *Id.* CP continued in his testimony and averred that it was the entire post that was offensive not just the emojis. *Id.* While the appellant proposed that the picture itself was not sexual in nature, CP testified that the appellant made it very clear what the image was intended to show both in his oral and written statements to OOI. *Id.*

This included explaining the meaning of each emoji for both this specification and those that followed. AF, W-2, Tabs 56, 62. Moreover, the appellant described the emojis as representing a sex act. AF, W-1, Tab 29, 4L part 1 at 40:05-47:10. CP testified that it was irrelevant to him whether the sex act was oral sex as proffered by the investigator or some other type of sex. AF, W-2, Tab 63. This was also understood by others who saw the post such as SM,

who wrote in his statement that the emojis represented sexual favors. AF, W-1, Tab 29, 4f at 148.

Further, CP explained he considered MD's feelings in making his decision in addition to all of the other relied upon material. AF, W-2, Tab 55. CP acknowledged that it was possible MD did not see the post prior to OOI interview. *Id.* It was CP's recollection that JL had told her about it and then the investigators described it to her. *Id.* CP disagreed with the appellant's premise that this meant it was the agency that inflicted the harm and not the appellant. *Id.* CP acknowledged on the stand that at his deposition he stated that MD had seen the post, which he realized was an error. AF, W-2, Tab 56. CP averred that during the deposition he had asked to see MD's statement and asked again at the hearing. *Id.*

CP testified he based his decision on the appellant's admissions and his conclusion that the post was inappropriate. AF, W-2, Tabs 56, 65. He averred that the record evidence supported his conclusion that the post was inappropriate, and several witnesses found it inappropriate, including KT, JL, and MD. *Id.* Thus, CP testified that his conclusion was supported by a preponderance of the evidence. *Id.*

CP also testified that he knew the appellant made allegations about MD a decade ago. AF, W-2, Tab 55. Further, CP understood the appellant restated those allegations in his statements to OOI. *Id.* When asked about a FB post involving benefits for sexual favors, CP testified that it was not merely what the appellant said but the manner in which he said it that was at issue in this case. *Id.* In the deposition portion the appellant had CP read that the FB post was not intended for someone to look into, but rather was done to show that the subject of the post was giving sexual favors in a way he could not. *Id.* Further, the appellant stated, CP averred, that the FPFB site was private and not intended to be looked into as there was no investigative responsibility assigned to the site. *Id.* CP acknowledged that the appellant's allegations were serious. *Id.* He

testified, however, that they involved events that occurred many years ago and appeared to be based on rumors. *Id.* Moreover, CP testified he understood from the appellant that he had already reported the matter. *Id.* Again, CP testified that it was his assignment to adjudicate the appellant's alleged misconduct, which was what he did. AF, W-2, Tab 55. The alleged relationship occurred in 2003-04 timeframe, and it was CP's conclusion that there was no nexus between that and the appellant's alleged misconduct. *Id.*

CP testified the appellant claimed that MD had been rewarded with assignments and career enhancing positions and his career was ruined because of his MSPB case. AF, W-1, Tab 29, 4f at 251; AF, W-2, Tab 63. Again, CP explained that he relied on the FPFB posts, the appellant's statements, and the audio of his OOI interview to support his conclusions. AF, W-2, Tab 63.

CP could not attest to how many people saw the post about MD, but he averred that there were more than 500 people who were members of the FPFB group. AF, W-2, Tab 55. Yet, CP testified he relied upon the appellant's admissions to engaging in the conduct as charged and showing little remorse. *Id.*

In the decision letter, CP acknowledged that the appellant did not perceive his comments as misconduct because he believed the content of his posts to be true. AF, W-1, Tab 29, 4a at 5-6. CP, however, did not find the appellant's rationale to excuse his misconduct. *Id.* at 6. Specifically, CP wrote that the appellant's choice of words, pictures, and use of emojis were an attempt to demean, ridicule, and belittle colleagues. *Id.* CP also noted in the decision letter that the appellant was previously warned against making disparaging comments about other FAMs and that the appellant made these posts years after the incidents allegedly occurred and had been reported to multiple agencies. *Id.*

The appellant's defense in his response to the proposed removal was that his statements about MD were true and therefore protected. AF, W-1, Tab 29, 4c at 3. As discussed above, I find the appellant's disclosures regarding MD were not protected and even if they were, it would not justify the means by which the

appellant conveyed the information, i.e. showing a woman cowering under a desk and implying through emoji's that she engaged in sexual conduct. *See* AF, W-1, Tab 29, 4f at 24, 30. The appellant admitted this was the meaning of his posts. AF, W-1, Tab 29, 4L part 1 at 47:22-48:30; 54:40-55:30; 1:32. Based on the appellant's admissions, without more, I find the agency has shown he made inappropriate comments.

I find the appellant's posts about MD to have been mean spirited, demeaning, and based on years old rumors. The posts were made on the FPFB which had over 500 members, including current and retired FAMs according to the appellant. AF, W-2, Tab 37. The appellant attempted to use the fact that the FPFB was private as a basis for finding that disciplinary action for the posting was improper. AF, W-1, Tab 29, 4c at 5. Yet he acknowledged that the site had over 500 members. AF, W-2, Tab 37. He appeared to make contradictory arguments. The appellant argued that the site was one on which he made disclosures - made public allegations of misconduct; or on the other hand, he argued it was private and he was not attempting to publicize his allegations of misconduct. AF, W-1, Tab 29, 4c at 2-5.

Further, I find unpersuasive the appellant's assertion that he did not specifically name MD in the posts. Even if, contrary to the evidence, no one could identify MD from the posts based on her position or other information, making the posts about any co-worker would have been inappropriate. Again, his disclosure could not have been meant as a specific allegation of wrongdoing absent identifying the alleged wrongdoer. Yet, even if it was meant to be a disclosure, I find it was unprotected and the manner of the disclosure was so offensive that it constituted misconduct regardless.

I find it disingenuous that the appellant would assert that it was OOI that caused MD's distress as they are the ones that actually showed MD the post. AF, W-2, Tab 45. The appellant mounted a year's long campaign against MD, and shared his opinion and rumors about her to co-workers and online to 500 co-

workers and former co-workers. The idea that this would not get back to MD or be offensive and cause distress to her and others demonstrates a complete lack of awareness and judgment on the part of the appellant.

*Specification 3 – Post related to RA*

Details of the post regarding RA were described at page 32 above. *See* AF, W-1, Tab 29, 4f at 30. CP testified that he considered the posts based on the text and emojis. AF, W-2, Tab 62. The appellant asked CP during his testimony whether, absent the emojis, could the post have been about wasting government funds. *Id.* CP responded that it could not because that was not what happened here based on the appellant's written statements and the audio recording of his OOI interview. *Id.* During the deposition, CP attested that he could not state the appellant's intent, but at the hearing he stated prior to testifying he went back and listened to the audio of the appellant's interview. *Id.*

While questioning CP, the appellant accused CP of providing a de facto explanation for his decision. AF, W-2, Tab 62. After denying this, CP testified that the appellant's intent was not relevant, but instead it was the content of the post that was relevant. *Id.*

CP testified that he considered the emojis and the appellant's explanation thereof in making his decision. AF, W-2, Tab 62. It was CP's testimony that the appellant's posts referred to the sexual relations of other employees, which he found inappropriate. *Id.*

For further detail, CP stated he would need to see his decision letter for complete accuracy. AF, W-2, Tab 62. CP did not dispute that the post at issue in Specification 3 did not include a baguette or a sick face emoji. AF, W-1, Tab 29, 4f at 141, 271, 331; AF, W-2, Tab 62. Instead, he testified that if he made such references in the decision it was an error. AF, W-2, Tab 62. While CP stated that if he had seen the discrepancy prior to issuing the decision he would have corrected it, but that it would not have changed the outcome. *Id.* CP also noted that the appellant had the opportunity to refute the specification in his response

and did not do so. *Id.* Instead, CP explained that the language came from the appellant's statement and related to his FPFB posts although perhaps not this one. *Id.* Further, CP indicated that the baguette and the hot dog had the same meaning – male genitals as explained by the appellant. AF, W-2, Tab 63. Specifically, the appellant wrote in his affidavit:

> The bread baguette represents the genitals of [FD] and [PS] that were inserted into [MD]; the droplets represent the bodily fluids [FD] and [PS] exchanged with [MD]. The bikini represents the 2007 trip MD [took with PS and RA] to the beach city of Rio de Janeiro, Brazil. The lipstick marks represent the tongue-kissing between [MD] and [FD … ]. The sick faces represent repulse displayed and the disgrace [FD] and [PS] brought on the FAMS.

AF, W-1, Tab 29, 4f at 257 n. 23. Thus, even absent the sick face and the baguette, the other emojis and text would have been sufficient to sustain the specification, CP testified. AF, W-2, Tab 63. This post included the droplet emoji, and CP testified he considered them to be similar in nature to the appellant's other posts. *Id.*

Again, CP reiterated that it was the manner in which the appellant conveyed information that was at issue. AF, W-2, Tab 62. He explained that he understood the post to be derogatory to the administrator and posted on social media as a means to ridicule an employee. *Id.*

When asked about whether the post was a protected disclosure, CP testified that he did not know. AF, W-2, Tab 62. Further, he averred that it did not matter whether the post included accurate or inaccurate information. *Id.* Rather, CP testified that he was looking at the allegation as written in the proposal and whether the evidence supported the allegation. *Id.* Based on the appellant's statements, he found it did. *Id.* I agree.

In the appellant's response to the proposal to remove, he did not contest the specification regarding the post about RA either that he made it or what it was described to mean. Instead, he focused on his right to make the statement and his claim that MD should not have been on the trip to Brazil and RA knew it. AF,

W-1, Tab 29, 4c at 374. Again, the appellant's failure to understand why it was improper to lewdly reference sexual conduct about a co-worker and management official is at the heart of the problem. This allegation, like the others were years old, and there was no evidence he was attempting to do anything except to ridicule and retaliate against those he felt had mistreated him. The appellant specifically stated in response to a question about the RA post that he was not seeking accountability, but instead stated that he "needs to be made whole" and he believed the post would further his efforts to get a promotion. AF, W-1, Tab 29, 4L part 1 at 2:15:35-2:20:15.

I find the appellant's comments were inappropriate regardless of his intent. Still, I find they are made more offensive when the appellant laid bare his purpose in making the comments in his interview.

*Specification 4 – Post related to KPi*

As with the other specifications, CP testified that the strongest evidence supporting this specification was the appellant's audio and written statement as well as the post itself. AF, W-2, Tab 63. This post was described above at page 32. The appellant did not deny making the post or that it compared KPi to feces. I find that name calling in person or on social media is inappropriate and that the specification was supported by the record.

*Specification 5 – Rumors about BB*

Regarding this specification, CP testified that he relied on the appellant's written statement as well as the statements provided by TE and TH, which were consistent. AF, W-2, Tab 63. In his testimony, CP stated that the appellant did not deny the allegation as set forth in Specification 5, and he had no reason to doubt the credibility of TE and TH. *Id.*

In their sworn statements to OOI, TE and TH expressed that the appellant seemed hung up on BB's alleged affair which he learned from MH. AF, W-1, Tab 29, 4f 367, 373. In TE's sworn statement, he said that after the appellant learned about the alleged affair, he spent the next week repeating the same stories

about BB to TE without realizing that he had already told TE numerous times. *Id.* at 367. TE said the appellant told him one story about BB "at least five times." *Id.* Similarly, in TH's sworn statement, he said that the appellant used "disrespectful and inflammatory comments" about BB. *Id.* at 373. Specifically, TH said the appellant made multiple claims about BB's affair to CC and MH. *Id.*

The appellant testified that he learned from MH that BB had an affair while working in Cincinnati. AF, W-2, Tab 37. According to the appellant, MH explained that this was the reason why BB was willing to retaliate against the appellant at the direction of HQ, because BB feared reassignment based on this relationship. AF, W-2, Tabs 37, 90. The appellant made a statement to OOI and said he may have been confused about what MH told him. AF, W-1, Tab 29, 4b at 746. The appellant testified that the rumor was continually changing. AF, W-2, Tab 40. The appellant averred that is why his statement changed 9 months later. *Id.* Moreover, the appellant testified that he believed MH told him about BB because MH knew the appellant would report it. *Id.* It was MH who was spreading the rumor, the appellant testified. *Id.* During his OOI interview the appellant stated that MH was probably really upset that the appellant was telling every Tom, Dick, and Harry about BB. AF, W-1, Tab 29, 4L part 3 at 21:23. On the stand, the appellant asserted that Tom, Dick, and Harry was a misstatement, but rather asserted he contacted people with direct knowledge, but admitted it was his voice on the recording. AF, W-2, Tab 40.

The appellant further stated during his testimony that he contacted SM within an hour of his conversation with MH to report what he had heard. AF, W-2, Tab 90. According to the appellant, SM stated he had not heard the information. *Id.* Moreover, the appellant contacted several other agency employees, to include DL, TE's wife, CB, and later DM, who had or were considering filing cases against the agency. *Id.*

After hearing about the alleged affair from MH, the appellant stated that he spoke to FAM TH, who had worked in the Cincinnati Field Office to find out

what he knew. *Id.* In addition, the appellant testified that he spoke to FAM TA about the allegation in an effort to find out whether MH was trying to get the appellant to spread false rumors against BB. *Id.* The appellant averred that he did not believe this to be the case after he learned that MH had also told FAM CC about the alleged affair. *Id.* He learned this from CC who overheard the appellant discussing the matter with TH, and CC told them that MH had also repeated the allegation about BB to him. *Id.*

The appellant sent an email to several private, non-governmental email addresses on January 26, 2017, in which he documented the above stated information. AF, W-1, Tab 29, 4c at 483-84. In a later email the appellant identified the recipients as his attorneys. *Id.* at 181. In the email, he also added that DL's claim of harassment was against JL and that DL was asking the appellant for advice about filing an EEO complaint. *Id.* at 483. The appellant wrote that he advised DL to give MH an opportunity as he had "been so patient with me in my own case." *Id.* Included with the email were three attachments all of which related to an affidavit provided by SAC BB. *Id.* Subsequently, on February 9 and 13, 2017 the appellant sent this same information to individuals in the OIG. *Id.* at 181-82. The appellant testified that MH lied in his affidavit about the matter. AF, W-2, Tab 37.

Although the appellant stated that he learned the information about BB in January, he did not formally report it to OOI until August 31, 2017. AF, W-2, Tab 90. The appellant explained on the stand that he made the report then because he believed it to be valid at that point and he had not wanted to spread a rumor. *Id.* Further, by then, the appellant testified, he concluded that MH's assertions were most likely true. *Id.* Yet, the appellant could not identify what happened between April and August that led him to make the allegation to OOI. *Id.*

MH testified that he heard a number of people make reference to the rumor about BB having an affair and during his deposition stated that "rumors were

rampant." AF, W-2, Tab 64. On the stand, MH stated that he discussed the issue with SFAM CB, SM, and the appellant as well as others he could not specifically recall. *Id.* MH averred he attempted to determine the validity of the rumors, and did not write an ITR, and while both SFAM CB and SM had heard the rumor neither knew the validity of it. *Id.* MH testified he did not ask where they heard the rumor or mention the appellant. *Id.* It was MH's testimony that other FAMs approached him regarding the rumor, and he responded that he had heard it and would try to find out whether it was true. *Id.* He testified he told the appellant the same. *Id.* MH averred that he heard the rumor before discussing it with the appellant. *Id.*

According to MH, BB contacted him while he was on detail between February 2017 and February 2020, but he could not specifically recall how, i.e. whether he called and left a message or sent an email. AF, W-2, Tab 64. During the communication with BB, BB asked whether MH was spreading rumors about him having an affair, MH testified. *Id.* BB testified that he explained the situation and that was the end. *Id.*

On cross examination, MH was asked to explain why he denied the conversation during his deposition. AF, W-2, Tab 64. MH explained that he misunderstood the question and thought he was being asked if he had such a conversation with BB while assigned to WFO. *Id.* MH testified he had no such conversation at that time, and averred the conversation took place when he was on detail. *Id.* Further, MH averred that at the time of the deposition he did not recall the conversation, but upon reflection he did remember it. *Id.*

MH testified he never asked BB about the rumors, but instead asked fellow SFAMs whom he respected, and who respected him. AF, W-2, Tab 64. When he asked his co-workers, MH reported that they had already heard the rumors. *Id.* It was MH's testimony that he did not report the appellant about this issue. *Id.* MH did not know what BB did other than ask him about the rumor, and MH testified he did not believe there was anything wrong with seeking to determine the

validity of the allegations. *Id.* MH could not recall whether he told BB that MH spoke to the appellant about the alleged affair. *Id.*

MH also testified that he had an approximately 30-second conversation with RM during which RM asked if he had heard the rumor about BB and whether he was spreading it. AF, W-2, Tab 64. It was MH's testimony that RM called him. *Id.* MH averred he told RM that he had heard the rumor but was not spreading it. *Id.* Further, MH testified that he did not believe he was spreading the rumor because it was already so widely known, but instead he was only seeking the veracity of the rumor. *Id.* Further, MH explained the reason he was seeking to find out if the rumor was true, was in order to stop it if it was untrue. *Id.* Yet, MH testified he did not know what he would have done if it were true, but added these types of rumors can be vicious, cause misperceptions, and create a mistrust in leadership. *Id.* MH averred there was a difference in the way he asked trusted supervisors about the alleged affair behind closed doors and the appellant who discussed the alleged affair in public among team members and in front of stakeholders. *Id.*

MH testified it was not clear to him that RM was trying to find the source of the rumors, and he did not recall RM asking MH if he started the rumor. AF, W-2, Tab 64. MH testified it was the latter question that he thought he was asked at the deposition. *Id.* MH averred that during the deposition he was confused by the appellant's questions to the point that he was upset and frustrated because of the accusations about his lack of candor. *Id.* MH denied that he purposefully omitted anything at any point and averred it was never his intention to mislead. *Id.* Instead, MH testified that any lapse was the result of a faulty memory. *Id.*

In context, prior to MH's deposition, the agency filed a motion for a protective order based on the appellant's FB posts about MH that the agency alleged were harassing in nature. AF, W-2, Tab 8. Based on the appellant's posts, I found there was sufficient evidence to show that the appellant's actions

constituted harassment and supported an order of protection. *Id.* Specifically, I found:

> the appellant has directed posts at MH, the appellant's postings imply that he may also target others. The appellant is hereby on notice that such posts or other actions to harass or intimidate witnesses will not be tolerated. If the appellant defies this order I will consider sanctions to include the disallowance of a witness, the appellant's ability to question a witness who is the subject of the appellant's postings, or potentially dismissing the appellant's appeal with prejudice. This order is issued to ensure a full and fair hearing uncorrupted by harassment or intimidation.

AF, W-2, Tab 8 at 5. The issue did not resurface and no sanctions were issued.

According to MH's testimony, no one else's name came up during this conversation. AF, W-2, Tab 64. During his deposition, however, MH did say the appellant's name had come up with RM. *Id.* MH averred it was a quick conversation with RM, but MH believed he raised the appellant's name but did not know why and could not specifically recall the specifics of the conversation. *Id.*

MH testified he was unsure whether the appellant did anything wrong regarding discussing the rumor about BB having an affair. AF, W-2, Tab 64. It was MH's opinion that it depended on how and why the appellant sought the information. *Id.* Further, MH testified that the appellant raised the issue of BB's alleged affair more than anyone else to him. *Id.* Initially, MH reported, the appellant raised it in casual conversation and then in front of other VIPR members and in front of stakeholders both internal and external. *Id.* According to MH, the appellant brought it up within the team continuously, but more limited in front of others. *Id.* MH could not explain why he had not raised the issue of the appellant communicating about BB with external stakeholders prior to his hearing testimony. *Id.* MH denied that it was because it had not happened and instead averred that he did not recall at the time, either in his deposition or even in his OOI interview. *Id.*

I note that MH's OOI interview statement included a reference to the appellant's behavior in front of stakeholders. AF, W-1, Tab 29, 4f at 352. Further, MH included in his statement to OOI a reference to the appellant's opinions about women. *Id.* at 350.

The appellant disputed the testimony offered by MH. AF, W-2, Tab 90. Instead, the appellant testified it was MH who told the appellant about BB. *Id.* Further, the appellant testified TE said MH discussed BB's affair with TE in April. *Id.*

It was the appellant's contention that MH said that he would get the appellant reassigned to work for him. AF, W-2, Tab 90. Further, the appellant testified he had no issue with BB. *Id.*

BB testified he was told by several people that the appellant had said BB had an affair, and he listed CB, MH, and RM. AF, W-2, Tab 38. It was BB's testimony that RM asked BB if he was aware the appellant was making these statements.[16] *Id.* The appellant alleged in an email to several people on February 26, 2018 that he heard about the affair from MH. AF, W-2, Tab 24, Ex. W. One of those people forwarded the email to KT who in turn sent it to BB. *Id.* In response, BB wrote to MH and asked if he knew why the appellant was making this claim. *Id.* BB stated that he would not have given RM instructions about speaking to MH because he contacted MH directly as evidenced by the email. *Id.*; AF, W-2, Tab 38.

Other than reaching out to MH, BB testified he did not contact anyone to make a complaint, including an investigative body. AF, W-2, Tab 38. BB explained in his testimony that MH was a member of management and therefore it felt appropriate to contact him. *Id.* Similarly, he included CB on the email because the appellant claimed MH told CB about the alleged affair. *Id.* BB could

---

[16] Although RM provided rebuttal testimony neither party asked about this communication.

not recall whether MH was still the appellant's supervisor in February 2018 when he sent the email. *Id.*

When he spoke to MH, BB reported, MH stated that it was the appellant who made the allegation, and not MH. AF, W-2, Tab 38. Thereafter, BB testified he contacted OCC because he wanted to know whether any action could be taken. *Id.* BB averred that CB approached him and encouraged BB to file a lawsuit against the appellant, but BB determined that it did not warrant a response. *Id.*

I find there is strong evidence to support the specification that the appellant talked to TE and TH about BB allegedly having an extra-marital affair in 2017. This is supported by the appellant's own statements as well as the statements by TE and TH. AF, W-1, Tab 29, 4f at 367, 373; 4L part 1 at 21:23. The issue of whether MH or others engaged in similar misconduct will be discussed under the comparator section, but does not cause me to question whether the appellant engaged in the misconduct or whether the allegation is supported by the record evidence as CP found.

*Nexus*

CP testified that the nexus between the appellant's posts and his employment was that it involved TSA employees and others saw it and were affected by it. AF, W-2, Tab 56. CP acknowledged that not everyone interpreted the appellant's posts the same way, and the post did not use any sexual words or specifically name MD. *Id.* Still, CP testified that the appellant identified MD by her position and in response someone wrote, "let me guess MD" and the appellant wrote back, "you said it not me." AF W-1, Tab 29, 4f at 24-25. Further, the appellant explained what he meant by the post about MD and it was indeed sexual in nature. Specifically, the appellant referred to the emojis as describing MD's "sexual antics" with FD and PS, and that the emojis stood for genitals, bodily fluids, and disgust respectively. AF, W-1, Tab 29, 4L part 1 at 40:05-47:10.

While CP testified that criticizing FAM employees is not always misconduct, he added that changes when it disrupts operations. AF, W-2, Tab 62. CP testified that the appellant sent many emails criticizing management, including making derogatory remarks. *Id.* CP could not specifically recall the emails or the content thereof, but testified that such emails were not relevant to his decision. *Id.*

In the decision letter, CP explained that the appellant's conduct in Specifications 1 through 5 violated multiple agency policies, including Section 9.N.(1) of Office of Law Enforcement (OLE) 1112, *Employee Responsibilities and Conduct*; Section 9.C.(1) of OLE 1112; Section 5.D.(3) of TSA MD 1100.73-5, *Employee Responsibilities and Code of Conduct*; Section I of the Handbook to TSA MD 1100.73-5; and Sections K and M of the TSA MD 1100.73-5 Handbook. AF, W-1, Tab 29, 4a at 6.

Moreover, I find the words "negativity" and lack of team work were used to describe the pall the appellant cast over his co-workers and the work environment. Based on his co-worker statements, I find the words negativity and lack of team work fail to capture just how pervasive and affecting the appellant's behavior was to the team, which culminated with his posts about MD and others.

For example, MN indicated that she avoided being alone with the appellant and had reported his incidents of unprofessionalism toward women in the office, which KT confirmed. AF, W-1, Tab 29, 4f at 336, 338-39; AF, W-2, Tab 48. This related to the appellant's comments to MN regarding her sex life in what she termed an offensively crude manner. AF, W-1, Tab 29, 4f at 337-39. She also noted the appellant repeatedly raised the topic of MD even after she asked him not to do so. *Id.* at 338. In the conclusion of her ROI statement, MN wrote that she feared harassment by the appellant and mentioned the appellant's statement to MN that he could find her home address. *Id.* Further, MN stated she was not confident that the appellant would come to her assistance in a work-related emergency situation. *Id.*

WY also wrote in his statement that the appellant caused discord in the office through his comments and attitude. AF, W-1, Tab 29, 4f at 358-59. WY specifically referenced comments made regarding WY and MN having a "quickie" in the office, to which WY took offense and reported. *Id.* Further, WY attested that the appellant attempted to talk about MD within the VIPR team, but was asked to stop. *Id.* at 360. WY wrote that because of the appellant's behavior and his "lack of respect for his fellow coworkers and the FAMS," WY did not want to work with the appellant and had doubts about the appellant's willingness to provide necessary support if there were an active shooter. *Id.*

In his OOI affidavit, TE wrote that he felt the need to distance himself from the appellant based on the appellant's social media posts, which he found pessimistic and "anti-leadership." AF, W-1, Tab 29, 4f at 366. TE stated that at some point the appellant mentioned that Virginia is a one-party consent state and VIPR team members feared the appellant was recording them during daily work activities. *Id.* TE wrote that he left VIPR, even though he had 2½ years left on the assignment, because of the work environment created by the appellant. *Id.* at 366-67.

TH wrote in his OOI statement that the appellant's "overall negativity does not make for a harmonious work environment" and at times "creates an officer safety issue." AF, W-1, Tab 29, 4f at 374. This negativity included comments about MD. *Id.*

Thus, even excluding from consideration, those individuals the appellant specifically targeted such as MD and JL, I find the appellant's attitude as well as his aggressive and destructive comments about the agency and co-workers caused discord in the office. These statements were all part of the ROI that CP testified he reviewed and relied upon in reaching his decision. Thus, I find supported CP's conclusion that the appellant's comments about MD and others were inappropriate and were a disruption to the office and the workplace environment overall.

*Charge 2 – Inappropriate Conduct During an Investigation*

CP testified that the appellant shared information about the investigation which interfered with it. AF, W-2, Tab 55. Specifically, CP mentioned that the appellant influenced shutting down the FPFB when he contacted members and told them about the investigation. *Id.*

*Specification 1 - Photograph*

As discussed at length above, see pages 41-46, the parties disputed how the appellant entered the Freedom Center and took a photograph of the visitor log book. I do not believe most of it is relevant to the issue of whether the appellant engaged in the misconduct as charged. In the specification, the appellant is charged with taking the photograph for "other than official purposes," and sending it to others to include potential witnesses. AF, W-1, Tab 29, 4e at 7. Still, because CP noted in the decision the conflicting information about how the appellant was able to take the photograph, I will discuss it below. AF, W-1, Tab 29, 4a at 8. I will incorporate information provided from Part I in this analysis.

CP testified that the appellant's conduct at the Freedom Center was improper when he photographed the visitor log and sent the photographs to others. AF, W-2, Tabs 55, 62. CP noted that the appellant did so for other than official purposes, as the appellant indicated that he did so to find out who had made the complaint against him. AF, W-2, Tab 55. CP also testified that on the day the appellant reported for his first interview at the TSOC, he misrepresented his purpose in being there by making the security guards believe he was there for a social visit. *Id.* Moreover, CP averred the appellant secretly pulled out his phone while the security guard was distracted and took two photographs, the second one after looking at the first. *Id.* CP added that the appellant admitted that he wanted everyone to know that it was JL who reported him and that she had broken the rules of the FB group. *Id.*

In the audio of his OOI interview, the appellant stated he recalled that he first contacted RY when he was in the OOI work space. AF, W-1, Tab 29, 4L

part 3 at 50:50. In addition, the appellant readily admitted he took two photographs when GC turned his back. *Id.* He explained he took the photos because he saw JL's name on the visitor log and he had reported her for allegedly violating the law by engaging in harassment, yet MH had dealt with his allegation informally and no complaint had been filed. *Id.* He alleged that JL was going out of her way to make his life miserable. *Id.* He wanted proof that it was JL who violated the rules of the secret group. *Id.* Further, the appellant compared JL sharing the posts with sneaking into his backyard and recording him. *Id.* He said he had a split second opportunity and made the decision. *Id.* When he saw her name on the visitor log, the appellant stated he thought to himself, "score." *Id.* The appellant stated that he had an expectation of privacy within FPFB. *Id.* During his testimony, the appellant acknowledged that he took the photographs, but stated it was to show that JL was retaliating against him. AF, W-2, Tab 90.

RY testified that they learned that the appellant had taken the photographs through investigation witnesses. AF, W-2, Tab 67. The appellant testified that while he provided a very lengthy response to the proposal to remove, based on the time limitations he did not correct the record regarding to whom he sent the visitor log photograph. AF, W-2, Tab 90.

CP acknowledged that the log was in plain sight in the visitor center, but denied that this area was open to the public. AF, W-2, Tab 62. Further, CP focused on the appellant's disclosure of the log to others and the text that accompanied the photograph. *Id.* The information provided also made one employee believe he was the subject of the investigation, CP averred. *Id.*

CP testified that he considered the appellant's denial that he misled GC, but CP was unpersuaded and instead he based his conclusion on the video and statements, and credited the clerk over the appellant. AF, W-2, Tab 29, 4c at 37; AF, W-2, Tab 55. GC signed a statement on October 4, 2017 about his interaction with the appellant on September 20, 2017 at the TSOC. AF, W-1, Tab 29, 4f at 400-01. According to GC, upon entering the main gate at the

Freedom Center the appellant informed the officer that his badge was "suspended" and GC said the appellant should be sent to the security office and GC would assist the appellant. *Id.* at 400. Although GC offered to call RY, who the appellant stated he was there to meet, the appellant said he would do it and appeared to make a call. *Id.* After reviewing the appellant's phone log, CP testified that GC erred when he wrote the appellant pretended to make a phone call, but he did not believe GC fabricated his statement. AF, W-1, Tab 29, 4c at 401; AF, W-2, Tab 55. Still, CP testified that he found the appellant's behavior was covert and deceptive. AF, W-2, Tab 55.

In sustaining this specification, CP testified that he reviewed the video. AF, W-2, Tab 63. The video showed the appellant presenting his identification to GC and then GC walked away. AF, W-1, Tab 29, 4g. Next, the appellant took out his phone and took a photograph. *Id.* It appeared that the appellant looked at the log, and then looked up to see who was there. *Id.* Thereafter, the appellant followed GC out of the frame. *Id.* GC returned followed by the appellant. *Id.* The appellant took his phone out again, and then he put the phone away and walked out of screen view, and then walked back to where the book was located and took another photograph and put the phone away. *Id.* After taking the photograph, the appellant appeared to study the log, looked up, and appeared to be speaking to someone. *Id.* The appellant took his phone out yet again and appeared to be typing. *Id.* The video did not show the appellant with his ear or face to the phone. *Id.*

Further, GC wrote in his statement that the appellant said he would call RY. AF, W-1, Tab 29, 4f at 400. In his statement, GC wrote that he confirmed that the appellant had not called RY. *Id.*

In the appellant's response to the proposed removal, he denied he misled GC about his reason for being at the Freedom Center. AF, W-1, Tab 29, 4c at 5. Further, the appellant stated he had in fact called RY contrary to both RY and

GC. *Id.* at 6. Still, the appellant admitted to having taken and forwarded the photographs of the visitor log. *Id.* at 5-6.

CP explained that the appellant, unlike JL, shared the information for improper reasons, because at the time he shared the photograph, he knew there was an ongoing investigation. AF, W-2, Tab 55. By sharing information about the investigation, and by reaching out to potential witnesses, the FPFB site was shut down. *Id.* On the contrary, CP testified he did not believe there was any evidence that the site was shut down because of JL or RY. *Id.* While CP could not affirmatively testify that shutting down the site impacted the investigation, CP averred that the appellant through his actions attempted to undermine the integrity of the investigation. *Id.* CP explained that his conclusion was based on the appellant contacting potential witnesses and telling those individuals that they were the subject of the investigation. *Id.* CP acknowledged that the appellant did not directly tell potential witnesses not to cooperate or to destroy evidence. *Id.* Such overt direction, however, CP testified, was not required for the appellant to have interfered with the investigation. *Id.*

During his OOI interview, the appellant admitted to taking the pictures of the visitor log on his personal device, and claimed he did it to show that it was JL who violated the FPFB rules and made the complaint. AF, W-1, Tab 29, 4L part 3 at 51:38; 52:15; 56:30-56:45; 57:45-58:30. Further, the appellant admitted that he forwarded the pictures to others in an effort to show that JL was "going to get [them] too." *Id.* at 1:20:14. Moreover, the appellant stated that he told those to whom he sent the photographs to contact the moderators of FPFB to either have them shut down the site or remove JL from it. *Id.* at 1:22:22.

Based on the appellant's admissions, I find the appellant took the photographs and sent them to others to include potential witnesses. I find this was not an official purpose and therefore I find the charge is supported by strong record evidence.

Further, I find that regardless of how the appellant came to be in the security office where he could observe the log, it was improper of him to take pictures of it as evidence by the fact that he waited until GC was not looking to do so. Thus, I need not make a credibility determination because even accepting the appellant's version of events as true I find the evidence nevertheless supports the charged misconduct. Moreover, the appellant's stated motivation for taking the picture and sending it to others was done in an effort to prove who made the complaint against him. I find this was improper. The appellant could and did notify the investigators of his concerns and he documented that in his testimony. I can think of no legitimate reason for disclosing this information to potential witnesses, but rather such a disclosure could only be made in an effort to undermine the investigative process.

*Specifications 2-4 – Contacted others about an on-going investigation*

Specifications 2-4 were summarized above at page 68 and related that the appellant contacted FPFB administrators, CK and DM about the on-going investigation. AF, W-1, Tab 29, 4a at 7.

CP testified that the appellant was told not to contact anyone about the investigation but did so anyway. AF, W-2, Tab 62. CP was unpersuaded by the appellant's argument that he had a good reason for doing so to include seeking exculpatory information or making protected disclosures. *Id.* Instead, CP repeated that the appellant was instructed not to discuss the investigation but did so regardless of what he said about it. *Id.*

Furthermore, CP testified that the appellant admitted that he told the FPFB site administrators that he was being investigated. AF, W-1, Tab 29, 4L part 3 at 1:22:10-1:22:22; AF, W-2, Tab 63. On the audio recording of his interview, the appellant stated he told all of the moderators, including SS. *Id.* Specifically, the appellant said that the page was "infiltrated" and should be shutdown. *Id.* He added that he warned people about the OOI investigation saying that people were going to be "jammed up." *Id.* at 1:31:30-1:35:00.

Regarding the appellant's communication with CK, CP averred that the appellant told CK to get an attorney and said OOI was going after him. AF, W-2, Tab 62. Further, CP testified he considered in his decision that CK wrote in an email that the appellant sent him intimidating messages to his personal email account. AF, W-1, Tab 29, 4f at 310, 312-315; AF, W-2, Tab 62. Based on those messages and CK's statement, CP testified that it was clear the appellant contacted CK about the investigation. AF, W-1, Tab 29, 4f at 310, 312-315; AF, W-2, Tab 62.

Further, CP testified that he relied on the appellant's email to RY in which he listed the people he contacted to include the FPFB moderator SS, CK, DM, SM, and others. AF, W-1, Tab 29, 4f at 405. Moreover, as with other Specifications, the appellant did not deny the misconduct alleged in Charge 2 Specifications 2-4, in his testimony, or in his response to the proposal.

Instead, in his OOI interview, the appellant admitted contacting other FAMS after his initial interview. AF, W-1, Tab 29, 4L part 3 at 1:31; 1:35-1:36. While the appellant denied this was witness tampering, he admitted it was in violation of the NDA he signed. *Id.* at 01:55:09-01:55:14, 01:58:50-01:59:30.

Again based solely on the appellant's own statements, testimony, and admissions, I find the agency's charge that the appellant contacted several individuals about the on-going investigation to be supported by the record evidence. Furthermore, the appellant knew that what he did by contacting individuals violated the NDA he signed. While the appellant claimed that other individuals engaged in similar misconduct, that does not diminish the evidence in support of the appellant's misconduct. As with other comparator claims, this issue will be addressed below.

*Specifications 5-6 Looking for who filed the complaint*

Specifications 5-6 related to allegations that the appellant was seeking to discover the person who filed the complaint against him. The appellant admitted

to doing so as stated above, but I find the evidence does not support the specification in which the appellant was charged with posting a message on FPFB looking for the "rat" or "snitch." The reference post was not part of the ROI.

Instead, JL sent an email to KT on September 20, 2017 with the posts at issue. AF, W-2, Tab 24, Ex. O. JL included two screen shots as attachments, which indicated an effort to learn who had reported the appellant's posts. *Id.* at 2-3. The appellant did not make the posts, nor is his name listed in the comment section. *Id.* Therefore, I find the evidence did not support Specification 5 of Charge 2. I note, however, the appellant did not specifically address this allegation in his response to the proposal notice.

In KT's written statement included in the ROI, she discussed that JL reported to SM the post on the FPFB page about looking for the snitch. AF, W-1, Tab 29, 4f at 168-69. SM in turn reported it to KT, and she then notified OOI investigator RY. *Id.* SM, during his OOI interview also reported these events stating that JL informed him of the FPFB post and her concern regarding retaliation by the appellant. *Id.* at 145.

CP acknowledged that when he made the decision to remove, the post that involved a comment that someone was looking for the rat or snitch was not in the ROI. AF, W-2, Tab 56. Rather, CP testified that he only saw it when the appellant's counsel showed it to him. *Id.* Further, CP averred that if a post such as the one described in the decision letter existed and was made by the appellant it should have been included in the ROI. *Id.* According to CP, this was one of the errors he identified on his first day of testimony that he had made in his deposition. *Id.* Although he was wrong, CP denied that his error was intentional. *Id.* Rather, CP testified that the allegation was in the proposal and while the appellant had the opportunity to respond he did not address this issue. *Id.*

Similarly, I find Specification 6 was not supported by strong evidence. BB testified that SM told him that the appellant was aware of the investigation and, in front of others, said that he would find the person who filed the complaint.

AF, W-2, Tab 43. BB could not recall to whom SM reported this incident, and whether they directly spoke about it. *Id.* It was BB's impression that the appellant was trying to intimidate and create further anxiety within the group. *Id.* BB acknowledged that he could have learned of SM's allegation through an email that SM sent to KT who then forwarded it to him. AF, W-2, Tab 24, Ex. R; AF, W-2, Tab 43.

The email addressing the appellant's asserted comments was dated September 26, 2017 and was written by SM and sent to KT. AF, W-2, Tab 24, Ex. R. In the email, SM wrote that in response to the question whether the appellant was back in the office, he responded, "[y]es, I still have my weapon, job and I have to head back over there tomorrow to be interrogated again." *Id.* SM then stated the appellant made the statement in the public area of the office and it was loud enough to be overheard by the 6 VIPR team members present to include JL. *Id.* Further, SM stated that he was concerned about the potential for workplace violence based on his training and would "keep a very close eye on the situation." *Id.*

Upon learning of the appellant's comments from SM, BB testified that he did not take any action or request that SM document the interaction. *Id.* BB could not recall whether the cease and desist letter was related to this and added it was a long time ago. *Id.* Beyond being aware that a cease and desist letter was being prepared, he had no involvement, BB averred. AF, W-2, Tab 43. Further, BB testified he did not know who was involved. *Id.*

The appellant denied in his testimony that he said in the presence of VIPR team members that he was looking for the person who filed the complaint against him which started the investigation. AF, W-2, Tab 38. The appellant testified that he had no reason to say that because he already knew it was JL based on her avatar. AF, W-2, Tabs 38, 40. Still, the appellant acknowledged that prior to learning who made the complaint he might have said he was looking to find out. AF, W-2, Tab 40.

The appellant testified that he did not read the proposal notice in its entirety, and that he was represented by counsel. AF, W-2, Tab 40. Thus, that appeared to be the appellant's explanation for why he did not specifically deny the allegation in response to the proposal. *Id.*

CP testified that he also relied on BB's statement that SM said the appellant commented in front of VIPR C team members that the appellant was looking for the person who complained about him. AF, W-2, Tab 62. CP averred he did not investigate the matter. *Id.* Further, CP testified he did not find it significant that SM did not mention it in his statement although he would have thought it significant if SM had denied that he told BB about the appellant's statement. *Id.*

In addition, in the decision to remove, CP pointed to the appellant's written reply to the proposal in which he admitted to taking a photograph of the Freedom Center visitor log and contacting agency employees about the OOI investigation because he wanted to "tr[y] to learn who [his] accusers were, and [communicate] with witnesses to advance [his] defense during a potential criminal investigation of [his] lawful protected activity." AF, W-1, Tab 29, 4a at 9. In so doing, CP found that the appellant violated agency Paragraph F(1) of the Handbook to TSA MD 1100.73-5 and Section 6.E of TSA MD 1100.73-5. *Id.* at 10.

Even absent the appellant making the FBFP post looking for the complainant, CP testified he would have removed the appellant. AF, W-2, Tab 63.

Based on the discussion herein regarding Specifications 5-6 of Charge 2, I find there was not strong evidence to support these Specifications. Still, I find the appellant's failure to deny the allegation or provide evidence or argument about them in his 511 page response to the proposal or in his oral response, to be a basis for CP's decision. Further, BB provided a statement about what he believed based on his communication with SM. Thus, while I find the evidence

does not strongly support the specifications, I find there was some evidence in support of them.

*Charge 3 - Misuse of Government Property*

This charge was based on the agency finding several cookies on the appellant's phone from the website PornHub.com. AF, W-1, Tab 29, 4a at 410-11.

In the audio recording of his OOI interview, the appellant stated that the PornHub cookies got on his work phone either because of tethering, meaning that he attached his phone to his personal laptop to use Wi-Fi, or by accident. AF, W-1, Tab 29, 4L part 3 at 34:15-36:25. The appellant explained this was made clear by a comparison to his personal computer which would show that he was a frequent visitor and connoisseur of PornHub.com. *Id.* The appellant said he probably visits the site approximately four times a week, but the fact that it was a few cookies in 3 years shows it was accidental. *Id.* The appellant was supposedly told by many FAMS that it was okay. *Id.* Then, the appellant asked where in the Handbook or agency rules and regulations it says he could not look at PornHub on his government phone. *Id.* The appellant stated that he did not know that going to an adult website off duty was impermissible and said he had never heard of it. *Id.*

In the appellant's response to the proposal, he stated he was driving at the time he was accused of accessing PornHub. AF, W-1, Tab 29, 4c at 6-7. He also asserted that at the time they were using the phone for Waze navigation. *Id.* The appellant added the amount of cookies was trivial. *Id.* at 7.

During his testimony, the appellant averred that he was "scared to death" of an allegation regarding accessing unauthorized information, and therefore he used his personal phone almost exclusively. AF, W-2, Tab 90. Still, the appellant acknowledged that the forensic report showed that there was a search on his phone for "G-string underwear." AF, W-1, Tab 29, 4J. When asked for an explanation, he testified he was not sure if he had initiated the search, but even if

he had he was not sure it would constitute unauthorized use of government property. AF, W-2, Tab 90. This is in contrast to pornography, which the appellant testified he knew was prohibited. *Id.*

CP testified that the appellant stated during his interview that he was a connoisseur of PornHub.com and might have accidentally accessed it. AF, W-2, Tab 55. CP further testified, however, the appellant later changed his story to allege someone else had possession of his phone while he was driving and maybe that employee accessed the site, as well as other possible explanations for the existence of PornHub cookies on his phone. *Id.* In the decision letter, CP wrote the appellant changed his earlier admission in his replies to the proposal by denying responsibility and "trivializ[ing] the incident." AF, W-1, Tab 29, 4a at 10. Moreover, CP noted the appellant violated agency policy "regardless of whether the site was visited for six seconds or six minutes." *Id.* at 11.

The IT Specialist MDe explained that the cookies from PornHub.com could have gotten on the appellant's phone either through accessing the site or through a hosted advertisement. AF, W-1, Tab 29, 4f at 395. Based on the appellant changing his story and the appellant's admission that he regularly visited the site, CP concluded the charge was proven by a preponderance of the evidence. AF, W-2, Tabs 55, 63. Furthermore, CP testified that he found the appellant's explanation that someone else took his phone while he was driving and went to PornHub was not plausible. *Id.*

When asked if he thought OOI's search of the appellant was illegitimate, CP testified he did not believe that to be the case. AF, W-2, Tab 55. Instead, CP testified that because the allegation involved posting onto social media, and the appellant had an agency-issued device, it would have been remiss not to check that device. *Id.* In the decision, CP explained that he considered the appellant's assertions that the underlying investigation by OOI and the proposal were retaliation for engagement in protected activity, but CP found no evidence to support the appellant's assertion that the OOI investigation was initiated or based

upon current or prior protected activity. AF, W-1, Tab 29, 4a at 11. Still, CP explained that this charge was not the basis for the appellant's removal. *Id.*

I find strong evidence supports the agency's charge that the appellant accessed PornHub on his government issued phone. I find the appellant's testimony on the subject was not credible as it was contradicted by his statements to investigators during the OOI interview. Specifically, the appellant told the OOI interviews that he did not believe accessing pornography off-duty on his government phone was a problem and had never heard of it being an issue. AF, W-1, Tab 29, 4L part 3 at 34:15-36:25. This was at odds with the appellant's testimony that he was "scared to death" of accessing a prohibited site on his work phone. AF, W-2, Tab 90. Further, I find the appellant's implication that PornHub was a pop-up advertisement on Waze to be false. I find more likely the appellant's initial explanation that it was an accident. Still, regardless of the reason, I find the evidence showed that it was more likely than not that the appellant accessed PornHub.com on his government phone.

*The appellant's allegations regarding the support for the charges*

The appellant asked CP whether the appellant had alleged that he was the subject of retaliation and alleged the investigation itself was a "sham." AF, W-2, Tab 55. CP acknowledged that the appellant made this allegation, but CP averred that was not the subject of the action he was reviewing. *Id.* Instead, CP testified that he looked at all of the information relied upon, and adjudicated the case before him. *Id.* It was CP's testimony that the appellant could have made his claims of retaliation to the OIG, OSC, and others. *Id.* CP testified that he considered the appellant's allegation in the context of the whole case. *Id.* This included that the appellant had been counseled in January 2016 about making inappropriate comments, but could not recall the details of the counseling during his testimony. *Id.*

The appellant asked CP a number of questions about the investigation and implied that the investigation was tainted by bias. AF, W-2, Tab 55. CP testified

that he had no information that investigators were told only to look for incriminating evidence. *Id.* Further, CP testified that if a manager or any employee becomes aware of an allegation of harassment, they must report it. *Id.* CP could not provide information regarding what investigators knew or did not know, but rather relied on the report. *Id.*

CP testified he did not believe the appellant's whistleblower claims had merit as it related to the charged misconduct. AF, W-2, Tab 63. CP added that he did not find evidence in the ROI that showed retaliation. *Id.* Further, CP included these findings in the decision letter. AF, W-1, Tab 29, 4a at 11. Instead, CP averred that the appellant engaged in the misconduct which was the basis for the investigation and the proposal to remove him regardless of whether he engaged in whistleblowing. *Id.*

The appellant appeared to imply that JL, who engaged in protected activity when she filed a complaint about the appellant, was not entitled to protection from harassment. Many witnesses and OOI interviewees testified to their perception that the appellant harassed and intimidated co-workers and managers. AF, W-2, Tab 55; AF, W-2, Tab 43; AF, W-2, Tab 48. This was evidenced by the appellant's FPFB posts, his threats against managers, and even his conduct during the investigation and the Board process. AF, W-2, Tab 8 at 5; AF, W-2, Tab 43; AF, W-1, Tab 29, 4f at 166, 102-03, 338; AF, W-2, Tab 55; AF, W-1, Tab 29, 4c at 210-11. All employees are entitled to a workplace free from harassment. That includes protection from employees who may be whistleblowers. I am not concluding that there is some limitation on the protection afforded for making protected disclosures or engaging in protected activity, but rather such actions are not a protective cloak allowing a whistleblower to mistreat co-workers or management. I find the failure to investigate JL's allegations would have deprived her of the same type of protection the appellant believed was appropriately applied to him.

Based on my analysis above, I agree with CP that the record evidence does not show that the investigation was tainted by retaliatory animus. Further, I find, as discussed above, that the primary basis for sustaining the majority of the charged misconduct was the appellant's own admissions and statements. Thus, even if there was evidence of animus in the creation of the ROI, it would not serve to negate the strong evidence in support of the decision to remove the appellant.

*Douglas Factors*

The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas v. Department of Veterans Affairs*, 5 M.S.P.R. 280, 306 (1981). While not purporting to be exhaustive, the Board identified the following factors: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality

problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Id*. at 305-06.

In the decision letter, CP explained that the appellant's inappropriate comments on FPFB were not the first time employees reported that he made inappropriate and disparaging comments about them, which was supported by the testimony of KT and MH. AF, W-1, Tab 29, 4a at 11; AF, W-2, Tabs 48, 64. CP reported that JL told OOI that the appellant's comments disrupted operations in the workplace, which was supported by the statements of several of the appellant's co-workers even excluding those the appellant alleged had a motive to retaliate against him to include MN, WY, TH, and TE. AF, W-1, Tab 29, 4a at 11-12; AF, W-1, Tab 29, 4f at 336-39, 358-60, 366-67, 374. In addition, CP considered comments from numerous colleagues who said the appellant was "quite vocal" in rumors about MD. *Id.* at 12. Again this conclusion was supported by co-worker statements. AF, W-1, Tab 29, 4f at 336-39, 358-60, 366-67, 374. CP also noted that the appellant's supervisors instructed him to refrain from talking negatively about his colleagues and that the appellant's posts to FPFB were made a few months after receiving these instructions from supervisors. *Id.*

As CP explained in the decision letter, he considered the appellant's posts on FPFB caused MD "considerable stress." AF, W-1, Tab 29, 4a at 12. CP also noted that multiple employees stated to him that the appellant is not a "team player" and that they do not trust him to support them in law enforcement actions. Several of the appellant's co-workers provided similar statements for the record. AF, W-1, Tab 29, 4a at 12; AF, W-1, Tab 29, 4f at 336-39, 358-60, 366-67. CP expressed that the appellant's supervisors "question[ed] [his] judgement and reliability." *Id.* at 13.

CP considered that the appellant was put on notice regarding the policies that he violated because evidence demonstrated he completed the required "TSA Policy on Employee Responsibilities and Code of Conduct, TSA MD 1100.73-5" training in December 2015 and November 2016. AF, W-1, Tab 29, 4a at 14. In the decision letter, CP also considered that the appellant received a 1-calendar day suspension in 2016 for failing to maintain possession of his FAMS-issued equipment. *Id.*

As for the mitigating factors, CP considered the appellant's military service, his twenty-six years of Federal Service, and his sixteen years with FAMS. AF, W-1, Tab 29, 4a at 14. CP testified that he found the appellant was forthright and candid regarding the allegations against him, but found he had little remorse. AF, W-2, Tab 55. CP explained that the appellant would start to express remorse, but then return to talking about other employees again. *Id.* Further, CP averred that he did not consider remorse to be a mitigating factor, and asserted that to understand his conclusion it was necessary to listen to the audio of the appellant's interview. AF, W-2, Tab 63. In the decision letter, CP noted that he gave "no weight" to the appellant's remorse because after expressing remorse, the appellant continued to disparage MD. AF, Tab 4a at 14.

CP acknowledged the appellant used the word remorse in relationship to MD, but averred he did not find it sincere. AF, W-2, Tab 63. Instead, CP explained that the appellant said he was remorseful for "potentially harming MD." *Id.* Yet he also said that she brought it on herself. *Id.* In short, CP did not believe the appellant's statement of remorse was genuine. *Id.*

During the appellant's OOI interview, RY asked the appellant whether he understood that the posts about MD and others could be maliciously construed. AF, Tab 4L part 1 at 46:19-46:23. The appellant responded that he had "regret" and "remorse" if MD interpreted his posts on FPFB as an attack on her. *Id.* The appellant also stated that he was not aware that MD saw the posts. *Id.* at 1:56:18. After stating that he had remorse for MD's perception of the posts, the appellant

continued to disparage MD and questioned how she, a single woman, could have landed a GBA when GBAs were highly coveted among FAMs with families. *Id.* at 1:02:40-1:02:49. I find, as CP did, that although at times the appellant said the word remorse, it was clear that he held nothing but contempt for MD and believed he was justified in his actions with respect to her. A review of the audio recording of the appellant's interview clearly supports my finding. AF, W-1, Tab 29, 4L part 1.

In the decision letter, CP noted that the aggravated penalty range for each of the charges includes the penalty of removal. AF, W-1, Tab 29, 4a at 14. Moreover, CP found that the mitigating factors were not significant enough to overcome the aggravating factors. *Id.* at 15. CP noted that removal was warranted because he found the appellant to be incapable of rehabilitation. *Id.* at 16. This again was made clear by the appellant's failure to understand how his behavior impacted others and the ability of the team to perform its mission.

Regarding notice, CP testified that the appellant was previously counseled about making inappropriate comments at work, including speaking negatively about co-workers. AF, W-1, Tab 29, 4f at 147-48; AF, W-2, Tab 55. MH was the appellant's first line supervisor from July 2016 to February 2017. Thereafter, SFAM SM became the appellant's first line supervisor. AF, W-2, Tab 44. During the transition, MH gave the appellant a verbal counseling which SM attended at the instruction of KT, SM testified. *Id.*

MH testified that he could have counseled the appellant about how his behavior disrupted the work of the team. AF, W-2, Tab 64. This included the appellant's regular discussion about his cases, complaints, and communications with Congress, which the team members complained to MH was disruptive. *Id.* Based on his supervisory authority and after consultation with his supervisor, MH gave the appellant a verbal counseling, he testified. *Id.* It was MH's testimony that the counseling was done in an effort to improve the work environment and educate the appellant on the perception and disruption he was creating on the

team. *Id.* MH added that he wanted the appellant to learn from his mistakes and succeed. *Id.*

MH averred that he and SM wrote the memorandum summarizing the oral counseling together and he could not recall whether they gave a copy to the appellant. AF, W-1, Tab 29, 4f at 354; AF, W-2, Tab 64. The reference in the counseling to internal stakeholders related to people who help support the VIPR teams and the external individuals who were in those operational environments such as subways, trains, airports, Union Station, and Amtrak. AF, W-1, Tab 29, 4f at 354; AF, W-2, Tab 64.

In the memorandum, SM wrote that he and MH had counseled the appellant on January 25, 2017 relating to the appellant's performance while serving on VIPR. AF, W-2, Tab 24, Ex. I. SM stated that the appellant was informed he was "not acting like a team player." Next, SM provided examples to include "his behavior and attitude towards other team members was distan[t] and often negative." AF, W-2, Tab 24, Ex. I. In a similar vein, the appellant was told to "stop talking negatively about other supervisors and other FAM employees," which was perceived as putting him and FAMS in a "negative light." *Id.* SM wrote that "VIPR stake holders had complained about his negative attitude towards TSA and the FAM service. *Id.* To that end, SM stated the appellant was told to raise such matters with his supervisor and refrain from doing so with stake holders. *Id.* SM also noted the appellant's "excessive use of [his] personal cell phone." *Id.* In conclusion, SM wrote that the appellant "accepted responsibility for his actions and [said] that he would work to improve himself." *Id.*

SM testified that following the counseling, the appellant did not repeat the behaviors about which he was counseled to the best of his recollection. AF, W-2, Tab 44.

The appellant also testified about the counseling session on January 25, 2017. AF, W-2, Tab 37. According to the appellant, MH stated that the counseling was only verbal and would not go into his record. *Id.* Moreover, the

appellant asserted that there was no written documentation of the oral counseling. *Id.* The appellant confirmed that SM was mostly getting a debriefing from MH and the appellant. The appellant added that SM did not provide much input. *Id.*

The appellant averred that MH told him that a team member complained that he was discussing his disclosures, not driving enough, and not a team player and preferred to be alone during foot patrol. AF, W-2, Tab 37. On the stand, the appellant stated that MH had previously told the appellant about the foot patrol issue. *Id.* Thus, I find the appellant was on notice of the concerns of the team regarding his attitude and participation.

RM testified that he did not recall anything similar to the appellant's oral counseling about another VIPR member. AF, W-2, Tab 90. Further, after having his recollection refreshed, RM testified it was not a standard practice to create written documentation of an oral counseling. *Id.* Still, RM testified that he believed that documentation was warranted, and what was unusual was for a VIPR team member to receive a verbal counseling without documenting it. *Id.*

While the term "not a team player" is often code for a whistleblower, I find that was not the issue being addressed here. VIPR worked as a team and needed the cooperation of all its members. As discussed above, the appellant's negativity and lack of team support went well beyond his whistleblowing, and included generalized criticisms and aggressive disdain for co-workers, managers and the agency to the point that others did not want to work with him and often avoided him. AF, W-1, Tab 29, 4a at 12; AF, W-1, Tab 29, 4f at 336-39, 358-60, 366-67. Such a work environment is not sustainable, nor required for co-workers to endure.

Moreover, CP averred that as a law enforcement officer, the appellant was responsible for upholding the law making his inappropriate conduct during the investigation even more egregious. AF, W-2, Tab 63. Therefore, CP stated that even absent the appellant impacting the investigation, he would have sustained the charge and removed the appellant on Charge 2 alone. *Id.*

Likewise, CP testified he would have removed the appellant solely based on the appellant's posts about MD. AF, W-2, Tab 63. CP explained that he and others felt the comments were inappropriate toward women and involved women in compromising positions. *Id.*

*Summary of findings*

Based on the foregoing, I find the agency's action was supported by strong evidence. I find each of the charges was supported by preponderant evidence as detailed above. While I found two of the Specifications under Charge 2 were unsupported, it is only necessary to prove one specification to support sustaining a charge, which I find the agency did here. *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990); *O'Lague v. Department of Veterans Affairs*, 123 M.S.P.R. 340, ¶ 11 (2016) (To sustain a charge of misconduct an agency need only prove one specification of the charged misconduct, even if more specifications are charged).

Further, I find that CP correctly assessed the *Douglas* factors and concluded that removal was an appropriate penalty. I agree with CP's discussion regarding the appellant's lack of remorse and potential for rehabilitation for the reasons stated throughout this decision as well as the appellant's hearing testimony during which he remained defiant in defense of his actions. Given the nature and seriousness of his misconduct, his position as a law enforcement officer coupled with his lack of remorse, I find the appellant's removal was supported by strong evidence.

**BIAS/ANIMUS**

The appellant alleged animus and bias by a number of agency employees. I find, however, that there is no evidence that any of these individuals influenced CP in his decision to remove the appellant. I note some alleged retaliating employees or those with a motive to retaliate provided statements in the ROI, yet I find that even absent those statements, there was strong evidence in support of

CP's decision to remove the appellant based on the appellant's statements, interviews, and his response to the proposal. Because I have provided information throughout the decision about the appellant's allegations of bias and animus by co-workers, supervisors, and higher-level management, I find further discussion of it herein is unnecessary given the lack of reliance on those individuals in CP's decision.

There was no evidence that either TJ or CP had a specific personal motive to retaliate against the appellant based on his protected disclosures or activity. Regarding TJ, she testified, without contradiction, that prior to receiving the ROI for adjudication, she had not heard of the appellant. AF, W-2, Tab 82. Further, none of the appellant's disclosures, litigation, Congressional testimony, OSC, or OIG complaints involved either TJ or CP.

CP provided testimony about his knowledge of those about whom the appellant made posts and allegations. On the stand, CP was asked about his relationship with FD. CP testified that he did not know him, but instead had only heard of him because of the appellant. AF, W-2, Tab 55. CP testified it was his recollection that the appellant alleged FD and MD had a relationship back in 2003. *Id.* CP claimed he did not know the accuracy of the statement and did not find it relevant to his decision. *Id.* Rather, CP testified he was focused on the appellant's alleged misconduct. *Id.*

CP also testified that he did not consider the credibility of JL and MD. AF, W-2, Tab 63. While he acknowledged the appellant made allegations of whistleblower retaliation, CP testified none of them were about him. *Id.*

Similarly, CP testified he did not know PS, another individual with whom the appellant claimed MD had a relationship. AF, W-2, Tab 55. It was CP's understanding that PS was no longer an agency employee and that the appellant had reported his allegations to OOI. *Id.* Therefore, CP testified he had no obligation to report the appellant's allegations about PS and MD and others the appellant made and he did not do so. *Id.* Again, CP testified his role was to

adjudicate the allegations regarding the appellant as found in the proposal and ROI; it was not to investigate or report the appellant's previously reported allegations of other employees' misconduct. AF, W-2, Tabs 55, 63.

Regarding the appellant, CP knew that the appellant had returned to work following the the MSPB's reversal of a prior action. AF, W-2, Tab 55. CP testified he did not know the reason for the decision and did not consider that action in deciding to remove the appellant. *Id.*

In addition, CP acknowledged that he saw an ITR regarding the appellant's post on Twitter that included a photograph of him in uniform taking credit for the barriers at DCA in April 2017. AF, W-2, Tab 24, Ex. HH; AF, W-2, Tab 55. CP could not specifically recall the ITR, however, and stated it was possible he provided some direction and or guidance with respect to the ITR. AF, W-2, Tab 55.

In responding to the appellant's questions about why he did not take action when the appellant complained by email to his supervisors about feeling ridiculed and humiliated, CP testified that while he reviewed the email, he did not believe he needed to take any action. AF, W-2, Tab 56. CP explained the email was forwarded with the acronym FYSA meaning "for your situational awareness." AF, W-2, Tab 56. CP reiterated that he gets 100s of emails and he did not consider the appellant's comments to be tantamount to a claim of harassment and retaliation. *Id.* CP explained that he was on some of the emails related to the appellant's medical situation because the appellant was cleared for light duty and he received this information for all those on light duty at least monthly. *Id.*

DT denied that he spoke to CP about his decision or even having knowledge about what was found in the investigation. AF, W-2, Tab 52. Further, DT testified that he did not know of the appellant's removal until he got the standard advisement that the appellant was gone. *Id.*

As found in Part II, I find CP had at least some knowledge of the appellant's disclosures and complaints. Still, there was no evidence that he was

personally implicated or believed that he was. Further, there was no evidence that CP had a personal relationship with anyone who was implicated by the appellant's protected whistleblowing. Moreover, there was no evidence or argument that any adverse employment situation befell him or TJ as the result of the appellant's protected whistleblowing. Therefore, I find no evidence of a personal motive to retaliate by either TJ or CP.

Still, part of the appellant's theory of the case was that the agency in general was antagonistic to whistleblowers and especially him, which would go to the motivation to retaliate based on a professional retaliatory motive. *See Soto v. Department of Veterans Affairs*, 2022 MSPB 6, ¶ 15 (2022). Therefore, I also considered TJ's and CP's professional motive to retaliate.

I agree with the appellant that knowledge about his protected disclosures and activity were widely known. Further, the appellant provided evidence and argument about his protected whistleblowing as part of the OOI investigation, as well as in his response to the proposal to remove. AF, W-1, Tab 29, 4c; AF, W-1, Tab 29, 4b; AF, W-1, Tab 29, 4f at 201-62; AF, W-1, Tab 29, 4L. Thus, to the extent that any manager or agency official would have a motive to retaliate, I find CP and TJ shared that motivation.

**COMPARATORS**

The appellant identified many comparators regarding the initiation of the investigation, the investigation generally, and how he was generally perceived and treated. I have analyzed those comparisons, where appropriate, in other sections of this decision. I have not addressed every such allegation, as I find the agency's investigation was not relevant in every respect to my determination of whether the agency would have removed the appellant even absent his protected whistleblowing. Thus, while I allowed testimony and the admission of evidence on these allegations I have not discussed them herein. Instead, here I discuss

other individuals who were not known whistleblowers[17] but who were investigated and charged with alleged similar misconduct. In considering these purported comparators, I have evaluated whether they are appropriate comparators and if so how they were treated.

Comparator 1

The agency on October 23, 2018, issued a notice of decision to a FAM in the Philadelphia Field Office. AF, W-2, Tab 24, Ex. PP. The FAM in that case was charged with one specification of Inappropriate Comments. *Id.* The charge was related to a November 15, 2015 FB post in which the FAM wrote: "Tired of all the F@%&ing posts about the entitled, crybaby #mizzou idiot student protests and the #blackiesmatter racists!! Enough already!!" *Id.* at 1. In addition, according to the decision letter the post included the statement "IT'S TIME TO START KILLING MOTHERFUCKERS" under a picture of Ronald Reagan. *Id.* at 1-2. In this case, the appellant posted on his private FB page using a pseudonym and did not identify himself as a FAM. *Id.* at 2. Nevertheless, the agency found that the post was reported by an individual who knew the appellant's identity and knew he was a FAM. *Id.*

The deciding official sustained the charge. AF, W-2, Tab 24, Ex. PP. Further, the deciding official upheld the proposed 5-day suspension. *Id.*

The agency argued that this FAM was not an appropriate comparator because that case involved a different deciding official and the case involved only one charge and one specification. AF, W-2, Tab 37.

CP testified there was only one charge in the case involving Comparator 1, and he was not the deciding official. AF, W-2, Tab 56. Still, CP testified that the statements were inappropriate, but added that in determining discipline he

---

[17] There was no testimony or other evidence regarding whether any of the comparators were whistleblowers.

considers the entire record to include the employee's reply and whether it would be possible to rehabilitate the employee. *Id.* CP averred he did not know the material facts in the case, and would need to look at the record in that case to give an opinion of what action was appropriate. *Id.*

I find Comparator 1 is not similarly situated for several reasons. First, the employee was alleged to have made only one post, albeit highly offensive and egregious, while the appellant made several. Further, unlike the appellant, Comparator 1 did not have prior discipline and had not previously been counseled about similar misconduct. *See* AF, W-2, Tab 24, Ex. PP. Moreover, unlike Comparator 1, the basis of the appellant's decision was three charges with multiple specifications under each. *Compare* AF, W-1, Tab 29, 4a *with* AF, W-2, Tab 24, Ex. PP.

Further, it is significant that there were different deciding officials. This is especially significant in a case in which the motive of the deciding official is relevant to the determination of whether he would have taken the same action absent protected whistleblowing.

Comparator 2

In another case, the agency proposed a 7-day suspension for a Miami Field Office FAM. AF, W-2, Tab 24, Ex. LL. In that case, as with Comparator 1, the decision was based on one charge and one specification of Inappropriate Comments. *Id.* According to the decision, the case involved one FAM calling another FAM the "n word" in the workplace. *Id.*

As with Comparator 1, CP was not the deciding official for the Comparator 2 decision. *See* AF, W-2, Tab 24, Ex. LL. Again, CP testified he did not have the record, and therefore could not determine what he would have done in that case. AF, W-2, Tab 63.

Still, the decision provided at least one stark distinction between the appellant and Comparator 2. In the decision letter, the deciding official quoted

from Comparator 2's statement related to the incident. AF, W-2, Tab 24, Ex. LL. Therein, Comparator 2 expressed regret and remorse for his comment in a very specific and personal way. *Id.* Further, Comparator 2 took responsibility for his misconduct and apologized as well as indicated he would not engage in similar misconduct in the future. *Id.*

Moreover, some of the same reasoning articulated for Comparator 1 was similarly applicable to Comparator 2. There was no evidence that Comparator 2 had been previously counseled for similar misconduct as the appellant was, and unlike the appellant, Comparator 2 was not alleged to have made more than one inappropriate comment or engaged in other misconduct. *Compare* AF, W-1, Tab 29, 4a *with* AF, W-2, Tab 24, Ex. LL.

Comparator 3

In the third proffered comparator decision CP was the deciding official and the decision included a charge of Failure to Cooperate in an Investigation, one specification, and two specifications of the charge Misuse of Government Property. AF, W-2, Tab 24, Ex. UU. The decision was removal. *Id.* This was so even though Comparator 3's case did not involve the charge of Inappropriate Comments. Further, the charged misconduct was based on Comparator 3's refusal to provide investigators with the password to his "iTunes backup account" on his government phone, and did not involve contacting potential witnesses or otherwise seeking to influence witnesses. *Id.*

In that case, the employee had prior discipline, but CP chose not to consider it because of the age of misconduct and because the prior misconduct was dissimilar in nature. *Id.* CP testified that a Letter of Reprimand may only be used for 2 years except it may continue to be used for the purpose of notice. AF, W-2, Tab 56. In this example, because the misconduct was different in each case, it could not be used for notice. *Id.*

CP further explained that the employee, in that case, was asked to provide a password and he refused. AF, W-2, Tab 63. CP decided to remove the employee and wrote that he would have removed him based solely on the charge of Failure to Cooperate with an Investigation. *Id.* Thus, I find no evidence of disparate treatment between Comparator 3 and the appellant. Indeed, even if Comparator 3 were treated more favorably, I find the appellant was charged with additional misconduct.

Based on the foregoing, I find the agency has shown by clear and convincing evidence that it would have removed the appellant even absent his protected disclosures and protected activity. Specifically, as articulated above, I find strong evidence that the appellant engaged in the charged misconduct, that CP appropriately considered the *Douglas* factors, and determined that removal was an appropriate penalty. Moreover, I find only a very limited basis for TJ and CP to harbor retaliatory animus, and that was only based on the generalized motivation possessed by any agency official. In addition, I find the only comparator identified whose conduct was assessed by CP was removed like the appellant, while the other two purported comparators did not share sufficient commonality to be true comparators. Accordingly, I find the appellant has failed to establish his entitlement to corrective action based on his removal.

## DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/

Melissa Mehring
Administrative Judge

## NOTICE TO APPELLANT

This initial decision will become final on **March 14, 2023**, unless a petition for review is filed by that date. This is an important date because it is

usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

**BOARD REVIEW**

You may request Board review of this initial decision by filing a petition for review.

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

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

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

**Criteria for Granting a Petition or Cross Petition for Review**

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

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

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than

12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

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

§ 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

**NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

**NOTICE OF APPEAL RIGHTS**

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

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

**(1) Judicial review in general**. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S.

Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

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

582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

**(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012**. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's

disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

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

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