

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,  
Petitioner,

v.

LARRY L. HATHAWAY  
Respondent.

DOCKET NUMBER  
HQ12159010005

DATE: AUG 16 1991

Anthony T. Cardillo, Esquire, Dallas, Texas,  
for the Special Counsel.

Larry L. Hathaway, Fort Worth, Texas, pro se.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

This is the first complaint for disciplinary action filed by the Special Counsel since the enactment of the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16 (1989). The eight-count complaint charges that Larry L. Hathaway, a GM-15 Regional Personnel Officer, Region 7, General Services Administration (GSA) engaged in prohibited personnel practices by recommending, threatening,

or taking personnel actions against an employee because of the employee's whistleblowing.

The case is currently before the Board on the parties' exceptions to the Chief Administrative Law Judge's (CALJ) Recommended Decision. The CALJ sustained one of the eight counts and recommended Hathaway's demotion to a non-supervisory GS-13 position for a minimum period of three years. For the reasons set out below, the Board ADOPTS the Recommended Decision as MODIFIED.

#### Background

Harry Livengood worked for the respondent as an Employee and Labor Relations Officer, GM-13. On July 31, 1989, Livengood and a colleague, Eddie Ward, reported to the Regional Inspector General (IG), Richard Herr what they believed to be improper personnel actions taken by respondent. Livengood disclosed information concerning eight discontinued service retirements, Tr. 43, 69, 70, 133, and Ward disclosed information concerning the appointment of an unqualified individual (hereafter the Chadwick action).<sup>1</sup> Tr. 71, 331; Appeal File (AF), Petitioner's Exhibit (P. Ex.) No. 25.

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<sup>1</sup> The CALJ found that Livengood and Ward made a joint disclosure to IG Herr regarding the above personnel actions. R.D. at 6. IG Herr testified, however, that Livengood provided most of the information regarding the discontinued service retirements while Ward supplied information regarding the Chadwick action. Tr. 69. In addition, one of these employees disclosed information concerning tardy performance appraisals. However, this last disclosure is not significant to this case.

On Friday, August 4, 1989, respondent called Livengood, Ward and another employee named Brown to his office at about 8:00 a.m. Tr. 148, 353. Recommended Decision (R.D.) at 7. A heated discussion ensued in which the Chadwick action was discussed. Tr. 148, 313, 796. Respondent also discussed the possibility that someone in the office was leaking management information to the union. Tr. 149. After Ward and Brown left the meeting respondent told Livengood that he did not trust him. Livengood answered that respondent had reason not to trust him and that he was "out to get" respondent. Tr. 150, 497. In the version of the conversation credited by the CALJ, and which the Board credits as well, respondent then asked, "With Harry?" and Livengood answered, "Yes." R.D. at 9. Harry Dawson, AFGE Counsel 236 President, was the person to whom information was allegedly being leaked.<sup>2</sup>

Shortly thereafter, Livengood told respondent that his comment about trust did not refer to Harry Dawson. Tr. 150; AF P. Ex. No. 43, at 36. Respondent did not believe Livengood's quick denial. Hathaway then went to the office of his immediate supervisor Leighton Waters and informed him that Livengood admitted leaking information to the union.

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<sup>2</sup> Livengood and Hathaway gave somewhat differing accounts of their conversation in which the admission was made. The CALJ credited respondent's version, as set forth above, which provides that in response to Livengood's statement that he was out to get respondent and respondent's question, "With Harry?", Livengood replied "Yes." R.D. at 9. The Special Counsel has not pointed to anything in the record to call this finding into doubt.

Tr. 798. The two men agreed that reassignment was appropriate and discussed the possibility of reassignment either within or outside the region, including reassignment to Washington, D.C. Tr. 745, 799.

Respondent quickly called Livengood to his office and informed him that, because of his leaks to the union, he would be reassigned to Washington, D.C. Livengood then informed respondent that he had made disclosures to the IG. Tr. 151-152. Almost immediately respondent telephoned the IG to request a meeting.

The IG, IG investigator Brian Murphy, Livengood and respondent met about 11:15 a.m. Respondent called Livengood disloyal and expressed displeasure that Livengood had gone to the IG "behind his back". Tr. 53; R.D. at 11. Additionally, respondent asserted his belief that Livengood was leaking information to the union. When asked for evidence of this belief by the IG, respondent answered that he had a feeling that Livengood was the "leak". Tr. 54, 79-80.

At 1:30 p.m. of the same day, respondent called together some of Livengood's staff and informed them that he was going to reassign Livengood out of the region because he was no longer trustworthy. Tr. 450. He also told them that Livengood had made disclosures to the IG and that they were all to cooperate if contacted by the IG's office. *Id.*

Respondent relieved Livengood of his supervisory duties as well as his labor relations activities on August 8, 1989.

Shortly thereafter Livengood took two weeks annual leave. Tr. 159. In the interim respondent reassigned Livengood and placed another employee in Livengood's former position. Tr. 159, 205, 806. Livengood was reassigned to unclassified duties effective August 14, 1989. AF, P. Ex. No. 7. Additionally, Hathaway cancelled Livengood's attendance at a two-day symposium on MSPB procedures. Tr. 160.

Livengood's new assignment was shortened by the involvement of the Special Counsel in this matter. GSA management decided to return Livengood to his former position but with restricted access to labor relations information. Tr. 807, 808. According to both Livengood and respondent they had a number of heated discussions following Livengood's return. Tr. 221, 810. On October 2, 1989, following Livengood's request for a copy of his 1989 performance appraisal, respondent allegedly told him that he should not expect a highly satisfactory rating the next year and that respondent would remove him from Federal service at the conclusion of the Special Counsel's investigation. Tr. 175-76.

Based on these events, the Special Counsel, in counts one through four, charged respondent with retaliating against Livengood for whistleblowing in violation of 5 U.S.C.A. § 2302(b)(8) (West Supp. 1990) (hereafter (b)(8)).<sup>3</sup>

<sup>3</sup> The relevant portion of this statutory section prohibits taking or threatening to take personnel actions against an employee because of that employee's disclosures to the Inspector General of an agency which the employee believes evidences a violation of law, rule or regulation or which

Specifically, in count one Hathaway was charged with threatening to reassign Livengood on or about August 4, 1989; in count two he was charged with relieving Livengood of his duties as chief of the Employee and Labor Relations Branch on or about August 8, 1989, and detailing him, effective August 13, 1989, to unclassified duties; in count three he was charged with cancelling previously scheduled training for Livengood on or about August 11, 1989; and in count four he was charged with threatening, on or about October 3, 1989, to remove Livengood and to give him an unsatisfactory performance rating for the 1989-1990 performance appraisal year.

Counts five through eight are based on the same facts set out in the first four counts. The counts are set out separately, however, because the Special Counsel asserts that these same events establish a second prohibited personnel practice under 5 U.S.C.A. § 2302(b)(9)(C) -- a provision prohibiting retaliation for lawful disclosures of information to agency inspectors general.<sup>4</sup>

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evidences gross mismanagement or a gross waste of funds. 5 U.S.C.A. § 2302(b)(8)(B)(i) and (ii). All references to 5 U.S.C.A. are to West's 1990 supplement to the United States Code Annotated.

<sup>4</sup> It is a prohibited personnel practice under 5 U.S.C.A. § 2302(b)(9)(C) 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 cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law.

## ANALYSIS

The Section 2302(b)(8) Violations

Before addressing the parties' exceptions to the first four counts, it is necessary to discuss the effect of the recently enacted WPA on the issue of proof in disciplinary cases involving § 2302(b)(8). The CALJ adopted the Special Counsel's argument that the evidentiary standards used to determine (b)(8) violations in corrective action cases under 5 U.S.C.A. § 1214(b)(4)(B), a section enacted as part of the WPA, should also be used to determine (b)(8) violations in disciplinary cases brought pursuant to 5 U.S.C.A. § 1215. R.D. at 16. The respondent does not contest this finding, and the Board agrees that the CALJ employed the proper standard.

Section 1215 of 5 U.S.C.A. sets out the procedures to be followed when the Special Counsel brings a disciplinary action against an employee for committing a prohibited personnel practice. Such practices are defined only in 5 U.S.C.A. § 2302(b). Section 2302(b)(8) sets forth the definition of a prohibited reprisal for whistleblowing. Under this section, a violation does not occur unless it is proven that the personnel action taken or threatened was "because of" the protected disclosure. This section, however, does not explain how the element of causation, and thus proof of a statutory violation, is to be established. But section 1214(b)(4)(B), the corrective action provision of the WPA, provides a framework for determining causality.

Under section 1214(b)(4)(B), the Special Counsel may establish that a whistleblower reprisal has taken place by showing, by a preponderance of the evidence, that the whistleblowing was a contributing factor in the personnel action. 5 U.S.C.A. § 1214(b)(4)(B)(i); see also 135 Cong. Rec. H747 (daily ed. Mar. 21, 1989) (Explanatory Statement on Senate Amendment S. 20). However, a finding of a (b)(8) violation may be avoided, even if whistleblowing was a contributing factor in the personnel action, if it is shown by clear and convincing evidence that the same action would have been taken in the absence of the whistleblowing. 5 U.S.C.A. § 1214(b)(4)(B)(ii); see also 135 Cong. Rec. H749 (daily ed. Mar. 21, 1989) (Joint Explanatory Statement). The Board finds that where reprisal for whistleblowing is at issue, this standard should be applied in disciplinary cases as well as corrective action cases.

The definition of reprisal contained in (b)(8), including the causal connection requirement, is exclusive and only permits one interpretation.<sup>5</sup> Therefore, the definition of a (b)(8) prohibited personnel practice must be

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<sup>5</sup> Section 2302(a)(1) of Title 5 states that "[f]or the purposes of this title, 'prohibited personnel practice' means any action described in subsection (b) of this section." Under the rules of statutory construction "[a] definition which declares what a term 'means' ... excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n.10, 99 S.Ct. 675, 684 n.10 (1979) (quoting 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)).

the same regardless of whether a claim of prohibited reprisal is made in the context of a corrective action or a disciplinary action. Because section 1214 contains the only statutory standard explaining how the causal connection element in (b)(8) may be proven, it follows that the § 1214 standard must also be used in adjudicating disciplinary actions.

Previously, the Board applied different standards in corrective action and disciplinary cases. *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 609 (1984) *rev'd on other grounds*, 802 F.2d 537 (D.C.Cir. 1986); see also *Special Counsel v. Starrett*, 28 M.S.P.R. 60 (1985), *rev'd on other grounds*, 792 F.2d 1246 (4th Cir. 1986). However, *Harvey* and *Starrett*, were issued prior to the enactment of the WPA. In the WPA, Congress, for the first time, set out a standard for determining the causal connection in (b)(8). 5 U.S.C.A. § 1214. Given the fact that Congress has now set out a standard for determining (b)(8) violations, it is no longer appropriate to have different standards for disciplinary and corrective action cases. Accordingly, the different standards for disciplinary and corrective action cases, approved in *Harvey* and *Starrett*, are inapplicable to post-WPA cases.

#### Count One

Count one charged respondent with threatening to reassign Livengood to Washington, D.C. because of his whistleblowing. The CALJ found that Livengood's protected

activity was a contributing factor to the threatened reassignment, but concluded that (b)(8) was not violated because respondent proved by clear and convincing evidence that he would have taken the same action in the absence of the protected disclosures. R.D. 25, 29, 31. Specifically, the CALJ found that Hathaway proved that he would have taken the action anyway because of his belief that Livengood was leaking information to the union. *Id.* In his exceptions, respondent contends that the Special Counsel failed to prove that whistleblowing was a contributing factor in the threatened reassignment. Respondent's Exceptions (R.E.) 2-4. Specifically, he contends that Livengood's whistleblowing could not have been a contributing factor because he was unaware of the disclosures to the IG until after he told Livengood about the reassignment. R.E. at 7.

It is undisputed that the threatened reassignment occurred before Livengood told Hathaway about his disclosures to the IG. It is also true that no one who was aware of Livengood's disclosures told Hathaway about them before the reassignment was threatened.<sup>6</sup> R.D. at 24.

<sup>6</sup> The Special Counsel asserts that Mr. Earl Eschbacher told Hathaway about Livengood's disclosures before August 4th and therefore, that Hathaway had knowledge of the whistleblowing prior to the threatened reassignment. Petitioner's Reply to Exceptions (P.R.E.) 8-9. The Special Counsel's argument is based on Eschbacher's close friendship with the respondent, Eschbacher's failure to deny that he had conversations with respondent between August 2nd and August 5th, and a phone message for respondent allegedly left by Eschbacher on August 2nd, shortly after Eschbacher learned of the whistleblowing. However, in the face of Eschbacher's consistent testimony on direct and cross examination, there

Accordingly, there is no direct evidence that Hathaway had knowledge of Livengood's disclosures before he threatened to reassign Livengood on August 4, 1989.

The Special Counsel maintains, however, that circumstantial evidence supports a finding that respondent had full knowledge of the whistleblowing prior to the threatened reassignment. Petitioner's Exceptions (P.E.) 2-4 and Petitioner's Posthearing Brief (PHB) 8-25. She points to alleged inconsistencies in respondent's rationale for the August 4th, 8:00 a.m. meeting to support this assertion. According to the Special Counsel, Hathaway's explanations for the meeting are so inconsistent that they are unbelievable and that the only other reason for calling the meeting was Hathaway's knowledge about and interest in the Ward and Livengood disclosures to the IG.

While inferences from circumstantial evidences may in certain instances be strong enough to overcome the effect of direct testimony to the contrary, we are unable to draw such inferences from the record. Although respondent's rationale for the 8:00 a.m. meeting has been stated in several different ways, the different versions are not contradictory and respondent's knowledge of Livengood's disclosures may not be inferred from them.

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is no basis to disturb the CALJ's finding that Eschbacher did not inform the respondent of Livengood's disclosures prior to August 4th.

The record shows that respondent was angry that Livengood and Ward were "grousing" about the Chadwick recruitment action. Respondent's affidavit and testimony simply provide a fuller explanation for the meeting - to chastise Livengood for interfering with the Chadwick action in an effort to benefit another employee, Larry Bargas. AF, P. Ex. 43 at 17, Tr. 525-27.

Respondent's testimony that he could not recall whether he specifically mentioned Bargas at the meeting with Ward and Livengood and their testimony that they do not recall Bargas being mentioned at the meeting, does not, as the Special Counsel suggests, demonstrate a conflict or a fabrication. See AF, Tab 54 at 17-21. The fact that respondent called Livengood to the meeting is some indication that respondent intended to discuss Bargas in connection with the Chadwick action because it was Livengood who had tried to assist Bargas on two prior occasions. Additionally, respondent indicated in his September statement to the Special Counsel that, in his private meeting with Livengood following the 8:00 a.m., August 4th meeting with Livengood, Ward and Brown, he did not "get to the part about Bargas because of Livengood's admission that he was leaking information to Harry Dawson."<sup>7</sup> AF, P. Ex. 43 at 35.

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<sup>7</sup> The Special Counsel asserts that respondent's claim of ignorance is proved false by a comparison of Doug Waters' testimony with Hathaway's September 22, 1989 statement to the Special Counsel. P.R.E. 9-10. Hathaway's statement, according to the Special Counsel, indicates that he first

In the Recommended Decision, the CALJ found that Hathaway had no knowledge of Livengood's disclosures at the time the initial decision to reassign Livengood was made. However, the CALJ found that Livengood's protected activity was a contributing factor in the threatened personnel action because the reassignment decision was reaffirmed after respondent learned of the protected activity. R.D. 23, 29. The Board disagrees.

The CALJ's contributing factor analysis relied heavily on respondent's quick decision to meet with the IG, his behavior during that meeting and the IG's testimony regarding respondent's personality.<sup>8</sup> While the Board agrees with the CALJ's findings regarding respondent's conduct at the meeting with IG Richard Herr, neither the strong words used nor intense emotion displayed is sufficient, under the circumstances, to show that Livengood's protected activity was a contributing factor in the decision to reassign.<sup>9</sup>

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learned the substance of the disclosures on August 5, 1989. AF, P. Ex. 43 at 71-74. However, Doug Waters testified that, on August 4, 1989, respondent identified discontinued service retirement actions as the subject of Livengood's disclosures. Tr. 465-466. The Board finds that the September 22 statement is inconclusive on the issue.

<sup>8</sup> Respondent challenges the CALJ's findings that he has a volatile temperament and was prone to retaliate. R.E. at 2-6. These CALJ findings have not been considered because they are unnecessary to the Board's conclusions.

<sup>9</sup> Respondent criticized the CALJ's reliance on the testimony of IG Herr concerning respondent's behavior at the 11:15 a.m. August 4, 1989 meeting. See R.E. at 6. The CALJ noted that Herr was disinterested, was not under the same strain as others at the meeting, was not the least equivocal in his testimony, and his capacity to observe and narrate what went on was the greatest among those present at the meeting.

There is nothing in the record that indicates that Hathaway reassessed his threat to reassign Livengood once he learned of the disclosures. The quickness of Hathaway's decision to meet with the IG after he learned of the disclosures belies a finding that the reassignment threat was reassessed and reaffirmed. The CALJ apparently found that Hathaway had reaffirmed his decision because he "persisted" in it after he learned of the disclosures. R.D. at 26. However, Hathaway's persistence does not, by itself, transform the previously threatened reassignment into a prohibited personnel practice. There is nothing in (b)(8) that requires a supervisor to change a decision once he learns that the employee has engaged in whistleblowing. Accordingly, the fact that Hathaway persisted in his plan to reassign Livengood after he learned of the disclosures to the IG does not constitute a violation of (b)(8). The Board finds, therefore, that the Special Counsel failed to prove that whistleblowing was a contributing factor in the threatened reassignment.<sup>10</sup> Count one is not sustained.

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R.D. at 12, n.6. Thus, respondent's exceptions fail to show that the CALJ's findings on this matter are not entitled to deference. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980).

<sup>10</sup> The Special Counsel also argues that the relatively short time between Livengood's disclosures and the attempted reassignment constitutes circumstantial evidence of a (b)(8) violation. PHB at 8-11, P.R.E. at 2. It is true that "[o]ne of the ... ways to show that whistleblowing was a factor in the personnel action is to show that the official taking the action knew .. of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." 135 Cong. Rec. H749 (daily ed. March 21, 1989).

Count Two

Count two charged respondent with relieving Livengood of his duties as chief of the Employee and Labor Relations branch on August 8, 1989, and detailing him to unclassified duties on August 13, 1989. The CALJ determined that the same reasons which caused him to find Livengood's protected conduct a contributing factor as to count one warranted finding the whistleblowing a contributing factor as to count two. R.D. 31. Similarly, the CALJ concluded that respondent offered clear and convincing evidence that he would have taken the personnel actions cited in count two in the absence of the whistleblowing because he believed that Livengood was leaking information to the union. R.D. 31.

On this count it is unnecessary to decide whether Livengood's whistleblowing was a contributing factor because the Board agrees with the CALJ's finding that Hathaway showed by clear and convincing evidence that he would have relieved Livengood from his position and reassigned him to unclassified duties even if he had not engaged in whistleblowing. The Special Counsel argues that respondent's concern about unauthorized disclosures to the union was a sham designed to hide respondent's unlawful conduct. However, the record shows that management had been concerned with leaks to the union for a long time. Tr. 538, 594, 636. It also shows that Livengood admitted that he was

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However, here, the Special Counsel has failed to prove that respondent had knowledge. As a result, a (b)(8) violation cannot be found.

the one providing information to the union. While the Board recognizes that Livengood quickly retracted that admission, it was reasonable for Hathaway to doubt the retraction, and it was reasonable for Hathaway to feel that it was urgent to put Livengood in a job where he could not supply information to the union, especially when national negotiations were scheduled in the near future. AF, P. Ex. 43 at 79. Detailing Livengood out of his labor relations position was a logical solution to the problem pending investigation of the leaks. Accordingly, count two is not sustained.

### Count Three

Count three charged respondent with cancelling Livengood's training in MSPB procedures because of Livengood's protected disclosures in violation of 5 U.S.C.A. § 2302(b)(8). In order to find that the cancellation of training is a prohibited personnel practice as defined in section 2302(b)(8) it is necessary to show that the training meets the statutory definition of a personnel action contained in 5 U.S.C.A. § 2302(a)(2)(A)(ix).<sup>11</sup> The CALJ found that the training in question did not fall within this definition.<sup>12</sup>

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<sup>11</sup> This section provides that a personnel action means:

a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph.

<sup>12</sup> The CALJ interpreted 5 U.S.C.A. § 2302(a)(2)(A)(ix) to mean that the cancelled training must be career enhancing.

The Special Counsel argues that the CALJ reached the wrong conclusion because he applied an incorrect legal standard. P.E. at 4-7. According to the Special Counsel, any training that bears a relationship to an employee's job should be considered a personnel action for purposes of establishing a 2302(b)(8) violation. Special Counsel's argument is not supported by either the statute or its legislative history.

The plain language of the statute establishes that not all training and education are included within the meaning of the statute. It must be training that "may reasonably be expected to" lead to a personnel action as described in section 2302(a)(2)(A). 5 U.S.C.A. § 2302(a)(2)(A)(ix). The limiting language was contained in both the House and Senate versions of the bill. See H.R. 11280 and S. 2640, 95th Cong., 2d Sess. reprinted in 1 Legislative History of the Civil Service Reform Act of 1978 at 5 (Leg. Hist.). The Senate Report explains that a personnel action includes a decision concerning education or training if it may lead to some other personnel action. 2 Leg. Hist. at 1484. Thus, the legislative history demonstrates that there must be a link between the decision regarding training and a future personnel action.

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In light of the lack of any evidence that nonattendance at the MSPB symposium could affect Livengood's career we find it unnecessary to address the CALJ's finding that the cancelled training or education must be "career enhancing" to constitute a personnel action.

That link is defined in the statute in terms of what it is reasonable to expect. The meaning of reasonable is "moderate: not demanding too much" or "being or remaining within the bounds of reason: not extreme." (*Webster's Third International Dictionary* (1971)). Expect has been defined as including the following "to consider probable or certain." *Id.* Thus, pursuant to the common meaning of the statutory terms, training that "may reasonably be expected to" lead to a personnel action can be interpreted to mean a moderate probability that the training will result in some type of personnel action. Surely these definitions contemplate more than evidence of a relationship between the cancelled training and one's job. However, it is unnecessary to decide in this case how much evidence is sufficient to meet the statutory standard because the Special Counsel has offered only speculation as to how the lack of training could affect Livengood in the future. Based on the evidence of record it is impossible to determine whether nonattendance at the two-day symposium could reasonably be expected to lead to a personnel action involving Livengood.<sup>13</sup> Accordingly, the Board finds, in agreement with the CALJ, that because the Special Counsel failed to

<sup>13</sup> The CALJ found no evidence that attendance or nonattendance at training was of such significance that it would in any way influence Livengood's career. We note that the CALJ referred to the lack of effect on "respondent's" career. R.D. at 34. That the CALJ meant to cite Livengood rather than respondent is clear from the context of the paragraph. This inadvertent error, which was not cited by the parties, is of no consequence. See *Kentner v. National Transportation Safety Board*, 20 M.S.P.R. 595, 598 (1984).

show that Livengood was subjected to a personnel action as defined in 5 U.S.C.A. § 2302(a)(2)(A)(ix) there cannot be a section (b)(8) violation.

Count Four

Count four charged respondent with violating § 2302(b)(8) by threatening to give Livengood an unsatisfactory performance appraisal and threatening to remove him after the Special Counsel's investigation concluded.<sup>14</sup> The CALJ sustained this count finding that the threats were made, that Livengood's protected disclosures were a contributing factor in the threatened personnel actions and that if the protected conduct had not taken place, the threats concerning the removal and the performance appraisal would never have been made. R.D. 41.

Respondent generally challenges the CALJ's finding that threats were made. R.E. 12. In the alternative, he urges that his remark about the performance appraisal was misinterpreted. *Id.* Regarding the denial, the CALJ found Livengood's testimony more credible because he was persistent in his version and was not shaken on cross-examination. R.D. at 37. The CALJ also noted that Livengood's account was consistent with the other record evidence of respondent's attitude toward Livengood after August 4, 1989. In contrast, the CALJ found respondent's

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<sup>14</sup> Count four refers to threats made on or about October 3, 1989. Livengood testified that the threats in question were actually made on October 2, 1989. Tr. 175-76.

broad denials self-serving. *Id.* Respondent's citation of Livengood's alleged inconsistent testimony provides no basis to refute the CALJ's finding of a threat because none of the examples cited were related to Livengood's testimony concerning the threats.<sup>15</sup> Thus, no reason has been shown to disturb the CALJ's finding that Livengood was the more credible witness on this point. See *Weaver v. Department of the Navy*, 2 M.S.P.R. at 133.

Respondent also argues that the remark about the performance appraisal should not be considered a threat. He implies that the remark in question, that Livengood should not expect to get the same rating as last year (a highly successful), could mean that Livengood could receive one of four other ratings in the five level performance appraisal system, one of those ratings being outstanding. See R.E. at 12. Under the circumstances of daily harassment described by Livengood and credited by the CALJ, it would be unreasonable to construe the remark to mean anything other than an unsatisfactory rating, especially when the remark is considered together with the threat of removal.

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<sup>15</sup> Respondent cites the following examples of Livengood's allegedly inconsistent testimony on the issue of whether threats were made: testimony concerning the number of times a day Livengood was called into respondent's office; testimony regarding the number of investigations respondent initiated concerning Livengood's performance; and testimony regarding an alleged conversation at a party. See R.E. 18-19.

Further, contrary to respondent's belief, *Gergick v. General Services Administration*, 43 M.S.P.R. 651 (1990) does not preclude a finding that a single remark about Livengood's future performance appraisal constitutes a threat. R.E. at 13. In *Gergick* the Board adopted the dictionary definition of the term "threaten." Under that definition, "threaten" means, among other things, "to give signs of the approach of (something evil or unpleasant)." *Gergick* at 656. Hathaway's statement about Livengood's performance appraisal certainly meets this definition. The fact that the performance rating was mentioned only once does not make it any less a threat.

Respondent also argues that his remark to Livengood about the performance rating could not be viewed as a threat because there was no evidence that he either initiated procedures to start a performance-based action against Livengood or communicated that intent to his superiors. R.E. at 14. However, as noted in *Gergick*, the legislative history of section 2302(b)(8) of the WPA shows the intent of Congress that the term "threaten" be given a very broad interpretation. *Gergick* at 656. Further, the joint explanatory statement expressing the understanding of the floor managers of the bill as to the intent of the provisions regarding threats, includes the statement that "no actual proposal of a personnel action is necessary to establish a prohibited personnel practice." 135 Cong. Rec. H750 (daily ed. Mar. 21, 1989)(statement of Rep. Sikorski).

Thus, the Board concludes that respondent's statement regarding the performance rating was a threat.

The Board also finds that Livengood's protected disclosures were a contributing factor in the threatened personnel actions. First, we note that unlike count one, Hathaway was aware of the whistleblowing at the time he made the charged threats. He learned of the disclosures and the substance of them on August 4, 1989. Tr. 465-66.

In addition, Livengood's disclosures were about serious matters -- allegedly improper discontinued service retirements -- and could well have been a provocation for reprisal.<sup>16</sup> Indeed, respondent showed by his behavior at the August 4th meeting with Livengood and the IG that he was angry about the whistleblowing.

Furthermore, the record shows that during August and September respondent's treatment of Livengood changed following his knowledge of Livengood's protected conduct. Respondent called Livengood into his office on a daily basis where he was subject to harsh criticism. Tr. 219, 221. His work was also subject to closer scrutiny. Tr. 179, 180. Most notably, respondent's threat to give Livengood an unsatisfactory rating on his next performance appraisal was made while handing Livengood his current rating, "highly

<sup>16</sup> It may be inferred that Hathaway, as Livengood's immediate supervisor, knew that Livengood, rather than Ward, made the disclosures about the discontinued service retirements because processing retirement actions is a program area within Livengood's responsibility. Tr. 132-33, 423.

satisfactory", which covered a performance period prior to Livengood's disclosures to the IG and before the next appraisal period was completed.

Finally, the record shows that respondent was reflecting on this protected conduct when he made the threats at issue. Livengood testified that respondent told him that when the Special Counsel "gets through with this" respondent would remove him from federal service.<sup>17</sup> Tr. 221. Based on ~~these~~ circumstances, it is clear that Livengood's protected conduct was a contributing factor in the personnel actions threatened in count four.

Finally, respondent apparently contends that any threats he may have made resulted from his loss of trust in Livengood which, in turn, resulted from his suspicion that Livengood leaked information to the union. The evidence does not support this argument.

Unlike the personnel actions in count two, the threats in count four occurred long after Livengood's admission and retraction of his involvement with the union. During this period between August 4th and October 2nd, the date of the threats, no evidence was ever developed that Livengood was actually the source of the leak. This lack of evidence is important because Hathaway testified at the hearing that the

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<sup>17</sup> Respondent denied making this specific statement to Livengood but admitted that he told the Special Counsel that he would try his best to have Livengood removed from his office. Tr. 822-23. Further, as stated in the text, *supra*, we concur in the CALJ's finding that the threat was made as charged.

proper action against an employee he suspected to be leaking information to the union, but against whom he had no evidence, would be a reassignment. Tr. 776. Here respondent had no evidence that Livengood was leaking information to the union. However, instead of threatening a reassignment, Hathaway threatened an unsatisfactory performance appraisal and a removal. Under these circumstances, Hathaway has not proved by clear and convincing evidence, that he would have made the threats even in the absence of Livengood's whistleblowing.

Finally, the Board notes respondent's exception that it is unreasonable to find that he retaliated against Livengood when he took no action against Ward who also made disclosures to the IG. R.E. at 5. First, the evidence shows retaliation against Livengood. Next, we note that Ward's disclosure concerning the Chadwick recruitment action was potentially less serious than Livengood's disclosures concerning eight allegedly improper retirement actions.<sup>18</sup> Moreover, in the 8:00 a.m., August 4th meeting with Livengood, Ward and Brown, respondent obtained a concession

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<sup>18</sup> Ward, a staffing specialist in the Employment and Training Branch of the Personnel Division, was not likely to have any personal knowledge or personal involvement in the processing of the retirement actions, with one exception, because his principal duties concern recruitment actions, reduction-in-force actions and promotion plans. Tr. 329, 333. Further, because respondent, as Director of Personnel and Ward's second level supervisor, would be familiar with Ward's duties, it is highly unlikely that he would associate Ward with any disclosure other than the Chadwick recruitment action.

from Ward that he could not prove that the recruitment was illegal. Thus, respondent had less reason to retaliate against Ward. Additionally, Livengood initially provided respondent with a reason to take action against him by his statement that he was leaking information to the union. Thus, respondent's failure to take action against Ward has no effect on the conclusion that respondent took the actions charged in count four because of Livengood's protected disclosures. Accordingly, the Board concurs in the CALJ's finding that Livengood's protected disclosures were a contributing factor in the actions charged in count four and that respondent failed to provide clear and convincing evidence that he would have taken the actions in the absence of those disclosures. R.D. 34-41.

#### The Section 2302(b)(9)(C) Violations

The Special Counsel set forth an alternative theory of liability in counts five through eight. These counts cite the actions and threatened actions set forth in the first four counts as establishing liability under 5 U.S.C.A. § 2302(b)(9)(C).<sup>19</sup> The CALJ, while noting that it was not strictly necessary to consider the alternative theory in view of his findings on the first four counts, stated his opinion that section 2302(B)(9)(C) does not cover the type of conduct at issue here. In the CALJ's view (b)(9)(C) only applies where an employee discloses information while

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<sup>19</sup> See n. 4 supra.

cooperating with the IG during an investigation. We find the CALJ's reading of the statute too narrow.

The starting point for statutory interpretation must be the language itself. *Darsigny v. Office of Personnel Management*, 787 F.2d 1555, 1557 (Fed. Cir. 1986). Section (b)(9)(C) refers to cooperation with, "or" disclosure of information to, the Inspector General of an agency or the Special Counsel, in accordance with applicable provisions of law. According to the general rule of statutory construction "or" should be given disjunctive rather than conjunctive effect. See *Special Counsel V. Doyle*, 42 M.S.P.R. 376, 382 (1989) citing *U.S. Customs Service, Region II v. Federal Labor Relations Authority*, 739 F.2d 829, 832 (2nd Cir. 1984). Thus, on its face, section 2302(b)(9)(C) covers disclosures made while cooperating with the Inspector General or Special Counsel during an investigation and those made independent of an investigation.

However, a statute should not be interpreted in such a way as to render one part superfluous. *Horner v. Merit Systems Protection Board*, 815 F.2d 668, 674 (Fed. Cir. 1987). If we were to interpret section 2302(b)(9)(C) literally as covering all disclosures to an Inspector General or the Special Counsel, it would render section 2302(b)(8), at least to the extent that the disclosures meet the statutory requirements of that section, superfluous. Thus, we conclude that Congress did not intend such an interpretation. See *Williams v. Department of Defense*, 46

M.S.P.R. 549 (1991) (literal interpretation of section 2302(b)(8) inappropriate where such interpretation would broadly override and make redundant provisions of section 2302(b)(9)). Accordingly, we find, in agreement with the Special Counsel, that section 2302(b)(9)(C) covers those employee disclosures to an Inspector General or the Special Counsel which do not meet the precise terms of the actions described in section 2302(b)(8).<sup>20</sup> PHB at 28. Furthermore, because neither respondent nor the Special Counsel argues that any of the alleged disclosures were not of the type covered by section 2302(b)(8), the Board finds that the disclosures fall within the scope of this section. Thus, under the analysis set forth above, the disclosures are not also covered by section 2302(b)(9).

#### Penalty

The Board's assessment of penalties in original jurisdiction cases is made pursuant to the guidance set out in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). *Special Counsel v. Starrett*, 28 M.S.P.R. at 74. *Douglas* sets out a list of factors which may be considered in setting a penalty but notes that not all of them will be

<sup>20</sup> For example, a disclosure of mismanagement or a waste of funds which does not rise to the level of "gross mismanagement" or "gross waste of funds" required by section 2302(b)(8) would be protected under section 2302(b)(9). Additionally, section 2302(b)(9), unlike section 2302(b)(8), does not impose a reasonability standard. Section 2302(b)(9) requires only that the employee's or applicant's disclosures to the Special Counsel or Inspector General of an agency be made in accordance with applicable provisions of law in order to be protected.

pertinent in every case. 5 M.S.P.R. at 305-06. A responsible balance must be struck among the relevant factors within the limits of reasonableness. *Id.* In this case the Board finds that the following factors are relevant: the nature and seriousness of respondent's offense; his awareness of the law; the impact of the violation on the agency's reputation; respondent's job level; his past work record; and his potential for rehabilitation.

In this case, the violation of 5 U.S.C.A. § 2302(b)(8) was serious. It was not a technical violation, and the respondent was aware of the laws protecting whistleblowers. He was also well aware of the Special Counsel's interest in the case because she requested the agency to stay any plans to reassign Livengood until the investigation of prohibited personnel practices in the Regional Personnel Office had been completed. AF, Tab 51, Respondent's Exhibit 17. Further, a finding that a high level management employee violated the law protecting whistleblowers could be expected to have an adverse impact on the reputation of the agency.

The Board finds, however, in agreement with the CALJ, that the Special Counsel's recommendation of removal is excessive given the following mitigating factors. The record shows that respondent has 17 years of service with no past disciplinary record. The record also shows that he has been recognized as an excellent employee by his immediate

and former supervisors and held their confidence. Tr. 615, 639, 772. In fact, he was recently promoted to GM-15. AF, P. Ex. 13. In addition, the misconduct charged in this case appears to be atypical, and respondent appears to be a good candidate for rehabilitation. Finally, only one of four counts raised was sustained.

Under these circumstances the Board finds that a 30-day suspension is an appropriate sanction for respondent's violation under count four. Therefore, in accordance with 5 U.S.C.A. § 1215(a)(3), it is ORDERED that respondent be SUSPENDED for a period of 30 days.

This is the final order of the Merit Systems Protection Board in this case. The respondent is hereby notified of the right to seek judicial review of the Board's action as provided in 5 U.S.C.A. § 1215(a)(4).

Within 60 days of the date of this Order, the Special Counsel shall submit proof of compliance with respect to the suspension of respondent.

FOR THE BOARD:

Washington, D.C.

*Matthew Shannon*  
for Robert E. Taylor  
Clerk of the Board