UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

75 M.S.P.R. 639

Docket Number CB-1215-94-0023-T-1

SPECIAL COUNSEL, Petitioner,

v.

MILTON G. SPEARS, Respondent.

Date: July 3,1997

Anthony T. Cardillo, Esquire, Dallas, Texas, for the petitioner.

William D. Kimball, Esquire, St. Louis, Missouri, for respondent.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

FINAL DECISION AND ORDER

This case is before the Board on the Recommended Decision of Administrative Law Judge (ALJ) James P. Timony in a proceeding for disciplinary action under 5 U.S.C. § 1215 which the Office of Special Counsel (OSC) brought against the respondent, Milton G. Spears. OSC has filed exceptions to the decision, which finds that OSC has failed to show a basis for discipline and recommends dismissing the action, and the respondent has filed a response to the exceptions. The Board ADOPTS the Recommended Decision as MODIFIED below.

BACKGROUND

This case originated with a complaint filed by OSC requesting the Board to discipline the respondent for committing prohibited personnel practices as Chief of the Directorate of Contracting (the DOC) at the U.S. Army Engineering Center, Fort Leonard Wood, Missouri. The complaint charged that the respondent violated 5 U.S.C. § 2302(b)(8), prohibiting reprisal for whistleblowing, and 5 U.S.C. § 2302(b)(9)(C), prohibiting reprisal for cooperating with or disclosing information to an agency Inspector General. Counts one through six charged the respondent with acting in a way adversely affecting his secretary, Debbie Pendleton, because of his belief that Pendleton wrote or contributed to an anonymous letter received in August 1992 which was critical of the respondent and a subordinate supervisory employee in the DOC, Paulette Bloch. Counts seven through ten charged the respondent with

reprisal for Pendleton's cooperation with an investigation by the Fort Leonard Wood Inspector General (IG) into allegations made in the letter and in four other anonymous letters. Administrative Record (AR), Tab 1.

The August 1992 unsigned letter, which was addressed to the Fort Leonard Wood Chief of Staff, the IG, and other officials, was entitled "Possible Misconduct/Waste and Abuse." It began by noting the respondent's August 13, 1992 meeting with staff concerning rumors about respondent and Bloch. In paragraph 3, the letter described them as "the sorriest supervisors" that the writer had observed in 20 years of service and suggested that their actions gave an appearance that something was "going on between them."1 The letter also asserted in paragraph 4 that the respondent's and Bloch's attendance at an August, 1992 training course in Virginia which cost in excess of $2000 was probably "fraudulent" or "a waste and abuse of funds and privileges" because the same course was given locally at Fort Leonard Wood two weeks later.2 The letter closed by calling in paragraph 5 for an investigation of the two supervisors' conduct. Petitioner's Exhibit 1 (P1). A copy of the letter was mistakenly placed in respondent's in-box while he was attending the Virginia training course. It was discovered by his acting secretary, Julie Meyer, who called him and read him the letter over the telephone. On his return, when respondent asked Pendleton about the letter, she denied that she had written it.

The first count of OSC's complaint alleged that respondent failed to recommend Debbie Pendleton for a cash performance award because he believed that she was the author of the anonymous letter or that she provided the information contained in it. According to the complaint, the letter's assertions constituted allegations of preferential treatment of Paulette Bloch by respondent in violation of Army Regulation (AR) 690-400 and of 5 C.F.R. § 735.201a(b) (1992), and the letter was therefore a protected disclosure under section 2302(b)(8), making the respondent's failure to recommend Pendleton because of it a violation of the statute.

Counts two through six of the complaint also charged the respondent with reprisal against Pendleton for perceived whistleblowing in the August letter in violation of section 2302(b)(8). The complaint charged that he retaliated by significantly changing her duties in a manner inconsistent with her salary or grade level (count two); by placing Pendleton's secretarial position on a list of positions to be abolished if the DOC budget were to be reduced 20% (a "decrement list") and later placing her position on a second decrement list of positions to be abolished if there were a 10% budgetary reduction (count three); by threatening Pendleton with discipline for allegedly falsifying her time card and with an unsatisfactory rating for alleged performance deficiencies (count four);

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[1] In support of these allegations, the letter cited an occasion when the respondent gave Bloch flowers at the time she received an award, something assertedly never done for anyone else, and another time when respondent presented her an award in private, not as part of the monthly awards ceremony, an award which she allegedly told "everyone" that she did not receive.

[2] The letter also objected that a rental car was used at the training course and that respondent and Bloch stayed overnight rather than returning on the last day and suggested that this also gave the appearance that "something is going on."

by giving her a letter of counseling for allegedly spending too much time away from her desk talking to a co-worker (count five); and by recommending that Pendleton be reprimanded for alleged discourtesy (count six).

Counts three through six alleged in the alternative that the respondent also violated section 2302(b)(8) in those actions which he took after Pendleton met with an IG investigator by retaliating for protected disclosures which she made to the IG's office. Counts seven through ten charged as another alternative theory of liability that in these same actions the respondent violated section 2302(b)(9)(C) by retaliating against Pendleton for her cooperation with the IG's investigation.

The respondent moved to dismiss the complaint for lack of jurisdiction on the ground that the anonymous letter on which OSC relied was not a protected disclosure and that cooperation with the IG could not be an independent basis for jurisdiction since the IG investigation concerned the anonymous letter. AR, Tab 33. He argued that no one could reasonably believe that the allegations in the letter were evidence of governmental wrongdoing within the meaning of section 2302(b)(8). Specifically, he urged that the regulations which he is alleged to have violated by giving "preferential treatment" do not define this term or establish sufficient standards for its application and that his allegedly unnecessary training trip was approved by his supervisor and would not in any event amount to a "gross waste of funds" under *Ward v. Merit Systems Protection Board*, 981 F.2d 521 (Fed. Cir. 1992).3

In response, OSC contended that the anonymous letter writer could reasonably have believed that the respondent did not give Bloch awards on the basis of her actual performance, as required by AR 690-400, paragraph 1-5d. OSC also argued that section 735.201a(b), the ethical standard requiring employees to avoid creating the appearance of preferential treatment, did not have to define "preferential treatment" to be enforceable and that the respondent's reliance on *Ward* was misplaced because under it a single trip could be a "gross waste of funds." AR, Tab 34.

The ALJ denied the motion to dismiss as premature on the ground that the issue of whether there was a protected disclosure or whether the respondent took retaliatory action based on it would turn on the facts of the case. The issue concerning the protected status of the anonymous letter, Judge Timony stated, appeared to turn on whether the discloser could reasonably have believed that the allegedly unnecessary training trip involved a gross waste of funds or that the respondent abused his authority in giving Paulette Bloch preferential treatment. AR, Tab 42.

After extensive discovery, a four-day hearing was held at which 17 witnesses testified. Two transcripts of telephone testimony were also accepted into evidence, and numerous exhibits were submitted by the parties. In its posthearing brief, OSC urged the ALJ to recommend the respondent's removal. AR, Tab 63 at 67.

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[3] Although the complaint did not specifically charge that the anonymous letter's allegation of "waste and abuse" in the training trip disclosed a "gross waste of funds" for purposes of the statute, the case was litigated on this basis after the respondent's motion was filed.

In a Recommended Decision (RD) issued November 1, 1995, AR, Tab 66, Judge Timony determined that the complaint should be dismissed. He concluded that OSC failed "to prove that a reasonable person in the position of the whistleblower in this case would have believed that the matter reported in the anonymous letter evidenced a violation of law, rule, or regulation, gross mismanagement or other whistleblowing misconduct." AR, Tab 66, RD 32. The ALJ determined that none of the incidents reported in the anonymous letter constituted misconduct covered by section 2302(b)(8) or could reasonably be believed to be such conduct. *Id*. He found that the record established that Debbie Pendleton was at least a contributing author of the letter, but he determined that she did not have a reasonable belief in its assertions. RD 19-20.

With respect to the allegedly unnecessary trip, the ALJ found that Pendleton, as the office training coordinator, was aware of the rules governing training and could not have believed that the trip, which was approved by respondent's superior, was improper. He also concluded that the allegation about something going on between respondent and Paulette Bloch was "irresponsible and frivolous,"4 that respondent's sending flowers to Bloch in connection with an award was not "gross mismanagement or a significant abuse of power," that the complaint about presenting Bloch an award without a ceremony was "frivolous," and that the allegation respondent and Bloch were "the sorriest supervisors I have ever observed" was so general and subjective as to be frivolous. RD 20.

In addition, Judge Timony concluded that an intent to retaliate against Pendleton for her role in the anonymous letter or for cooperating with the Inspector General was not a significant factor in any of respondent's decisions charged in the complaint. He also determined that neither respondent's oral counseling of Pendleton nor the memorandum of the counseling which he gave her was a personnel action within the meaning of 5 U.S.C. § 2302(a) and that respondent had no authority to recommend that the Civilian Personnel Office (CPO) give Pendleton a reprimand. RD 32-33.

The ALJ found that the anonymous letter was one factor among several indiscretions which caused the respondent to lose confidence in Pendleton because he believed she furnished the information in the letter and was disloyal in not notifying him of the letter when she learned about it. However, he noted that respondent signed the form nominating Pendleton for an award a month after he learned of the letter, and he concluded that subsequent occurrences further eroded respondent's trust and led, along with the letter and earlier incidents, to his decision not to forward the nomination for approval. RD 11, 21-25. Thus the ALJ held that OSC failed to prove that the anonymous letter was a significant factor, rather than a merely tangential one, in the respondent's decision or that the respondent intended to retaliate against Pendleton because of it. RD 20-25.

The ALJ rejected OSC's contention that the respondent significantly reduced Pendleton's duties in retaliation for the anonymous letter and concluded that, to the extent she stopped performing duties, she acted on her own initiative. RD 25.

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[4] The ALJ noted that Bloch's husband also worked in the DOC directly for the respondent. RD 3.

Concerning the charge that the respondent placed Pendleton's secretarial position on decrement lists of least essential positions in retaliation for her protected activities, the ALJ found that the respondent probably would have made the same decision absent such activities because of the reasons he gave concerning the nonsubstantive nature of the position's responsibilities. RD 26. The ALJ noted that the other employees in DOC, including those unfriendly to the respondent, agreed with his assessment of the position's value. RD 13-14, 26-27.

The ALJ determined that the respondent did not threaten Pendleton with discipline or an unfavorable rating as the term "threaten" is used in the statute. He found that, when respondent learned that Pendleton had submitted a possibly false time card, he appropriately sought advice from the Civilian Personnel Office and pursuant to that advice counseled Pendleton, who corrected the error. RD 14, 28. The ALJ found that respondent, again on the advice of the CPO, requested a meeting with Pendleton for "mid-point" performance counseling, that he did so in a memorandum explaining her work deficiencies which he proposed to discuss, and that this memorandum was not a threat to take a personnel action within the meaning of the statute. RD 15-16, 28-29.

The ALJ rejected the allegation that the respondent retaliated against Pendleton by counseling her about being away from her desk and giving her a written memorandum of the counseling session. He found that respondent counseled Pendleton because he believed that she was spending too much time talking to another employee at his desk. In addition, he held that oral counseling and a memorandum of it are not disciplinary or corrective actions within the meaning of section 2302(a)(2)(A). RD 29. He found that the respondent did not retaliate against Pendleton by recommending that she be reprimanded for discourtesy, as charged. Rather, he determined that in the memorandum cited by OSC as a recommendation the respondent sought advice on the matter from the CPO, which lacked authority to issue a reprimand, and that he dropped the matter when advised by the CPO to do. RD 15, 30.

The ALJ's fact findings are contained in 75 numbered paragraphs. RD 3-17. In making them, he relied to a considerable degree on his credibility findings concerning the respondent, Pendleton, and Bloch. All three testified at the hearing, and Judge Timony made general findings as to their characters and credibility. He found that Bloch was intelligent, articulate, a competent manager, independent in spirit, and blunt of speech. RD 31. He found that the respondent was a hardworking, skilled manager whose voluminous testimony was candid, unguarded, and even effusive. He found that the respondent credibly denied the rumors concerning himself and Bloch and that he was "basically a truthful and honest witness." He noted that some of respondent's statements were possibly somewhat inconsistent with statements given in the agency investigations preceding this case, but he determined that this inconsistency was due to the nature of the questioning and fading memory rather than to disingenuousness. RD 31.

Judge Timony found that Pendleton was not a credible witness. He found her to be "glib, histrionic, insecure, obsessive, and driven by jealousy and spite." RD 31. His conclusions about Pendleton were based both on her own testimony and that of other witnesses whom he found credible. RD 11-12. The ALJ determined that she was one of the leaders of a network of disgruntled employees who were jealous of management,

disliked having Bloch, a female, as a supervisor, and tried to end the careers of respondent and Bloch. RD 12, 31. He found that her description of the duties which respondent allegedly took away from her, when compared with the respondent's corroborated testimony concerning the same subject, showed her testimony to be unreliable. RD 31, 16-17. He concluded that Pendleton "contributed information to the author of the first anonymous letter, although she knew or should have known that the allegations were false or trivial." RD 32.

OSC has filed extensive exceptions to the Recommended Decision, alleging that the ALJ made numerous errors and that his decision is contrary to the overwhelming weight of the evidence. AR, Tab 67. Petitioner contends that the ALJ erred in ruling that the anonymous letter was not a protected disclosure because a reasonable person in Pendleton's position would not have believed that its assertions were evidence of wrongdoing within the meaning of section 2302(b)(8). Petitioner maintains that the ALJ erred in finding that Pendleton contributed to the letter and cited its argument to the ALJ that the Board is not required in the case of an anonymous disclosure to determine whether there is a reasonable basis for belief that it evidences governmental wrongdoing. *Id.* at 7-12. However, OSC also contends that in any event there was a reasonable basis to believe that the assertions in the letter were evidence of matters covered by the statute. *Id.* at 12-17. Other legal errors by the ALJ according to OSC were his findings that oral counselling is not a disciplinary action covered by the statute and that the respondent could not have made a "recommendation" to the Civilian Personnel Office as that term is used in section 2302(b). *Id.* at 6, 40, 42.

Petitioner challenges many of the ALJ's fact findings, including his conclusion that OSC failed to prove that either the anonymous letter or Pendleton's meeting with the IG was a significant factor in respondent's decisions to take any of the allegedly retaliatory personnel actions charged by the complaint. *Id*. at 18-44. OSC contends that the ALJ's credibility determinations on which his fact findings depend do not resolve credibility issues in the way prescribed by the Board and deserve no deference. *Id.* at 5, 44-63. Petitioner charges the ALJ with bias against whistleblowers and urges the Board, in the event of a remand, to assign the case to a different ALJ. *Id*. at 5, 58.

The respondent replies that OSC's assertion of errors by the ALJ is mere disagreement with his factual findings not warranting review since the Board must give special deference to the ALJ's findings based on credibility assessments in which he implicitly relied on the witnesses' demeanor. AR, Tab 68 at 2, 8-9. The respondent contends that Pendleton could not have reasonably believed that the anonymous letter disclosed wrongdoing because of her experience in the Directorate of Contracting, her knowledge of the respondent's competence as a supervisor, and her familiarity with the rules concerning training trips from her role as training coordinator. *Id.* at 15. In response to petitioner's objections to the ALJ's failure to infer a retaliatory motive for the respondent's actions from the evidence which OSC presented, respondent maintains that petitioner has failed to show internal inconsistency or inherent improbability in the ALJ's interpretation of the evidence. He contends that OSC failed to show that he had an intent to retaliate on the basis of the anonymous letter and thus did not meet the significant factor test applicable in a disciplinary proceeding. *Id.* at 17-19.

The respondent criticizes the petitioner for contending that the Board should give no deference to the ALJ's decision while arguing for deference to reports of internal agency investigations prompted by various anonymous letters, including the one at issue here. *Id.* at 22, 33. The respondent characterizes as unfounded OSC's suggestion that the ALJ's rulings with which it disagrees reflect bias, and he asks the Board to address the charge and uphold the integrity of the ALJ. *Id.* at 33-36.

ANALYSIS

1. An Anonymous Disclosure Is Protected Only If The Information Which It Discloses Can Reasonably Be Believed To Evidence Wrongdoing Within The Meaning Of 5 U.S.C. § 2302(b)(8).

Pendleton denies that she wrote or contributed to the anonymous letter at issue in this case. It is not disputed that an employee is protected from retaliatory actions based on a mistaken belief that the employee has made a protected disclosure and that the Board may order correction of such actions. *See Special Counsel v. Department of the Navy,* 46 M.S.P.R. 274, 278 (1990). However, the parties disagree on the application of this rule here. Both agree that, if the authorship of the letter is unknown, it cannot be determined whether a person in the author's position could reasonably believe that the letter's disclosures evidence wrongdoing within the meaning of the statute. OSC concludes that a determination as to such a reasonable belief concerning the disclosures therefore need not be made, AR, Tab 63 at 37-38, while the respondent contends that disciplinary action should not be imposed at all where the disclosures at issue were made anonymously. AR, Tab 62 at 4-5.

The ALJ did not address these arguments because he found that Debbie Pendleton was at least a contributing author of the anonymous letter. RD 19. He noted the respondent's belief that information concerning the Virginia training trip came from Pendleton because she made the arrangements for it, and he credited respondent's testimony that the letter contained cost information, dates, and other subtle details which were known only to Pendleton, Bloch and himself. RD 10, citing Respondent's Exhibit 28 (R28) at 35-36. The ALJ found that, although Pendleton claimed that she never read the entire anonymous letter, R15 at 8, her letter to OSC contained essentially the same allegations as paragraph 4 of the August letter. RD 10, *comparing* P1 *and* R15 at 4. He also agreed with respondent that there were clear similarities in style of writing between the two letters. *Id.*

The petitioner replies that the ALJ's conclusion concerning Pendleton's involvement in the letter is unfounded because respondent stated he did not believe Pendleton actually wrote it and because other employees who processed the training authorization had access to information about the trip. AR, Tab 67 at 7-10. However, respondent testified as well that he strongly suspected that Pendleton was the source of information in the letter, Hearing Transcript (HT) 663, and there is no showing that other employees had the intimate knowledge of the trip's details that Pendleton possessed, such as the late change in the closing date from August 21 to August 20.

OSC also overlooks the similarities in the writing style and outlook of the August letter and the later letter to OSC. *See* R28 at 34-37.[5]

In any event, we need not decide whether Pendleton was a contributor to the anonymous letter because we do not accept the parties' contention that, where the actual discloser is unknown, it cannot or need not be determined whether the disclosures could reasonably be believed to evidence matters protected under the statute. The language of section 2302(b)(8) makes plain that its protection extends only to reasonably based disclosures. Where the individual making the disclosure cannot be determined, it is still possible, and necessary, to determine whether a hypothetical observer could reasonably believe that the information is evidence of agency wrongdoing covered by the statute. Absent such a reasonable belief, the statute does not apply.

The cases on which OSC relies to support its contention that a determination of reasonable belief need not be made do not support its position. *Mausser v. Department of the Army*, 63 M.S.P.R. 41, 44 (1994), for example, held that in the absence of a disclosure an official's belief that an employee intends to make a protected disclosure may support a finding of reprisal. *Mausser* did not hold that the anticipated disclosure need not be one which could reasonably be believed to evidence a violation. Similarly, in *Special Counsel v. Department of the Interior*, 68 M.S.P.R. 19, 23 (1995), the employee was mistakenly believed to have disclosed to Congress the inappropriate dumping of hazardous chemicals, and there was no question that the matter disclosed was one covered by the statute. *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 581-82 (1991), found that the discloser reasonably believed in the accuracy of his account of the agency's financial situation and that the retaliating official believed that the disclosure was one which might evidence mismanagement and abuse of discretion. It is implicit in the *Thompson* decision that the official's belief was a reasonable one. None of these decisions can be read to hold that the coverage of section 2302(b)(8) is broader in cases where the disclosure is anonymous. Accordingly, we must determine whether the anonymous letter at issued here disclosed matters to which the statute applies.

2. The Statements In Paragraph 3 Of The Anonymous Letter Did Not Evidence Abuse Of Authority, Preferential Treatment Or Gross Mismanagement And Were Therefore Not Protected Disclosures Within the Meaning of Section 2302(b)(8).

Paragraph 3 of the August 1992 anonymous letter described the respondent and Bloch as the "sorriest supervisors" that the author has observed and asserted that their actions created the impression that something was going on between them, i.e., that they were having an affair, citing respondent's sending Bloch flowers when she received a performance award and his presenting Bloch an award privately on another occasion.

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[5] The anonymous letter's focus on respondent and Bloch's personal relationship - for example, its insinuation about the reason for their return on the morning of August 21 - reflects the same personal animosity to Bloch which is evident in Pendleton's letter to OSC. *See* R15 at 2-7, 12. Other evidence of Pendleton's jealousy and her preoccupation with interactions between Bloch and respondent are summarized in the Recommended Decision. *See* RD 5, 11-12.

The ALJ concluded that Pendleton lacked a reasonable belief that the letter's assertions evidenced wrongdoing under the statute. He found that the allegations in paragraph 3 about respondent's preferential treatment of Bloch and their having an affair were frivolous and did not constitute "gross mismanagement or a significant abuse of power," and that the criticism of their supervision was so general and subjective as also to be frivolous. RD 20.

In its exceptions, OSC contends that these rulings by the ALJ were erroneous. Its principal argument is based on conclusions in the report of the Inspector General's investigation into the allegations made in several anonymous letters, including the one at issue here.6 P10. Although the IG did not find that the respondent gave Bloch preferential treatment, OSC correctly notes that the test for protected status is not the truth of the matter disclosed, but whether it was reasonably believed. *See, e.g., Geyer v. Department of Justice*, 63 M.S.P.R. 13, 17 (1994). The petitioner relies on the IG's findings that there was a perception that the respondent and Bloch were having an affair and a perception that he treated her more favorably than other subordinate supervisors. Tab 67 at 15-16, citing P10 at 6-7, 18-19. The existence of such perceptions, the petitioner reasons, supports the contention that the anonymous letter writer had a reasonable belief that the letter's disclosures evidenced abuse of authority by the respondent. Similarly, OSC relies on the IG report's criticisms of the respondent's managerial performance to show the reasonableness of the "sorriest supervisors" allegation. Tab 67 at 16-17, citing P10 at 9, 14, 17-18.

The IG report's finding that there was a perception of the respondent's favoritism towards Bloch was based on the frequency with which he consulted her compared to others concerning the work of the DOC and on his greater reliance on her advice in his decisionmaking. P10 at 18-19. OSC is mistaken in believing that a perception of such "favoritism" in carrying out agency business would constitute a reasonable belief in improper preferential treatment of an employee. Because a supervisor's purpose in consulting a subordinate is ordinarily to obtain advice, not to reward the subordinate, the supervisor's reliance on the employee's advice is not in itself conferral of a benefit within the meaning of "preferential treatment." *Cf. Weber v. Department of the Army,* 9 F.3d 97, 100 (Fed. Cir. 1993) (while an agency may provide awards as an incentive for employee proposals, the purpose of accepting a proposal is the agency's improvement and not remuneration of the employee; thus declining an employee's proposal is not a personnel action under section 2302(a)). Absent a prohibited purpose, such as laying a basis for improperly benefiting the employee to whom work is assigned, the

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[6] As discussed in the text, the IG investigation, which was conducted between January 20 and April 6, 1993, substantiated none of the August 1992 letter's specific allegations, finding only perceptions of impropriety. Nonetheless, the IG report found that respondent withdrew sensitive duties from Pendleton and moved her position up the decrement list in reprisal for the letter and her cooperation with the IG. P10 at 10-11. Another investigation, conducted by Colonel Billy Mitchell under Army Regulation 15-6, found that respondent withdrew duties from Pendleton and abolished her position in reprisal for Pendleton's taking a poison pen letter addressed to her husband and allegedly written by Bloch to the Criminal Investigation Division (CID) and for her cooperation with the IG. P25 at 3, 12.

discretionary decisions of managers concerning the assignment of work do not constitute abuse of authority within the meaning of section 2302(b)(8).

Petitioner may rely on the IG's finding that there was a perception that respondent and Bloch were having an affair to support a reasonable belief that there was an improper purpose in respondent's reliance on Bloch. However, the grounds for the IG's finding - rumors of an affair among DOC employees and a noticeable improvement in respondent's and Bloch's work relationship and their denial of it, P10 at 6-7 - are not persuasive. There is no indication whether the IG considered the possibility that the rumors might be malicious fabrications by the network of disgruntled DOC employees found by the ALJ.7 In our view, such an unfounded "perception" falls far short of a reasonable basis to believe that an improper purpose to confer a benefit on Bloch motivated the respondent's work relationship with her.

Moreover, as noted above, the allegations of preferential treatment in the anonymous letter did not mention work assignments or respondent's reliance on Bloch but rather cited his sending flowers with a performance award and presenting Bloch an award in private. We agree with the ALJ that such actions are too trivial for a reasonable person to believe that they evidence abuse of supervisory authority by the respondent within the meaning of section 2302(b)(8). *Cf. Frederick v. Department of Justice*, 73 F.3d 349, 353 (Fed. Cir. 1996) (purported whistleblower could not have had a reasonable belief that supervisor's trivial infraction was a violation of law within the meaning of section 2302(b)(8)).

Further, the record shows that the respondent sent Bloch flowers when presenting her an award for the successful completion of an unusually protracted, difficult, and important negotiation, which avoided a potentially large liability for the government. RD 8. *See* HT 326-28. Thus, even if the allegation that flowers were sent would otherwise qualify as a protected disclosure, this factual context would likely have been known to employees of the DOC. Under the circumstances, it would be difficult to show that the letter writer had a reasonable belief that the respondent's actions evidenced improper preferential treatment.8

Similarly, we agree with the ALJ that the anonymous letter's bare allegation that the respondent was a poor supervisor is no evidence of gross mismanagement and could not reasonably be believed to be so. Petitioner's effort to bootstrap this

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[7] There is ample support in the record for the ALJ's finding that there was a group of DOC employees (including Pendleton) who were actively opposed to respondent and Bloch. *See* RD 12. The AR 15-6 investigation also found that a disruptive network of employees had existed in the office for several years. P25 at 11.

[8] This case is unlike *Sirgo v. Department of Justice*, 66 M.S.P.R. 261 (1995), cited by petitioner, where the administrative judge dismissed without a hearing. *Sirgo* remanded for a hearing, holding that whether the appellant made a protected disclosure in discussing a supervisor's preferential treatment of an employee who was the supervisor's girl friend depended on what the matters discussed were and whether they could reasonably be believed to evidence abuse of authority. *Id.* at 268. Here the Recommended Decision was issued after a hearing, and the specific disclosures at issue are clear, *i.e.*, the allegations in the anonymous letter.

conclusory assertion into a protected disclosure by reference to subsequent investigatory findings concerning matters not mentioned in the letter is a misguided one. Petitioner cites *Gores v. Department of Veterans Affairs*, 68 M.S.P.R. 100 (1995), as holding that subsequent substantiation of an allegation supports its reasonableness for purposes of protection under section 2302(b)(8). *Gores* is distinguishable, however, because the disclosures at issue in that case were specific factual allegations. *Id.* at 107. The Board held that the employee's reasonable belief that these allegations were protected under section 2302(b)(8) was supported by the report of an investigation which found that the violations which they evidenced had occurred. *Id.* at 113-14.

Unlike the matters disclosed in *Gores*, the anonymous letter's assertion did not constitute a nonfrivolous allegation of gross mismanagement. *See Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 122 (1994) (general allegations of "illegal business practices" did not constitute specific and detailed disclosures protected by 5 U.S.C. § 2302(b)(8)). We do not believe the statute should be read to protect name calling and conclusory accusations on the theory that someone might have made disclosures which could reasonably have been believed to support such charges. Under the circumstances here, findings of mismanagement which are not contained in any form in the anonymous letter do not confer protected status on it.9

3. Paragraph 4 of the Anonymous Letter Made a Protected Disclosure of an Unnecessary Training Trip Because A Discloser Could Reasonably Have Believed That The Information Disclosed Was Evidence of a Gross Waste of Funds.

Paragraph 4 of the anonymous letter characterized the respondent's and Bloch's training trip at the time of the letter as probably "fraudulent, at a minimum waste and abuse of funds and privileges." It stated that their attendance from August 17-20, 1992 at a "Basic Job Order Contracting Course" in Virginia was costing in excess of $2,000 and implied that this expenditure was unnecessary because the same course was to be given locally at Fort Leonard Wood from August 31 to September 3, 1992, a fact which it said was known to respondent and Bloch. The letter also stated that they were unnecessarily staying overnight on August 20th, adding that "[t]his gives the appearance that something is going on," and it implied that their use of a rental car was also unnecessary. P1.

The Recommended Decision makes findings concerning both the reasonableness of the trip and the reasonableness of the anonymous letter writer's beliefs about it. The ALJ found that Job Order Contracting (JOC) was a new type of contract for the DOC which was going to be awarded before the middle of September 1992, that the

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[9] In its exceptions, OSC for the first time contends that, even if the anonymous letter is not a protected disclosure under section 2302(b)(8), the IG was an addressee and the respondent is therefore liable on the basis that the letter was an activity protected under 5 U.S.C. § 2302(b)(9)(C). AR, Tab 67 at 17 n.13. This alternative basis for discipline, which was not stated in the complaint, was advanced too late and will not be considered. Petitioner has not sought to amend the complaint nor shown a basis for doing so. *See Special Counsel v. Narcisse,* 51 M.S.P.R. 222, 227 (1991), *vacated in part on other grounds on reconsideration*, 60 M.S.P.R. 294 (1994).

respondent's supervisor approved his attendance at the August 1992 JOC contracting course in Virginia, that Bloch attended the course because she supervised Darlene Pemberton, who was too busy working on the actual JOC contracting solicitation to attend, and that the respondent declined to change his trip when he learned of the later course at Fort Leonard Wood because Darlene Pemberton needed immediate answers to the questions that she was sending with her supervisors to the conference. RD 9. He noted the opinions of a contract specialist and of other DOC employees, who testified that they did not consider the trip a waste of funds, and the conclusion of the agency IG who investigated and found nothing wrong with the trip. RD 10. The ALJ found that Debbie Pendleton could not reasonably have believed the letter's assertions about the training trip to Virginia. In addition to noting the supervisor's approval of the trip and other evidence of its reasonableness, he found that Pendleton should have realized the trip was not improper because as training coordinator for the office she was aware of all the rules governing training. RD 20.

In its exceptions, OSC does not dispute the respondent's supervisor's approval of the trip or the conclusion of the IG's report that the trip involved no regulatory violation. Petitioner maintains that it is irrelevant whether there was in fact wrongdoing covered by the statute because, in order for the disclosure to be protected, the discloser need only have a reasonable belief that the information evidenced such wrongdoing. OSC also argues that the opinion testimony relied on by the ALJ is subjective and irrelevant because the reasonable belief test is an objective one.10 Under such a test, OSC asserts that a discloser could reasonably believe that travel to attend a training course at a cost of in excess of $2000 when the same course was being given locally two weeks later was a violation of travel or training regulations or a gross waste of funds. Tab 67 at 13-15.

The IG report concluded that the JOC training trip by respondent and Bloch was not an unnecessary expenditure or a violation of regulations. The report noted that there were no personnel within DOC trained in preparing JOC contracts, which was a new responsibility of the office, and that the timing of the training was critical because it was needed to prepare for solicitation and award of an ongoing action. P10 at 7. As respondent testified, there was a need to obtain the JOC training in time for its use to complete work on a contract in early September, permitting issuance of delivery orders before the end of the fiscal year. HT 524-26, 531. The IG report also concluded that selection of respondent and Bloch to attend a non-local course was appropriate because customers of the DOC would be present at the local course and it was likely that Bloch, as contracting officer, would be frequently called out of a local course to advise on routine contracting matters. P10 at 7-8.

In our view it was primarily the timing of the training course in Virginia in relation to the office's needs which justified the additional cost of respondent's and Bloch's

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[10] We disagree with petitioner's implication that opinion testimony in itself is irrelevant to the reasonable belief test. However, the testimony cited by the ALJ is of little value because the witnesses do not state the basis for their opinions or disclose whether the letter's author would have been aware of the facts on which their conclusions were based.

attendance. The protected status of a disclosure depends, not on whether it in fact discloses wrongdoing covered by the statute, but on whether a reasonable person would believe that what it reports is evidence of such wrongdoing. We see no basis for concluding that anyone who was aware of the facts about the training trip asserted in the letter would necessarily have also been aware of the time sensitive aspect of the JOC training. Thus the protected status of this disclosure depends on whether the facts asserted by themselves would reasonably be believed to evidence a gross waste of funds.

We would reach the same conclusion on the basis of the ALJ's finding that Pendleton was a contributor to the anonymous letter, at least of the information about the trip. We disagree with the ALJ's apparent assumption that, because Pendleton was familiar with training and travel regulations, she would necessarily also have been familiar with the substantive considerations which justifed the respondent's and Bloch's trip. There is no evidence in the record that she prepared forms discussing the timing justification for the trip or that she was otherwise familiar with the DOC's need for immediate JOC training. The respondent testified that he asked Pendleton to see if there were openings at a course in June and that she learned that the June course was filled, but informed him that another course was scheduled for August. HT 526. He stated that, although she was on detail to the purchasing office at the time, Pendleton assisted his acting secretary in arranging his and Bloch's attendance at the August training in Virginia. HT 531. However, the respondent did not testify that he or anyone else informed Pendleton of the need for DOC employees to get the training in time for its use in early September.

Without knowledge of this key fact, the author of the anonymous letter could reasonably have believed that, in view of the identical course being offered locally two weeks later, the training trip was entirely unnecessary. *Cf. D'Elia v. Department of the Treasury*, 65 M.S.P.R. 540, 546 (1994) (the whistleblower reasonably believed that the supervisor illegally approved falsified time sheets where the supervisor did not inform him of the explanation for the discrepancies in them). Under the alleged circumstances, we think that a reasonable person could believe that the $2,000 expenditure for the trip was a gross waste of funds. *See Ward v. Merit Systems Protection Board,* 981 F.2d at 528 (in some situations a single individual's travel could constitute a gross waste of funds). It may be objected that a person could not reasonably make this allegation without first attempting to learn the rationale for the trip and that, because no such inquiry is shown or even alleged, the letter's disclosure of less than all the facts about the trip does not deserve protected status. However, we cannot add requirements not found in the statute, such as a full investigation by the whistleblower before making a disclosure. The statute protects "any disclosure" which meets the reasonable belief test and otherwise falls within its coverage. *See* S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988).11 We think Congress intended to protect even partial disclosures, provided the

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[11] This report of an earlier, unenacted version of the Whistleblower Protection Act, which also substituted the "any disclosure" wording in section 2302(b)(8), is part of the legislative history of the Act as adopted. 135 Cong. Rec. 5032, 5033 (1989). *See Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

information disclosed is sufficient to support a reasonable inference of wrongdoing, despite the possibility that examination of all the facts would ultimately reveal that the actions were not improper. Under this test, we conclude that the statement in the anonymous letter concerning the training trip constituted a protected disclosure under 5 U.S.C. § 2302(b)(8).

3. Petitioner Has Not Shown That The Respondent Took, Threatened, Or Failed To Take Any Personnel Action In Reprisal For The Protected Disclosure In The Anonymous Letter Or For Disclosing Information To The Inspector General.

Although the ALJ did not find that the anonymous letter made a protected disclosure, he went on to determine that its disclosures were not a significant factor in any of the personnel actions affecting Pendleton which OSC charged the respondent with taking in reprisal for the letter. He also concluded that the respondent's actions following Pendleton's meeting with the IG were not personnel actions in reprisal for her cooperation with the IG, as charged in counts seven through ten of the complaint. Our review of Judge Timony's findings will take into account our determination that, although its other assertions were not covered by the statute, the anonymous letter made a protected disclosure concerning the training trip to Virginia.

In a disciplinary action under 5 U.S.C. § 1215, OSC must prove that the protected whistleblowing activity was a significant factor in the alleged reprisal action. *Eidmann v. Merit Systems Protection Board*, 976 F.2d 1400, 1405 (Fed. Cir. 1992). Petitioner must show that the respondent would not have taken the allegedly retaliatory actions in the absence of the protected disclosure, and the "significant factor" test is not met unless the respondent's motivation for his actions is shown to have been an improper one. *Special Counsel v. Santella*, 65 M.S.P.R. 452, 456-58 (1994). As discussed below, we find that the petitioner has not met this burden.

A. *Count 1, The Withheld Performance Award Recommendation*.

The ALJ concluded that OSC did not show that the anonymous letter was a significant factor in respondent's decision not to recommend Pendleton for a performance cash award. He noted that the respondent signed a form nominating Pendleton for an award a month after he learned of the letter, and he found that respondent would not have done so if the letter were a significant factor in his decision not to recommend an award. Judge Timony determined that the decision not to forward the nomination, of which respondent informed Pendleton in October 1992, was due to a loss of trust and confidence in her which developed over a period of months beginning in May or June 1992 and that several indiscretions on her part besides her role in the August 1992 letter contributed to the respondent's conclusion that she did not deserve an award.

The ALJ found that Pendleton contributed to respondent's decision by spreading malicious rumors about his taking walks with Bloch, bringing him a thick file of trivial offenses allegedly committed by Bloch which Pendleton had compiled to discredit her, and suggesting to him that a poison pen letter received by Pendleton's husband accusing her of having an affair with another employee was written by Bloch, when the respondent believed Pendleton had written it herself. The ALJ found that, when read in context, the statements cited by OSC in which respondent acknowledged the influence

of Pendleton's conduct with respect to the letter did not suppport a finding that the letter was a significant factor in his decision. He concluded that the letter was only one tangential factor and that the evidence did not show that respondent intended to retaliate against Pendleton because of it. RD 20-25.

In its exceptions, OSC contends that the ALJ erred in not specifically determining whether respondent would have given Pendleton the award if he had not known about the letter. According to petitioner, the ALJ also erred in his fact findings by giving insufficient weight to the respondent's admissions to agency and OSC investigators that it was the anonymous letter which dissuaded him from recommending Pendleton for a cash award and to his failure to mention in these interviews other incidents as reasons for his decision. In addition, OSC argues that the ALJ's finding that the deterioration in their relationship began prior to the letter is not supported by the evidence and that a sudden change for the worse in respondent's attitude toward Pendleton following its discovery supports the inference that the letter motivated his decision. AR, Tab 67 at 18-25.

As a preliminary matter, we must first decide whether the respondent's failure to recommend Pendleton constitutes failure to take a personnel action within the meaning of section 2302(b)(8). In *Frederick v. Department of Justice*, 73 F.3d at 353-54, the court held that not every recommendation concerning a personnel action constitutes the taking of an action or the failure to take one to which liability attaches under the statute. *Frederick* involved the discipline of a supervisor for an allegedly retaliatory recommendation against the retention of a trainee. The supervisor's evaluation, which was one of approximately ten evaluations to be considered, was unlikely by itself to determine the agency's action, and the court held that such a recommendation was not subject to liability under section 2302(b)(8). *Id.* at 354. In contrast, the kind of recommendation which is covered by the statute is illustrated by *Eidmann v. Merit Systems Protection Board*, 976 F.2d at 1407, where the court sustained the discipline of a supervisor for a reprisal which he brought about by recommending the dismissal of the whistleblower and drafting the termination letter for his superior, who technically took the action. It is not disputed that Pendleton invariably received the cash performance awards which the respondent recommended in the past. *See* R15 at 1. Under the circumstances, we believe that his recommendations were sufficiently effectual to make his failure to recommend an award a failure to take an action for purposes of section 2302(b)(8).

Turning to petitioner's exceptions, we see no merit in its objection to the form of Judge Timony's determination that the anonymous letter was not a significant factor in respondent's failure to recommend Pendleton for an award, i.e., his finding that it played only a tangential role. It is implicit in that finding that the other contributing factors would have resulted in the same decision absent consideration of the letter. *See Special Counsel v. Santella*, 65 M.S.P.R. at 458.

In another challenge to the ALJ's evaluation of the evidence, OSC is correct that he was mistaken in finding that respondent stated that he experienced a deterioration in his relationship with Pendleton beginning in May or June. RD 21. In fact, respondent testified that the August letter incident gave him a different perspective on Pendleton's earlier activities, which he did not realize were serious or malicious at the time they

occurred. HT 538, 709-10. However, this error does not affect the ALJ's basic determination that respondent ultimately considered these activities, as respondent's testimony shows. It also shows that he filled out the nomination form a month after the anonymous letter and did not make his decision on the award until another month had passed, when he also considered subsequent incidents casting doubt on Pendleton's reliability. HT 539-45. Thus the record supports the ALJ's determination that at the time of his decision the respondent considered a number of incidents occurring over a period of months.

Petitioner's primary argument is based on statements which the respondent made to OSC and agency investigators which OSC contends are admissions that the anonymous letter was in fact the basis for his decision on the award. The ALJ correctly interpreted these statements by reading them in context. Thus, he points out that in respondent's sworn response to the AR 15-6 investigation his statement, cited by OSC in its post-hearing brief, that Pendleton's role in the letter dissuaded him from nominating her for an award was immediately followed by statements that his deliberations also included consideration of other indiscretions going back to Pendleton's rumor spreading in April or May. RD 22, citing P27 at 23. Similarly, when the respondent told Col. Billy Mitchell (in the AR 15-6 investigation) that he was concerned about issues of trust and loyalty as a result of Pendleton's actions in August, he also noted that he filled out an award form, then later changed his mind as to its appropriateness "under all the circumstances." RD 21, citing P33 at 3. When he told the OSC investigator that he decided not to give Pendleton the award based on the August letter, he did so in a rambling and somewhat hesitant statement which cannot be read to exclude other reasons since he also stated in this connection that as a manager he considered everything. RD 22 & n.19; *see* P29 at 6.12 These statements do not cast doubt on the credibility of the respondent's more complete hearing testimony, which did not deny that Pendleton's role in the anonymous letter was a factor in his decision. HT 538.

Moreover, as we have found, the allegations in the letter of preferential treatment and gross mismanagement were not reasonably based, and the respondent's adverse reaction to these frivolous assertions and the malicious charge that respondent and Bloch were having an affair was not prohibited retaliation. The respondent knew that there was a group of disgruntled employees in the DOC seeking to undermine his authority. He was justifiably concerned about the potential damage to the contracting process from the circulation of false and damaging rumors that he knew were being repeated by private contractors. HT 195, 200-02, 503-08; R20. Respondent's acknowledgement that he lost trust in Pendleton because of her involvement in

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[12] There is no contradiction between respondent's testimony that Pendleton's charging Bloch with writing the poison pen letter to her husband was a factor in his award decision, HT 542-46, and his statement to the OSC investigator that his decision had nothing to do with that letter. P29 at 9. The context of the latter statement shows that his intent was to deny the AR 15-6 investigation's charge that he retaliated against Pendleton for taking the letter to the CID. *Id.* at 3-5. At the hearing he testified that the accusation itself together with Pendleton's expression of an intent to "get" Bloch was what concerned him. HT 546.

spreading this derogatory information does not support an inference that he intended to retaliate against her for the single protected disclosure which the letter contained, an assertion about the Virginia training trip that the respondent knew was easily refuted, as the IG report's conclusion confirms. *See* P10 at 7-8. Petitioner has not shown that absent that allegation respondent would have recommended Pendleton for an award. We conclude that the letter's disclosure concerning the training trip was not a significant factor in the respondent's decision not to recommend Pendleton for an award.

B. Count 2, Significant Changes in Pendleton's Duties.

The ALJ found that the respondent did not make any significant change in Pendleton's duties following her return from her detail to purchasing on October 1, 1992 and that therefore he did not take such action to retaliate against her because of the anonymous letter. Judge Timony's finding was based on the convincing detail in the respondent's extensive, sworn rebuttal to the report of the AR 15-6 investigation and on the evidence of corroborating witnesses. RD 16-17, 25. OSC's exceptions to this finding rely on contrary findings by the IG and in the AR 15-6 report, on the "self-serving" nature of respondent's rebuttal, and on his alleged inconsistent admission to Col. Mitchell that Pendleton lacked work during this period. AR, Tab 67 at 25-29.

The respondent's rebuttal to the AR 15-6 report is a point-by-point reply, with supporting documentation, to Pendleton's "before" and "after" lists of duties purporting to show that they were reduced from 36 to 9. R28 at 17-26, 47-58. While the respondent's statement is, of course, an interested one, its partial corroboration by others and inherent plausibility in comparison to Pendleton's (also interested) lists and testimony on this point, P5, P8, R15 at 9, HT 111-14, make it more believable. The conclusion of the AR 15-6 report that the respondent changed or withdrew the major duties of Pendleton's position for a period of more than 30 days, P25 at 3, is presented with very little explanation or analysis.13 Similarly, the IG report's finding that the respondent withdrew sensitive work from Pendleton because of a lack of trust is unaccompanied by any analysis to show that this action involved a significant change in her duties. P10 at 10-11. Because of their conclusory nature, we find that these reports deserve little evidentiary weight in relation to the ALJ's finding on this point, which cites and carefully evaluates the testimonial and documentary evidence on which it is based. *See* RD 16-17.

OSC also cites the respondent's admission to Col. Mitchell that Pendleton was not busy 8 hours a day following her return from her detail, P32 at 14, as inconsistent with his denial that he removed her duties, and petitioner criticizes the ALJ's conclusion based on the respondent's testimony that Pendleton's lack of initiative was responsible for the situation. AR, Tab 67 at 26-27. In fact, respondent denied in the statement to Col. Mitchell that he made any extensive reduction in Pendleton's duties and gave other

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[13] The report merely states that Pendleton provided a list of her former duties and claimed that some of the major ones had been taken away and that respondent denied the allegation, stating that it was his practice to type his own correspondence and memoranda, that a major report which she formerly prepared was assigned to another office, and that Pendleton's lack of gainful employment on a given day was due to her lack of initiative. P25 at 13.

reasons for the level of her work, including her refusal to undertake certain tasks. P32 at 13. The statement was thus consistent with his hearing testimony and his reply to the AR 15-6 report, in both of which he stated that Pendleton's lack of initiative was responsible for her idleness. HT 701; R28 at 24-25.

OSC makes another argument based on respondent's admission that, because of his lack of confidence in Pendleton, he did not trust her with information about certain sensitive matters which could not be disclosed to all employees - primarily the upcoming reorganization and RIF. HT 701; R28 at 24. According to petitioner, a secretary's exclusion from such confidential matters amounted to a withdrawal of significant duties because these responsibilities were grade controlling. AR, Tab 67 at 27-28. This argument is not persuasive. In his reply to the AR 15-6 report, the respondent identified 70 different duties in Pendleton's job description and, as noted above, he discussed many of them in detail. R28 at 17-26, 47-58, & Tab G. While characterizing the reply as "self-serving," petitioner has not presented any detailed challenge to its accuracy.[14] In view of the nature and extent of Pendleton's duties, her exclusion along with others from sensitive information about internal personnel matters did not constitute a significant change in her duties within the meaning of 5 U.S.C. § 2302(a)(2)(A)(xi), and petitioner has shown no other basis for disturbing the ALJ's finding on this charge.

C. Counts 3 and 7, The Decrement Lists.

Count three charged that in reprisal for the anonymous letter the respondent placed Pendleton's secretarial position on a decrement list of the least essential positions in the DOC that he was required to submit as part of a reduction in force. Counts three and seven also charged that respondent later submitted a second list moving the secretarial position from sixth to second least essential position in reprisal for the letter and for Pendleton's disclosure of information to the Inspector General. Judge Timony found that in doing so the respondent made a recommendation of a personnel action within the scope of 5 U.S.C. § 2302(b)(8) and that the submission of the second decrement list shortly following Pendleton's meeting with the IG raised a suspicion of retaliation. However, the ALJ concluded that it was more likely than not that the respondent included the secretarial position on these lists for valid managerial reasons and that the evidence failed to show that Pendleton's protected activities were a significant factor in his actions. He concluded that the respondent selected her support position for the decrement list because it did not involve responsibility for the substantive mission of the office. The ALJ found that the respondent moved the secretary position up the list as a result of staff briefings announced in a December 1992 memomorandum which directed use of a different method to assess the need for a position. He also noted the agreement of other DOC employees with the respondent's assessment of the position's importance, which was reflected in their

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[14] OSC cites respondent's elimination of Pendleton's automatic access to his electronic mail as a duty which he removed. AR, Tab 67 at 29. However, petitioner does not challenge respondent's explanation that reviewing his electronic messages was not a duty in Pendleton's job description and that he continued to forward to her those which she needed to read or act on just as he did with other employees. R28 at 55.

detailed responses to a survey of the relative importance of positions in the office.[15] RD 25-28.

The ALJ correctly rejected the respondent's argument that, because higher authority required him to develop a decrement list, his placement of Pendleton's position on it was not a voluntary action for which he could be held responsible. Clearly the selection of her position was a matter within his control. However, the ALJ did not address the issue of whether the respondent's action amounted to the taking of a personnel action within the meaning of the statute. The evidence indicates that the respondent's placement of a position on his decrement list would not by itself cause the position to be abolished in the event of budgetary reductions. All the office heads (commanders and directors) submitted such lists and then voted on the overall outcome by ranking the 344 positions submitted beginning with the least essential. Positions above a "cut line" determined by the total budget reduction were to be abolished. *See* R13, P22. As a result of the vote of the office heads, the secretary position moved from the second to the first place among positions to be cut in the DOC. R28 at 31. The respondent played an important part in this process, but obviously he had no control over the budget reduction and had only one vote on the overall prioritization of positions to be abolished, and therefore we cannot find that his recommendation was sufficiently decisive to constitute the taking of a personnel action.

It is true that the only binding result of the collective decision was the number of positions which each office would lose, and that the office head retained the authority, with the approval of the Chief of Staff, to substitute different positions from those initially placed on the list. R13 at 2; R28 at 30. However, the complaint did not charge the respondent with failure to seek authorization to make such a substitution in Pendleton's case, and even considering it along with his initial recommendation, we cannot say that the elimination of Pendleton's position was a personnel action which the respondent took rather than the result of a collective decision.[16] *Cf. Frederick v. Department of Justice*, 73 F.3d at 354 (supervisor did not take a personnel action where his recommendation was only one of ten considered in the decision).

Moreover, even assuming that the respondent's placement of Pendleton's name on the DOC decrement lists constituted taking a personnel action, we find that the petitioner has shown no error in the ALJ's finding that Pendleton's protected activities were not a significant factor in the respondent's action. We see no merit in petitioner's argument that respondent's stated rationale - ranking positions in purchasing and contract administration above a support position - was pretextual because Pendleton had acquired buying skills on her recent detail to the purchasing division. AR, Tab 67 at

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[15] After the positions to be cut in the DOC had been allocated, the Chief of Staff informed the respondent that two of them might be restored and asked for his recommendation. Respondent took a survey of the DOC employees asking them which two positions scheduled to be abolished were needed most. Twenty-seven of the DOC employees responded. Only two of them placed the secretarial position in this category. *See* R31; HT 597-98.

[16] When her position was abolished, Pendleton was laterally reassigned to a GS-6 secretary position in the Directorate of Engineering and Housing on August 9, 1993. RD 3.

29-30. The decrement list, as a reduction in force exercise, was directed at positions; it was not based on the skills of individual employees. Petitioner is correct that the later survey of DOC employees ranking the value of positions is not direct evidence of respondent's earlier motivation. *Id.* at 32. However, the survey results are very good evidence of how a knowledgeable person would have prioritized the DOC positions, and they support the ALJ's conclusion that the respondent placed Pendleton's position on the decrement list for bona fide managerial reasons.

OSC also contends that the ALJ erred in finding that use of a new method of assessment directed in a December memorandum influenced the respondent's submission of a second decrement list because the memorandum did not mention the decrement list or budget reduction and because respondent did not refer to it when questioned by OSC and AR 15-6 investigators. *Id.* at 30-31. However, the method, one using a Mission Essential Task List (METL), R33, is obviously relevant to prioritizing positions in terms of the agency's need for them in preparing for budgetary cuts. The respondent discussed how his thinking was changed by the meetings held during January 1993 on use of the METL concept in prioritizing all of the proposed decrements in his response to the AR 15-6 report. R28 at 31-32.

The credibility of this explanation is not called into question by respondent's failure to mention these meetings to AR 15-6 and OSC investigators in brief answers explaining that he learned that increased workloads would require retaining more purchasing positions and that in any event the second decrement list had no effect on Pendleton's vulnerability. He was not subjected to the kind of probing questions that would naturally have elicited a detailed discussion of all the events influencing his decision. *See* P32 at 11; P29 at 46; HT 671. We agree with the ALJ that petitioner did not show that the respondent intended to retaliate against Pendleton when he placed the secretarial position on the DOC decrement lists.17

D. Counts 4 and 8, Threats of Discipline and An Unsatisfactory Rating.

Counts 4 and 8 charged the respondent with threatening Pendleton with discipline for an allegedly falsified time card and with an unsatisfactory rating for alleged performance problems when in reality these threatened actions were in reprisal for the anonymous letter and her cooperation with the IG. Judge Timony found that when respondent learned from Bloch that Pendleton had submitted an erroneous time card, he sought advice from the Civilian Personnel Office about how to handle the problem and was advised by the CPO to counsel her. He determined that after respondent talked to Pendleton, she submitted a corrected time card, and that respondent's actions were not "threats" within the meaning of the statute. RD 28.

OSC contends that the respondent made a retaliatory threat when, according to Pendleton's testimony, HT 135-36, he told her that he was going to request disciplinary

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[17] OSC also cites findings of the IG and the AR 15-6 report contrary to the ALJ's, but we find that because of their conclusory nature they deserve little weight. *See* P10 at 10; P25 at 3. In addition, as noted above, the AR 15-6 report found reprisal on a different basis from that asserted in the complaint. *See* page 18, note 6.

action from the Chief of Staff for the time card error because the IG was investigating him for a time card problem. Petitioner contends that this allegation is supported by respondent's telling Sandy Kruse in the CPO that he wanted to counsel Pendleton about the matter. AR, Tab 67 at 35-37. However, the respondent denied that he threatened Pendleton about the time card, HT 603, and, according to Kruse, HT 167, 174, he properly requested advice from CPO about whether to counsel Pendleton formally or informally and showed no vindictiveness towards her. No basis for questioning Kruse's veracity has been suggested, and, as discussed below, *see* pages 52-57, we agree with the ALJ's determination that the respondent was a credible witness and that Pendleton was not. Moreover, he correctly ruled that a request for advice about how to counsel an employee does not constitute a threat to take a disciplinary action.

The ALJ found that the respondent requested a meeting with Pendleton to give her "mid-point" performance counseling at the urging of Naomi Campbell in the CPO, despite his reluctance to do so while the OSC investigation of her charges was pending. The ALJ noted that the respondent conveyed his request to Pendleton in a memorandum which noted deficiencies in her use and safeguarding of the system established for monitoring suspense response dates. R26 at 1. When the Chief of Staff asked him about the memorandum to Pendleton, the respondent replied with an explanation of its basis and context. R26 at 3-5. In the end, respondent did not counsel Pendleton about her performance deficiencies. Judge Timony found that the respondent's actions did not constitute a threat under the statute and that in this count OSC in effect charged the respondent with having "prohibited personnel thoughts." RD 28-29.

OSC objects that the respondent, by informing Pendleton that she was failing in two of her critical elements, was implicitly threatening her with an unsatisfactory annual performance appraisal and with the possibility of an adverse action if she did not improve. AR, Tab 67 at 39. However, the petitioner cites no evidence that the performance problems identified by the respondent in his memorandum did not exist. The counseling memorandum was part of a process designed to assist the employee to bring his or her performance to an acceptable level. While there may be circumstances in which notice of a performance deficiency would be an implied threat to issue a retaliatory performance appraisal, the record here does not support such a conclusion concerning the respondent's mid-point counseling memorandum. *Cf. Marren v. Department of Justice*, 51 M.S.P.R. 643, 645 (1991) (simply taking actions required by an employee's less than satisfactory performance evaluation does not demonstrate retaliation for whistleblowing).

E. Counts 5 and 9, Oral Counseling About Leaving Desk.

Judge Timony found that the respondent gave Pendleton a memorandum documenting an oral counseling session concerning her spending too much time away from her desk talking to Purchasing Agent Ebaugh. He concluded that the respondent counseled Pendleton for the reason stated, which was corroborated by other employees, and not in reprisal for protected activities, as charged in counts 5 and 9. The ALJ also determined that giving an employee a memorandum of oral counseling is not a "personnel action" within the meaning of the statute. RD 29.

The petitioner objects to the ALJ's finding that the respondent did not take a personnel action, contending that oral counseling is a "disciplinary or corrective action" under 5 U.S.C. § 2302(a)(2)(A)(iii) because, like a reprimand, its purpose is to correct perceived inappropriate behavior. AR, Tab 67 at 40. The respondent replies that counseling is not subject to the statute, citing our holding in *Caddell v. Department of Justice*, 52 M.S.P.R. 529, 532-33 (1992), that, because the provision applies to Chapter 75 and "other disciplinary or corrective action," the latter phrase should be read to include only actions "in the nature of a Chapter 75 action." Unlike formal disciplinary action, he notes, no SF50 (or SF52) is issued to memorialize oral counseling, and no record is placed in the employee's official personnel file, precluding its consideration in subsequent discipline as a prior disciplinary action. As a matter of policy, the respondent also urges the Board not to treat counseling as a personnel action lest every communication between supervisor and employee be turned into a potential retaliation claim. AR, Tab 68 at 27-30.

We agree with the respondent for the reasons stated that counseling such as Pendleton received does not constitute disciplinary or corrective action within the coverage of the statute. As the personnelist Sandy Kruse testified, "[c]ounseling would occur *before* any discipline is taken -- or should occur." HT 178 (emphasis added). The petitioner's reading of the statute is inconsistent with the rule of interpretation stated in *Caddell*, and we believe it would be counterproductive to construe the statute in such a way as to discourage resolving workplace issues short of formal disciplinary action.

We also reject OSC's challenge to the finding that respondent counseled Pendleton for bona fide reasons. AR, Tab 67 at 41. The ALJ correctly found no substance in the supposed contradictions of the witnesses who testified that Pendleton spent a considerable amount of work time talking to Ebaugh. *See* RD 29-30 n.56. And contrary to petitioner's assertion, the respondent's failure to discipline Ebaugh does not call his good faith into question since he was not Ebaugh's first-level supervisor. Respondent asked the first level supervisor to counsel him, and he also correctly noted that the cases were different since, unlike Pendleton, Ebaugh was not absent from his desk. HT 728. There is no evidence, for example, that Ebaugh was unavailable for work when his supervisor needed him.

F. Counts 6 and 10, Recommended Reprimand for Discourtesy.

In counts 6 and 10 the complaint charged that the respondent recommended that Pendleton be reprimanded, allegedly for a discourteous remark about Bloch, but actually in reprisal for her protected activities. Judge Timony found that the memorandum cited as the recommendation was in fact a request for advice from Sandy Kruse of the CPO and that the request was not a "recommendation" under the statute since the CPO had no authority to reprimand Pendleton. The ALJ also found that in seeking advice about the matter the respondent was following the format established by the CPO and was not retaliating against Pendleton because of the anonymous letter or her meeting with the IG. RD 30.

Petitioner contends that the ALJ's finding that respondent's memorandum was only a request for advice is confused and illogical. According to OSC, respondent was seeking required approval from the CPO for the reprimand which he wished to give and

therefore his request was in that sense a recommendation. AR, Tab 67 at 42. However, Kruse's testimony cited to show that CPO concurrence was necessary does not indicate that it was, merely that CPO would be aware of any formal disciplinary action. *See* HT 169-70. As the respondent points out, Kruse testified that the CPO lacks authority to take personnel actions against employees of other offices and that its role is limited to providing such offices advice and making recommendations. AR, Tab 68 at 31-32, citing HT 170-71. Thus, although the respondent's memorandum expressed the opinion to CPO that Pendleton should be reprimanded, the ALJ was correct in his determination that the memorandum did not constitute a recommendation for purposes of the statute.

More importantly, because of the CPO's advice, respondent never gave Pendleton a letter of reprimand for discourtesy. As a result, he did not "take an action" in the matter which could have violated sections 2302(b)(8) or (9). *See Frederick v. Department of Justice*, 73 F.3d at 354 (liability under section 2302(b)(8) attaches only to those who take or fail to take a personnel action).18

4. Petitioner Has Shown No Basis For Disturbing The Administrative Law Judge's Credibility Findings.

The petitioner has presented extensive objections to the credibility findings in the Recommended Decision and asks the Board not to give them the deference to which such findings are ordinarily entitled. According to OSC, the ALJ has failed to resolve factual disputes in the prescribed way by summarizing the evidence on each side of an issue and stating which version he believes and why. Petitioner takes exception to the ALJ's credibility determinations concerning the three principal witnesses and requests the Board to substitute its judgment for his with respect to all hearing witnesses. AR, Tab 67 at 44-45.

OSC urges the Board to find that the ALJ erred in finding that the respondent was a candid and truthful witness. Petitioner faults Judge Timony for relying on abilities (trained engineer, skilled manager) and other characteristics (hardworking, Sunday School teacher, teetotaller) which it contends have no relevance to truthfulness, and petitioner also disputes his conclusion concerning the respondent's managerial ability. OSC accuses the ALJ of ignoring inconsistencies in the respondent's testimony, and it asserts that respondent's falsifications at the hearing and in his previous conduct make his testimony generally unworthy of belief. *Id.* at 55-63. Similarly, OSC contends that the ALJ erred in relying on Bloch's intelligence, independent spirit and managerial skills to find her believable, while ignoring allegedly dishonest conduct shown by the record which casts doubt on her truthfulness. *Id.* at 52-55. Petitioner also defends Pendleton's credibility and criticizes the ALJ's conclusions concerning her character and her reliability as a witness. *Id.* at 45-52.

We agree with the petitioner that skills such as managerial ability have little bearing on a witness's credibility, and we will not address its arguments concerning

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[18] The ruling of the court in *Frederick* applies to section 2302(b)(9) as well since the introductory wording of this provision is identical to the language of section 2302(b)(8) interpreted by the court.

respondent's and Bloch's managerial abilities, noting only that we see no basis for holding them entirely responsible for the polarization within the DOC and the existence of a "network" of anti-management employees.19 However, the ALJ's assessment of the witnesses' characters in general deserves some, though hardly dispositive, weight, such as his consideration of the respondent's 25 years of unblemished service. RD 17. The bias of witnesses is also a relevant consideration, but we cannot agree with OSC's argument that respondent's testimony should be discounted as self-serving, while the complainant Pendleton's testimony need not be. AR, Tab 67 at 27, 52. It is true that only the respondent's job was at stake, but it is clear from the record that all three of the principal witnesses were very much personally involved in this matter. Similarly, we cannot accept OSC's suggestion that DOC employees Meyer, Johnson and Hickey are not credible witnesses because pro-management,20 while Pendleton's testimony should be accepted notwithstanding her membership in the network of disgruntled DOC employees.21 *Id.* at 28, 41, 47, 51. Few, if any, of the witnesses in this case can be characterized as entirely without bias.

More relevant, as OSC points out, is the consistency of the witnesses' testimony and their truthfulness or lack of it on previous occasions. Petitioner argues, *id*. at 53, 55, that the credibility of both Bloch and respondent is diminished because of an incident involving a few hours of work by Bloch on a Monday holiday which was reported as overtime work on the previous Saturday and the respondent's signing off on her time card. Bloch testified that she left the reporting of her time up to Pendleton, who was the time keeper, and that, although overtime is paid at a higher rate than holiday work, she received an insignificant amount of additional pay due to the cap on such pay which was applicable because of her grade level. HT 829-33, 868-70. The respondent testified that his approval of the erroneous time card was inadvertent and that he believed no appreciable gain to Bloch was received. HT 604-07, 686-88. Although the IG report found that Bloch submitted and respondent approved a fraudulent time card, the basis for concluding that this incident involved deliberate falsification is not explained. See P10 at 9. This conclusory finding is insufficient to call into question the testimony of Bloch and respondent concerning the matter and provides no basis for questioning the credibility determination of the ALJ who heard their testimony and observed their demeanor.

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[19] *See* note 7, *supra*.

[20] OSC also argues that Hickey is not credible because she allegedly denied a statement which she had made to the IG. AR, Tab 67 at 47. In fact, Hickey testified believably that she did not remember the statement made 27 months earlier but did not dispute that she had made it. HT 384-85.

[21] OSC does not dispute the existence of this dissident group or that Pendleton was a member, but merely challenges the ALJ's finding, RD 12, 31, that Pendleton was one of its leaders. AR, Tab 67 at 51-52. In fact, contrary to petitioner's contention, Hickey testified that Pendleton was a network leader, HT 377, 388-89, as did Meyer, HT 401-402, and Bloch testified that Pendleton was a member of the group, although she was uncertain when she became part of it. HT 829, 865.

OSC also cites, AR, Tab 67 at 53, the IG's finding that Bloch and her husband, also an employee of the DOC, failed to report on their financial disclosure form the financing of a property other than their residence. The property in question was a rental jointly financed with their residence and on the same land, and the Blochs stated that they did not understand the reporting requirement. P10 at 12-13. Again, this incident is consistent with an honest misinterpretation and hardly supports finding the proclivity to falsification which petitioner would infer. Moreover, even considering these incidents as showing a lack of carefulness about accuracy, they would detract little from corroborated testimony. *See Christensen v. U.S. Postal Service,* 51 M.S.P.R. 681, 688 (1991)(even a showing of a propensity to make unfounded complaints would not be dispositive of the witness's credibility where his testimony was corroborated by other evidence), *aff'd*, 979 F.2d 216 (Fed. Cir. 1992)(Table).

Petitioner identifies two major falsehoods in the respondent's testimony which it contends the ALJ erroneously ignored. The first of these is the respondent's alleged statements that he began to lose trust and confidence in Pendleton in May or June of 1992. AR, Tab 67 at 58-60. However, the respondent's statements cited by petitioner make no such claim. As noted above, *see* page 33, the respondent testified that Pendleton's probable role in the anonymous letter opened his eyes to the significance of earlier actions on her part which he did not take seriously at the time. HT 709-10. OSC's argument is apparently based on a "time line" submitted by respondent, R1 at 2, which presents respondent's *current* view of the deterioration of his relationship with Pendleton and indicates that on her side it began in May or June 1992, as she stated in her letter to OSC. R15 at 3. There is no basis to the contention that in his testimony respondent sought to downplay the significance of the anonymous letter by falsely claiming that he had lost confidence in Pendleton prior to August 1992.

The other alleged major prevarication in the respondent's testimony concerns the nature of the rumor which prompted him to call the "All Hands" meeting of the DOC staff in August 1992. OSC asserts that the respondent, to minimize his reaction to the anonymous letter, falsely testified that a rumor about Bloch's inappropriate conduct with other men at a conference was his reason for calling the meeting, when his own earlier statements to the IG and the testimony of others indicated that the rumor about their affair was the reason. AR, Tab 67 at 60-64. The alleged inconsistency is more imagined than real. The only specific rumor which respondent mentioned to the IG investigator was the gossip about his walks with Bloch. However, respondent also stated that over time the rumors grew worse and worse, and he nowhere indicated that the more severe allegations which followed pertained to his relationship with Bloch. *See* P28 at 5.

As the ALJ pointed out, RD 23 n.21, a comparison of the respondent's draft speech for the meeting with the actual speech shows that he was originally most concerned about rumors about Bloch, which he tactfully did not repeat in detail, and that he added his name to hers as the object of slander at her suggestion. *Compare* R25, para. 3 *and* R5, para. 3. The respondent stated that he did not recall being aware of the specific rumor about an affair at the time of the meeting. HT 192. However, he did not claim that he was unaware of the gossip about his walks with Bloch, and he referred to the gossip in the speech. It is not surprising that the rumor about an affair was the rumor

remembered by other witnesses questioned in the investigations following the anonymous letter trumpeting it. We see no error in the ALJ's failure to be persuaded by these alleged inconsistencies, nor any basis in them to overturn his credibility finding concerning the respondent.22

We are also unpersuaded by petitioner's challenge to Judge Timony's adverse finding concerning Pendleton's credibility. OSC objects to the ALJ's assessment of Pendleton's character as unsupported by the record and irrelevant to her credibility. Although petitioner would give them a different reading, in our view her hearing testimony and her complaint letter to OSC readily support the ALJ's conclusion - essentially that her emotions distorted her perception of events in such a way as to diminish her credibility as a witness. Moreover, the most important basis for the ALJ's credibilty finding was his comparison of Pendleton's testimony and the respondent's concerning her claim that he withdrew responsibilities so as to significantly change her duties following her return from the detail to the purchasing division. RD 16-17. As discussed above, pages 36-39, petitioner has shown no basis for overturning the ALJ's determination that respondent's testimony on the subject was more believable than Pendleton's. We also agree with Judge Timony that her unreliability on this matter lessens her credibility as a witness generally.

In reviewing the ALJ's credibility findings, the Board is mindful that we are required to give special deference to fact findings that are based expressly or implicitly on the demeanor of the witnesses. *Chauvin v. Department of the Navy,* 38 F.3d 563, 566 (Fed. Cir. 1994) (*citing Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985)). Because Judge Timony's assessment of the hearing witnesses is implicitly based in part on their demeanor, the Board will not overturn his credibility findings absent a clear showing of reasons in the record for finding his interpretation of their evidence erroneous.

As was the case in *Chauvin*, an ultimate factual question in this case involved whether the respondent acted with wrongful intent - in this case whether such intent motivated actions which he took affecting Pendleton. The ALJ heard the respondent's testimony, observed his demeanor, found him to be a truthful witness, and believed his statement that he did not retaliate against Pendleton for her role in the anonymous letter or for her cooperation with the IG. RD 32. The other incidents involving Pendleton which led to respondent's decision not to give her a cash award were admitted or not disputed. As discussed above, evidence corroborating the respondent's testimony supports the ALJ's resolution of the other principal factual disputes in the case: whether Pendleton's position was one of the least essential in the DOC and whether the

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[22] There is even less substance to respondent's other allegedly "glaring" inconsistencies identified by OSC. AR, Tab 63 at 63-64. Contrary to petitioner's assertion, the respondent was correct in stating the IG substantiated none of the allegations made in the anonymous letter (unless the letter is implausibly read to allege only the appearance of an affair). *Compare* P1 *and* P10. Respondent did not deny that he initiated Pendleton's detail to the Purchasing Division, but merely explained that CPO had a role in effectuating the action, AR, Tab 64 at 2, and he lacked authority to change the positions which were voted to be eliminated from the DOC without the approval of the Chief and the Commanding General, R13 at 2.

respondent withdrew a significant number of her duties. Petitioner's arguments reflect mere disagreement with the ALJ's assessment of the witnesses, not the clear error which would justify our overturning his credibility determinations. *See Hambsch v. Department of the Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986).

Finally on the basis of various alleged errors and "slanted findings" by the ALJ, OSC alleges that he was biased against whistleblowers, a charge which we emphatically reject.23 An allegation of bias is a serious matter and should not be lightly presented. It is well established that incorrect rulings, standing alone, are not evidence of bias. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 134 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982). Neither is accepting one party's version of the facts over the other's. *Hutchcraft v. Department of the Treasury*, 60 M.S.P.R. 299, 303 (1994). Judge Timony's detailed and careful consideration of the factual and legal issues in this case has reached a conclusion with which the petitioner disagrees. However, we see no basis for petitioner's bias challenge to the rulings which produced this result. Certainly the petitioner's arguments fall far short of a showing which would overcome "the presumption of honesty and integrity which accompanies administrative adjudicators." *Begay v. Department of Health and Human Services*, 52 M.S.P.R. 447, 448 (1992) (citation omitted).

CONSLUSION

For the reasons stated, the Board ADOPTS the Recommended Decision as MODIFIED in this opinion and DISMISSES the complaint.

NOTICE TO RESPONDENT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

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[23] OSC cites a number of errors allegedly reflecting bias by the ALJ, AR, Tab 67 at 3-6, which we have found in the foregoing to have been correct determinations. Petitioner is also mistaken as to other supposed inaccuracies by the ALJ, or it has identified typographical errors where the intended citation was easily determined. For example, OSC contends, *id.* at 4 n.2, that the ALJ's record citation did not support his finding that Pendleton claimed not to have read the entire anonymous letter at the time it was discovered, when in fact she did state that she made this claim to respondent in her letter to OSC. *See* R15 at 8. OSC objects to the ALJ's miscitation at RD 10, Finding 44, to R38. *Id*. We were readily able to determine that the intended reference was R28, as the parallel cite to P27 makes clear. Similarly, the ALJ's reference to Bloch's testimony at HT 20-24 was obviously a typographical error for HT 820-24. Such occasional mistakes are not surprising given the size of the record and are inappropriately cited in support of allegations of bias.

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The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.