UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 248

Docket No. AT-0752-06-0350-I-1

Kenneth M. Pedeleose,
Appellant,
v.
Department of Defense,
Agency.

October 24, 2007

Kenneth M. Pedeleose, Marietta, Georgia, pro se.

Gary E. Jencson, Esquire, Bratenahl, Ohio, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Chairman McPhie issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that affirmed his 30-day suspension. For the reasons set forth below, we GRANT the appellant's petition for review under 5 U.S.C. § 7701(e), REVERSE the initial decision, and do NOT SUSTAIN the agency's 30-day suspension.

BACKGROUND

¶2 On October 18, 2005, the agency proposed to suspend the appellant from his position as a GS-12 Industrial Engineer for the Defense Contract Management Agency (DCMA), Lockheed Martin Marietta (LMM), in Marietta, Georgia, for 30 days based on three charges: (1) refusal to cooperate in an agency investigation;

(2) insubordination; and (3) failure to follow instructions. Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4e. The first charge consisted of two specifications, namely, that the appellant refused to meet with agency investigator Stacy Scantlebury, Chief of Special Processes at DCMA, Atlanta, for an interview during two investigations of rumors that certain employees within the appellant's command were being targeted for termination from federal service. *Id.*, Subtab 4e at 3. The second charge specified that on June 22, 2005, the appellant expressly refused to cooperate with the investigation in response to the oral and written directions to cooperate by his supervisor, DCMA LMM Commander Colonel Nicole Plourde. *Id.* at 3-4. The third charge specified that the appellant failed to follow Plourde's direct written instructions to meet with Scantlebury on September 12, 2005, and to fully cooperate and answer all questions posed by her as part of her investigation. *Id.* at 4. The deciding official sustained the charges and the agency effected the suspension on January 25, 2006. *Id.*

¶3 On appeal to the Board, the appellant raised the affirmative defense of reprisal for whistleblowing activity. He alleged that the agency's action was reprisal for his protected disclosures: (1) that, in February 2005, agency officials were not holding Lockheed Martin, which had the government contract on the C-130J, a medium-range, tactical aircraft, accountable for submitting bills to the government that are substantiated and traceable, IAF, Tab 28, Exhibit B; (2) that threatening to fire Susan VanDerbeck, who had also made protected disclosures regarding the C-130J, and other employees was a violation of law, the Whistleblower Protection Act (WPA) and an abuse of authority; and (3) that the investigation of rumors that certain employees within the appellant's command were being targeted for termination constituted a violation of law and an abuse of authority. He also alleged that the agency's action was retaliation for prior equal employment opportunity (EEO) activity and harmful error, and claimed that the agency improperly believed that he had created a hostile work environment in his

office and that the 30-day suspension penalty constituted disparate treatment. IAF, Tab 1, Tab 16 at 7-8, Tab 21 at 5-27, Tab 26. The administrative judge apprised the appellant of the burden and elements of proof as to his affirmative defense of reprisal for whistleblowing. IAF, Tab 19 at 2-3.

¶4 The appellant initially requested a hearing but later withdrew this request. IAF, Tabs 1, 4, 19 at 1. Following his receipt of the parties' final submissions, the administrative judge issued an initial decision affirming the agency's action. IAF, Tab 29, ID. The administrative judge found that the agency proved its charges by preponderant evidence and showed that the penalty of a 30-day suspension was reasonable. *Id.* at 3-4, 7-9. The administrative judge further found that the appellant failed to establish his affirmative defenses. *Id.* at 4-7.

¶5 In his PFR, the appellant reasserts the affirmative defenses he raised below, alleges bias by the administrative judge, and claims that the administrative judge ignored evidence and accepted false statements by agency witnesses.[1] Petition for Review File (RF), Tab 1. The agency has responded in opposition. RF, Tab 3.

ANALYSIS

Factual background.

¶6 The appellant submitted a May 16, 2005 report titled "Cover-up in the Department of Defense," IAF, Vol. 5, the appellant's Exhibit D at 4-55, to the DOD IG and Senator Grassley. *Id.* at 1-2. The report was developed by the appellant and other employees who had for a number of years been involved in disclosing to Congress and other authorities details of safety problems and waste

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[1] Before and after the close of the record on PFR, the appellant submits for the first time a number of additional documents. We have carefully considered these submissions under our standard for admitting evidence after the close of the record below. *See* 5 C.F.R. § 1201.115(d) (the Board will not consider evidence submitted for the first time with a PFR absent a showing that it is both new and material). We find that none of the appellant's submissions are admissible under that standard and we have not considered them.

in the troubled history of the C-130J program. The appellant's involvement in disclosing problems with the C-130J program was widely known at DCMA. The report identified safety and waste problems with the C-130J program that existed before and after the issuance of a July 23, 2004 report by the IG stating that the IG substantiated the allegation that, at that time, the C-130J aircraft did not meet contract specifications and therefore could not perform its operational mission. IAF, Tab 28, Exhibit A. A month after the appellant submitted this report, the appellant helped VanDerbeck, an engineer and a probationary employee, file a complaint with the DoD IG regarding safety issues that she had observed as she worked in the C-130J program. IAF, Tab 28, Exhibit E. In her June 10, 2005 complaint, VanDerbeck identified 14 alleged violations in the C-130J program. *Id*. The appellant's e-mail to the IG of VanDerbeck's complaint was copied to Plourde. *Id.* On June 15, 2005, the appellant received information that in a meeting, Plourde discussed the system safety issues that VanDerbeck was raising and that Plourde was quoted as saying that "since Susan Vanderbeck is a probationary employee all they (DCMA management) have to do is fire her." IAF, Tab 28, Exhibit F. The appellant e-mailed this information to the IG. *Id*. The e-mail specifically identified those present at the meeting, Plourde, Henrietta Snow, and Myra Tate, and stated that the appellant suspected that Tate told "Shelton-Thomas, who in turn told Ms. Davis" what Plourde said. *Id*. The agency terminated VanDerbeck the following day.

¶7 On June 16, 2005, De Angeles Davis, a former DCMA LMM employee, sent the appellant an e-mail message stating that she had learned from LaNorma Shelton-Thomas[2] that VanDerbeck, Kim Lee, and Gerry Sawyer were targeted by Plourde for termination. IAF, Tab 28, Exhibit F at 1, 26-27.

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[2] Ms. Davis's e-mail mistakenly refers to Ms. Shelton-Thomas as Ms. Thomas-Shelton. IAF, Tab 28, Exhibit F at 26.

¶8 On Saturday, June 18, 2005, the appellant telephoned Ms. Sawyer at home and told her that he had heard that she was "targeted to be fired." IAF, Tab 6, Subtab 4w at 10, the appellant's Exhibits I at 5, K at 3. At this point, it was known that VanDerbeck had been fired. Ms. Sawyer became very upset and decided to retire to avoid removal. *Id.*, Subtab 4w at 10. Accordingly, when she returned to work on Monday, June 20, 2005, Ms. Sawyer submitted paperwork for her retirement and began looking for Kelly Wells, her supervisor, to notify him that she intended to retire. *Id.* During this time, various DCMA LMM supervisors, including Mr. Wells and Kenneth Pates, heard the rumor that Ms. Sawyer and others were going to be removed. *Id.* at 11, 13, 17. Mr. Pates reported the rumor to Plourde and Ms. Snow, who met with Ms. Sawyer and told her that the rumor was false. *Id.* at 11, 17, IAF, Tab 22, agency Exhibit 7 at 2. Plourde observed that Ms. Sawyer was visibly upset during the meeting and that she advised Plourde that she was stunned over the weekend after being told that she was going to be fired. IAF, Tab 22, agency Exhibit 7 at 2. Plourde asked Ms. Sawyer to reveal the name of the person who had called her and told her she was going to be fired. Ms. Sawyer declined to do so. IAF, Tab 6, Subtab 4w at 11, Tab 22, agency Exhibit 7 at 3.

¶9 On the same day, the appellant sent an e-mail to the IG (DoD) informing the IG that he had confirmation of his earlier e-mail to the IG reporting that Plourde was targeting VanDerbeck for firing because of her whistleblowing and informing the IG that Plourde was targeting additional employees for firing. IAF, Tab 28, Subtab F at 29. The next day, June 21, 2005, Plourde began an investigation into the rumors about terminations.

¶10 Plourde stated that, after meeting with Ms. Sawyer, she decided to conduct an investigation into the source of the information that Ms. Sawyer was about to be fired because she believed that such information was having a negative effect on employee morale at DCMA LMM. She averred that on the afternoon of June 20, 2005, she discussed the matter with agency counsel Leigh Owens, who agreed

that an investigation was a good idea and suggested that Plourde consider using Scantlebury as the investigator because she had no connections with DCMA LMM and had conducted similar investigations in the past. Plourde further stated that she initiated the investigation because she "was concerned that one of [her] supervisors was inappropriately discussing confidential management information with subordinates and that this conduct was feeding rumors that certain employees were targeted to be fired." IAF, Tab 22, agency Exhibit 7 at 3-4.

¶11 On June 21, 2005, Plourde issued an appointment letter naming Scantlebury to conduct the investigation. IAF, Tab 6, Subtab 4bb, Vol. 5, the appellant's Exhibit G at 2. That morning, Plourde also issued a "Commander's Direct Order" directing Ms. Sawyer to reveal the name of the person who had called her and told her she was going to be fired, and Ms. Sawyer identified the appellant. *Id.*, Subtab 4w at 10, Vol. 5, the appellant's Exhibit G at 3-4.[3]

¶12 The investigation began the following day, June 22, 2005, and Scantlebury telephoned the appellant that morning to schedule a time to discuss the situation involving Ms. Sawyer. IAF, Tab 22, agency Exhibit 9 at 2, Tab 6, Subtab 4w at 2. The appellant, accompanied by Roy Rogers, the acting local union president, came to the conference room where Scantlebury was working. IAF, Tab 28, Subtab HH at 44, lines 21-24. After Scantlebury again explained why she wanted to speak with him, the appellant questioned her credentials as an investigator and stated that he would not speak with her until she gave him a copy of the appointment letter from Plourde, which Scantlebury refused to do without Plourde's consent. IAF, Tab 6, Subtab 4w at 2.

¶13 Later on that day, the appellant and Mr. Rogers met with Plourde, who had learned of the appellant's refusal to cooperate in the investigation and prepared a

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[3] The record does not indicate whether Plourde issued the appointment letter before or after Ms. Sawyer revealed that the appellant was the person who had told her she was going to be fired; however, the record does indicate that Plourde decided to have an investigation before learning who told Ms. Sawyer she was going to be fired. IAF, Tab 22, agency Exhibit 7 at 3.

Letter of Direction instructing him to cooperate with the inquiry that Scantlebury was conducting. IAF, Tab 6, Subtab 4aa, Vol. 5, the appellant's Exhibit G at 10. At the meeting, Plourde orally directed the appellant to cooperate in the investigation and handed him the June 22, 2005 Letter of Direction as well as a copy of the appointment letter that the appellant had requested from Scantlebury. IAF, Tab 6, Subtab 4x at 1, Tab 22, agency Exhibit 7 at 5, the appellant's Exhibit K at 5. In response, the appellant stated that the Letter of Direction was an illegal order and left Plourde's office. IAF, Tab 6, Subtab 4d at 9, Tab 22, agency Exhibit 7 at 5-6, the appellant's Exhibit K at 5.

¶14 The appellant then sent e-mails to DCMA Director Major General Darryl A. Scott, DCMA East Director Keith Ernst, and Daniel P. Meyer of the DoD IG's office alleging that Plourde's Letter of Direction was an illegal order and accusing her of abuse of authority, threatening a federal witness, and witness tampering, IAF, Vol. 5, the appellant's Exhibit H at 1, 4, 11. The appellant explained in his deposition that he believed that the Scantlebury investigation would interfere with the investigation of the same matters that he believed would be investigated by the IG. IAF, Tab 18 (Agency Exhibit 5 at 51); IAF, Tab 28, Subtab HH at 51.[4] The appellant stated "Did I just blatantly not agree – cooperate with her [Scantlebury] based on the fact that I had suspicions? No, I turned it over to the Inspector General and I wanted an independent look at this from an outside organization." *Id.* at 53.

¶15 On June 30, 2005, Scantlebury sent the appellant an e-mail message stating that she was wrapping up her investigation and needed to know whether he still intended not to speak with her. IAF, Tab 6, Subtab 4w at 6, the appellant's Exhibit H at 19. The record indicates that the appellant received and read this

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[4] Both parties submitted the entire transcript of the appellant's deposition into the record. For that reason, the Board has credited the deposition testimony as it would a stipulation by the parties. We find it noteworthy that both parties submitted many of the same documents into the record.

e-mail but did not respond to it. *Id.*, Subtab 4w at 7. On July 5, 2005, Scantlebury reported the results of her investigation to Mr. Ernst. *Id.* at 1-3, Tab 22, agency Exhibit 7 at 6.

¶16 During the first week of July 2005, the appellant told Mr. Thomas that he was targeted for firing. IAF, Tab 22, agency Exhibit 7 at 6. On July 12, 2005, Mr. Thomas wrote Plourde a letter in which he stated, "I am hearing rumors and information from very reliable sources to collaborate [sic] those rumors that I have been targeted for 'firing' for some time." IAF, Tab 6, Subtab 4v at 2. He asked Plourde whether he was targeted for firing and, if so, what he could do to protect himself. *Id.*

¶17 Because of this information, Plourde stated in her affidavit that she decided to request an investigation into this additional matter and, on the advice of counsel, she elevated the matter to Mr. Ernst, who issued a memorandum appointing Scantlebury to conduct a new investigation into the circumstances leading Ms. Sawyer and Mr. Thomas to believe that the agency was going to fire them. IAF, Tab 22, agency Exhibit 7 at 6-7, Tab 6, Subtab 4u.

¶18 Scantlebury received Mr. Ernst's appointment memorandum on August 1, 2005. IAF, Tab 6, Subtab 4j at 1. The following day, she sent the appellant an e-mail message seeking to interview him in conjunction with her investigation. *Id.* at 11, the appellant's Exhibit J at 3. In response, the appellant sent Scantlebury e-mail messages questioning the authority for the investigation and notifying both Scantlebury and Mr. Ernst that he considered the investigation reprisal. IAF, Tab 6, Subtab 4j at 19, 21, the appellant's Exhibit J at 4-7. He stated "[t]he DoD IG already has an investigation in this area and I have already provided the information I have to them." *Id.* Scantlebury forwarded the appellant's messages to Ms. Owens for assistance in gathering information and providing a response. *Id.*, Subtab 4j at 1.

¶19 At about the same time, Ms. Owens exchanged a number of e-mail messages with the IG regarding the Scantlebury investigation. IAF, Tab 15

(Exhibits 1-4). The IG expressed concern over "how two investigations can proceed, and what does a witness in one (ours) say to your investigator if disclosing information will affect the OIG DOD investigation." *Id.* (Exhibit 1). The IG stated further that he had "urged Pedeleose and Hagel to cooperate, and to answer questions that they feel will compromise the OIG investigation by referring the matter to us; we can then decide, and not have two witnesses setting OIG policy (which is my fear)." *Id.* The IG informed Ms. Owens: "Though it is perhaps beyond my portfolio, be careful of the Congressional end of this case – which has been quiet for a while. Grassley and McCain are interested in the issues Pedeleose is perceived as advancing, so you may want to make sure your liaison is in the loop when the Colonel's investigation goes ahead." *Id.* (Exhibit 3). He also stated that, after he reviewed the questions that Scantlebury expected to ask the appellant, "on their face, [he saw] no conflict between [his] investigation and [Scantlebury's]." *Id.* (Exhibit 4).

¶20 On August 19, 2005, Scantlebury was provided a new letter of appointment from Mr. Ernst, along with documents that addressed the appellant's questions regarding Scantlebury's authority to conduct investigations and administer oaths.[5] However, on the advice of Ms. Owens, Scantlebury delayed contacting the appellant until additional information was received from the office of the U.S. Attorney for the District of Atlanta. *Id.* at 2. By August 2, 2005, the U.S. Attorney authorized Scantlebury to communicate to the appellant that he would not be subject to a criminal proceeding for any responses that he may give, except for providing a false answer. IAF, Tab 6, Subtab 4j at 20.

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[5] Although it is unclear from the record specifically which documents were attached to the August 19, 2005 new letter of appointment, other than two lists of questions – one for the appellant and one for Henry Hagel, another DCMA LMM employee – IAF, Tab 6, Subtab 4j at 73-78, the documents referenced in that appointment letter were 5 U.S.C. §§ 301, 302, DoD Directive 5105.64, and Delegation of Authority to Administer Oaths. *Id.* at 73.

¶21 On September 7, 2005, Scantlebury had a number of exchanges with the appellant. He asked why she had not answered his questions. She gave the appellant a package of information that contained the following documents detailing her authority to conduct the investigation: the August 19, 2005 letter of appointment as AR 15-6 Investigating Officer, IAF, Tab 6, Subtab 4j at 73-74, Vol. 5, the appellant's Exhibit Q at 3-4; a list of specific questions for the appellant, IAF, Tab 6, Subtab 4j at 75-76, Vol. 5, the appellant's Exhibit Q at 16-17; an August 18, 2005 letter with the subject line Delegation of Authority to Administer Oaths, *id.* at 5, and DoD Directive 5105.64 (establishing the DCMA), IAF, Tab 6, Subtab 4dd, Vol. 5, the appellant's Exhibit Q at 6-13. The letter of appointment states that Scantlebury may ask "follow-on questions if warranted." Although Scantlebury must have been aware of the e-mail communications with the IG because the IG reviewed the questions that she would be asking the appellant, there is no evidence that Scantlebury showed the appellant those e-mail communications or otherwise informed him that the list of questions had been approved by the IG.

¶22 The following day, September 8, 2005, Plourde issued the appellant a Letter of Direction ordering him to meet with Scantlebury on September 12, 2005, and "to fully cooperate and answer all questions posed by Scantlebury as part of her inquiry." IAF, Tab 6, Subtab 4n. In his deposition, the appellant stated that just before Plourde gave the appellant the Letter, he told her that he had turned over to the IG the information that he had about the subject matter of the investigation and asked her to go to the IG to talk to them about the investigation. IAF, Tab 28, Subtab HH at 123. Plourde did not respond to the appellant's request and handed him the Letter. *Id*. There is no indication in the record that Plourde told the appellant that the IG had reviewed a specific list of questions and that the IG believed that on their face the questions would not interfere with his investigation, that Scantlebury would be limited to asking those questions notwithstanding the statement in the letter of appointment that she

could ask "follow-on questions," or that the appellant could seek the advice of the IG if he believed that a "follow-on question" would interfere with the IG's investigation in the same matter.

¶23 The appellant also consulted with the IG and stated in his deposition that the IG told him to cooperate with lawful investigations. The appellant stated further that, when he specifically asked whether this investigation was lawful, the IG replied that he had no idea. *Id*. at 130-31.

¶24 Shortly before the time of the scheduled interview, the appellant gave Scantlebury two letters from Senator Charles Grassley, Chairman of the Senate Finance Committee, dated April 26, 2004, *id.*, Subtab 4j at 85, and August 16, 2005, *id.* at 84, which cited the assistance the appellant had provided the committee in its investigation of the C-130J program and quoted 18 U.S.C. § 1505, a criminal statute that protects those who are assisting in a Congressional investigation from retaliation. The appellant then read a statement accusing Scantlebury of conducting an illegal investigation, impersonating an investigator, making false statements concerning an investigation, interfering with a DoD IG investigation, and using government time and equipment to conduct a "false" investigation. *Id.* at 83. He then "respectfully" declined to participate in the interview. *Id.*

¶25 On September 20, 2005, Scantlebury sent the appellant an e-mail message stating that she was trying to conclude her investigation and requesting that he contact her by close of business that day to schedule an interview. IAF, Tab 6, Subtab 4l. The e-mail does not inform the appellant of the opinion advanced by the IG regarding the written questions that Scantlebury would pose to the appellant and does not indicate that Scantlebury's interview would be limited to those questions. As noted above, there is no evidence of record to show that Scantlebury informed the appellant of such. The appellant did not contact Scantlebury to schedule an interview. *Id.*, Subtab 4j at 3. Scantlebury reported

the results of her second investigation to Mr. Ernst on September 27, 2005. *Id.* at 1-4.

The agency failed to prove the charges.

¶26 As noted, based on the foregoing exchanges between the appellant, Scantlebury, and Plourde, the agency suspended the appellant for 30 days on three charges: (1) refusal to cooperate in an agency investigation; (2) insubordination for refusal to follow instructions to cooperate in an agency investigation; and (3) failure to follow instructions of September 12, 2005, to meet with Scantlebury regarding an agency investigation. Initial Appeal File (IAF), Tab 6, Subtabs 4a, 4b, 4e. Thus, all of the charges are specifically related only to the appellant's non-cooperation with the Scantlebury investigation.

¶27 Generally, an employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances. The Board has defined one example of those limited circumstances, situations where obedience would place the employee in a clearly dangerous situation, or when complying with the order would cause him irreparable harm. *See Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table); IAF, Tab 19 at 2. The Board has not had occasion to define additional circumstances that provide exceptions to the general rule, although the Board's reviewing court has found that the agency and the Board must consider surrounding circumstances, including the appellant's reservations regarding the legality of the instruction, in disciplining an employee for failure to obey an order, particularly where, as here, the employee has no prior misconduct. *See Brown v. Department of Justice*, 31 M.S.P.R. 211 (!986), *citing Brown v. Department of Justice*, 790 F.2d 89 (Fed. Cir. 1986) (Table).

¶28 Two considerations underlie the "obey now, grieve later" rule: (1) the agency and its mission may be harmed by the employee's failure to act; and

(2) the employee may be mistaken in his belief. Therefore, cases where employees are disciplined for breaking the rule usually involve investigations of potential crimes and serious misconduct. *See, e.g., Weston v. Department of Housing & Urban Development*, 724 F. 2d 943 (Fed. Cir. 1983); *Negron v. Department of Justice*, 95 M.S.P.R. 561 (2004); *Larry v. Department of Justice*, 76 M.S.P.R. 348 (1997); *Pope v. Department of the Navy*, 63 M.S.P.R. 51 (1994).

¶29 None of these considerations are present in this case. The agency concedes that the Scantlebury investigation did not involve any potential crimes or even misconduct meriting discipline. It was an inquiry into rumor spreading, nothing more. The agency provides no evidence of harm due to the appellant's lack of full cooperation. Further, the e-mails from the IG show that it is uncertain whether the appellant was mistaken in his belief that the investigation, if not illegal, might conflict with the IG's investigation into similar matters.

¶30 Considering the circumstances surrounding the Scantlebury investigation as well as the facts that it did not involve a potential crime or serious misconduct and the absence of evidence that the appellant's failure to fully co-operate caused harm to the agency or its mission, we find that an exception to the "obey now, grieve later" rule is warranted in this case. In so finding, we stress that the appellant raised legitimate concerns about the investigation in which he was initially asked and ultimately ordered to participate. He sought the advice of the IG and did not get a definitive answer about whether the investigation was lawful. Further, the appellant supplied to the IG the information that Plourde sought through the investigation conducted by Scantlebury. *See*, e.g., IAF, Tab 28, Exhibit F at 5-8. He informed Plourde and Scantlebury on more than one occasion during the investigation that he had given the information that they sought to the IG.

¶31 As noted, agency officials also took steps to determine whether the agency investigation might conflict with any investigation of the same or similar issues by the IG. The agency submitted to the IG a list of questions that it planned to

ask the appellant. The IG indicated that "on their face" none of the written questions would interfere with his investigation into the appellant's allegations. However, there is no evidence that Plourde or Scantlebury informed the appellant of the steps that the agency had taken to coordinate the two investigations.[6] This failure contrasts with the fact that Scantlebury, with Plourde's knowledge, informed the appellant of the actions that the agency had taken to consult with the U.S. Attorney. *See* IAF, Tab 28, Exhibit O at 7. Further, this failure appears disingenuous against the backdrop of the appellant's repeated statements of concern to Plourde and Scantlebury about the potential conflict with the IG's investigation. By not conveying the IG's views to the appellant, Plourde and Scantlebury essentially cut off the means by which the appellant could have complied with their investigation and orders without fearing interference with the IG's investigation.

¶32 Under the circumstances of this case, we find that the agency failed to prove its charges. Because the appellant supplied the relevant information to the IG, repeatedly informed Plourde and Scantlebury that he had done so, and consulted with the IG to learn that it was unclear whether giving the relevant information to Scantlebury would interfere with the IG's investigation, and because no one involved with the agency's investigation gave the appellant the information that would have allowed him to cooperate in the investigation in the

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[6] One of the emails sent by the IG to Ms. Owens asserted that the IG had urged the appellant to cooperate with the investigation and to refer any questions he felt would compromise the IG investigation to the IG. This was apparently an oral communication and the appellant made no reference to it in his deposition. The only reference that the appellant makes to an oral communication with the IG is that the IG told him to cooperate with a lawful investigation but could not say whether the Scantlebury investigation was lawful. Regardless of what the IG orally communicated to the appellant on one occasion, there is no evidence that Ms. Owens, Scantlebury, or Plourde informed the appellant that the list of questions Scantlebury wished to ask had been approved by the IG or that the IG and the agency had agreed upon a means to proceed with both investigations, despite the appellant's repeated protests about the potential conflict between the investigations.

manner that Plourde ordered, we find that the agency did not establish its charges by a preponderance of the evidence.

The appellant established a prima facie case of whistleblowing.

¶33 In support of his whistleblowing claim, the appellant alleged that he made numerous protected disclosures.[7] Considering the disclosures asserted by the appellant who is pro se, and the evidence he submitted into the record, we find that one of the appellant's allegations of protected disclosures lies at the heart of this appeal: that threatening to fire VanDerbeck, who had also made protected disclosures regarding the safety of the C-130J program, was a violation of the WPA and an abuse of authority.

¶34 A protected disclosure is one the appellant reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 5 (2000). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct prohibited under the WPA is whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude

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[7] Specifically, the appellant alleged that he made the following protected disclosures: (1) a May 16, 2005 report titled "Cover-up in the Department of Defense," IAF, Tab 28, Exhibit D at 4-55, that the appellant sent to the DoD IG and Senator Grassley, *id.* at 1-2; (2) a June 15, 2005 DoD IG affidavit (with enclosures) discussing DCMA LMM management's alleged intentions to terminate VanDerbeck, IAF, Tab 28, Exhibit F at 6-13, which the appellant also sent to Senator John McCain's office, *id.* at 14, 16-23; (3) a June 20, 2005 e-mail message from the appellant to Mr. Meyer forwarding a June 16, 2005 e-mail message summarizing a conversation about DCMA LMM management's alleged intentions to terminate Susan VanDerbeck, *id.* at 29-31; (4) a July 7, 2005 DoD IG affidavit by the appellant (with enclosures), IAF, Tab 28, Exhibit I at 1-35; (5) a September 8, 2005 e-mail message to the DoD IG hotline with the subject line "Hit List and Targeted to be Fired" (with enclosures), *id.*, the appellant's Exhibit R; and (6) a September 19, 2005 e-mail message from the appellant to the DoD IG hotline with the subject line "Unlawful Investigations by the Defense Contract Management Agency" (with enclosures), IAF, Vol. 6, the appellant's Exhibit T.

that the actions of the government evidence wrongdoing as defined by the WPA. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *White v. Department of the Air Force*, 95 M.S.P.R. 1, ¶¶ 27-28 (2003). The U.S. Court of Appeals for the Federal Circuit emphasized in *Lachance* that this standard is an objective one: "A purely subjective perspective of an employee is not sufficient even if shared by other employees." 174 F.3d at 1381; *see White*, 95 M.S.P.R. 1, ¶ 28.

¶35 An appellant may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, including evidence that the official taking the personnel action knew of a disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Easterbrook v. Department of Justice*, 85 M.S.P.R. 60, ¶ 7 (2000).

¶36 The appellant alleged that Plourde violated the WPA and abused her authority by targeting certain DCMA LMM employees, notably VanDerbeck, for termination. As noted, the appellant alleged that Plourde's alleged intention to fire and ultimate firing of VanDerbeck, who had made disclosures of safety issues regarding the C-130J, was a violation of law and was an abuse of authority because it threatened VanDerbeck's career. He also alleged that the investigation Plourde initiated into the rumors concerning the termination of employees was an abuse of authority.

¶37 An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or preferred other persons. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236, ¶ 13 (2001). There is no de minimis standard for abuse of authority as a basis of a protected disclosure under the Whistleblower Protection Act. *Murphy v. Department of the Treasury*, 86 M.S.P.R. 131, ¶ 6 (2000). Harassment or

intimidation of other employees may constitute an abuse of authority. *Id.* A supervisor's use of his or her influence to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he or she disagrees constitutes abuse of authority. *Id.*

¶38 Here, we must determine whether the appellant had a reasonable belief that his disclosures revealed either a violation of law or abuse of authority in the form of harassment or intimidation of other employees, or a supervisor's use of influence to denigrate other staff members and to threaten the careers of staff members. As noted the test is whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the appellant, could reasonably conclude that the actions the appellant's supervisors constituted an abuse of authority.

¶39 As discussed above, in early June 2005, the appellant helped VanDerbeck file a complaint with the DOD IG alleging 14 safety violations in the C-130J program. IAF, Tab 28, Exhibit E. The appellant's e-mail to the IG of VanDerbeck's complaint was copied to Plourde. VanDerbeck's disclosures followed closely on the Air Force's decision, notwithstanding the IG report, quoted above, to keep the C-130J program. Also in June 2005, the appellant received information that Plourde said, in response to a discussion about the system safety issues that VanDerbeck was raising, that since VanDerbeck was a probationary employee all they had to do was fire her. Additionally, the appellant had worked closely enough with VanDerbeck to be able to judge the quality of her work and he believed that she was a good engineer. In his deposition, the appellant stated, "I mean, I've heard her [VanDerbeck] describe things on the C-130J that are absolutely brilliant, as far as electrical systems, distribution and all this." IAF, Tab 28, Deposition at 63. Thus, the appellant had a reasonable belief that Plourde knew of VanDerbeck's safety disclosures and that VanDerbeck was a competent employee with knowledge of the C-130J. Under all of these circumstances, we find that the appellant had a reasonable

belief that Plourde had been correctly quoted regarding firing VanDerbeck and that Plourde's statement exhibited a violation of the WPA and an abuse of authority.

¶40 The appellant also established by preponderant evidence that his protected disclosure was a contributing factor in his suspension. Because the agency's investigation of the rumor that employees would be terminated began on June 22, 2005, soon after the appellant sent the June 2005 e-mail to the DoD IG, which was copied to Plourde, we find that the appellant has satisfied the timing prong of the knowledge/timing test. *See Russell v. Department of Justice*, 76 M.S.P.R. 317, 323 (1997). Further, the appellant established that the deciding official in this case, DCMA East Deputy Director Steven T. Bogusz, had knowledge of his allegation that Plourde violated the law and abused her authority by targeting VanDerbeck. In his response to the notice of proposed suspension, the appellant detailed his accusation that Plourde had targeted employees to be fired. IAF, Tab 6, Subtab D at 9. Among the items that the appellant submitted in his response to the notice of proposed suspension was an e-mail from Plourde to the appellant in which she states "[y]ou state that Scantlebury's investigation was initiated as a result of the termination of Ms. Susan VanDerbeck. Your statement is inaccurate. … The investigation was neither responsive to, nor directed at, any action involving VanDerbeck."[8]

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[8] Because we have found that the appellant made a prima facie case of whistleblowing with regard to his disclosure that threatening to fire Susan VanDerbeck was a violation of law and an abuse of authority, we find it unnecessary to determine whether he made a prima facie case of whistleblowing with regard to his disclosures that management allegedly violated law and abused its authority by targeting employees other than VanDerbeck for firing and that the investigation of rumors that certain employees within the appellant's command were being targeted for termination constituted a violation of law and an abuse of authority.

The agency failed to show by clear and convincing evidence that it would have taken the same action absent the appellant's disclosure of his reasonable belief that Plourde's threat to terminate VanDerbeck was a violation of law.

¶41 As we stated above, once an appellant has established that a protected disclosure was a contributing factor in the contested personnel action, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. § 1221(e)(1), (2); *see Horton v. Department of the Navy*, 66 F. 3d 279, 284 (Fed. Cir. 1995). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than preponderant evidence. 5 C.F.R. § 1209.4(d).

¶42 In determining whether an agency has met its burden by clear and convincing evidence,[9] the Board will consider the following factors: The strength of the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Because the action taken by the agency officials must be weighed in light of what

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[9] Noting that the Board may resolve these merits issues in any order it deems most efficient, the administrative judge proceeded directly to the issue of whether the agency established by clear and convincing evidence that it would have suspended the appellant for 30 days in the absence of any whistleblowing. ID at 4-5. Member Sapin would find that, if the administrative judge assumes that the appellant has made a prima facie showing and proceeds to a determination of whether the agency has met its clear and convincing burden, the administrative judge must inform the appellant of the factors used to decide whether the agency had met its burden and, importantly, that the appellant may present evidence that is relevant to that standard. *See Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 21 (2005) (the Board remanded the appeal to allow the testimony of a witness, denied by the administrative judge, whose testimony was relevant and material to whether the agency proved by clear and convincing evidence that it would have suspended the appellant absent her whistleblowing).

they knew at the time they acted, in determining whether an agency has met its burden of rebutting the appellant's prima facie case by clear and convincing evidence, the Board must assess the evidence as it stood at the time the officials acted. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

¶43 Here, for the reasons that we found that the agency did not prove its charges, the strength of the agency's action is weak. The record also shows that Plourde, who as the proposing official was involved in the agency action, had a motive to retaliate against the appellant. The motive to retaliate can be inferred from the fact that the alleged wrongdoer knew of the allegations of wrongdoing directly. *See Russell*, 76 M.S.P.R. at 326-328. Plourde was aware of the appellant's allegations. She was aware that the appellant assisted VanDerbeck in her whistleblowing activity, and that, after the agency terminated VanDerbeck, he represented her in her EEO complaint. Plourde knew that the appellant believed that she had violated the law and abused her authority in threatening to fire VanDerbeck. As noted, in his response to the notice of proposed suspension was a copy of an e-mail from Plourde to the appellant in which she states "[y]ou state that Scantlebury's investigation was initiated as a result of the termination of Ms. Susan VanDerbeck. Your statement is inaccurate. … The investigation was neither responsive to, nor directed at, any action involving VanDerbeck." IAF, Tab 6, Subtab D at 173.

¶44 Plourde was also well aware of the appellant's contribution to Congressional investigations into the C-130J program, investigations which resulted in a report calling for the termination of the C-130J, the program that she was charged with administering. The appellant's participation in those investigations was widely known at DCMA. The IG had cautioned Owens in an e-mail that Senators Grassley and McCain were interested in the issues the appellant was perceived as advancing. IAF, Tab 15, Exhibit 3. Further, the appellant had given Scantlebury two letters from Senator Grassley citing the

assistance the appellant had provided the Senate Finance Committee in its investigation of the C-130J program.

¶45 Plourde's motive to retaliate is also inferred from the shifting reasons that she gave to conduct the investigation. On one hand she said that there was no basis for the rumors and the investigation was because the rumors were having a negative effect on employee morale. IAF, Tab 22, Exhibit 7 at 3. Yet, as we quoted above, in her affidavit, Plourde stated "I was concerned that one of my supervisors was inappropriately discussing confidential management information with subordinates and that this conduct was feeding rumors that certain employees were targeted to be fired." *Id.* at 4. Plourde's statement and actions imply that she had a real concern that information that she wanted kept confidential was leaking to employees and that she wanted to get to the ultimate source of that leak. The force of her actions after she traced the rumors to the appellant implies that she had a motive to retaliate against the appellant, who published the allegation of her violation of law and abuse of authority and would not provide her the information that she wanted.

¶46 Plourde's motive to retaliate is further evidenced in the fact that she did not inform the appellant that the IG approved the questions for the Scantlebury investigation and what recourse he had if he believed that additional questions would interfere with the IG investigation. The appellant repeatedly told Plourde and Scantlebury that he had given the information they sought to the IG and that he was concerned that their investigation would interfere with that of the IG. Nevertheless, neither Plourde nor Scantlebury told the appellant that they had consulted the IG and worked out a means of coordinating the two investigations. Plourde's failure to inform the appellant of the means to resolve his expressed concerns about the investigation compels the inference that her purpose in questioning the appellant was not simply to gather information, but instead to force the appellant into a failure to cooperate with the investigation, thereby

providing the means to punish him for making protected disclosures about her threat to terminate VanDerbeck.

¶47 Finally, there is no evidence regarding whether the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated; therefore, we find that the agency has failed to meet its significant statutory burden of proof to show by clear and convincing evidence that it would have disciplined the appellant absent his whistleblowing. Thus, corrective action is mandated. 5 U.S.C. § 1221.[10]

ORDER

¶48 We ORDER the agency to cancel the appellant's 30-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

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

¶50 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the

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[10] In his PFR, the appellant also asserts that the administrative judge erred in finding that the appellant failed to prove retaliation for participation in the EEO process, erred in finding that the appellant failed to prove harmful procedural error, and that the administrative judge was biased. We find that the appellant failed to show error by the administrative judge in these regards and failed to show that the administrative judge was biased.

actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

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

¶52 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at http://www.mspb.gov/mspbdecisionspage.html.

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

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

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

must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
CONSEQUENTIAL DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. § § 1201.202, 1201.202 and 1201.204. If you believe you meet these requirements, you must file a motion for consequential damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no

later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court

no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Kenneth M. Pedeleose v. Department of Defense

MSPB Docket No. AT-0752-06-0350-I-1

¶1 I do not agree with the majority opinion, for three reasons.

I. THE CHARGES

¶2 I would not make an exception to the obey-now-grieve-later principle for purposes of this case. As the majority acknowledges, it is well-established that an employee must obey an instruction from a superior, even if he disagrees with it, and grieve the propriety of the instruction later. *See Larson v. Department of the Army*, 91 M.S.P.R. 511, ¶ 21 (2002). Exceptions to the so-called obey-now-grieve-later rule have been recognized only in unusual cases. For instance, an employee is not required to obey an unlawful instruction, *Harris v. Department of the Air Force,* 62 M.S.P.R. 524, 529 (1994), nor must an employee follow an order if doing so would put him in danger of serious harm, *Nickerson v. U.S. Postal Service*, 49 M.S.P.R. 451, 459 (1991). Additionally, an employee cannot be forced to follow an order that would result in his surrender of a constitutionally-protected right. *Wiley v. Department of Justice*, 89 M.S.P.R. 542 (2001), *rev'd on other grounds*, 328 F.3d 1346 (Fed. Cir. 2003).

¶3 This case is unlike any of the extreme situations just described and does not warrant a further exception to the obey-now-grieve-later principle. Indeed, according to the majority, the agency's investigation, with which the appellant was explicitly instructed to cooperate, "was an inquiry into rumor spreading, nothing more." The appellant was simply mistaken in thinking that the agency had no right to ask whether he was spreading rumors in the workplace that certain employees had been targeted for firing. The fact that the appellant had previously speculated in a communication to the Inspector General (IG) that the

agency was going to fire an employee for an illegitimate reason did not give him license to stonewall investigators outside of the IG's office, who were trying to find out who was upsetting and distracting certain employees. *See* Initial Appeal File (IAF), Tab 6, Subtab 4J at 75-76. While the IG may have been looking into whether the agency had committed or was about to commit illegal retaliation, the IG was not investigating rumor-mongering, and the appellant could not have reasonably believed that he was. Thus, the appellant's supposed concern that the investigators who wanted to question him about the rumors would interfere with an IG investigation was unfounded.

¶4 It is also noteworthy, as the majority acknowledges, that after the appellant's first refusal to answer questions about rumor-spreading, he informed the head of the agency and the IG that forcing him to answer the questions would interfere with an IG investigation. IAF, Vol. 5, Ex. H at 1, 4, 11. When agency officials returned a few weeks later to ask again about the rumors, it must have been clear to the appellant that neither the head of the agency nor the IG had shut down the investigation into the rumors. The appellant was not an agent of the IG, and he was not free to decide for himself that he must protect the prerogatives of the IG by continuing to refuse to answer questions.

¶5 Based on the foregoing, I would sustain the charges of refusal to cooperate in an investigation, insubordination, and failure to follow instructions.

II. THE APPELLANT'S DISCLOSURE

¶6 I do not agree that the appellant made a protected disclosure to the IG. According to the majority, in early June 2005, "the appellant received information that [Colonel] Plourde said, in response to a discussion about the system safety issues that [Susan] Vanderbeck was raising, that since Vanderbeck was a probationary employee all they had to do was fire her." The majority goes on to state that the appellant knew Vanderbeck to be a competent employee, and that he reasonably believed that Plourde was aware of the disclosures Vanderbeck

had made. On this basis, the majority concludes that when the appellant told the IG that the agency intended to terminate Vanderbeck's appointment in retaliation for what he considered to be her protected whistleblowing activity, he made a protected disclosure under 5 U.S.C. § 2302(b)(8) of a violation of law and an abuse of authority.

¶7 In fact, the evidence shows that the appellant's disclosure to the IG concerning Vanderbeck was not protected. In his June 15, 2005 disclosure, the appellant merely repeated what DeAngeles Davis supposedly had heard from LaNorma Shelton-Thomas, who in turn had heard something from Myra Tate about a meeting Tate had attended with Plourde. In other words, by the appellant's own account, the appellant's belief that Plourde intended to terminate Vanderbeck's appointment for an illegitimate reason was fourth-hand information about what was said in a meeting that the appellant did not attend. *See* IAF, Vol. 5, Ex. F at 1. Moreover, the appellant sent a message to the IG less than two hours after the message that the majority finds was a protected disclosure, in which the appellant admitted that Shelton-Thomas herself characterized what she had said about Vanderbeck as a "rumor." *Id.* at 13.

¶8 It is also significant that a day after the appellant made his disclosure to the IG, Davis informed the appellant that Vanderbeck was being considered for termination because agency officials had received reports that Vanderbeck had taken a bicycle belonging to a contractor without permission, and had also made a bad impression on some of the contractor's employees when she was seen dancing in a restaurant on her lunch hour. *Id.* at 26. In other words, the appellant's supposed source for his belief that Vanderbeck had been targeted for termination because of her whistleblowing -- a source who, like the appellant, was not present at the meeting where Plourde allegedly discussed her intention to fire Vanderbeck -- actually thought that Vanderbeck was in jeopardy of losing her job for reasons unrelated to any protected activity on Vanderbeck's part.

¶9 A disclosure of information is protected if the individual making the disclosure "reasonably believes" he is revealing a violation of law, an abuse of authority, or one of the other situations described at 5 U.S.C. § 2302(b)(8). A disclosure based on unreliable or scanty information is not protected, *Special Counsel v. Spears*, 75 M.S.P.R. 639, 656 (1997), nor is a disclosure protected if it is based on an individual's purely subjective belief, *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Put differently, a disclosure that amounts to unsubstantiated speculation is not protected. *Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 122 (1994). Here, although terminating a probationary appointment in retaliation for the probationer's protected whistleblowing would be a violation of law and an abuse of authority, when the appellant made his disclosure to the IG he did not reasonably believe that the agency intended to terminate Vanderbeck's appointment because of her whistleblowing. As the discussion above shows, the appellant's disclosure to the IG was nothing more than unsubstantiated speculation. The appellant's subjective belief that Plourde intended to fire Vanderbeck for an illegitimate reason was not based on any reliable information, and accordingly, the appellant did not make a protected disclosure when he shared his supposition with the IG.

III. AGENCY'S AFFIRMATIVE DEFENSE

¶10 The majority finds that the appellant's June 15, 2005 disclosure to the IG contributed to the agency's decision to suspend the appellant for 30 days. When the Board finds that protected whistleblowing activity was a contributing factor in a personnel action, it must order corrective action unless the agency shows by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing. 5 U.S.C. § 1221(e)(2). Here, the majority concludes that the agency has failed to meet its burden. One of the key factors relied upon by the majority in reaching this conclusion is the fact that the agency did not prove its charges. As a result, the majority reasons, the evidence in

support of the agency's decision to suspend the appellant must be deemed "weak."

¶11 I disagree with this analysis. The evidence in support of the agency's decision to suspend the appellant is very strong; indeed, the evidence is uncontested. The majority creates an exception to the well-established obey-now-grieve-later principle for purposes of this case, so it can hardly be said that the charges upon which the suspension was based were flimsy or trumped-up. Again, I would sustain the charges, and I would not find that the appellant made a protected whistleblowing disclosure. If, however, I agreed with the majority that the charges could not be sustained and that the appellant made a protected disclosure that contributed to his suspension, I would assess the agency's arguments in support of its affirmative defense differently from the majority because at the time it acted the agency reasonably believed under prevailing law that it was entitled to discipline the appellant for the conduct described in the charges.

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Neil A. G. McPhie
Chairman

	DFAS CHECKLIST **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

   a. Employee name and social security number.
   b. Detailed explanation of request.
   c. Valid agency accounting.
   d. Authorized signature (Table 63)
   e. If interest is to be included.
   f. Check mailing address.
   g. Indicate if case is prior to conversion. Computations must be attached.
   h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

   a. Must provide same data as in 2, a-g above.
   b. Prior to conversion computation must be provided.
   c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.