

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 67

Docket No. DE-0752-09-0199-I-2

**Cory D. Voorhis,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

July 5, 2011

Thomas F. Muther, Jr., Esquire, Denver, Colorado, for the appellant.

Robert P. Erbe, Esquire, Tucson, Arizona, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision issued by the administrative judge that affirmed the agency's removal action and denied the appellant's affirmative defense of whistleblower retaliation. For the reasons set forth below, we AFFIRM the initial decision as MODIFIED in this Opinion and Order.

BACKGROUND

¶2 The appellant was a GS-13 Senior Special Agent (Criminal Investigator) with the agency's Bureau of Immigration and Customs Enforcement (ICE) in Denver, Colorado. MSPB Docket No. DE-0752-09-0199-I-1, Agency Response File (ARF), Volume (Vol.) I, Tab 4b at 1, 3; *id.*, Tab 4c at 1. In 2006, Denver District Attorney (DA) William Ritter and United States Congressman Robert Beauprez were opponents in the campaign for Colorado governor. *See, e.g.*, ARF, Vol. II, Tab 4g at 411-12. On August 23, 2006, the *Rocky Mountain News* published an article in which Mr. Ritter stated that as DA, he "made it a policy to always send illegal immigrants to jail so federal authorities would have the chance to detain them" but that the "feds often chose not to detain them." *Id.* at 411. After reading the article, the appellant contacted John Marshall, who the *Rocky Mountain News* identified as Congressman Beauprez's spokesman, at the Congressman's office and was told that Mr. Marshall was "at the campaign office." *See id.*; January 28, 2010 Hearing Transcript (Jan. 28 HT) at 143-44 (testimony of the appellant). When he spoke to Mr. Marshall on the telephone, the appellant told him that Mr. Ritter's statements in the newspaper article were false. *Id.* at 146-47. At Mr. Marshall's request, the appellant agreed to meet. *Id.* at 147.

¶3 The appellant met with Mr. Marshall at a coffee shop in the basement of the appellant's office building, as Mr. Beauprez's campaign office was next door, and explained to Mr. Marshall and Rick Beeson, who was introduced as a researcher, that as the DA, Mr. Ritter had a policy of structuring plea agreements with illegal immigrants who were charged with felonies, which allowed them to plead guilty to misdemeanor charges in order to avoid deportation. *Id.* at 136, 150. The appellant encouraged Messrs. Marshall and Beeson to verify the policy by searching cases in the Denver court records. *Id.* at 153. A few days later, at Mr. Beeson's request, the appellant agreed to participate in a meeting with

researchers from a Philadelphia-based firm at the Trailhead Group. *Id.* at 154-55. The Trailhead Group is a political advocacy group, although the appellant maintained that he did not know the Trailhead Group was a political organization or that the information he was providing would be used for a political purpose. *Id.* at 159, 162-63. During the teleconference at the Trailhead Group, the appellant again explained Mr. Ritter’s plea bargaining policy as the Denver DA and suggested that the researchers pull case files at the Denver courthouse. *Id.* at 157.

¶4 After a telephone call during which Mr. Marshall explained that he had searched the court records and made a list of names from cases of interest, Mr. Marshall and the appellant met again in the coffee shop. *Id.* at 167-68. At Mr. Marshall’s request, the appellant agreed to provide the “alien status information” for the names on Mr. Marshall’s list (the Marshall List), and Mr. Marshall’s assistant later delivered the list to the appellant. *Id.* at 168-70; ARF, Vol. II, Tab 4g at 414. The appellant ran the names through the Central Index System (CIS), the National Crime Information Center (NCIC), the Colorado Crime Information Center (CCIC), ICON,¹ and Accurant databases, although he did not run every name through each database. Jan. 28 HT at 172. Following his queries, the appellant made handwritten notes on the Marshall List, including information such as the individual’s immigration status, the year the individual was granted legal permanent resident status, the individual’s country of origin, whether they were granted amnesty or asylum, and if and when they were deported. ARF, Vol. II, Tab 4f at 2; ARF, Vol. II, Tab 4g at 414; Jan. 28 HT at 174-75. The appellant provided the list to Mr. Marshall at the Beauprez Campaign headquarters on September 29, 2006, instructing Mr. Marshall to “focus on Walter Noel Ramo.” Jan. 28 HT at 176-77.

¹ ICON is a state court database available to the public. *See* Jan. 28 HT at 158.

¶5 In October 2006, using information provided by the appellant on the Marshall List, the Beauprez Campaign ran a political advertisement alleging that Carlos Estrada-Medina was an illegal alien who was arrested on suspicion of distributing heroin and who received lenient treatment from the Denver DA's office, which allowed him to avoid deportation, and that as a result, Mr. Estrada-Medina was later arrested on suspicion of sexually assaulting a minor in California. ARF, Vol. II, Tab 4g at 29-30. On October 12, 2006, the Ritter Campaign contacted the Colorado Bureau of Investigation (CBI) to report the possible misuse of the NCIC law enforcement database in connection with the Estrada-Medina advertisement, citing two television reporters' inability to independently verify the accuracy of the political advertisement. *Id.* at 4, 29-31. On October 20, 2006, the Ritter Campaign filed another complaint with the CBI regarding a second televised political advertisement that made similar claims about the plea-bargaining practice in the Denver DA's office under the leadership of Mr. Ritter. *Id.* at 50.

¶6 CBI Agent in Charge Jan Simkins began her investigation by conducting a criminal history query through the CCIC, but it did not reference the name of Carlos Estrada-Medina, although it did retrieve a record for Walter Noel Ramo. *Id.* at 37, 43. Ms. Simkins also queried the NCIC to determine who else had queried Mr. Ramo, and the database revealed that the appellant queried Mr. Ramo on September 27, 2006. *Id.* at 43. CBI Director Robert Cantwell contacted ICE Denver Special Agent in Charge Jeffrey Copp, who asked the appellant about the Beauprez advertisement, to which the appellant admitted running Mr. Ramo's name in the NCIC database but refused to speak further on the advice of his lawyer. *Id.*, Tab 4g at 106; *id.*, Vol. III, Tab 4h at 478.

¶7 On or about October 31, 2006, the agency placed the appellant on administrative leave pending the completion of the criminal investigation and an

investigation by the Office of Professional Responsibility (OPR).² ARF, Vol. I, Tab 1 at 18; Vol. III, Tab 4h at 480, 493. On October 25, 2007, the appellant was charged with three counts of violating [18 U.S.C. § 1030\(a\)\(2\)\(B\)](#) for intentionally exceeding his authorized access to a computer and obtaining information from an agency of the United States while acting outside his official capacity as an ICE agent. *Id.*, Vol. III, Tab 4h at 398-404. The same day the appellant was again placed on administrative leave and his security clearance was suspended. *Id.*, Vol. I, Tab 1 at 18. He was indefinitely suspended on January 23, 2008. *Id.* Following a jury trial, the appellant was acquitted of all charges on April 10, 2008. *Id.*, Vol. III, Tab 4h at 406.

¶8 On October 17, 2008, the agency proposed to remove the appellant from federal service based on the charges of Unauthorized Queries of Individuals on an Official Government Computer Database (2 specifications), Unauthorized Disclosure (2 specifications), Misuse of Position (2 specifications), and Lack of Candor (6 specifications). ARF, Vol. II, Tab 4f at 1-5. Following the appellant's submission of a written reply, *see* ARF, Vol. I, Tab 4e, Robert Weber, Assistant Director, Operations, ICE Headquarters, sustained each of the charges and specifications and determined that removal was the appropriate penalty. *Id.*, Tab 4c. The appellant's removal was effected February 13, 2009, and he filed an appeal with the Board on March 9, 2009. *Id.*; MSPB Docket No. DE-0752-09-0199-I-1, Initial Appeal File (IAF), Tab 1.

¶9 After holding the hearing requested by the appellant, the administrative judge sustained all of the agency's charges, but not all of the specifications, and found that removal was a reasonable penalty. MSPB Docket No. DE-0752-09-0199-I-2, Refiled Appeal File, Tab 16, Initial Decision at 2, 47. The administrative judge sustained Specifications 1 and 2 of the Unauthorized Queries

² In February 2007, the appellant was returned to duty in an administrative capacity. ARF, Vol. I, Tab 1 at 18.

charge, rejecting the appellant's assertion that his queries were authorized because he sought to ensure that the agency properly handled the cases and that further enforcement action was not necessary. *Id.* at 15-16, 18. The administrative judge found that the appellant made the queries as the result of his contacts with Mr. Marshall and the Beauprez Campaign and that the queries were unauthorized because they were not within the scope of his law enforcement duties. *Id.* Moreover, the administrative judge found that the appellant's assertions that he did not know that Mr. Marshall, Mr. Beeson, and the Trailhead Group were working for the Beauprez Campaign and that he conducted these queries because he needed to be sure the agency did everything right were not credible. *Id.* at 15-17.

¶10 The administrative judge also sustained Specifications 1 and 2 of the agency's Unauthorized Disclosure charge. *Id.* at 22, 24. With respect to Specification 1, the administrative judge rejected the appellant's assertion that the information he handwrote on the Marshall List could be disclosed because it was already in the public domain. *Id.* at 19. The administrative judge found that, even assuming each piece of information existed somewhere in the public domain, the government databases synthesized the pieces of information and linked them together for each individual queried, as evidenced by Mr. Marshall's failure to find the information in the public domain. *Id.* at 19-20. The administrative judge also rejected the appellant's assertion that his disclosures were authorized because Mr. Marshall worked on Congressman Beauprez's staff, finding that the appellant should have known that Mr. Marshall was primarily functioning as a campaign operative and that Mr. Marshall's interest in Mr. Ritter's practices as the Denver DA was politically motivated. *Id.* at 20. Further, the administrative judge found that an individual's asylum status would not have been disclosable even to a Congressional staffer under [8 C.F.R. § 208.6](#). Initial Decision at 21. With respect to Specification 2, the administrative judge found that the appellant's disclosures to Mr. Marshall of Mr. Estrada-Medina's FBI

number and multistate criminal history were unauthorized. *Id.* at 22. The administrative judge found that the information the appellant provided was not available to the public in 2006, that Mr. Marshall sought it specifically because it was not publicly available, and that the appellant had no law enforcement purpose for disclosing the information. *Id.* at 23.

¶11 The administrative judge sustained Specification 1 of the agency's Misuse of Position charge, finding that the appellant misused his position by meeting with Mr. Marshall and Mr. Beeson, providing them with information regarding Mr. Ritter's plea-bargaining practices, and by meeting at the Trailhead Group offices to provide specific examples of Mr. Ritter's policy by referencing information he obtained through his position at ICE. *Id.* at 25-26. The administrative judge found unpersuasive the appellant's assertion that his sole motivation was to expose what he believed to be an unlawful and dangerous policy and found that the appellant's intent in disclosing the information was furthering the interests of the Beauprez Campaign. *Id.* at 25. The administrative judge merged Specification 2 of the Misuse of Position charge with the agency's Unauthorized Disclosure charge as they were both based on the appellant's disclosure of information regarding the individuals on the Marshall List. *Id.* at 27.

¶12 After the agency withdrew Specifications 1 and 5 of the Lack of Candor charge, the administrative judge sustained Specifications 3 and 6. *Id.* at 27 n.5, 29, 34. With respect to Specification 3, the administrative judge found that, because he previously found that the appellant's database queries were unauthorized and that he must have known that Mr. Marshall would use the information he provided to assist the Beauprez Campaign, the appellant demonstrated a lack of candor when he told OPR investigators that he conducted the queries to ensure that the agency "had not dropped the ball" on those cases. *Id.* at 29. With respect to Specification 6, the administrative judge found that the appellant demonstrated a lack of candor when he told OPR investigators that he

did not know the Trailhead Group was a political organization. *Id.* at 34. The administrative judge did not sustain Specifications 2 and 4 of the Lack of Candor charge, finding that the agency failed to prove by preponderant evidence that the appellant should have known by September 27, 2006, that Mr. Marshall was a campaign manager or that, in light of the questionable credibility of Anthony Rouco, the appellant's supervisor, the appellant displayed a lack of candor when he told OPR investigators that he asked Mr. Rouco to retrieve the appellant's database query printouts from the shred bin after learning of the CBI investigation. *Id.* at 27-33.

¶13 The administrative judge rejected the appellant's affirmative defense based on whistleblower retaliation, finding that the appellant failed to make a protected disclosure as the information he disclosed pertained to the plea-bargaining practices of the Denver DA's office rather than a federal entity and, according to the appellant, was "publicly known." *Id.* at 35-36. The administrative judge further found that the appellant's First Amendment rights were not infringed upon by the agency because the appellant made the statements at issue in his capacity as a Senior Special Agent with the agency, rather than as a private citizen and because the appellant would not have had access to the information he disclosed had he not been a Senior Special Agent with the agency. *Id.* at 38. The administrative judge also rejected the appellant's claim that the agency violated his right to petition Congress under [5 U.S.C. § 7211](#), finding that the appellant was in contact with the Beauprez gubernatorial campaign rather than with Congressman Beauprez' Congressional office. Initial Decision at 39.

¶14 The administrative judge rejected the appellant's claim that the agency usurped the authority of the Office of Special Counsel (OSC) in effecting his removal. *Id.* at 41. The administrative judge found that agencies have broad authority to manage the federal workplace and impose discipline that promotes the efficiency of the service. *Id.* at 40. He further found that nothing in the proposed removal suggested that the agency charged the appellant with violating

the Hatch Act, [5 U.S.C. § 7324\(a\)\(1\)](#), noting that the Misuse of Position charge most closely resembles a potential Hatch Act violation but that the agency based the charge on the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct), which prohibit federal employees from allowing the use of nonpublic, government information to further any private interest. *Id.* at 40-41. The administrative judge found that the agency's action promotes the efficiency of the service and that the penalty of removal is reasonable based on the deciding official's and the administrative judge's consideration of the relevant *Douglas* factors. *Id.* at 41-46.

¶15 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 4. The agency has filed a response in opposition. *Id.*, Tab 5.

ANALYSIS

Charge 1: Unauthorized Queries on an Official Government Computer Database

¶16 With respect to Specifications 1 and 2 under Charge 1, the appellant asserts that the administrative judge improperly required the agency to prove only that the queries were conducted for an unofficial purpose and not that they were both unauthorized and conducted for an unofficial purpose. PFR File, Tab 4 at 38-41. The appellant asserts that the agency failed to establish that his CIS queries were unauthorized because it failed to establish that his access of the CIS database was unauthorized under any CIS policy, agency policy, regulation, or law. PFR File, Tab 4 at 38.

¶17 The appellant misconstrues the agency's charge. The agency did not charge the appellant with unauthorized access of the CIS and the NCIC/CCIC databases. Rather, the agency charged that the appellant's queries of the names on the Marshall List were unauthorized and conducted for an unofficial purpose. *See* ARF, Vol. II, Tab 4f at 2. Further, the appellant's assertion that the agency failed to show that he was required to obtain authorization prior to accessing the CIS is similarly without merit. PFR File, Tab 4 at 39. The agency has not

suggested that the appellant was required to obtain authorization prior to accessing the CIS and the NCIC/CCIC databases. Moreover, the appellant's assertion that the agency failed to establish that he violated any agency policy, regulation, or law is similarly without merit as the agency did not charge that the appellant violated any law, rule, or regulation. *See Levick v. Department of the Treasury*, [75 M.S.P.R. 84](#), 90 (1997) (finding that the agency did not charge and was not required to establish that the appellant violated any statutory provision or agency regulation; rather, the agency described the appellant's misconduct, proved it, and established that the adverse action promoted the efficiency of the service), *aff'd*, 155 F.3d 568 (Fed. Cir. 1998) (Table).

¶18 The appellant also asserts in his petition for review that the agency failed to prove that the queries were conducted for an unofficial purpose because he has maintained that he ran the queries to ensure that the agency's prior handling of the cases was appropriate. PFR File, Tab 4 at 39-40, 44. We discern no reason to disturb the administrative judge's finding that the appellant's assertion is implausible, especially in light of the fact that the appellant not only ran the queries at the request of Mr. Marshall, but then disclosed the results to Mr. Marshall, who had no interest in whether the agency properly handled cases that were several years old. *See Haebe v. Department of Justice*, [288 F.3d 1288](#), 1301 (Fed. Cir. 2002) (the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so); Initial Decision at 16-17.

Charge 2: Unauthorized Disclosure

¶19 With respect to Specification 1, the appellant asserts that the administrative judge erred in finding that the appellant's disclosure of information on the Marshall List violated the Privacy Act because the agency failed to establish that, even though the appellant accessed various databases, the databases accessed

constitute a system of records under the Privacy Act. PFR File, Tab 4 at 45. Once again the appellant misconstrues the agency's charge. The agency did not charge the appellant with violating the Privacy Act by disclosing the handwritten information on the Marshall List. *See* ARF, Vol. II, Tab 4f at 2-3.

¶20 The appellant also asserts in his petition for review that agency policy allowed the release of publicly available information to anyone and that all of the information on the Marshall List was publicly available and thus permissible to release. PFR File, Tab 4 at 47-48. The "agency policy" that the appellant relies on as evidence that his disclosures were permitted is an outline of the Privacy Act, provided to him by Anthony Rouco, *see* ARF, Vol. I, Tab 4e at 358-60, and, as noted above, the agency is not required to demonstrate that the appellant's disclosures violated a statute or regulation, only that they were unauthorized. *See Levick*, 75 M.S.P.R. at 90. We discern no error in the administrative judge's reliance on the testimony of the deciding official, Robert Weber, regarding the reasons for which the appellant's disclosures were unauthorized, and the appellant has failed to identify a sufficiently sound reason for disregarding Mr. Weber's testimony. *See Haebe*, 288 F.3d at 1301; Initial Decision at 21. Moreover, the appellant's assertion that Associate Chief Counsel Dani Page's testimony somehow established that his disclosure of information on the Marshall List was authorized or permitted is without merit based on our review of her testimony. *See* Jan. 28 HT at 84-85, 88-89, 95-96.

¶21 Moreover, we concur with the administrative judge's finding that, even assuming that each piece of information was available in the public domain, "the government databases the appellant accessed synthesized these discrete shreds of information and linked them together." Initial Decision at 19-20. Furthermore, two professional journalists without access to a federal database were unable to find the pieces of information that the appellant disclosed, again illustrating that this information was not as "publicly available" as the appellant claims. *See* ARF, Vol. II, Tab 4f at 1; *id.*, Tab 4g at 30.

¶22 With respect to Specification 2, the appellant asserts that the agency failed to prove from which system of records the appellant disclosed Walter Noel Ramo's FBI number and criminal history. PFR File, Tab 4 at 54-55. Once again, the appellant misconstrues the agency's charge. *See* ARF, Vol. II, Tab 4f at 3. The appellant has failed to establish that the agency was required to prove from which system of records or database the appellant disclosed Mr. Ramo's information.

Charge 3: Misuse of Position

¶23 In his petition for review, the appellant reiterates his assertion before the administrative judge that there is no evidence supporting a finding that he was motivated to disclose information for the purpose of furthering the interests of a political campaign, citing testimony indicating that he was not a political partisan. PFR File, Tab 4 at 57-58. The appellant asserts that in sustaining this charge the administrative judge failed to reference any law, rule, or regulation that was violated or any confidential or restricted information that was released. *Id.* at 61. First, the agency did not allege that the appellant violated any law, rule, or regulation in its misuse of position charge, and the appellant has failed to cite any precedent requiring an administrative judge or the Board to reference a law, rule, or regulation when sustaining the charge of misuse of position. *See Levick*, 75 M.S.P.R. at 90. Moreover, the appellant has failed to identify any error in the administrative judge's analysis and findings with respect to the agency's Misuse of Position charge. *See* Initial Decision at 26.

Charge 4: Lack of Candor

¶24 In his petition for review, the appellant restates his assertions before the administrative judge that he was forthright when he told OPR investigators that he ran the queries in the law enforcement databases to ensure the agency handled the cases properly and that he did not know that the Trailhead Group was a political organization. PFR File, Tab 4 at 62-64. As discussed above, we discern

no error with the administrative judge's finding that the appellant's assertion that he ran the queries to ensure proper handling of the cases by the agency was not credible, in light of the agency's inability to act further on the cases at that time and the appellant's subsequent disclosure to Mr. Marshall of the information resulting from his queries in response to Mr. Marshall's specific request that the appellant obtain and provide the information. Further, as noted by the administrative judge, the agency's characterization of William Winkler's and Rick Beeson's testimony in Specification 6 is consistent with our review of their testimony at the appellant's criminal trial. *See* ARF, Vol. II, Tab 4f at 5; *id.*, Vol. III, Tab 4h at 213, 311; Initial Decision at 33-34. Accordingly, we discern no reason to disturb the administrative judge's finding that the agency proved Specification 6 of its Lack of Candor charge by preponderant evidence. *See* Initial Decision at 33-34.

The appellant failed to establish that the agency violated his right to petition Congress under [5 U.S.C. § 7211](#).

¶25 The appellant asserts that the administrative judge erred in finding that the appellant's actions were not protected under [5 U.S.C. § 7211](#),³ which gives federal employees the right to petition and provide information to Congress. PFR File, Tab 4 at 12. The appellant claims that he had a reasonable belief that he was providing information to a member of Congress, even though he actually provided the information directly to Mr. Marshall. PFR File, Tab 4 at 18. He further claims that it is irrelevant that Mr. Marshall was Congressman Beauprez's campaign manager because the appellant had a reasonable expectation that he was providing the information to Congressman Beauprez and because he was not aware that Mr. Marshall was functioning solely as Congressman Beauprez's

³ Under [5 U.S.C. § 7211](#), "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

campaign manager during the relevant time period. *Id.* at 18-25. The appellant contends that the administrative judge erred in finding that the appellant sought to influence the gubernatorial election and that, in so finding, the administrative judge failed to consider testimony that the appellant had no interest in partisan politics and had no interest in who won the gubernatorial election. *Id.* at 22-24. He maintains that he was not aware that the Trailhead Group was a political committee or that the information he provided would be used as part of a campaign. *Id.* at 26-27.

¶26 Citing *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987), the administrative judge found not credible the appellant's assertions that he did not know Mr. Marshall, Mr. Beeson, and the Trailhead Group were working for the Beauprez gubernatorial campaign. Initial Decision at 15, 20. As noted previously, the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe*, 288 F.3d at 1301. The appellant has failed to provide a sufficiently sound reason for overturning the administrative judge's credibility determination.

¶27 Moreover, the evidence in the record shows that the August 23, 2006 newspaper article in the *Rocky Mountain News* concerned the gubernatorial campaign. ARF, Vol. II, Tab 4g at 411-12. Further, while the article identified Mr. Marshall as Congressman Beauprez's spokesman rather than as his campaign manager, the article put the appellant on notice that the immigration issue and Mr. Ritter's plea-bargaining policy were issues in the campaign, not necessarily important issues for Mr. Beauprez as a Congressman, especially given that Mr. Ritter was responding to Mr. Beauprez's criticism that he failed to aggressively pursue immigrants who broke the law. *Id.* at 411. Additionally, the evidence shows that at least once the appellant met Mr. Marshall at the Beauprez Campaign headquarters, which was clearly identified as such by a sign on the

door and which contained campaign literature. Jan. 28 HT at 272. Therefore, even if the appellant initially sought to contact Mr. Beauprez’s Congressional office, we discern no error in the administrative judge’s finding that the appellant must have realized by the time he made the queries in the federal databases and made the disclosures of information that Mr. Marshall’s interest in Mr. Ritter’s plea-bargaining practices was politically motivated and not a reflection of Mr. Beauprez’s concern for or involvement in the issue in his role as a Congressman. *See* Initial Decision at 20-21. Accordingly, we discern no error in the administrative judge’s finding that the appellant’s actions were not protected under [5 U.S.C. § 7211](#) because the appellant’s communications did not constitute petitioning Congress but, rather, were with the Beauprez gubernatorial campaign. *Id.* at 39.⁴

¶28 Citing *Steck v. Connally*, 199 F. Supp. 104 (D.D.C. 1961), the appellant asserts that [5 U.S.C. § 7211](#) “contains no limitations, nor qualifiers, on what information a federal employee has the right to provide to Congress,” and thus the administrative judge erred in finding that the appellant could not provide “privileged” information to Congress. PFR File, Tab 4 at 13. The appellant emphasizes that Congress’ oversight of the executive branch is facilitated by allowing agency employees to provide “unsanitized” information to Congress. *Id.* at 15. We agree that the statutory language in [5 U.S.C. § 7211](#) does not, on its face, restrict a federal employee’s right to petition Congress based on the nature or status of the information sought to be submitted, and, therefore, we vacate that part of the initial decision discussing whether an employee’s right under § 7211

⁴ Thus, the appellant’s argument that there was not sufficient evidence to support a finding that the appellant sought to influence the gubernatorial election is unavailing. We agree with the administrative judge that by the time that the appellant retrieved the alien status information from the law enforcement databases and transmitted it to Mr. Marshall, he had to know that Marshall’s interest in Mr. Ritter’s plea-bargaining practices was politically motivated.

extends to privileged or other information. We reserve addressing this important issue for another day in an appropriate case. However, this in no way alters our conclusion that the administrative judge properly concluded that the appellant's actions were not protected under [5 U.S.C. § 7211](#) because they did not constitute "petitioning Congress" within the meaning of that provision.⁵ The record evidence demonstrates that the appellant was in repeated contact with the Beauprez gubernatorial campaign rather than with Congressman Beauprez' Congressional office. *See* Initial Decision at 39.

The appellant failed to establish that the charges brought against him by the agency are within the exclusive authority of OSC.

¶29 The appellant asserts that the first three charges against him are "thinly veiled Hatch Act charges which are the exclusive jurisdiction" of OSC, and therefore only OSC may investigate or prosecute cases involving factual allegations of prohibited political activity. PFR File, Tab 4 at 29-30. First, as the administrative judge recognized, any disciplinary action that an agency might take against an employee does not preempt OSC's specific statutory authority to prosecute Hatch Act violations. *See Special Counsel v. Winfield*, [18 M.S.P.R. 402](#), 407 (1983); Initial Decision at 40. Second, the appellant misconstrues the "essence" of Charges 1, 2, and 3. The appellant fails to appreciate that the

⁵ The appellant has not challenged the administrative judge's disposition of his First Amendment claim. Nonetheless, we disagree with his conclusion that the appellant's disclosures were not protected under the First Amendment on the grounds that they were made in his capacity as a Special Agent. Initial Decision at 38, *citing Garcetti v. Ceballos*, [547 U.S. 410](#) (2006) (statements made by public employees pursuant to their official duties are not protected under the First Amendment). The record reflects that the appellant's disclosures clearly were not made pursuant to his official duties and, therefore, we reject any reliance on *Garcetti*. Rather, we conclude that the correct approach to the appellant's First Amendment claim is to review it under the traditional *Pickering* analysis; we have done so and find that the government's concern in protecting against unauthorized access and disclosure of law enforcement information outweighs the appellant's interest in providing evidence of allegedly objectionable plea bargaining practices to a political campaign. *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968).

factual basis of Charges 1, 2, and 3 is that the appellant made unauthorized queries of federal databases as a result of a personal relationship he formed with Mr. Marshall, who requested that the appellant perform such queries, and that he disclosed the results of those queries to Mr. Marshall who had no legitimate reason to know the information. In describing the bases for its charges in the notice of proposed removal, the agency stated that it found the appellant's actions in violation of the Standards of Ethical Conduct, which prohibit federal employees from misusing their position by allowing the improper use of nonpublic information to further any private interest. ARF, Vol. II, Tab 4f at 6; see [5 C.F.R. § 2635.101\(b\)\(3\)](#). As noted by the administrative judge, the private interest furthered "in this particular case happened to be a candidate in a partisan political campaign" in violation of the Standards of Ethical Conduct. See Initial Decision at 40-41. Accordingly, while the appellant's actions may also be of interest to OSC given the political undercurrent, we discern no error by the administrative judge in finding that the agency had the authority to discipline the appellant on the basis that his actions violated the Standards of Ethical Conduct. See Initial Decision at 41.

The appellant failed to establish his affirmative defense of whistleblower retaliation.

¶30 Relying on *Arauz v. Department of Justice*, [89 M.S.P.R. 529](#) (2001), the appellant asserts that his disclosures regarding the Denver DA's practice of plea bargaining with criminal aliens implicated the reputation and good name of the federal government because Mr. Ritter alleged in the August 23, 2006 newspaper article that the federal government, rather than his office, was responsible for releasing illegal aliens. PFR File, Tab 4 at 80. The instant case is distinguishable from *Arauz*, and we therefore discern no error in the administrative judge's finding that the appellant's disclosures were not protected. See Initial Decision at 35. First, unlike the circumstances in *Arauz*, the Denver DA's office is not a private organization operating under a federal program and

there is no evidence that the DA's office was using a federal program to facilitate wrongdoing. Rather, the Denver DA's office is a city entity with independent prosecutorial power and policy making authority. The agency may disagree with the office's exercise of its prosecutorial power, and, indeed, the office's exercise of its prosecutorial power could indirectly implicate the agency's reputation, but only for those who lack understanding regarding the limits of the agency's powers. Moreover, it is difficult to see how the agency could be viewed as an accessory to the decisions or actions of the Denver DA's office based solely on the plea-bargaining policy disclosed by the appellant. Additionally, the appellant has failed to show that a disinterested observer could reasonably conclude that the Denver DA's plea-bargaining policy actually evidenced wrongdoing. *Lachance v. White*, [174 F.3d 1378](#), 1381 (Fed. Cir. 1999). Accordingly, we concur with the administrative judge's finding that the appellant's disclosures did not implicate the reputation and good name of the federal government and thus are not protected under [5 U.S.C. § 2302\(b\)\(8\)](#). See Initial Decision at 35.

The penalty of removal is within the bounds of reasonableness.

¶31 In his petition for review, the appellant asserts that the Board should give no deference to the deciding official's penalty determination because the agency failed to provide the deciding official with several relevant pieces of documentary evidence, including the Privacy Act outline, Mr. Rouco's testimony at the criminal trial, and the OPR findings demonstrating that Mr. Rouco lied during the criminal trial. PFR File, Tab 4 at 65. The appellant's assertions are without merit. First, as the appellant concedes, he provided the Privacy Act outline and Mr. Rouco's criminal trial testimony to the agency with his response to the notice of proposed removal. See PFR File, Tab 4 at 65; ARF, Vol. I, Tab 4e at 248-356, 358-65. The appellant has failed to demonstrate that Mr. Weber did not consider these documents. Moreover, OPR's Reports of Investigation concerning the honesty of Mr. Rouco's criminal trial testimony were completed on February 2, 2009, and April 3, 2009, while the notice of proposed removal and the decision

notice were issued on October 17, 2008, and February 11, 2009, respectively. *See* ARF, Vol. I, Tab 4c at 1; *id.*, Vol. II, Tab 4f at 1; IAF, Tab 19, Subtabs M, N. Thus, OPR's Reports of Investigation were respectively issued days before and months after the decision notice was issued. Accordingly, we discern no reason to deny deference to the agency's penalty determination based on the agency's failure to provide the deciding official with the OPR Reports of Investigation regarding Mr. Rouco's testimony at the appellant's criminal trial.

¶32 The appellant also asserts in his petition for review that the penalty of removal imposed against him is inconsistent with the agency's treatment of Mr. Rouco, who remains employed as a Supervisor Criminal Investigator and undisciplined, after he was found to have perjured himself in federal district court. PFR File, Tab 4 at 75. Here, there is little similarity between the nature of the appellant's proven misconduct and the nature of Mr. Rouco's alleged misconduct. *See Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶ 6 (2010). While the appellant was charged with making unauthorized queries in federal databases and unauthorized disclosures, misusing his position, and exhibiting a lack of candor in interviews with OPR investigators, the appellant has failed to suggest that Mr. Rouco engaged in similar misconduct, aside from an allegation of lack of candor in potentially committing perjury during the appellant's criminal trial. Accordingly, the appellant has failed to prove his claim of disparate penalties. Further, given the administrative judge's thorough analysis of the relevant *Douglas* factors and the deciding official's thorough testimony and written statement regarding his consideration of the relevant *Douglas* factors, we discern no reason to disturb the administrative judge's finding that the penalty of removal is reasonable in the instant case. *See* Initial Decision at 42-46; ARF, Vol. I, Tab 4d; Jan. 27 HT at 209-17.

ORDER

¶33 After fully considering the filings in this appeal, we affirm the initial decision as modified by this Order. This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.