UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 74

Docket Nos. DA-1221-09-0725-W-1
DA-1221-10-0078-W-1

Robert John McCarthy,

Appellant,

v.

International Boundary and Water Comm: U.S. and Mexico,

Agency.

August 5, 2011

Christine Erickson and Paula Dinerstein, Washington, D.C., for the appellant.

Dan Hartsfield and Karen E. Griffin, Dallas, Texas, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of initial decisions that denied his requests for corrective action in his two individual right of action (IRA) appeals. For the reasons set forth below, we VACATE the initial decision in Docket No. DA-1221-10-0078-W-1 and AFFIRM the initial decision in Docket No. DA-1221-09-0725-W-1, AS MODIFIED by this Opinion and Order. We JOIN the appeals under 5 C.F.R. § 1201.36 and DENY the appellant's request for corrective action in these joined appeals.

BACKGROUND

¶2 The appellant received an excepted service appointment as a permanent full-time GS-0905-15 Supervisory Attorney for the agency at its offices in El Paso, Texas, effective January 18, 2009. DA-1221-09-0725-W-1 Appeal File (0725 AF), Tab 43 at 4 (Joint Statement of Facts); DA-1221-10-0078-W-1 Appeal File (0078 AF), Tab 27, Subtab 4h. On July 28, 2009, the appellant submitted a memorandum entitled "Disclosures of Fraud, Waste and Abuse" to several federal agencies, including the State Department's Office of Inspector General (OIG), the Office of Special Counsel (OSC), the Government Accountability Office (GAO), the Federal Bureau of Investigation (FBI), and the White House. 0725 AF, Tab 43 at 6, Tab 52, Exhibits (Exs.) E, N, X, Y, Z, JJJJJ. On July 28, 2009, the appellant also sent an email to his supervisor, agency Commissioner C.W. Ruth, stating that he had "report[ed] allegations of fraud, waste and abuse (and suspected criminal activity) directly to the State Department [OIG], the FBI, and/or other appropriate entities. . . . Having done so, I assert my rights as a whistleblower." 0725 AF, Tab 43 at 7, Tab 52, Ex. O. On July 31, 2009, Commissioner Ruth issued a termination notice stating that the appellant was unfit for continued employment with the agency because he displayed a "lack of cooperation to support [the Commissioner]" and a "continued failure to support [the Commissioner] or other members of the executive staff in a constructive and collegial manner." 0725 AF, Tab 52, Ex. R.[1] Commissioner Ruth identified four specific memoranda prepared by the appellant as evidence to support his action. *Id.*

¶3 The appellant filed a complaint with OSC on August 1, 2009, asserting that his termination constituted retaliation for whistleblowing under the Whistleblower Protection Act (WPA). *Id.*, Tab 4 at 4-20. On September 7, 2009,

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[1] The appellant's service was terminated effective August 28, 2009. 0752 AF, Tab 52, Exs. XXXX-YYYY.

the appellant filed a second complaint with OSC in which he alleged that the agency also retaliated against him for whistleblowing activity when it terminated his federal employee health benefits (FEHB) coverage on August 28, 2009, and when it refused to reimburse him for his moving expenses, as was allegedly promised in his employment agreement. 0078 AF, Tab 3 at 34-45. After OSC notified the appellant that it had terminated its investigation into his complaints, 0725 AF, Tab 1 at 21-24; 0078 AF, Tab 3 at 18, the appellant filed the instant appeals with the Board, renewing the allegations that he made before OSC, and asserting that the agency's actions were also in violation of statutorily mandated notice and due process requirements and constituted prohibited personnel practices. 0725 AF, Tab 1 at 1-19 (termination appeal); 0078 AF, Tab 1 at 1-16 (FEHB appeal).

¶4 In a Summary of Telephonic Prehearing Conference for the appellant's termination appeal dated January 26, 2010, the administrative judge identified the following issues in dispute:

> 1- Whether the appellant made a protected disclosure under 5 U.S.C. § 2302(b)(8);
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> 2- Whether the appellant's protected disclosure was a contributing factor in the personnel action that terminated his Federal service;
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> 3- If so, whether the agency can show by clear and convincing evidence that it would have taken the same action absent the protected disclosure.

0725 AF, Tab 44 at 1-2. The January 26th summary also stated that the disclosures that would be considered were those that the appellant reported to OSC, as recited in a Summary of Status Conference dated January 15, 2010. *Id.* at 2; *see* 0725 AF, Tab 34 at 2-3.[2] The January 26th summary also set forth the

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[2]Specifically, the January 15th summary identified the following disclosures:

> 1) [T]he [agency] is constructing levees with architectural designs over which it has no rights and, consequently, no recourse for engineering flaws.

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2) The [agency] improperly used funds to augment money appropriated to another government agency, the Department of Homeland Security, for construction of a border barrier project, which augmentation of the DHS budget violates the Congressional purpose for which the money was originally appropriated, *i.e.*, for flood control projects.

3) [The agency] improperly used funds for cosmetic improvements to existing levees in exchange for right-of-way agreements from landowners to permit the construction of an additional new levee while knowing and failing to disclose the uselessness of the cosmetic improvements and that such knowledge and failure to disclose operated a fraud upon the landowners to obtain their agreement.

4) The [agency] "pledged" appropriated funds in connection with "a financial award" for a water treatment plant in response to a court order.

5) Three [agency] executive officers improperly excluded the appellant from meetings regarding the agency's implementation of the Recovery Act and made false representations regarding their activities to the IWBC Commissioner and the State Department about their compliance with that act.

6) The [agency] improperly maintained budget and contracting responsibilities within a single office.

7) The [agency] permitted illegal surreptitious surveillance by Mr. Graf of other [agency] employees.

8) The [agency] permitted unlawful monitoring of employee computers by Mr. Graf and Ms. Forti.

9) [Agency] executives permitted improper salary increases in violation of OPM regulations and merit promotion principles.

10) [Agency] executives Graf and Forti improperly interfered with the hiring process.

11) [Agency] executives Graf and Forti submitted false reports to the Department of State [OIG] regarding Principal Engineer Al Riera.

12) [Agency] executives Graf and Forti engaged in threatening, abusive and hostile behavior toward a former Commissioner, the appellant and other employees.

0725 IAF, Tab 34 at 2-3.

administrative judge's determination that "the Board lacks jurisdiction to consider the appellant's claims of a lack of due process or any other affirmative defenses in this IRA appeal." 0725 AF, Tab 44 at 2.

¶5 In a Summary of Prehearing Conference for the appellant's FEHB appeal dated January 26, 2010, the administrative judge identified the following issues in dispute:

> 1- Whether the appellant made a protected disclosure under 5 U.S.C. § 2302(b)(8);
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> 2- Whether the appellant's protected disclosure was a contributing factor in the failure to continue the appellant's [FEHB coverage] following his termination and failure to reimbursement [sic] his moving expenses;
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> 3- If so, whether the agency can show by clear and convincing evidence that it would have taken the same action absent the protected disclosure.

0078 AF, Tab 32 at 1-2. The January 26th summary for the FEHB appeal further stated that the disclosures that would be considered were those that the appellant reported to OSC, as recited in a Summary of Status Conference dated January 15, 2010. *Id.* at 2; *see* 0078 AF, Tab 25 at 2-3.[3]

¶6 The administrative judge joined the appeals pursuant to the Board's regulations at 5 C.F.R. § 1201.36(a)(2) for hearing purposes only. 0725 AF, Tab 30; 0078 AF, Tab 23. Following that hearing, the administrative judge denied the appellant's requests for corrective action in both appeals. 0725 AF, Tab 54, Initial Decision (0725 ID) at 2, 23; 0078 AF, Tab 39, Initial Decision (0078 ID) at 2, 7.

¶7 With respect to the appellant's termination appeal, the administrative judge found that, because the appellant was not an "employee" within the meaning of

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[3] The disclosures recited in the January 26th summary in the appellant's FEHB appeal are the same as those recited in his termination appeal. *Compare* 0725 AF, Tab 34 at 2-3 *with* 0078 AF, Tab 25 at 2-3.

chapter 75, his termination was not an action otherwise appealable to the Board and could only be reviewed by the Board through an IRA appeal. 0725 ID at 2-3.[4] Regarding the appellant's allegations of reprisal for whistleblowing activity, the administrative judge found that the appellant's termination was a "personnel action" under the WPA, that the appellant had demonstrated that he exhausted his administrative remedies before OSC, and that he had established Board jurisdiction over his appeal by making nonfrivolous allegations that he made protected disclosures under 5 U.S.C. § 2302(b)(8) and that his disclosures were a contributing factor in the termination. *Id.* at 4-6. Turning to the merits of the appellant's claims, the administrative judge assumed, arguendo, that the appellant established that he made protected disclosures and that his disclosures were a contributing factor in the agency's personnel action. *Id.* at 7. The administrative judge found, however, that the agency established by clear and convincing evidence that it would have taken the same personnel action in the absence of the appellant's protected disclosures. *Id.* at 7-23. Specifically, the administrative judge found credible and assigned significant weight to Commissioner Ruth's hearing testimony that he terminated the appellant because "he was frustrated with the appellant's incorrect legal advice and his contentious, divisive memoranda." *Id.* at 22. The administrative judge found that, "although the appellant's whistleblowing disclosures coincided, either by chance or by design, with the end of the degenerating relationship between himself and Ruth, they did not cause the deterioration." *Id.* at 22-23. Accordingly, the administrative judge found that the agency established by clear and convincing evidence that it would have terminated the appellant in the absence of his

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[4] The administrative judge cited the initial decision in *McCarthy v. International Boundary and Water Commission*, MSPB Docket No. DA-0752-10-0044-I-1 (Jan. 8, 2010), in which he dismissed the appellant's removal appeal for lack of jurisdiction on the grounds that the appellant was not an "employee" within the meaning of 5 U.S.C. § 7511. 0725 ID at 2 n.2. That decision became final on February 12, 2010.

whistleblowing activity, and he denied the appellant's request for corrective action based on his termination. *Id.* at 23.

¶8 With respect to the appellant's FEHB appeal, the administrative judge found that the personnel actions at issue were not actions otherwise appealable to the Board and that the appeal was therefore limited to a determination of whether the agency denied the appellant's FEHB coverage and his request for reimbursement for moving expenses in reprisal for whistleblowing. 0078 ID at 4. The administrative judge determined that there was jurisdiction over the appeal under the WPA, again finding that the appellant had exhausted his OSC remedies, that the appellant made nonfrivolous allegations that he made a protected disclosure under 5 U.S.C. § 2302(b)(8), and that his disclosure was a contributing factor in the agency's failure to extend his FEHB coverage and to deny his request for reimbursement of moving expenses. *Id.* at 1-2. As he did in the termination appeal, the administrative judge assumed, arguendo, that the appellant showed that he made protected disclosures. *Id.* at 4. He also assumed that the appellant had a reasonable belief in the truth of his disclosure. *Id.* He found, however, that the appellant failed to present any evidence that his disclosures were a contributing factor in the agency's decisions to terminate his FEHB coverage or to refuse to reimburse his moving expenses because the appellant "failed to identify the agency official responsible for making those decisions and, consequently, failed to show that such deciding official knew of his disclosures." *Id.* at 6. Based on those findings, the administrative judge concluded that the appellant failed to prove by preponderant evidence that he was entitled to corrective action. *Id.* at 7.

¶9 The appellant has timely filed petitions for review of both initial decisions, and the agency has submitted responses in opposition to the appellant's petitions for review. 0725 Petition for Review (PFR) File, Tabs 1, 3; 0078 PFR File, Tabs 1, 3.

ANALYSIS

The administrative judge abused his discretion in failing to fully join the appellant's IRA appeals.

¶10 The appellant contends on review that, by joining his appeals for hearing only, the administrative judge "artificially separated the effects of the removal decision into a loss of employment and a loss of benefits, when in fact the same decision had both results." 0078 PFR File, Tab 3 at 77. The Board is authorized to join two or more appeals filed by the same appellant and hear and decide them concurrently if it determines that joinder "could result in the appeals' being processed more expeditiously and would not adversely affect any party." 5 U.S.C. § 7701(f)(2); *see* 5 C.F.R. § 1201.36(b). The decision whether to join two appeals is a matter committed to the sound discretion of the administrative judge in accordance with the guidance set forth above. Because we find that the administrative judge's failure to fully join these appeals adversely affected the appellant's ability to adjudicate his claims concerning his FEHB coverage and relocation expenses, the administrative judge's decision in this regard constituted an abuse of discretion. *Cf. Stein-Verbit v. Department of Commerce*, 72 M.S.P.R. 332, 338-42 (1996) (the administrative judge's decision to bifurcate the charges under the circumstances of the case constituted an abuse of discretion where the decision incurred on the appellant's right to present a full defense and to have a meaningful right to a hearing).

¶11 As stated above, the appellant alleges that the agency's actions in terminating him, discontinuing his FEHB coverage, and refusing to reimburse him for relocation expenses all constituted reprisal for having made the disclosures set forth in his July 28, 2009 memorandum. Where, as here, the appellant has filed more than one complaint with OSC in support of an overall claim of reprisal for whistleblowing activity, an administrative judge should not take a piecemeal approach by adjudicating separate, but related, personnel actions in separate appeals. Given the similarity of the issues presented and the likely

overlap of evidence and witnesses, joinder of the appellant's two pending IRA appeals for adjudication was appropriate. *See Groseclose v. Department of the Navy*, 111 M.S.P.R. 194, ¶ 14 (2009).

¶12 Here, we find that the administrative judge erred by adjudicating the appellant's claims concerning his FEHB coverage and relocation expenses without considering them in the context of his termination appeal and by denying corrective action in the appellant's FEHB appeal on the ground that the appellant failed to establish that his disclosures were a contributing factor in the agency's actions because he failed to identify the agency official responsible for making those decisions or show that such deciding official knew of his disclosures. 0078 ID at 6. The appellant's contentions concerning his entitlement to FEHB coverage and relocation expenses are inextricably intertwined with his contention that he was unlawfully terminated in reprisal for whistleblowing activity. Although the appellant did not specifically allege that the agency officials involved in the decisions affecting his FEHB coverage and reimbursement for his relocation expenses knew of his disclosures, he has alleged in the termination appeal that Commissioner Ruth, the deciding official, had actual knowledge of his whistleblowing activity, and that his whistleblowing activity was a contributing factor in the decision to terminate him. 0725 AF, Tab 1 at 16. The appellant's entitlement to corrective action in the form of continued FEHB coverage or relocation expenses does not require the appellant to establish that the officials who made the determinations concerning them had actual knowledge of his disclosures. Rather, an appellant may establish imputed or constructive knowledge of his disclosures by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108 (1994). Thus, the administrative judge erred by dismissing the appellant's FEHB appeal for failure to demonstrate that the deciding official had actual knowledge of his protected activity.

¶13 As an additional basis for our determination, we note that 5 U.S.C. § 1221(g)(1)(a) provides that corrective action may include "back pay and related benefits, . . . travel expenses, and any other reasonable and foreseeable consequential changes." Thus, the appellant's request for corrective action in his termination appeal could include the relief that he seeks in his FEHB appeal. Accordingly, we find that the administrative judge's failure to join the instant appeals was an abuse of discretion, and we join them for adjudication pursuant to 5 C.F.R. § 1201.36(b).

The appellant may not challenge an administrative judge's orders on his stay requests through the petition for review process.

¶14 On petition for review, the appellant also claims that the administrative judge erred in denying his request for a stay. 0725 PFR File, Tab 1 at 211-214. An appellant may not challenge an administrative judge's order on a stay request under the WPA through the petition for review process; a request for an interlocutory appeal is the only option. *Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 24 (2004); *Weber v. Department of the Army*, 47 M.S.P.R. 130, 132-33 (1991). However, once the administrative judge denies a request for certification of an interlocutory appeal, the party that sought certification may raise the matter at issue in a petition for review filed after the initial decision is issued. 5 C.F.R. § 1201.93(b). Here, the administrative judge denied the appellant's request for a stay, but the appellant did not submit a request for an interlocutory appeal of that decision. 0725 Stay File, Tab 8. Therefore, the appellant is barred from challenging on review the administrative judge's denial of his stay request.

The administrative judge's rulings on discovery matters did not constitute an abuse of discretion.

¶15 The appellant alleges on review that the administrative judge committed various procedural errors in the adjudication of his appeals, such as the denial of his motions to compel the agency to produce documents and answer

interrogatories in response to his discovery requests, and by failing to certify an interlocutory appeal of the administrative judge's ruling to the Board. 0725 PFR File, Tab 1 at 55-96; 0078 PFR File, Tab 1 at 86-105*; see* 0725 AF, Tab 32. An administrative judge has broad discretion in ruling on discovery matters, and, absent a showing of abuse of discretion, the Board will not find reversible error in such rulings. *O'Connor v. Small Business Administration*, 60 M.S.P.R. 130, 132 (1993).

¶16 Our review of the record indicates that the appellant served two sets of interrogatories and requests for production of documents on the agency. 0725 AF, Tab 29 at 74-105.[5] On November 12, 2009, the appellant filed a motion to compel production of documents in response to his requests. 0725 AF, Tab 19 at 4-72; Tab 29 at 4-110.[6] During the course of the parties' efforts to resolve outstanding discovery disputes, the agency, by letter dated November 17, 2009, made the following offer to the appellant's representative, Karen E. Griffin:

> The Agency invites you or [the appellant's other representative, Paula] Dinerstein (we ask that [the appellant] not be [in] attendance but we can certainly arrange for a telephone to be available should you wish for him to be available by phone) to the Agency's location in El Paso, Texas at which time, you may request any non-privileged document referenced in your discovery requests through the date of [the appellant's] termination subject to the footnoted limitations. If the documents exist, they will be made available to you for inspection. Because I am not sure what documents are requested in the often broad requests, please come prepared to identify with particularity the documents requested. If you wish to have copies made, you may request that they be made at [the appellant's] expense. Likewise, I will have a computer set up for you to review the contents of [the appellant's] hard drive. You may inspect the

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[5] The appellant propounded 45 separate document production requests and interrogatories. 0725 AF, Tab 29 at 76-93

[6] As discussed below, the motion also sought imposition of sanctions against the agency.

> hard drive and have copies made of any document or email at [the appellant's] expense.

0725 AF, Tab 22 at 64-65. In its response to the appellant's motion to compel, the agency characterized its offer as one "to make all other non-privileged documents, with narrow exceptions, available for inspection as the documents are kept in the regular course of business" as permitted by the Federal Rules of Civil Procedure. 0725 AF, Tab 22 at 4-5.[7] The administrative judge thereafter suspended case processing for 30 days pursuant to the appellant's request. 0725 AF, Tabs 21, 24. The appellant then designated himself as an additional representative of record, but declined the agency's offer to inspect the documents as they are kept in the regular course of business and renewed his motions to compel on December 28, 2009. 0725 AF, Tab 22 at 67-69, Tab 28, Tab 29 at 4-107. The administrative judge denied the appellant's motions to compel on the

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[7] Federal Rule of Civil Procedure 34(b)(2) provides, in relevant part:

> (B) *Responding to Each Item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.
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> * * *
>
> (E) *Producing the Documents or Electronically Stored Information*. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
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> > (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
> >
> > (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
> >
> > (iii) A party need not produce the same electronically stored information in more than one form.

ground that they failed to comply with the Board's discovery procedures at 5 C.F.R. § 1201.73. 0725 AF, Tab 32.

¶17 During a January 14, 2010 status conference, the appellant indicated that there were still outstanding discovery requests to which the agency had not responded. 0725 AF, Tab 34 at 3. The administrative judge's summary of that status conference states:

> The agency indicated that it had informed the appellant's representative that it would make the agency's documents and files available at the agency's offices in El Paso. The appellant's representative indicated that the appellant himself was in El Paso and was available to review the documents, but that the agency refused to permit the appellant personally to enter agency offices. The agency indicated that they thought it was inappropriate for them to deal directly with a represented party and that his presence would be unduly disruptive. I instructed the appellant to file a written request to permit the appellant's personal access to the agency and its document[s] and, after allowing the agency an opportunity to respond, I would issue a ruling on the matter.

0725 AF, Tab 34 at 3-4. By order dated January 20, 2010, the administrative judge denied the appellant's motion for certification of an interlocutory appeal, or in the alternative, for reconsideration of his orders denying the appellant's motions to compel. 0725 AF, Tab 37. The following day, the appellant filed a submission, which stated, in part that:

> Having reviewed Appellant's document requests and the Agency's objections, it has become clear that the Agency has agreed to produce almost nothing further even if Appellant or Appellant's counsel appear at the Agency headquarters to make the document requests in person. Appellant will not, therefore, be making a last-minute, futile request for permission for [the appellant] to review such documents at Agency headquarters that the Agency may deign to produce. Given the Agency's written objections, and particularly in light of the Administrative Judge's denial of all motions to compel as well as the denial of the motion for interlocutory appeal or in the alternative to reconsider motions to compel discovery, Appellant has no reason to request permission to personally access the Agency's documents.

0725 AF, Tab 39 at 23. Thus, the appellant never acted on the administrative judge's invitation to file a motion seeking personal access to the agency and its documents.

¶18 Based on the foregoing, we find that the administrative judge did not abuse his discretion in denying the appellant's motions to compel or the motion to certify an interlocutory appeal to the Board. The Board's regulations at 5 C.F.R. § 1201.92 provide that an administrative judge will certify a ruling for interlocutory review only if the ruling involves an important issue of law or policy about which there is a substantial ground for difference of opinion and an immediate ruling will materially advance the completion of the proceedings, or the denial of an immediate ruling will cause undue harm to a party or the public. *Robinson v. Department of the Army*, 50 M.S.P.R. 412, 418 (1991). The Board will not reverse an administrative judge's denial of request for certification absent an abuse of discretion. *Id.*

¶19 We find no abuse of discretion here. In this regard, we find no error in the administrative judge's decision to instruct the appellant to file a written request to permit his personal access to the agency's documents. *See Butler v. Defense Commissary Agency*, 77 M.S.P.R. 631, 634 (an administrative judge has broad discretion in controlling the proceedings before him), *review dismissed*, 155 F.3d 565 (Fed. Cir. 1998) (Table). On review, the appellant characterizes the administrative judge's instruction as an "invit[ation] . . . to make a formal motion requesting permission for [the appellant] to conduct discovery at the Agency, under the restrictive terms of the Agency's 'offer,' a motion that if granted would have left [the appellant] begging for scraps . . . ." 0725 PFR File, Tab 1 at 65 n.102. We disagree. The administrative judge's summary of the January 14 status conference clearly demonstrates that, despite the denial of the appellant's motions to compel, the administrative judge was still attempting to assist the parties in resolving their outstanding discovery disputes. The appellant was not at liberty to simply refuse to follow the administrative judge's directions

concerning the conduct of discovery on the grounds that doing so would have been "futile" and instead present his discovery disputes to the Board on review. Having opted to do so, we find that his contentions on review concerning discovery are without merit and that certification of the appellant's interlocutory appeal would have further delayed the proceedings below, rather than materially advanced their completion.[8]

¶20 The appellant argues, too, that the administrative judge erred in not granting his motions for sanctions against the agency for its alleged discovery-related misconduct. 0725 PFR File, Tab 1 at 55-96; *see* 0725 AF, Tab 29. He claims, inter alia, that the agency should be sanctioned because its offer concerning document production was "unethical, illegal and deceptive," that its "'offer' to open its files at [its] headquarters instead of simply providing the requested documents and answers was made with full knowledge that no documents or answers would be provided," and that acceptance of the offer would require the appellant "to fund an expensive undertaking and he and his counsel would be distracted and kept busy in the weeks before the hearing." 0725 PFR File, Tab 1 at 66. For the reasons stated above, we find that the appellant's own conduct during the course of discovery renders without merit his complaints concerning the administrative judge's failure to sanction the agency for failure to comply with his document requests.

¶21 In any event, we reject the appellant's contention that the agency's offer to make the documents available for inspection as they are kept in the usual course of business was improper. Although the Board is not bound by the Federal Rules of Civil Procedure, it may look to them for guidance. *Wagner v. Department of*

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[8] In light of the foregoing, we also find without merit the appellant's contention on review that the administrative judge "erroneously admitted into evidence calendar entries and records of meetings purportedly made by Commissioner Ruth, while denying Appellant's repeated motions to compel production of the calendar or record book in which these documents allegedly were recorded." 0725 PFR File, Tab 1 at 97.

Homeland Security, 105 M.S.P.R. 67, ¶ 14 (2007); 5 C.F.R. § 1201.72(a). In this regard, we note that Rule 34 expressly permits discovery responses stating that "inspection and related activities *will be permitted* as requested," and allows production of documents "as they are kept in the usual course of business." Fed. R. Civ. Pro. 34(b)(2)(B), (E)(i) (emphasis added); *see also Pass & Seymour, Inc. v. Hubbell Inc.*, 255 F.R.D. 331, 336 (N.D.N.Y. 2008) ("The most obvious means of complying with the requirement of Rule 34(b) to produce documents as they are kept in the usual course of business is to permit the requesting party to inspect the documents where they are maintained, and in the manner in which they are organized by the producing party."); *In re Subpena Addressed to Office of Special Counsel*, 20 M.S.P.R. 245, 249 (1984) (the Board rejected the applicant's contention that OSC should deliver subpoenaed documents to her representative's office for inspection and copying, stating that an arrangement providing for inspection and copying at the office of [OSC] "would best promote the administrative efficiency and responsiveness . . . in making the necessary documents available to the applicant," and "would also most ensure the physical integrity of the documents themselves.").[9]

Hearing-related rulings.

¶22 The appellant also contends that the administrative judge abused his discretion in denying the appellant's motion to postpone the hearing. 0725 PFR File, Tab 1 at 96-97. Again, we find no abuse of discretion. On February 5, 2010, the appellant requested that the hearing scheduled for February 11 and 12, 2010, be postponed, stating that one of his designated representatives had conflicting obligations in another pending matter. 0725 AF,

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[9] The appellant also claims that the agency created "numerous documents . . . well after the events they purport to describe, secretly back-dated, and used to perpetrate fraud upon the tribunal." 0725 PFR File, Tab 1 at 82. The Board finds that appellant's allegations are unsubstantiated by the record.

Tab 48 at 5. The request did not suggest that his other designated representative was unavailable, and it stated that "Mr. McCarthy has entered his appearance in the case and is prepared to conduct the hearing himself." *Id*. The administrative judge denied the appellant's request, noting, inter alia, that neither party had raised any objection to the hearing date at two previous prehearing conferences or indicated any potential conflict, and that hearing facilities had been reserved and subpoenas had been served on witnesses. 0725 AF, Tab 50 at 1. He also noted that the appellant had designated two representatives and that the conflict appeared to involve only one and that he had advised the appellant during a telephonic conference concerning the request that he could proceed pro se at the hearing. *Id.*

¶23 An administrative judge has the authority to grant a request for postponement only upon a showing of good cause. 5 C.F.R. § 1201.51(c). We agree with the administrative judge that the appellant failed to make such a showing below. Accordingly, the administrative judge did not abuse his discretion in denying the appellant's request.

¶24 The appellant next contends on review that the administrative judge erred in denying the appellant's motion at the hearing to admit as evidence documents that he claims were previously unavailable and that were wrongfully withheld by the agency in discovery. 0725 PFR File, Tab 1 at 5, 99-105. At the hearing, the administrative judge rejected the appellant's proffer of several documents into evidence on the ground that they were not included as exhibits in his prehearing submission. Hearing Compact Disk (HCD), Session 01; *see* 0725 AF, Tab 52, Ex. KKKKK. The appellant claims on review, as he did below, that these documents were previously unavailable because the agency wrongfully refused to provide them in response to his document production requests, and that he therefore had to obtain them "from alternative sources only days prior to the hearing." 0725 PFR File, Tab 1 at 100. Again, we find that the appellant's own conduct during the course of discovery renders without merit his complaints

concerning the agency's failure to comply with his document requests. Because the appellant has not established that the agency failed to comply with his document production requests, he likewise has failed to establish that the documents he sought through those requests were previously unavailable. The administrative judge therefore did not abuse his discretion in denying the appellant's motion to admit those documents as exhibits at the hearing.

¶25 Finally, the appellant contends that the administrative judge erred in permitting Commissioner Ruth to refer to his "Day-Timer" professional planner during his hearing testimony, but refusing to permit the appellant to inspect it. 0725 PFR File, Tab 1 at 98. The appellant's contentions are not supported by the record. Ruth briefly referred to his planner during his direct examination testimony to confirm that he traveled to Washington D.C. on July 29, 2009, an issue that does not appear to be in dispute. HCD, Session 11. Although the appellant stated during the hearing that he would "like to look at [the planner]," *id.*, the administrative judge did not make a ruling on the issue during the conversation that ensued, and, in any event, the appellant did not object. The appellant's failure to timely object to rulings during the hearing precludes his doing so on petition for review. *Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988).[10]

The appellant's other constitutional and statutory claims are not before the Board.

¶26 The appellant contends that the administrative judge erred in failing to invalidate the agency's action on the grounds that Commissioner Ruth, absent appointment by the U.S. Senate, lacked the constitutional authority to terminate him and discontinue his benefits. 0725 PFR File, Tab 1 at 205-211; 0078 PFR File, Tab 1 at 158. He also claims that the agency violated his right to

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[10] We note that, although the appellant also directed Ruth's attention to his day planner on cross-examination, HCD, Session 12, the page to which the appellant referred was included in the agency's exhibits below. *See* 0078 AF, Tab 27, Ex. DD.

constitutional due process as a tenured, non-probationary employee, 0725 PFR File, Tab 1 at 48-55; 0078 PFR File, Tab 1 at 148-50; and that it also failed to comply with statutory procedures under chapter 43 and chapter 75 of title 5 when it terminated him, 0078 PFR File, Tab 1 at 150-58. These issues were not included in the administrative judge's prehearing conference summaries and the appellant did not object to their exclusion. 0725 AF, Tab 44; 0078 AF, Tab 32. Further, as stated above, the administrative judge's summary in the appellant's termination appeal expressly states that "[t]he Board lacks jurisdiction to consider the appellant's claims of a lack of due process or any other affirmative defenses in this IRA appeal." 0725 AF, Tab 44 at 2. An issue is not properly before the Board where, as here, it is not included in the administrative judge's memorandum summarizing the prehearing conference, which states that no other issues will be considered, where neither party objects to the exclusion of that issue in the summary. *Crowe v. Small Business Administration*, 53 M.S.P.R. 631, 635 (1992).

¶27 In any event, the appellant's arguments that his termination did not comply with constitutional or statutory requirements are not within the Board's jurisdiction because he was not an "employee" with chapter 75 appeal rights at the time of his termination, *see McCarthy*, MSPB Initial Decision No. DA-0752-10-0044-I-1 (Jan. 8, 2010), and his allegations may not be heard in the context of his IRA appeals, *see Marren v. Department of Justice*, 51 M.S.P.R. 632, 638-39 (1991) ("[T]he Board's jurisdiction to review IRA complaints based on personnel actions over which it otherwise does not have appellate jurisdiction is limited to adjudicating the whistleblower allegations."), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table); *see also Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 699 (1994) (the appellant's allegations that the agency violated the First Amendment and committed other prohibited personnel practices may not be heard in the context of an IRA appeal); *Garrett v. Department of Defense*, 62 M.S.P.R. 666, 674 (1994) (the Board found that it lacked jurisdiction to decide a harmful

error claim in the context of an IRA appeal). The administrative judge therefore properly determined that the Board lacks jurisdiction to consider these claims.

The appellant's claim that the administrative judge was biased against him is unsupported by the record.

¶28 The appellant's next claim, that the administrative judge was biased against him, is also without merit. 0725 PFR File, Tab 1 at 214. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). Further, an administrative judge's conduct during the course of a Board proceeding will warrant a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Here, the appellant merely asserts, without citation to the record, that "the AJ has made numerous rulings and comments that evidence a deep-seated favoritism or antagonism that would make fair judgment impossible." 0725 PFR File, Tab 1 at 214. However, disagreement with the administrative judge's evidentiary findings is not sufficient to show bias. *See Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶¶ 10-11 (2004). In addition, the appellant has failed to identify on review any comment or action that reveals a deep-seated favoritism or antagonism against him, and his conclusory statement on review is insufficient to overcome the presumption of honesty and integrity afforded the administrative judge.

This consolidated IRA appeal requires adjudication of the merits of both the appellant's prima facie case and the agency's affirmative defense.

¶29 The WPA prohibits any federal agency from taking, failing to take, or threatening to take or fail to take, any personnel action against an employee in a covered position because of the disclosure of information that the employee

reasonably believes to be evidence of a violation of law, rule, or regulation, gross mismanagement or a waste of funds, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2), (b)(8).[11] In order to establish a prima facie case under the WPA, the appellant must prove, by preponderant evidence, that he made a protected disclosure and that the disclosure was a contributing factor in an adverse action against him. 5 U.S.C. § 1221(e)(1); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 12 (2011). If the appellant makes out a prima facie reprisal for whistleblowing claim, the agency is given an opportunity to prove, by clear and convincing evidence, the affirmative defense that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *see Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 970-71 (Fed. Cir. 2009); *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 18 (2010). Because the WPA does not mandate any particular sequence for trying the elements of a whistleblower case, in appropriate cases, the Board has first addressed the agency's affirmative defense and then, if necessary, turned to the question of whether the appellant has established a prima facie whistleblower claim. *See, e.g., Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 16 (2007); *Santos v. Department of Energy*, 102 M.S.P.R. 370, ¶ 12 (2006); *Holloway v. Department of the Interior*, 95 M.S.P.R. 650, ¶ 13 (2004), *aff'd*, 131 F. App'x 717 (Fed. Cir. 2005); *Geyer v. Department of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997) (Table); *Mausser v. Department of the Army*, 63 M.S.P.R. 41, 44 (1994).[12]

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[11] The Commission is an "agency" for purposes of the WPA. *Wilcox v. International Boundary & Water Commission*, 103 M.S.P.R. 73, ¶ 8 (2006). Furthermore, we find that, because the Standard Form 50 reflecting the appellant's appointment shows that he was appointed to a Schedule A, excepted service position pursuant to 5 C.F.R. § 213.3102(d), he is an "employee" in a "covered position" for purposes of the WPA. *Id.*, ¶¶ 11, 13; *see* 0725 AF, Tab 52, Ex. S.

[12] Our reviewing court has tacitly approved of the Board's approach. *See Fellhoelter*, 568 F.3d at 971 (citing *Kalil v. Department of Agriculture*, 479 F.3d 821, 824-25 (Fed.

¶30 As stated above, the administrative judge proceeded in this manner in adjudicating the instant appeals. That is, in the appellant's termination appeal, the administrative judge decided it would be most efficient to assume, arguendo, that the appellant had established that he made protected disclosures and that the disclosures were a contributing factor in his termination, and to proceed directly to whether the agency established by clear and convincing evidence that, absent any protected disclosures, it would have terminated the appellant. 0725 ID at 7. Because the administrative judge determined that the agency would have terminated the appellant absent any protected disclosures, he made no findings on the merits of the appellant's prima facie case. 0725 ID at 23. In the appellant's FEHB appeal, the administrative judge decided it would be most efficient to assume, arguendo, that the appellant had established that he made protected disclosures, but determined that the appellant failed to establish that the disclosures were a contributing factor in the agency's determinations concerning his FEHB coverage and reimbursement for moving expenses. 0078 ID at 4-7. Thus, in that appeal, the administrative judge made no findings regarding whether the appellant established that he made protected disclosures or regarding whether the agency established by clear and convincing evidence that it would have taken the same actions independent of any protected disclosures.

Cir. 2007); *Greenspan v. Department of Veterans Affairs*, 464 F.3d 1297, 1303-04 (Fed. Cir. 2006); *Clark v. Department of the Army*, 997 F.2d 1466, 1470-71 (Fed. Cir. 1993), *superseded by statute on other grounds as recognized in Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995)); *but see Kahn v. Department of Justice*, 618 F.3d 1306, 1316 (Fed. Cir. 2010) (stating in *dicta* that, in a hearing on the merits, the Board should make findings on whether (1) the acting official had authority concerning the personnel action; (2) the employee made a protected disclosure; (3) the acting official used his authority against the employee; (4) the protected disclosure was a contributing factor in the personnel action; and (5) the agency would have taken the same action in the absence of the protected disclosure; and that "[i]f the Board finds one of those contested issues dispositive, it should nevertheless resolve the remaining issues to expedite resolution of a case on appeal").

¶31 Under the circumstances of this case, however, we find that full and fair consideration of the appellant's claims requires adjudication of both the merits of his prima facie case as well as the agency's affirmative defense. The Board has stated that, in determining whether the agency would have taken the same personnel action in the absence of a protected disclosure, it considers, inter alia, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision. *Chambers*, 116 M.S.P.R. 17, ¶ 29; *see Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Because direct evidence of a deciding official's retaliatory motive is rare, appellants are entitled to rely on circumstantial evidence giving rise to an inference of impermissible intent. *Fellhoelter*, 568 F.3d at 971; *see Webster v. Department of the Army*, 911 F.2d 679, 689-90 (Fed. Cir. 1990); *see also Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). As our reviewing court recognized in *Fellhoelter*, in some cases, "evidence of retaliatory motive [may also be] relevant to the [appellant's] prima facie case; for example, evidence of an employee's assertions of misconduct by a supervisor can be relevant to whether the employee has made a protected disclosure and also whether the supervisor has a strong motivation to retaliate." 568 F.3d at 971.

¶32 As discussed below, in this case, the circumstantial evidence bearing on retaliatory motive includes the substance of the appellant's allegedly protected activity as well as the extent to which the deciding official was aware of it. Thus, resolution of both the merits of the appellant's prima facie case and the agency's affirmative defense is required. We can make these determinations at this level, however, because the appellant has established jurisdiction over his whistleblower claim, a hearing has been conducted, and the evidence of record is complete. *See, e.g., Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶¶ 4-26 (2011).

The appellant established by preponderant evidence that he was perceived as a whistleblower and that he made a protected disclosure.

¶33 One who is perceived as a whistleblower is entitled to the protection of the WPA, even if he has not made protected disclosures. *Jensen v. Department of Agriculture*, 104 M.S.P.R. 379, ¶ 11 n.3 (2007); *Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 12 (1998). Commissioner Ruth testified that he was responsible for hiring the appellant in January 2009, and that he decided to hire the appellant knowing that the appellant had previously filed whistleblower disclosures regarding his previous employer, the Department of the Interior. HCD, Session 11. Furthermore, as stated above, in his July 28, 2009, email to Commissioner Ruth, the appellant "assert[ed his] rights as a protected whistleblower" on the grounds that he had "report[ed] allegations of fraud, waste and abuse . . . to the State Department [OIG], the FBI, and/or other appropriate entities." 0725 AF, Tab 52, Ex. O. Based on the foregoing, we find that the appellant was perceived as a whistleblower.

¶34 We also find that the appellant established by preponderant evidence that he made at least one protected disclosure. A protected disclosure is a disclosure that an appellant reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories in section 2302(b)(8)(A). *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). To establish that the appellant had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), he need not prove that the condition disclosed actually established a regulatory violation or any of the other situations detailed under 5 U.S.C. § 2302(b)(8)(A)(ii); rather, the

appellant must show that the matter disclosed was one which a reasonable person in his position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *Schnell*, 114 M.S.P.R. 83, ¶ 19. The Board may consider only those charges of whistleblowing that the appellant asserted before OSC, and it may not consider any subsequent recharacterization of those charges put forth by the appellant in his appeal to the Board. *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 231 (1993).

¶35 It is undisputed that the disclosures at issue are those set forth in the appellant's July 28, 2009 memorandum entitled "Disclosures of Fraud, Waste and Abuse" that he sent to the State Department OIG, the OSC, the GAO, the FBI, and the White House. 0725 AF, Tab 43 at 6, Tab 52, Exs. E, N, X, Y, Z, JJJJJ. In it, the appellant disclosed, among other things, that as part of a "conspir[acy] to control and manipulate information concerning the agency's implementation of the Recovery Act [13] [and to] deceive the Commissioner and the State Department, . . . three officials held secret Recovery Act oversight committee meetings, actively excluding the fourth member of the committee – [the appellant] – from every such meeting." 0725 AF, Tab 4 at 29; *see* Tab 52, Ex. E at 1-2.

¶36 We find that in making this disclosure, the appellant failed to disclose information that he reasonably believed evidenced a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302 (b)(8)(A). At the hearing, Commissioner Ruth testified that he had assigned certain staff members to work on matters involving the Recovery Act, and that at the time of the original assignments, he agreed with the appellant's suggestion that "legal" should be part of the process. HCD, Session 11. He

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[13] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 19, 2009).

explained that, during a subsequent staff meeting, the appellant complained that he was being excluded from meetings of a "committee" and demanded that he be allowed to participate. *Id.* Commissioner Ruth further testified that he had never created a formal committee concerning the Recovery Act, and that he announced at the meeting that there was no committee. *Id.* The testimony of Mary Brandt, Special Assistant to the Commissioner and liaison officer with the State Department, corroborates Ruth's testimony. HCD, Session 10. Because there is no evidence in the record indicating that the appellant reasonably believed the Recovery Act oversight committee existed, the appellant has failed to show that the matter disclosed, i.e. his exclusion from the non-existent committee, was one which a reasonable person in his position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *See Schnell*, 114 M.S.P.R. 83, ¶ 19.

¶37 The appellant also disclosed that the agency purportedly issued a bid solicitation for levee construction under the Recovery Act based on design specifications prepared by a design firm with which the agency had no contractual relationship. 0725 AF, Tab 54, Ex. E at 2-3. He contended that "[i]n the event of flaws in the design, especially latent flaws," the agency would be exposed to liability but would have "limited if any third party recourse." *Id.* at 3; *see id.*, Tab 4 at 25-27; Tab 39 at 8. We find that in making this disclosure, the appellant, at a minimum, disclosed a matter that he reasonably believed evidenced a violation of law, rule, or regulation, which was protected under 5 U.S.C. § 2302(b)(8)(A)(i). In particular, the appellant has shown that this disclosure exposed a potential violation of the Federal Acquisition Regulations (FAR), 48 C.F.R., part 46, relating to quality assurance in government contracting. 0725 AF, Tab 4 at 25-26; *see Reid v. Merit Systems Protection Board*, 508 F.3d 674, 676-78 (Fed. Cir. 2007) (finding section 2302(b)(8)(b) may be satisfied by a disclosure of a violation of the FAR); *Schnell*, 114 M.S.P.R. 83, ¶ 20. We find that the appellant was in a position to reasonably believe his disclosure because, as part of his duties as a Supervisory Attorney for the agency,

he analyzed the issue and expressed his concerns. 0725 AF, Tab 52, Ex. G; *cf. Kalil v. Department of Agriculture*, 96 M.S.P.R. 77, ¶ 16 (2004) (considering the appellant's status as an attorney in determining whether he had made a nonfrivolous allegation that he reasonably believed his disclosure). In making this determination, however, we do not find that the appellant actually established a regulatory violation, but only that he met his burden of establishing that the matter disclosed was one which a reasonable person in his position would believe evidenced such a violation. *See Schnell*, 114 M.S.P.R. 83, ¶ 19; *see also Weber v. Department of the Army*, 9 F.3d 97, 101 (Fed. Cir. 1993) ("In general, the WPA does not give the Board the right to review the substance of whistleblowing claims."). Based on the foregoing, we conclude that the appellant proved by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure.

¶38 In appropriate cases, the Board should consider, with respect to each purported disclosure, whether the appellant has established by preponderant evidence that he made a disclosure that he reasonably believed evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety under 5 U.S.C. § 2302(b)(8)(A). This is particularly appropriate in cases in which the substance of the appellant's disclosures is also relevant to the deciding official's motive to retaliate for having made them. *See, e.g.*, *Chambers*, 116 M.S.P.R. 17, ¶¶ 58-69. In view of our determination that the appellant established that he was perceived as a whistleblower and that he established that he made a protected disclosure, it is not necessary to do so here with respect to his remaining disclosures. As discussed below, although the appellant advised Commissioner Ruth in his email of July 28, 2009 of the fact that he had made purported disclosures, there is no evidence in the record that Ruth knew the details contained within the appellant's written disclosures themselves prior to the time that he terminated the appellant on July 31.

Therefore, in this case, the substance of the disclosures themselves has no bearing on our determination regarding whether the appellant was terminated in reprisal for whistleblowing activity. Rather, under these circumstances, the relevant consideration for the Board is whether the appellant has established by preponderant evidence that his perceived status as a whistleblower, including the agency's knowledge of the fact that he made purported disclosures, was a contributing factor in the agency's decision to terminate the appellant, and, if so, whether the agency met its burden of demonstrating by clear and convincing evidence that it would have taken the same action absent the appellant's perceived status. *See Juffer*, 80 M.S.P.R. 81, ¶ 18. Thus, under the particular circumstances of this case, we find that an exhaustive analysis of each of the appellant's remaining disclosures is not necessary to the Board's adjudication of the merits of this appeal.

The appellant has established that his protected disclosures were a contributing factor in the agency's personnel action.

¶39 To obtain corrective action, the appellant must meet his initial burden of establishing by preponderant evidence that his whistleblowing activity was a contributing factor in the personnel action in dispute. 5 U.S.C. § 1221(e)(1); *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 11 (2006). Whistleblowing is a contributing factor if it affects an agency's decision to threaten, propose, take, or fail to take a personnel action. *Rubendall*, 101 M.S.P.R. 599, ¶ 11; *see* 5 C.F.R. § 1209.4(c). To prove that a disclosure was a contributing factor in a personnel action, the appellant need only demonstrate that *the fact of*, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Rubendall*, 101 M.S.P.R. 599, ¶ 11; *see Marano v. Department of Justice*, 2 F.3d 1137, 1143 (Fed. Cir. 1993).

¶40 In a 1994 amendment to the WPA, Congress established a knowledge/timing test that allows an employee to demonstrate that the disclosure

was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action "knew of the 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); *Rubendall*, 101 M.S.P.R. 599, ¶ 12; *see Perkins v. Department of Veterans Affairs*, 98 M.S.P.R. 250, ¶ 13 (2005). Although the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard, it is "one of the many possible ways" to satisfy the standard. *Rubendall*, 101 M.S.P.R. 599, ¶ 12. Once the knowledge/timing test has been met, the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue, even if after a complete analysis of all of the evidence a reasonable fact finder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action. *Id.*

¶41 In the present appeal, the appellant "assert[ed his] rights as a whistleblower" in his July 28, 2009 email to the Commissioner on the grounds that he had "report[ed] allegations of fraud, waste and abuse . . . to the State Department [OIG], the FBI, and/or other appropriate entities." 0725 AF, Tab 52, Ex. O. Although there is no evidence in the record that Commissioner Ruth knew the details contained within the appellant's written disclosures, the fact that the appellant told him that he had made the disclosures is sufficient to establish the "knowledge" element of the knowledge/timing test. *Marano*, 2 F.3d at 1143; *Rubendall*, 101 M.S.P.R. 599, ¶ 13; *see also Mausser*, 63 M.S.P.R. at 44-45 (even though the appellant never revealed purported disclosures to any authority, the contributing factor test would be satisfied if the deciding official was aware that the appellant had threatened to make the disclosures and thus perceived him as a whistleblower). Furthermore, the length of time between the appellant's disclosure and the agency's decision to terminate him - 3 days - is sufficiently proximate that a reasonable person could conclude that the disclosure was a

contributing factor in the termination. 0725 AF, Tab 52, Ex. R; *see, e.g.*, *Rubendall*, 101 M.S.P.R. 599, ¶ 13 (an interval of less than 6 months between the disclosure and the personnel action was sufficient to satisfy the knowledge/timing test); *but see Costello v. Merit Systems Protection Board*, 182 F.3d 1372, 1377 (Fed. Cir. 1999) (a 2-year gap between the disclosures and the allegedly retaliatory action was too long an interval to justify an inference of cause and effect between the two).

¶42 Consequently, the appellant has satisfied the knowledge/timing test and, thus, has established that the fact of his disclosure, and, consequently, his perceived whistleblower status, was a contributing factor in the agency's personnel action. As a result, the burden of proof shifts to the agency to establish by clear and convincing evidence that it would have taken the same personnel action absent the protected activity. *Rubendall*, 101 M.S.P.R. 599, ¶ 14; *Juffer*, 80 M.S.P.R. 81, ¶ 18. Any contrary evidence regarding a contributing factor may be considered in the context of the agency's clear and convincing evidence. *Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 13 (2009).

The agency established by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing.

¶43 If the appellant 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 the disclosure. 5 U.S.C. § 1221(e)(1), (2); *see Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 18 (2005). 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) (2009).

¶44 In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of

whistleblowing, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr*, 185 F.3d at 1323; *Azbill*, 105 M.S.P.R. 363, ¶ 17. The Board does not view these factors as discrete elements, each of which the agency must prove by clear and convincing evidence. Rather, the Board will weigh the factors together to determine whether the evidence is clear and convincing as a whole. *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, ¶ 11 (2010); *see Yunus v. Department of Veterans Affairs*, 84 M.S.P.R. 78, ¶ 27 (1999), *aff'd*, 242 F.3d 1367 (Fed. Cir. 2001).

¶45 Although we find, based on the knowledge/timing test, that appellant's protected whistleblowing activity was a contributing factor in his termination, we agree with the administrative judge's determination in the appellant's termination appeal that the agency demonstrated by clear and convincing evidence that it would have terminated the appellant absent his protected activity. 0725 ID at 7-23. Here, the administrative judge's findings on the charges are based either on undisputed facts or, in significant part, on his assessment of the credibility of the witnesses. *See* 0725 ID at 8-22. The appellant has not presented sound reasons for us to revisit those credibility determinations or the resultant findings. In this regard, we note that the Board "is not free simply to disagree with an administrative judge's assessment of credibility." *Chauvin v. Department of the Navy*, 38 F.3d 563, 566 (Fed. Cir. 1994). Rather, it must give deference to an administrative judge's credibility determinations where, as here, 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 v. Department of Justice*,

288 F.3d 1288, 1301 (Fed. Cir. 2002); *accord Walker v. Department of the Army*, 102 M.S.P.R. 474, ¶ 13 (2006).

Strength of the agency's evidence in support of its action

¶46 When applying the first *Carr* factor, the Board will consider the weight of the evidence that was before the agency when it acted. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1372 (Fed. Cir. 2001); *Phillips*, 113 M.S.P.R. 73, ¶ 12. Here, the administrative judge, based on a detailed discussion of the evidence and a thorough and persuasively reasoned analysis, was satisfied that the testimony and evidence presented at the hearing established that Commissioner Ruth terminated the appellant because "he was frustrated with the appellant's incorrect legal advice and his contentious, divisive memoranda," and that "although the appellant's whistleblowing disclosures coincided, either by chance or by design, with the end of the degenerating relationship between himself and Ruth, they did not cause the deterioration." 0725 ID at 22-23. We agree.

¶47 For example, the administrative judge credited Commissioner Ruth's testimony that he hired the appellant in January 2009, but that within about 3 months of hiring the appellant, he became concerned about the quality of the appellant's legal advice. HCD, Session 11; *see* 0725 ID at 10. Ruth testified that he first became concerned in or around April 2009 when he reviewed exchanges of emails between the appellant and other executive staff members that Ruth deemed to be inappropriate and unprofessional. HCD, Session 11. He further testified that in May 2009, in response to a question about the agency's monitoring of computers, the appellant wrote a memorandum urging that the agency's information technology (IT) staff be reorganized so that they would report directly to the Commissioner. *Id.; see* 0725 AF Tab 52, Ex. H. Ruth testified that he found the recommendation to be "strange" and unreasonable, that he approached the State Department OIG to ask for guidance on whether the

current IT organizational structure required a change, and that OIG told him that the appellant's advice was incorrect. HCD, Session 11.

¶48 Ruth further testified that in May 2009, the appellant prepared and issued a memorandum giving the opinion that Ruth's appointment to the position of Commissioner was unconstitutional and invalid. *Id.* Ruth said that he sought legal advice from the State Department, and that, in the State Department's opinion, the appellant was again wrong. *Id.*

¶49 Ruth also testified that in June 2009, the appellant issued a memorandum that addressed the organizational structure under the agency's Chief Administrative Officer, Diana Forti. *Id.; see* 0725 AF Tab 52, Ex. ZZ. Ruth characterized the memorandum as attacking Forti personally, asserting that she was a "mid-level administrator who does not possess these core competencies." HCD, Session 11; *see* 0725 AF Tab 52, Ex. ZZ at 7. Ruth testified that this memorandum was inappropriate, in part, because it was disseminated to all of the agency's executive staff without first providing Ruth an opportunity to review it. He stated that senior staff reacted with "a lot of resentment" because the memorandum raised questions about their competence, and that the memorandum contained the same information that the appellant had presented about the IT organization, which had been found to be incorrect. HCD, Session 11.

¶50 Ruth further testified that the appellant issued a second memorandum in June 2009 which addressed matters for which the Commissioner had made no request, and that this memorandum, too, was sent to all of the executive staff simultaneously, without providing Ruth the opportunity to review or approve its contents. HCD, Session 11; *see* 0725 AF, Tab 38, Ex. 4MM. Ruth asserted that he was concerned about the memorandum because it accused the agency of "gross mismanagement" by failing to adopt the organizational recommendations of the OIG. HCD, Session 11; *see* 0725 AF, Tab 38, Ex. 4MM at 3. Ruth stated that he was frustrated with the appellant because the memorandum recommended dramatic organizational changes in apparent ignorance of the fact that the

agency's organizational structure had already been modified to comply with the OIG's recommendation. HCD, Session 11.

¶51 Ruth further testified that he was disturbed by an additional memorandum issued by the appellant on July 14, 2009, concerning the appellant's review of proposed revisions to the agency's internal audit program. HCD, Session 11; *see* 0725 AF Tab 38, Subtab 4GG. Ruth stated that the appellant's memorandum again harshly criticized another agency employee personally, labeling him as incompetent and unethical, and recommended organizational changes that stripped that employee of virtually all his responsibilities and reassigned them either to the appellant himself or to other managers. HCD, Session 11. Ruth testified that the appellant's memorandum was "upsetting" because it was again issued without providing Ruth the opportunity to review it and that it went beyond simply commenting on the proposed revisions and presented extreme recommendations. *Id.*

¶52 Ruth explained that the appellant's June 2009 memoranda undermined one of his central objectives, to create a cohesive staff that could work together effectively to advance the agency's mission, because the memoranda were divisive and generated discord among the executive staff. *Id.* He also stated that the memoranda resulted in a grievance complaining of the appellant's "bullying" behavior as "intimidating and a clear demonstration of his abuse of power as the agency's legal advisor." *Id.*, *see* 0725 AF Tab 38, Subtab 4II.

¶53 Ruth further testified that, during the staff meeting on Monday, July 27, 2009, during which the appellant asserted that he was being excluded from the meetings of the Recovery Act oversight committee, Ruth made the firm decision that he would terminate the appellant—that "enough was enough," he was done with the appellant's contentiousness and attacks. HCD, Session 11.

¶54 The record also contains ample evidence that Ruth's concerns about the appellant's job performance predated the appellant's July 28, 2009 email claiming protected whistleblower status, thus indicating that the agency's stated

concerns about the appellant were not mere pretext. *See Phillips*, 113 M.S.P.R. 73, ¶ 20. For example, Brandt testified that, in mid-May 2009, during Ruth's visit to Washington D.C., Ruth showed her the appellant's memorandum questioning the legality of Ruth's appointment and expressed concerns to her about the appellant's work performance. HCD, Session 10. Brandt also testified that in late June 2009, she again talked to Ruth about two other memoranda written by the appellant, and that Ruth told her that the appellant was not a good fit for the agency, that he was not "a team player," that he regretted hiring the appellant, and that Ruth was considering terminating him. *Id.* She testified that Ruth showed her the SF-50 for the appellant's appointment and asked whether he could terminate the appellant "without cause" or on the basis of the June 2009 memoranda. *Id.* Brandt stated that Ruth asked her if there was someone in the State Department's legal offices that could provide employment law advice. *Id.* Brandt indicated that the same day she met with Ruth in June 2009, she talked to the State Department's Deputy Director for Employment Law, Richard Visek, and asked him if he could assist Ruth. Brandt said that Visek agreed to provide help and she provided the contact information to Ruth. *Id.*

¶55 Ruth testified that he actually began drafting the appellant's termination letter on July 18, 2009, ten days prior to the date upon which the appellant notified him that he had made allegedly protected disclosures. HCD, Session 11. As the administrative judge recognized, 0725 ID at 22, the agency's computer meta-data corroborates Ruth's testimony, 0725 AF Tab 38, Subtab 4FF.

¶56 Ruth further testified that on July 20, 2009, he spoke with Human Resources Director Kevin Petz about the damaging effects of the appellant's behavior on Ruth's efforts to unify the agency's managers, and told Petz that he needed information about how to terminate the appellant. HCD, Session 11. Although Petz testified that he did not remember the exact date of his conversation with Ruth, he stated that it might have occurred on July 20 or 21, 2009. HCD, Session 9. Petz testified that Ruth entered his office and told him

that he was thinking about terminating the appellant, and that during this conversation, Ruth stated that he wanted information about the procedures for terminating the appellant and what rights the appellant had. *Id.* Petz also testified that he offered to obtain this information. *Id.*[14] Thus, Petz's hearing testimony corroborates Ruth's testimony in this regard.

¶57 Ruth testified that it was not until he traveled to Washington D.C. on July 29, 2009, that he was actually able to talk to Visek and a State Department personnel specialist. HCD, Session 11. Ruth testified that he did not remember exactly when he received the appellant's July 28th email claiming to have made disclosures of fraud, waste and abuse, but he assumed it was in his possession when he got to Washington D.C. *Id.* Ruth stated that Visek advised him that he could terminate the appellant with a letter and that the appellant could not appeal the termination because he had less than 1 year of service. *Id.* Ruth stated that he was advised to simply present the appellant with a written notice of the termination and to not discuss the action. *Id.* Ruth testified that the first draft of the termination letter was considerably longer than the notice he actually delivered to the appellant on July 31, 2009, but that Ruth had revised it after the State Department attorneys advised him to make it "short and to the point." *Id.*

¶58 Both Ruth and Brandt testified that, while Ruth was in Washington D.C., Ruth had a meeting with the OIG because of the appellant's July 28th email claiming that he had filed, or would soon file, allegations of fraud, waste and abuse. *Id.;* HCD Session 10. Ruth explained that he wanted the OIG to know that he intended to proceed with the termination action. HCD, Session 11. Ruth and Brandt testified that, at the time of the meeting, Ruth had not seen the appellant's memorandum of disclosures, nor did he have any indication what they were. HCD, Sessions 10-11. Brandt also testified that the IG stated that his

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[14] Petz also testified that, after his conversation with Ruth, he informed the appellant that Ruth was considering terminating him. *Id.*

office had not received any disclosures from the appellant but that they would follow up with any disclosures filed.

¶59 Ruth and Petz's testimony establishes that upon his return to El Paso, Ruth called Petz to set up a time to meet with the appellant. HCD, Sessions 9. 11. Both Ruth and Petz described the meeting on July 31, 2009, with the appellant as very brief, and that Ruth stated that he simply announced to the appellant that he had a letter notifying him that he was being terminated and that it was not negotiable. *Id.*

¶60 Based on the foregoing, we agree with the administrative judge's conclusions that "Ruth's dissatisfaction with the appellant was corroborated by Brandt, with whom he confided, and from whom he sought referrals for government employment law advice because he could not get advice from his own lawyer, whom he sought to fire. Ruth's endeavor to get advice on how to remove the appellant began in May 2009 and continued at every opportunity until the termination notice was delivered." 0725 ID at 22. There is nothing in 5 U.S.C. § 2302(b)(8) that required Ruth to change his decision once he learned that the appellant had made his disclosures. *See O'Shea v. Department of Transportation*, 65 M.S.P.R. 512, 515 (1994).

¶61 The appellant argues extensively about the quality of his work and the basis for his belief in the truthfulness of the allegations set forth in his disclosures. *E.g.*, 0725 PFR at 113-25. However, in an IRA appeal, the relevant inquiry is not whether the appellant committed any actual misconduct, but whether the agency had strong evidence to support its personnel action.[15]

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[15] After the close of the record on review, the appellant filed a "Submission of New Evidence Relevant to the Appeal" in which he submits evidence and argument that allegedly "undermines both the testimony of . . . Ruth and the findings of the Administrative Judge . . . as to the Agency's claims that [the appellant's] legal opinions were the reasons for his removal." 0725 PFR File, Tab 5 at 4. Specifically, the appellant contends that information on the agency's public website indicates that the current Commissioner has adopted some of the appellant's recommendations, which he

Phillips, 113 M.S.P.R. 73, ¶ 15; *Yunus*, 84 M.S.P.R. 78, ¶ 12. The appellant also argues that "[n]ot coincidentally, each of the four [memoranda] in question deals with a significant aspect of fraud, waste or abuse included in [his] July 28 protected disclosures." 0725 PFR File, Tab 1 at 113. As our reviewing court has recognized, however, "[t]he WPA is not a weapon in arguments over policy or a shield for insubordinate conduct." *LaChance*, 174 F.3d at 1381. Thus, the fact that the appellant's disclosures concerned the matters addressed in his legal memoranda did not foreclose Ruth from considering the memoranda in determining to terminate the appellant. The evidence as a whole supports a finding that the appellant's conduct was problematic under the circumstances. For all these reasons, we find that the agency had a strong basis for directing the appellant's termination.

Motive to Retaliate

¶62 When applying the second *Carr* factor, the Board will consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision. *See Carr*, 185 F.3d at 1326; *Phillips*, 113 M.S.P.R. 73, ¶ 21; *Mangano v. Department of Veterans Affairs*, 109 M.S.P.R. 658, ¶ 30 (2008). In this case, the relevant agency officials are Commissioner Ruth, who issued the termination

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claims demonstrates that the agency would not have removed him but for his protected whistleblowing activity. *Id.* at 5-9. The Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Evidence offered to impeach a witness's credibility, however, is not generally considered new and material. *Bucci v. Department of Education*, 42 M.S.P.R. 47, 55 (1989). More important, the question here is not ultimately whether the appellant or the agency was correct regarding their legal and policy differences, but whether the agency had strong evidence to support its personnel action. Because we conclude that the agency had such strong evidence, the appellant's submission does not change the result.

letter, as well as Brandt and Petz, whom the Commissioner consulted about the termination.

¶63 As stated above, Commissioner Ruth testified that before he hired the appellant, he was aware that the appellant had worked for the Department of the Interior and that the appellant had previously filed whistleblower disclosures regarding the Department of the Interior. HCD, Session 11. Ruth testified that he decided to hire the appellant knowing of his history as a whistleblower. *Id.* We agree with the administrative judge that, under these circumstances, "the mere act of making disclosures, regardless of their substance, does not appear to be a motive for Ruth to retaliate." 0725 ID at 22. In addition, there is no evidence that Commissioner Ruth or Brandt was aware of the particulars of the disclosures at the time the appellant was terminated. Indeed, in his July 28, 2009 memorandum to the State Department's OIG setting forth his disclosures, the appellant expressly stated that that "these disclosures should not be referred to the Commissioner." 0725 AF, Tab 52, Ex. E. Thus, the substance of the disclosures themselves could not have constituted a motive for Ruth to retaliate. Therefore, we find that, to the extent that the appellant's July 28, 2009 email to the Commissioner created a retaliatory motive for Commissioner Ruth, that motive was slight. Furthermore, to the extent that Commissioner Ruth consulted Brandt or Petz concerning the appellant's termination, as discussed above, those consultations occurred prior to the time the appellant made his disclosures. Thus, to the extent that Brandt or Petz could be deemed agency officials who influenced the decision, neither Brandt not Petz had a motive to retaliate against the appellant because of his disclosures.[16]

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[16] Although the appellant states that he had prepared a draft of his whistleblowing disclosures and shared them with Petz and another agency employee, Al Riera, there is no claim that Riera was consulted or had any role in the appellant's termination. 0725 PFR File, Tab 1 at 138; *see* 0725 AF Tab 52, Ex UUU. Moreover, the appellant does not claim that Petz had any motive to retaliate against him as a result of his awareness of the appellant's draft disclosures.

¶64 Considering all of the evidence, although there was some motive on the part of Commissioner Ruth to retaliate against the appellant, in light of Ruth's lack of awareness of the particulars of the disclosures themselves, we find that his motive to retaliate was not strong. Accordingly, we find that the evidence of such motive does not outweigh the strength of the evidence in support of the agency's termination decision.

¶65 Finally, the record contains no evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. We agree with the administrative judge that Riera, who the appellant identified as a comparator employee, was not similarly situated. 0725 ID at 20-21. Accordingly, we find that the third *Carr* factor is not a significant factor for the Board's analysis in the instant appeal.

¶66 Weighing the three *Carr* factors against one another, we find that the agency established by clear and convincing evidence that it would have terminated the appellant notwithstanding any protected disclosures. The primary decision-maker lacked a strong retaliatory motive, and the agency had a strong basis to terminate the appellant.

¶67 Thus, notwithstanding the administrative judge's failure to make findings on first two prongs of the WPA analysis, he correctly found that the agency would have terminated the appellant notwithstanding his protected disclosures.

ORDER

¶68 Accordingly, for the forgoing reasons, the initial decision in Docket No. DA-1221-10-0078-W-1 is VACATED and the initial decision in Docket No. DA-1221-09-0725-W-1 is AFFIRMED AS MODIFIED by this Opinion and Order. The appeals in Docket Nos. DA-1221-10-0078-W-1 and DA-1221-09-0725-W-1 are joined, and the appellant's request for corrective action in these joined appeals is DENIED. 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 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.