UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 12

Docket No. AT-1221-10-0216-W-2

Jacques A. Durr,

Appellant,

v.

Department of Veterans Affairs,

Agency.

February 8, 2013

Jacques A. Durr, Seminole, Florida, pro se.

Tanya Burton, Esquire, Bay Pines, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that denied his request for corrective action in this individual right of action (IRA) appeal. For the following reasons, we GRANT the appellant's petition for review, VACATE he initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 The appellant, a Physician at the Bay Pines, Florida Veterans Administration Healthcare System, filed a Board appeal asserting that, in reprisal for whistleblowing, the agency delayed converting his temporary appointment to a permanent appointment. Initial Appeal File (IAF), Tab 32; Refiled Appeal File (RAF), Tab 20 at 3. The appellant alleged that, if the agency had not unreasonably delayed his conversion until November 12, 2006, his subsequent termination from the agency on November 7, 2008, would not have been a probationary termination, but instead would have been a termination of an employee who had earned pre-termination procedural rights and post-termination appeal rights to the Board. IAF, Tab 32 at 5, 7-8.

¶3 After finding that the Board had jurisdiction over the appeal and holding a hearing, the administrative judge denied the appellant's request for corrective action. RAF, Tab 37, Initial Decision (ID) at 2, 13. The administrative judge held that the appellant made a protected disclosure in a September 10, 2003 letter he sent to the Office of Special Counsel (OSC) regarding his malfunctioning computer and the agency's malfunctioning Local Area Network (LAN), which he reasonably believed evidenced a substantial and specific danger to patients and thus public health or safety. ID at 2-4. The administrative judge further assumed, for purposes of her decision, that the appellant made a protected disclosure in 2003 when he placed his non-functioning computer in a trash bin as a symbolic act to call attention to his complaints regarding the hospital's malfunctioning computer system, and when he left a voice mail message on the answering machine of the Information Resources Management Service (IRMS) informing them of what he had done. ID at 2-3, 10. The administrative judge also found that a delay in the appellant's conversion or permanent appointment was a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)(ix). ID at 4-5.

¶4 The administrative judge further noted that the appellant had worked for 19 years as a Physician with the agency under a series of temporary appointments

because he was not a U.S. citizen and not eligible to hold a permanent appointment. ID at 5. After becoming a U.S. citizen in June 2006, the appellant requested in July 2006 that his appointment be converted to a permanent position. *Id*. The administrative judge found that the appellant's service chief recommended in July 2006 to the chief of medicine that the conversion take place, but the chief of medicine waited approximately 1 month before submitting the request to the chief of staff because of concerns the chief of medicine had regarding the appellant's interpersonal skills and behavior with staff, as well as the chief of medicine's attempts to confirm or refute such reports. ID at 5-7. The administrative judge held that, once the chief of medicine referred the matter to the chief of staff on August 4, 2006, with a recommendation that the appellant be converted, the chief of staff kept the request until October 23, 2006. ID at 7-9. The chief of staff then forwarded the request to the Privileging and Credentialing Section for verification of licenses and privileges, which forwarded it to the Professional Standards Board (PSB), where it was approved on November 1, 2006, signed off on by the Director of Bay Pines on November 2, 2006, and made effective November 12, 2006. ID at 8-9. The administrative judge found that the chief of staff testified that he did not concur in the recommendation to convert the appellant because of the appellant's "recent track record" of inappropriately taking salary from a university while working for the agency, making inappropriate notations on medical notes, and verbally abusing a patient. ID at 8. The administrative judge found that the PSB, however, determined that the appellant had had no incidents with patients or staff for several months and should be converted to permanent status. *Id*.

¶5 Regarding the contributing factor element of the appellant's whistleblower claim, the administrative judge held that there was "no evidence that anyone having any input or involvement in the decision to remove [sic] the appellant had knowledge of the appellant's protected activity, *i.e.*, his September 2003 letter to the OSC." ID at 10. Thus, the administrative judge found that "there is no

evidence that his actual protected activity had any bearing on the process to convert him to permanent status." *Id.* The administrative judge further held that, even assuming that the appellant made a protected disclosure in 2003 when he placed his non-functioning computer in a trash bin and left a voice mail message for the IRMS, and even assuming that this activity was a contributing factor in the length of time it took the agency to process his request for permanent status, the agency proved by clear and convincing evidence that it would have processed the appellant's request in the same manner absent the activity. ID at 2-3, 10.

¶6 In this regard, the administrative judge found that there was no evidence that the appellant's conversion took an inordinate amount of time because conversions generally took 4 to 6 months and the appellant's conversion fell within that time frame. ID at 10-11. The administrative judge also found that, although the chief of medicine took 1 month to forward the appellant's conversion request, he credibly testified that he had concerns regarding the appellant unrelated to the computer incident, including disrespectful and disruptive behavior with staff and a lack of interpersonal skills. ID at 11. The administrative judge noted that the chief of medicine's testimony was corroborated by another witness, that the chief of staff credibly testified that he had legitimate concerns regarding the conversion, and that the agency's evidence regarding the time it took to process the appellant's request was therefore strong. ID at 11-12. The administrative judge found that the acting officials did not have a strong motive to retaliate against the appellant and that, although the chief of medicine had heard about the computer incident, there was no evidence that he was motivated to slow the appointment process because of it. ID at 12. Finally, the administrative judge found that the chief of medicine and the chief of staff were not involved in the computer incident because they were not at the facility at the time and that there was no evidence that similarly-situated employees who had not engaged in whistleblowing activity were treated differently. ID at 12-13.

ANALYSIS

Clear and Convincing Evidence Test

¶7 The appellant asserts on review that there are numerous reasons why the agency's evidence in support of its delay was not strong and why the agency otherwise did not prove by clear and convincing evidence that it would have taken the same actions in the absence of his disclosures. As set forth more fully below, we find that this case must be remanded for further proceedings consistent with the court's decision in *Whitmore v. Department of Labor*, 680 F.3d 1353, 1357 (Fed. Cir. 2012), because all the pertinent evidence was not weighed.

¶8 Federal agencies are prohibited 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, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 2302(a)(2), (b)(8); *see Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 16 (2012). In order to establish a prima facie case of whistleblower reprisal, the employee must prove, by preponderant evidence, that he made a protected disclosure and that the disclosure was a contributing factor in a personnel action against him. 5 U.S.C. § 1221(e)(1); *Jenkins*, 118 M.S.P.R. 161, ¶ 16. If the appellant makes out a prima facie claim of whistleblower reprisal, the agency is given an opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *Jenkins*, 118 M.S.P.R. 161, ¶ 16. 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 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 v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Jenkins*, 118 M.S.P.R. 161, ¶ 16.

¶9 The appellant challenges the agency's claim that legitimate concerns regarding his behavior caused the delay in his conversion because he would still have had to complete a 2-year probationary period upon his conversion to a permanent appointment. Petition for Review (PFR) File, Tab 1 at 6 n.3, 32-33. The appellant further contends that the agency changed its reason for the delay, from initially indicating on appeal that there was no delay because the normal conversion process takes that amount of time, to later claiming that there was a delay caused by concerns relating to the appellant's behavior. *Id*. at 9-10; *cf. Doe v. Pension Benefit Guaranty Corporation*, 117 M.S.P.R. 579, ¶ 45 (2012) (an appellant may demonstrate that an articulated nondiscriminatory reason is a pretext for discrimination by relying on, among other things, an inconsistency in the employer's explanation). In addition, the appellant asserts that the agency's claim that there were concerns about his interpersonal skills was unsubstantiated, given that there were no complaints in 2006 regarding his interpersonal skills, his proficiency reports had rated him highly on personal qualities until well after the alleged issues arose, the first indication of such a problem did not appear until 2008, and the agency relied upon a 2002 report of contact that did not include his response and the affidavit of a direct witness and that resulted in his exoneration by an investigator. PFR File, Tab 1 at 12-13. In this regard, the record reflects that, for the period from September 6, 2001, to September 6, 2002, the appellant received an "Outstanding" rating on his proficiency report in the category of "Personal Qualities," which includes emotional stability, dependability, relations with staff and community, eliciting cooperation, handling groups, and adherence to ethical standards. IAF, Tab 19 at 15. For the period from September 6, 2002, to September 6, 2003, the appellant received a "High Satisfactory" rating on his proficiency report in the "Personal Qualities" category. *Id*. at 18. For the period

from September 6, 2003, to September 6, 2004, and from September 6, 2004, to September 6, 2005, the appellant received "Outstanding" ratings on his proficiency reports in the "Personal Qualities" category. *Id*. at 21, 23. He received "High Satisfactory" category ratings on his proficiency reports in the "Personal Qualities" category for the periods from October 1, 2005, to September 30, 2006, and October 1, 2006, to September 30, 2007. *Id*. at 25-27.

¶10 The appellant also contends that the agency's claim that it had "concerns" regarding his behavior was not credible because on May 17, 2006, less than 2 months before he requested the conversion, the PSB recommended that he receive the maximum 2-year re-privileging and re-credentialing and that this determination by the PSB took only 1 month. PFR File, Tab 1 at 13. The appellant contends that "[t]here is nothing in the record that indicates a single event after May 17, 2006, but before my June 2006 request for conversion, that could have brought alleged 'concerns' to management relating to interpersonal skills, communication, professionalism, that had not already been reviewed and rejected as invalid by the PSB in May when my privileges were renewed for a full two years." *Id*. at 16. Thus, the appellant contends that, if there were concerns, they were necessarily presented, addressed, and rejected in May 2006. *Id*.

¶11 Similarly, the appellant asserts that the administrative judge gave too much weight to unspecified concerns that amounted to unsupported hearsay and did not attempt to verify the chief of staff's allegations that (1) a few months before requesting conversion the appellant verbally abused a patient to whom the chief of staff had to write a letter of apology, and (2) the appellant improperly worked for "salaried services" at a university while on agency time. PFR File, Tab 1 at 34. The appellant addresses these allegations on review, claiming that the agency did not discipline him or draft a report of contact relating to alleged patient abuse, that the agency took no action against him despite an alleged zero-tolerance policy against verbal abuse of co-workers and patients, that the PSB had recommended a renewal of his privileges on May 17, 2006, despite any

such alleged abuse, and that if he had worked for pay from an outside entity while receiving a government salary he would have been prosecuted for a felony and possibly deported. *Id*. at 34-36. The appellant contends that, if he had been given proper notice that the latter accusation was going to be an issue in this case, he would have presented witnesses and documents showing that an Inspector General investigation in 2005 regarding alleged payments to the appellant for teaching at a university was dismissed for lack of evidence because the appellant merely taught there for free one afternoon per week. *Id*. at 36. The appellant contends that the chief of staff knew that the agency's prior chief of staff and service chief had permitted the appellant to volunteer at the university and that the administrative judge considered these allegations as "factual" without asking him about them or permitting him to submit evidence refuting them. *Id*. at 37-38.

¶12 The appellant asserts that the administrative judge misinterpreted the testimony of the chief of medicine regarding the reason for his approximately 1-month delay in processing the appellant's conversion request. PFR File, Tab 1 at 39. In this regard, the appellant contends that, although the chief of medicine testified on cross-examination that the delay was caused by his need to ascertain whether the appellant's supervisor agreed with the conversion, the administrative judge found that his delay was caused by concerns he had with the appellant's character and behavior. *Id*. In addition, the administrative judge found that the appellant claimed that the agency had to spend $1.5 million to fix the problem he had complained about regarding the computer system, ID at 6, and the appellant asserted that several witnesses testified that the chief of medicine and the chief of staff believed that the appellant was never properly punished for his alleged whistleblower activity involving his placement of a computer in a trash bin, PFR File, Tab 4 at 13. These allegations were not addressed in determining whether the relevant officials were motivated to retaliate against the appellant.

¶13 In addition, the appellant claims that the administrative judge overlooked the terms of a July 22, 2009 settlement agreement under which the agency agreed

that the appellant did not engage in improper conduct when he complained about the problems with the LAN computer system, the nonfunctioning personal computer, and the inadequate support from the agency's IRMS and that there was no finding of wrongdoing by the appellant regarding his placement of the computer in a wastepaper basket or any other wrongdoing associated with these incidents. PFR File, Tab 1 at 24. The appellant contends that during the hearing the agency's attorney cast these acts as reprehensible and insinuated that they were worthy of discipline, thus lending credence to the notion that the appellant was disruptive and that there was a basis for his delayed conversion. *Id*. at 24-25.

¶14 In *Whitmore*, 680 F.3d at 1357, the court held that the Board excluded or ignored evidence necessary to adjudicate the whistleblower retaliation claim, vacated the Board's decision, and remanded for further fact-finding wherein all of the relevant evidence would be considered pursuant to the correct legal standards. The court held that whether evidence is sufficiently clear and convincing to carry an agency's burden of proving that it would have taken the same personnel action in the absence of the whistleblowing disclosures cannot be evaluated by looking only at the evidence that supports the conclusion reached. *Id*. at 1367-68. Thus, "[e]vidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Id*. at 1368. The court noted that "it is error for the Board not to evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately," and that "[i]f considerable countervailing evidence is manifestly ignored or disregarded in finding a matter clearly and convincingly proven, the decision must be vacated and remanded for further consideration so that all the pertinent evidence is weighed." *Id*. In considering the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, the court noted that "[t]hose responsible for the agency's performance overall may well be motivated to retaliate even if they are not directly implicated

by the disclosures, and even if they do not know the whistleblower personally, as the criticism reflects on them in their capacities as managers and employees." *Id*. at 1370. The court required the Board to reconsider the evidence under a more expansive view of what suffices to evidence the existence or strength of a retaliatory motive so that all the relevant evidence may be properly weighed. *Id*. at 1372.

¶15 We find that the administrative judge did not fully address the appellant's arguments and evidence in this case, including the arguments and evidence set forth above, which lend support to the appellant's claim that the agency did not prove by clear and convincing evidence that it would have taken or failed to take the same personnel action in the absence of his disclosures. Because such issues may involve resolving conflicting evidence and testimony based upon the demeanor of witnesses, the administrative judge is in the best position to resolve such questions. *See Somuk v. Department of the Navy*, 117 M.S.P.R. 18, ¶ 12 (2011). Accordingly, we vacate the initial decision and remand the appeal for further adjudication consistent with this Opinion and Order and *Whitmore*. *See Massie v. Department of Transportation*, 118 M.S.P.R. 308, ¶¶ 7-8 (2012).

Protected Disclosures

¶16 The appellant asserts that the administrative judge improperly "dissociated" his "symbolic" placement of a non-functioning computer in a trash can outside his office from its whistleblowing context by finding that only his September 10, 2003 letter to OSC was a protected disclosure. PFR File, Tab 1 at 22-23. In this regard, the appellant contends that the U.S. Court of Appeals for the Federal Circuit, in *Durr v. Merit Systems Protection Board*, 297 F. App'x 966 (Fed. Cir. 2008), held that the Board's decision improperly focused on the appellant's September 10, 2003 letter to OSC and that the Board conceded before the court that the appellant had made nonfrivolous allegations of protected disclosures occurring before the personnel action, including his voice mail message to the IRMS. PFR File, Tab 1 at 23. The appellant claims that the

agency perceived him as a whistleblower because witnesses testified that management believed he had not been sufficiently disciplined for the computer incident. *Id*. at 24 n.17.[2]

¶17 The administrative judge initially found in a summary of a telephonic prehearing conference that "[t]he Federal Circuit has previously found that the appellant's 2003 disclosure regarding his malfunctioning computer and LAN network is protected . . . . That issue is, therefore, settled and will not be relitigated in the instant appeal." IAF, Tab 28 at 1. The administrative judge then set forth a list of issues in the case that did not include the issue of whether the appellant made a protected disclosure. *Id*. at 2-3. After the hearing but before the close of the record below, however, the administrative judge clarified her order, noting that the Federal Circuit had previously found that the appellant had only made a nonfrivolous allegation that he made a protected disclosure to the IRMS with respect to the non-functioning computer system. RAF, Tab 30 at 1. The administrative judge informed the parties that she would consider the issue of whether the appellant established by preponderant evidence that he engaged in whistleblower activity regarding any disclosure he made in connection with the agency's non-functioning computer system and that the parties could address the issue in their post-hearing briefs. *Id*. at 2. The appellant objected to the order, asserting that he would need additional witnesses and "material" to meet the preponderance of the evidence standard and that he was concerned that the administrative judge had indicated that the appellant's disclosure to the IRMS

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[2] Whether the agency perceived the appellant as a whistleblower was not identified by the administrative judge as an issue in this case. IAF, Tab 28 at 2-3. Thus, even assuming that the appellant exhausted such a claim before OSC, he may not raise it on review. *See Crowe v. Small Business Administration*, 53 M.S.P.R. 631, 634-35 (1992) (an issue is not properly before the Board when it is not included in the administrative judge's memorandum summarizing the prehearing conference, which states that no other issues will be considered, unless either party objects to the exclusion of that issue in the summary).

regarding the agency's non-functioning computer system was a mere expression of frustration for the inconvenience it caused him. RAF, Tab 31 at 4-5.

¶18 Because the appellant did not have a full opportunity to present evidence and argument proving by preponderant evidence that he reasonably believed that he made a protected disclosure in 2003 when he placed a non-functioning computer in the trash and left a message on the voicemail of the IRMS, the appellant is entitled to a supplemental hearing on that issue on remand if he so requests. *See Gath v. U.S. Postal Service*, 118 M.S.P.R. 124, ¶¶ 12-13 (2012). The administrative judge must determine on remand whether the appellant established by preponderant evidence that he made a protected disclosure in this regard, and whether such a disclosure was a contributing factor in the delayed conversion. *See Massie*, 118 M.S.P.R. at 312, Order.

¶19 The appellant further contends that it was impossible for new agency management not to have known that he had an ongoing whistleblower case given his litigation before the Board. PFR File, Tab 1 at 6 n.2. The appellant's mere claim that it was impossible for "management" in general not to know of his 2003 disclosure to OSC does not establish error in the administrative judge's specific finding that the appellant did not prove by preponderant evidence that the chief of medicine and the chief of staff, who were involved in the alleged delay in the appellant's conversion, were not aware of that disclosure.

Procedural Matters

¶20 The appellant asserts on review that the administrative judge improperly admitted into evidence an agency exhibit introduced at the hearing. PFR File, Tab 1 at 8. However, the appellant did not object to the introduction of this exhibit at the hearing. Hearing Transcript (HT) at 210-11. Therefore, he is precluded from objecting to the introduction of the exhibit at this time. *See Brown v. Department of the Navy*, 57 M.S.P.R. 621, 625 (1993).

¶21 The appellant also submits for the first time on review affidavits from two co-workers who participated in the PSB meetings in question. PFR File, Tab 1 at

47-50. The appellant contends that these affidavits constitute new and material evidence because an "odd" sentence in the aforementioned exhibit to which he did not object at the hearing caused him to seek out and question those co-workers after the hearing. *Id.* at 14-16. The appellant did not, however, include those co-workers on his list of requested witnesses, IAF, Tab 21 at 15-17, or otherwise introduce relevant evidence from them before the record closed below. Thus, even assuming that the affidavits are material, the appellant has not shown that the information included in those affidavits was unavailable before the record closed below despite his due diligence. *See Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989); 5 C.F.R. § 1201.115(d). The appellant asserts that the administrative judge improperly permitted three witnesses to testify to matters beyond the scope of their expected testimony. PFR File, Tab 1 at 18-19. However, the appellant effectively waived his right to challenge this testimony on review because he did not object at the hearing to any portion of the testimony of these witnesses. HT at 198-234, 282-92; *see Eikenberry v. Department of the Interior*, 26 M.S.P.R. 250, 253 (1985).

¶22 The appellant asserts that the administrative judge's in camera review of the PSB minutes was a prohibited ex parte communication because it concerned the merits of the appeal and the appellant did not have an opportunity to participate in the in camera review. PFR File, Tab 7 at 4-5. The Board's regulations generally prohibit oral or written communications between the adjudicating administrative judge and an interested party to a case before him, when those communications concern the merits of a matter before the Board for adjudication, and when they are made without providing the other party to the appeal with an opportunity to participate. *See* 5 C.F.R. §§ 1201.101, 1201.102.[3]

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[3] The amendment to the Board's regulation at 5 C.F.R. § 1201.101(b)(2), which took effect November 13, 2012, is immaterial to our decision because the appellant has alleged an ex parte communication with the adjudicating judge, as opposed to a mediator or settlement judge. *See* 77 Fed. Reg. 62,367 (Oct. 12, 2012).

In camera review of sensitive material sought in discovery may be appropriate before the administrative judge determines the extent to which release of the material to the party requesting it is appropriate. *Fickie v. Department of the Army*, 86 M.S.P.R. 525, ¶ 14 (2000). An agency's request for such a review, however, and any request for a protective order, concern the merits of the appeal, and they therefore should not be made on an ex parte basis without notice to the appellant. *See id*. When a communication is made to an administrative judge in violation of the general prohibition on ex parte communications, the communication—or a memorandum stating the substance of it, if the communication was made orally—is to be made part of the record, the administrative judge is to notify the parties of the violation in writing, and she is to give the parties 10 days to file a response concerning the matter. 5 C.F.R. § 1201.103(a), (b). It appears that the administrative judge may not have followed these regulations in this case. Thus, to the extent the administrative judge has not already done so, she shall on remand retroactively apply the Board's regulations relating to ex parte communications.

¶23 Finally, after the record closed on review, the appellant filed a request for leave to submit a decision issued by the U.S. Court of Appeals for the 11th Circuit, which affirmed a finding by a U.S. district court that the same agency officials involved in this case created a retaliatory hostile work environment for two other agency doctors who filed equal employment opportunity complaints at the appellant's medical center. We deny the appellant's request. *See* 5 C.F.R. §§ 1201.114(a)(5), 1201.114(k). To constitute new and material evidence, the information contained in the document, not just the document itself, must have been unavailable despite due diligence when the record closed. *Grassell*, 40 M.S.P.R. at 564. The appellant has not shown that the evidence relied upon by the court in its decision was unavailable despite his due diligence when the record closed in this case. *See Harding v. Department of Veterans Affairs*, 115 M.S.P.R.

284, ¶ 12 (2010), *aff'd*, 451 F. App'x 947 (Fed. Cir. 2011); *Agbenyeke v. Department of Justice*, 111 M.S.P.R. 140, ¶ 13 (2009).

ORDER

¶24 Accordingly, we VACATE the initial decision and REMAND this appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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