UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

SHARON HELMAN,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
DE-0707-15-0091-J-1

DATE: December 22, 2014

Debra L. Roth, Esquire, Washington, D.C., for the appellant.

James P. Garay Heelan, Washington, D.C., for the appellant.

Julia H. Perkins, Esquire, Washington, D.C., for the appellant.

Bradley Flippin, Esquire, Nashville, Tennessee, for the agency.

Hansel Cordeiro, Esquire, Washington, D.C., for the agency.

Jeffrey T. Reeder, Esquire, Dallas, Texas, for the agency.

Kimberly Perkins McLeod, Esquire, Washington, D.C., for the agency.

Thomas R. Kennedy, Esquire, Denver, Colorado, for the agency.

BEFORE
Stephen C. Mish
Chief Administrative Judge

DECISION

On December 1, 2014, the appellant timely filed this appeal challenging the agency's November 24, 2014 action removing her from her position as the Senior

Executive Service (SES) Director of its Phoenix, Arizona Medical Center, and from the federal civil service altogether. Appeal File (AF), Tab 1. The Board has jurisdiction over the appeal pursuant to 38 U.S.C. § 713(d)(2)(A).

For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Outstanding Ruling

Due to issues with the agency's discovery responses, the parties were ordered to brief the issue of whether an adverse inference should be drawn against the agency with regard to those responses. Having considered the parties' arguments, no adverse inference will be drawn against the agency. The shortened process of 38 U.S.C. § 713 is new. Expecting the agency to accomplish in a few days what normally requires several weeks or more to do correctly is simply not realistic.[1] By that same token, although as ruled previously, the appellant could be subject to an adverse inference for not responding to the agency's discovery requests by invoking the Fifth Amendment right against self-incrimination, she will not be. She is caught between a Scylla and Charybdis of criminal and civil processes focused on overlapping events. Therefore, both parties' claims are decided based on the evidence they adduced to support them.

Findings of Fact

The preponderant evidence of record establishes the following.[2] Over the course of a decade, the agency's Office of Inspector General (OIG) publicly reported a variety of concerns with agency medical care facilities across the country, which included allegations of altered patient appointment lists, and the

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[1] As the agency gains more experience in these cases, it may be expected to have a better system for responding to discovery in place.

[2] Record citations are to the pagination applied by the Board's electronic docketing system.

failure to use electronic wait lists (EWL). (AF, Tab 48, p. 16). Indeed, since 2005, the OIG has issued at least 18 reports identifying deficiencies in scheduling at the local and national level, (AF, Tab 6, p. 38).

Specifically with respect to Phoenix VA Health Care System (PVAHCS), on September 2, 2006, the OIG wrote a memorandum to the then-Director regarding allegations of altered patient wait times and the failure to use the EWL (AF, Tab 41, p. 165). In it, the OIG concluded that PVAHCS had engaged in an "accepted practice" of altering appointments to avoid wait times greater than 30 days in an effort to improve performance measures (*Id.*).

The appellant was first appointed to the Senior Executive Service in 2007 as the director of an agency facility in Walla Walla, Washington. (AF, Tab 18, SF-50, p. 35). She later transferred to Hines, Illinois as the director of the agency's facility there. (*Id.* p. 33). On February 26, 2013, the appellant transferred to Phoenix and became the PVAHCS Director. (*Id.*). At that point, her direct supervisor was Veterans Integrated Service Network (VISN) 18 Director Susan Bowers. (AF, Tab 71, Appellant's Merits Brief, Bowers Decl. p. 76).

As the SES Director of the PVAHCS, the appellant was responsible for a wide range of oversight of operations. (AF, Tab 6, Performance Assessment, pp. 24-34). For example, the appellant was generally tasked with broad goals such as developing an organizational vision, balancing change and continuity, fostering high ethical standards, and the like. (*Id.*, pp. 25-26). These broad goals were further fleshed out by more specific directives such as, "The SE will increase high performing inter-professional team-based care to achieve patient-driven health care and coordination of care across all care settings, both within and outside VHA." (*Id.*, p. 28). The appellant was also generally responsible for leading the staff and, when necessary, holding employees accountable for appropriate levels of performance and conduct. (*Id.*, p. 25).

Very early on after the appellant moved to Phoenix, likely the evening before her first official day of work, she spoke with Dr. Katherine Mitchell, who, at the time, was the Director of the PVAHCS Emergency Department (ED). (AF, Tab 8, Mitchell Interview; pp. 61-62). During that meeting, Dr. Mitchell reported to the appellant that the ED was so understaffed and so dangerous that, in her opinion, it needed to be shut down. (*Id.*, pp. 23, 61-62, 63). Nevertheless, according to Dr. Mitchell, the appellant did not follow up with her on the matter, although, for her part, Dr. Mitchell did not follow up with the appellant, either. (*Id.*, p. 65). In any event, Dr. Mitchell continued to raise the issue of ED staffing with others, as reflected in her June 6, 2012 memo to ED Nurse Manager Catherine Gibson regarding her concerns with the conduct and insufficient skill level of a particular ED nurse during a busy night. (AF, Tab 7, p. 73).

Not long after the appellant began her position in Phoenix, in or around March or April of 2012, PVAHCS Public Affairs Officer Paula Pedene briefed the appellant regarding her allegations of a hostile work environment under the prior Director, Gabriel Perez. (AF, Tab 10, Pedene Tr., pp. 12, 14). Pedene informed the appellant of various concerns she had about how Perez had berated and belittled employees, and how, to her observation, the PVAHCS staff did not trust him. (*Id.*, 13). The meeting lasted approximately 30-45 minutes. (*Id.*, p. 16).

On December 3, 2012, Dr. James Felicetta, the PVAHCS Chief of Medicine, administratively reassigned Dr. Mitchell, effective December 10, 2012, from the ED to the Operation Enduring Freedom, Operation Iraqi Freedom, and Operation New Dawn Clinic, where she would report directly to Dr. Christopher Burke. (AF, Tab 7, Felicetta's Memorandum, p. 71). According to Dr. Felicetta, the reassignment was because PVAHCS had "identified a greater need" for Dr. Mitchell's services "in another area," and Dr. Felicetta took the opportunity to express his "sincerest appreciation" for Dr. Mitchell's "hard work, dedication,

and leadership that [she] provided for our veterans in the Emergency Department." (*Id.*).

In late November 2012, Pedene's husband, who was an agency volunteer, not an employee, was observed by a PVAHCS employee working on her computer and, this employee informed Robinson of his observation. (AF, Tab 11, Subtab 27, Pedene ROI, p. 70). By memorandum dated December 10, 2012, PVAHCS Associate Director Lance Robinson informed Pedene that she was being temporarily reassigned for an initial period of 30 days to the hospital's Education Section. (AF, Tab 9, p. 33). Robinson's stated that the reassignment was due to an allegation of possible misconduct by Pedene, but the misconduct was not further described (*Id.*).

On about July 22, 2013, Dr. Mitchell contacted Arizona Senator John McCain's office expressing various concerns about veterans' medical care and recent suicide trends at PVAHCS. (AF, Tab 7, Subtab 11, Mitchell Issue Brief, p. 68; Tab 9, Mitchell Complaint Summary, pp. 8-17). Among other things, Dr. Mitchell requested that the OIG dispatch an investigative team to conduct a PVAHCS investigation. (*Id.*). In response to Dr. Mitchell's contact, by letter dated September 4, 2013, Senator McCain's office wrote to agency Deputy Director of Legislative Affairs, Adam Anicich, and reiterated Dr. Mitchell's request for an out-of-state OIG investigation of PVAHCS regarding a variety of topics, including "the number of suicides since 2010," and the "confusing and confidential nature of the electronic 'wait list' for veterans to be seen by a physician." (AF, Tab 9, McCain Letter, p. 6).

By memorandum dated September 20, 2013, the appellant placed Dr. Mitchell on administrative leave pending the outcome of a fact finding investigation. (AF, Tab 7, Mitchell Leave Memorandum, p. 64). Although not stated in the memorandum, the reason for the administrative leave and fact finding is reflected in an October 2, 2013 "Issue Brief" regarding Dr. Mitchell's alleged "inappropriate access to veteran charts" (AF, Tab 7, Subtab 11, Mitchell

Issue Brief, p.68). The focus was Dr. Mitchell's 16-page letter to Senator McCain's office regarding medical care issues and recent suicide trends, as well as Dr. Mitchell's request that the OIG dispatch an investigative team to PVAHCS to conduct an investigation. (*Id*.). According to the Issue Brief, Dr. Mitchell accessed the medical chart "without a role based need[.]" (*Id*.). Additionally, on December 19, 2013, Dr. Burke, Chief of Ambulatory Care, provided Dr. Mitchell with a written non-disciplinary counseling regarding the fact that Dr. Mitchell "may have" disclosed personally identifying health information without following applicable policy and procedures. (AF, Tab 7, Subtab 10, Mitchell Counseling, p. 66). According to Dr. Burke, Dr. Mitchell was being counseled for making disclosures of personally identifying patient information that was "outside the normal functions" of her position. (*Id*.). The memorandum counseled Dr. Mitchell that, in the future, any such disclosure needed to be vetted through the appropriate agency Privacy Officer first. (*Id*.).

On April 9, 2014, Congressman Jeff Miller, Chairman of the House Committee on Veterans Affairs, announced allegations that Veterans were dying while waiting on "secret" wait lists to receive care at PVAHCS. (AF, Tab 45, Ex. bbb, Safety Letter, p. 173). Thereafter, many politicians took interest in the operations of the PVAHCS and the appellant, herself. For example, in a letter dated April 14, 2014, Congressmen David Schweikert, Trent Franks and Matt Salmon wrote to the appellant directly to express their "great concerns" with the indication that, under her leadership, there were "secret lists" to keep patient wait times artificially low. (AF, Tab 35, Ex. s, Schweikert Letter, p. 22). They asserted that "Because of [her] and [her] leadership team's choices, forty or more veterans have died due to lack of care." (*Id*.). The Congressmen called upon the appellant and other PCAHCS managers to resign. (*Id*.). On that same date, the Congressmen also wrote to then-Secretary Eric Shinseki and requested that he immediately remove the PVAHCS leadership team from their positions. (AF, Tab 35, Ex. t, Schweikert Letter, p. 23).

On May 2, 2014, the appellant and Robinson were both placed on administrative leave by order of the Secretary. (AF, Tab 35, Exs. w-y, pp. 34-36). On May 21, 2014, President Obama announced that he would "not stand" for misconduct within the VA health system, and that anyone found to have falsified records would be held accountable. (AF, Tab 36, Ex. ee, President's Statement, pp. 11-14). At the same time, however, the President announced the need to allow the investigators looking in to the matter to gather the facts and get to the bottom of the situation before making any judgments. (*Id*.).

Next, on May 28, 2014, the OIG issued an Interim Report regarding PVAHCS. (AF, Tab 6, Ex. 5, Interim OIG Report, pp. 36-70). The OIG was asked to investigate various allegations, including "gross mismanagement of VA resources and criminal misconduct by VA senior hospital leadership, creating systematic patient safety issues and possible wrongful deaths." (*Id*., p. 38). As stated in the Interim Report, some of these issues were not new: since 2005 the agency's OIG had issued 18 reports that identified deficiencies in scheduling at the local and national level. (*Id*.).

The OIG Interim Report focused on two issues: (1) Did the facility's electronic wait list (EWL) purposely omit the names of veterans waiting for care and, if so, at whose direction? (2) Were the deaths of any of these veterans related to delays in care? (*Id*., p. 39). In terms of conclusions, the Interim Report "substantiated serious conditions" and identified 1700 veterans who were waiting for a primary care appointment but were not on the EWL. (*Id*., p. 40). The Interim Report also concluded that "the Phoenix HCS leadership significantly understated the time new patients waited for their primary care appointment in their FY 2013 performance appraisal accomplishments, which is one of the factors considered for awards and salary increases." (*Id*.). The OIG also found the use of wait lists at PVAHCS, other than the office EWL, which may have been basis for allegations regarding the creation of "secret" lists. (*Id*.).

Following the release of this interim report, on May 30, 2014, the agency's Deputy Chief of Staff Hughes Turner proposed the appellant's removal. (AF, Tab 18, Subtab 3d, p. 29). The proposal letter included one charge: failure to provide oversight. (*Id.*). The specifications were based on the OIG Interim Report. (*Id.*) The agency, however, did not make a decision on this proposed removal.

In the meantime, the OIG was still investigating the circumstances at the PVAHCS and was also examining allegations about the appellant, herself. On August 26, 2014, the OIG issued its final report. (AF, Tab 6, Ex. 6, Final OIG Report, pp. 72-214), which reached the following conclusions:

- "While the case reviews in this report document poor quality of care, we are unable to conclusively assert that the absence of timely quality care caused the deaths of these veterans." (*Id.*, p. 77);
- The OIG identified numerous veterans who were on unofficial wait lists, but not on the official EWL. (*Id.*, p. 78);
- "PVAHCS senior administrative and clinical leadership were aware of unofficial wait lists and that access delays existed. Timely resolution of these access problems had not been effectively addressed by PVAHCS senior administrative and clinical leadership." (*Id.*);
- "As a result of using inappropriate scheduling practices, reported wait times were unreliable, and we could not obtain reasonable assurance that all veterans seeking care received the care they needed." (*Id.*);
- "The emphasis by Ms. Sharon Helman, the Director of PVAHCS, on her "Wildly Important Goal" (WIG) effort to improve access to primary care resulted in a misleading portrayal of veterans' access to patient care. Despite claimed improvements in access measures during fiscal year (FY) 2013, we found her accomplishments related to primary care wait times and the third-next available appointment were inaccurate or unsupported." (*Id.*, p. 79).

The Final OIG Report focused on five questions. (*Id.*, p. 76). First, were there clinically significant delays in care? On that issue, the OIG concluded that

there were "access barriers that adversely affected the quality of primary and specialty care provided for them." (*Id*., p. 113). Second, did PVAHCS omit the names of veterans waiting for care from its Electronic Wait List (EWL)? For that issue, the OIG concluded as follows: "PVAHCS maintained what we determined to be unofficial wait lists, and used inappropriate scheduling processes, which delayed veterans' access to health care services. We identified over 3,500 additional veterans who were waiting to be scheduled for appointments. Those 3,500 veterans were not on the EWL as of April 2014; most were on what we determined to be unofficial wait lists. PVAHCS management was aware of many of the documents that we identified as unofficial wait lists and that access delays existed in PVAHCS. Senior PVAHCS administrative and clinical leaders did not effectively address these access problems." (*Id.*, p. 128). Third, were PVAHCS personnel following established scheduling procedures? In that respect, the OIG concluded as follows: that PVAHCS personnel did not always follow established VHA scheduling practices, and that "[s]ome schedulers acknowledged that they manipulated appointment dates by using prohibited scheduling practices because of pressure to meet wait time goals imposed by leaders at VHA and PVAHCS"; as a result, reported wait times were "unreliable," and the actual wait times were "unknown" to key stakeholders. (*Id*., p. 134). Fourth, did the PVAHCS culture emphasize goals at the expense of patient care? On that issue, the OIG concluded as follows: that "PVAHCS's emphasis on goals resulted in a misleading portrayal of veterans' access to patient care. Despite Ms. Helman's claims of successful improvements in access measures during FY 2013, we found those accomplishments were inaccurate and unsupported." (*Id.*, p. 144). Fifth, were scheduling deficiencies systematic throughout VHA? On that issue, the OIG offered recommendations, but there were no formal conclusions. (*Id*.).

Also during this period following the May 30, 2014 proposed removal, the agency was conducting internal investigations in to the actions taken against Dr. Mitchell and Pedene. By memo dated September 16, 2014, Mike Culpepper, of

the agency's Office of Accountability Review, issued a Report of Investigation regarding Dr. Mitchell's allegation that she was subject to whistleblower reprisal. (AF, Tab 7, Ex. 14, Mitchell ROI, pp. 77-94). Among other things, the Culpepper Report of Investigation sustained Dr. Mitchell's retaliation claim against Dr. Deering, Dr. Piatt, and Claflin for allowing staff to persist in their hostile and insubordinate attitude toward Dr. Mitchell, and their failure to timely and thoroughly review Dr. Mitchell's allegations. (*Id.*, p. 93). This report also found that Dr. Deering engaged in retaliation by reassigning Dr. Mitchell, even though it was based on Dr. Deering's stated desire to remove Dr. Mitchell from a "malignant situation" in the ED, because that situation developed as a result of Dr. Mitchell's disclosures. (*Id.*, p. 93). The report also concluded that it was within Dr. Mitchell's area of responsibility to report on ways to reduce patient suicides, such that it was retaliation to issue her written counseling for violating patient privacy in that respect. (*Id.*, p. 94). The report also sustained a finding of retaliation with respect to Dr. Mitchell's FY 10, 11 and 12 performance ratings, which included comments regarding delays in scheduling, and adverse interactions with nursing staff, which went to the core of Dr. Mitchell's disclosures. (*Id.*). The report recommended administrative action against those who had retaliated against Dr. Mitchell. (*Id.*). This report did not include any express conclusions about the appellant retaliating against Dr. Mitchell, but did mention the appellant's September 2013 decision to place Dr. Mitchell on administrative leave, which was related to her possible release of patient's information to Senator McCain. (*Id.*, p. 78).

With regard to Pedene, on October 30, 2014, Culpepper issued a second report regarding Pedene's allegations of whistleblower reprisal. (AF, Tab 11, Ex. 27, Pedene ROI, pp. 64-84). This report concluded that Pedene had been subject to retaliation regarding her reporting of the prior director's actions. It recommended that "[a]ppropriate administrative action should be initiated against Ms. Helman and Mr. Robinson for engaging in retaliatory acts related to Ms.

Pedene's detail, and the manner in which the subsequent investigations regarding alleged computer violations and misuse of appropriated funds were conducted" (*Id.*, p. 83).

Following the issuance of this report, the agency rescinded the May 30, 2014 proposal notice. (AF, Tab 18, Subtab 3c, Recession Letter, p. 27). By memorandum titled "Pending Action" (PAM) dated November 10, 2014, Sloan Gibson, the Deputy Secretary of Veterans Affairs, notified the appellant he was proposing to remove her under the provisions of the recently passed Veterans Access, Choice and Accountability Act of 2014. (AF, Tab 1, PAM, pp. 9-13). The new removal notice was based on three charges. *Id.*

The appellant responded to the proposal through counsel. In her November 17, 2014 response, the appellant contended she was being scapegoated for the PVAHCS situation to protect higher level agency leaders and voiced her belief that she would be removed to appease various Congresspersons no matter what she said. (AF, Tab 1, PAM Response, p. 18-19). She also made various legal arguments as to why the agency's actions toward her were improper and why, on appeal, it would not be able to prove the charges it brought. (*Id.*)

On November 24, 2014, Deputy Secretary Gibson sustained his proposal and removed the appellant from her position and the federal service. (AF, Tab 1, Removal Letter, pp. 31-33). This appeal followed.

I reserve additional findings for discussion below.

Background Legal Standards

The agency must prove its charged misconduct by preponderant evidence. *See* 5 C.F.R. § 1210.18(a). That is the "degree of proof which is more probable than not." *Black's Law Dictionary*, 1182 (6th ed.) *See also* 5 C.F.R. § 1201.56(c)(2) (a preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would

accept as sufficient to find that a contested fact is more likely to be true than untrue).

A misconduct charge typically consists of two parts, a name or label that generally characterizes the misconduct and a narrative description of the alleged acts that constitute the misconduct. *See Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, 9 (2006) (citing *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 203 (1997)). Where an agency uses "general charging language" for its label, language which does not describe the misconduct with particularity, one "must look to the specification to determine what conduct the agency is relying on as the basis for its proposed disciplinary action." *See LaChance v. Merit Systems Protection Board*, 147 F.3d 1367, 1371 (Fed. Cir. 1998). The Board is required to review the agency's decision on a disciplinary action solely on the grounds invoked by the agency; it may not substitute a more adequate or proper basis. *See Minor v. U.S. Postal Service*, 115 M.S.P.R. 307, 311 (2010); *Walker v. Department of Army*, 102 M.S.P.R. 474, 477 (2006); *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989).

If the agency proves misconduct by the appellant, its chosen penalty is presumed reasonable and will be upheld unless the appellant adduces preponderant evidence that the agency's chosen penalty is unreasonable under all the circumstances of the case. *See* 5 C.F.R. § 1210.18(a), (d); 2 *McCormick On Evidence* §§ 342, 344 (7th ed.) If the appellant meets that burden, the agency's action must be reversed. *See* 5 C.F.R. § 1210.18(a), (d).

With her affirmative defenses, the appellant must prove them by preponderant evidence. 5 C.F.R. § 1210.18(b)(3), (c). With her claim of harmful error, the appellant must prove there was a law, rule or regulation applicable to the removal proceedings, the agency did not follow it, and that, if it had been followed, the agency was likely to have reached a different decision on her removal. *See* 5 C.F.R. §§ 1201.56(c)(3), 1210.18(c); *Cornelius v. Nutt*, 472 U.S. 648, 657-59 (1985) (harmful error is not defined in 5 U.S.C. § 7701 and the

Board defines it by regulation). With her claim of denial of due process, the appellant must prove that the agency did not provide her with a meaningful opportunity to respond to its proposal notice. *See Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999).

The agency has proven the appellant engaged in misconduct.

The agency brought three charges of misconduct against the appellant. The first was styled "Lack of Oversight" and the agency set out four specifications to support it. This is generalized charging language and the specifications supporting the charge determine what the agency must prove. *See LaChance*, 147 F.3d at 1371. The first, "Specification A," stated, in its entirety:

> In report number 14-02603-267, issued on August 26, 2014, the Department of Veterans Affairs (VA) Office of Inspector General (OIG) determined that the Phoenix VA Health Care System (PVAHCS) did not include all Veterans who were waiting to be scheduled for an appointment on an electronic wait list (EWL). According to VHA Directive 2010-027, the EWL is the official wait list for outpatient clinical care appointments and no other wait lists should be used for tracking requests for outpatient appointments. As of around April 2014, numerous Veterans were waiting to be scheduled for an appointment at PVAHCS but were not on the EWL. As the Director of PVAHCS, you knew or should have known that PVAHCS was not in compliance with VHA Directive 2010-027.

(AF, Tab 1, PAM, p. 9).

This specification cannot be sustained because, although it sets forth a state of affairs at the PVAHCS which the agency found unacceptable, it does not expressly set forth any particular actions or inactions by the appellant which could constitute misconduct by her. *See LaChance*, 147 F.3d at 1371 ("we must look to the specification to determine what *conduct* the agency is relying on") (emphasis added). One can be supplied through implication. For example, while it is not stated in the charge, adding a line to the effect of "and you did not attempt to bring it in to compliance" or perhaps "you allowed that state of affairs to persist" would set forth something the appellant did or failed to do. The

problem with expressly adding what is implied, however, is that I would be guessing at what the agency intended and adding terms to the agency's charge letter that the agency did not put there itself.[3] Such modification of the agency's specification at this stage of proceedings is impermissible. *See Minor*, 115 M.S.P.R. at 311; *Walker*, 102 M.S.P.R. at 477; *Gottlieb*, 39 M.S.P.R. at 609.

More generally, as the Director of the PVAHCS, the appellant was not personally tasked with doing the day-to-day data entry to place a veteran on the EWL. (AF, Tab 6, Performance Assessment, pp. 24-34). To the extent an agency wishes to hold a manager responsible for any failures of his or her subordinates, *i.e.*, those that occur on his or her watch, it may do so. *See, generally, Miller v. Department of Navy*, 11 M.S.P.R. 518, 521 (1982) ("A supervisor, by his very position, may be held accountable for improprieties stemming from the actions of his subordinates"). However, in order to do so, an agency must identify the subordinates, show what the subordinates' failures were, show why the manager should have known about them and show that he or she failed to take action to correct the identified failures. *See id.* at 519-21. *See also Mauro v. Department of Navy*, 35 M.S.P.R. 86, 91-93 (1987) (same). To phrase it more colloquially, an agency must connect the dots of fault from the identified failure by the subordinates back up the line to the manager. The agency did not attempt to do so here.[4] Accordingly, this specification is not sustained.

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[3] This omission is made more glaring when Specification A is compared to Specification B, which also describes an unacceptable state of affairs, but which explicitly states what the agency contends the appellant failed to do about it but should have.

[4] The agency argues for a different rule of law, one of strict liability, in essence. It contends, "Appellant's actual knowledge of the deficiency is immaterial, since the specification falls under a charge of 'lack of oversight.' Effectively, whether or not Appellant knew that PVAHCS was not in compliance with the Directive, it was her responsibility to ensure that the facility was in compliance, and she neglected her duty to do so." (IAF, Tab 71, p. 12). It cites no authority for such a no-fault proposition, I am aware of none and I decline to adopt it. Statutes are to be interpreted by starting

The next specification, Specification B, supporting the charge of "Lack of Oversight" alleged that:

> According to OIG report number 14-02603-267, around October 2012, PVAHCS data management staff identified a backlog of approximately 2,500 new patient appointments in Primary Care that were scheduled later than December 1, 2012. Some of these appointments were scheduled for almost a year in the future. Despite efforts to reduce the backlog, approximately 544 of the 2,501 Veterans had not received Primary Care appointments as of March 31, 2014. As of August 26, 2014, approximately 143 of these patients had still not received a Primary Care appointment. As the Director of PVAHCS, you knew or should have known that the backlog for Primary Care appointments could have jeopardized patient care and safety. Consequently, you should have taken immediate action to remedy the situation or notified your senior leadership so they were aware and could assist PVAHCS.

(AF, Tab 1, PAM, p. 9).

Thus, the agency must prove the appellant either did not take "immediate action to remedy the situation" or that she did not "notif[y] [her] senior leadership" of it. *See LaChance*, 147 F.3d at 1371; *Chauvin v. Department of the Navy*, 38 F.3d 563, 565 (Fed. Cir. 1994); *James v. Department of the Air Force*, 73 M.S.P.R. 300, 304 (1997). In support of this specification, the agency relies almost exclusively on a particular page of the OIG Final Report. (AF, Tab 71, Agency's Merits Brief, pp. 12-15). This is permissible. *See Addison v. Department of Health and Human Services*, 46 M.S.P.R. 261, 269 (1990) ("While

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with the plain meaning of their language. *Hawkins v. United States*, 469 F.3d 993, 1000 (Fed. Cir. 1996). Section 713 speaks in terms of "misconduct." That term is defined in the statute to mean "neglect of duty, malfeasance, or failure to accept a directed reassignment[.]" 38 U.S.C. § 713(g)(2). "Neglect of duty" is not itself specifically defined, and the common definition of "neglect" is "to give little attention or respect to: disregard" or "to leave undone or unattended to esp. through carelessness." *Merriam-Webster's Collegiate Dictionary*, 829 (11th ed. 2003). Thus, even under the agency's theory of neglect of duty, the agency would have to prove there was something the appellant was supposed to do, some task or undertaking she was to accomplish, but that she left undone or disregarded.

it is true that the agency did not introduce the original workpapers on which the removal action was based, the Board has found that the introduction of such original sources is not required to sustain an agency action"). That portion of the OIG Final Report recounts that, in October of 2012, approximately eight months after the appellant started in Phoenix, data management employees of the division of the agency known as the "Health Administration Service" (HAS) "identified new patient appointments in Primary Care that were scheduled later than December 1, 2012." (AF, Tab 6, Subtab 6, Final OIG Report, p. 120). According to the OIG report, "[s]ome of these appointments were scheduled for almost a year in the future" and these delayed appointments "represented a backlog of 2,501 appointments." (*Id.*). The report states that "[t]he goal at the time" was to divide that backlog of new patient appointments up among the primary care providers available and get them earlier appointments. (*Id.*). According to the report, HAS staff distributed these waiting patients among 43 providers, 28 of the providers at the main Phoenix facility with the remainder at external agency clinics. (*Id.*). As set forth in the report, "[d]espite the effort to redistribute the veterans to other providers with the intent of getting an earlier appointment, we determined 544 of the 2,501 veterans had not received Primary Care appointments as of March 31, 2014." (*Id.*). The OIG report then recounts that its investigators went through the electronic health records of 200 of the 544 veterans who had still not had an appointment by that time. *Id.* Of that 200, 143 were still waiting to be seen, with the remainder no longer needing an appointment for various reasons ranging from moving out of the Phoenix area all the way to the death of the waiting patient. (*Id.*).

The appellant challenges the overall accuracy of the report, beginning with the fact she was not interviewed by the OIG's investigators for it. She does not, however, take specific issue with the accuracy of the numbers contained in this section of the OIG report. Rather, she contends that this specification "should fail because: 1) Ms. Helman's team did make significant, effective efforts to

reduce the primary care backlog, as described in the text of the specification; 2) those aware of the actual circumstances at the Phoenix VA knew the backlog could not have been 'immediately' eliminated; and 3) the Phoenix VA backlog was well known to senior Agency leadership at both the VISN 18 and VACO levels." (AF, Tab 70, Appellant's Merits Brief, p. 40).

The agency has not proven the appellant failed to take "immediate action to remedy the situation[.]" As set forth in the very same paragraphs of the OIG Final Report on which the agency relies, a plan was instituted "at the time" to divide these backlogged patients up among primary care providers to get them in sooner, and this was, in fact, done, with each provider getting approximately 67 of these patients. (AF, Tab 6, Subtab 6, Final OIG Report, p. 120). The remedy was not fully effective, such that each and every one of these veterans had been seen by March 31, 2014 upon the OIG's follow up, but the vast majority had been. This specification does not assert that the appellant should have seen to it that all of these patients were seen before March 31, 2014 but did not, although it could have been written that way had the agency chosen to do so. Again, the agency must prove specifically what it charges, and I may not modify its language for it. *See Minor*, 115 M.S.P.R. at 311; *Walker*, 102 M.S.P.R. at 477; *Gottlieb*, 39 M.S.P.R. at 609. *See also Parbs v. U.S. Postal Service*, 107 M.S.P.R. 559, 564 (2007) ("the agency is required to prove the charge as it is set out in the notice of proposed removal, however, not some other offense that might be sustainable by the facts of the case").

Charge 1, Specification B, also alleges, in the alternative, that the appellant did not "notif[y] [her] senior leadership" about this 2,501 patient backlog in primary care.[5] With this second prong of Specification B, the appellant takes

[5] It is unclear what specific persons or offices the term "senior leadership" is meant to encompass. Perhaps that is by design, perhaps not. As will be explained below, failure to identify them and submit evidence from them about whether or not the appellant

issue with the implication that the agency's senior leadership was unaware of problems with getting all veterans who put in for appointments and needed to be seen actually seen. The agency concedes, through the declaration of Barbara Schuster, Associate Director of the Veterans Health Administration Access and Clinical Administration Program, that "VHA was aware of 'pockets' of scheduling issues occurring sporadically throughout the nation[.]" (AF, Tab 71, Schuster Declaration, p. 50). I find it more likely than not that at least some senior agency leaders were aware, or should have been, of nationwide problems getting veterans scheduled for timely appointments at or around the times of the events described in this specification, and that the agency's Phoenix facilities, as a part of the nationwide system, also had those problems. (AF, Tab 70, Petzel Affidavit, p. 74; Bowers Declaration, pp. 76-80). Nevertheless, the implied assertion that senior leaders were unaware of that problem and would have provided help had they only known is not something the agency needs to prove in order to sustain this specification. It is a description of surrounding circumstances, accurate or not, for the appellant's alleged failure to notify, which is the misconduct at issue. *See Larry v. Department of Justice,* 76 M.S.P.R. 348, 355 (1997); *Lawton v. Department of Veterans Affairs*, 53 M.S.P.R. 153, 156 (1992).

In reviewing the evidence for this specification, I am mindful that the appellant does not need to disprove the charges against her. *Cf. Jackson v. Veterans Administration,* 768 F.2d 1325, 1329 (Fed. Cir. 1985) ("the agency [is] in the position of a plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion, with respect to the basis for the charge or charges. The employee (while denominated appellant) has the advantageous evidentiary

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informed them of the October 2012 2,501 patient backlog does not redound to the agency's advantage.

position of a defendant with respect to that aspect of the case"). This specification sets forth two particular actions the appellant is alleged not to have done with regard to a particular set of circumstances and refers the reader to the Final OIG Report detailing those circumstances. An agency may rely on a failure to deny specific, detailed charges as part of its proof. *See Berkner v. Department of Commerce*, 116 M.S.P.R. 277, 279, 285 (2011) (an appellant's failure to deny specific allegations was considered in determining whether an agency had met its burden); *Bixby v. U.S. Dept. of Agriculture*, 24 M.S.P.R. 13, 19 & n.4 (1984) (same); *Duncan v. U.S. Dept. of Educ.*, 15 M.S.P.R. 31, 32 n.2 (1983) (same). A failure to deny detailed charges is not, however, sufficient by itself. *Delancy v. U.S. Postal Service*, 88 M.S.P.R. 129, 133 (2001) ("where the letter of charges is not merely conclusory, but sets forth in great factual detail the employee's errors and deficiencies, *and where the notice is corroborated by other evidence*, the letter of charge may be considered as forming part of the agency's valid proof") (emphasis original).

In none of her own statements, or those of her attorneys made on her behalf, at any point after she received the agency's PAM, or even the first, rescinded proposed removal, does the appellant assert that she did alert someone above her about the 2,501 veteran backlog for primary care appointments revealed in October 2012. (AF, Tab 1, Appellant's Response to PAM; Tab 40, Ex. ww, Appellant's Response to Proposed Removal; Tab 70, Appellant's Merits Brief; Tab 72, Appellant's Response Brief). Although she submitted a declaration from her immediate superior, Susan Bowers, in which Bowers attests that she "regularly worked with and had many conversations with Ms. Helman about what and how VISN 18 officials would assist PVAHCS to improve the scheduling process, and thus decrease the backlog of veteran clients waiting for appointments[,]" at no point does Bowers aver that the appellant ever raised the issue of the October 2012 2,501 veteran backlog with her. (AF, Tab 71, Appellant's Merits Brief, Bowers Decl. p. 76).

The question then becomes, what other proof has the agency offered to establish the appellant did not notify "senior leadership" about this backlog. *See Delancy,* 88 M.S.P.R. at 133. Based on how the agency framed this specification, it must prove a negative, that senior leadership was not notified about this October 2012 backlog by the appellant. Absent an admission by the appellant, which she has not offered, to prove the lack of notification, the agency would have to adduce affidavits from whatever real persons comprised "senior leadership" at the time saying, "She did not notify me about that." It has not done so. I conclude that a detailed proposal which is not specifically denied is, without more, too slender a reed to constitute preponderant evidence. *See Delancy*, 88 M.S.P.R. at 133. This specification is not sustained.

The penultimate specification for this charge, Specification C, alleges:

> On or around June 6, 2012, Dr. Katherine Mitchell, then Director of the PVAHCS Emergency Department, sent a report of contact to Catherine Gibson, Nurse Manager for the Emergency Department. In this report of contact, Dr. Mitchell disclosed that certain nurses in the Emergency Department lacked triage skills and were being insubordinate. On or around December 3, 2012, Dr. Mitchell was reassigned as Director of the Emergency Department to a position as Director of the Post-Deployment Clinic. Dr. Mitchell's reassignment was directed by Dr. James Felicetta, PVAHCS' Chief of Medicine, who reported to Dr. Darren Deering, PVAHCS' Chief of Staff. Dr. Deering was your direct subordinate. You knew or should have known that Dr. Mitchell's reassignment could be perceived as retaliation for her disclosures. You should have intervened in Dr. Felicetta's decision to reassign Dr. Mitchell.

(AF, Tab 1, PAM, p. 10).

To start, although this specification refers to a disclosure made by Dr. Mitchell on or about June 6, 2012 to ED Nurse Manager Gibson, in its merits brief, the agency does not even mention this disclosure but instead relies on a disclosure made by Dr. Mitchell directly to the appellant in February 2012. (AF, Tab 1, PAM, pp. 9-11; Tab 71, Agency's Merits Brief, pp. 15-19). That

purported disclosure is nowhere referred to in the PAM, even in passing. (AF, Tab 1, PAM, pp. 9-12). The agency cannot charge the appellant knew or should have known that failing to stop the reassignment of Dr. Mitchell could have been perceived as retaliation because of one set of events, those which flow from Dr. Mitchell's June 6, 2012 report of contact to Gibson, and then attempt to prove now she should have known that because of an entirely different set of uncharged events. *See LaChance*, 147 F.3d at 1372 ("The principle underlying [*King v.*] *Nazelrod* [43 F.3d 663 (Fed. Cir. 1994)] is that the agency must prove what it charges; where the specification contains the only meaningful description of the charge, *Nazelrod* supports the Board's conclusion that the agency must prove what it has alleged in the specification") (emphasis added); *Alvarado v. Department of Air Force*, 103 M.S.P.R. 1, 7 (2006) ("we are bound to decide this case according to how the charge is written, not how it could or should have been written"). Having identified no evidence in its merits or rebuttal briefs about the June 6, 2012 disclosure and what the appellant should have known about that, this specification is not sustained.

Finally, Specification D of Charge 1 alleges:

> Between May 2011 and April 2012, PVAHCS Public Affairs Specialist Paula Pedene cooperated with an administrative investigation concerning PVAHCS leadership and made numerous disclosures to PVAHCS leadership about staffing and resources and experiencing a hostile work environment. Ms. Pedene also made a disclosure to Veterans Integrated Service Network 18 about PVAHCS leadership failing to restore certain public affairs functions. On or about December 10, 2012, PVAHCS' Associate Director Lance Robinson, your direct subordinate, reassigned Ms. Pedene to the Education Service pending an investigation into an alleged computer security breach. Numerous other PVAHCS employees who may have committed computer security breaches were not reassigned.
>
> You knew or should have known that Ms. Pedene had made disclosures to PVAHCS leadership. You knew or should have known that Ms. Pedene's reassignment could be perceived as

> retaliation for her disclosures. You should have intervened in Mr. Robinson's decision to reassign Ms. Pedene.

(AF, Tab 1, PAM, p. 10).

In support of this specification, the agency begins with a May 10, 2011 memorandum from Pedene to the Medical Center Director in Phoenix at the time, and the Associate Director, as well. (AF, Tab 9, Pedene Public Affairs Memorandum, Subtab 21, pp. 25-28). Its subject was "Public Affairs Recommendations." (*Id.*) In it, Pedene requested realignment of the reporting structure in Phoenix so that the Public Affairs Officer reported directly to the Medical Center Director. (*Id.*) She also requests restoration of $50,000.00 for production of an agency television show, "To Your Health," restoration of "contractual support" for "PR writers" and replacement of a position in Public Affairs with an Audio Visual Production Specialist. (*Id.*) Pedene posits that "[t]he funding for the PR writer function will assist with news releases, fact sheets, media advisories and the like which have all declined without the contractual support." (Id.) She also asks that the Public Affairs Officer be empowered to "'Take action to raise the public's awareness of VHA's willingness to accept gifts and the productive use of GPF gifts'; and, 'Communicate VHA gift needs to potential donors' for Parade and Community Outreach in accordance with VHA Directive 4721." (*Id.*) She asserts that this authority would "allow the PAO to make the community aware of parade and community outreach needs that extend beyond the facilities current budget allocations." (*Id.*) Pedene also requested restoration of "support of the VA Veterans Day Parade Committee and activities surrounding this VA Regional Event[.]" (*Id.*) Pedene then lists several other suggested changes and empowerments for the public affairs function. (*Id.*) She concludes the substance of the memorandum by noting "[e]very item listed in this memo had been in place and has been systematically removed during the past two years[,]" and that, "Public Relations should be granted at least 1/10th of 1%

of the company's overall operating budget for a standard program. For us that means $460,000. The current PR budget is $258,000 including salaries." (*Id.*)

The agency, however, has mischaracterized this memorandum. The agency states "On May 10, 2011, Paula Pedene, the Public Affairs Officer for PVAHCS, submitted a memorandum to Appellant through PVAHCS's Associate Director Lance Robinson requesting, among other things, a restructuring of PVACHS's public affairs strategy and additional funding." (AF, Tab 71, Agency's Merits Brief, p. 19). By the agency's own admission, the appellant did not start her employment at the PVAHCS until February 26, 2012. (AF, Tab 71, Agency's Merits Brief, p. 4) ("Appellant was employed as the Director of the Phoenix VA Health Care System (PVAHCS) from February 26, 2012 to November 24, 2014" citing "Tab 18, SF-50s, pp. 23 & 33"). The agency does not explain why this memorandum would have been sent to the appellant approximately nine months before she began to work there, and I find it more likely than not that it was not. Moreover, although it is not completely clear when Robinson's tenure as an Assistant Director in Phoenix began, for reasons discussed below I find it more likely than not it was after this May 10, 2011 memorandum was written.

Before writing this memorandum, on May 5, 2011, Pedene was interviewed by members of an agency Administrative Investigation Board looking in to matters involving "fee basis, sexual harassment, and hostile work environment at the VA Medical Center in Phoenix, Arizona." (AF, Tab 11, Pedene Interview Transcript, Subtab 26, p. 5). She had previously provided some documentation to this board. (*Id.*) Pedene's interview centered on actions taken over the previous two years by the director who preceded the appellant in Phoenix, Perez, and an Assistant Director, a Dr. Bacorn, who directly supervised Pedene. (*Id.*, pp. 3-60).

Next, the agency points to a memorandum dated July 8, 2011, from Pedene to the VISN 18 Director, to be routed through the Phoenix Medical Center Director. The agency avers, "On July 8, 2011, in a message sent through

Appellant to the Network Director for Veterans Integrated Service Network (VISN) 18, Ms. Pedene noted that she was facing a hostile work environment because of PVAHCS's Associate Director Robinson, a direct subordinate of Appellant, when the Associate Director tried to divest Ms. Pedene of the responsibility of coordinating the annual Veterans Day Parade." (AF, Tab 71, Agency's Merits Brief, p. 19). This, as with the May 10, 2011 memorandum, is simply a misrepresentation of the facts of this case.[6] The appellant did not begin her tenure as the Medical Center Director in Phoenix until February 26, 2012. As such, I find the memorandum was not routed through the appellant as she had not yet begun her employment in Phoenix. Furthermore, the memorandum never mentions Robinson at all. (AF, Tab 9, Pedene Hostile Environment Memorandum, Subtab 20, pp. 22-24). It alleges that Dr. Bacorn was perpetuating a hostile environment. The very first sentence reads, "I am writing to inform you that it appears as if the hostile work environment, initiated under Gabriel Perez, is still present at the PVAHCS, under the auspices of the actions being conducted by the Associate Director (AD) Dr. Bacorn." (*Id.*, p. 22).

The agency has also mischaracterized another memorandum from Pedene. It relies on a November 25, 2011 memorandum addressed to "VISN 18 Network Director" titled "Request for action regarding restoration request." (AF, Tab 9, Subtab 22, Pedene Action Request Memorandum, p. 30). The agency states "As of November 25, 2011, Ms. Pedene continued to face a hostile work environment. This time, she by-passed Appellant and went directly to Appellant's supervisor Susan Bowers with her complaints." (AF, Tab 71, Agency's Merits Brief, p. 19).

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[6] It is unclear which of the agency attorneys who have entered their appearance in this case actually authored these passages. Pedene's memoranda are addressed to position titles, not actual persons, and the agency may have lost sight of who was where when. While they do not help defend against the appellant's argument that the agency is engaged in a win-at-all-costs railroading campaign, I assume these misrepresentations were inadvertent.

Again, however, at the time of this memorandum, if the appellant had not yet arrived in Phoenix, Pedene could not have been bypassing her.[7]

Another piece of documentary evidence the agency stands on in support of this specification, although not "a few weeks after Ms. Pedene's last memorandum to the VISN Director" as the agency advances, does at least postdate the start of the appellant's employment in Phoenix. On December 10, 2012, Robinson issued a memorandum to Pedene which advised her she was "being temporarily administratively reassigned for an initial period of thirty (30) days" because a "complaint was filed against [her] for possible misconduct. The misconduct alleged is of a very serious nature and during the investigation [sic] would be inappropriate for [her] to retain access to [her] current confidential files or [sic] in contact with individuals who may be later identified as negatively affected by [her] actions." (AF, Tab 9, Subtab 23, Robinson Reassignment Memorandum, p. 33.)

The allegations against Pedene were that she had committed a "computer security violation when Ms. Pedene (who is legally blind) allowed her husband, an official VA volunteer, to access her computer to transfer pictures he took of the Phoenix VA (sic) Parade, into a PowerPoint presentation." (AF, Tab 11, Subtab 27, Pedene ROI, p. 66). After Pedene had apparently filed a whistleblower's complaint with the Office of Special Counsel, the agency conducted an internal investigation in to Pedene's activities and the appellant's and Robinson's responses to them. (AF, Tab 11, Subtab 27, Pedene ROI, p. 64.) The report generated from that investigation concluded, in pertinent parts, as follows:

> For purposes of this review, it is accepted that Ms. Pedene's actions as identified herein constitute protected whistleblowing

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[7] In this memorandum, Pedene takes issue with certain actions and inactions of "Interim Director, Dr. Jamie Robbins," and an unidentified Associate Director and "Asst. Director." (IAF, Tab 9, Subtab 22, Pedene Action Request Memorandum, pp.30-31).

> activity. Even though the initial protected disclosure occurred in May 2011 prior to the arrival of Ms. Helman and Mr. Robinson, both of them were aware of Ms. Pedene's prior whistleblower activity and her continued efforts to restore staffing and budget reductions she attributed to that activity. [***]

(*Id.*, p. 81).

> The allegation that Ms. Pedene's whistleblowing activity was a contributing factor to her detail in Education Service is sustained. Numerous employees alleged to have been involved in similar computer or privacy violations were not detailed to other positions. Additionally, neither the original detail nor subsequent extensions were properly documented in accordance with VA policy. [***] Although Ms. Pedene clearly violated VA IT security policy and corrective action was warranted, as confirmed by OGC and VACO HR, her violations do not establish clear and convincing evidence that Ms. Pedene would have been treated in the same manner in the absence of whistleblowing. Lastly, it must be noted that Ms. Pedene inadvertently committed an earlier privacy violation in January 2012 for which she received no adverse personnel action. This "no action" arguably militates against a retaliatory motive, but does not sufficiently overcome the obvious disparate treatment Ms. Pedene received following the computer incident in December 2012.

(*Id.*, p. 82).

The appellant's attack on the agency's case for this specification is both legal and factual. The appellant argues first that failing to stop a reassignment which "could be perceived as retaliation," as the specification states, is not actionable misconduct because the standard is too amorphous, in that, any action "could look objectionable to someone, somewhere, at some time," the standard departs from related precedent, the agency has not previously held managers to such a standard and, if the appellant had stopped the reassignment because it could be perceived as retaliation for whistleblowing, she would have directly run afoul of the Whistleblower Protection Act because she would have failed to take a personnel action because of a protected disclosure. (AF, Tab 70, Appellant's Merits Brief, pp. 44-46).

While it has some surface appeal, the short answer to the first objection is that I am not in the business of running the agency or deciding what standards of conduct it ought to set for its senior managers in managing its institutions; the agency is free to bind their hands with Gordian knots if it chooses. *Cf. American Federation of Government Employees, Local 2017 v. Brown*, 680 F.2d 722, 726 (11th Cir. 1982); *Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, 18-19 (2004). The particular language of the statute at issue, Section 713(a)(1) of title 38, authorizes a removal "if the Secretary determines the performance or misconduct of the individual warrants" it. This section gives very broad authority to the Secretary of Veterans Affairs in determining what constitutes misconduct for an employee in the Senior Executive Service at that agency.

As to departing from precedent, in the cases the appellant cites, the employees were charged by the Office of Special Counsel with actually violating the Whistleblower Protection Act (WPA) or another provision of law. *Costello v. Merit Systems Protection Bd.*, 182 F.3d 1372, 1375 (Fed. Cir. 1999) ("the Office of Special Counsel filed complaints with the Board against Costello and Strehle, seeking disciplinary actions (under 5 U.S.C. § 1215) against them for alleged violations of the Whistleblower Protection Act"); *Special Counsel ex rel. Perfetto v. Dep't of Navy*, 85 M.S.P.R. 454, 458-59 (2000) ("In a stay request, OSC need not prove, as part of a prima facie case, that the protected activity was a significant factor in the agency's termination decision. Rather, that is part of its burden of proof on the merits"); *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 177 (1996) ("The respondent was charged with violating 5 U.S.C. § 2302(b)(9)(A) and (C)"). I am aware of no precedent which would require the agency to charge the appellant with actually violating a law, even if it believed she had done so, and the appellant does not cite any. An agency may draft misconduct charges in the manner it thinks best. Having drafted a charge which states the appellant "knew or should have known that Ms. Pedene's reassignment could be perceived as retaliation for her disclosures[,]" the agency does not need

to prove the appellant actually violated the provisions of the WPA, only that circumstances were such that a perception of retaliation could arise. That does require reference to the WPA's standards, but not actual proof of violation.

The issue of not having previously charged a senior manager with such an offense speaks to the propriety of the penalty, not the viability of the charge itself. *See Lewis v. Department of Veterans Affairs,* 113 M.S.P.R. 657, 664 (2010) (lack of notice of a change in policy is a factor in penalty determinations).

Finally, I conclude the appellant misconstrues the WPA. While her interpretation may follow from a literal reading of the act, interpreting it in the manner she suggests would lead to absurd results, and I decline to do so. *See Wassenaar v. Office of Personnel Management*, 21 F.3d 1090, 1092 (Fed. Cir. 1994). The act is meant to protect whistleblowers from harm. *See Schmittling v. Department of Army,* 92 M.S.P.R. 572, 579 (2002) ("the 'purpose' language of the WPA suggests that Congress sought to broadly protect whistleblowers from 'adverse consequences' as a result of prohibited personnel practices, whether those 'adverse consequences' result from personnel actions that are taken or personnel actions that are not taken"). In the context of this scenario, leaving Pedene in her position would not have been an infliction of harm on her. The WPA does not shield the appellant as she argues.

With her factual challenge, the appellant contends the report of investigation is unreliable and points out that she, Robinson and OIG Special Agent Richard Cady were not interviewed for the report. (AF, Tab 11, Subtab 27, Pedene ROI, p. 66) (listing persons interviewed). Moreover, none of the persons interviewed, save Pedene, an interested party, were under oath and, the agency has proffered no explanation for why that is. (*Id.*) *See Borninkhof v. Department of Justice,* 5 M.S.P.R. 77, 87 (1981) (in weighing the probative value of hearsay, considerations include whether the out of court statements were made under oath, and if not, why not, and whether they were made by persons disinterested in the events). Additionally, the witness statements and exhibits the report refers to

were not appended to the report, (AF, Tab 11, Subtab 27, Pedene ROI, p. 64-84), and I cannot look past even the first level of hearsay to evaluate that same evidence now. These proceedings are *de novo*, the agency must prove its case by preponderant evidence and I cannot simply assume the accuracy of the report in light of the evidence the appellant has adduced about it.

The supplemental declarations from Mary Monet and Laurie Butler the agency introduced in support of this charge do not help and actually undermine its position somewhat. The reports generated by Monet are not actually appended to her declaration, although there is an electronic place holder for them. (AF, Tab 71, Agency's Merits Brief, Monet Decl., pp. 62-63). In Butler's declaration she avers she directed her staff to search a PVAHCS database which tracks all disciplinary and adverse actions taken there. (AF, Tab 71, Agency's Merits Brief, Butler Decl., p. 60). "The search included the terms private, privacy, HIPAA, violation, access, disclosure, disclose, disclosed, reassign, reassignment, and reassigned." (*Id.*) That "search resulted in 24 cases from January 2012 to August 22, 2014 where an employee was charged with a privacy access and/or disclosure violation. This involves the case of Dr. Katherine Mitchell." (*Id.*). Butler also directed her staff to "pull all available disciplinary files (paper copy) for the 24 actions that were identified." (*Id.* p. 61). They "could locate only 21 of the 23 files."[8] (*Id.*). She further avers "In none of the 21 instances of privacy access/disclosure violations that I reviewed, other than in the case of Dr. Katherine Mitchell, was the offending employee placed on administrative absence or reassigned." (*Id.*). If the agency really did mean these declarations support its case regarding the reassignment of Pedene, records relating to her reassignment were not there, which casts some doubt on the accuracy of those records. The agency apparently relied on those records, or some such records, for its finding

[8] I take the change of 24 to 23 to be a typographical error.

that "[n]umerous employees alleged to have been involved in similar computer or privacy violations were not detailed to other positions."

The appellant introduced an affidavit and declaration from Robinson wherein he avers Cady asked him to temporarily reassign Pedene while the OIG investigated allegations of financial impropriety by her.[9] (AF, Tab 70, Ex. 4, Robinson Aff., p. 86; Ex. 4a, Robinson Decl., p. 89). Attempting to blunt this last point, the agency introduced a declaration from Cady where he states, "In January 2013, my office looked into an investigative referral regarding Ms. Paula Pedene at the Phoenix VA Health Care System (PVAHCS). I never directed PVAHCS Associate Director Lance Robinson to reassign Ms. Pedene to another position." (AF, Tab 71, Agency's Merits Brief, Cady Decl., p. 42). I find it more likely than not both statements are true.[10] Cady did not direct Robinson to reassign Pedene, because as an investigating agent he likely had no authority to direct the taking of a personnel action, and he did request that Robinson reassign her so that, if there actually was wrongdoing to be uncovered, Pedene would not be in a position to cover her tracks as easily or otherwise interfere with the investigation.

To make out a prima facie case of whistleblower retaliation before the Board, one must allege: (1) he or she engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Ormond v. Department of Justice*, 118 M.S.P.R. 337, 339 (2012) (citing *Yunus v. Department*

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[9] The report sets out the appellant's involvement in the misuse of funds allegation and why her actions in that regard appeared retaliatory, but the agency did not charge her with anything related to that, only the reassignment by Robinson.

[10] The agency argues that "Appellant has claimed that OIG Agent Cady advised that Robinson reassign Pedene. Agent Cady specifically denies this. (Decl. of Agent Cady, ¶ 3.)" (IAF, Tab 71, Agency's Merits Brief, p. 20 n.11). Again, that is simply not what Cady says in the declaration.

of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001)). A protected disclosure is a disclosure that a person 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). I conclude that Pedene's statements to the Administrative Investigation Board or the appellant herself could be construed as disclosing an abuse of authority. However, if an agency can prove, by clear and convincing evidence it would have taken the same actions in the absence of the protected disclosure, no unlawful retaliation has occurred. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012).

Putting aside for now the *Miller* issue discussed with Specification A, *supra*, in considering all the evidence identified by the parties for this specification, I conclude the agency has not demonstrated, by preponderant evidence, the appellant "knew or should have known that Ms. Pedene's reassignment could be perceived as retaliation for her disclosures."

The evidence the agency introduced is marginally probative at best. The report generated from the internal investigation does not pass muster under *Borninkhof* and cannot carry the day for the agency by itself. Even if it did carry significant probative value, one of the things it points out is that Pedene was observed violating agency computer security policies, apparently for a second time. *See Russell v. Department of Justice,* 76 M.S.P.R. 317, 325 (1997) ("An employee is not completely shielded from his misconduct by anti-discrimination laws or the WPA. Rather, those laws shield an employee only to the extent the record supports a finding that he would not have been disciplined except for his status as a whistleblower or a member of a protected class"). The OIG's involvement in Pedene's reassignment is not mentioned in the report the agency heavily relies on. Moreover, something not addressed in the report is that before Robinson reassigned Pedene, he consulted with the PVAHCS Human Resources Officer, Maria Schloendorn, who counseled that Pedene should be reassigned

while the Office of Inspector General conducted its investigation. (AF, Tab 70, Ex. 6, Agency's Response to Appellant's Request for Admission 70). There is no contention by the agency that Cady or Schloendorn had any reason to know about Pedene's disclosures or that Robinson was prone to ignoring Schloendorn's advice. When the agency's evidence is weighed against the facts that an OIG agent specifically requested Ms. Pedene's reassignment, and that Robbins asked his Human Resources Officer what he should do about that request and she advised he should reassign, I conclude Robinson would have taken the same action, Pedene's disclosures notwithstanding. The agency has not met its burden on this specification, and the charge as a whole is not sustained.

With its second charge, Charge 2 is labeled "Conduct Unbecoming a Senior Executive," and has two specifications. (Tab 1, PAM, p. 10.) This is also a generic charge with no specific elements of proof. It is established by proving that the appellant committed the acts alleged in support of the broad label. *See LaChance*, 147 F.3d at 1371; *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, 513 (2010).

Charge 2, Specification A reads as follows:

> On September 20, 2013, you placed Dr. Mitchell on administrative absence pending investigation into an allegation that she violated patient privacy by providing Senator McCain with a list of patients who had committed suicide. Between January 2, 2012 and August 22, 2014, PVAHCS investigated numerous data breaches. There is no evidence any of the subjects of these investigations were placed on administrative absence. You knew or should have known that Dr. Mitchell made a disclosure to Senator McCain. You knew or should have known that placing Dr. Mitchell on administrative absence could be perceived as retaliation for her disclosures.

(AF, Tab 1, PAM, p. 10.)

In its merits brief, the agency argues that the appellant "either engaged in retaliation or in conduct that could be perceived as retaliation." (AF, Tab 71, Agency Merits Brief, p. 22). I will not address whether the conduct alleged in

this specification constituted actual retaliation because the agency charged the appellant only with engaging in conduct that she knew or should have known "could be perceived as retaliation." (AF, Tab 1, PAM, p. 10). It is immaterial whether the appellant's actions were actually retaliatory because the agency did not charge her with actual retaliation. *See LaChance*, 147 F.3d at 1372. Rather, it charged her with creating the possible perception of retaliation. The agency cannot rewrite the specification at this stage of the proceedings to include allegations that it could have included in the charging document but did not. *See Minor*, 115 M.S.P.R. at 311.

As for the proof of what was actually charged, I find that the agency has met its burden, and the underlying facts do not appear to be in real dispute. The agency submitted a copy of the documents that Dr. Mitchell sent to Senator McCain's office, which show that, on August 20, 2013, Dr. Mitchell disclosed the first names and last initials of four Phoenix VAHCS patients who had committed suicide. (AF, Tab 9, pp. 18-19). The record also shows that, on September 20, 2013, the appellant executed a memorandum notifying Dr. Mitchell that she would be placed on administrative leave effective immediately. (AF, Tab 7, p. 64). A December 19, 2013 memorandum of counseling signed by Dr. Mitchell's immediate supervisor confirms that her disclosure to Senator McCain was the reason for her placement on administrative leave. (*Id*. p. 66). The appellant's and Dr. Mitchell's declarations corroborate these events and the appellant's personal awareness of them. (AF, Tab 70, Appellant's Decl., pp. 71-73, Tab 71, Mitchell Decl., p. 65).

I also find that the agency has proven that the appellant knew or should have known that placing Dr. Mitchell on administrative absence could be perceived as retaliation for her disclosures. (AF, Tab 1, PAM, p. 10). Dr. Mitchell's disclosures appear calculated to address what she reasonably believed was a substantial and specific danger to public health and safety, *i.e.*, the inadequacy of the Phoenix VAHCS's suicide prevention efforts, which in Dr.

Mitchell's opinion, contributed to the deaths of the patients named in the disclosure. (AF, Tab 9, pp. 18-19). *See* 5 U.S.C. § 2302(b)(8)(A); *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, 206-207 (2011) (the appellant made a non-frivolous allegation that substandard care at a Veterans Administration hospital presented a substantial and specific danger to public health and safety because such substandard care could lead to patient deaths). In addition, the appellant herself admits that Dr. Mitchell's disclosures were the reason that she placed Dr. Mitchell on administrative leave, thus establishing a connection between Dr. Mitchell's disclosures and the administrative leave. (AF, Tab 70, Appellant's Decl. pp. 71-73). I find that these facts would be sufficient for Dr. Mitchell to establish a prima facie case under the WPA, as amended, with the appellant as the retaliating official. *See Yunus*, 242 F.3d at 1371. Because Dr. Mitchell's disclosure is the very reason for placing her on administrative leave, there is no way establish the same action would have been taken in the absence of the disclosure. Thus, I find that the agency has established that the appellant's act of placing Dr. Mitchell on administrative leave could be perceived as retaliatory.

Although the appellant does not dispute the facts, she argues that Charge 2, Specification A fails to make out a case of actionable misconduct. (AF, Tab 70, Appellant's Merits Brief, pp. 48-50, Tab 72, Appellant's Reply Brief, pp. 17-19). Specifically, she argues that she relied on the advice of her immediate supervisor, the Phoenix VA Chief of Human Resources, and two different agency attorneys in determining that Dr. Mitchell should be placed on paid administrative leave pending an investigation into whether the disclosure violated patient privacy. (AF, Tab 70, Appellant's Merits Brief, pp. 48-50, Appellant's Decl., p. 72; Tab 72, Appellant's Reply Brief, pp. 17-19). Again, as discussed above, the agency may set its standards of conduct for its senior managers in the manner it thinks best. She further argues that no one raised concerns of retaliation at the time, and that no other employee had been placed on administrative leave for a suspected

privacy violation during her tenure because none of those other employees had released information outside the agency. (AF, Tab 70, Appellant's Merits Brief, p. 50; Appellant's Decl., pp. 71-72; Tab 72, Appellant's Reply Brief, pp. 49-50). This evidence and argument appears to be geared toward showing that the appellant's actions were not, in fact, retaliatory, which as explained above is beside the point. The agency did not charge the appellant with actual retaliation, but with taking actions that "could be perceived as retaliatory for [Dr. Mitchells'] disclosures." (AF, Tab 1, PAM, p. 10.) The agency has carried it burden on this issue.

The appellant's argument is akin to an argument that an appellant might make in an appeal under 5 U.S.C. Chapter 75 that a proven charge bears no nexus to the efficiency of the service. *See* 5 U.S.C. § 7513 (an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service); *see, e.g.*, *Jordan v. Department of the Air Force*, 36 M.S.P.R. 409, 411 (1988) (although the agency proved its charge of selling black market motor vehicles off duty, the Board reversed the removal because the agency failed to establish a nexus between the conduct and the efficiency of the service). However, this appeal does not arise under 5 U.S.C. chapter 75; it arises under 38 U.S.C. § 713. Thus, a question is raised: Is there a nexus requirement for disciplinary actions under that section?

The statute provides, in pertinent part, that "[t]he Secretary may remove an individual employed in a senior executive position at the Department of Veterans Affairs from the senior executive position if the Secretary determines the performance or misconduct of the individual warrants such removal." 38 U.S.C. § 713(a)(1). I find that the plain language of the statute does not contain a specific nexus requirement as is found in 5 U.S.C. § 7513(a), but it does predicate the Secretary's removal authority on the existence of actual misconduct. *Cf. Social Security Administration v. Long*, 113 M.S.P.R. 190, ¶ 46 (2010) (the "good

cause" standard to remove and administrative judge under 5 U.S.C. § 7521 does not contain a separate nexus requirement).

As for whether creating the possible perception of reprisal constitutes actual misconduct, if this were an appeal under Chapter 75, I would be inclined to agree with the appellant that it does not. Any personnel action taken against an employee who arguably made a protected disclosure, by a manager who arguably knew about the disclosure, raises an inference of retaliation. *See Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, 370-71 (2013). Nevertheless, employees who have previously blown the whistle are not immune from performance and conduct deficiencies; nor are they immune from budgetary and organizational considerations that affect the agency at large, and agency managers may be required to take action against such employees for legitimate, nonretaliatory reasons. *See* 5 U.S.C. § 1221(e)(2); *Morgan v. Department of Energy*, 424 F.3d 1271, 1273 (Fed. Cir. 2005) (the Board cannot not order corrective action in a whistleblower reprisal case if the agency can prove, by clear and convincing evidence, that it would have taken the personnel action at issue notwithstanding the protected disclosure); *Moeller v. Department of Veterans Affairs*, 62 M.S.P.R. 361, 366-67 (1994) (whistleblowing does not shield an employee from discipline which is not motivated by retaliation for the protected disclosure). Thus, in the ordinary case, the possible perception of whistleblower reprisal, in the absence of something more, would likely not constitute misconduct. However, as discussed above, the particular language of the statute gives the Secretary broad discretion in determining what constitutes misconduct for the agency's SES. Charge 2, Specification A is therefore sustained.[11]

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[11] Notwithstanding the above, I find that it is proper for me to consider the tenuous nature of this misconduct, such as it is, in deciding whether the appellant has rebutted the reasonableness of the penalty imposed on her. As explained below, this charge, although proven, merits little weight in that regard.

Specification B of this charge alleges:

Charge 2, Specification B reads as follows:

> You accepted the following gifts from Dennis "Max" Lewis, Vice President. Jefferson Consulting Group, who you knew or should have known was a consultant to a healthcare provider that was seeking to conduct business with one or more PVAHCS Community-Based Outpatient Clinics (CBOCs) under your management:
>
> a. Airline tickets at a cost of approximately $465.07 roundtrip from Phoenix, Arizona to Vancouver, British Columbia for travel in May 2012;
>
> b. Airline tickets at a cost of approximately $355.60 roundtrip from Phoenix, Arizona to Portland, Oregon from [sic] travel in October 2012;
>
> c. Admission price of approximately $121.80 for a Pink Jeep Tour in November 2012;
>
> d. Entry fee of approximately $65 paid on November 27, 2012, for the Runners Den/Fiesta Bowl Half marathon and 5K on December 2, 2012;
>
> e. Airline tickets at a cost of approximately $317.60 roundtrip from Phoenix, Arizona to El Paso, Texas for travel in March 2013;
>
> f. Entry fee of approximately $70.25 paid on April 29, 2013 for the Mississippi [Blues] Marathon;
>
> g. Airline tickets at a cost of approximately $1,015.60 roundtrip from Phoenix, Arizona to Eureka, California for travel in May 2013;
>
> h. Airline tickets at a cost of approximately $389.80 roundtrip from Phoenix, Arizona to Portland, Oregon for travel in June 2013;
>
> i. Five tickets and parking for approximately $729.50 paid on August 24, 2013 to The Mrs. Carter Show World Tour Starring Beyonce on December 7, 2013;
>
> j. Entry fee of approximately $282.98 paid on or about December 11, 2013 for the 2014 P.F. Chang’s Rock 'n' Roll Arizona Marathon & Half Marathon on December 2, 2013;
>
> k. A trip to Disneyland which cost in excess of $11,000; and

> l. An entry fee of approximately $105 for you to participate in the Napa Valley Marathon in 2015.
>
> You knew or should have known that the acceptance of these gifts creates the appearance of a conflict of interest.

(AF, Tab 1, PAM pp. 10-11). For this specification, the agency must prove: (1) whether the appellant accepted these gifts as alleged, and if so (2) whether she knew or should have known that such acceptance created the appearance of a conflict of interest.

For the reasons discussed below in connection with Charge 3, I find that the agency established that the appellant accepted the following gifts from Lewis: Item a., roundtrip airline tickets at a cost of approximately $465.07 between Phoenix and Vancouver for travel in May of 2012; item b., roundtrip airline tickets between Phoenix and Portland, Oregon at a cost of approximately $355.60 for travel in October 2012; item e., roundtrip airline tickets between Phoenix, Arizona and El Paso, Texas at a cost of approximately $317.60 for travel in March, 2013; item h., roundtrip airline tickets from Phoenix, Arizona to Portland, Oregon at a cost of approximately 389.80 for travel in May, 2013; item i., five tickets and parking for approximately $729.50 paid on August 24, 2013 to the Mrs. Carter World Show Starring Beyoncé on December 7, 2013; and item j., an entry fee of approximately $282.98 paid on or about December 11, 2013 for the 2014 P.F. Chang's Rock 'n' Roll Arizona Marathon and Half Marathon on December 2, 2013. Also for the reasons discussed below in connection with Charge 3, I find that the agency failed to establish that the appellant accepted item g., roundtrip airline tickets between Phoenix, Arizona and Eureka, California at a cost of approximately $1,015.60 for travel in May, 2013.

Regarding item c., admission price of approximately $121.80 for a Pink Jeep Tour in November, 2012, I find that the agency has failed to show that the appellant accepted this as a gift from Lewis. The record contains a receipt showing that, on November 9, 2012, Lewis booked a Pink Jeep tour for November 14, 2012 at the cost of $243.59. (AF, Tab 11, pp. 304-05). The record

also contains a liability waiver and a trip manifest that appear to be related to this booking. (*Id*. pp. 305-06). The appellant's name, however, appears nowhere in any of these documents, and the agency has not explained how it tied this item to the appellant or concluded that this was a gift for her. In fact, this alleged gift is mentioned nowhere in the agency's merits brief or its rebuttal brief. In short, the agency has not identified any evidence that the appellant accepted item c. from Lewis as alleged in the specification.

I likewise find that the agency failed to prove that the appellant accepted as a gift from Lewis item d., an entry fee of approximately $65 paid on November 27, 2012 for the Runners Den/Fiesta Bowl Half Marathon and 5K on December 2, 2012. This allegation is not mentioned in the agency's merits brief or its rebuttal brief. Nor has my review of the record uncovered any documentation related to this allegation which would support it.

Regarding item f., an entry fee of approximately $70.25 paid on April 29, 2013 for the Mississippi Blues Marathon, I find that the agency has proven that the appellant accepted this as a gift from Lewis. Specifically, the record contains an April 29, 2013 registration confirmation for that marathon, indicating that the appellant was the registrant and that Lewis paid the $70.25 entry fee (AF, Tab 11, p. 329). Cady's declaration confirms that the IG uncovered this document during its investigation. (AF, Tab 71, Cady Decl. p. 44).

Regarding item k., a trip to Disneyland costing "in excess of $11,000," I find that the agency has proven that the appellant accepted this gift from Lewis as well. The record contains a January 13, 2014 email from Lewis to the appellant stating "Enjoy." (AF, Tab 11, p. 238). Attached to the email is a reservation confirmation for the appellant and what appear to be six of her family members for an 8-night stay at Disneyland, plus several upgrades and amenities. (*Id.*, p. 239). The total amount of the reservation is blocked out on the attachment, but the record contains an unredacted copy of it as well, showing the total amount to be $11,205.28, and that payment in full had been made on January 13, 2014. (Id.,

p. 243). The record also contains a document titled "Information on Payment," showing that Lewis engaged in a credit card transaction of exactly $11,205.28 on that date. (*Id*., p. 154). Finally, the record contains a printout of a subpoenaed Walt Disney computer record stating that a Disney employee "spoke w/Dennis Lewis who made this resv and paid for it . . . This is a secret gift to this family and only Sharon knows the source but even she does not know the cost." (*Id*., p. 184). These facts are confirmed by Cady's declaration about the investigation. (AF, Tab 71, Cady Decl., p. 46).

Regarding item l, an entry fee of approximately $105 for the appellant to participate in the Napa Valley Marathon in 2015, I find that the agency has proven that the appellant accepted this as a gift from Mr. Lewis. Specifically, the record contains a March 28, 2014 registration confirmation for that marathon, indicating that the appellant was the registrant and that Mr. Lewis paid the $105.00 entry fee. (AF, Tab 11. p. 246). Cady's declaration again confirms that the OIG uncovered this document during its investigation. (AF, Tab 71, Cady Decl., p. 46).

Having proven that the appellant accepted nine of the twelve alleged gifts from Lewis, the agency must now prove, as it charged, that the appellant knew or should have known that the acceptance of those gifts created the appearance of a conflict of interest. *See LaChance,* 147 F.3d at 1371. For the following reasons, I find that the agency has met its burden of proof.

First, I find that the appellant knew that Lewis was a Vice President at Jefferson Consulting at the time that she accepted these gifts from him, and that she knew that Jefferson Consulting was doing work for companies doing business or seeking to do business directly with the agency. The record contains an August 7, 2013 email from the President of Jefferson Consulting Group to the appellant introducing a Humana employee for purposes of discussing "Humana's experience and ideas to provide a near term alternative solution to VHA's need for larger, community-based clinics with expanded capabilities," and offering to

participate in the discussion as needed. (AF, Tab 12, p. 266). The record also contains two business-related email exchanges between Lewis and the appellant, with Mr. Lewis using his business address. In the first email exchange, dated August 28, 2012, Lewis forwarded the appellant information pertaining to the current contractor at a VISN 18 community-based outreach clinic and the "challenges facing the clinic and its workload." (*Id*., pp. 273-74). In the second email exchange, dated August 21, 2013, Lewis and the appellant discussed agency practices in meeting with potential vendors. (*Id.*, pp. 277-78). Based on the foregoing, I find it more likely than not that the appellant was aware of Lewis's position with Jefferson consulting, and that Jefferson Consulting was involved in helping contractors to secure business with the agency. The appellant, at least occasionally, had business-related discussions with Lewis, and the appellant had personally worked with Jefferson Consulting in discussions with potential contractors. I find it difficult to believe that she accepted over $13,000 in gifts from Lewis over a two year period, as described above, without knowing what he did for a living.

I also find that this acceptance of gifts from him created the appearance of a conflict of interest. Although Jefferson Consulting does not appear to have been doing business, or attempting to do business, directly with the agency, its client companies were. In fact, it is Jefferson Consulting's very business is to assist its clients in securing favorable government contracts, particularly with the Department of Veterans Affairs. (AF, Tab 12, pp. 279-80). Furthermore, I find, based on documentary evidence pertaining to the appellant's involvement in contract negotiations and her approval of a contract request, that her official duties as Director of the Phoenix VAHCS placed her at the opposite end of the negotiating table from Jefferson Consulting Group and its clients. (AF, Tab 11 pp. 248-51, 260-62). I therefore find that the agency has proven that the appellant's interest in accepting the gifts from Lewis "reasonably create[s] an appearance" of having an effect on her interests or duties in her role as Director

of the Phoenix VAHCS. *See Lane v. Department of the Army*, 19 M.S.P.R. 161, 162-63 (1984). Charge 2, Specification B is sustained.

The third charge against the appellant was "Failure to Report Gifts," which included two specifications. (AF, Tab 1, PAM, pp. 11-12). Once again, the agency used generalized charging language, so the specifications supporting the charge determine what the agency must prove. *LaChance*, 147 F.3d at 1371.

Specification A involved the failure to report calendar year 2012 gifts. It states:

> On or around March 22, 2013, you signed an Office of Government Ethics Form 278, Executive Branch Personnel Public Financial Disclosure Report in which you reported your financial assets for calendar year 2012. Annual reporting is your obligation as a member of the Senior Executive Service. Under Schedule B, Part II: Gifts, Reimbursements and Travel Expenses, you marked the box "None" in response to the following:
>
> "For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $350, and (2) travel-related cash reimbursements received from one source totaling more than $350."
>
> You failed to report the following gifts which were given to you by Dennis "Max" Lewis, Vice President for Jefferson Consulting Group during calendar year 2012:
>
> a. International airline tickets at a cost of approximately $465.07 roundtrip from Phoenix, Arizona to Vancouver, British Columbia for travel in or about May 2012; and
>
> b. Airline tickets at a cost of approximately $355.60 roundtrip from Phoenix, Arizona to Portland, Oregon from travel in or about October 2012.

(AF, Tab 1, PAM, p. 11).

Thus, in order to prove Specification A, the agency must prove the following elements: (1) that for calendar year 2012 the appellant signed Ethics Form 278 on about March 22, 2013; (2) that the appellant marked "None" when asked about 2012 transportation gifts in excess of $350 from a single source; and

(3) that in 2012 the appellant received from Lewis a May 2012 roundtrip airline tickets from Phoenix to Vancouver, which cost approximately $465.07, as well as October 2012 roundtrip airline tickets from Phoenix to Portland, which cost approximately $355.60.

First, the agency has proven that the appellant signed the required 2012 Ethics Form 278 on about March 22, 2013. (AF, Tab 11, p. 264). As with part of Charge 2, the primary supporting evidence is provided by the sworn declaration of Cady, the Resident Agent in Charge of a division of the OIG. (AF, Tab 71, p. 42).[12] Cady obtained the appellant's Form 278 from the agency's Office of General Counsel (AF, Tab 71, Cady Decl., pp. 46-47). Second, Cady's investigation confirmed that the appellant did, indeed, check "none" when asked about 2012 transportation gifts in excess of $350 from a single source. (AF, Tab 11, page 266). Third, as explained in more detail below, and despite some evidentiary issues, the agency has proven that Lewis gave the appellant the two referenced 2012 roundtrip airline tickets.

With respect to the $465.07 roundtrip airline ticket between Phoenix and Vancouver in May 2012, there are two pieces of evidence that seem probative. The first is Lewis's April 30, 2012 email in which he forwarded the United Airlines e-ticket directly to the appellant. (AF, Tab 11, pp. 188-191). The second is the OIG-subpoenaed United Airlines record that confirms the e-ticket was purchased with Lewis's credit card. (AF, Tab 11, pp. 335, 337). Both pieces of evidence are confirmed by Cady's investigation. (AF, Tab 71, Cady Decl. pp. 43-44). Accordingly, I find the agency has proven the first unreported 2012 gift in Specification A.

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[12] Starting in April 2014, Cady's investigation included a review of subpoenaed records from Southwest Airlines, United Airlines, Kaiser Permanente, and Live Nation (Ticket Master). (IAF, Tab 71, pp. 42-43). His investigation also included a review of numerous emails obtained from the agency's email system. (*Id.*, p. 43).

With respect to the $355.60 roundtrip airline ticket between Phoenix and Portland in October 2012, there is an evidentiary issue, but the agency has nevertheless managed to overcome it. The evidentiary issue involves Cady's assertion that he reviewed an email from Lewis to the appellant indicating that on September 15, 2012, the appellant was issued a United Airlines roundtrip e-ticket between Phoenix and Portland for travel in October 2012. ((AF, Tab 71, Cady Decl., pp. 44). Although he makes that assertion, Cady failed to provide any record citation for that email. Moreover, in culling the record, I could find no such email. Nevertheless, in paragraph 17 of Cady's declaration, (AF, Tab 71, p. 44) he also relies on an OIG-subpoenaed record from United Airlines, which indicates that on September 14, 2012, Lewis paid for two tickets, each worth $355.60, that were issued to the appellant and Lewis. (AF, Tab 11, pp. 340-41). Accordingly, I find the agency has also proven the second unreported 2012 Lewis gift in Specification A. This specification is sustained.

Turning to Specification B, which involved the appellant's failure to report calendar year 2013 gifts, the agency alleged the following:

> On or around March 22, 2014, you signed an Office of Government Ethics Form 278, Executive Branch Personnel Public Financial Disclosure Report. Under Schedule B, Part II: Gifts, Reimbursements and Travel Expenses, you marked the box "None" in response to the following:
>
> "For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $350, and (2) travel-related cash reimbursements received from one source totaling more than $350."
>
> You failed to report receiving in-kind payment or reimbursement for travel expenses totaling over $770.00, including a hotel room for one night, airfare, meals, a rental car and airport parking, resulting from a job interview with Kaiser Permanente in October 2013.

> You failed to report the following gifts purchased by Dennis "Max" Lewis, Vice President, Jefferson Consulting Group during calendar year 2013:
>
> a. Airline tickets at a cost of approximately $317.60 roundtrip from Phoenix, Arizona to El Paso, Texas for travel in or about March 2013;
>
> b. Airline tickets at a cost of approximately $1,015.60 roundtrip from Phoenix, Arizona to Eureka, California for travel in or about May 2013;
>
> c. Airline tickets at a cost of approximately $389.80 roundtrip from Phoenix, Arizona to Portland, Oregon for travel in or about June 2013;
>
> d. Five tickets and parking for approximately $729.50 paid on or about August 24, 2013 to The Mrs. Carter Show World Tour Starring Beyoncé on or about December 7, 2013;and
>
> e. Entry fee of approximately $282.98 paid on or about December 11, 2013, for the 2014 P.F. Chang's Rock 'n' Roll Arizona Marathon & Half Marathon on or about December 2, 2013.

(AF, Tab 1, PAM, p. 12).

As before, the language of Specification B determines what the agency must prove. *LaChance*, 147 F.3d at 1371. Thus, the agency must prove: (1) that for calendar year 2013 the appellant signed Ethics Form 278 on about March 22, 2014; (2) that the appellant marked "None" when asked about the receipt of 2013 gifts of transportation, lodging or food, as well as the receipt of 2013 travel-related cash reimbursements; and (3) that in 2013 the appellant received from a single source one or more of the listed items in excess of $350.

First, the agency has proven that the appellant signed the required 2013 Ethics Form 278 on about March 21, 2014. (AF, Tab 11, p. 270). As with the prior year's form, Cady obtained the Form 278 from the agency's General Counsel. (AF, Tab 71, Cady Decl., pp. 46-47). Second, Cady's investigation confirmed that the appellant did, indeed, check "None" when asked about 2013 gifts in excess of $350 from a single source. (AF, Tab 11, page 272). Third, as explained in more detail below, and again despite some evidentiary issues, the

agency has proven that the appellant received more than $350 from Kaiser Permanente, and more than $350 from Lewis, based on most, but not all, of the items set out in the specification.

The agency alleged that the appellant failed to report the reimbursement of travel expenses regarding her October 2013 Kaiser Permanente job interview, which totaled more than $770 for airfare, hotel, meals, rental car, and airport parking. (AF, Tab 1, page 12). In support of that allegation, Cady's Declaration confirms the review of OIG-subpoenaed documents from Kaiser Permanente, (AF, Tab 71, Cady Decl., p. 45), which indicate that on October 7, 2013, the appellant did indeed interview for the position of Chief Operating Officer at the Santa Clara Medical Center. (AF, Tab 11, p. 295). However, with respect to the expenses for that trip, Cady makes the following assertion in his declaration: "I reviewed OIG-subpoenaed documents from Kaiser Permanente (KP). They indicate that Ms. Helman's reimbursements for the interview described in paragraph 29 above were paid as follows by Kaiser Permanente: $33.78 (meals), $60.57 for one day's car rental, $22.00 for airport parking, $141.34 for one night's hotel stay, and round trip air fare of $259.80. This resulted in a total of $517.49." (AF, Tab 71, Cady Decl. p. 45) (citing AF, Tab 11, pp. 278, 281-83, 286-88, 290-91, 293). In looking at the underlying evidence, it is somewhat more nuanced: Kaiser Permanente only reimbursed the appellant with a check for $116.35 to cover meals, rental car, and airport parking, while the remaining expenses for hotel ($141.34) and air travel ($259.80) were paid directly by Kaiser Permanente to third-party vendors, and not to the appellant. (AF, Tab 11, p. 276). The distinction makes somewhat of a difference because Form 278 only requires the reporting of "travel-related cash *reimbursements* received from one source totaling more than $350." (AF, Tab 11, pp. 266, 272) (emphasis added). In this case, the appellant only received a "travel-related cash reimbursement" of $116.35, which is below the reporting threshold. Nevertheless, for the remainder of the Kaiser Permanente interview trip, the appellant received more than $350 in

value, which triggers the Form 278 requirement to report "gifts (such as tangible items, transportation, lodging food, or entertainment) received from one source totaling more than $350." (*Id.*). Accordingly, I find that the agency has established a 2013 unreported reimbursement received from Kaiser Permanente.

With respect to the five unreported 2013 gifts from Lewis, each is addressed in turn. The first unreported 2013 Lewis gift involves roundtrip airline tickets from Phoenix to El Paso for travel in March 2013 at a cost of approximately $317.60. (AF, Tab 1, page 12). At the outset, it should be noted that this item, standing alone, does not meet the $350 minimum reporting requirement. (AF, Tab 11, pp. 266, 272). As Form 278 provides, the appellant was only required to report gifts or travel-related cash reimbursements "received from one source totaling more than $350." (*Id.*). Nevertheless, to the extent it may be combined with other unreported 2013 gifts from Lewis, the record evidence supports the charge. Cady's Declaration confirms that he reviewed a March 11, 2013 email from Lewis to the appellant confirming the Phoenix to El Paso e-ticket at a cost of $317.60. (AF, Tab 71, Cady Decl., p. 44). Although Cady again does not provide a record citation, this time, the email is included in the record. (AF, Tab 11, pp. 204-208). The gift is also confirmed by Cady's Declaration regarding his review of the OIG-subpoenaed documents from Southwest Airlines, (AF, Tab 71, Cady Decl. p. 44), which references those records. (AF, Tab 11, pp. 309-325).

The second unreported 2013 Lewis gift was a roundtrip airline ticket from Phoenix to Eureka, California for travel in May 2013 at a cost of $1015.60. (AF, Tab 1, PAM. p. 12). The agency has not proven this alleged gift by preponderant evidence. Cady's declaration confirms his review of Lewis's April 4, 2013 email to the appellant forwarding the United Airlines Eureka roundtrip e-ticket to the appellant, which states "[f]or your upcoming Avenue of the Giants Marathon." (AF, Tab 11, pp. 211-13). However, the problem with this allegation is also found in Cady's declaration, which concedes that, based on OIG-subpoenaed

United Airlines documents, the airfare was $1015.60, but only $507.80 was paid (AF, Tab 71, page 44). Although that fact strongly suggests there was travel by either the appellant *or* Lewis, but not both, Cady does not further explain the discrepancy. Moreover, the very OIG-subpoenaed documents relied upon by Cady tend to show the passenger was Lewis, not the appellant. (AF, Tab 11, pp. 343-44). Paragraph 21 of Cady's declaration cites Tab 11, pages 343-44, which is a difficult to decipher computer printout, but almost all the references are to Lewis, not the appellant. Moreover, the very next two pages, which Cady does not mention, seem to confirm Lewis as the passenger in the itinerary, and include a copy of his boarding pass. (AF, Tab 11, pp. 345-46). There are no comparable documents, a boarding pass or something similar, for the appellant. Accordingly, I find that the agency has failed to prove this gift to the appellant.

The third unreported 2013 Lewis gift was a roundtrip airline ticket from Phoenix to Portland, Oregon for travel in June 2013 at a cost of approximately $389.80. (AF, Tab 1, PAM, p. 12). Paragraph 24 of Cady's declaration references his review of a June 26, 2013 email Lewis sent to the appellant forwarding the e-ticket for this trip (AF, Tab 71, Cady Decl. p. 44). That email is in the record. (AF, Tab 11, pp. 216-219). Moreover, Cady relies on the OIG-subpoenaed record from United Airlines, which further confirms the appellant's flight at Lewis's expense. (AF, Tab 11, page 348, column 3). Both the Lewis email and the OIG-subpoenaed United Airline record confirm that the roundtrip ticket was purchased in June for travel in July. (AF, Tab 11, pp. 216-219, 348). I conclude that the agency has proven this gift allegation.

The fourth unreported 2013 Lewis gift was a set of tickets and parking fees for the Mrs. Carter Show World Tour Starring Beyoncé on about December 7, 2013 at a cost of $729.50. (AF, Tab 1, PAM, p. 12). Cady again confirms his review of a December 13, 2013 email from the appellant to her staff regarding her attendance at the Beyoncé concert. (AF, Tab 71, Cady Decl., p. 45). That email is found in the record. (AF, Tab 11, p. 235). In Paragraph 27 of his declaration,

Cady also asserts the uncovering of an August 28, 2013 email from Lewis to the appellant forwarding the Ticketmaster confirmation and including the message, "Enjoy!" (AF, Tab 71, Cady Decl. p. 45). He again, however, fails to provide a record citation to that email, and a search has not revealed it. Nevertheless, in paragraph 28 of the declaration, Cady attests to his review of OIG-subpoenaed documents from Live Nation/Ticketmaster, which confirmed that Lewis paid for the tickets. (AF, Tab 71, Cady Decl. p. 45). Those documents are actually in the record. (AF, Tab 11, pp. 300-302). Accordingly, I find it more likely than not Lewis gave the appellant this gift.

The last of the five unreported 2013 Lewis gifts involved a December 2013 entry fee for the 2014 P.F. Chang's Rock 'n' Roll Arizona Marathon & Half Marathon at a cost of $282.98. (AF, Tab 1, PAM, pp. 12). Again, standing alone, this allegation would be insufficient due to the $350 reporting requirement (AF, Tab 11, pp. 266, 272). Nevertheless, in combining it with other 2013 unreported gifts, Cady's Declaration confirms his review of Lewis's December 11, 2013 email to the appellant, which forwards the race registration confirmation to the appellant and which was paid by an individual with Lewis's billing address and the last four digits of Lewis's VISA credit card number. (AF, Tab 71, Cady Decl., p. 45). That email is also in the record. (AF, Tab 11, pages 230-32). I find that the agency has proven this last gift, as well.

In sum, with respect to the Charge 3, I find the agency has proven the following. For Specification A, I find that the agency has proven both of its allegations regarding unreported 2012 Lewis gifts: (1) the $465.07 roundtrip airline ticket between Phoenix and Vancouver; and (2) the $355.60 roundtrip airline ticket between Phoenix and Portland, Oregon. For Specification B, regarding the unreported 2013 Kaiser Permanente monies, I find the agency has proven the allegation, but only with respect to the hotel and airfare. As for the five unreported 2013 Lewis gifts, I find the agency has proven the payment for the $317.60 roundtrip airfare between Phoenix and El Paso, the $389.80 roundtrip

airfare between Phoenix and Portland, Oregon, the Beyoncé world tour tickets and parking and the P.F. Chang's Rock 'n' Roll Arizona Marathon. The agency did not adduce preponderant evidence regarding the $1015.60 roundtrip airline ticket between Phoenix and Eureka because the underlying paperwork suggests that the trip was taken by Lewis, not the appellant.

In response to these charges, the appellant asserts three arguments, none of which carries the day. First, the appellant argues that she is unable to respond to the merits of the allegations based on due process considerations. (AF, Tab 70, Appellant's Merits Brief, pp. 53-54). As ruled previously, although no adverse inference has been drawn against the appellant, the agency has proven the charge without any inference. The appellant also argues that the agency has not brought a charge of "failure to report gifts" against any senior executive in the past five years, or possibly ever (AF, Tab 70, page 54). Again, this speaks to penalty not the legality of the charge.

Finally, the appellant argues that the agency "neither alleges nor cites to any evidence that Ms. Helman used the purported gifts at issue or that she did not repay the purported giftor for those gifts." (AF, Tab 72, Appellant's Merits Brief, p. 18). I reject that argument. First, it is irrelevant whether the appellant used or repaid the gifts because Form 278 requires disclosure of gifts that were "received" by the appellant, regardless of whether they were used or repaid. (AF, Tab 11, pp. 266, 272). *See LaChance*, 147 F.3d at 1371 (the agency need only prove what it has charged in the specification). Moreover, the record supports the conclusion that the gifts were accepted and utilized. For example, when Mr. Lewis emailed the appellant travel confirmation for her flight to Eureka, he wrote "For your upcoming Avenue of the Giants Marathon. Good Luck!" (AF, Tab 11, p. 211). The Kaiser Permanente records are clear about the payments made to and on behalf of the appellant, with no suggestion of repayment. (AF, Tab 11, pp. 227, 276-298). Likewise, when Lewis emailed the appellant to confirm her trip to the Rock 'n' Roll Arizona Marathon, the appellant responded by email

"Whoooo hoooo!" (AF, Tab 11, page 230), and Lewis replied: "Hope you feel that way after you run the marathon …. :) I think you're in Sedona two day[s] later …. :)" (AF, Tab 11, p. 230). Similarly, as detailed above, the OIG-subpoenaed airline records confirm that the appellant took the flights. I find the agency has adduced preponderant evidence in support of this specification, and it is sustained.

The appellant has not established her affirmative defenses.

The appellant has argued from the start that the agency violated her pre-removal due process rights by failing to give her meaningful notice and opportunity to respond to the action pending against her, and also that the post-removal proceedings here violate her due process rights because of their abbreviated nature. (AF, Tab 1, Appeal Form, p. 6, Tab 70, Appellant's Merits Brief, pp. 19-35; Tab 72, Appellant's Response Brief, pp. 5-8). As I explained in my December 8, 2014 ruling, violation of due process is a viable affirmative defense in proceedings under 38 U.S.C. § 713. (AF, Tab 25). The appellant bears the burden of proving this affirmative defense by preponderant evidence. 5 C.F.R. § 1210.18(b)(3).

The essential requirements of due process are prior notice and an opportunity to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). As the Supreme Court has explained, dismissals for cause will often involve factual disputes, and consideration of the employee's response may help clarify such disputes before any deleterious action is taken. In addition, even if the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is before the termination takes effect. *See id*. at 543. In order for this opportunity to respond to be meaningful, the deciding official must actually consider an employee's timely response to a proposed action. *See Hodges v. U.S. Postal Service*, 118 M.S.P.R. 591, 594 (2012) ("the deciding

official's complete failure to consider the appellant's written response to the proposal notice before issuing a decision constitutes—in and of itself—a violation of minimum due process of law").

In this case, the appellant alleges that the deciding official had already decided to remove her before she responded to the notice of pending action, thus failing to give her response meaningful consideration, and thereby violating her pre-removal due process rights. (AF, Tab 1 at 6; Tab 70, Appellant's Merits Brief, pp. 24-32). Specifically, she argues that the agency was under intense political pressure to remove her, and that the deciding official bowed to this pressure without regard to the appellant's side of the story. (*Id*., pp. 25-30). In support of her argument, the appellant cites to numerous public comments and other documents by and from individuals expressing their desire that she be removed, some of which were quite harsh. (*Id*., pp. 25-27). Most specifically to her, she cites a letter from Arizona Senators John McCain and Jeff Flake to Secretary McDonald stating that "[t]he clearest example of your failure to change the culture at the VA is the continued employment of Sharon Helman, the former director of the Phoenix VA Health Care system," (AF, Tab 48, pp. 7-8), a news article quoting Representative Jeff Miller as stating that the agency "needs to move much more quickly to purge other disgraced personnel from its payroll," including the appellant, (*id*., p. 13), a press release from Representative Miller's office stating that the agency needs to get serious about purging "villains", (*id*., p. 32), a hearing before the House Committee on Veterans Affairs, in which Representative Kirkpatrick stated that he and his constituents are "calling for the [appellant's] immediate firing. We want that to happen immediately." (AF, Tab 49, p. 17). The appellant also cites public comments by Secretary McDonald, stating that he intended to hold senior leadership at the Phoenix VAHCS accountable through appropriate disciplinary action. (AF, Tab 45, pp. 16, 19-20; Tab 70, Apppellant's Merits Brief, p. 26). Finally, she cites a letter from Secretary McDonald to Representative Miller, explaining delays in the agency's

taking action against the appellant and assuring him that the agency "will move swiftly, within the bounds established by law, to bring these matters to closure." (AF, Tab 72, Appellant's Response Brief, pp. 30-32). More probably than not, the agency was under political pressure, amplified through the media, to remove her from service, and Secretary McDonald responded to this pressure by assuring Congress and the public that the agency was taking swift action to address the situation.

Nevertheless, the agency submitted a declaration from Deputy Secretary Gibson, the actual deciding official in this case, explaining that he took his job as deciding official seriously, that he did not discuss the matter with any agency employee apart from counsel and human resources staff, that no agency official pressured him to reach a particular result, and that despite congressional and media attention, he personally felt no pressure to take a particular action against the appellant, and in fact, he does not allow the media or Congress to pressure or influence him in the performance of his official duties as Deputy Secretary. (AF, Tab 71, Agency's Merits Brief, Gibson Decl., pp. 57-59). He further explained his decision-making process and the evidence that he took into account in arriving at his decision, including the appellant's response to the notice of pending action. (*Id.*, pp. 54-59).

Weighing the circumstantial evidence of political and media pressure against the direct evidence of impartiality by the deciding official, I find that the appellant has not proven she was deprived of a meaningful opportunity to respond to the PAM before her removal. *See Blake v. Department of Justice*, 81 M.S.P.R. 394, 413-14 (1999). While not wholly discounting the scrutiny to which the agency has been subjected recently, and with respect to the appellant in particular, I find insufficient reason to disbelieve the deciding official's sworn claim of impartiality. Absent effective cross examination or some kind of "smoking gun," overcoming that declaration is a high hurdle. I further find that, notwithstanding the demands from individual congressmen that the appellant be

removed from service, there is insufficient evidence to find that Deputy Secretary Gibson ever promised any particular result in her disciplinary action. Rather, Secretary McDonald assured Congress and the public that the process would proceed as quickly as practicable and that the course of events would be determined by the law and the evidence. (AF, Tab 45, pp. 16, 19-20; Tab 72 pp. 30-32).

The appellant also argues that the agency deprived her of pre-removal due process by giving her only 5 days to respond to the notice of pending action, which she argues was insufficient under the circumstances. (AF, Tab 70, Appellant's Merits Brief, pp. 31-32). I agree with the appellant that 5 days was a short amount of time to respond to this notice of pending action. Nevertheless, I do not find the response period was so short as to constitute, on its face, a due process violation, *i.e.*, lack of a meaningful opportunity to respond to the charges. *See Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1068-69 (6th Cir. 1982) (3 days' notice was sufficient to satisfy due process in the hospital's termination action).

Furthermore, recognizing that due process is, to a large extent, situational, I have considered the particular facts of this case, and find that the appellant has not established that the 5-day response period that she was afforded violated her due process rights.[13] *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Specifically, I find that the appellant was aware for over 5 months, since the May 30, 2014 notice of proposed removal, that the agency was pursuing disciplinary action against her, and of the general bases for at least some of the misconduct alleged in the November 10, 2014 notice of pending action. (AF, Tab

[13] The agency asserts the appellant actually had eight days to respond. I use the shorter period to evaluate the appellant's claim.

1, p. 9, Tab 18, p. 29). Thus, this is not a case where an employee was caught off guard. I further find that the appellant did not request an extension of time to respond to the proposal. She argues that "the VA's procedures do not allow any discretion in the time frame for [her] response," (Tab 70, Appellant's Merits Brief, p. 31), but this characterization is not quite accurate. The agency's written procedures provide that "the Senior Executive will have 5 business days after receiving both the Pending Action Memorandum and the evidence file to respond in writing to the Pending Action Memorandum." (AF, Tab 12, p. 248). The procedures do not expressly provide for an extension of this time period, but neither do they forbid it. (*Id*., pp. 242-49). Indeed, Deputy Secretary Gibson stated in his sworn declaration that he offered the appellant an extension of time to respond to a discrete issue for which he obtained additional information after the appellant had submitted her response, but the appellant declined the offer. The appellant has not offered evidence to rebut that point. Under these circumstances, I cannot find that the 5-day response period deprived the appellant of due process.

Regarding post-removal due process, the appellant argues that the abbreviated 21-day statutory adjudication period is unreasonable and calculated to deprive her of due process, and that the Board's implementing regulations deprive her of the opportunity to conduct meaningful discovery and develop the record. (AF, Tab 70, Appellant's Merits Brief, pp. 32-35). *See* 38 U.S.C. § 713(e)(1), (3), 5 C.F.R. § 1210.12. As an initial matter, the Board's discovery regulations are calculated, in part, to assist administrative judges, and the parties, in complying with the statutory 21-day adjudication period. Discovery is truncated because the entire process is truncated. Furthermore, the Board's discovery regulations are alterable at the presiding judge's discretion, something not sought here. The problems the appellant cites are all children born of the statute. Therefore, it seems the appellant's due process challenges to these post-removal proceedings are all tantamount at a due process challenge to the statute

itself. I lack the power to rule on the constitutionality of the enabling statute which provides the authority to hear this case in the first place. *See Special Counsel v. Bianchi,* 57 M.S.P.R. 627, 632 (1993).

The appellant also argues that the agency committed harmful error in the application of its procedures when it removed her. Harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. See, *e.g., Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991). The appellant also bears the burden of proving this affirmative defense by preponderant evidence. 5 C.F.R. § 1210.18(c).

In this case, the appellant argues that the agency violated its written procedure requiring that"[t]he Secretary or his designee will give full and impartial consideration to the Senior Executive's reply, if any, and all evidence of record." (AF, Tab 12, p. 248; Tab 70, Appellant's Merits Brief, pp. 57-58). The appellant argues that a poorly constructed charging document, the defeat of several specifications by their own language or by the Agency's own evidence, and the agency's challenge to the appellant's response to Charge 1 as "irrelevant" to these proceedings indicate that the deciding official was not fair and impartial as required. (AF, Tab 70, Appellant's Merits Brief, pp. 57-58). Although I agree with the appellant that the agency's case suffers from some infirmities, I do not think that these, or the agency attorneys' litigation strategies during this appeal, are particularly probative of the deciding official's state of mind. Once again, as found above, I find insufficient reason to doubt Deputy Secretary Gibson's impartiality as expressed in his declaration. The appellant also points to irregularities in the agency's action to take back bonus money she was paid, such as not turning over documents to her that possibly should have been. She does not, however, tie those actions to the deciding official here. Because the

appellant has not shown that the agency committed any procedural error, I find that she has not proven her claim of harmful procedural error.

The appellant has not rebutted the presumption of the reasonableness of the penalty.

The appellant first makes a legal argument about penalty mitigation, *i.e.*, the practice of reducing an agency's chosen penalty to some lesser form of punishment. First she contends the Board was not authorized to actually promulgate regulations. She also contends that the all-or-nothing rebuttable presumption approach to penalty review established by 5 C.F.R. § 1210.18 is unwarranted and that penalty mitigation is still permissible. She notes that penalty mitigation has been a long standing fixture of civil service law and that in passing 38 U.S.C. § 713 Congress did not expressly rule it out, but could have, as it did with particular regulatory and statutory sections. She further points out that Congress did expressly make appeals under Section 713 subject to the provisions of 5 U.S.C. § 7701, and 5 U.S.C. § 7701(b)(3) provides the authority to mitigate. (AF, Tab 70, Appellant's Merits Brief, pp. 57-59). The appellant may or may not have a fair argument. However, it will not be addressed. The time to raise a challenge to the procedures used to decide this appeal was before the motion deadline.

For its part, the agency argues that the Board's seminal penalty consideration decision, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), is not applicable to this appeal under 38 U.S.C. § 713. However, it also concedes that some of the factors set out in *Douglas* were factors the Deputy Secretary himself considered in arriving at his decision. (AF, Tab 71, Agency's Merits Brief, pp. 29-31). As the parties were previously notified, whether the appellant can rebut the presumption of the appropriateness of the penalty imposed in this case, removal, will be determined by the totality of the circumstances. Simply because certain types of circumstances were discussed in *Douglas* does

not render them inapplicable. Therefore, the *Douglas* factors will be considered along with, as ruled earlier, any other factor the parties feel is germane, even though it is not set out in *Douglas*.

The arguments above aside, the appellant points to several factors in her attempt to rebut the reasonableness of her removal. At the outset, it must be noted the appellant is attempting to rebut a presumption. For the proven misconduct, the penalty of removal is reasonable unless and until the appellant adduces sufficient evidence to prove otherwise. *See* 2 *McCormick On Evidence* §§ 342, 344 (7th ed.).

The appellant correctly anticipated that Charge 1 would not be sustained, and she contends those charges were the most serious against her as they were the ones the Deputy Secretary noted in the PAM as making her not suitable for the civil service. She wrongly anticipated, however, that Charge 2, Specification A would not be sustained. However, as noted above, the charge that a manager either took or allowed an action which "could be perceived as retaliation" is not particularly serious because any time a manager takes some personnel action against an employee who has engaged in some kind of protected activity, a perception of retaliation could arise, subject to the legal contours of a retaliation claim for the particular type of protected activity, even if there is no deliberate ill intent or carelessness on the manager's part. Thus, while that specification was sustained, it is not particularly serious misconduct. She contends that in looking at Charge 2, Specification B, and all of Charge 3, it is not serious misconduct and removal is unreasonable, citing a case holding inadvertent offenses lessen the seriousness of the misconduct. I must disagree.

In the context of the appellant's position, as an SES Director of a sizable health care system with a large budget, one must be scrupulous to avoid even the appearance of a conflict of interest and to correctly report the things of monetary value one receives from others. *See Coons v. Department of Navy*, 15 M.S.P.R. 1, 5 (1983) ("Creating the appearance of a conflict of interest constitutes a

serious breach of trust. The Government clearly has an interest in prohibiting such conduct, and in ensuring that its agents and employees are not compromised in the performance of their duties as a result of any outside influences"). The higher ranking one is, the more important those things become. *See Walcott v. U.S. Postal Service,* 52 M.S.P.R. 277, 284 (1992) (an agency can hold a high-ranking employee to a higher standard of conduct for purposes of penalty), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992). Moreover, I conclude that the appellant's misconduct in Charge 2, Specification B and in Charge 3, was not inadvertent. Sincerely forgetting about one of the plane rides purchased for her might be understandable in some circumstances but, the notion she actually forgot them all strains credulity. Moreover, accepting gifts such as tickets to a popular performer's concert from a person who represents companies seeking to do business with the agency was, more probably than not, not an accident or mistake. I conclude the appellant's offenses are serious and more likely than not, intentional. *See Murry v. General Services Administration*, 93 M.S.P.R. 554, 557-58 (2003); *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 135-36 (1997) (the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional are paramount considerations).

The appellant contends she a long a history of quality service with the agency and, until this point, it was blemish free. *See Alexander v. U.S. Postal Service*, 67 M.S.P.R. 183, 190 (1995) (long service with a good history weigh in favor of the employee). Indeed, she avers she worked her way up from a low ranking Program Assistant position to ultimately be chosen for a series of facility director positions. She has not adduced evidence of that earlier work history, however. On the other hand, the agency also adduced no evidence that the misconduct at issue here was the last straw on top of a history of problematic behavior, and no such evidence is apparent from the record. Ultimately, though, it is the appellant's burden to prove what she asserts to rebut the penalty and, she

has not established a long, positive work history by preponderant evidence.[14] Moreover, even if the appellant had adduced such evidence, it is outweighed by the seriousness of her misconduct and its relation to her position. *See id.*

With considerations about notoriety of the appellant's misconduct, I am aware of none, insofar as the sustained misconduct is concerned. The press and Congressional attention has been on the charges the agency failed to prove. This weighs in favor of the appellant. Then there is the issue of notice. While I find it more likely than not the appellant was not on notice that taking an action which might be perceived as retaliatory could be misconduct on her part, I find she was on notice that not accurately completing the Office of Government Ethics Form 278 was actionable misconduct, because the form advised next to the signature box that by signing she was certifying that the statements she made on the form were true, correct and accurate to the best of her knowledge. The form also states in the following section that another official must certify that the appellant's answers avoid even the appearance of a conflict of interest. *See Ware v. Department of Veterans Affairs*, 76 M.S.P.R. 427, 435-36 (1997) ("the fact that the appellant was clearly on notice of the procedures to be followed to avoid the misconduct support the removal penalty").

I conclude the appellant has little rehabilitative potential. She has steadfastly denied any wrongdoing in the course of this appeal and attempted to deflect attention from her own actions by pointing to political considerations and complaining the agency has been looking in to her private life. While it is likely that the political spectacle which followed the revelations about how the agency was conducting its business is what led the agency to apply scrutiny to her, taking a close look was not unwarranted under the circumstances. Moreover, even if it was somehow inappropriate for the agency to scrutinize the appellant in the

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[14] The appellant points to her "Ex. 1 ¶¶ 2, 4, 8." The Exhibit 1 to the brief is a declaration from the appellant, but it does not discuss her work history.

manner it did, when the agency did look, it found serious financial improprieties on her part. They are not to be simply ignored. Her failure to take responsibility for any of the sustained misconduct does not support a finding of rehabilitative potential. *See Dolezal v. Department of Army*, 58 M.S.P.R. 64, 71 (1993) (in holding an appellant had "little, if any," rehabilitative potential, the Board noted "the appellant still does not understand the serious nature of his misconduct. He still contends that his [misconduct] was none of the agency's business" and that "He does not appear to understand that he is held to a higher standard of conduct because of his SES status").

In sum, considering all the factors cited by the parties, including the discretion the agency argues it should have under 38 U.S.C. § 713, I conclude the ones outlined above are most relevant. The appellant has not established that the penalty of removal is unreasonable under the circumstances of this case. It must, therefore, be upheld.

DECISION

The agency's action is AFFIRMED.

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Stephen C. Mish
Chief Administrative Judge

NOTICE TO APPELLANT

Pursuant to 38 U.S.C. § 713(e)(2), this decision is final and not subject to any further appeal.