

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
CENTRAL REGIONAL OFFICE**

XIAFEN CHEN,  
Appellant,

DOCKET NUMBER  
CH-0752-17-0028-I-1

v.

DEPARTMENT OF COMMERCE,  
Agency.

DATE: April 23, 2018

Stephen A. Simon, Esquire, Cincinnati, Ohio, for the appellant.

Alpana K. Gupta, Washington, D.C., for the agency.

**BEFORE**

Michele Szary Schroeder  
Chief Administrative Judge

**INITIAL DECISION**

**INTRODUCTION**

The Appellant, Xiafen Chang, was a Hydrologist for the United States Department of Commerce, National Oceanic and Atmospheric Administration in Wilmington, Ohio. Ms. Chang filed a timely appeal challenging the agency's action to remove her from employment in March 2016, based on charges of Conduct Demonstrating Untrustworthiness, Misrepresentation, Misuse of a Federal Database and Lack of Candor. The Board has jurisdiction in this appeal pursuant to [5 U.S.C. §§ 7512\(1\) and 7513\(d\)](#). I held a three-day hearing in March

2017. The parties submitted written closing arguments on April 26, 2017. For the reasons set forth below, the agency's penalty of removal is mitigated to a 15-day suspension.

## ANALYSIS AND FINDINGS

### Background

#### Introduction

The National Oceanic and Atmospheric Administration (NOAA) is dedicated to predicting and protecting the environment and is part of the United States Department of Commerce. The National Weather Service (NWS) is part of NOAA. NWS provides weather, hydrologic and climate forecasts and warnings. Within NWS are a number of River Forecast Centers that provide models and forecasts on flooding, water levels, and related weather events.<sup>1</sup>

Ms. Chen was born in China. She came to the United States in 1992 and became a United States citizen in 1997.<sup>2</sup> Tr. Chen, p.662 Prior to coming to the

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<sup>1</sup> Citations to the Board's record will be identified by the tab number followed by the page number in the bottom right hand corner, e.g., Tab 1, p.27. Some documents have more than one number shown in the bottom right hand corner. When available, the page number assigned by the Board's electronic filing system will be used.

<sup>2</sup> Citations to the transcript for the first two days of hearing (March 14 and 15, 2017), will be identified by Tr., witness's last name, and the transcript page number(s). Citations to the transcript for the third day of hearing (March 28, 2017) will be identified by Tr. 2, witness's last name, and the transcript page number(s). Because of the deciding official's (Admiral Devany) unavailability to testify in person at the hearing, by agreement the parties secured his testimony through a video deposition on January 19, 2017. Tab 28. The transcript of his testimony was made part of the Board's record at Tab 51. Citations to Admiral Devany's testimony will be identified by Tab 51, Devany, and the electronic page number in the bottom right-hand corner.

United States, she received her bachelor's and master's degrees in hydrologic engineering from Tsinghua University and the Institute of Water Conservancy and Hydropower Research. After coming to the United States, Ms. Chen obtained a second master's degree from the University of Nebraska in water resources and climatology. Tr. Chen, pp.749-50.

Ms. Chen started her career with the NWS in March 2007 after working for the state of Missouri as a hydrologist.<sup>3</sup> Tr. Chen, p. 662. She was employed with the NWS as a Grade 12 Hydrologist until the agency removed her from employment in March 2016. Tab 54, p.5.

Ms. Chen was assigned to the Ohio River Forecast Center (ORFC) in Wilmington, Ohio, during her employment with NWS. *Id.* Ms. Chen was responsible for performing a wide range of assignments of considerable difficulty and complexity in hydrology and water resources, with an emphasis on developing river forecast models relating to the Ohio River and its tributaries. Tr. Lee, p.12; Schade, pp.108-11; Davis, pp.615-16; Chen, p.665. The river model was referred to as a Hydrologic Engineering Center's River Analysis System or HEC-RAS, which simulates flow on a river with input from its tributaries. Ms. Chen's Ohio HEC-RAS covered the whole Ohio River drainage area, which extends from the western edge of Pennsylvania to the Illinois/Indiana

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<sup>3</sup> The appeal in this matter was filed under the name of Xiafen Chen. Ms. Chen went by the name of Sherry Chen during her employment with NWS. Accordingly, during the hearing and in some of the documentary evidence, Ms. Chen is referred to as Sherry. Tr., p.7. The hearing transcript uses two spellings — Sherry and Cherry.

border and from Lake Erie to Central Tennessee. To develop her HEC-RAS, Ms. Chen would gather information and data about the geometry of the river, the overbank, and the land surrounding the river. Ms. Chen would then use the information and data to run simulations along with a series of calibrations to improve the simulations. Tr. Schade, pp.108-11.

During her tenure with the NWS, Ms. Chen received excellent performance evaluations and was the recipient of the agency's Larry Johnson Award. Ms. Chen did not have any disciplinary actions taken against her prior to her removal from employment in this matter. Tr. Lee, pp.56-57; Furgione, pp.593-95; Chen pp.669-70; Tab 51, Devany, pp.67-68.

At all times relevant to this appeal, Trent Schade, Hydrologist in Charge at the ORFC, served as Ms. Chen's first-level supervisor. Laura Furgione, a Deputy Director of NWS, was Ms. Chen's fourth-level supervisor and the proposing official for Ms. Chen's removal from employment. Vice Admiral Michael Devany was the Deputy Under Secretary for Operations for NOAA until his retirement in July 2016. Admiral Devany was Ms. Chen's sixth-level supervisor and the deciding official.<sup>4</sup> Tr. Furgione, p.436; Tab 51, Devany, p.12; Tab 54, p.5.

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<sup>4</sup> Dr. Louis Uccellini, Director of NWS, was Ms. Chen's fifth-level supervisor. The agency initially named Dr. Uccellini as the deciding official when it issued Ms. Chen's initial proposed removal letter in September 2015. Dr. Uccellini recused himself from the matter and Ms. Furgione reissued the proposal letter in December 2015 naming Admiral Devany as the deciding official. Tr. Furgione, p.436; Tab 51, Devany, pp.12-14.

### Ms. Chen's Trip to China

Ms. Chen has family in China and would visit them periodically. In April 2012, Ms. Chen visited her parents and other family members in Beijing, China, for approximately three weeks. During that visit, Ms. Chen's nephew approached her and asked if Ms. Chen would meet with her former classmate and colleague Jiao Yong.<sup>5</sup> Tr. Chen, pp.671-72. Mr. Jiao was the Vice Minister for Water Resources in Beijing. Tr. Lieberman, p.383. The nephew's father-in-law was having a dispute regarding a contract issue for work on a pipeline the father-in-law had completed for a local government official. Ms. Chen's nephew was aware that Mr. Jiao had some responsibility in the area involving the contract dispute. Ms. Chen originally refused her nephew's request because she wanted to spend time with her family and she had not seen Mr. Jiao in several years, but after repeated requests, she agreed. After Ms. Chen's nephew provided a telephone number, Ms. Chen spoke to Mr. Jiao's secretary who arranged a meeting for the following day. The meeting lasted approximately 15-20 minutes. Tr., Chen pp.672-75; Tab 9, pp.41, 57-58.

Mr. Jiao and Ms. Chen spent the majority of the meeting discussing the contract dispute. Prior to leaving, Mr. Jiao asked Ms. Chen about her work in the United States. Ms. Chen explained her employment with the NWS. In response, Mr. Jiao asked Ms. Chen how the Federal and local governments shared costs to

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<sup>5</sup> In China, the last name or family name is listed first followed by the given name. Accordingly, Jiao Yong is Mr. Jiao.

repair aging dams as well as the total water volume in the United States. Ms. Chen was embarrassed that she did not know the answer to his question concerning total water volume and told Mr. Jiao she would look for an answer. The portion of the meeting where Ms. Chen and Mr. Jiao discussed Ms. Chen's work for NWS lasted a few minutes. Tr. Chen, pp.675-77; Tab 9, pp.41, 58, 60.

#### Ms. Chen's Return to the United States

Ms. Chen returned to the United States from her trip to China on May 8, 2012, and returned to work on May 10, 2012. In an effort to find answers to Mr. Jiao's questions, Ms. Chen accessed the National Inventory of Dams (NID) website.<sup>6</sup> Tr. Chen, pp.677-78. The NID is managed by the U.S. Army Corps of Engineers (USACE). Tr. Lee, p.21. The NID has public information as well as databases that are restricted to government users. Tr. Chen, p.678; Tab 51, Devany, pp.88-89. The NID has approximately 63 attributes about dams that are publically available, such as who owns a dam, when it was last inspected, the height, and width of the dam, and the county where the dam is located. Tr. Lee,

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<sup>6</sup> If there is a conflict in the parties' positions and testimony, I must make credibility determinations. To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. [\*Hillen v. Department of the Army\*, 35 M.S.P.R. 453, 458 \(1987\)](#).

p.20, 22. Ms. Chen initially searched the NID to look for answers to Mr. Jiao's questions during her lunch hour on May 10. At that time, Ms. Chen did not search the government-restricted databases because she did not have a password and she realized the password-protected areas would not be the place to find answers for Mr. Jiao. Tr. Chen, pp.680-81; Tab 9, pp.51-61.

Ray Davis was Ms. Chen's co-worker and a hydrologist at the ORFC. Tab 54, p.5. They usually interacted on a daily basis. Mr. Davis has training in geographic information systems, which allowed him to obtain and process map data that would be useful to Ms. Chen with the development of her Ohio River HEC-RAS. Tr. Davis, pp.614-16; Chen, p.682. Mr. Davis was also the focal point at the OHRC for emergencies involving dam breaks. Tr. Davis, pp.619-23; Chen, pp.681-82. Mr. Davis had a username and password for the restricted databases within the NID website. Not all employees in the ORFC had login information for the NID. The NID databases were the first place to look for information in the event of a dam break to obtain the characteristics of the dam. Tr. Davis, pp.620-21. Mr. Davis maintained the username and password for the NID in a "Dam Break" binder. Mr. Davis kept the binder in the operations area of the ORFC. The advantage to keeping the username and password in the binder was that it would be available to all employees in case of an emergency when Mr. Davis (as dam break focal point) was not available. Tr. Davis, pp.622-23; Tab 54, p.5. Mr. Davis maintained a current NID username and password for ORFC employees to access the NID starting in 2009 and the practice continued until

approximately October 2014. Tr. Schade, pp.182-84; Davis, pp.640-41; Tab 37, pp.127-31.<sup>7</sup>

After seeing that certain databases within the NID required a password when Ms. Chen accessed the website during her lunch hour on May 10, 2012, she thought that the NID might have new or improved information that would be helpful with the development of her Ohio River HEC-RAS.<sup>8</sup> Tr. Chen, p.681. During the afternoon of May 10, Ms. Chen asked Mr. Davis about accessing the NID. Mr. Davis offered to provide her with the password, which he referred to as the “office” password. Initially, Mr. Davis told Ms. Chen that she could obtain the username and password from the binder. Mr. Davis also said he would email the information to her, which he did.<sup>9</sup> Tab 9, p.64. After providing Ms. Chen with the login information, Mr. Davis realized he had enough time (he was scheduled to depart the office at 3:00 p.m.) to show Ms. Chen the NID. Mr.

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<sup>7</sup> Although the practice may not have been appropriate and since changed, that was the practice in the ORFC at the time of the charged conduct.

<sup>8</sup> Ms. Chen started with NWS in 2007. At that time, no part of the NID website required a password. In 2009, the U.S. Army Corps of Engineers held a webinar for NWS employees to encourage NWS employees to use the NID website. It was in 2009 that certain portions of the NID website required a password to access. Tr. Davis, 645-47, 655; Chen, 680-81.

<sup>9</sup> Mr. Davis did email Ms. Chen the username and password on May 10, 2012. The agency disciplined Mr. Davis for doing so. In September 2015, Mr. Davis received notice of a proposed three-day suspension for (1) sharing the NID password and (2) emailing the NID password. Mr. Davis challenged the suspension. Dr. Uccellini, the deciding official, did not sustain the specification for sharing the NID password, but did sustain the specification for emailing the NID password. Dr. Uccellini mitigated the proposed suspension to a letter of reprimand. Tr. Davis, pp.642-44.

Davis sat with Ms. Chen at her computer and Mr. Davis logged into the password-required NID database. Tr. Davis, pp.618-25; Chen, pp.681-85. Ms. Chen and Mr. Davis were in the database for 11 minutes. During that time on May 10, Mr. Davis and Ms. Chen downloaded one file from the NID database relating to Ohio dams, which were part of Ms. Chen's Ohio HEC-RAS model. Tab 54, p.9; Tr. Davis, p.624. On May 15, 2012, Ms. Chen accessed the password-required NID database by herself; she was logged on the NID for 16 minutes.<sup>10</sup> Tab 54, pp.10-11. Ms. Chen accessed the database on May 15, because after Mr. Davis gave her the "tour" she wanted to go back and follow "his footsteps" on her own. The file Ms. Chen downloaded on May 15 was also titled Ohio and was the same file that she and Mr. Davis downloaded four days earlier. Ms. Chen testified she was looking for information that would be useful to her HEC-RAS model, such as location of dams and flow from dams, but was not able to locate useful information because it was not up to date. Tr. Chen, pp.704-09; Tab 9, pp.42, 44, 52-62.

Ms. Chen contacted her supervisor Trent Schade via email on May 11, 2012, to obtain assistance in answering Mr. Jiao's questions. Mr. Schade had recently come from a position at the USACE and Ms. Chen thought Mr. Schade

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<sup>10</sup> The parties stipulated that Ms. Chen logged into the NID's password-protected database on May 11 and 14, 2012. The start and end times on those two dates are the same; Ms. Chen stated that she believes she may have mistakenly "clicked on the site" on those two dates and exited immediately, which would explain why no elapsed time was recorded. Tab 54, pp.9-10; Tr. Chen, p.703.

might have answers to the questions Mr. Jiao asked relating to water management because USACE administers the NID. Tab 9, pp.42, 55; Tr. Chen, pp.685-87.

Ms. Chen sent the following email to Mr. Schade:

Some one asked me about dam related questions that I don't have straight answers and thought you might be the best person to ask. Do you know or can you point me some contacts or agencies from which I can find more info such as:

1. Total dam storage or capacity at national level
  2. The policy and procedures or guidelines to follow to build new dams
  3. For large dams managed by COE, who pays for the construction and Maintenance and what are loan sources etc.
- National Inventory of Dams (NID) has dam storage info but it is by dams or states and only available to government users. Where to get some general info for public?

Thanks.

Sherry

Tab 54, p.6. All of the items and information requested by Ms. Chen was public information. Tr. Lee, pp.89-92.

After receiving Ms. Chen's email, Mr. Schade contacted Deborah Lee. In 2012, Ms. Lee was the Director of the Watershed Management Division for the U.S. Army Corps of Engineers, Great Lakes and Ohio River Division. Tr. Lee, p.11. Mr. Schade sent the following email on May 11 to Ms. Lee:

Debbie,

Sherry is after public information source related to dams. I would think mostly this information is not organized at a national level for public consumption due to national security concerns. I think some states might have information related to dam safety and dam inspections, but it might not be publicly available.

I'd appreciate if you have any ideas or know any other sources.

Thanks,

Trent

Tab 37, pp.84-85. Ms. Lee responded to Mr. Schade the same day and advised Mr. Schade to “have Sherry refer the person to us and we’ll address his/her question.” Tab 37, p.84. Mr. Schade then emailed Ms. Chen on May 11 as follows:

Sherry,  
Please refer requests related to dam information the Corps of Engineers.  
Have them call the operations number for water management at 513-84-3072, and they will help them get the information they need.  
Thanks,  
Trent

Tab 37, pp.84.

On May 15, 2012, Ms. Chen used her personal email account to send an email to Mr. Jiao as follows:

Hello Jiao Yong,

It was very glad to meet you in Beijing after so many years and impressed with your achievement and contribution to the nation in water resources development and management.

I am back to home now and have been looking for the dam related information you are interested.

Here are some websites and articles with contact information that might interest to you.

1. Federal Energy Regulatory Commission (FERC)  
<http://www.ferc.gov/>for Federal Energy Regulatory Commission (FERC) <http://www.ferc.gov/forcitizens/about-ferc.asp>

FERC is an independent agency that regulates the interstate transmission of natural gas, oil and electricity. FERC also regulates natural gas and hydropower projects. It also oversees environmental matters related to natural gas and hydropower projects and major electricity policy initiatives. It can be contacted at:

Office of External Affairs  
 Telephone: 202-502-8004  
 Toll Free: 1-866-208-3372  
 Email: [customer@ferc.gov](mailto:customer@ferc.gov)

2. This article provides a brief review of who is involved in decisions affecting dams at Federal, states, tribal in the United States

<http://ucowr.org/updates/126/126 A7.pdf>

3. The following is the National Inventory of Dams (NID) website maintained and published by the US Army corps of Engineers with collaboration with the Federal Emergency Management Agency (FEMA) and state regulatory offices.

<http://geo.usace.army.mil/pgis/f?p=397:1>

The NID database contains dam information on location, type, storage, capacity, year of built etc. The dams meet at least one of the following criteria:

- 1) High hazard classification-loss of one human life is likely if the dam fails,
- 2) Significant hazard classification-possible loss of human life and likely significant property or environmental destruction,
- 3) Equal or exceed 25 feet in height and exceed 15 acre-feet in storage,
- 4) Equal or exceed 50 acre-feet storage and exceed 6 feet in height.

However, this database is only for government users and non-government users are not able to directly download any data from this site. I contacted some people I worked with at the COE regarding public information sources such as the total dam capacity, policies, procedures and guidelines for dam permit, regulation, financial aids etc. I was told that the Water Management Divisions at the Corps of Engineer (COE) could answer dam related questions. They said you could can their operation number for Water Management at COE at 513-684-3072.

I will do some more search and let you know what I come up with.

Keep in touch.  
Chen Xiafen

Tab 54, pp.6-7. On May 21, 2012, Ms. Chen sent a second email from her personal account to Mr. Jiao as follows:

Jiao Yong,

I am send my earlier email again since I haven't heard from you. Please drop me note once you received the email. Thank you.

Chen Xiafen

Tab 54, p.7. On May 22, 2012, Mr. Jiao sent an email to Ms. Chen's personal account as follows:

Hi, Xiafen: Your email received. I am sorry to reply you with a delay as I was on an one-week trip for inspection of flood works. Thanks for the information you forward to me. I will go through it.

Best regards,  
Jiayong.

Tab 54, p.8.

Ms. Chen contacted Ms. Lee on May 24, 2012, via telephone and had a short conversation with her in order to obtain information responsive to Mr. Jiao's questions. Ms. Lee referred Ms. Chen to the USACE website and indicated Ms. Chen could find water management information under the "Mission" tab. Tr.

Chen, pp.696-97.<sup>11</sup> After Ms. Lee's conversation with Ms. Chen, Ms. Lee sent the following email to Joanne Rutledge who was the security officer for USACE, Great Lakes and Ohio River division:

I received a call today, 24 May 2012—3:00 ET from Ms. Sherry Chen (email address), who is a hydrologist with the National Weather Service, Ohio River Forecast Center. She is a US citizen, but a Chinese national.<sup>12</sup> She said based on a recent trip to China, where she was approached by Chinese colleagues, she was asked to collect information on how US Federal reservoirs are authorized, designed, and built. She was looking for specific documents on the planning process. She also wanted [to] know how we managed the built projects and wanted to know if the water control manuals were available for each project in the US. She also requested a list of storage capacity of the Federal reservoirs. I pointed her to the public web page on the USACE planning process but indicated that the water control manuals are not publicly available and that a summary of reservoir storages is not publicly available (to my knowledge).

In the past, she has requested detailed design documents of the Ohio River navigable dams, ostensibly for the purpose of hydraulic modeling for the National Weather Service, but that level of detail is not necessary and she was referred to the information available on the public navigation charts for her purposes. I'm concerned that an effort is being made to collect a comprehensive collection of USACE water control manuals

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<sup>11</sup> In July 2015, Ms. Lee provided an affidavit in connection with the EEO complaint filed by Ms. Chen. In her affidavit, Ms. Lee stated that during their May 24 conversation, Ms. Chen asked Ms. Lee how to access the NID. Ms. Lee testified that her statement was incorrect — Ms. Chen did not ask how to access the NID during their conversation; rather, when Ms. Chen asked how to get information on U.S. dams, Ms. Lee understood this to mean she wanted to know how to access the NID. Tr. Lee, pp.33-34, 94; Tab 9, pp.96-99.

<sup>12</sup> Ms. Lee testified that she meant to say that Ms. Chen was a naturalized citizen. Tr. Lee, p.58.

by a foreign interest. While the manuals are not secret, they contain sensitive information on points of contact, dam site information, and operating priorities such as navigation, fossil fuel plants, etc.

Tab 54, p.8.

On May 29, 2012, Ms. Chen sent the following email from her personal account to Mr. Jiao to which Mr. Jiao responded, “Thanks a lot! Jiao.”<sup>13</sup>:

Jaoyong,

I talked to a chief of Water Management Division of the U.S. Army Corps of Engineers (COE). I asked about water storage of dams at national level as well as complete process of building dams. Here is a brief summary of our conversation.

COE owns and operates more than 600 dams in the United States.

COE operates and maintains 12,000 miles of commercial Inland navigation channels.

COE maintains 926 coastal, Great Lakes and Inland harbors.

COE provides a total water supply storage capacity of 329.2 million acre-feet in major Corps lakes.

Owns and operates 24 percent of the U.S. hydropower capacity or 3 percent of the total U.S. electric capacity

Dams to be built require authorization from US congress

A study to assess feasibility must be done by COE.

Dams to be built and approved by the Congress will get 100% financing, no cost sharing with states of local governments.

Water users have to pay fees for the cost of building and maintenance of the dam.

No new dams have been built since early 1980s. There is a tremendous need for dam repairing in the United States

Here is a link of more information on COE mission and Civil Works. <http://www.usace.army.mil/Missions.aspx>

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<sup>13</sup> All the information Ms. Chen provided to Mr. Jiao was public information. Tr. Lee, pp.89-92; Tab 51, Devany, p.85.

I was also told that we would see many changes in the future since the federal government is going to revise the policy and procedures of the whole process of building new infrastructure.

The Water Management Chief at COE said you could contact them directly if you have more specific questions.

Let me know if you need other information.

Take care.

Tab 54, pp.8-9.

### Criminal Investigation

The Department of Commerce's Office of Security conducted a review of Ms. Chen's work email account after receiving the information in Ms. Lee's email concerning Ms. Chen's request for information when Ms. Chen returned from China in May 2012. After completing its review, Department of Commerce Special Agents Andrew Lieberman and Mike Benedict interviewed Ms. Chen at the ORFC office in Wilmington, Ohio, on June 11, 2013, for approximately seven hours. Tr. Lieberman, pp.254, 310. The interview initially consisted of general questions about Ms. Chen's work with NWS and then the agents asked her questions about her trip to China and her interactions with Mr. Jiao. Tr. Lieberman, pp.266-67. Before leaving the ORFC offices on June 11, the agents requested that Ms. Chen provide them with a written statement. After Ms. Chen provided her written statement to the agents, the agents reviewed her statement and asked her follow-up questions before leaving the ORFC offices on June 11. Tab 9, p.63. At some point, the Department of Commerce turned the investigation over to the Federal Bureau of Investigation. Tr. Lieberman, p.302.

A federal grand jury indicted Ms. Chen in October 2014 on two counts involving unauthorized access of the NID database and two counts of lying to federal agents. Tab 37, pp.58-59. Ms. Chen was arrested at the ORFC on October 20, 2014. Tab 54, p.10. NWS indefinitely suspended Ms. Chen from her position on November 24, 2014. Tab 9, p.130. On March 11, 2015, the criminal charges against Ms. Chen were dismissed as a result of the Department of Justice's motion to dismiss the indictment. Tr. Lieberman, pp.338-39; Tab 37, p.60.

Ms. Chen's Emails to Tom Adams<sup>14</sup>

In April 2013, Ms. Chen received an email from Tom Adams. Mr. Adams had been employed as the NWS Development and Operations Hydrologist at the ORFC and left the agency in February 2013.<sup>15</sup> Mr. Adams' April 10 email advised Ms. Chen that he needed assistance in preparing an academic paper that he intended to submit to the American Society of Civil Engineers Journal of

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<sup>14</sup> The charged conduct involves two unrelated areas. Two of the charges (Misuse of a Federal Database and Lack of Candor) relate to Ms. Chen's interactions with Mr. Jiao and her subsequent actions during May 2012. The other two charges (Conduct Demonstrating Untrustworthiness and Misrepresentation) relate to Ms. Chen's interactions with Mr. Adams in May 2013. Agent Lieberman interviewed Ms. Chen in September 2013 concerning her May email exchanges with Mr. Adams. Tr. Chen, p.732; Tab 9, p.72.

<sup>15</sup> The emails sent between Ms. Chen and Mr. Adams in October 2013 reflect that Mr. Adams has a "noaa.gov" extension on his email address and next to his name is the notation "NOAA Affiliate." There was no testimony presented as to Mr. Adams' current relationship with NOAA or NWS; however, in a May 2015 email from Patricia Washington, Labor Relations Specialist with NOAA, to Ms. Furgione, Mr. Adams is identified as a NOAA contractor. Tab 41, p.55.

Hydraulics. Mr. Adams asked if Ms. Chen had completed her calibrations for the Kentucky and Licking Rivers because to “most effectively write the paper, the new results should be included.” Tab 9, p.93; Tab 21, p.17. Ms. Chen responded the same day and advised Mr. Adams:

It is So Glad to hear from you. We miss you very much here. Every time pass by your old office, wish you were there. Believe it or not, your name is brought up almost everyday in the office. Some people are saying that you might be our boss' boss at the new water center. Will that be nice? I know you have gone through some tough time lately but everything will be fine at the end because you are a such strong person and a fighter.

Regarding of the paper off HEC-RAS model, yes, of course. Just give me a little more as I just got some new dss file from Joe and waiting for the rest. The data I have been using for calibration ends 2011, over a year old. I would like to bring the new data in to see how the model looks for last year events. I think I can get the new model to you some time this month. Just let us know what you need.

Tab 9, p.93.

On April 16, 2013, Mr. Schade, the Hydrologist in Charge at the ORFC, emailed Mr. Adams and copied all ORFC employees, including Ms. Chen, as follows: “Tom, Please send your requests for data or code through me. Thanks, Trent.” Tab 9, p.88.

On May 16, 2013, Ms. Chen emailed Mr. Adams and explained the difficulties she was having with obtaining updated data for her model, but was hopeful she could get Mr. Adams the information she needed by the following week. The email message in pertinent part stated:

I am sorry that I couldn't get the model to you as I expected. I have had hard time to get the data I need. The same data I have requested for about six months ago. I am very frustrated for that. I did start push to get the data but again delayed due to recent flood events and Joe's vacation. The hard drive hasn't sent out to the Kentucky Planning Commission for the Licking River data that you promised them we would send to them last December or January.

I had sent out emails to the management to complain that the delays had directly impacted my work since you left. I asked Jim Noel to be the lead person for the hydraulic work group and mentioned to them what you had been doing and asked for the go-to person for issues. The answer was Jim would be involved in some degree but would not be the lead person. Anyway, you got the point.

For the model I just got final piece of data and was be able to run model up to mid 2012. I have also got new surveyed cross section data from USGS from Bellville L&D to Hannibal L&D that I am processing right now and about to finish. But I think I can get data out to you next week based what I have so far. Let me know what data you need. The same table with simulated vs. obs?

Tab 9, p.89. The same day, Mr. Adams responded with the following email:

Sherry,

It sounds like a mess; I'm very sorry for that. When exactly are you going to China (I hope you have a wonderful time)? Please send me data exactly like you did before so we can make exact comparisons. Please do not tell anyone you are doing this; is that OK? Thank you so much for your help and friendship!

Tom

Tab 9, p.89. Ms. Chen responded the same day as follows:

Tom,

I am going to China August 26 and come back September 24 about one month. I will not tell anyone I give the data since COE has been push me release the model several times and I have refused so far but we are going to have a meeting in a few minutes regarding the release in our office. I really like to know how our model is doing and your analysis will tell. No one in the office can do what you can do on the statistic analysis. I will try to get the obs in so I can send you the data early next week. Got to go to the meeting.

Sherry

Tab 9, p.92. On May 22, 2013, Ms. Chen emailed Mr. Adams data relating to her Ohio HEC-RAS model with the subject line “new HEC-RAS.” Tab 13, p.16.

In October 2013, five months later, Ms. Chen and Mr. Adams exchanged emails. Mr. Adams initiated the email exchange the morning of October 22.

Dear Sherry,

I have sent you a couple of emails which I did not hear back from you. I guess you have been very busy and lost track. I'm very sorry it took so long for me to generate the . . .

Tab 37, p.89. Later that morning, Ms. Chen, in pertinent part, responded as follows:

After sent you the simulation result of the HEC-RAS model, I heard that Trent had sent out an email to the office that any request from you had to go through him. I must have missed it as I had never seen it. It seems like it was sent after your request of data from Scott.

Your statistic analysis of the model results definitely help us to see how the model is doing and give me insights where it should be improved. But I have to get permission from Trent to send the data to you. Do you want to send him an email or do you want me talk to him?

Sherry

Tab 37, p.89.

That same day, shortly before noon, Mr. Adams responded:

Sherry,

Things are OK here, although Anne is still in Ohio. We have been unable to sell our house. So, I come back to visit every other weekend. But you know how that is, when you were away from your husband for so long!

The HIC [Trent Schade] will not allow anyone to send me data or files; he is very vindictive and he is punishing me for not worshipping him. This is why I had to leave. Probably what I'll do to get data, if I need it, is to contact NWS Eastern Region Headquarters and make an official request that will make it impossible for the HIC to deny. If he does I will file a freedom of information act appeal and possibly sue him, if I can do that.

But, please tell me, how is the HEC-RAS model progressing? What do you currently have in CHPS that you run every day. I do want to write a paper, but I need to at least know what is in the model right now and have information about how many miles are modeled, number of structures, etc. -- like you have given me before. I'll start writing the paper and you and I will be authors.

Take care,  
Tom

Tab 37, pp.88-89.

Shortly thereafter, Ms. Chen responded:

Tom,

You know all you need is just one buyer to sell the house, one buyer who likes the house, and that can happen at any day. It seems like the house market has picked up momentum here even in Wilmington. There are many higher priced houses for sale in my subdivision including Jeff Meyers house and they are sold out one by one. Jeff and Link just had their house sold lately. I hope yours soon too.

The model component is pretty much like what you know. I believe I have Licking and Kentucky Rivers added to the model when you were here. There is no new reach added since then but only some new cross sections around Marietta were added. I have been mainly doing calibrations. Not sure how the statistic would show but simulation looks better. There are no dramatic swings at L&Ds during low flows and match well at high flows. I am about to stop further calibrations since I don't think I can make it any better without new data.

However, We just got all the data we asked for when you were here for Green, Wabash, great Miami and McApline. I will add them in one by one.

We are running the model in FEWS daily and many new HEC-RAS related graphics has been added to and will be added to FEWS.

Sherry

Tab 37, p.88. Followed by a response from Mr. Adams:

Sherry,

Thank you; what we'll need for a paper is exact numbers in terms of:

- (1) current total model length
  - (2) total number of cross-sections
  - (3) modeled lengths of Licking & Kentucky Rivers (since they were recently added)
  - (4) did any of the added cross-sections around Marietta go up the Muskingum; how far?
  - (5) can you send me some examples of some of the new HEC-RAS graphics that are generated?
  - (6) an example graphic from CHPS showing a comparison between modeled and simulated stages at low flow downstream of a lock&dam
- None of this is data, so it should not involve the HIC.

Thank you,  
Tom

Tab 37, p.87. The correspondence ended with Ms. Chen's response early that evening:

Tom,  
You really have to forgive me on this one. Not just data but all requests. It is clear that it is the HIC's position.  
Please accept my apologies. I am deeply sorry about the way the things have to be and sincerely ask you for understanding.

Best regards,  
Sherry

Tab 37, p.87.

#### Administrative Action

After the dismissal of the criminal charges, NOAA initiated a disciplinary investigation. Tr. Furgione, pp. 487-94. NOAA's proposing official, Ms. Furgione, issued proposed removal letters to Ms. Chen in September and December 2015.<sup>16</sup> Ms. Chen was charged with: (1) two specifications of Conduct Demonstrating Untrustworthiness based on her email exchange with Tom Adams and providing him with data in May 2013, (2) misrepresentation based on her statement to a federal agent as to how she learned of Mr. Schade's April 2013 email, (3) two specifications of Misuse of a Federal Database for accessing the NID and downloading two documents, and (4) nine specifications of Lack of Candor relating to her responses about her trip to China and subsequent actions

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<sup>16</sup> The two proposed removal letters were the same. As previously noted, Ms. Furgione issued the December 2015 letter due to a change in the deciding official. Tr. Furgione, p.436.

when interviewed by federal agents on June 13. Tab 9, pp.5-24. In March 2016, Admiral Devany sustained the four reasons proposed,<sup>17</sup> upheld Ms. Chen's proposed removal, and terminated her employment effective March 11, 2016. Tab 7, pp.5-16.

### Media Coverage

There was significant media coverage of Ms. Chen's criminal case and the agency's action to remove her from employment. Admiral Devany testified, "There was a lot of flurry out there." Tab 51, Devany, pp.6, 173. In 2015, the *New York Times* published, "Accused of Spying for China, Until She Wasn't" and "Chinese-American Cleared of Spying Charges Now Faces Firing." The *Washington Post* published, "Falsely accused of spying, Weather Service employee's life turned upside down," and the *Wall Street Journal* published an article after the criminal charges were dismissed. Ms. Chen's then-attorney's Op-Ed "Chinese-Americans are being caught mistakenly in the U.S.'s cybercrime dragnet" was also published by the *Washington Post*. Tab 39, pp.73-96. Members of Congress also sent letters relating to Ms. Chen and her employment at the NWS to the Secretary of the Department of Commerce and the Attorney General of the United States. *Id.* at pp.97-116. The articles and letters reference Ms. Chen's ethnic background and on at least two occasions, Ms. Chen and her

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<sup>17</sup> The decision letter does not reference Reason 4 (Lack of Candor), Specification 6; however, Admiral Devany testified he did not sustain that specification. Tab 51, Devany, p.32.

attorney made statements concerning allegations of racial discrimination against the agency. For instance, Ms. Chen's counsel was quoted in the *New York Times* as saying, "How is this not a clear case of racial discrimination." *Id.* at p.86. Ms. Chen released a statement saying, "I know they treated me unfairly, but I'm proud of my service." *Id.* at p.82. Numerous emails indicate that various agency officials were aware of the media coverage. *Id.* at pp.39, 45-73. Admiral Devany and Ms. Furgione were the recipients of some of the emails that discussed the newspaper coverage as well as a segment being considered for the television program 60 Minutes. Tab 39, pp.45-61, 71-72; Tab 51, Devany, p.272. In addition, they both testified regarding their knowledge of the media and congressional attention raised by Ms. Chen's situation as most of the coverage predated the proposed removal letter issued in September 2015. Tr. Furgione, pp.571-78; Tab 51, Devany, pp.46, 60-61, 173-81.

#### Ms. Chen's appeal

On May 20, 2016, Ms. Chen filed a formal complaint of discrimination with the Department of Commerce Office of Civil Rights alleging her removal from employment was based on discrimination (race (Asian) and national origin (Chinese)) and retaliation for publically protesting that she was the victim of discrimination. The agency completed its investigation and issued a Final Agency Decision on September 21, 2016. Tab 3. On October 6, 2016, Ms. Chen filed a timely appeal with the Board. Tab 1.

**Stipulations**

1. The parties filed Amended Joint Stipulations on March 7, 2017. Tab 54; Tr.2, pp.41-42.
2. The parties stipulated that there was a nexus between the charged conduct and the efficiency of the service. Tab 52, p.3.
3. The agency stipulated that it turned over the documents contained in Tabs 41, 42, 44, and 45, to Ms. Chen during discovery. Tr. Furgione, p.554.

## Charged Conduct

### Applicable Law

To sustain an adverse action before the Board an agency must prove, by preponderant evidence, the factual basis for the misconduct charged and must establish the disciplinary action, based on the proven misconduct, promotes the efficiency of the service. 5 C.F.R. § 1201.56(b)(1)(ii); *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Preponderant evidence is defined as the 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. 5 C.F.R. § 1201.4(q). Where an agency supports a charge with more than one specification, proof of one or more, but not all, of the supporting specifications is sufficient to sustain that charge. *Miller v. U.S. Postal Service*, 117 M.S.P.R. 557, ¶ 17 (2012); *Oates v. Department of Labor*, 105 M.S.P.R. 10, ¶ 9 (2007).

The Board's review of a removal action under Chapter 75 is designated as an appeal of the agency's action. Despite the fact that the employee initiates the action, the agency is required to establish its case by preponderant evidence under 5 U.S.C. § 7701(c). This standard results in a *de novo* review by the Board. See *Norris v. Securities and Exchange Commission*, 675 F.3d 1349, 1355 (2012); *Jackson v. Veterans Administration*, 768 F.2d 1325, 1329 (Fed. Cir. 1985). Because it is a *de novo* proceeding, all evidence obtained up to the time of

hearing is admissible. *See Brook v. Corrado*, 999 F.2d 523, 528 (Fed. Cir. 1993)(the OIG report was relevant to the removal decision and was not barred from consideration by reason of having been obtained after the notice of removal was issued); *see also Zeiss v. Veterans Administration.*, 8 M.S.P.R. 15, 17–18 (1981)(this Board has consistently rejected the notion that its scope of review is limited to that of appellate courts or to consideration of the administrative record established before the agency, citing, *inter alia*, *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 412–14 (1981)). This Board is mandated by 5 U.S.C. § 7701(a) and (b) to conduct a hearing if requested by appellant, and to consider *de novo* all the relevant evidence presented by both parties, whether offered at a hearing or transmitted as part of the administrative record. Accordingly, I have taken into consideration all credible evidence before me.

#### Materials Excluded from the Agency File

Ms. Furgione and Admiral Devany were unable to consider some documentary evidence because it was not in the agency file. For example, the agents unilaterally decided which interviews they would reduce to writing. They based their decision on whether the information gleaned from the interview was, according to them, material to the case. If the agents believed the information was material, the agents would transcribe the hand-written notes from an interview into a typed Memorandum of Investigation (MOI) and it would become part of the agency file; if they did not, the notes or information did not make it to the file. Tr. Lieberman, pp.333-35. For instance, as described in more detail

below, the agents determined that an interview with Mr. Davis, which specifically discussed why Ms. Chen would have work-related reasons to access the NID and his sharing of the NID password, was not material information. Tr. Lieberman, pp.351-66. This is both puzzling and unfortunate.

Equally troubling is the agency's belated submission to Ms. Chen (one day after the deadline for prehearing submissions had passed) of approximately 200 pages of documents that involved material relevant to this appeal that were created prior to the issuance of Ms. Chen's proposed removal letter. Tab 40, Tr. Furgione, pp.557-70. The agency's untenable position is that the materials were not relevant and that is why they were not part of the agency file, not provided to the proposing and deciding officials, and not turned over initially in response to Ms. Chen's discovery requests. Tab 43.<sup>18</sup> NWS only turned the documents over to Ms. Chen after her counsel discovered their existence by chance.<sup>19</sup> Admiral Devany could not offer any explanation as to why the agency did not provide him with any of these documents. Tab 51, Devany, p.109.

The documents originated from an investigation by Patricia Washington who was an Employee and Labor Relations Specialist with NOAA. The agency

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<sup>18</sup> I denied the agency's Motion to Strike the Appellant's Supplemental Prehearing Submissions, which describes its position in detail, as moot. Tabs 43, 48.

<sup>19</sup> Ms. Chen had requested and received documents relating to Mr. Davis's appeal (see p.8, fn. 9). When Ms. Chen's counsel deposed Mr. Schade about these documents, he testified that the agency investigator (Patricia Washington) had interviewed everyone in the office. After receiving this information, Ms. Chen requested the additional documents. Tab 40.

assigned Ms. Washington to the employee relations matter involving Ms. Chen. Tab 41, p.21. The documents consisted of emails and declarations that Ms. Washington and others sent or created between March and August 2015. Ms. Washington turned over the declarations to the Department of Commerce's Office of General Counsel (OGC) in August 2015.<sup>20</sup> Tab 44, p.30. When Ms. Washington was seeking travel funds to go to the ORFC she explained, "I am working with OGC regarding the Xiafen (Sherry) Chen case that was recently featured In a New York Times story. I suggested [redacted] that I conduct an investigation of whether other Ohio River Forecast Office staff used the username/password assigned to one employee in the office to access the National Inventory of Dams database . . . I need to meet with the Ohio River employees and interview them so that a determination of whether or not disciplinary action is warranted can occur. This determination will have an impact on the Chen case." Tab 41, p.60. Ms. Washington sent another email entitled "Travel for Chen case" and again discussed traveling to interview the ORFC employees. *Id.* at p.58. The sworn declarations Ms. Washington obtained from numerous ORFC employees extensively discuss the use of the NID username and password acquired by Mr. Davis that was available to other employees. Tab 41, p.103; Tab 42, pp.13, 17, 54, 60; Tab 44, pp.13, 15, 19, 25.

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<sup>20</sup> Ms. Furgione issued Ms. Chen's first proposal letter in September 2015, one month after Ms. Washington obtained the declarations. Tr. Furgione, p.436.

I can discern no reason how the agency could have reached the conclusion that these materials were not relevant. Ms. Furgione's testimony regarding this issue defied logic — she testified that she knew that Ms. Washington interviewed ORFC employees about the username and password, but without seeing the declarations she testified that she was not given them because “it didn’t add to the case and didn’t add any relevancy to my decision.” Ms. Furgione did not ask Ms. Washington to see the other interview statements because, “I had plenty of other material already to reference. I had 519 pages of material already.” Tr. Furgione, pp.557-58. Ms. Furgione clearly believed that Ms. Chen’s case was significant as she acknowledged that she was willing to spend the agency’s money in order to obtain certain computer documents. During the hearing, Ms. Furgione acknowledged when referring to the computer documents during the administrative investigation, she stated, “This is a big viable case, so let me know how much it would cost.” *Id.* at p.555. Based on Ms. Furgione’s recognition of the significance of Ms. Chen’s case, it is difficult to understand why she assumed she had enough information based on a number of pages.<sup>21</sup>

A few more pages would have provided Ms. Furgione and Admiral Devany with sworn declarations from a number of employees that explained the NID username and password was an office password. Those pages would have

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<sup>21</sup> Although I question why Ms. Furgione did not request the declarations from Ms. Washington, I also question why OGC did not provide them as part of the agency file. Ms. Washington turned over all of the declarations to OGC by August 2015. Tab 40, p.12; Tab 44, p.30.

included a sworn declaration from Mr. Schade (Ms. Chen's supervisor and the hydrologist-in-charge of the ORFC) that stated, "Data from the NID could be downloaded into our systems. The focal point for access was Ray Davis. He was supposed to maintain access and keep the operational system up to date. There was a practice of keeping the username and password for the NID in a binder. It was not a policy. This practice was in place for other passwords. We kept a binder of shared username passwords for systems. We still do." Tab 41, p.103. If Ms. Furgione had received this declaration obtained by Ms. Washington, it seems unlikely that she would have made statements in Ms. Chen's proposal letter to the effect that, "you asked Ray Davis to give you his individual credentials and password to access the NID," or "you used Mr. Davis's individual credentials to access the NID," or "you requested a colleague's individual credentials and password to the NID." Tab 9, pp.5-24.

It is also likely that, had Admiral Devany had the benefit of the declarations, he would not have accused Ms. Chen of "using someone else's access information," or stated, "you had no business browsing the NID," or "the investigators found no evidence that Mr. Davis's personal username and password were contained in the password binder."<sup>22</sup> Tab 7, p.8.

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<sup>22</sup> There was reference to both a "password binder" and a "dam break binder"— both of which were available to ORFC employees. The username and password for the NID were maintained in the dam break binder.

There is extensive discussion throughout Ms. Furgione's proposal letter and Admiral Devany's decision letter about the NID and its password. There is questioning in June 2013 by the agents of Ms. Chen relating to the password. Even isolating the Misuse of a Federal Government Database charge renders these materials relevant. For instance, the fact that Ms. Chen had an "office" username and password readily available to her could shed doubt on the agency's contention that she had no work-related reason to be on the database. In sum, the documents were clearly relevant evidence.

Reason 1: Conduct Demonstrating Untrustworthiness

Specification 1: On or about May 16, 2013, you sent Thomas Adams, former National Weather Service employee, an email from your NOAA email address in which you stated, in relevant part:

Tom, I will not tell anyone I give you the data since COE has been push me release the model several times and I have refused so far but we are going to have a meeting in a few minutes regarding the release in our office. I really like to know how our model is doing and your analysis will tell. No one in the office can do what you can do on the statistic analysis. I will try to get the obs in so I can send you the data early next week. Got to go to the meeting. Sherry.

A charge of conduct demonstrating untrustworthiness is much like a charge of conduct unbecoming, as it has no specific elements of proof and it is established by proving that the employee committed the acts alleged in support of the broad label. *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509,

¶ 9 (2010); *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 22 (2006); *aff'd*, 490 Fed.Appx. 932 (10<sup>th</sup> Cir. 2012). However, a general charge must be described in sufficient detail to allow an appellant to make an informed reply and it is acceptable so long as it describes the misbehavior. *See Colbert v. U.S. Postal Service*, 93 MSPR 467, ¶ 12 (2003). *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶ 8 (2001).

There is no dispute that Ms. Chen sent the two emails to Thomas Adams (a former NOAA employee) on May 16 and 22, 2013, that are identified in Specifications 1 and 2. Ms. Chen testified the emails were accurate. Tr.2 Chen, p.26. The emails from May 16 and 22 were the continuation of an email exchange between Ms. Chen and Mr. Adams that started on April 10, 2013. On April 10, Mr. Adams advised Ms. Chen that he planned to write a HEC-RAS paper for a journal, but needed assistance from Ms. Chen and Ray Davis. From Ms. Chen, Mr. Adams was looking for information concerning “calibrations” for the “Kentucky and Licking Rivers” that were part of Ms. Chen’s Ohio HEC-RAS. Ms. Chen responded the same day stating she would be willing to share the calibration information, but wanted to wait until she updated her model with new data. Tab 9, p.93.

Subsequently on May 16, Ms. Chen apologized to Mr. Adams for the delay in providing the information he requested and explained she had difficulties in securing updated information, but expected she could provide the data the following week. In response, Mr. Adams thanked Ms. Chen for her assistance

and requested she not tell anyone she was providing him with the data. *Id.* at p.89. I find Mr. Adams made this request to Ms. Chen (although he did not specify a reason in his message) because after his April 10 communication with Ms. Chen when he initially requested the information from her, he had received the April 16 email from Mr. Schade advising him to direct all requests for data or code through Mr. Schade. Ms. Chen responded on May 16 that she would not tell anyone that she was giving Mr. Adams the data and then on May 22, Ms. Chen emailed Mr. Adams the data. Tab 9, pp.88-92.

Ms. Chen testified credibly — and she provided the same explanation during the EEO investigation and in her oral and written replies — that she agreed not to tell anyone that she was providing the data to Mr. Adams because she knew Mr. Schade and Mr. Adams had a difficult personal relationship and was just repeating the language Mr. Adams used in his email in her response. Tr. Chen, pp.731, 738-40; Tab 2, p.45. Mr. Schade’s testimony corroborates the existence of a contentious relationship between himself and Mr. Adams. Mr. Schade acknowledged that there was a sentiment in the office that he and Mr. Adams did not get along. He acknowledged there was a rumor in the office that Mr. Schade left the NWS because of Mr. Adams and then when Mr. Schade came back Mr. Adams left. Tr. Davis, pp.227-28. Mr. Adams’ email to Ms. Chen on October 22 also mentions the nature of his relationship with Mr. Schade when he stated, “The [Hydrologist in Charge] (Trent Schade) will not allow anyone to

send me data or files; he is very vindictive and he is punishing me for not worshipping him. This is why I had to leave.” Tab 37, p.88.

Ms. Chen asserts that at the time she did not see any issues with agreeing not to tell anyone she was going to send Mr. Adams data on May 16, because there was no requirement to tell anyone when releasing information to the public. Tr. Chen, p.724. There was no prohibition to providing the information to Mr. Adams because it was not proprietary or confidential. Both Ms. Furgione and Mr. Schade testified that there was nothing proprietary in the information Ms. Chen provided to Mr. Adams. Tr. Schade, p.232; Furgione, p.488; Tab 54, p.6. At one point, Mr. Schade testified that they would not have shared the information with Mr. Adams because it was “still a work in progress,” but later stated it was not proprietary. Tr. Schade, pp.152, 232. I find that when Mr. Schade was discussing that the information Ms. Chen provided to Mr. Adams was a “work in progress” he was conflating Ms. Chen’s model with simulated data. Ms. Chen discussed in her email that the USACE was pushing her to release her model, which was a work in progress. Ms. Chen had been “waiting for data for several rivers” and did not want to release the model until she updated it. On the other hand, Ms. Chen was providing Mr. Adams with simulated data, not the model. Tr. Chen, pp.741-45.

Ms. Chen also testified she did not become aware of Mr. Schade’s April 16 email to Mr. Adams regarding requests for data or code until after she provided the data to Mr. Adams on May 22. Prior to Mr. Schade joining NWS as the

Hydrologist in Charge (HIC), NWS staff members handled information requests from the public on a routine basis and there was no policy that anyone had to tell the HIC prior to disclosing information or data. Tr. Davis, pp.649-51. There is contradictory testimony and evidence regarding NWS's policy on public information requests once Mr. Schade came to the office in April 2012. Mr. Schade testified that he established a policy within a month of coming to the office in April 2012 that he wanted the NWS employees to send him all requests for information from the public. Mr. Schade also testified that he did not put the policy in writing, but rather announced it at a staff meeting and he reminded the staff at subsequent staff meetings. Tr. Schade, p.144. However, he also testified that requests from the public "are usually routed through me," rather than there being a policy that employees were required to route requests through him. *Id.* at p.143. On two other occasions during the criminal investigation, when discussing the release of information with the agents, Mr. Schade never mentioned a policy that required employees to route all requests through him. In fact, when asked by the agents in June 2013 about Ms. Chen's request from Mr. Jiao, Mr. Schade commended Ms. Chen's efforts in responding to the inquiry rather than stating she should have passed the request to him:

S/A Lieberman asked Schade if there was a policy, protocol or process for matters like this. Schade said what she did was consistent with what a good performer would do: continue to follow up. If ACE can't share the information, we need to say that. In that case I hope she would make sure the request is being handled. If a data request comes in don't let it go. Talk to ACE put the two [parties] together and ensure it's handled.

S/A Lieberman asked Schade if there was a formal process for requests [for information]. Schade said “No” and that calls or website emails come in and the WEBADMIN determines who on staff should field.

Tab 8, pp.75-76.

In June 2014, Mr. Schade told the FBI that once he learned that Tom Adams was making requests to NWS employees he cautioned them not to provide him with data or code. As he used the identical phrase “data or code” in his email, I find he was referring to the email he sent on April 16, 2013. Furthermore, he limits his cautionary instruction to requests from Tom Adams and never mentions to the agents that there is a policy that would have required Mr. Adams’ requests be sent to him. Tab 8, p.82. Additionally, Mr. Adams was employed by NWS in the ORFC until February 2013,<sup>23</sup> so he would have been present when Mr. Schade said he made announcements about his new policy regarding public information requests starting in April 2012. However, when Mr. Schade sends the April 16, 2013 email to Tom Adams the language Mr. Schade used in the email indicates he is making a new request. Mr. Schade states, “Please send your requests to me” rather than confirming language that would remind Mr. Adams of the policy. Mr. Adams’ October 22, 2013 email corroborates what the policy was before April 16, 2013, when Mr. Adams discusses the issue of Mr. Schade refusing to give him data and asks Ms. Chen for information “like you gave me before.” Tab 37, p.88.

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<sup>23</sup> At some point, Mr. Adams became a contractor with NOAA. See fn.15.

Based on Mr. Schade's inconsistent statements and testimony and his definitive statement to the agents that there was no formal process, I find that there was no policy or directive in the ORFC to route requests for information received from the public through Mr. Schade prior to April 16, 2013.

Ms. Furgione testified about the national NWS policy relating to the release of information in response to public requests and stated a memorandum of understanding (MOU) controlled the release of information to academics. The agency did not produce any evidence that ORFC employees were advised that sharing with academics was controlled by MOUs. Ms. Furgione further testified that she was not aware of the practices or policy for sharing information in ORFC. Tr. Furgione, p.496. During Mr. Schade's testimony he stated they routinely shared information with academics, but never mentioned a MOU. Tr. Schade, p.224.

In addition to the contradictory positions Mr. Schade has taken and Ms. Furgione's lack of knowledge regarding the policies and procedures at the ORFC, Ms. Chen and Mr. Davis both testified that there was no policy put in place by Mr. Schade — except for the email instruction on April 16, 2013, specifically addressing requests from Mr. Adams — regarding information requests from the public. They also testified similarly about sharing information with the public and those in academia. Tr. Schade, p.143; Davis, pp.649-51; Chen, p.724. Ms. Chen also testified that she had a very good reputation for answering all of the questions posed by the public. Tr.2 Chen, p.38. I find that the policy in place

prior to April 16, 2013, permitted NWS employees to respond to requests from the public without advising or obtaining approval from the HIC.

The findings related above, although they are relevant to the penalty analysis below, do not negate the fact that the conduct of Ms. Chen identified under Specification 1 constitutes untrustworthy behavior. The crux of the conduct identified under Specification 1 is that Ms. Chen was demonstrating untrustworthy behavior when she agreed with a member of the public not to tell anyone that she was giving him data that she acquired by virtue of her position with NOAA.

Admiral Devany determined — and I agree — that Ms. Chen promising not to reveal to anyone that she was giving Mr. Adams data from NWS resulted in conduct that was untrustworthy. The fact that Ms. Chen believed Mr. Adams' request not to reveal that she was giving him data was the result of a contentious relationship between Mr. Schade and Mr. Adams is not a reason to agree not to divulge to her agency that she is providing information to a member of the public. In addition, the fact that there was no agency prohibition to releasing this type of information to the public — putting Mr. Schade's April 16 email aside — may be a reason not to inform anyone in the agency, but it is not a basis to agree in advance to withhold information from the agency. I am not speculating as to what Ms. Chen would have done if Mr. Schade or anyone from NWS or NOAA asked her after the fact if she provided Mr. Adams with the data, but as charged by the agency, she did agree not to divulge her release of the data.

The agency proved by preponderant evidence that Ms. Chen's agreement in her May 16 email not to tell anyone she was providing information to Mr. Adams constitutes conduct demonstrating untrustworthiness. Accordingly, Specification 1 of Reason 1 is sustained.

Specification 2: On or about May 22, 2013, you sent Thomas Adams, former National Weather Service employee, an email from your NOAA email address and attached government data available to you at the Ohio River Forecast Office.

In Specification 2, the agency charged Ms. Chen with demonstrating untrustworthiness by actually sending the data to Mr. Adams. Putting Mr. Schade's April 16 email regarding requests from Mr. Adams to the side, there was no evidence presented by the agency that Ms. Chen providing this data to Mr. Adams was inappropriate or constituted untrustworthy conduct. As noted above, the information Ms. Chen provided to Mr. Adams was routinely provided to academics and was not proprietary. Tr. Furgione, p.488; Tab 54, p.6. In fact, after Mr. Schade learned from the agents in September 2013 that Ms. Chen sent data to Mr. Adams, he apparently had no significant concerns about Ms. Chen releasing the data because he never even checked to see what data Ms. Chen sent Mr. Adams. Tr. Schade, p.232.

The only basis for finding that Specification 2 constitutes untrustworthy conduct rests on Ms. Chen's knowledge of Mr. Schade's April 16 email. The agency did not rely on Ms. Chen's knowledge of the email and if it was implying

as such, it did not prove by preponderant evidence that Ms. Chen was aware of Mr. Schade's April 16 email when she sent the information to Mr. Adams on May 22. Ms. Chen's position was that she was not aware of Mr. Schade's email concerning requests from Mr. Adams until Jim Noel told her about it. Tr. Chen, pp.728-31. Although Admiral Devany discredits Ms. Chen's position that she did not see the April 16 email until after she sent her emails on May 16 and May 22, he does not rely on that conduct when deciding her behavior was untrustworthy.<sup>24</sup> Tab 7, p.6. Accordingly, Specification 2 of Reason 1 is not sustained.

Where more than one event or factual specification is set out to support a charge . . . proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (1990). Because I have sustained Specifications 1 of Reason 1, the agency's charge that Ms. Chen's conduct demonstrated untrustworthiness is sustained.

#### Reason 2: Misrepresentation

Specification: In a September 25, 2013 interview, you told Special Agent Lieberman that you were not aware of Mr. Schade's April 16, 2013 email asking that all requests for code or data from

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<sup>24</sup> Although Admiral Devany did not believe Ms. Chen when she said she did not see the email, the agency made the same argument when discussing whether Admiral Devany saw an email that was sent to him and three other individuals about a potential 60 Minutes episode concerning Ms. Chen. In that situation, the agency stated that since there was no response from [Admiral] Devany there was no indication he "even read the message." Tab 29, p.39.

Adams be routed through Mr. Schade until your coworker, Jim Noel, advised you about it, which occurred after you already sent the code to Adams, or something to that effect.

Charges of falsification and misrepresentation require the same elements of proof. *See Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 9 (2007). The Board has held that to establish a charge of falsification, the agency must prove, by preponderant evidence, that the appellant: (1) supplied wrong information; and (2) knowingly did so with the intention of defrauding, deceiving, or misleading the agency for her own private gain. *Gardner v. Department of Veterans Affairs*, 123 M.S.P.R. 647, ¶ 11 (2016), citing *Boo v. Department of Homeland Security*, 122 M.S.P.R. 100, ¶¶ 10-12 (2014). Falsification and fraud cases often turn on proof of the element of intent. However, a finding that an appellant has provided incorrect information cannot control the question of intent for purposes of adjudicating a falsification charge. *Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 16 (2001). Whether intent has been proven must be resolved by the totality of the circumstances. *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 27 (1999). Although circumstantial evidence generally is used to establish intent, the Board must also consider the appellant's plausible explanation as an element of the totality of the circumstances. *Guerrero*, 105 M.S.P.R. 617 at ¶ 10; *Nelson v. U.S. Postal Service*, 79 M.S.P.R. 314, ¶¶ 6-7 (1998); *Riggin v. Department of Health and Human Services*, 13 M.S.P.R. 50, 52 (1982).

In April 2013, Mr. Schade sent an email to Tom Adams and copied the NWS staff, which included Ms. Chen. Tab 9, p.88. As noted above, the email requested that Mr. Adams send any requests for data or code to Mr. Schade. Ms. Chen asserts that she must have overlooked the email and first learned of it from her co-worker Jim Noel after she provided data to Mr. Adams. Tr. Chen, pp.726-33. At the time, Mr. Noel was the Service Coordination Hydrologist at the ORFC. Tr.2 Noel, p.54.

Mr. Schade sent the April 16 email when Ms. Chen was not in the office. When Ms. Chen returned after being gone for three days, she had approximately 80 unread emails in her in box. I find Ms. Chen testified credibly when she stated that she overlooked Mr. Schade's email. The day Ms. Chen returned to the office she was on the evening shift, which only included one other co-worker compared to five to seven people that would have been on duty during the day shift and she stated she had too much work to read all of her emails. Ms. Chen testified credibly that sometime after May 22, she was having a conversation with Mr. Noel about Mr. Schade and Mr. Adam's relationship being so volatile ("any moment, they can explode") and then Mr. Noel stated that is why "Trent sent out that email." Ms. Chen asked Mr. Noel what email he was referring to and Mr. Noel referenced Mr. Schade's April 16 email requiring Mr. Adams to request data or code directly from Mr. Schade. Ms. Chen stated that she had not seen the email and asked Mr. Noel who were the recipients of Mr. Schade's email. Mr. Noel then showed Ms. Chen the email on his computer. Tr. Chen, pp.728-32.

Ms. Chen's testimony was consistent with what she relayed to the agents when interviewed on September 25, 2013, i.e., she did not see the email originally and learned about it from Mr. Noel.<sup>25</sup> Tab 9, p.72.

Two days after the interview with Ms. Chen, Agent Lieberman interviewed Mr. Noel telephonically. According to the typed MOI, Mr. Noel stated that: (1) he did not have a conversation with Ms. Chen about Mr. Schade's email; (2) he did not have a conversation with her about her statement that she did not see the email, and (3) Ms. Chen had not approached him at any time to discuss any aspect of the situation. Tab 9, p.72. Agent Lieberman testified about his interview with Mr. Noel and stated that Mr. Noel was clear that he did not have a conversation with Mr. Chen about her not seeing Mr. Schade's email. He further testified that although Mr. Noel originally said he could not recall, later Mr. Noel was certain that he never discussed the email with Ms. Chen. Tr. Lieberman, pp.287-94, 399-402. I did not find Agent Lieberman's testimony credible.<sup>26</sup> Agent Lieberman's testimony was inconsistent with Mr. Noel's testimony at the hearing, with the

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<sup>25</sup> The portion of Agent Lieberman's MOI relating to Ms. Chen's September 25 interview that resulted in this misrepresentation charge consisted of only five typed lines, which demonstrates Agent Lieberman's inquiry was limited. Tab 9, p.72.

<sup>26</sup> Agent Lieberman's demeanor during his testimony revealed he was determined not to provide any positive testimony for Ms. Chen. Even some of the most direct questions on cross-examination were responded to with circuitous answers, e.g., Counsel - "You see the words . . . exemplary employee . . . Do you think Mr. Schade was describing Sherry Chen?" Agent Lieberman - "He could have been . . . I can't say for sure." Counsel - "Who else would you have been discussing with Trent Schade . . . ?" Agent Lieberman - "I mean my conversations with Mr. Schade were about Sherry Chen. But I don't have that, you know, in my notes right here. So, I don't want to say with 100 percent." Tr. Lieberman, pp.323-24.

EEO affidavit Mr. Noel submitted prior to the hearing, and most notably Agent Lieberman's testimony was inconsistent with the hand-written notes taken during his telephonic interview of Mr. Noel.<sup>27</sup>

The MOI and hand-written notes as well as Mr. Noel's recollection demonstrate Agent Lieberman's interview of Mr. Noel did not last very long. Tr.2, Noel, p.57; Tab 8, p.79; Tab 9, p.72. According to the hand-written notes, there were two bullet points relevant to the topic of Mr. Noel having any discussions with Ms. Chen about Mr. Schade's email. The first bullet point stated: "Don't recall meeting or discussion with Sherry where she discussed not having received Trent's email re: Tom Adams." The second bullet point stated: "Sherry has not discussed anything with Jim and has not advised about conversation." I find it is readily apparent that the first bullet point involved the question of whether Ms. Chen had a conversation with Mr. Noel about the existence of Mr. Schade's April 16 email after Mr. Schade sent it. I further find that the second bullet point from the hand-written notes resulted in the second and third statements in the written MOI. First, that Ms. Chen did not discuss anything about this issue with Mr. Noel during the two days between Ms. Chen's September 25 interview with Agent Lieberman and Mr. Noel's September 27 interview and second, that Ms. Chen did not advise Mr. Noel that Agent Lieberman spoke to her on September 25.

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<sup>27</sup> Agent Lieberman acknowledged that the typed MOIs were not always consistent with the hand-written notes. Tr. Lieberman, pp.397-98.

Mr. Noel testified that he recalled a short conversation with an agent in September 2013.<sup>28</sup> Mr. Noel could not remember the specifics of the interview and could not recall if Agent Lieberman asked him about Mr. Schade's April 16 email. He testified that he was not certain and that he does not recall having a conversation with Ms. Chen about the email, but could not guarantee that it did not happen. Tr.2 Noel, pp.54-59. Mr. Noel's declaration in the EEO proceeding in July 2016 consistently stated that he could not recall whether he had a conversation with Ms. Chen about the email or showed her the email. Mr. Noel definitively stated, as he did to Agent Lieberman, that he does not recall whether or not he had a conversation with Ms. Chen about Ms. Schade's April 16, 2013 email or whether he shared the email with her. Mr. Noel has never asserted that those events did not happen. Tab 14, pp.82-85. I find that Mr. Noel had a conversation with Ms. Chen between May and September 2013 as credibly related by Ms. Chen, but that Mr. Noel did not remember it four months later.

In his decision letter, Admiral Devany determined that Ms. Chen's statement that she overlooked the email was not credible because a supervisor has a right to expect that emails "will be read and understood." Tab 7, p.7. Admiral Devany further stated that if Ms. Chen decided not to read the email, "that her willing ignorance of his [Mr. Schade's] expectations are no different from

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<sup>28</sup> During Mr. Noel's testimony, he was initially confusing Agent Lieberman's interview with a conversation he had with an NWS employee about his affidavit filed in Ms. Chen's EEO matter.

learning those expectations and ignoring them.”<sup>29</sup> *Id.* In sustaining the charged conduct, Admiral Devany discounts Ms. Chen’s position that she learned of Mr. Schade’s April 16 email from her co-worker Mr. Noel by concluding that the investigation revealed that Mr. Noel was certain he did not have a conversation with Ms. Chen about the email. Admiral Devany found Ms. Chen’s position that she would not have used another co-worker “for cover” because it could be easily discovered (by contrary testimony from the co-worker) as a “cynical assertion.” *Id.*

The decision letter indicated that Admiral Devany relied on the typed MOI, which reflected that Mr. Noel stated unequivocally that he did not have a conversation with Ms. Chen about the email. However, in his testimony he referred to Mr. Noel’s position as not recalling whether he spoke to Ms. Chen, but felt that it was a definitive statement even though he was unaware of what the agents did, if anything, to refresh Mr. Noel’s recollection of the event.<sup>30</sup> Admiral Devany testified that Mr. Noel said, “I do not recall.” And to me, that’s pretty

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<sup>29</sup> This statement by Admiral Devany may have been relevant if the charged conduct involved Ms. Chen’s failure to read an email or failure to follow a supervisor’s directive, but I do not find it relevant evidence to a misrepresentation charge, which requires the appellant to have knowingly supplied wrong information.

<sup>30</sup> Admiral Devany repeatedly refused to acknowledge that any change in the evidence he reviewed could alter any part of his decision and testified that he was required to stand by his decision to remove Ms. Chen from employment regardless of whether exculpatory evidence existed. For example, when asked, “So no matter what facts I show today, you’re going to maintain the termination was proper. Is that what you are saying?” Admiral Devany responded, “That’s correct.” Tab 51, Devany, pp.64-65. This casts serious doubt on Admiral Devany’s testimony.

clear.” Tab 51, Devany, p.28. It is difficult to discern what Admiral Devany found “clear” about Mr. Noel not being able to recall the discussion with Ms. Chen.

I also find it relevant that Ms. Chen, when asked again by Mr. Adams to provide him with information in October 2013, refuses his request and cites her acquired knowledge of the April 16 email that requires Mr. Adams to submit requests to Mr. Schade. Granted, this was after her September 25 interview, but she is insistent that she cannot provide any information. In fact, when Mr. Adams attempts to distinguish his request as not being “data or code”, Ms. Chen still maintains she cannot provide Mr. Adams with anything unless she has permission from Mr. Schade. Tab 37, pp.87-89.

I further find Ms. Chen’s testimony credible and relevant that she would not have risked her job to disobey a directive from her supervisor just to provide Mr. Adams with data. Ms. Chen testified that it was “absolutely not” worth her career or job to help Mr. Adams with his academic paper. Tr. Chen, p. 740-41. Ms. Chen further testified, “I would not be that crazy and risk my job to get the data to Tom.” Tr.2 Chen, p.39. The emails between Ms. Chen and Mr. Adams in April, May, and October 2013, clearly demonstrate that they respected each other professionally and were acquaintances. In the emails, they are aware of each other’s marital status, discuss real estate issues, and travel plans. However, it is also clear that they did not keep in regular contact as there were significant gaps of times between their email correspondence and the language in the emails does

not give any indication that they had been in contact by other means. I find it unlikely that someone would risk their job — both initially by providing the data and then by lying about the knowledge of a directive — for what I would categorize as a professional associate.

Unlike Admiral Devany, I find Ms. Chen's repeated assertion that she learned of Mr. Schade's April 16 email after a conversation with Mr. Noel to not be a "cynical assertion" but relevant evidence. Admiral Devany testified that Ms. Chen's motive for telling the story about Mr. Noel was because she needed to "cover her tracks." Tab 51, Devany, p.28. I find that Ms. Chen, when asked by the Agent Lieberman during a short interview as to her knowledge of Mr. Schade's April 16 email, would not have created a story on the spot involving Mr. Noel. And then not ask Mr. Noel to "cover" for her or at least try to explain the situation to Mr. Noel if she was actually lying about how she learned of the email. The hand-written notes and MOI of Agent Lieberman's interview with Mr. Noel, as well as Mr. Noel's testimony, were clear that Ms. Chen never approached Mr. Noel after her September 25 interview with the agents to explain the situation, ask for his help, or coach him. Even Agent Lieberman acknowledged that when people tell a lie they would pull people in, talk to the person, and ask for their help. Tr. Lieberman, pp.403-04. That simply did not happen.

In sustaining this charge, Admiral Devany relies on Ms. Chen's reputation for checking her email and being responsive to requests at work. There certainly

was testimony and evidence attesting to this fact from a number of witnesses that Ms. Chen was very responsive to her emails and I find that evidence relevant. But I do not find the fact that she was attentive to emails comes close to tipping the scale in favor of finding preponderant evidence to sustain the charge. Rather, the totality of the evidence, which includes (1) Ms. Chen's explanation as to why she missed Mr. Schade's April 16 email, (2) her plausible explanation as to how she learned of the email from Mr. Noel, and (3) the absence of any communication from Ms. Chen to Mr. Noel after they were both interviewed by Agent Lieberman in September 2013, supports my finding that Ms. Chen gave a truthful explanation to Agent Lieberman when asked about how she learned of the Mr. Schade's email.

Accordingly, I conclude that Ms. Chen did not supply wrong information to Agent Lieberman. Therefore, the agency did not establish its misrepresentation charge by preponderant evidence and Reason 2 is not sustained.

Reason 4: Lack of Candor<sup>31</sup>

In *Ludlum v. Department of Justice*, 278 F.3d 1280 (Fed. Cir. 2002), the Federal Circuit explained that lack of candor and falsification are distinct charges. While falsification “involves an affirmative misrepresentation, and requires intent to deceive,” lack of candor, by contrast, “is a broader and more

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<sup>31</sup> A portion of evidence that is necessary to address the specifications in Reason 4 is relevant to my analysis of the conduct charged under Reason 3. For clarity and efficiency, I will address the specifications under Reason 4 first and my analysis of the conduct charged under Reason 3 will follow.

flexible concept whose contours and elements depend on the particular context and conduct involved.” *Id.* at 1284. Lack of candor need not involve an affirmative misrepresentation, but “may involve a failure to disclose something that, in the circumstances, should have been disclosed to make the statement accurate and complete.” *Id.* Unlike falsification, lack of candor does not require “intent to deceive.” *Id.* at 1284–85. Lack of candor, however, “necessarily involves an element of deception.” *Id.* at 1284; see *Parkinson v. Department of Justice*, 815 F.3d 757, 766 (Fed. Cir. 2016); *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 11 (2012), overruled in part on other grounds by *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015).

In *Rhee*, a case in which the appellant was charged with lack of candor in making an incorrect statement to her supervisor, the Board found that, to establish the “element of deception,” the agency had to prove that the appellant knowingly made an incorrect statement. *Rhee*, 117 M.S.P.R. 640 at ¶ 11. The Board found that the agency failed to establish by preponderant evidence that the appellant knew her statement was false and the charge could not be sustained. *Id.* at ¶¶ 12–16. The Federal Circuit took a similar approach in *Parkinson*, in which an employee of the Federal Bureau of Investigation was charged with lack of candor under the FBI Offense Code based on his alleged “failure to be fully forthright” in his statements to agency investigators. In that context, the court found that the “element of deception” required under *Ludlum* entailed that the employee must have “knowingly” failed to be

forthright. *Parkinson*, 815 F.3d at 766–67. The court reversed the Board's decision to sustain the charge, finding that, even if the employee failed to be fully forthright, there was no substantial evidence that he did so knowingly. *Id.* at 767–68. In light of *Rhee* and *Parkinson*, a lack of candor charge requires proof of the following elements: (1) that the employee gave incorrect or incomplete information; and (2) that she did so knowingly. Accordingly, in addition to determining whether Ms. Chen gave incomplete or incorrect information, I must also make findings as to whether there was an element of deception present, i.e., whether she knowingly gave incomplete or incorrect information.

#### Lack of Candor Specifications<sup>32</sup>

Specification 1: In a June 11, 2013 interview with the DOC OSY, S/A Lieberman asked you whether anyone approached you regarding your work. You said, "You mean internationally? Yea they ask me what I do." S/A Lieberman asked you, "Where?" You replied, "Beijing." S/A Lieberman asked you, "Did anyone ask you for information?" On June 11, 2013, in response to Department of Commerce Office of Security Special Agent Andrew Lieberman's question to you regarding whether anyone asked you for information, you stated, "No, or something to that effect."

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<sup>32</sup> English is Ms. Chen's second language. A review of Ms. Chen's testimony, emails, and June 13 handwritten statement corroborate the existence of a language barrier at times between Ms. Chen and the agents. Admiral Devany stated that he was aware that English was Ms. Chen's second language and agreed there may have been some miscommunication between Ms. Chen and the agents. Tab 51, Devany, p.166. Mr. Schade also explained that Ms. Chen had a "language hindrance" when explaining why he thought Ms. Chen did not apply for a promotion despite her co-workers thinking that Ms. Chen would be perfect for the position. Tab 8, p.83.

According to the written report of the interview with Ms. Chen, immediately prior to asking if anyone approached her about her work, the agents were asking her questions about international collaboration regarding her work with NOAA. She responded negatively and explained that her work involves the Ohio River and other rivers in its proximity so international collaboration would not be beneficial to her work. She further expounded that she knew of two individuals (“Tom Adams and Joe”) who had worked on a project with Romania for a couple years. After Agent Lieberman asked Ms. Chen if anyone approached her about her work, Ms. Chen asked if Agent Lieberman meant internationally and Agent Lieberman responded affirmatively. Ms. Chen then stated, “Yeah they ask me what I do. My parents are too old, they’re 80, they don’t care.” Agent Lieberman then said, “where” to which Ms. Chen responded, “Beijing.” The next question was, “Did anyone ask you for information,” to which Ms. Chen responded, “no.” Tab 9, p.49. It is at this point the agency’s specification comes to fruition. Based on this exchange, the agency charged Ms. Chen with the first specification of lack of candor for not telling the agents about her visit and conversation with Mr. Jiao. The very next question — and I emphasize it was not after a break but the very next question — was, “Did anyone internationally ask you for information regarding locks and dams,” to which Ms. Chen immediately responded, “Yeah, my colleague. I didn’t have the information to provide.” Tr. Lieberman, p.383; Tab 9, p.49. Ms. Chen then told the agents that she wondered

if there was anything online she could provide to her colleague regarding his question about how [the United States] manages its projects. She further explained that she did not know so she asked Ms. Lee. Tr. Lieberman, p.383; Tab 9, p.49.

I initially find that when Ms. Chen responded that no one asked her for information, she was continuing the dialogue presented in the prior question where she mentioned her parents. In other words, she assumed that Agent Lieberman was asking if the family and friends she interacted with when visiting China asked her for information about her work. Therefore, in light of how and when Agent Lieberman posed the question, Ms. Chen's answer was not incorrect because the agency has not shown that anyone other than Mr. Jiao asked her for information during her visit to China in 2012.

Based on the common pace of a conversation, there may have been 30 seconds at most between Ms. Chen telling the agents that no one asked her for information and then responding that her colleague asked her for information on locks and dams. In sustaining the specification, Admiral Devany stated in his decision letter, "while you ultimately acknowledged Mr. Jiao's request for information when confronted with the evidence, I find that you lacked candor when you initially denied that anyone internationally had asked you for information." Tab 7, p.8. The definition of ultimately — finally, in the end, eventually — clearly requires some passage of time. And there was no passage of time as it was Ms. Chen's response to the very next question. In addition, there is

no basis for Admiral Devany's statement that Ms. Chen responded truthfully, when "confronted with the evidence" as neither the written report nor any other evidence, indicates that the agents presented Ms. Chen with any evidence when she responded that her colleague asked her for information about locks and dams.

*Id.*

It can be said that because Mr. Jiao was from Beijing, Ms. Chen's initial response was incorrect when she said no one asked her for information. To that extent, I find, that based on her very next response that her colleague asked her for information, her initial response, even if incorrect, was not a knowing act by Ms. Chen to provide incorrect information.

The agency has presented no evidence, let alone preponderant evidence, to support Specification 1 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

Specification 2: In a June 11, 2013 interview with the DOC OSY, S/A Lieberman asked you, "Did anyone internationally ask you for information regarding locks and dams?" You said, "Yeah, my colleague ... " S/A Lieberman asked you for the name of the individual who asked you for the information. On June 11, 2013, in response to Department of Commerce Office of Security Special Agent Andrew Lieberman's question to you regarding the name of the individual who asked you for information regarding locks and dams, you stated, "Umm, he was one class above me; I haven't seen him in ten years; let me think about it," or something to that effect.

During the interview, Agent Lieberman asked Ms. Chen for the name of the individual and Ms. Chen explained that her colleague was one class above her [in college] and that she had not seen him in ten years. Ms. Chen then said, “Let me think about it.” She further then explained she saw him last time she visited her parents for three weeks. She stated her father was in the hospital and that her parents were not doing well. Tab 9, p.50. The interview continued with questions relating to her visit to Beijing and in her responses Ms. Chen explained the meeting with Mr. Jiao in detail and corresponding with him via email. Agent Lieberman asked Ms. Chen if she used her work or personal email account when corresponding with Mr. Jiao and Ms. Chen responded, “I don’t recall, I can forward you the email.” Tab 9, p.61. During the interview, Ms. Chen tells the agents that she has memory issues — “I have to tell you – I have surgery and my memory is bad.” *Id.* at pp.55, 62. Shortly after that statement, Agent Lieberman asked Ms. Chen if there is anything the agents could do to help her remember and she responded, “Yes, anything you can do” and she also told them that since her two surgeries, “I don’t trust my memory.”<sup>33</sup> *Id.* at 55. As the interview continued and before Ms. Chen took a break to use the restroom, Agent Lieberman asked

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<sup>33</sup> It was obvious Ms. Chen was having issues with dates during the interview. For example, she told the agents she met with Mr. Jiao “two years ago” although that would have been in 2011. In fact, she insisted on numerous occasions that her last trip to China took place in 2011. Tab 9, pp.49-54. Mid-way through the interview the agents showed Ms. Chen the 2012 email where she is asking Mr. Schade for public information for Mr. Jiao and Ms. Chen then realized her last trip was in 2012. *Id.* at 55.

Ms. Chen again to provide the name of the individual she met with. He then asked her how old he was. Ms. Chen responded by describing him as 56 and a Deputy Director and told the agents that she would send them the email she sent to him in English. *Id.* at 57.

I do not find that with her responses Ms. Chen was knowingly providing incorrect or incomplete information. In fact, right after Ms. Chen said she would provide the agents with the email she sent to Mr. Jiao, she remembered his name and wrote it on a “sticky note” that she handed to Agent Lieberman. In addition, right before Ms. Chen remembered Mr. Jiao’s name, she reiterated that she would provide Agent Lieberman with the email she sent. *Id.* Furthermore, Ms. Chen saw Mr. Jiao thirteen months before her interview with the agents and had not seen Mr. Jiao prior to that time for approximately ten years. The meeting encompassed 15-20 minutes of a three-week trip to Beijing to visit family, including her elderly parents who were in poor health. Tab 9, pp.50, 58; Tab 51, Devany, p.80. Ms. Chen indicated to the agents that she had trouble with her memory at times. She subsequently provided Mr. Jiao’s name during the interview before she even took a break and without the agents refreshing her recollection with emails or other documents. In addition, prior to remembering Mr. Jiao’s name she offered to provide the email she sent to Mr. Jiao, which would have identified his name or at least reflected the email address had she been unable to remember. Prior to remembering Mr. Jiao’s name, she also provided a number of details about where Mr. Jiao went to school, where he was

currently working, and his title. I found no evidence that she knowingly lacked candor when Ms. Chen could not recall Mr. Jiao's name immediately.<sup>34</sup>

The agency has not presented preponderant evidence to support Specification 2 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

Specification 3: In a June 11, 2013 interview with the DOC OSY, S/A Lieberman asked you when you last corresponded with the individual who asked you for the information (Mr. Jiao). On June 11, 2013, in response to Department of Commerce Office of Security Special Agent Andrew Lieberman's question to you regarding when you last corresponded with the individual who asked you for the information (Jiao Yong), you stated that you sent only one email to Mr. Jiao or something to that effect.

Over the course of 15 days, a little over a year before Ms. Chen's June 2013 interview with the agents, Ms. Chen sent three emails from her personal account to Mr. Jiao (May 15, 21, and 29). Tab 54, pp.6-9. The middle email sent on May 21 contained no substantive information, but rather was a follow-up to see if Mr. Jiao had received the May 15 email as Ms. Chen had not received a response. During Ms. Chen's interview with the agents, Agent Lieberman asked

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<sup>34</sup> On a number of occasions during the hearing, it was demonstrated that other employees during the course of the investigation were unable to recall certain facts although none were deemed by the agency to have lacked candor. Notably, Admiral Devany during his deposition was unable to recall the last name of a co-worker he worked with during a 2-year period, sometimes daily, but remembered it later that day when testifying. Tab 51, Devany, p.193.

Ms. Chen about her correspondence with Mr. Jiao and the MOI indicated that she only sent Mr. Jiao one email. However, throughout the interview, Ms. Chen described in detail for the agents the type of information she emailed Mr. Jiao. The information Ms. Chen described to the agents throughout her interview was in both the May 15 and 29 emails. For example, Ms. Chen tells the agents she provided Mr. Jiao with the link that Ms. Lee gave her (that was in the second email) as well as that she told Mr. Jiao that only government users could download information on the NID (that was in the first email). Tab 9, pp.51, 54; Tab 54, pp.7-9. Ms. Chen provided this information without the benefit of the agents showing her any emails. Tr. Lieberman, pp.378-81. And what Ms. Chen described was completely consistent with what was in the emails. Furthermore, as stipulated by the agency, none of the information in Ms. Chen's two substantive emails to Mr. Jiao was inappropriate for Ms. Chen to give to Mr. Jiao, i.e., it was all public information. Tab 54, p.6. Near the end of the seven-hour interview, SA Lieberman asked Ms. Chen if there were any other emails to Mr. Jiao. Ms. Chen responded that she was "not sure" and that she would "search" again pointing out that she cannot remember everything since her surgeries in the 90s. According to the MOI, they stopped the first portion of the interview at that time. Within 13 minutes, Ms. Chen provided the agents with two printed emails to Mr. Jiao from her private email account. The agents left Ms. Chen's office for approximately 45 minutes; when they returned, Ms. Chen told them she found another email and provided them with a copy. Ms. Chen advised the agents that

she had not corresponded with Mr. Jiao since the time of the emails that she provided to the agents and there was no evidence presented to the contrary. Tab 9, pp.45, 62-63.

Throughout the interview and the follow-up questions the agents asked after Ms. Chen provided the agents with her hand-written statement, Ms. Chen was forthcoming. For instance, when discussing what she did after she spoke to Ms. Lee, Ms. Chen discussed the email she sent to Mr. Jiao. When asked if there are other emails, she stated that she could not trust her memory, but volunteered to search for other emails and subsequently produced them. Tab 9, pp.41-63.

I find that Ms. Chen did not knowingly provide incomplete information to the agents when she initially stated that she only sent one email to Mr. Jiao, rather than two or three. I reiterate that the middle email did not contain any substantive information, as it was only an inquiry as to whether Mr. Jiao received her first email. At the time Agent Lieberman posed the question about the number of emails, thirteen months had elapsed and the two emails were sent only two weeks apart. Ms. Chen never responded with an unequivocal “no” when asked if there were other emails. To the contrary, she commented on her memory issues and said she would search for other emails. Notably, before the interview was over, Ms. Chen produced all three of the emails. Tab 9, pp.41-63; Tab 51, Devany, pp.200-201. Based on the passage of time and the fact that she continued throughout the interview to describe what was in the two substantive emails, I find she simply forgot how many emails she sent to Mr. Jiao.

The agency has not presented preponderant evidence to support Specification 3 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

Specifications 4, 5, 7, 8 and 9:

These specifications of the lack of candor charge all involve Ms. Chen's responses to the agents when addressing questions relating to her access to and use of the NID website and database. Prior to specifically addressing lack of candor specifications 4, 5, 7, 8, and 9, it is important to discuss some broader aspects of this matter that influence my analysis of these specifications.

Investigative Interviews

When interviewing Ms. Chen, Agent Lieberman had no experience as a hydrologist. He did not have any expertise regarding data in relation to water movement or locks and dams. Tr. Lieberman, p.308. In fact, going into the interview Agent Lieberman did not even know that Ms. Chen's position required her to acquire information about locks and dams. *Id.* at p.395. Prior to the interview, the agents did not make any inquiries about the type of information Ms. Chen was asking for on behalf of Mr. Jiao, e.g., whether it was public information. In fact, the agents confirmed shortly after Ms. Chen's interview that the information Ms. Chen was seeking for Mr. Jiao was public information and they found no evidence that Ms. Chen had ever provided secret, classified, or proprietary information to a Chinese official or anyone outside of the agency. Tr. Lieberman, pp.308-11.

In addition, Agent Lieberman did not review and had no understanding as to the meaning of the one file (Ohio) downloaded twice (May 10 and May 15) from the NID. *Id.* at pp.342, 415. There was no evidence presented that, when the agents conducted Ms. Chen's interview, they had an understanding of or exposure to the NID, either through their own investigation or by discussing the NID with anyone with the agency who had knowledge. *Id.* at p.308.

When the agents interviewed Ms. Chen on June 11, 2013, Agent Lieberman asked the questions while Agent Mike Benedict took hand-written notes. *Id.* at pp.254, 260-62. Ms. Chen was not aware of the purpose of the agents' meeting with her and Ms. Chen understood that they were interviewing all employees in the office. *Id.* at 257. The first part of the interview dealt with general areas concerning NWS and its employees, involved open-ended questions about the NWS office, and addressed Ms. Chen's duties and accomplishments. Tab 9, pp.46-49; Tr. Lieberman, p.271. At one point, Agent Lieberman made an inquiry as to whether she needed any additional resources to do her job. Tab 9, p.48. According to Agent Lieberman, Ms. Chen was more relaxed during the general parts of the interview, but once they started "moving into some of the more targeted areas of our discussion — specifically international requests for

information, China” she started looking down and “she may have been nervous during those time frames.”<sup>35</sup> Tr. Lieberman, pp.300-01.

According to Agent Lieberman, Agent Benedict<sup>36</sup> prepared a typed MOI within one to two weeks of their June interview with Ms. Chen. However, Agent Benedict did not sign the typed MOI until November 6, 2013. Agent Lieberman testified he reviewed the MOI and that it was a true and accurate record of the interview, although he did not testify as to when he completed his review. Tab 9, pp.46-63; Tr. Lieberman, pp.273-74.

Agent Lieberman stated that only the typed MOIs become part of the agency’s investigative report (not the related hand-written notes) and that anything material to the investigation would be part of the typed MOI. The agents decided whether the notes they took during an interview would be reduced to a MOI; if they did, it would be included as part of the overall report. In other words, the agents conducted interviews related to this matter, for which hand-written notes exist, but the notes were not reduced to a typed MOI and thus were not made part of the investigative report relied upon by the agency.<sup>37</sup> Tr.

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<sup>35</sup> I find it understandable that Ms. Chen may have become nervous when she realized the purpose of the agents’ visit to the ORFC was to address specifically issues related to her visit to China. In fact, at the end of the interview, Ms. Chen stated, “You guys came here just for this?” Tab 9, p.62.

<sup>36</sup> Agent Benedict did not testify.

<sup>37</sup> As previously mentioned, in addition to the hand-written notes taken during interviews (for both interviews that were and were not reduced to MOIs), the agency did not provide Ms. Furgione or Admiral Devany with a number of declarations from

Lieberman, pp.298, 334-37. For example, Agent Lieberman took notes during one of Mr. Schade's interviews.<sup>38</sup> During this interview, Mr. Schade indicated Ms. Chen had a work-related reason to look at information on the NID, that NWS "continually share[d] data with academics," and that Ms. Chen and Mr. Davis worked closely together. *Id.* at pp.346-50. Despite the obvious relevance to the events surrounding Ms. Chen's charged conduct, the agents decided not to prepare an MOI and the hand-written notes were not part of the materials the agency provided to Ms. Furgione or Admiral Devany.<sup>39</sup>

Similarly, the agents interviewed Mr. Davis on June 13, 2013, immediately prior to interviewing Ms. Chen at the ORFC. During this interview, Agent Benedict took 11 pages of hand-written notes while Agent Lieberman interviewed Mr. Davis. Tab 8, pp.37-48; Tr. Lieberman, pp.350-51. Agent Lieberman testified he did not prepare a MOI to memorialize this interview. Tr. Lieberman, p.366. During this interview, Mr. Davis told Agent Lieberman numerous times

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ORFC employees. The agency did not deem them relevant to Ms. Chen's case. The agency came to this conclusion despite the fact the agency acquired the declarations during a workplace investigation referred to in emails as the "Chen investigation." For example, the employee soliciting the declarations stated in an email that she spoke to Mr. Schade and she would be interviewing the ORFC employees during the next week regarding the Chen case." Tab 41, p.62.

<sup>38</sup> Agent Lieberman did not conduct this interview. He took notes while FBI agents interviewed Mr. Schade. Tr. Lieberman, p.345.

<sup>39</sup> Ms. Chen obtained the agents' hand-written notes through the discovery process in the criminal proceeding. Tr. Lieberman, p.337. Ms. Chen relied on and provided some of the hand-written notes in her reply to Admiral Devany before he issued his decision. Tab 51, Devany, p.121.

that Ms. Chen has work-related reasons — generally and specifically — to use the NID database. *Id.* at 418. For example, Mr. Davis said the information would be useful and helpful to Ms. Chen. According to Mr. Davis, Ms. Chen had a need to get data and using the NID would make it easier. Tr. Lieberman, pp.354-60; Davis, pp.624-34. Mr. Davis also discussed “hydro pool capacity” information with the agents, although Agent Lieberman did not understand what that meant and apparently did not follow-up with Mr. Davis to gain an understanding. Tr. Lieberman, pp.361-62. Mr. Davis also responded negatively when asked if accessing the NID would be outside the scope of Ms. Chen’s work as a hydrologist. *Id.* at 363.

During the interview with Mr. Davis that the agents did not memorialize in an MOI, Mr. Davis also discussed the username and the password for the NID. Initially, Mr. Davis did not remember emailing the username and password for the NID database to Ms. Chen. The agents refreshed his recollection by showing him the email he had sent 13 months ago.<sup>40</sup> Tr. Lieberman, pp.351-53. Mr. Davis also informed the agents that he shared the NID password with others in the office; however, despite Agent Lieberman’s testimony that “we left no stone unturned” the agents did not talk to any other ORFC employees regarding the availability and use of the password. *Id.* at pp.304, 355-56.

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<sup>40</sup> The agency did not charge Mr. Davis with lack of candor for initially forgetting that he emailed Ms. Chen the information. The agents believed Mr. Davis “honestly forgot.” Tr. Lieberman, p.353.

Notably, all of Mr. Davis's responses to the agents were based on a general discussion of why Ms. Chen would be using the NID, as Mr. Davis had no knowledge of the request from Mr. Jiao. Because of Mr. Davis's lack of knowledge of the situation involving Mr. Jiao, he did not appear to be in a position of trying to protect Ms. Chen or explain away why the information she looked at on the NID was not for Mr. Jiao. *Id.* at 365.

In fact, Agent Lieberman testified that it was his understanding that Ms. Chen went into the NID — with no differentiation or clarification of when or what Ms. Chen accessed — because of Mr. Jiao's request. *Id.* at p.362. In addition, it is inconceivable (and I do not find credible) how, after the responses given by Mr. Schade and Mr. Davis, that Agent Lieberman could reach the conclusion that “we were able to substantiate during the interview that her access to the NID was as a result of the request [by Mr. Jiao], not for a work-related purpose.” *Id.* at p.373. And it is equally inconceivable why the agents did not reduce this information to an MOI, which would have been provided to the agency. The responses from Mr. Davis to Agent Liebermann's questions were directly relevant to the material issues, i.e., work-related reasons why Ms. Chen accessed the NID and the details surrounding the NID username and password.

#### National Inventory of Dams

The difference between the NID website and databases is a vital component of this discussion. That is, the NID website is a government site managed by the USACE and available for anyone, including the public to access; however, there

are databases within the website that are restricted to government employees and require a username and password. At the time of the events relevant to this matter, an employee could not download documents without government-authorized credentials. Prior to 2009, however, the NID did not require login credentials. In 2009, the USACE held a webinar for NWS employees to encourage them to use the NID website. It was at that time that the NID required a password to access certain databases. Tr. Lee, pp.89-92; Lieberman, pp.384-85; Davis, pp.645-47, 655; Chen, pp.680-81.

Agent Lieberman testified that he was not confused about the difference between the public NID and the password protected database side of the NID. Tr. Lieberman, pp.384-85. However, his confusion was apparent by his failure to pose clear questions to Ms. Chen and to follow-up on Ms. Chen's responses. Relevant follow-up questions would have allowed Agent Lieberman to obtain specific information as to what Ms. Chen was looking at on the NID. More importantly, Agent Lieberman could have determined when she was looking at the public portion of the NID versus the password-protected sections. *Id.* at p.385. In fact, the lack of follow-up or clarification is notable in the typed MOI when Agent Lieberman is asking Ms. Chen about requesting blueprints and manuals. Ms. Chen's responses have nothing to do with Ms. Lee's concerns about Ms. Chen's questions to Ms. Lee relating to water manuals, Mr. Jiao, or Ms. Chen's access to the NID in May 2012. As evidenced by her answers to the questions, Ms. Chen was discussing a work project involving a complex situation

caused by split dams in Louisville in 2011. She also stated that she consulted Ms. Lee and Mr. Bruner about this project. Tab 9, pp.54, 56.

It is clear that all employees in the ORFC shared the same username and password for the NID. Michael Fenbers, a Senior Hydro Meteorological Analyst and Support Meteorologist who had worked at ORHC for 24 years submitted an affidavit (unfortunately, not one given to Ms. Furgione or Admiral Devany) stating that a login account for the NID was acquired on behalf of the entire professional staff. He further acknowledged that it was his understanding that employees were to see Ray [Mr. Davis] for the username and password if they needed access. Tab 38, pp.123-24. Scott Young, a Senior Hydrologist with in the ORFC for 17 years, stated that ORFC used a generic password to get access to the NID. According to Mr. Young, “Ray [Mr. Davis] typed the password and put it in the binder. Rather than get everyone a password, it was decided to get one password. He [Mr. Davis] got the password in his name.” Tab 38, pp.125-26. In another one of the declarations that the agency did not find relevant to provide to Ms. Furgione or Admiral Devany, Mary Golden-Blair, a hydrologist for 25 years stated that after the training in 2009 (the webinar) she heard from others that “each office” was given a password to use and ORFC’s password was put in a binder in the operations area. Tab 41, pp.105-06.

An examination of the agency’s narratives in the proposal and decision letters surrounding the Lack of Candor specifications relating to the NID shed considerable light on why I cannot sustain the agency’s lack of candor charge.

Simply put, the agency's descriptions of the NID database, the practice surrounding the username and password, and its characterizations of Ms. Chen's admissions are inaccurate or, at best, incomplete. For example, the agency describes the NID as a secure database whose access is restricted to registered users; in fact, portions are, other are not. The agency also states that Ms. Chen repeatedly asked for Mr. Davis's password; the evidence demonstrates that she did not. Finally, the agency's letters give the impression that it was solely Mr. Davis's password; yet the established ORFC practice was for all employees to use the password. Tab 7, pp.5-16; Tab 9, pp.5-24.

The MOI sections relating to the NID from Ms. Chen's June 2013 interview are challenging to review because of the lack of specificity in Agent Lieberman's questions. Based on my review of the questions posed and Ms. Chen's answers, it is clear that Agent Lieberman and Ms. Chen were, at many times, talking about different situations. Tr. Chen, p.717. The two were conflating Ms. Chen's access to the NID at noon on May 10 when she was looking for public information for Mr. Jiao with Mr. Davis and Ms. Chen's access during the afternoon of May 10 as well as a previous occasion in 2011 when Mr. Davis and Ms. Chen looked for information on the NID. Tab 9, pp.52, 53, 54, 56, 59. Unfortunately, there was no distinction in Agent Lieberman's questions between the public and restricted portions of the NID. There was no distinction or follow-up concerning specifics, such as year, time of day, or purpose. There clearly was an assumption by Agent Lieberman that Ms. Chen had only accessed

the NID database inappropriately with someone else's password, where the evidence demonstrates that the noon access by Ms. Chen did not involve the use of credentials and the afternoon access was made by Mr. Davis in an effort to train Ms. Chen. The forensic report only shows that Ms. Chen used login information to access the NID at 2:30 p.m. on May 10. Tab 54, p.9. Accordingly, there is no evidence that Ms. Chen used credentials and was logged into a restricted NID database when she attempted to locate answers to Mr. Jiao's questions by accessing the NID at noon on May 10. Although Agent Lieberman testified he was not confused between the website and the database when interviewing Ms. Chen, the fact that there was no discussion during the interviews about the differences, makes Agent Lieberman's position dubious. Tr. Lieberman, p.385.

#### Ms. Chen's Activities between May 10 and May 29

I find based on a thorough review of the evidence and testimony, that when Ms. Chen returned from Beijing in May 2012, she wanted to respond to questions posed by her former colleague Mr. Jiao that were raised during a brief conversation they had while she was in China.<sup>41</sup> Ms. Chen thought about checking the NID when she was in Mr. Jiao's office. At this time, Ms. Chen did not know or remember the NID required a password. Ms. Chen told the agents

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<sup>41</sup> Although Ms. Chen and Mr. Jiao met for 15-20 minutes, I find the majority of the conversation dealt with a family matter Ms. Chen was discussing with Mr. Jiao at the request of Ms. Chen's nephew.

that she only thought to herself to check the NID and did not mention the NID in to Mr. Jiao. Tab 9, pp.57, 59; Tr. Lieberman, p.271.

I find that on May 10, 2012, during her lunch break around noon, Ms. Chen went on the NID website to see if there was any public information available that would be responsive to Mr. Jiao's inquiry concerning the United States' total water volume. Tr. Chen, 680-81.<sup>42</sup> Once Ms. Chen accessed the NID website, she determined that there was no relevant public information as to total water volume and that she would need a username and password to access the databases. Based on her recollection of the NID, database access credentials were not needed.<sup>43</sup> At that point, she determined that the password-protected areas would not be the place to find answers for Mr. Jiao. Although she was unable to locate any information for Mr. Jiao, Ms. Chen thought there might be new and helpful information available on the NID that would help her with her river modeling responsibilities because the databases were now password protected. Tr. Furgione, pp.589-90; Chen, pp.680-81, 721; Tab 9, pp.42, 55, 60, 61.

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<sup>42</sup> Although Admiral Devany has never accessed the NID, he acknowledged the public versus restricted aspects of the NID and testified there was no issue with Ms. Chen looking at the public portion of the NID website for Mr. Jiao. Tab 51, Devany, pp.88-94. Ms. Furgione confirmed that the United States' total water volume is public information. Tr. Furgione, p.528.

<sup>43</sup> Ms. Chen used the NID database with Mr. Davis in 2011. I find that she did not remember that login credentials were required at that time, i.e., credentials were required in 2009 after the webinar. Tab 9, pp.52, 56.

Around 2:30 p.m. on May 10, 2012, Ms. Chen asked Mr. Davis if he could help her with the NID. Tr. Davis, p.619. Mr. Davis testified that he agreed to help Ms. Chen and volunteered to give her the password — a password that he and many others in the office considered an office-wide password that was available for anyone to use. Mr. Davis emailed Ms. Chen the username and password and advised her that it was available in a binder in the operations area. According to Mr. Davis, the advantage of keeping the password in a place readily available was that other employees could access the information. *Id.* at p.619-20. The evidence shows Ms. Chen never requested the password from Mr. Davis — not once let alone several times as asserted by Admiral Devany.<sup>44</sup>

After offering to give Ms. Chen the username and password, Mr. Davis realized he still was on duty for approximately 30 more minutes so he offered to show Ms. Chen the NID. Mr. Davis sat with Ms. Chen at her computer and he logged in. During the 11 minutes that Mr. Davis and Ms. Chen were on the computer, they downloaded a document related to Ohio. Although Mr. David testified that he does not specifically remember why they downloaded a file

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<sup>44</sup> Admiral Devany acknowledged that his decision letter was incorrect when he stated that the investigators found no evidence that the username and password were available in a binder maintained in the ORFC. Tab 51, Devany, pp.98-99. Admiral Devany also acknowledged that he had no information to dispute that Mr. Davis sent Ms. Chen the username and password without Ms. Chen specifically asking for it. However, despite acknowledging that fact, Admiral Devany would not agree that his decision letter was mistaken when he stated that Ms. Chen repeatedly asked Mr. Davis for the NID credentials. Tab 7, p.8; Tab 51, Devany, pp.102-05.

relating to Ohio, he stated it made sense because the ORFC's drainage area includes Ohio. Tr. Davis, pp.623-25.

Ms. Chen testified that Mr. Davis spent time giving her a tour of the database and remembers downloading a file so they could see what information it contained and speculated they picked Ohio as it was in their area of responsibility. Tr. Chen, pp.683-85. Mr. Davis further provided very detailed testimony as to why information from the NID could be relevant and useful to Ms. Chen in connection with the development of her river model. Tr. Davis, pp.625-34. Ms. Chen considered the 11 minutes she and Mr. Davis spent on the NID database as a tour, which included the downloading of the Ohio file. Tr. Chen, 683. During Ms. Chen's entire NID 11-minute visit on May 10, Mr. Davis was with her. Tr. Davis, pp.625-34; Chen, pp.683-85.

On May 11, one day after Mr. Davis and Ms. Chen accessed the NID (and four days before she accessed it again), Ms. Chen emailed Mr. Schade and asked him for assistance in responding to Mr. Jiao's questions because she was unable to get public information from the NID database. Ms. Chen testified that she thought Mr. Schade would be able to be of assistance because he used to work at the USACE and that agency administered the NID. The email clearly states that Ms. Chen was looking for "general information for public." Tab 54, p.6; Tr. Chen, pp.685-87.

Mr. Schade forwarded Ms. Chen's email to Deborah Lee at the USACE. In response, Ms. Lee told Mr. Schade to have Ms. Chen refer the request concerning

dam information to USACE. Tab 37, pp.84-85. Ms. Chen then emailed Mr. Jiao and provided him with articles and websites, all of which were available to the public. In addition, Ms. Chen advised Mr. Jiao that she had contacted the USACE on his behalf and that the Water Management Division would be able to answer his dam-related questions and provided him with the telephone number. Notably in this email, Ms. Chen explained to Mr. Jiao that the NID database is restricted to government users and the public cannot download information. Tab 54, pp.6-7.

On May 15, after Ms. Chen already told Mr. Jiao the NID database was restricted and after asking Mr. Schade for assistance in responding to Mr. Jiao's request, she accessed the NID database for approximately 16 minutes. Tab 54, p.10. Ms. Chen testified credibly that five days after Mr. Davis gave her the tour of the password protected NID; she accessed the database on her own to see if there was anything useful for her river model. She used the access information provided to her by Mr. Davis and downloaded the same Ohio file that she and Mr. Davis downloaded on May 10. There was no difference between the two documents that were downloaded. Ms. Chen testified that the information she was looking for was not relevant to Mr. Jiao's request because he was looking for total water volume and the database on the NID was providing specific information for individual dams. Ms. Chen further explained in detail why she determined that the information she found on the NID was not going to be useful to the development of her Ohio HEC-RAS. Tr. Chen, pp.703-09.

About ten days later, Ms. Chen realized there was still more information she wanted to provide to Mr. Jiao so she called Ms. Lee on May 24 to explain what she was looking for to see if Ms. Lee could be of any assistance. Ms. Chen explained to Ms. Lee about being in China and receiving questions from a former classmate.<sup>45</sup> According to Ms. Chen, there was nothing unusual about the conversation, noting that she and Ms. Lee had worked together for many years.<sup>46</sup> Ms. Chen testified that Ms. Lee gave her some information that she was able to pass along to Mr. Jiao, again extending the invitation for Mr. Jiao to contact the USACE with any further questions. In addition, in both the May 15 and May 29 emails, Ms. Chen provided information for Mr. Jiao that she had gathered from internet searches. Tr. Lieberman, p.328; Chen, p.678. Mr. Jiao responded to thank Ms. Chen and, according to the evidence presented, that was the last contact the two of them had. Tab 54, pp.8-9; Tr. Chen, pp.696-701.

Some of my findings above are not specifically relevant to Lack of Candor Specifications 4, 5, 7, 8, and 9. However, they are relevant to understanding the context of Ms. Chen's responses to the agents that resulted in the conduct

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<sup>45</sup> This telephone call prompted Ms. Lee to send an email to the USCAE's Office of Security.

<sup>46</sup> In Ms. Lee's 2015 EEO affidavit, she states that Ms. Chen refused to provide Mr. Jiao's name and was angry and demanding during their May 24 conversation. However, Ms. Lee did not provide this information in her 2012 email to the Office of Security or to the agents in 2013. Tr. Lee, pp.26-27, 95-99; Lieberman, pp.321-32. In fact, the agent's hand-written notes indicate Ms. Lee told the agent that Ms. Chen seem "disappointed" based on Ms. Lee's responses. Tr. Lieberman, pp.327-28; Tab 9, pp.96-99.

identified in these specifications. Based on the findings set forth above, I question whether I could sustain any of these specifications because of the poorly phrased questions along with the agents taking Ms. Chen's responses out of context. Nevertheless, I will address these specifications individually.

Specification 4:<sup>47</sup> In a June 11, 2013 interview with the DOC OSY, S/A Lieberman asked you whether Mr. Davis gave you his password to the NID database. On June 11, 2013, in response to Department of Commerce Office of Security Special Agent Andrew Lieberman's question to you regarding whether Raymond Davis, your coworker, gave you his password to the National Inventory of Dams (NID) database, you stated, "No-I never used his," or something to that effect.

As to Specification 4, I find that when Ms. Chen responded that she did not use Mr. Davis's password, Ms. Chen was clearly confused by the timeframe, as Agent Lieberman provided no parameters when posing the question. In the questions that immediately follow, Ms. Chen is discussing Mr. Davis logging her on to the NID rather than Ms. Chen logging on by herself. Ms. Chen explained that she and Mr. Davis longed on to get "levy information for Louisville," an event that took place before 2012. Ms. Chen also stated that she talked to Ms.

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<sup>47</sup> In Specification 4, Admiral Devany notes one of the reasons why it was "inexplicable" that Ms. Chen did not remember that Mr. Davis gave her his password is because Ms. Chen asked Mr. Davis for the password several times. To the contrary, Ms. Chen never asked Mr. Davis for his password — Mr. Davis gave it to her voluntarily. See fn.44.

Lee about the Louisville information. Ms. Chen then discussed the webinar (which is when the NID became password protected) put on for NWS by the USACE where it was promoting use of the NID. In addition, Ms. Chen, readily admitted during the interview that she and Mr. Davis downloaded the Ohio file that pertained to her Ohio HEC-RAS. Tab 9, pp.53-54. When Ms. Chen stated she did not use Mr. Davis's password, she also stated she did not download anything, again referring again to her access of the website during her lunch hour.

The agency has not presented preponderant evidence to support Specification 4 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

Specification 5: On June 11, 2013, when Department of Commerce Office of Security Special Agent Andrew Lieberman showed you a print out of a May 10, 2012 email from your coworker Ray Davis to you containing Mr. Davis's username and password for accessing the National Inventory of Dams (NID) and asked you about whether you provided information from the NID to anyone in China, you stated, "No, these have nothing to do with each other." or something to that effect.

As to Specification 5, I find that Ms. Chen provided accurate information to Agent Lieberman when asked about using Mr. Davis's username and password to access the NID database in connection with the request from Mr. Jiao and she responded, "No, these have nothing to do with each other." Ms. Chen's response was differentiating between her access to the website at noon and her subsequent

training session with Mr. Davis that afternoon. Again, I find that when Ms. Chen realized she needed credentials to access the database, she thought there might be newer or updated information that would be helpful to her Ohio HEC-RAS. Ms. Chen clearly admitted she had gone on the unrestricted or public NID to check for information that would be responsive to Mr. Jiao's questions. Tab 9, pp.55, 57, 61. In response to a follow-up question from the agents after they reviewed her hand-written statement, "I got the National Dam database to find volume/capacity info as I remember Ray Davis and I found some info before."<sup>48</sup> *Id.* at p.42. We didn't need any log in because it was free to public but this time it required password." She further stated when discussing Mr. Davis logging her in to the NID, "This was just for my own curious as some info were related to the HEC-RAS model I am development." *Id.*

Ms. Chen's actions support her testimony. Ms. Chen sent the email to her supervisor Mr. Schade the very next day after accessing the NID (and prior to logging on to the NID for the second time) and asked him for public information that would be responsive to Mr. Jiao's questions. Ms. Chen's thought process was logical — she could not locate public information on the NID, the NID is managed by the USACE, Mr. Schade is my supervisor and he used to work for the USACE; therefore, let me ask him for assistance. Ms. Chen credibly testified that she checked the public homepage of the NID for Mr. Jiao around noon on May

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<sup>48</sup> During her interview, Ms. Chen advised the agents on two occasions that she and Mr. Davis logged on to the NID during the 2011 flood. Tab 9, pp.52, 56.

10. Because of the NID's password requirement, Ms. Chen decided the NID was not the place to find information for Mr. Jiao. Ms. Chen emailed Mr. Schade in an effort to obtain public information for Mr. Jiao. Tab 54, p.6; Tr. Chen, p.685.

I find Ms. Chen attempted to respond to the agents' questions accurately, but the agents were at a disadvantage of understanding her answers because they did not understand the NID and did not differentiate the different timeframes and events Ms. Chen was describing. When the agents asked Ms. Chen about the downloaded document and if the document was for the request from China, she told the agents that she told the person (Mr. Jiao) that the information was not available. Tab 9, p.54. That is exactly what Ms. Chen told Mr. Jiao in her May 15 email. Ms. Chen advised Mr. Jiao, "this database is only for government users and non-government users are not able to directly download any data from this site." Tab 54, pp.6-7. Ms. Chen was trying to convey to the agents that she checked the public NID for Mr. Jiao and accessed the restricted database with Mr. Davis because she was curious about data for her river model. Tab 9, p.54.

The agency has not presented preponderant evidence to support Specification 5 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

Specification 7: On June 11, 2013, when Department of Commerce Office of Security Special Agent Andrew Lieberman asked you again whether you downloaded information from the NID, you responded, "Never," or something to that effect.

As to Specification 7, I find, that when Ms. Chen responded that she did not download anything from the NID, Ms. Chen provided accurate and complete information that she was referring to her noontime access to the website.

The information contained in the document that Ms. Chen and Mr. Davis downloaded on May 10 and Ms. Chen downloaded again five days later did not relate to the type of data that would be responsive to Mr. Jiao's request. Mr. Jiao was looking for total water volume for the United States, whereas the downloaded file involved information about the Ohio River's dams and tributaries. Tr. Lieberman, pp. 362-63, 390-93; Chen, pp.679, 685, 708, 721.

Agent Lieberman was unable to differentiate between searching the NID for total water volume compared to volume of an individual dam. This was relevant because Mr. Jiao had been inquiring about total water volume whereas Ms. Chen was curious to look for individual volume of dams once she became aware that the NID was password protected. Tr. Lieberman, pp.361-62. Ms. Chen advised the agents that the password requirement made her curious as to what information may have changed on the NID that would relate to her Ohio HEC-RAS. Tab 9, 56. Total volume, which would have been responsive to Mr. Jiao's requests, was not available on the NID. Tr. Lieberman, pp.361-62, 418; Davis, pp. 624-25, 633-34; Chen, pp.721-22.

Because of Agent Lieberman's lack of understanding, his question lacked any foundation. Ms. Chen clearly explained (as reflected on the next page of the MOI) that she and Mr. Davis downloaded documents. Tab 9, pp.53-54. If Ms.

Chen was trying not to be candid with the agents, she would not have provided accurate information within such a short time that she and Mr. Davis downloaded documents. Ms. Chen provided this information during the same interview without taking any breaks or leaving the room.

The agency has not presented preponderant evidence to support Specification 7 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

Specification 8: On June 11, 2013, when Department of Commerce Office of Security Special Agent Andrew Lieberman showed you a print-out of a forensic report log demonstrating that your NOAA profile was used to download two documents from the National Inventory of Dams. You stated something to the effect of: "Downloaded! Oh these ones are within our model - I told you we downloaded and it was off-Ray and I did at the beginning of model development," or something to that effect. You also said you and Raymond Davis, your coworker, downloaded data in 2011, or something to that effect.

As to Specification 8, I find that Ms. Chen provided accurate and complete information when she responded affirmatively that she and Mr. Davis downloaded the Ohio River file twice after the agents showed her the forensic log report that reported that her NOAA profile downloaded two documents. Ms. Chen clearly differentiates the situation from her access without credentials of the NID noon. By stating the events that resulted in the downloading of the Ohio file

were “off Ray,” Ms. Chen was presumably referring to the use of the credentials Mr. Davis provided when he accessed the NID on Ms. Chen’s computer in the afternoon on May 10 and when she used the same credentials five days later. Tab 9, p.54.

The agency has not presented preponderant evidence to support Specification 8 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

Specification 9: On June 1, 2013, in response to Department of Commerce Office of Security Special Agent Andrew Lieberman's question asking you whether your 2012 downloads from the National Inventory of Dams (NID) database were for the request you received in China, you stated, "No, I told the person the information was not available," or something to that effect.

As to Specification 9, I find Ms. Chen provided accurate and complete information when she stated that she told Mr. Jiao that the information on the NID database was not available to the public as evidenced by her email to Mr. Jiao on May 15, 2012. Tab 54, pp.6-7; Tab 9, p.61. And she emailed Mr. Schade for his assistance the day after she learned there was no responsive information to Mr. Jiao’s request on the NID that was available to the public. Tab 54, p.6. Furthermore, Ms. Chen never tried to hide accessing the NID for Mr. Jiao. She told the agents during her interview that not only did she access the NID to find information, but even explained to the agents that she first thought of checking

the NID when she was standing in Mr. Jiao's office in Beijing. Ms. Chen also explained during her interview that the type of information Mr. Jiao was looking for was federal — total volume, aggregate figures — and what she was looking at when she went on the NID to see if it would be useful for her model was for individual dams. Tab 9, p.60; Tr. Chen, p.708. Ms. Chen and Mr. Davis had randomly picked one document to see what type of information it had relating to volume of individual dams, but it was not specific enough for Ms. Chen's data needs for her river model. Tr. Chen, pp.706-09.

The agency has not presented preponderant evidence to support Specification 9 that Ms. Chen knowingly supplied the agents with incorrect or incomplete information. Accordingly, this specification is not sustained.

#### Summary of Lack of Candor Charges

To the extent any of Ms. Chen's responses identified in the lack of candor specifications could be considered inaccurate or incomplete because Ms. Chen confused her noontime access of the NID with her access on May 10 at 2:30 p.m. and her subsequent use of the NID on May 25, I find that she did not knowingly provide inaccurate or incomplete information to the agents.

If I had found that any of Ms. Chen and Mr. Davis's actions involving the NID database on the afternoon of May 10 or May 15 pertained to the request from Mr. Jiao, which I do not, Ms. Chen's responses to the agents would need a deeper examination. I find, however, that their access on May 10 and Ms. Chen's access on May 15 were simply (1) an effort by Mr. Davis to acclimate Ms. Chen to the

NID database and (2) an effort by Ms. Chen to explore the NID for information that she thought might be useful for her river model.

Because I concluded that the agency did not present preponderant evidence as to any of the specifications of the lack of candor charge, the charge is not sustained.

Reason 3: Misuse of a Federal Government Database<sup>49</sup>

Specification 1: On or about May 10, 2012, you accessed the National Inventory of Dams (NID) database and downloaded a file from the NID. Your Government position did not require you to download the file from the NID at that time.

Specification 2: On or about May 15, 2012, you accessed the National Inventory of Dams (NID) database and downloaded a file from the NID. Your Government position did not require you to download the file from the NID at that time.

The agency has charged Ms. Chen with misusing a federal database because she was accessing the NID outside of her professional capacity, i.e., her access was not related to her work with NWS. Ms. Furgione testified, “accessing a government database for your professional capacity, if you need that information for the issuance of forecasts and warnings for the protection of life and property is one thing, but accessing a government database for personal reasons and giving that information or sending emails on that information to a

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<sup>49</sup> Because the same file was downloaded on the dates identified in both specifications, I will address them together.

foreign entity is a complete misuse of a federal government database.” Tr. Furgione, p.460. Simply stated, the agency’s charge centers on the premise that Ms. Chen did not need to and, furthermore, did not access the NID on May 10 and 15 for work-related reasons.

According to Admiral Devany’s decision letter, his reasons for sustaining the two specifications included the following: (1) Ms. Chen acknowledged accessing the NID based upon her desire to assist Mr. Jiao, (2) Admiral Devany interpreted Ms. Chen’s statement that she had not been on the NID in years as evidence that her assigned duties did not require her to use the NID, (3) Ms. Chen was using someone else’s access (username and password), (4) because Ms. Chen was not an approved user with a username and password and she had no business to be on the NID on Mr. Jiao’s behalf or on her own, (5) the investigators found no evidence that Mr. Davis’s personal username and password were contained in the password binder available in the office, and (6) Ms. Chen asked Mr. Davis for his username and password repeatedly. Tab 7, p.8.

When testifying for the agency about his decision to sustain the two specifications relating to Ms. Chen’s misuse of a database, Admiral Devany stated he reviewed forensic evidence and the investigative file when reaching his conclusion. Tab 51, Devany, p.30. Admiral Devany testified that Ms. Chen did not dispute the conduct and stated she downloaded a document for a work project. According to Admiral Devany, he did not believe Ms. Chen’s explanation because she admitted to the agents that she had downloaded data from the NID

for Mr. Jiao and never produced a work project where she used the downloaded document. *Id.* at pp.30-31.

Admiral Devany's conclusions cited in his decision letter and during his testimony are inconsistent with the evidence. Admiral Devany's testimony on cross-examination did not coincide with his direct testimony or his letter. He testified he had no reason to dispute Mr. Davis's statement that "Sherry asked about using the NID on 5/10/2012, and I seized the opportunity to train her as I had my other coworkers." *Id.* at pp.113-14. The evidence establishes that Mr. Davis was with Ms. Chen for the entire 11 minutes when they accessed the NID and downloaded a file on May 10, 2012. If Admiral Devany does not dispute Mr. Davis's account of what happened, then there clearly was a work-related reason for her and Mr. Davis to be on the NID and download a file for training purposes. Even Mr. Schade testified that Mr. Davis training Ms. Chen on the NID was important. Tr. Schade, p.169.

Although I found that Ms. Chen initially accessed the NID without using a username or password during her lunch hour on May 10 to see if there was public information available that would be responsive to Mr. Jiao's inquiries, I found no evidence that Ms. Chen used the password protected government database to assist Mr. Jiao.<sup>50</sup> The evidence does not support Admiral Devany's conclusion

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<sup>50</sup> The forensic evidence only shows Ms. Chen accessed the password-protected NID database once on May 10, 2012; the same time when Mr. Davis was training her. Tab 54, pp.9-10.

that Ms. Chen's duties did not require her to use the NID because she had not used it in years. Ms. Chen credibly explained that she previously did not find the information on the NID useful because it was dated. When Ms. Chen saw that there were databases only available to government users, she wanted to find out whether the NID would now contain useful information for her HEC-RAS model. Tr. Chen, pp.680-81, 706-09. Ms. Chen's reasoning refutes Ms. Lee and Mr. Schade's position that the information in the NID would be too general to be of any benefit to Ms. Chen. Tr. Lee, p.22; Schade, pp.117-18. That is exactly what Ms. Chen previously thought and why the need for a password prompted her to check the NID for potential improvements. Ms. Chen even told the agents during her interview that she asked Mr. Davis why the NID required a password. The agents requested Ms. Chen to provide them with a written statement before they left the ORFC on June 13. Prior to departing, the agents reviewed Ms. Chen's statement and asked her follow-up questions. Agent Lieberman asked, "When you asked Ray for NID login, what did you tell him it was for." Ms. Chen responded, "Do you know the website for the dam inventory? Do you know why it needs password no? Ray said he have the info and will email me." Tab 9, p.44.

The fact that Ms. Chen ultimately came to the same conclusion as Ms. Lee and Mr. Schade when Ms. Chen determined that the information on the NID would not be useful does not equate to her misusing the database. To reach that conclusion, Ms. Chen would have to have psychic abilities to know what was in

the databases without looking at them. And the fact that she did not find useful information explains why she did not produce a work-product with information from the NID.

Furthermore, experienced hydrologists established that the NID databases could provide useful information. Gary Bruner is a well-respected hydrologist who had knowledge of the development of river models and is responsible for quality control of the HEC-RAS river models. Tr. Lee, p.76; Schade, p.159. Mr. Bruner had worked with Ms. Chen for numerous years and stated unequivocally that Ms. Chen had a work-related reason to access the NID. Tab 38, p.44. Scott Young, a Senior Hydrologist with 16 years' experience, testified that he knew the data that Sherry needed, which included all of the Ohio River and its tributaries. Mr. Young estimated that there were 60 – 70 dams under the Ohio River tributaries. According to Mr. Young, the USACE held a webinar for NWS employees in 2009 and that the USACE was encouraging the NWS employees to use the NID. Mr. Young further explained that information in the NID would be helpful to Ms. Chen in the performance of her job, e.g., the NID contained a lot of levee information. Tr.2 Young, pp.43-47. Another experienced hydrologist, Mary Golden-Blair, stated that she has used data from the NID for forecasting dam breaks and possible flooding in towns downstream from the dams. According to Ms. Golden-Blair, Ms. Chen would have needed access to the NID because of her HEC-RAS duties. Tab 41, pp.104-05. The agency was also aware that Mr. Noel, a Service Coordination Hydrologist at ORFC, stated his belief that

the NID databases could have been useful to Ms. Chen because her responsibilities included hydraulic developmental flood forecasting. Tab 14, p.83. In fact, Mr. Davis who worked quite closely with Ms. Chen and provided her with data for her river model was with Ms. Chen when he walked her through downloading the “Ohio” file on May 10.

Although Mr. Schade stated Ms. Chen did not have a work-related reason to access the NID, the first time he looked up information about the NID was after the agents interviewed him in 2013 and the first time he accessed the NID was five weeks before his March 2017 testimony before me in this matter. Tr. Schade, pp.156-57. Based on Mr. Schade’s experience (or lack thereof) with the NID and his lack of experience with river model forecasting, I do not find his opinion as to Ms. Chen’s use of the NID useful. Because Mr. Schade had such limited experience with the NID, I do not find compelling Mr. Schade’s professional disagreement with other employees who were experienced with the NID and stated Ms. Chen had a work-related reason for accessing the NID. *Id.* at p.165.

Admiral Devany had no river forecasting experience and was not familiar with Ms. Chen’s Ohio HEC-RAS; in fact, he never even looked at the one file that Mr. Davis and Ms. Chen downloaded. Tab 51, Devany, pp.130-41. It is perplexing how the agency concluded that Ms. Chen’s government position did not require her to download a file from the NID, when the agency’s own employees (Mr. Davis, Mr. Young, and Ms. Golden-Blair), and an employee from

ACOE who managed the NID (Mr. Bruner) who are familiar with Ms. Chen's data needs, provided information to the contrary. Even Admiral Devany testified that others would be in a better position to know if Ms. Chen needed something for work-related reasons. *Id.* at p.131.

A plethora of evidence refutes Admiral Devany's statements concerning the NID username and password. It was clearly established that the ORFC was using the username and password obtained by Mr. Davis as an office password and that the password was maintained in a binder that was accessible to all ORFC employees. It even remained in the binder for 15 months after the agents disclosed the situation in June 2013. Tr. Schade, pp.182-84. There was no evidence presented that Ms. Chen "had no business browsing the NID" as stated in Admiral Devany's decision letter. Tab 7, p.8. Furthermore, Admiral Devany's statement that Ms. Chen asked Mr. Davis for his username and password repeatedly is simply false; after Ms. Chen made one inquiry to Mr. Davis about the NID, Mr. Davis volunteered to and supplied the user name and password to Ms. Chen.

In summary, I find the evidence supports the finding that on May 10, 2012, Ms. Davis accessed the NID in an effort to train Ms. Chen and they jointly downloaded one file that contained information related to Ms. Chen's HEC-RAS. On May 15, 2012, Ms. Chen accessed the NID using the username and password provided to her by Mr. Davis in an effort to see if she could navigate the NID as demonstrated to her by Mr. Davis in order to determine if there was useful

information for her Ohio HEC-RAS. During that access, she downloaded the same file that she and Mr. Davis downloaded on May 10. The evidence further supports the finding that Ms. Chen, as confirmed by other experienced hydrologists, had work-related reasons for accessing the NID databases.

The agency did not establish by preponderant evidence that Ms. Chen misused a federal government database on either May 10 or May 15, 2012. Accordingly, Reason 3 is not sustained.

In summary, after considering all the evidence and testimony of all the witnesses along with consideration of the *Hillen* factors, I find the agency only presented preponderant evidence to sustain Specification 1 of Reason 1 – Conduct Demonstrating Untrustworthiness.

## Nexus

The agency has the burden of establishing that disciplinary action is necessary based on the proven conduct by demonstrating a nexus exists between the misconduct and the efficiency of the service. See *Doe v. Department of Justice*, 103 M.S.P.R. 135, ¶ 5 (2006). When the alleged conduct occurs in the workplace, it is well settled that there is a nexus between the conduct and the efficiency of the service. See *Miles v. Department of the Navy*, 102 M.S.P.R. 316, ¶ 11 (2006).

In this matter, the parties stipulated that there was a nexus between the charged conduct and the efficiency of the service. Tab 52, p.3. The parties may stipulate to any matter of fact and the stipulation satisfies a party's burden. 5 C.F.R. § 1201.63. Accordingly, the agency has met its burden of establishing nexus.

## Affirmative Defenses

### Discrimination Based on Race and National Origin

Ms. Chen alleges that her termination was the result of discrimination based on her race (Asian) and national origin (Chinese). Tab 21. An appellant must prove discrimination allegations by preponderant evidence. *See* 5 § C.F.R. 1201.56(b)(2). The requirements necessary for an employee to prevail in discrimination and retaliation claims are set forth in *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶¶ 36, 37 (2015), where the Board announced 42 U.S.C. § 2000e-16 protects Federal employees against discrimination based on race, color, sex, religion, and national origin, as well as retaliation for the exercise of Title VII rights, and that a violation is established where the appellant shows that discrimination or retaliation “was a motivating factor in the contested personnel action, even if it was not the only reason.” *Id.* at ¶ 41.

An appellant may meet her burden to establish a violation of 42 U.S.C. § 2000e-16 in several ways. One way is by introducing direct evidence of discrimination or retaliation. *Id.* at ¶ 42. An appellant may also meet her burden through circumstantial evidence. Circumstantial evidence is evidence that may support an inference that intentional discrimination or retaliation was a motivating factor in an employment action. The Board has identified three types of circumstantial evidence. The first kind “consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at

other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn.” *Savage*, 122 M.S.P.R. 612, ¶ 42, quoting *Troupe v. May Department Stores Company*, 20 F.3d 734 (7th Cir. 1994). Considered together, such bits and pieces may compose “a convincing mosaic of discrimination.” *Troupe*, 20 F.3d at 736-37. Second is comparator evidence, consisting of “evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic . . . on which an employer is forbidden to base a difference in treatment received systematically better treatment.” *Id.* Third is evidence that the agency's stated reason for its action is “unworthy of belief, a mere pretext for discrimination.” *Id.* “Each type of evidence,” the court explained, “is sufficient by itself . . . to support a judgment for [the employee]; or they can be used together.” *Id.*

Accordingly, the Board will first examine the record to determine if an appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. The evidence may consist of any of the four types discussed above, alone or in combination. If an appellant has made such a showing, the Board will find that the agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(1). If she has not made such a showing, the inquiry will end at that point.

If an appellant makes the required showing, the next issue is whether she is entitled to corrective action. A violation of 42 U.S.C. § 2000e-16 will entitle the appellant to reversal of the personnel action only if the prohibited personnel

practice was its “but for” cause, meaning that the agency would not have taken the same action in the absence of the discriminatory or retaliatory motive. *Savage*, 112 M.S.P.R. 612 at ¶¶ 48, 49. The burden of proof shifts to the agency to show, also by preponderant evidence, that it would have taken the action even if it lacked such a motive. *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 273 (1981). “If we (the Board) find that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action.” *Savage*, 112 M.S.P.R. 612 at ¶ 51. Ms. Chen seeks to prove her discrimination claims with a variety of circumstantial evidence and, under *Savage*, I am obligated to review all of the evidence presented as a whole. *Sabio v. Department of Veterans Affairs*, 124 M.S.P.R. 161, ¶ 36 (2017).

Ms. Chen testified that she never heard Ms. Furgione or Admiral Devany make any discriminatory comments or any comments relating to her complaints of discrimination. Ms. Chen had not had any previous interactions with Ms. Furgione or Admiral Devany prior to the circumstances giving rise to this appeal. Similarly, prior to the events in this matter, Ms. Furgione and Admiral Devany had never met or heard of Ms. Chen. Tr. Furgione, p.484; Tr.2 Chen, p.34; Tab 51, Devany, p.11.

In terms of comparators, Ms. Chen points to Mr. Davis and Mr. Schade as similarly situated employees that the agency treated more favorably. Tab 21. Other employees are deemed to be similarly situated for purposes of a claim of disparate treatment based on discrimination when all relevant aspects of an

appellant's employment situation are "nearly identical to those of the comparative employees. *Spahn v. Department of Justice*, 93 MSPR 195, ¶ 13 (2003).

The conduct identified by Ms. Chen as to both Mr. Davis and Mr. Schade involve the same general events surrounding Ms. Chen's charged conduct. However, I cannot find that Mr. Davis and Mr. Schade were similarly situated to Ms. Chen. Mr. Davis's proposed suspension and resulting letter of reprimand addressed his decision to email the NID's username and password to Ms. Chen.<sup>51</sup> Conversely, the agency did not charge Ms. Chen with any conduct involving the emailing of passwords. Further, the agency's decision not to charge Mr. Davis with lack of candor when the agents asked him about sending an email to Ms. Chen and he failed to remember the incident until they refreshed his recollection falls far short, in terms of quantity, to the numerous lack of candor charges brought against Ms. Chen. Tr. Furgione, pp. 546-48. The same analysis holds true for Mr. Schade. Forgetting a conversation he had with Ms. Lee about Ms. Chen's request for information for Mr. Jiao and confusing the order of events as to when Ms. Chen accessed the NID are not nearly identical to Ms. Chen's situation that resulted in four charges, most with multiple specifications. Tr. Schade, pp. 177-78; Furgione, pp. 537-39. In addition, Ms. Chen was not a supervisor so the agency's decision not to discipline Mr. Schade when one of his subordinates improperly maintained the NID password is not relevant comparator

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<sup>51</sup> See fn.9.

evidence. Ms. Chen did not establish by preponderant evidence the existence of any similarly situated employees.

I do not find that the agency's stated reasons for Ms. Chen's removal from employment are unworthy of belief. While I found the charges to be suspect or overreaching, those findings do not, in and of themselves, demonstrate a discriminatory nexus.

Nor do I find that Ms. Chen has presented preponderant evidence that the record demonstrates a convincing mosaic of discrimination.<sup>52</sup> I clearly understand that Ms. Chen may subjectively feel or believe the agency singled her out based on her race and national origin. The event that initiated the investigation that ultimately resulted in Ms. Chen's removal from employment was Ms. Lee's report to the Army Corp of Engineers Security Department, and Ms. Lee specifically referenced Ms. Chen's national origin in her email.<sup>53</sup> Tab 54, p.8. However, Ms. Lee did not send the email to the security department just because she knew Ms. Chen was Chinese. Ms. Lee and Ms. Chen had worked

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<sup>52</sup> There was no evidence before me that NOAA or NWS previously encountered a disciplinary situation involving concerns of national security based on an information request from an employee; accordingly, there was no prior activity for me to compare with Ms. Chen's situation.

<sup>53</sup> A question arises whether Ms. Lee's report that raised Ms. Chen's ethnicity to her security officer could be a basis for a discrimination claim. That is, whether an agency could be liable under Title VII when an employee makes a report that she believes involves national security issues. *See, e.g., Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012). However, as explained below, I find there was no discriminatory animus or motive, so I do not need to address this issue.

together for years. They first became acquainted with each other when Ms. Chen began her career with the NWS. Tr. Lee, p.17. There was no evidence presented that there were any issues between them or that Ms. Lee had ever raised issues because of Ms. Chen's race or national origin. In fact, there is no question that Ms. Chen was a valued NWS employee; co-workers and supervisors respected Ms. Chen and NWS repeatedly recognized Ms. Chen for her exemplary performance.

Rather, Ms. Lee sent the email to the Office of Security after she received the email from Ms. Chen (forwarded by Mr. Schade on May 11) and after having a conversation with Ms. Chen on May 24, where Ms. Chen was seeking information for someone outside of the United States. Ms. Lee believed the information that Ms. Chen was seeking could involve matters of national security. In addition, according to Ms. Lee, when she spoke to Ms. Chen on May 24, Ms. Lee believed Ms. Chen was acting differently and may have been under duress. Ms. Lee testified that she referenced Ms. Chen's nationality in her email as relevant information. Tr. Lee, pp.23-31, 38-46.

Ms. Lee testified credibly that, because Ms. Chen was collecting information for someone outside the United States, she believed that Ms. Chen's request could have national security implications. Tr. Lee, pp.34-35. Based on that belief, Ms. Lee felt she had an obligation based on her security training to report her concerns to the security office. As stated in the email Ms. Lee sent to the security office, Ms. Lee was worried that "a foreign interest [was] trying to

obtain secret information of the U.S. Government” and Ms. Lee had concerns that sensitive information would be provided outside the agency. Tr. Lee, p.39. In fact, even at the hearing, Ms. Lee did not focus on Ms. Chen, but on the information request. Ms. Lee testified, “I did not report Sherry Chen. I reported an incident of a foreign interest trying to acquire sensitive data on a national scope and scale.” Tr. Lee, p.100. Although I find that Ms. Lee’s belief was not objectively reasonable, I do not find that Ms. Lee had any discriminatory animus or motive toward Ms. Chen.<sup>54</sup>

Ms. Chen states that, inter alia, Ms. Furgione and Admiral Devany inappropriately relied upon Ms. Lee’s statements to support the decision to terminate Ms. Chen,<sup>55</sup> stating that Ms. Furgione relied upon and specifically cited Ms. Lee’s affidavit — as did Admiral Devany — to support the decision to terminate Ms. Chen. Tab 72, p.18. A review of Ms. Furgione’s testimony does

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<sup>54</sup> Ms. Lee continued to follow this matter closely; after the court granted the Department of Justice’s motion to dismiss Ms. Chen’s criminal charges, Ms. Lee wrote to the U.S. Attorney expressing her concerns. Tab 36, pp.46-47.

<sup>55</sup> Ms. Lee was an employee of the USACE not NOAA, the NWS, or any component of the Department of Commerce. To the extent Ms. Chen is asserting a “cat’s paw” theory, it appears the question is unanswered as to whether an employee of a separate federal agency would fall within the Supreme Court’s parameters of demonstrating that a management official, acting because of an improper animus, can influence an agency official who is unaware of the improper animus when implementing a personnel action. *Staub v. Proctor Hospital*, 562 U.S. 411 (2011); *Naval Station Norfolk v. Department of the Navy*, 123 M.S.P.R. 144, ¶ 26 (2016). It is not necessary for me to address this question because of my finding that Ms. Lee’s mindset at the time she emailed her security officer involved a security concern and not an improper animus toward Ms. Chen.

not indicate that Ms. Furgione reached a conclusion because Ms. Chen was born in China as stated in Ms. Lee's affidavit, but rather her testimony shows that she was looking at the facts in Ms. Lee's affidavit to determine if there were appropriate charges to propose against Ms. Chen. Tr. Furgione, pp.464-65. A similar conclusion can be drawn from Admiral Devany's testimony where he simply states he reviewed Ms. Lee's affidavit and believed that she was reporting a security matter and that Ms. Lee did not have a discriminatory animus against Ms. Chen. Tab 51, Devany, pp.59-60.

Ms. Furgione initially proposed Ms. Chen's removal from employment in September 2015. The charges brought by the agency were the result of information provided to Ms. Furgione as part of an administrative action after more than two years of investigation and after the Department of Justice dismissed the criminal charges brought against Ms. Chen. Ms. Furgione and Admiral Devany never met Ms. Chen prior to their involvement with her disciplinary proceedings. Ms. Chen had no knowledge of either of them making any disparaging statements concerning her ethnicity. I am not persuaded by Ms. Chen's conclusion that, because her national origin was initially mentioned in Ms. Lee's report, Ms. Furgione's and Admiral Devany's conclusions regarding the charges were discriminatory. There was no evidence, direct or circumstantial, that would lead me to find that Ms. Furgione or Admiral Devany based their decisions to proposed or sustain the charges because of Ms. Chen's race or

national origin. I find their testimony credible that Ms. Chen's ethnicity had no bearing on their decisions to propose or decide the charged conduct in question.

It was, however, extremely evident by their demeanor, that both Ms. Furgione and Admiral Devany were simply digging their heels in when it came time to support the decision they had made. Even when shown a document that disproved a statement Ms. Furgione made in the proposal letter, she testified, "I stand by my proposal as written." Tr. Furgione, p.564. When Admiral Devany was asked if he would keep an open mind if he learned of new evidence that would show that Ms. Chen did not commit the misconduct, Admiral Devany responded, "I would have to stand by the decision I stated in my decision." Tab 51, Devany, p.67. Admiral Devany took a similar stance regarding Ms. Chen's use of the "office" password. *Id.* at pp.118-19. In the following question, counsel asked Admiral Devany if he was going to maintain the termination was proper no matter what the facts show today, and Admiral Devany responded, "Correct." *Id.* at pp.64-65. In short, Ms. Furgione and Admiral Devany seemed more concerned about being right than doing the right thing. Based on the unyielding nature of their testimony, I would not have been surprised if they rejected that  $2 + 2 = 4$ . My conclusion that Ms. Furgione and Admiral Devany testified truthfully about their lack of discriminatory motive does not diminish the fact that the agency did not prove the vast majority of Ms. Chen's charged conduct; but I believe the agency was wrong, not discriminatory.

It is not my place nor is it necessary for me to the decide whether Ms. Furgione or Admiral Devany had a blinding desire to save face for the agency in light of the press coverage and the length of time that had passed since Ms. Lee first submitted her concerns to the security office, whether they felt Ms. Chen returning to the agency would embarrass or not reflect well on the agency's initial actions, whether their thought process was tainted by the dismissed criminal charges, or whether they simply did not have the competence or experience to impartially perform their respective roles as proposing and deciding officials in this matter. It is my duty to determine whether the evidence showed that their actions were the result of a discriminatory motive based on Ms. Chen's race and national origin and the evidence does not support such a finding. The fact that after a thorough review of the evidence and testimony I found the agency did not produce preponderant evidence to support its charges does not automatically result in a finding that it must have been based on Ms. Chen's ethnic background. The same thorough review of the evidence reveals that Ms. Furgione and Admiral Devany were simply wrong, albeit not discriminatory.

#### Retaliation for Engaging in Protected Activity

In addition, Ms. Chen alleges her termination was in retaliation for engaging in protected activity. Ms. Chen's claim is predicated on the fact that she and her representative publicly asserted that the government's failed prosecution of her was racially motivated and the agency retaliated against her for those statements. Tab 21; Tab 72, p.18.

When an appellant asserts an affirmative defense of retaliation, the Board first will inquire whether the appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. *Savage*, 122 M.S.P.R. 612, ¶ 51. The record demonstrates that Ms. Chen engaged in protected EEO activity based on the statements to the press made by Ms. Chen and her representative when discussing the criminal charges brought against Ms. Chen and the subsequent dismissal of the charges. For example, Ms. Chen's counsel was quoted in the *New York Times* as saying, "How is this not a clear case of racial discrimination." Tab 39, p.86. In addition, Ms. Chen released a statement saying, "I know they treated me unfairly, but I'm proud of my service." *Id.* at p.82.

Relying in part on my discussion of Ms. Chen's discrimination claim, I find that the agency's action against Ms. Chen was not in retaliation for the statements, directly or indirectly citing discrimination, by Ms. Chen or her representative, but rather for what the agency believed to be her misconduct. Although there is no question Ms. Furgione and Admiral Devany were aware of the media coverage, I found their testimony credible that the media coverage, including the statements alleging discrimination, did not influence their decisions. Tr. Furgione, pp.482-83; Tab 51, Devany, pp.63-64.

#### Summary of Discrimination and Retaliation Claims

Considering all the documentary evidence and testimony, I found no discriminatory animus or retaliatory motive on the part of Ms. Furgione or

Admiral Devany. Ms. Chen failed to produce preponderant evidence and the record is void of evidence to support a conclusion that Ms. Furgione and Admiral Devany made their decisions based on Ms. Chen's ethnicity or statements to the press. Ms. Chen's ethnicity and the statements made to the press were not a motivating in the agency's action to remove Ms. Chen from employment. Accordingly, I find that the agency did not commit a prohibited personnel practice in violation of [5 U.S.C. § 2302\(b\)\(1\)](#). Under *Savage*, the inquiry ends here.<sup>56</sup>

Ms. Chen asserts that she is the "victim of a gross injustice." After reviewing the evidence and testimony in this matter in this matter, I believe Ms. Chen's assertion is correct; however, the gross injustice was caused not by discrimination or retaliation, but by the agency's mishandling of the situation on a number of different levels as discussed throughout this decision.

#### Harmful Procedural Error

Ms. Chen asserts the agency committed harmful procedural error for failing to follow its progressive disciplinary policy when it removed her from employment. An appellant bears the burden of proof to show harmful error by the agency in effecting an adverse action. [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#); *see* ¶ 9 (2013); *Helms v. Department of the Army*, 114 M.S.P.R. 447, ¶ 6 (2010). Harmful

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<sup>56</sup> Even assuming Ms. Chen could satisfy her burden of showing that her protected activity was a motivating factor in the decisions to propose or sustain the charged conduct, I find that the agency would have made the same decision to remove Ms. Chen from employment based on the gravity of the misconduct at issue, however misplaced.

error 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. *Canary*, 119 M.S.P.R. 310 at ¶ 12.

There is no dispute that Ms. Chen had a stellar employment history at NWS no prior discipline. Nevertheless, those facts by themselves would not preclude a penalty of removal from employment. If all (or at least more) of the agency's charged conduct had been sustained, there is a likelihood that removal would have been a reasonable penalty based on the egregiousness of the conduct and the agency would have been within its rights to bypass progressive discipline. The agency's discipline policy provides that some situations, such as sustained charges of misrepresentation, may warrant removal for the first offense. Tab 13. *Weaver v. Social Security Administration*, 94 M.S.P.R. 447, ¶¶ 21-23 (2003)(progressive discipline is not required if the *Douglas* factors are appropriately considered). However, it is not necessary for me to analyze Ms. Chen's claim based on my determination that the agency failed to present preponderant evidence for three of its four charges and my resulting conclusion that the maximum reasonable penalty for the one sustained charge is a 15-day suspension.

## Penalty

When all of an agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306; *McNab v. Department of the Army*, 121 M.S.P.R. 661, ¶ 11 (2014). However, when not all of the charges are sustained, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *Reid v. Department of the Navy*, 118 M.S.P.R. 396, ¶ 24 (2012) (citing *Douglas*, 5 M.S.P.R. at 308). The Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated, which it did not, in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Id.* In doing so, however, the Board may not disconnect its penalty determination from the agency's managerial will and primary discretion in disciplining employees. *Id.* In *Douglas*, 5 M.S.P.R. at 305-06, the Board set forth the means by which an administrative judge may determine whether the penalty imposed is within the tolerable bounds of reasonableness. The administrative judge must take into consideration, where applicable: (1) the type of offense the appellant committed, (2) the appellant's type of employment, (3) her past disciplinary record, (4) her past work record, (5) the effect of her conduct upon the service, (6) penalties imposed for similar offenses, (7) standard agency penalties, (8) any notoriety, (9) whether the appellant was

on notice to avoid the particular misconduct at issue, (10) her potential for rehabilitation, (11) any mitigating circumstances, and (12) the availability of alternative sanctions. Not all of the factors will be pertinent in every instance, and the relevant factors must be balanced in each case to arrive at the appropriate penalty. *Id.* at 306.

In assessing whether an agency's selected penalty is within the tolerable limits of reasonableness, the most important factor is the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. *Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173 ¶ 14 (2010). An agency's failure to prove all of its supporting specifications may require, or contribute to, a finding that the agency's penalty is not reasonable. *See Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650 (1996). Admiral Devany did not indicate in his decision or during the hearing that he would have imposed anything short of a removal if I sustained fewer than all of the charges. As such, all relevant factors must be considered to determine whether removal was the appropriate penalty. *See Byers v. Department of Veterans Affairs*, 89 M.S.P.R. 655, ¶ 20 (2001).

I have thoroughly reviewed and considered Admiral Devany's decision letter and testimony relating to his determination of a penalty. He states that all four charges independently require Ms. Chen's removal from employment because they all involved integrity. While Admiral Devany considered mitigating factors in reaching his decision, he found them outweighed by the

gravity of Ms. Chen's misconduct. However, given that I have not sustained the most serious charges against Ms. Chen, Admiral Devany was conducting a balancing test that was inherently flawed. Similarly, while Admiral Devany stated that he had lost trust in Ms. Chen, that she was not a good candidate for rehabilitation, and that her misconduct involved notoriety, he based his conclusions on allegations of widespread, serious, and intentional misconduct that the agency has not demonstrated actually occurred. *Cf. Jefferson v. U.S. Postal Service*, 73 M.S.P.R. 376, 384 (1997)(an agency's claim that supervisors have lost trust and confidence in an appellant, that the appellant is not a good candidate for rehabilitation, or that the appellant's misconduct involved notoriety must be supported by evidence and cannot be based solely on a mere conclusory statement). After careful review and consideration, I find the one sustained charge of conduct demonstrating untrustworthiness does not merit the penalty imposed by the agency. *Reid v. Department of the Navy*, 118 M.S.P.R. 396, ¶ 24 (2012) (citing *Douglas*, 5 M.S.P.R. at 308.). As set forth below, after taking into consideration the relevant factors, I have determined that the maximum reasonable penalty under the circumstances of this case is a 15-day suspension.

The one sustained charge, Conduct Demonstrating Untrustworthiness, by its label is a serious offense because it involves the agency's ability to fully trust its employees. Because it is a generic charge and the range of seriousness of the underlying conduct can differ significantly, I looked to the specification to determine specifically what conduct the agency was relying on as the basis for its

proposed action and ultimately the penalty. *Boltz v. Social Security Administration*, 111 M.S.P.R. 568, ¶ 16 (2009) citing, *Lachance v. Merit Systems Protection Board*, 147 F.3d 1367, 1372 (Fed. Cir. 1998).

The sustained charge involves Ms. Chen's agreement to provide data to Mr. Adams with a written assurance not to tell anyone she was doing so. In his decision letter, Admiral Devany notes as an aggravating factor that Ms. Chen provided the data to Ms. Adams (a member of the public), while resisting attempts to provide it to the USACE. Tab 7, p.6. The evidence does not support Admiral Devany's conclusion. Based on Ms. Chen's credible explanation when she testified, I could differentiate between Ms. Chen (1) not wanting to release her river model and (2) providing Mr. Adams with simulated data. Ms. Chen noted in her email that she was going to a meeting and USACE had been pushing her to release her Ohio HEC-RAS model. Because she was still waiting to improve her model by incorporating updated data, she did not want to release the model. On the other hand, she was providing simulated data rather than the model to Mr. Adams. Tab 9, pp.88-93; Tr. Chen, pp.741-45. Ms. Chen provided a clear distinction of the difference between what she did not want to release to USACE and what she was giving to Mr. Adams.

Although I believe Ms. Chen testified credibly when she stated that she simply repeated Mr. Adams' language to "not tell anyone" when she sent her email in response, by her own admission she still agreed not to advise the agency that she was providing Mr. Adams with data. I also found Ms. Chen's testimony

credible that she learned of Mr. Schade's April 16, 2013 email after she sent the data to Mr. Adams. Although I cannot speculate as to what Ms. Chen would have done if the agency asked her about sending data to Mr. Adams, I note that after she learned of Mr. Schade's email from Mr. Noel, she did not at that time go to Mr. Schade and explain that she sent the email without knowledge of his email. Tr.2, Chen, p.24. I also note that despite the agents making Mr. Schade aware of what happened concerning Ms. Chen's release of data to Mr. Adams in September 2013, his statement that he would have difficulties in continuing to trust Ms. Chen involved no mention of that incident, but solely focused on the "shocking charges in the indictment." Tr. Schade, pp.222-23. It was the allegations in the indictment that changed Mr. Schade's view of Ms. Chen, not her release of information to Mr. Adams. *Id.* at pp.219-20. In addition, although it never made it into Agent Lieberman's typed notes of his September 25 interview of Mr. Schade, the handwritten notes indicate that Mr. Schade told the agents on September 25 that Ms. Chen's emails with Mr. Adams were "within Sherry's scope" although he considered it insubordinate because of the email he sent out.<sup>57</sup> Tab 38, p.81(hand-written notes); Tab 9, p.72(typed notes).

With the exception of the type of offense committed, the remaining *Douglas* factors weigh significantly in favor of a mitigated penalty. The agency

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<sup>57</sup> Although Admiral Devany did not believe that Ms. Chen missed the April 16 email, the agency did not charge her with failing to obey Mr. Schade's email. Furthermore, I previously found that Ms. Chen was not aware of Mr. Schade's April 16, 2013 email at the time she sent the data to Mr. Adams in May 2013.

removed Ms. Chen from employment after a seven-year stellar career with NWS. During her employment, there were no instances of disciplinary action relating to performance or conduct. To the contrary, Ms. Chen's peers and supervisors respected her. According to Mr. Davis, she was "very hard working, very dedicated, focused. She really – when I say focused, she was very focused on what she was doing and did a very, very good job." Tr. Davis, p.651. Scott Young, a senior hydrologist in the ORFC testified that Ms. Chen was very committed, trustworthy, and had a good work ethic. Tr.2, Young, p.48. Gary Bruner, Senior Hydraulic Technical Engineer for the USACE in California worked with Ms. Chen for over seven years. During that time, he found Ms. Chen to be honest, hardworking, and believed her goal was to improve the river forecasting model of the Ohio River System. Tab 38, p.44.

Mr. Schade, who was her supervisor at the time of the event at issue, testified that Ms. Chen's performance was great all around, she was professional and hardworking, and was a model employee in terms of her operational expertise and development work. Tr. Schade, pp.194-95. Mr. Schade told the agents that Ms. Chen was an exemplary employee. Tr. Lieberman, p.323.

When reviewing Ms. Chen's performance in October 2013, Mr. Schade found that she met or exceeded all critical elements of her performance plan, which was the best rating possible under NWS's appraisal system. Tr. Schade, p.208. Mr. Schade reached the same conclusions in October 2014. Neither of the performance evaluations noted any constructive criticism. Tr. Schade,

pp.208-10; Tab 37, pp.38-43. Her previous supervisor, Craig Hunter provided Ms. Chen with a similar performance appraisal, where he stated, “Throughout the year, Ms. Chen has demonstrated remarkable skill and dedication to the implementation and calibration of HEC-RAS along the entire length of the main stem Ohio River. The work represents the largest implementation of HEC-RAS ever attempted and represents a major accomplishment for Ms. Chen, the ORFC, and NWS. She is to be commended for her continued hard work.” Tab 37, p.27.

Throughout her tenure with NWS, the agency repeatedly recognized Ms. Chen with awards for special achievements. For example, in 2008, NWS recognized Ms. Chen for her excellent work relating to the winter and spring flooding in the Ohio Valley. Tab 37, p.45. Ms. Chen was also recognized for her outreach efforts when NWS acknowledged that her willingness to help with exhibits, as well as staffing the exhibits for the entire weekend at an outreach event in Dayton, were essential to the success of the event. Tab 37, p.55.

Ms. Chen’s most notable recognition with NWS came about after her efforts in 2010, where she was recognized for her work to calibrate and implement her HEC-RAS model so that it was able to be utilized effectively during the historic flooding on the lower Ohio and mid-Mississippi Rivers. NWS acknowledged Ms. Chen for working tirelessly with the USACE daily for two months where she ran different scenarios, frequently coming in on her days off to make sure correct information was being processed and passed to the USACE. NWS noted that her work was outstanding and produced positive results of

national significance during a historic event. Tab 37, p.52. As a result, NWS selected Ms. Chen to accept the Larry Johnson Special Award in Birmingham, Alabama, on behalf of the ORFC. Tr. Lee, p.57; Schade, p.194; Chen, pp.668-70. The plaque presented stated, “For the development and implementation into operations a new hydrologic model used to produce lifesaving river forecasts for the Ohio and Mississippi Rivers during the 2011 record flooding.” Tr. Lee, pp.56-57.

Although there was significant media coverage relating to the charged conduct relating to her visit with Mr. Jiao in China and her activities to provide him with information upon her return, the agency did not present any evidence relating to notoriety or impact on the agency as to the conduct of the one sustained specification involving Mr. Adams. Admiral Devany testified that NOAA was embarrassed; however, the alleged embarrassment did not arise out of the conduct set forth in the one sustained specification. Tab 51, Devany, p.49.

In determining the maximum reasonable penalty, I have also considered other circumstances surrounding Ms. Chen’s May 16 email. It is clear that NWS shared information with others outside of the agency and there was considerable collaboration with NWS and universities, researchers, and academics. Tr. Furgione, p.451; Davis, pp.648-51; Chen, p.665. Ms. Chen’s supervisor, Mr. Schade, also agreed that NWS routinely shared information with academics. Tr. Schade, p.224. It is clear that as of April 16, 2013, Mr. Schade created a policy that requests from Mr. Adams had to be routed through him, but prior to that

there is not credible evidence that he had changed the policy of releasing information to the public that had existed for some time in the ORFC. Tr. Davis, pp.648-651. According to Mr. Schade, the two-line email sent to Mr. Adams was the only way he memorialized his policy. Tr. Schade, pp.224-25.

The agency stipulated that there was nothing inappropriate, e.g., proprietary, with the information Ms. Chen sent to Mr. Adams. Tab 54, p.6. It is also obvious that Ms. Chen relied on Mr. Adams's statistical analysis to improve on her model. In her May 16 email, Ms. Chen states, "I really like to know how our model is doing and your analysis will tell. No one in the office can do what you can do on the statistic analysis." Tab 9, p.92. On October 22, Ms. Chen states, "Your statistic analysis of the model results definitely help us to see how the model is doing and give me insights where it should be improved." Tab 37, p.87. In addition, the email from Mr. Adams indicates it was a past practice to obtain information from NWS as Ms. Chen and Mr. Davis testified — on May 16, Mr. Adams tells Ms. Chen, "Please send me data exactly like you did before so we can make exact comparisons." Tab 9, p.89. When requesting information on April 10, 2013, Mr. Adams states, ". . . I need help from you and Ray," and Ms. Chen's responds, "let us know what you need." *Id.* at p.93. This indicates that Mr. Adams' request was not unusual and presumably, at least Mr. Davis had previously been involved with providing information to Mr. Adams.

Ms. Chen testified credibly that she wished she did not miss Mr. Schade's April 16 email. She also testified credibly that she would not have risked her job

or career by disregarding Mr. Schade's instruction. Tr. Chen, pp.729, 740-41; Tr.2, Chen, p.39. When asked on future occasions, Ms. Chen did not send Mr. Adams any information. In October, Mr. Adams sent Ms. Chen an email stating that he sent her other emails, but had not received a response. Ms. Chen responded and told Mr. Adams that after she sent the data the last time in May, she learned that she missed the email that Mr. Schade sent stating all requests from Mr. Adams had to be submitted to Mr. Schade. Ms. Chen acknowledged how helpful Mr. Adams statistical analysis is to see how her model is performing, but nevertheless stated that she had to get permission from "Trent" and offered to talk to Mr. Schade or send him an email. Mr. Adams responded that the HIC (Mr. Schade) is being very vindictive by not allowing anyone to send him data or files and feels that Mr. Schade is "punishing [Mr. Adams] for not worshipping him." Mr. Adams again asked Ms. Chen for information and stated, "None of this is data, so it should not involve the HIC." Once again, Ms. Chen stated she could not provide the information and that Mr. Adams must go through Mr. Schade. Tab 37, pp.87-89; Tr. Chen, pp.736-37. Lastly, I consider that Ms. Chen testified credibly that she simply was repeating Mr. Adams's words back when she said she would not tell anyone because she knew "these two had really bad difficulty working relationship" and she thought Mr. Adams just did not want her to say anything to Mr. Schade. Tr. Chen, pp.738-40.

Ms. Chen has asserted throughout the proceedings that the agency treated her more harshly than other employees who engaged in similar misconduct.

Although I previously considered her claim within the context of prohibited discrimination as an affirmative defense, the Board in determining the reasonableness of the penalty may also consider a claim of disparate penalty. *See Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶ 20 (2010). To establish disparate penalties, the appellant must prove the charges and circumstances surrounding the charged behavior are substantially similar. *See Hamilton v. Department of Homeland Security*, 117 M.S.P.R. 384, ¶ 14 (2012).<sup>58</sup>

I do not find Ms. Chen proved that the one sustained specification in her case was substantially similar to her assertions relating to Mr. Davis and Mr. Schade's conduct. Mr. Davis's conduct raised by Ms. Chen involved one instance of lack of candor when he forgot he provided Ms. Chen with the NID's login information until the agents refreshed his recollection by showing him an email and emailing her the NID password.<sup>59</sup> Mr. Schade's conduct involved two instances of lack of candor based on his failure to recollect Ms. Chen's request for information in

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<sup>58</sup> The standard for determining whether employees are similarly situated for purposes of a disparate penalty analysis differs from the standard used for determining whether employees are similarly situated for purposes of a discrimination claim. *See Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 15 (2010). In a disparate penalty claim, the Board has no hard and fast rules regarding the outcome-determinative nature of these factors. *Hooper v. Department of the Interior*, 120 M.S.P.R. 658, ¶ 8 (2014). An appellant's initial showing that there is enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that an agency treated similarly-situated employees differently shifts the burden of proof to the agency to show a legitimate reason for the difference in treatment between employees. *Id.*

<sup>59</sup> Mr. Davis received a reprimand for emailing the NID password to Ms. Chen. See fn.9.

May 2012 and confusing a time sequence on another occasion. Additionally, Ms. Chen raises the fact that the agency did not discipline Mr. Schade after it learned that one of Mr. Schade's subordinates had improperly maintained the NID password. Tr. Furgione, pp.538-547. Ms. Chen was not a supervisor so any charge relating to a supervisor's responsibilities would not be substantially similar to Ms. Chen's conduct.

I conclude that an analysis of disparate penalties is not relevant because Ms. Chen has not raised any circumstances where other employees engaged in similar conduct as reflected in the one sustained charge of conduct demonstrating untrustworthiness.

Ms. Chen should have been aware not to make an assurance to Mr. Adams that she would not tell anyone she was giving him data. However, based on my findings that (1) she did not see Mr. Schade's email until after she corresponded with and provided the data to Mr. Adams, (2) she was sharing the data with a former colleague for academic purposes, (3) sharing with the public was a routine occurrence, (4) she did not share anything that was proprietary, (5) she did not provide Mr. Adams with material that she would not give to the USACE, (6) she would not have risked her career with NWS to provide Mr. Adams with data, (7) she refused to provide Mr. Adams with information after she became aware of Mr. Schade's directive, and (8) she believed Mr. Adams made the request not to tell anyone because of his contentious relationship with Mr. Schade, I find there is clearly an available alternative sanction. A suspension

clearly sends a message to Ms. Chen that despite what she may understand a situation to be, she simply is not able to agree not to tell anyone that she is providing information, regardless if there is nothing improper in supplying the information. I conclude that my findings indicate that Ms. Chen is an expert in her field of hydrology and the one sustained charge was a singular lapse of judgment on Ms. Chen's part. There is no reason why she cannot continue to be a productive employee and continue to contribute to NWS's mission. Accordingly, I find that a 15-day suspension, rather than removal, is the maximum reasonable penalty in this case for the one specification that was sustained.

### **DECISION**

The agency's action is MITIGATED.

### **ORDER**

I **ORDER** the agency to cancel the removal and substitute in its place a **fifteen-day** suspension without pay. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good

faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

## INTERIM RELIEF

If a petition for review is filed by either party, I **ORDER** the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD:

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Michele Szary Schroeder  
Chief Administrative Judge

### **ENFORCEMENT**

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a petition for enforcement with this office, describing specifically the reasons why you believe there is noncompliance. Your petition must include the date and results of any communications regarding compliance, and a statement showing that a copy of the petition was either mailed or hand-delivered to the agency.

Any petition for enforcement must be filed no more than 30 days after the date of service of the agency's notice that it has complied with the decision. If you believe that your petition is filed late, you should include a statement and evidence showing good cause for the delay and a request for an extension of time for filing.

### **NOTICE TO PARTIES CONCERNING SETTLEMENT**

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. See 5 C.F.R. § 1201.112(a)(4).

## **NOTICE TO APPELLANT**

This initial decision will become final on May 28, 2018, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the “Notice of Appeal Rights” section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

## **BOARD REVIEW**

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must

state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.  
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

#### **NOTICE OF LACK OF QUORUM**

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, see 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. See 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled “Notice of Appeal Rights,” which sets forth other review options.

**Criteria for Granting a Petition or Cross Petition for Review**

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge’s credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to

submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (see 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. See 5 C.F.R.

§ 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. See 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

### **ATTORNEY FEES**

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

### **NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

### **NOTICE OF APPEAL RIGHTS**

You may obtain review of this initial decision only after it becomes final, as explained in the “Notice to Appellant” section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit

Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully the two main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

**(1) Judicial review in general.** As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).<sup>60</sup>

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<sup>60</sup> A provision of the Whistleblower Protection Enhancement Act (WPEA) of 2012 provided for judicial review of MSPB decisions in whistleblower reprisal cases in circuit courts of appeal other than the United States Court of Appeals for the Federal Circuit. That authority expired on December 27, 2017, which means that requests for judicial review of MSPB decisions in whistleblower reprisal cases filed after that date must now be filed with the Federal Circuit.

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (not the

U.S. Court of Appeals for the Federal Circuit), **within 30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); see *Perry v. Merit Systems Protection Board*, 582 U.S. \_\_\_\_ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within 30 calendar days after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, N.E.  
Suite 5SW12G  
Washington, D.C. 20507



## DFAS CHECKLIST

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

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS  
PAYMENTS AGREED UPON IN SETTLEMENT CASES  
CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL  
OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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



## NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
  - a. Employee name and social security number.
  - b. Detailed explanation of request.
  - c. Valid agency accounting.
  - d. Authorized signature (Table 63)
  - e. If interest is to be included.
  - f. Check mailing address.
  - g. Indicate if case is prior to conversion. Computations must be attached.
  - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

### Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

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

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

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

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