UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 82

Docket No. DC-1221-11-0466-W-1

Elissa Rumsey,

Appellant,

v.

Department of Justice,

Agency.

October 28, 2013

Robert A. Burka, Esquire, Washington, D.C., for the appellant.

Kristen E. Bucher, Esquire, and Morton J. Posner, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that denied her request for corrective action in this individual right of action (IRA) appeal. For the reasons set forth below,[1] we GRANT the petition for review, REVERSE the initial decision, and ORDER corrective action with respect to the appellant's

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

claims concerning the cancellation of her telework agreement and her 2007 performance rating, and AFFIRM the initial decision with respect to the appellant's remaining claims.

BACKGROUND

¶2 As found by the administrative judge, and not disputed by the parties on review, the appellant is a GS-14 Compliance Monitoring Coordinator in the Office of Juvenile Justice and Delinquency Prevention (OJJDP), and one of the functions of OJJDP is to award grants to organizations and then ensure that they use the grant money in compliance with the terms of the grant. Initial Appeal File (IAF), Tab 95, Initial Decision (ID) at 1-2. In 2007, the agency solicited grant applications and staff reviewed the applications, assigned ratings, and made recommendations regarding the awarding of grants. Hearing Transcript, Volume 2, July 26, 2011 (Tr. 2) at 159-61 (testimony of Slowikowski). The OJJDP Administrator, Robert Flores, received the recommendations but awarded grants to some lower-scoring organizations. *Id.* at 160. The awards led a number of employees, including the appellant, to protest the decisions. Hearing Transcript, Volume 1, July 25, 2011 (Tr. 1) at 187-88 (testimony of the appellant), Tr. 2 at 160-61 (testimony of Slowikowski). The controversy was eventually publicized, first in *Youth Today* (a trade publication) and then on ABC's *Nightline* program and in congressional oversight hearings. IAF, Tab 20, Subtabs 4AA, 4EE; *see* IAF, Tab 66 at 28.

¶3 The appellant contended that she engaged in protected whistleblowing by providing information about the purportedly improper grant practices to ABC News and Congress and by filing an Inspector General (IG) complaint concerning alleged grant fraud. IAF, Tab 66 at 28-29. She further asserted that the agency perceived her as the source of the confidential information that formed the basis for the *Youth Today* article, although she was not in fact the source. *Id.* at 28. The appellant alleged that the agency took reprisal against her in a variety of

ways, including giving her improperly low performance ratings; conducting a reorganization that moved many of her job duties to other employees; terminating her telework agreement;[2] eliminating her opportunities to conduct outreach, training, and travel; prohibiting her from conducting site visits; pressuring her to accept a detail; counseling her for alleged gossiping; and investigating her for additional gossiping. *Id*. at 28-30. She filed a complaint with the Office of Special Counsel (OSC), and this appeal followed. IAF, Tabs 1, 92.

¶4 The administrative judge found jurisdiction in a prehearing ruling, IAF, Tab 27 at 1, and, after a 3-day hearing, she denied the appellant's request for corrective action, ID. The administrative judge dismissed some of the appellant's claims for lack of jurisdiction on the basis that she failed to exhaust her remedies before OSC. ID at 19; IAF, Tab 81 at 6-7, Tab 89 at 1. The administrative judge also found that the appellant failed to show that she was perceived as a whistleblower because she did not show that Flores considered her to be the source of the information underlying the *Youth Today* article. ID at 8-11. The administrative judge further found that the appellant's disclosures to ABC News and Congress were not protected because the appellant disclosed information that was already publicly known via the *Youth Today* article. ID at 11. She also found that the appellant failed to show that these disclosures were a contributing factor to alleged retaliatory personnel actions because some of the disputed personnel actions took place before the disclosures and because the appellant failed to show that the relevant manager knew she had made disclosures to ABC News and Congress. ID at 11-12. The administrative judge further determined that the appellant failed to show that the appellant's protected disclosures to the IG were a contributing factor to a personnel action because, although management knew that someone filed an IG complaint, the appellant did not show

[2] The appellant worked under a telework agreement that permitted her to telework 1 day per week. Tr. 1 at 280 (testimony of the appellant).

that the relevant managers knew that she was the one who filed the IG complaint. ID at 13-16.

¶5 The administrative judge determined that the appellant failed to show that the counseling session concerning her alleged gossiping or the investigation into the appellant's gossiping were personnel actions. ID at 16-18. The administrative judge also found that the appellant did not show that the agency pressured her to accept a detail or precluded her from travel, training, and outreach opportunities. ID at 25-26. Finally, the administrative judge found that the agency proved by clear and convincing evidence that it would have taken the same actions absent any whistleblowing. ID at 20-29.

¶6 The appellant petitions for review of the initial decision. Petition for Review (PFR) File, Tab 3. The agency responds in opposition to the petition for review. PFR File, Tab 5.

ANALYSIS

The appellant has not shown that the administrative judge erred by finding that the appellant failed to prove that the agency perceived her to be a whistleblower.

¶7 The Whistleblower Protection Act (WPA) prohibits any federal agency from taking, failing to take, or threatening to take or fail to take, any personnel action against an employee in a covered position because of the disclosure of information that the employee reasonably believes to be evidence of a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2), (b)(8); *see McCarthy v. International Boundary and Water Commission*, 116 M.S.P.R. 594, ¶ 29 (2011), *aff'd*, 497 F. App'x 4 (Fed. Cir. 2012). One who is perceived as a whistleblower is entitled to the protection of the WPA, even if she has not made protected disclosures. *McCarthy*, 116 M.S.P.R. 594, ¶ 33; *Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 12 (1998). The Board has found that a variety of fact patterns can support a finding

that an individual was perceived as a whistleblower. *King v. Department of the Army*, 116 M.S.P.R. 689, ¶ 7 (2011). Among those fact patterns is the "mistaken identity" theory, in which the relevant agency official thought the appellant made protected disclosures, but the appellant did not actually do so. *Id.*; *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 280 (1990). The critical factor is whether the agency official believed that the appellant engaged in whistleblowing activity. *See King*, 116 M.S.P.R. 689, ¶ 8. In "perceived as" cases, the focus is not on the appellant's perceptions or the disclosures themselves, but on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made disclosures. *See id.*

¶8 Therefore, to establish that the agency retaliated against her based on its perception that she was a whistleblower, the appellant must show that she exhausted her remedies before OSC, that the agency perceived her as a whistleblower, and that the agency's perception was a contributing factor in its decision to take or not take the personnel action at issue. *King*, 116 M.S.P.R. 689, ¶ 9. If the appellant meets her burden of proof, the agency may still prevail if it can show by clear and convincing evidence that it would have taken the personnel action at issue absent its perception of the appellant as a whistleblower. *Id.*

¶9 In this case, someone from the agency leaked information about the agency staff's 2007 grant recommendations and rating scores to *Youth Today*. In December 2007, *Youth Today* published an article that referenced that data and that contained a list of the scores each applicant received. IAF, Tab 20, Subtab 4EE. Flores was admittedly "quite upset" about the article, and a number of grant applicants contacted the agency to protest the rejection of their applications. Tr. 2 at 169-70 (testimony of Slowikowski); Hearing Transcript, Volume 3, July 27, 2011 (Tr. 3) at 92 (testimony of Flores); *see* Tr. 3 at 38-41

(testimony of Flores). The appellant was not the source of the leak.[3] Tr. 1 at 192 (testimony of the appellant).

¶10 The appellant asserts that Flores believed she was the leaker and that, in retaliation, he removed her compliance duties and transferred those duties from the Policy Office to the State Relations and Assistance Division (SRAD) in January 2008. IAF, Tab 66 at 28-29. The appellant testified that she knows Flores believed her to be the source of the leak because he looked at her during a staff meeting and stated "I know the person who leaked the data . . . and I'm going to get the persons who did this." Tr. 1 at 186-87 (testimony of the appellant). The administrative judge, however, credited Flores's testimony that he did not suspect anyone in particular and did not perceive the appellant to be a whistleblower. ID at 8-10. Flores's denial is corroborated by a contemporaneous memorandum dated December 19, 2007, from Flores to the IG in which he informed the IG where the leaked information had been stored and provided a list of people who had access to it; the appellant's name was not on the list. IAF, Tab 69 at 40.

¶11 The appellant contends on review that evidence that she was known to be a strong critic of Flores's grant decisions along with statements from two staff members close to Flores that they thought that Flores suspected the appellant was the source of the leak is sufficient to show that Flores perceived her to be a whistleblower. PFR File, Tab 3 at 67. However, she has not explained why the administrative judge's reasoning is incorrect or identified evidence that the administrative judge failed to consider; she merely repeats the same arguments that the administrative judge considered and rejected. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (before the Board will undertake a

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[3] Another coworker of the appellant who left the agency early in 2008 was the source of the leak. Flores testified that he did not know that the coworker was the source of the leak to *Youth Today* until he discovered that the coworker had appeared in the *Nightline* program. Tr. 3 at 44-45 (testimony of Flores).

complete review of the record, the petitioning party must explain why the challenged factual determination is incorrect and identify the specific evidence in the record which demonstrates the error), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). At best, the appellant's evidence shows that, from Flores's point of view, the appellant was one of a number of possible suspects, but it does not narrow the scope of Flores's suspicions to her.

¶12 The administrative judge based her conclusion that the appellant failed to prove that Flores perceived her to be a whistleblower at least in part on her assessment of Flores's credibility and demeanor as a witness. ID at 10. The Board is required to give deference to an administrative judge's credibility determinations where, as here, they are based, explicitly or implicitly, on witness demeanor. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). The appellant has not proffered a sufficiently sound reason to set aside the administrative judge's findings. *See McCarthy*, 116 M.S.P.R. 594, ¶ 45 (in a whistleblower reprisal case, the Board is required to apply appropriate deference to an administrative judge's credibility findings consistent with the principles contained in *Haebe*).

The appellant has not shown that the administrative judge erred by finding that the appellant's disclosures to ABC News and Congress were not a contributing factor in a "personnel action."

¶13 The appellant contends that, in reprisal for her disclosures to ABC News and Congress in April or May 2008, Nancy Ayers,[4] Deputy Administrator for Policy, transferred her compliance monitoring duties to SRAD and gave her an unfairly low performance appraisal for 2008. IAF, Tab 20, Subtab 4S, Tab 66 at 28. The administrative judge correctly found, and the appellant does not dispute, that the appellant's disclosures to ABC News and to Congress could not

[4] Ayers was the appellant's first-level supervisor from May 2007 until September 2009. Tr. 1 at 111, 264 (testimony of the appellant).

have been the basis for the decision to transfer the appellant's compliance monitoring duties because the transfer took place several months before the appellant made her disclosures. ID at 11. The administrative judge also found that the disclosures were not protected because the appellant disclosed information that was already publicly known via the *Youth Today* article. ID at 11. The administrative judge found that the appellant failed to show that her disclosures to ABC News and Congress were a contributing factor to the 2008 performance appraisal because she did not show that Ayers knew the appellant had made any disclosures to ABC News and Congress. ID at 11-12.

¶14 The appellant challenges the administrative judge's finding that her disclosures to ABC News and to Congress were not protected. PFR File, Tab 3 at 60-61. Although the administrative judge correctly relied on applicable law in effect at the time of her initial decision, Congress has since passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465. Section 101 of the WPEA provides that a disclosure is not precluded from protection because the disclosure revealed information that was previously known. WPEA, § 101(b)(2)(C) (codified at 5 U.S.C. § 2302(f)(1)(B)). We found in *Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶ 26 (2013), that the provisions of section 101 of the WPEA clarified the definition of a protected disclosure and should be applied to cases pending before the Board. Therefore, the administrative judge's finding is incorrect, and we find that the appellant's disclosures to ABC News and to Congress in April or May 2008 were protected.

¶15 In any event, however, the administrative judge correctly found that the appellant failed to show that Ayers had any knowledge of her disclosures to ABC News and Congress. ID at 11. In fact, the appellant never asked Ayers any questions at the hearing relating to this topic. Tr. 3 at 213-55 (testimony of Ayers). On review, the appellant essentially argues that Ayers was close to Flores and knew what he knew. PFR File, Tab 3 at 32, 72-73. She also identifies

an email that she claims shows that Ayers was aware that she made disclosures to ABC News and Congress. PFR File, Tab 3 at 72. In fact, the email in question is dated May 29, 2008, and shows that a reporter contacted a coworker outside proper channels and purportedly at the appellant's referral. The appellant stated she did not refer the reporter to the coworker and that she had "not had any conversations with any reporters regarding any matters" concerning the agency. IAF, Tab 73, Subtab G3. Aside from this email, which does not support her assertions, and from her speculation about what Ayers may have learned from Flores (and there is no evidence that Flores knew the appellant made disclosures to ABC News and Congress), the appellant identifies no evidence that her disclosures were a contributing factor to a personnel action, and we discern none.

The administrative judge erred by finding that the appellant's 2008 performance appraisal was not a "personnel action."

¶16 The administrative judge also found that the appellant's 2008 performance appraisal was not a "personnel action" because her 2007 and 2008 appraisals were the same and the 2008 appraisal therefore was not "lowered." ID at 11-12. The administrative judge's findings of fact are fully supported by the record.[5] IAF, Tab 20, Subtabs 4S, 4KK. However, the administrative judge is mistaken on this point of law. A "performance appraisal" is a personnel action under the WPA. 5 U.S.C. § 2302(a)(2)(A)(viii); *see Jones v. Department of the Interior*, 74 M.S.P.R. 666, 673-78 (1997) (addressing performance appraisals purportedly given in reprisal for whistleblowing). The statute contains no qualifying language that would require the contested performance appraisal to be either less than satisfactory or tangibly lower than the appraisal from the prior year. 5 U.S.C. § 2302(a)(2)(A)(viii). Thus, the appellant's 2008 appraisal was a

[5] During the time period relevant to this appeal, the agency used a four-tiered rating system. The four ratings are Unacceptable, Successful, Excellent, and Outstanding. IAF, Tab 20, Subtabs 4S, 4KK.

personnel action. Because, however, as discussed above, the appellant failed to show that her disclosures to ABC News and Congress were a contributing factor to her 2008 appraisal, the administrative judge's mistake did not prejudice the appellant's substantive rights with respect to the appellant's second disclosure. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

The administrative judge erred by finding that the appellant's disclosures concerning the state of Wisconsin's alleged submission of fraudulent data to agency managers were not protected.

¶17 The appellant claimed that she made protected disclosures to her coworkers and Ayers in 2007 and to the IG in February 2008 that the state of Wisconsin submitted fraudulent data in connection with its program compliance and agency managers were covering it up. *See* IAF, Tab 66 at 28-29. She alleged that, in reprisal for these disclosures, Flores transferred her compliance duties to SRAD; Ayers cancelled her telework agreement and pressured her to accept a detail; and Ayers and her successor, Melodee Hanes,[6] lowered her performance evaluations in 2007, 2008, and 2009.[7] *Id*. at 28-31.

¶18 The administrative judge found that the appellant's disclosures to her coworkers were not protected under *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001), because they concerned matters within her job responsibilities, occurred in the normal course of the performance of her duties, and were not made to someone in a position to remedy her concerns. ID

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[6] Hanes arrived at the agency in June 2009. Tr. 2 at 85 (testimony of Hanes).

[7] The appellant also alleged below that Greg Thompson, Associate Administrator for SRAD, did not allow her to perform compliance audits or site visits; Ayers denied her travel and outreach opportunities; Ayers counseled her for alleged gossiping about another employee's discipline; and the agency instigated an investigation into the alleged gossiping. The administrative judge found that the appellant did not meet her burden of proof on any of these issues. ID at 16-20; *see* IAF, Tab 66 at 28-31. The appellant does not challenge any of those findings on review, and we discern no basis to revisit them.

at 24. In light of section 101(b)(2)(C) of the WPEA (codified at 5 U.S.C. § 2302(f)(2)), which applies to pending cases, *see Day*, 119 M.S.P.R. 549, ¶ 26, this finding is no longer correct. Further, the administrative judge did not directly address whether the appellant's disclosures of the same alleged wrongdoing to Ayers and to the IG were protected, but we find that they are. *See Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, ¶ 11 (2011) (disclosures to the IG are protected); *Ingram v. Department of the Army*, 114 M.S.P.R. 43, ¶ 13 (2010) (a disclosure to any supervisor who is not the alleged wrongdoer is sufficient to constitute a disclosure under the WPA).

¶19 The appellant alleges on review that she made her disclosures concerning the state of Wisconsin's alleged submission of fraudulent data not only to coworkers and Ayers, but also to Flores and various state government personnel. PFR File, Tab 3 at 57-58. The appellant did not contend below that she made the Wisconsin disclosures to any state personnel, IAF, Tab 66 at 28-31, and the administrative judge did not include any disclosures to state personnel concerning the state of Wisconsin's alleged submission of fraudulent data as issues in the corrected memorandum of prehearing conference. IAF, Tab 89 at 3. Thus, any disclosures to state personnel are not before the Board. On the other hand, however, the remaining disclosures to Flores and other agency managers are protected. *See Ingram*, 114 M.S.P.R. 43, ¶ 13.

The administrative judge erred by finding that the appellant's disclosures concerning the state of Wisconsin's alleged submission of fraudulent data were not a contributing factor in a personnel action.

¶20 The administrative judge found that the appellant failed to show that her disclosures that the state of Wisconsin allegedly submitted fraudulent data were a contributing factor to a personnel action. ID at 13-16. This is correct in terms of the disclosures to the IG because the appellant failed to show that Flores or Ayers (the managers responsible for the disputed personnel actions) knew that the

appellant instigated the IG investigation into the Wisconsin matter. Tr. 3 at 50 (testimony of Flores), 231 (testimony of Ayers).

¶21 However, Ayers clearly knew about the disclosures that the appellant made to Ayers, and the cancellation of the telework agreement permitting the appellant to telework 1 day per week, *see supra* note 2, the alleged pressure to accept a detail, and the 2007 and 2008 performance appraisals all occurred within a period of time such that a reasonable person could conclude that the disclosures were a contributing factor in the decision to take a personnel action. *See Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 22 (2010) (a personnel action taken within approximately 1 to 2 years of the appellant's disclosures satisfies the knowledge-timing test). Therefore, the appellant has shown by preponderant evidence that her disclosures to Ayers concerning the state of Wisconsin's alleged submission of fraudulent data were a contributing factor to Ayers's decision to cancel her telework agreement, the pressure Ayers allegedly imposed on the appellant to accept a detail, and the appellant's performance evaluations in 2007 and 2008.

¶22 The administrative judge found that the appellant failed to prove that her disclosures concerning the state of Wisconsin's alleged submission of fraudulent data were a contributing factor to the appellant's 2009 performance evaluation[8] because she offered no evidence that Hanes, the rating official, was aware of the appellant's disclosures. ID at 13-14, 29. On review, the appellant discusses the reasons why she believes that her 2009 rating was improper, *see* PFR File, Tab 3 at 26-27, 54, 75, but she identifies no direct or circumstantial evidence that Hanes

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[8] The administrative judge found in the alternative that the agency proved by clear and convincing evidence that it would have rated the appellant the same in fiscal year 2009 regardless of her disclosures. ID at 28-29. We need not consider whether this finding is correct because we agree with the administrative judge that the appellant failed to prove that her disclosures were a contributing factor in her 2009 performance evaluation in any event.

had knowledge of her disclosures, and we discern none. Therefore, the administrative judge correctly found that the appellant failed to show that a protected disclosure was a contributing factor to her 2009 performance evaluation. *See Iyer v. Department of the Treasury*, 95 M.S.P.R. 239, ¶ 9 (2003) (the appellant did not show that his disclosures were a contributing factor in his nonselection where he failed to show that the relevant managers knew of his protected disclosures), *aff'd*, 104 F. App'x 159 (Fed. Cir. 2004).

¶23 Next, we must determine whether these actions constitute "personnel actions" within the meaning of the WPA. As discussed above, a performance appraisal is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(viii), and we find, accordingly, that the appellant has shown that the 2007 and 2008 performance appraisals are personnel actions. In addition, we find that the cancellation of the appellant's telework agreement constitutes a significant change in working conditions and is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii). Thus, we find that the appellant has established a prima facie case that Ayers retaliated against her for making disclosures about the alleged Wisconsin fraud to agency managers by cancelling the appellant's telework agreement and by issuing lower performance appraisals in 2007 and 2008.

The appellant has not shown that the administrative judge erred by finding that the appellant failed to show that the agency pressured her to accept a detail.

¶24 We agree with the administrative judge that the appellant failed to show that Ayers pressured the appellant to accept a detail. The administrative judge found, and we agree, that the evidence shows that Ayers offered the appellant a detail to the agency's Civil Rights Division and arranged an informational interview for her, and the appellant attended the interview and declined the detail. ID at 18-19; IAF, Tab 20, Subtabs 4U, 4V. The entire discussion took place between September 3 and September 10, 2008, and consisted mainly of a handful of emails, most of which consisted of the appellant asking questions and Ayers answering those questions. IAF, Tab 20, Subtabs 4U, 4V. Nothing in these

emails evidences anything approaching pressure, and the appellant adduced no evidence demonstrating any pressure. As the administrative judge correctly found, the appellant did not show that she was pressured to accept the detail. ID at 18-19.

¶25 On review, the appellant relates several reasons why the suggested detail did not appeal to her. PFR File, Tab 3 at 50-51, 70-71. The fact that the appellant subjectively perceived the detail to be inappropriate for her skill set and career objectives does not establish that she was pressured to accept the detail. We find that, because the appellant did not show that she was pressured to accept the detail, and because the detail was never effected, the appellant did not show that the discussions about a possible detail were either a personnel action or a threatened personnel action.

Any error by the administrative judge regarding the analysis of whether the appellant showed that a protected disclosure was a contributing factor to a personnel action is insignificant.

¶26 An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in a personnel action, i.e., by satisfying the knowledge/timing test. *Schnell*, 114 M.S.P.R. 83, ¶ 21. If the appellant fails to satisfy the knowledge/timing test, the Board must consider other evidence, such as that pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials and whether those individuals had a desire or motive to retaliate against the appellant. *Stiles*, 116 M.S.P.R. 263, ¶ 24; *Daniels v. Department of Veterans Affairs*, 105 M.S.P.R. 248, ¶ 16 (2007).

¶27 The appellant contends on review that the administrative judge did not apply an appropriate legal standard in determining whether she met her burden of proving contributing factor. PFR File, Tab 3 at 15, 62-63. We find it unnecessary to determine whether the administrative judge relied on the knowledge/timing test to the exclusion of alternative means of proving contributing factor. The only claim that the administrative judge rejected on the basis that the appellant did not prove that a protected disclosure was a contributing factor in a personnel action and that the appellant has preserved for review is her claim that Ayers took reprisals for the appellant's disclosures to Congress and to ABC News. *See* ID at 11. The personnel actions that the appellant attributes to this disclosure, specifically, the cancellation of her telework agreement and her 2007 and 2008 performance evaluations, are the same as with her claim regarding the disclosure of the alleged Wisconsin fraud. We have already determined, however, that the appellant did not show that she was pressured to accept a detail. The 2007 performance rating and the cancellation of the appellant's telework agreement in December 2007 both predate the disclosures to Congress and ABC News, which occurred in spring 2008, and the appellant cannot show that her disclosures to ABC News and Congress in 2008 were a contributing factor to the cancellation of her telework agreement in 2007 and her 2007 performance evaluation under any theory. *See Davis v. Department of Defense*, 106 M.S.P.R. 560, ¶ 12 (2007) (because the complained-of personnel action predated the protected disclosure, there is no way that the disclosure could have contributed to the personnel action), *aff'd sub nom. Davis v. Merit Systems Protection Board*, 278 F. App'x 1009 (Fed. Cir. 2008). Therefore, even assuming, arguendo, that the appellant's argument that the administrative judge applied the wrong contributing factor standard is correct, any hypothetical error did not prejudice the appellant's substantive rights because she cannot prove her assertions with regard to the 2007 personnel actions as a matter of law.

¶28 As to the appellant's 2008 performance evaluation, we have found, as noted above, that the appellant showed that her disclosures to Ayers that the state of Wisconsin allegedly submitted fraudulent data were a contributing factor in the 2008 performance evaluation. Thus, the agency bears the burden of justifying the 2008 performance evaluation by clear and convincing evidence, and any alleged error by the administrative judge with regard to the proper standard for proving contributing factor provides no basis for reversal of the initial decision. *See Panter*, 22 M.S.P.R. at 282.

The agency has not shown by clear and convincing evidence that it would have cancelled the appellant's telework agreement absent the appellant's protected disclosures.

¶29 Because the appellant proved a prima facie case that Ayers retaliated against her for making disclosures in the summer of 2007 about the alleged Wisconsin fraud and agency cover-up by cancelling the appellant's telework agreement and by issuing inappropriate performance appraisals in 2007 and 2008, the burden now shifts to the agency to show by clear and convincing evidence that it would have taken the same actions absent any whistleblowing. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *McCarthy*, 116 M.S.P.R. 594, ¶ 43. Clear and convincing evidence "is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(d). It is a higher standard than preponderant evidence. *McCarthy*, 116 M.S.P.R. 594, ¶ 43; 5 C.F.R. § 1209.4(d).

¶30 In determining whether an agency has met its burden, the Board will consider all of the relevant factors, including the following: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

Parikh v. Department of Veterans Affairs, 116 M.S.P.R. 197, ¶ 36 (2011). The Board must consider *all* the pertinent record evidence in making this determination. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012); *Mattil v. Department of State*, 118 M.S.P.R. 662, ¶ 25 (2012).

¶31 The appellant asserted that Ayers abruptly cancelled her telework agreement in retaliation for the Wisconsin disclosures. *See* IAF, Tab 20, Subtab 4O. Ayers testified that she wanted the appellant to spend more time at the agency because the appellant was not adequately communicating with her about her work assignments and was not getting her work done. Tr. 3 at 230-32 (testimony of Ayers).

¶32 There is little evidence of retaliatory motive. Ayers did not arrive at the agency until May 2007, and, shortly after that, the appellant went on maternity leave from May through September. Tr. 1 at 224-25 (testimony of the appellant), Tr. 3 at 237 (testimony of Ayers). The timing of the appellant's maternity leave and resulting absences might tend to indicate that Ayers had little opportunity to develop any animus against the appellant. Moreover, there is no evidence that Ayers was implicated in the alleged wrongdoing, or any evidence that Ayers was embarrassed or upset about the appellant's disclosures. Similarly, there is no evidence showing whether the agency treated appropriate comparators who were not whistleblowers differently.

¶33 However, the agency has not presented strong evidence in support of its reasons for cancelling the telework agreement. Those reasons are supported by Ayers's testimony, but there is little contemporaneous documentation to support Ayers's conclusion other than the narrative she provided to the appellant when she made her decision. IAF, Tab 20, Subtab 4O; Tr. 3 at 230-32 (testimony of Ayers). In addition, the record shows that the appellant grieved the decision to cancel her telework agreement. She prevailed in her grievance, and the agency reversed the cancellation within 4 months. IAF, Tab 20, Subtab 4H. The appellant's successful grievance is by no means dispositive of the question of

whether the agency has met the clear and convincing evidence test, but it is evidence that tends to undercut the strength of the agency's reasons for cancelling the agreement in the first place.

¶34 As discussed previously, to meet the clear and convincing standard, the evidence must produce a "firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(d). Although the agency has presented evidence in support of its burden of proof, upon considering all of the pertinent evidence of record, we are not left with the firm belief that the agency would have cancelled the appellant's telework agreement in any event. We are simply not persuaded that the agency's evidence rises to the clear and convincing level. *See Whitmore*, 680 F.3d at 1367 (discussing legislative history showing that Congress intended the clear and convincing evidence standard to be a heavy burden to meet).

The agency has not shown by clear and convincing evidence that it would have rated the appellant's 2007 performance the same absent the appellant's protected disclosures.

¶35 In October 2007, Ayers issued the appellant a performance appraisal for the performance year October 1, 2006, through September 30, 2007. IAF, Tab 20, Subtab 4KK. Ayers rated the appellant "Excellent" for "Accountability for Organizational Results" and "Successful" in both "Customer Service" and "Communication." *Id.* at 1. The summary rating was "Successful." *Id.* at 2. The performance appraisal itself contains no narrative explanation for the rating because agency policy did not require supervisors to prepare narrative statements for ratings at the "Successful" level. Tr. 3 at 236-37 (testimony of Ayers). Although Ayers testified as to what types of input she considered in arriving at the rating, she did not provide any testimony explaining why the appellant's performance warranted a "Successful" rating as opposed to some other rating. Tr. 3 at 214-16 (testimony of Ayers).

¶36 There is no evidence in the record concerning how the agency rated appropriate non-whistleblower comparators, so consideration of this factor

does not materially assist us in deciding whether the agency has met its burden of proof. Similarly, as noted above, Ayers and the appellant worked together for a brief period of time given the 5 months between Ayers's arrival in May 2007 and the end of the rating period on September 30, 2007, and much of that time the appellant was on maternity leave. Tr. 3 at 237 (testimony of Ayers). Moreover, the disclosures did not reflect on Ayers because she had only been at the agency for a few months at the time of the disclosures and was not implicated in any of the disclosures. Thus, there is little evidence of retaliatory animus.

¶37 Before Ayers, the appellant's supervisor was Greg Thompson, who rated the appellant "Excellent" for rating year 2006 despite some concern about the appellant's communication skills. Tr. 3 at 102, 116 (testimony of Thompson); IAF, Tab 20, Subtab 4QQ. The appellant received a $1,900 cash award in April 2007 for her work on a conference that took place in early 2007. IAF, Tab 73, Subtab D; Tr. 1 at 109-10 (testimony of the appellant). Thus, there is no reason to believe that the 2007 rating was consistent with a pattern of prior "Successful" ratings, while there is evidence that the 2007 rating was somewhat inconsistent with the agency's perception of the appellant's performance in the recent past.

¶38 We acknowledge that this is a close case. However, after considering all of the pertinent evidence of record, we find that the agency's evidence is insufficient to meet its burden of proving by clear and convincing evidence that it would have given the appellant the same rating absent any whistleblowing. *See Whitmore*, 680 F.3d at 1367.

<u>The agency has shown by clear and convincing evidence that it would have rated the appellant's 2008 performance the same absent the appellant's protected disclosures.</u>

¶39 In October 2008, Ayers issued the appellant a performance appraisal for the performance year October 1, 2007, through September 30, 2008. IAF, Tab 20, Subtabs 4S. As in the year before, Ayers rated the appellant "Excellent" for "Accountability for Organizational Results," "Successful" in both "Customer

Service" and "Communication," and "Successful" overall. *Id.* at 1-2. Also as in the year before, the performance appraisal contains no narrative explanation for the rating.

¶40 In contrast, however, to her testimony about the 2007 rating, Ayers explained the reasoning behind the 2008 rating. Tr. 3 at 226-30 (testimony of Ayers). Ayers testified that she considered concerns that state representatives had expressed at a conference in Denver in October 2007 about the appellant's interactions with her state counterparts and about her legal interpretations. Tr. 3 at 228-30 (testimony of Ayers).

¶41 Prior to the Denver conference, Flores started receiving word that some state representatives were complaining about the appellant's confrontational manner. Tr. 3 at 20-21 (testimony of Flores). They also raised concerns about the appellant's overly restrictive interpretation of the legal requirements of the agency's program and her unwillingness to be flexible or work cooperatively with clients to find mutually acceptable resolutions to disagreements. *See* Tr. 3 at 15-17 (testimony of Flores). Flores explained at the hearing that the statute governing the program contained some ambiguities that were necessarily subject to interpretation and that the agency's practice was to give interested parties an opportunity to present their views on these matters. Tr. 3 at 17-18 (testimony of Flores). However, state representatives complained that the appellant was not working collaboratively and not considering their views. Tr. 3 at 17, 21 (testimony of Flores). Flores testified that one of the reasons he attended the Denver conference was to attend a special meeting with the state representatives and hear their concerns. Tr. 3 at 11-12, 15 (testimony of Flores).

¶42 At that meeting, some state representatives indicated that they "were not interested really in dealing with [the appellant] any longer." Tr. 3 at 31 (testimony of Flores). Flores believed that diplomacy and cordiality were essential to the relationships with the representatives and that the program needed

"someone who had kind of a deft touch and where the personality was not going to get in the way of the program." Tr. 3 at 31 (testimony of Flores).

¶43 Thereafter, some state representatives[9] put their concerns in writing. IAF, Tab 20, Subtabs GG, HH, II. The agency followed up with a teleconference to discuss the representatives' concerns, IAF, Tab 20, Subtab 4HH, and Flores requested and obtained a formal legal opinion in an attempt to resolve some of the disputes about interpretation, Tr. 3 at 24-25 (testimony of Flores); IAF, Tab 20, Subtabs 4BB, 4DD, 4FF. After considering the legal opinion and input from representatives, staff, and management, Flores decided to separate the policy and compliance functions and transfer the compliance function to SRAD, which in effect meant that the agency greatly reduced or eliminated the appellant's face-to-face contact with the representatives. Tr. at 26-28 (testimony of Flores).

¶44 As described above, the agency has presented specific testimony and contemporaneous documentation in support of its allegation that it had concerns about the appellant's working relationship with state representatives, and Ayers testified that these concerns were in part the basis for the appellant's 2008 rating. Also as noted above, Thompson had, in prior performance years, advised the appellant to be careful of her tone. Tr. 3 at 102, 116 (testimony of Thompson); IAF, Tab 20, Subtab 4QQ. It is clear, therefore, that, well before the appellant made her disclosures in June 2007 about Wisconsin's alleged submission of fraudulent data, the agency had documented concerns about this aspect of the appellant's performance.

¶45 On the other hand, as noted above, there is little evidence that Ayers harbored any retaliatory motive. There is no indication that the appellant's

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[9] One of the written complaints was from Jeff Holsinger. IAF, Tab 20, Subtab 4GG. At the hearing, in explaining the appellant's 2008 rating, Ayers explicitly mentioned Holsinger by name as one of those who raised concerns. Tr. 3 at 229-30 (testimony of Ayers).

disclosures reflected on Ayers because they concerned matters that largely pre-dated Ayers's arrival at the agency. We see little reason why Ayers might have believed that the appellant's tone and poor relationships with clients reflected badly on her or her supervision in light of the timing of the appellant's maternity leave and the date of the Denver conference. Further, there is no evidence that there were other appropriate comparators with similar performance issues who were not whistleblowers but were treated more favorably than the appellant. Likewise, there is no evidence that the agency fabricated the complaints about the appellant, much less that it did so because of her disclosures.

¶46 We have considered that the appellant had similar problems in prior years before her disclosures for which there were few consequences. There were, however, *some* consequences in that the problems were documented in writing in her 2006 performance rating. IAF, Tab 20, Subtab 4QQ at 18. Furthermore, the appellant acknowledged the problem in 2006 and expressed a willingness to correct it, but apparently was not able to do so to the agency's satisfaction. *Id.*

¶47 We have also considered that at least some of the complaints on which the agency relied came from the Wisconsin representatives, and Wisconsin had been found out of compliance and ineligible for funding and may possibly have had some motivation to disparage or discredit the appellant. Tr. 1 at 116-17 (testimony of the appellant); Tr. 2 at 52-53 (testimony of the appellant). However, even assuming that the complaints from the Wisconsin group were illegitimate, as discussed above, Wisconsin was not the only source of the complaints. IAF, Tab 20, Subtabs 4GG, 4II. There is no suggestion in the record that any of the other complaints might be illegitimate.

¶48 Weighing the strength of the agency's evidence in support of the 2008 rating against the weak evidence of retaliatory animus and the evidence that may tend to suggest that the 2008 rating was improper, we are left with the firm belief that the agency would have rated the appellant "Successful" in performance year

2008 even if she had not made her protected disclosures in 2007. Therefore, we find that the agency has met its burden of showing by clear and convincing evidence that it would have taken the same action absent any whistleblowing. The appellant is not entitled to relief for this personnel action.

Conclusion

¶49 For the foregoing reasons, we find that the appellant is entitled to corrective action under 5 U.S.C. § 1221(g)(1) with respect to the cancellation of her telework agreement and her 2007 performance rating.[10]

ORDER

¶50 We ORDER the agency to provide the appellant with relief such that she is placed as nearly as possible in the same situation she would have been in had the agency had not retaliated against her for whistleblowing. 5 U.S.C. § 1221(g)(1)(A)(i); *see Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶51 We also ORDER the agency to pay the appellant, if applicable, the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

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[10] Finally, the appellant's former counsel has filed a motion to intervene in the appeal. PFR File, Tab 7. After full consideration, we DENY the motion to intervene.

¶52 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶53 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶54 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. The agency is ORDERED 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.

¶55 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If

you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.202 and 1201.204. If you believe you meet these requirements, you must file a motion for consequential damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE PARTIES

A copy of the decision will then be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(f)(3).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec.

27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can

be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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

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.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

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.