# UNITED STATES OF AMERICA
# MERIT SYSTEMS PROTECTION BOARD

71 M.S.P.R. 161

Docket Number CB-1215-93-0014-B-1

## SPECIAL COUNSEL, Petitioner,

## v.

## EINER R. NIELSON, Respondent.

Date: July 10, 1996

Ruth Robinson Ertel, Esquire, Washington, D.C., for the petitioner.

Einer R. Nielson, Vienna, Virginia, pro so.

### BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

### OPINION AND ORDER

In this case, the Special Counsel (SC) seeks disciplinary action against the respondent based on charges that he committed a prohibited personnel practice against an employee he supervised, Stephen Cruse. Specifically, the SC alleges that Mr. Nielson violated 5 U.S.C. § 2302(b)(9) by (1) terminating Cruse's temporary appointment in retaliation for his having provided information to the Department of Navy's Inspector General (IG); and (2) terminating Cruse's appointment because of his attempt to exercise his right to grieve the handling of his performance evaluation.

This case was initially assigned to the Board's former Chief Administrative Law Judge (CALJ). In June 1993, the CALJ issued a Recommended Decision in which he granted the SC's motion for a default judgment on the ground that the respondent had failed to file a timely answer to the complaint. After considering the respondent's exceptions to the Recommended Decision and the SC's response, the Board declined to adopt the decision and remanded the case for a hearing on the merits. *Special Counsel v. Nielson*, MSPB Docket No. CB-1215-93-0014-T-1 (Mar. 16, 1994). Because of the CALJ's retirement, a new ALJ heard the case.

In a Recommended Decision issued on March 31, 1995, the ALJ found that the SC failed to establish that the respondent violated the statute as charged and

recommended that the complaint be dismissed in its entirety.[1] The SC then filed exceptions. For the reasons set forth below, we ADOPT, as MODIFIED, the ALJ's finding that the SC did not establish that the respondent retaliated against Mr. Cruse because the latter cooperated with the Navy IG; SUSTAIN the charge that the respondent terminated Cruse's appointment because of his attempt to grieve his performance rating; and ORDER that the respondent be suspended for 90 days.

## BACKGROUND

A. Facts.

Unless otherwise noted, the facts set forth here are undisputed. The respondent served as the GS-15 Chief of the Facilities and Services Department, Naval District Washington, and supervised 41 employees. In October 1989, Mr. Nielson hired Stephen Cruse as a GS-9 Administrative Officer on a temporary appointment not to exceed a year, and subsequently requested that the appointment be extended for a second year. Mr. Nielson served either as Cruse's immediate supervisor or as his second-level supervisor during the period in question.

Respondent Nielson made two attempts to hire Cruse on a permanent basis. In January 1990, he requested that Cruse be appointed to a permanent GS-9/11/12 position as a Facilities Services Specialist, but this request was denied because of a hiring freeze. In February 1990, while respondent was serving as Cruse's second-level supervisor, he rated him as "exceeds fully successful" in every performance element. The comments section of the performance appraisal stated that "Cruse demonstrated exceptional analytical, organizational, and coordinative skills." Petitioner's exhibit (Pet. ex.) P-4. Subsequently, the respondent created a new position in his office of Special Assistant for Transportation, GS-9/11/12, told Cruse to apply when the job was announced, and selected him in October 1990. In February 1991, the Commandant of Washington Naval District initiated a request to waive the hiring freeze in order to place Cruse in this position, and a final decision on the waiver was still pending when the respondent terminated Cruse on April 12, 1991.

Two days before Nielson terminated him, Cruse was interviewed by investigators from the Navy's Inspector General's office concerning his knowledge of alleged contract improprieties. Specifically, the IG was investigating whether the former Commandant and the Chief of Staff had conspired to execute an illegal contract with the principal officer of a provider of Total Quality Management Training. Pet. ex. 9, at 2. The investigation was triggered by an anonymous complainant who alleged that: the training had violated a requirement for competitive bids; documents authorizing the training were not completed before it started; and the Chief of Staff prepared “false contract” documents, with the Commandant’s full permission, in an attempt to cover up these improprieties. *Id.* at 2. Although Nielson was not a direct target of the IG

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[1] References to the "RD" in this decision are to the Recommended Decision on remand that was issued on March 31, 1995. The docket number shown on the remand RD was incorrect and should have been CB-1215-93-0014-B-1.

investigation, the first round of the training had been conducted for employees in his office. Additionally, when it became evident that there were irregularities in the contracting process, Nielson attempted to obtain information for the Chief of Staff about what had happened. For example, he instructed Cruse to construct a "timeline" that would show what "went wrong in the document procedure." Transcript (Tr.) I at 108-09. Nielson testified that Cruse never produced the document for him. *Id*. at 109.

Cruse testified that Nielson had reason to be concerned about the IG investigation because Nielson had earlier asked him to "backdate" documents to make it appear as if the proper procedures had been followed to contract for the training. Cruse had refused to do so. Tr. I at 25-26. Cruse and Nielson were both interviewed by the IG. Cruse's interview with the IG lasted four hours, and he informed Nielson after the interview that he had provided information to the IG about the training contract. Tr. I at 25 (Cruse's testimony); Pet. ex. 10, at 17 (Nielson's deposition). Following its investigation, the IG issued a report that found that Navy guidelines had been violated because the training was conducted before the documents authorizing it were completed. Pet. Ex. 9, at 3, para. c.(1). The report stated that Nielson admitted to IG investigators that he had "postdated" his signature on DD Form 1556, the document that authorized the training, in an attempt to make it appear as if the training had been authorized in a timely manner. *Id.* at 4, para. c. (1)(c). Nielson was the only employee involved in the contract matter whom the IG report singled out for possible "administrative or disciplinary action." *Id*. at 5, para. 8.[2] At the MSPB hearing, the SC questioned Nielson on whether he had ever "backdated" any contract documents, but did not ask him if he had ever "postdated" any documents. Tr. I at 112. Nielson denied "backdating" any documents. *Id*.

As administrative officer, Cruse was responsible for monitoring his office's compliance with the agency's performance appraisal review system (PARS). This included reminding supervisors to timely complete performance standards and ratings, reviewing these documents, and collecting them for submission to the personnel office. *Id.* at 28, 84-85, 88. On April 11, 1991, one day after Cruse informed Nielson of his interview with the IG, Nielson signed a performance appraisal for Cruse that rated him as "fully successful," a lower rating than he had received the year before, based on the same performance standards. Nielson signed the rating as the immediate supervisor and did not include any comments that explained the lowered rating.[3] On April 12, 1991, Nielson gave Cruse the rating and instructed him to "fill it out." *Id.* at 26.

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[2] As of the date the record closed, there was no evidence that the agency had taken any disciplinary action against Nielson for his action of "postdating" the contract document.

[3] There appeared to be some confusion or disagreement concerning who was Cruse's immediate supervisor for his 1990-91 rating. Nielson's deputy testified that he could not rate Cruse because Cruse was working for Nielson. Tr. I 88-89. Patricia Young, Cruse's immediate supervisor, testified that she had no involvement in the rating

The manner in which Nielson completed the rating violated the agency's guidelines for its performance appraisal review system (PARS) in several respects. The PARS guidelines required that supervisors provide employees with their performance standards within 30 days of the beginning of the rating period, that employees receive a midyear progress review, and that final ratings "may not be communicated to employees prior to approval by the final reviewer." Pet. ex. 6, at 9, 17. Nielson had not obtained the required second-level review before he handed Cruse the rating, nor had he complied with the other procedures noted above. *See* Pet. ex. 5. The agency's PARS guidelines provided that the failure to inform employees of critical elements and standards within the required time frame is grievable.

After Nielson gave him the rating, Cruse advised his immediate supervisor, Patricia Young, that he was going to the CCPO (Consolidated Civilian Personnel Office) to discuss the matter. Young told him she would have to tell Nielson, and Cruse told her that he would tell him. On his way out of the building, Cruse saw Nielson, intercepted him, and informed him that he "was not satisfied with the process that had been performed here" and that he wanted to go to Personnel. Tr. I at 30. Nielson instructed him to step into a conference room and then told him that he was temporary and could be terminated. *Id*. Cruse testified that he believed that Nelson was trying to intimidate him because he wanted to go to the personnel office, and he responded, "Well, sir, if that's your choice, then fire me. I'm going to Personnel on this issue." *Id*. At that point Nielson told Cruse that he was terminated.

Nielson gave different versions of the termination incident in his deposition SC investigators and in his testimony at the Board hearing. For example, he stated in his deposition that Cruse told him he was going to the personnel office to file a complaint, but he denied in his hearing testimony being told by Cruse why the latter was going to Personnel. *Compare* Pet. ex. 10, at 38 *with* Tr. I at 113. Nielson eventually adopted his deposition testimony about the conversation with Cruse that triggered his termination, stating that it was closer to the time that the events occurred. Tr. I at 136-37. In his SC deposition, Nielson testified that: (1) when Cruse told him he was going to the personnel office to file a complaint, he responded, "Whatever turns you on, Steve"; (2) Cruse did not ask permission to go, but informed him he was going; (3) he was at his "wit's end" with Cruse; (4) he did not recall using the word "termination," but he had reminded Cruse that he was a temporary employee; and (5) this reminder was prompted by Cruse's past performance and demeanor. Pet. ex. 10, at 38-42.

At the Board hearing, Nielson testified that he terminated Cruse because he had become disruptive, there were complaints from other supervisors about him interfering in their work, and because Cruse had high moral standards for other people but not for himself. Nielson stated that he had counseled Cruse to stop looking through other employees' wastebaskets, to cease conducting private business on the job and to stop taking a lap top computer home at night. *Id.* at 22-24, 55. Cruse admitted that he occasionally checked other employees' trash cans to see if supplies were being wasted and to identify instances where employees were not performing their jobs. Tr. I at 53-

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because Cruse had only been working for her for about a month when the rating was due. Tr. II at 7-8, 19-20.

54. A co-worker testified of her irritation when he confronted her with file folders that she had thrown away. *Id.* at 93-94. Neilson testified that he "cautioned" Cruse about these wastebasket searches. Cruse's immediate supervisor, Patricia Young, testified that she had observed the relationship between Nielson and Cruse deteriorate during the months preceding Cruse's April 1991 termination. Tr. II 23-24.

Nielson also testified that "the straw that broke the camel's back" was an incident that occurred on the morning that Cruse was terminated where he concluded that Cruse was verbally abusive to another employee, Ms. Hardy. Tr. III at 6-7. According to Nielson, Cruse insulted her so badly that she left work and didn't come back until the next day. Pet. ex. 10, at 25.

B. The Recommended Decision and the SC's Exceptions.

The ALJ correctly found that Cruse's actions of announcing his intent to go to Personnel regarding the handling of his performance evaluation and being interviewed by the IG constituted protected activity under 5 U.S.C. § 2302(b)(9)(A) and (C). RD at 17. The ALJ also properly determined that Nielson had the requisite authority to take personnel actions against Cruse, and he found no evidentiary support for Nielson's contention that Cruse had resigned voluntarily. RD at 17-18. Mr. Nielson has not filed exceptions regarding those findings, and we find no basis to question them.

The ALJ dismissed the SC's complaint in its entirety, however, finding that the SC had failed to prove that Cruse's protected activities were a significant factor in Nielson's decision to terminate him. RD at 19, 22; *see Special Counsel v. Santella*, 65 M.S.P.R. 452, 456 (1994) (in a disciplinary action, the Special Counsel must establish by a preponderance of the evidence that the protected activity was a significant factor in the respondent's personnel decision). In its exceptions, the SC contends that the ALJ (1) erred by finding that Cruse's cooperation with the IG was not a significant factor in Nielson's decision to terminate his appointment; (2) erred by determining that Cruse's protected grievance activity was not a significant factor in the adverse personnel action; and (3) showed bias against Cruse by basing his decision on irrelevant facts and unsubstantiated allegations. SC exceptions, 3, 7, and 14. For the reasons given below, we conclude that (1) the SC established that the respondent terminated Cruse's appointment in violation of 5 U.S.C. § 2302(b)(9) when Cruse announced his intention to grieve the handling of his performance rating; (2) the SC failed to prove that the respondent terminated Cruse because he cooperated with the IG; and (3) a 90-day suspension is the appropriate penalty for the sustained charge.

## ANALYSIS

A. The statute and burden of proof.

The respondent was charged with violating 5 U.S.C. § 2302

(b)(9)(A) and (C), which provides that:

Any employee who has the authority to take ... any personnel action, shall not, with respect to such authority --

(9) take ... any personnel action against any employee or applicant for employment because of --

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

* * *

(C) cooperating with or disclosing information to the Inspector General of an agency.

If the Board finds that an employee has committed a prohibited personnel practice, as charged by the SC, it may order disciplinary action, such as a removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or a civil penalty not to exceed $1,000. 5 U.S.C. § 1215(a)(3). To impose disciplinary action under section 1215(a)(3), the Board must find that (1) the respondent had the authority to take or recommend the personnel action at issue against the employee; (2) the aggrieved employee engaged in protected activity; (3) the respondent took or failed to take the personnel action because of the employee's protected activity; and (4) the protected activity was a significant factor in the adverse personnel action. *See Eidmann v. Merit Systems Protection Board*, 976 F.2d 1400, 1407 (Fed. Cir. 1992), *aff'g on other grounds*, *Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991). A significant factor is one that "played an important role in the allegedly retaliatory action," not a factor that was "tangentially related" to the protected conduct. *Special Counsel v. Santella*, 65 M.S.P.R. 452, 458 (1994).

In *Santella* the Board explained the relationship between the significant factor test and the *Mt. Healthy* defense in Special Counsel disciplinary actions. 65 M.S.P.R. at 456-57. In *Mt. Healthy*, the Supreme Court ruled that the plaintiff, a discharged school teacher, would not be entitled to reinstatement for his employer's violation of his protected First Amendment disclosures if the employer could establish that it would have terminated him in the absence of his protected conduct. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285 (1977). *Santella* overruled prior Board precedent that had held that the *Mount Healthy* defense was not applicable in cases where the Special Counsel proposed to discipline employees for retaliation based on other employees' protected conduct. 65 M.S.P.R. at 460 n.5. While *Santella* did not find that respondents could rely on the *Mount Healthy* defense to defeat a disciplinary action, it nevertheless held that this defense and the significant factor test were interrelated. Specifically, the Board found that if the Special Counsel was able to establish that an employee's protected conduct played a significant role in the adverse personnel action taken by the respondent, the respondent "will necessarily be unable to present a successful *Mount Healthy* defense." *Id*. at 458. On this basis, the Board held that "the 'significant factor' test therefore subsumes the *Mount Healthy* defense and makes a separate analysis of evidence presented in connection with such a defense unnecessary." *Id*. at 459.

B. <u>The SC established that Mr. Cruse's action of announcing his intention to grieve the handling of his performance rating was a significant factor in the respondent's decision to terminate him</u>.

The ALJ held that Nielson had ample reason to be disenchanted with Cruse's value to his organization and that Cruse's announced intention to file a grievance "was, at best, merely tangentially related to Nielson's decision to terminate Cruse." RD at 22. On this basis, the ALJ found that the SC had failed to prove that Cruse's protected activity was a significant factor in Nielson's termination decision. *Id*. In analyzing the evidence concerning this charge, the ALJ stated:

I interpret respondent's position as being that he had become disenchanted with Cruse's performance because of conduct such as going through other employee's wastebaskets, having confrontations with other employees, conducting personal business on government time, taking a computer home, failing to insure that performance ratings for the office were filed within the deadline, i.e., February 28, his having become generally "disruptive" and "exceedingly arrogant."

RD at 19-20.

Although the ALJ did not make a specific finding that Nielson was a credible witness, he found that the reasons that Nielson gave for terminating Cruse were corroborated by the record to a significant degree and that any inconsistencies in his testimony were minor. RD at 20. We disagree.

Before analyzing Nielson's proffered reasons for terminating Cruse in more detail, we find that these reasons are significantly undermined by three defects that are common to all of them. First, Nielson did not mention <u>any</u> of these reasons to the personnel office, to his deputy, or to Cruse's immediate supervisor when he told them about Cruse's termination. Tr. I at 83-84; Tr. II at 15. At the time he fired Cruse, the only reason Nielson mentioned to any of these officials was that the termination was due to a dispute with Cruse over the performance rating system. Tr. I at 83-84 (Anderson's testimony). This supports the SC's contention that Nielson was angered by Cruse's announcement that he was going to grieve the handling of his performance rating and fired him when Cruse would not back down from his plan to go to the personnel office. Testimony about Nielson's conversation with personnel officials shortly after he terminated Cruse further bolsters this finding. When a supervisory personnel official, Mr. Randall, sought more information from Nielson about the circumstances surrounding Cruse's termination, Nielson again failed to mention any aspect of Cruse's performance or conduct as a reason for the firing. *See* Tr. I at 63. When Randall told Nielson that the termination was not being handled properly, Nielson responded by saying that "When I want your F---ing advice, I'll ask for it." Tr. I at 64. Again, Nielson's reaction belies his claim that he fired Cruse for legitimate reasons unrelated to Cruse's protected conduct.

A second factor that significantly undermines the reasons that Nielson proffered for Cruse's termination is Nielson's testimony that Cruse's performance and attitude were so bad that he decided around December 1990 that he needed to terminate him. This testimony cannot withstand scrutiny. In October 1990, Nielson had selected Cruse for a newly created position in his office. In February 1991, Nielson initiated a request to waive a Navy-wide hiring freeze to place Cruse in this position. The waiver request stated that Cruse had performed his duties as an administrative officer for the past fifteen months "in an exemplary manner," and praised his "professional demeanor."

Pet. ex. 8, at 20. Nielson never attempted to cancel Cruse's selection or withdraw the waiver request. Third, although the performance rating that Nielson gave Cruse the day he terminated him was lower than the year before (fully successful versus exceeds fully successful), it was devoid of any reference to any deficiencies in Cruse's conduct, attitude, or performance. Pet. ex. 5.[4]

In light of these facts, we cannot agree with the ALJ's finding that the inconsistencies in Nielson's testimony were minor. We need not defer to this finding because Nielson's version of why he fired Cruse is riddled with significant inconsistencies and is contrary to the great weight of the evidence. *See Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 557 (1994) (Board need not defer to an administrative judge's findings where they are contrary to the weight of the evidence or are not based on the witnesses' demeanor), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 728 (1996). We now turn to a more detailed analysis of the reasons proffered by Nielson for terminating Cruse.

1. The trash can searches and computer use.

Cruse testified that he occasionally checked other employees' trash cans to see if supplies were being wasted and to identify instances where employees were not performing their jobs. Tr. I at 53-57. He stated that he believed his role as administrative officer was to prevent waste, and he provided information to Nielson on what he had found. *Id*. at 54, 57.[5] Cruse at one time worked for the Naval Intelligence Service and testified that Nielson liked to reference his NIS background to intimidate other employees. *Id*. at 51-52. Nielson did not contradict this testimony. The ALJ found that Cruse's wastebasket searches were improper and were a legitimate reason that supported Nielson's termination of Cruse. RD at 21. In a similar vein, the ALJ found that Nielson had reason to be "disenchanted" with Cruse's performance because

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[4] Although the SC did not charge Nielson with committing a prohibited personnel practice by lowering Cruse's performance rating, that rating is part of the background of this case. Nielson testified that he was increasingly dissatisfied with Cruse's performance and attitude in the months before he terminated him. Tr. I 110-11. While Cruse's first level supervisor testified that she had no problems working with Cruse, she was aware that the relationship between Cruse and Nielson had already deteriorated before Cruse was fired. Tr. II, 17 23-24. Thus, it appears that the dispute between Nielson and Cruse regarding the handling of Cruse's rating, when combined with their already strained relationship, may have provided the "kindling" for Nielson's sudden and rather hotheaded decision to terminate Cruse.

[5] Nielson and Cruse gave conflicting testimony on whether Nielson told Cruse to stop these searches, which the ALJ did not resolve. Our determination of this issue does not turn on credibility, however, and we need not resolve this conflict.

Nielson had, on one occasion, counseled him not to use a government lap top computer for his own personal use.[6] RD at 19; Pet. ex. 10, at 55.

The ALJ erred in his analysis of these alleged incidents, however. The issue is not whether Cruse was the ideal employee or whether Nielson could have relied on these incidents to terminate him. Rather, the issue is whether he actually did rely on these incidents to terminate Cruse independent of the latter's protected conduct. *See Berube v. General Services Administration*, 820 F.2d 396, 399 (Fed. Cir. 1987) (Board was required to determine whether agency would have removed employee based on factors independent of his protected conduct). For the reasons we previously discussed and the additional reasons set forth below, we find that the reasons proffered by Nielson for terminating Cruse were not legitimate, nonretaliatory reasons and that the SC established that Cruse's protected conduct was a significant factor in Nielson's personnel decision.

2. Cruse's relationships with other employees and his "confrontational" attitude.

We find that the ALJ also erred in crediting Nielson's claims that he fired Cruse because he had confrontations with other employees and had become "disruptive" and "exceedingly arrogant." RD at 19-20. For example, Nielson contended that, on the morning of the day he fired Cruse, Cruse had a confrontation with another employee, Ms. Hardy, and upset her so badly that she left work and did not return until the next day. Pet. ex. 10, at 25. Nielson described this incident, which he did not witness, as "the straw that broke the camel's back." Tr. III at 6. Nielson's account of the incident, however, was soundly refuted by the alleged victim of Cruse's abuse, Ms. Hardy, and by her supervisor. Hardy testified that Cruse was not abusive towards her when he told her to correct her work, that she was not upset, and that she left work early on previously scheduled leave. Tr. I. at 98-99; *see also id*. at 88 (Anderson's testimony).

Nielson's version of an incident involving Cruse and Ms. Jackson that occurred more than a year before Cruse's termination is also soundly refuted by the evidence. Although the testimony shows that both Cruse and Jackson behaved badly towards each other on this occasion, nothing supported Nielson's claim that Cruse had used racial and obscene language with Jackson. Ms. Jackson testified that she and Cruse had a disagreement that led to Cruse calling her "stupid," which in turn caused her to lose her temper and call him "a profanity name." Tr. I at 92-93. Although Cruse admitted that Nielson had counseled him to treat employees with respect, the evidence showed that his occasional disputes with other employees were not out of the ordinary for his office. Patricia Young, Cruse's immediate supervisor, testified that the office environment was often characterized by frequent disagreements, bickering, and use of offensive language. Tr. II at 14.

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[6] Nielson contended that he had documented numerous occasions where he had counseled Cruse and stated that he would submit this documentation for the record. Pet. ex. 10, at 22-23, 53. Nielson failed to submit any such documentation, however.

The fact that Nielson's version of the incidents between Cruse and other employees is soundly refuted by the record severely undermines the ALJ's conclusion that these incidents were the real basis for Cruse's termination, rather than his protected conduct of announcing that he was going to grieve his rating. Nielson's claim that he fired Cruse based on incidents unrelated to this protected conduct is also soundly refuted by the other factors we noted earlier, i.e., Nielson never mentioned these incidents when he reported Cruse's termination to various officials, never mentioned them in Cruse's performance appraisal, and, as late as two months before the termination, was attempting to place Cruse in a permanent position.

In ruling that the SC had not met its burden of proving that Cruse's protected conduct was a significant factor that led to his termination, the ALJ also relied on Nielson's testimony that one of the reasons that he fired Cruse was the confrontational attitude Cruse displayed when he told Nielson that he was going to consult with the personnel office about his performance evaluation and his action of challenging Nielson to fire him. RD at 22. We agree that Cruse exhibited a confrontational attitude towards Nielson immediately before he was fired. Specifically, Cruse rejected his immediate supervisor's offer to inform Nielson that he was going to the personnel office to file a complaint about his rating. Tr. II at 8. He insisted on informing Nielson of this fact himself, and during the confrontation that followed, he essentially dared Nielson to fire him. Tr. I at 30. As a matter of law, however, we cannot agree with the ALJ's implicit legal conclusion, *see* RD at 21-22, that the confrontational attitude that Cruse displayed when he exercised his rights under section 2302(b)(9) was a legitimate, nonretaliatory reason that justified Nielson's action of firing him and stripped Cruse of protection under 2302(b)(9). The Board has previously recognized that:

> only in the most extraordinary case will statements made in grievances, or the filing of grievances, be found to constitute a proper basis for disciplining an employee.... [T]he case law in this area is clear that, in [the] absence of gross insubordination or threats of physical harm, an employee may generally not be discharged for rude or impertinent conduct in the course of presenting grievances.

*Social Security Administration v. Burris*, 39 M.S.P.R. 51, 57-58 (1988) (citation and quotes omitted), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (Table), *cert. denied*, 493 U.S. 855 (1989).

Although Cruse's conduct was confrontational, it was not the type of abusive or disruptive behavior that falls outside the protection of section 2302(b)(9). *See Burris*, 39 M.S.P.R. at 59 (agency had good cause to remove administrative law judge who used the grievance system as a forum for hurling invectives at his supervisors and management officials, repeatedly insulting their integrity, intelligence, and character); *Farris v. U.S. Postal Service*, 14 M.S.P.R. 568, 571 (1983) (finding unprotected the following conduct which occurred during a grievance meeting: appellant's actions of calling a management official a "pompous ass"; telling a management official he would "ruin" him and that he could knock him to the ground and stomp his teeth out, but would not do so). Thus, we find that Cruse's confrontational behavior towards the respondent, which occurred when Cruse announced his intent to grieve the handling of his performance evaluation, did not strip him of protection under section 2302(b)(9) or constitute a legitimate, nonretaliatory reason for Nielson's action of firing him.

3. Cruse's alleged failure to ensure that the office performance standards and ratings were timely completed.

The ALJ's finding, RD at 19-20, that Nielson had legitimate reasons to be disenchanted with Cruse because he failed to ensure that the performance standards and ratings for the office were completed on time is contrary to the weight of the evidence. This finding must therefore be rejected.

It is true that as administrative officer, Cruse was responsible for monitoring his office's compliance with the agency's performance appraisal review system (PARS). This included reminding supervisors to complete performance standards and ratings in a timely manner, reviewing these documents, and collecting them for submission to the personnel office. Tr. I 28, 84-85, 88. However, Cruse had no authority over Nielson or any other supervisor. Nielson's deputy corroborated Cruse's testimony that on several occasions at staff meetings, Cruse raised the issue of the need for supervisors to complete performance standards in a timely manner. *Id.* at 84-85. Cruse also complained that his own performance standards had not been put in place. *Id*. As we noted in footnote 3, there apparently was some confusion or disagreement concerning who was Cruse's immediate supervisor for his 1990-91 rating. Nielson's deputy testified that he could not rate Cruse because Cruse was working for Nielson. *Id.* at 88-89. Patricia Young, Cruse's immediate supervisor, testified that she had no involvement in the rating because Cruse had only been working for her for about a month when the rating was due. Tr. II at 7-8, 19-20. Certainly, Cruse cannot be held accountable for completing his own performance standards, mid-year review, and rating. This was the responsibility of his first and second-level supervisors (Anderson, Young, and Nielson), according to the agency's own guidelines. Pet. ex. 6, at 8-9.

C. The SC did not establish that Mr. Cruse's action of giving information to the Inspector General was a significant factor in the respondent's decision to terminate him.

The ALJ dismissed the charge that Mr. Cruse's disclosures to the IG were a significant factor in the respondent's decision to terminate him. He found there was a lack of evidence concerning the respondent's knowledge of the specific information that Cruse disclosed to the IG, i.e., the respondent did not appear to know what Mr. Cruse told the investigators. RD 18-19. We agree with the SC's exceptions that the ALJ applied an incorrect legal standard in evaluating this element of the case. Nothing in the statute imposes a requirement that the official who takes an adverse personnel action against any employee who cooperates with an IG have knowledge of the specific information that the employee provided. All that is required under the statute is that the adverse personnel action be taken "because of" the protected conduct. *See* 5 U.S.C. § 2302(b)(9)(c). *See also Eidmann*, 976 F.2d at 1407.

However, having analyzed the evidence and arguments presented by the SC, the Board is also compelled to find, for different reasons, that the SC did not establish that Nielson terminated Cruse because of his cooperation with the IG. *Santella*, 65 M.S.P.R. at 456 (in a disciplinary action charging reprisal for protected activities, the Special Counsel must establish by a preponderance of the evidence that the protected activity was a significant factor in the respondent's personnel decision). The SC's argument

that there was a causal connection is dependent in large measure on an interpretation of the IG's report that is at odds with the actual conclusions of the report.

The SC's assertion of a causal connection is based on its linking of several propositions, including Cruse's testimony that Nielson had reason to be concerned about Cruse's interview with the IG because Nielson had earlier instructed him to "backdate" contract documents and he had refused, Tr. I at 25, 32-33; Nielson's denial at the Board hearing that he had ever "backdated" contract documents, *id*. at 112; and, according to the SC, a finding by the IG that Nielson had in fact admitted that he had "backdated" a contract document. SC exceptions, at 4-5. On this basis, the SC contends that Nielson's denial concerning "backdating" documents was untruthful, shows that he was very concerned about Cruse's interview with the IG, and therefore had a motive to terminate Cruse because of his protected activity. *Id*. at 4-7.

We do not find that the record supports the SC's use of the IG's report to show that Nielson "backdated" a contract document, or that Nielson was untruthful to the IG on the same subject. Rather, the report states that Nielson admitted that he "postdated" his signature on a DD Form 1556, the document that authorized the training. Pet. ex. 9, at 4, para. c.(1)(c). In light of the IG's finding that Nielson admitted that he "postdated" a document, we cannot agree with the SC's contention that the IG's findings show that Nielson was untruthful when he denied at the Board hearing that he had ever "backdated" contract documents.[7]

Since a key element of the SC's case is based on an inaccurate discussion of the IG report, and the SC failed to prove a critical factual element of its theory of the causal connection between Cruse's cooperation with the IG and his termination, we find that this count of the SC's charge that Nielson violated section 2302(b)(9) cannot be sustained. *See Jacobs v. Department of Justice*, 35 F.3d 1543, 1546-47 (Fed. Cir. 1994)(when the agency's charge was based on a chain of propositions and it failed to prove each by a preponderance of the evidence, its charge cannot be sustained).

In addition, it would appear that the SC failed to utilize any available opportunity to clarify the confusion or conflict between its contention that Nielson had "backdated" a contract document and the IG's finding that he admitted to "postdating" a document. The SC could have attempted to explain why Nielson's admission of "postdating" may have provided him with a motive to terminate Cruse regardless of whether Nielson's specific misconduct actually involved "postdating" or "backdating" a contract document. But the Special Counsel never asserted this theory at any point in these proceedings. Rather, the SC's assertion of a causal connection was consistently based on its claim that Nielson had "backdated" contract documents. *See* Record, vol. 1, tab 5, SC's

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[7] The difference between "backdating" and "postdating" is not a minor semantic distinction. These terms are antonyms. "Backdating" means "dating a document *prior* to the date it was prepared or drawn (backdating a check)." *West's Legal Thesaurus/Dictionary* 78 (Special Deluxe ed. 1986)(emphasis supplied). "Postdating" means "to date an instrument at a time *later* than it was actually made." *Id*. at 587 (emphasis supplied).

amended complaint, at 2, para. 5; Tr. I at 112 (cross-examination of Nielson); and Record, vol. 2, tab 12, SC's posthearing brief, at 31.

We cannot unilaterally develop other theories which were never advanced by the SC to explain this conflict in the evidence. To do so would violate the respondent's fundamental due process rights to notice of the nature of the charges against him. Although a complaint in a disciplinary action need not state every legal theory on which the SC asserts liability, it must provide the respondent with sufficient notice of the SC's claims in order to prepare a defense. *Special Counsel v. Starrett*, 28 M.S.P.R. 60, 73 (1985), *rev'd on other grounds,* 792 F.2d 1246 (4th Cir. 1986). *See also Beardsley v. Department of Defense*, 55 M.S.P.R. 504, 509 (1992)("The Board has consistently held that a party must know of the claims with which he is being charged so that he may adequately prepare and present a defense...."), *aff'd*, 5 F.3d 1504 (1993) (Table). Hence, we cannot construct new theories that might support a causal connection between Cruse's cooperation with the IG and his termination when those theories are fundamentally inconsistent with the factual claims asserted by the SC throughout this proceeding.

## THE PENALTY

In determining the appropriate penalty to impose in Special Counsel disciplinary actions, the Board applies *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). *Special Counsel v. Hathaway,* 49 M.S.P.R. *595,* 612 (1991), *aff'd,* 981 F.2d 1237 (Fed. Cir. 1992). *Douglas* describes a number of factors that may be considered in setting a penalty, while noting that not all factors will be pertinent in every case. 5 M.S.P.R. at 305-06. In this case, we find that the following factors warrant discussion: the nature and seriousness of the respondent's offense, and his past work record.

As we have previously recognized, retaliating against another employee for protected activities is a very serious offense. *Hathaway*, 49 M.S.P.R. at 598; *Special Counsel v. Mongan*, 33 M.S.P.R. 392, 398 (1987). In *Hathaway*, we found that the respondent retaliated against another employee for protected activities when he threatened to give the employee an unsatisfactory performance rating and to remove him, and we imposed a 30-day suspension. In *Mongan*, we imposed a 60-day suspension for the respondent's violation of failing to promote another employee because of her protected disclosures. Here, the respondent's action of terminating Cruse was more serious and punitive than the personnel actions at issue in *Hathaway* and *Mongan.* On the other hand, the circumstances present here warrant a less severe penalty than the two-grade demotion that the Board imposed in *Eidmann*. There, we found that the seriousness of Mr. Eidmann's offense (recommending that a probationary employee be terminated because of his protected conduct) was aggravated by the fact that the respondent ignored the well-founded objections of the employee's supervisors who stated that the employee's conduct and performance were satisfactory. 49 M.S.P.R. at 628. This aggravating factor is not present here.

The respondent's long record of government service (39 years at the time of the Board hearing) and clean disciplinary record are mitigating factors.[8] *Douglas*, 5 M.S.P.R. at 305. Based on a consideration of all the relevant factors, as well as a comparison of this case with *Hathaway*, *Eidmann*, and *Mongan*, we find that the respondent's violation warrants a more severe sanction than the 30-day and 60-day suspensions imposed in *Hathaway* and *Mongan*, respectively, but a less severe penalty than the two-grade demotion imposed in *Eidmann*. We conclude that a 90-day suspension is the appropriate penalty for the respondent's offense.

## ORDER

Accordingly, it is ORDERED that the respondent be SUSPENDED for 90 days. Within 60 days of the date of this order, the Special Counsel shall submit proof of compliance with respect to the suspension of respondent.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

## NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

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[8] The respondent provided deposition testimony that the only prior disciplinary action taken against him had been reversed on judicial review. Pet. ex. 10, at 4-5, 11-12. The SC did not rebut this testimony.