UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 1

Docket No. CH-1221-08-0352-B-2

Anil N. Parikh,

Appellant,

v.

Department of Veterans Affairs,

Agency.

January 3, 2011

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Lisa Yee, Esquire, Chicago, Illinois, for the agency.

Timothy B. Morgan, Esquire, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the remand initial decision that denied his request for corrective action in his individual right of action (IRA) appeal. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and GRANT the appellant's request for corrective action.

BACKGROUND

¶2 The appellant was a GS-15 Staff Physician for the agency, employed at the agency's Jesse Brown Veterans Administration Medical Center (VAMC). Initial Appeal File (IAF), Tab 1, Subtab 1 at 1. Effective October 19, 2007, the agency removed the appellant based on one charge of "unauthorized release and disclosure of private and protected information." IAF, Tab 1, Subtab 2 at 1, 5. After exhausting his remedies with the Office of Special Counsel, the appellant filed an IRA appeal, alleging that he made nine disclosures protected under the Whistleblower Protection Act (WPA), and that the agency removed him based on those protected disclosures. IAF, Tab 1, Subtab 5, Tab 13 at 8-20.

¶3 The administrative judge issued an initial decision, finding that the appellant failed to establish Board jurisdiction over his appeal because he failed to make a nonfrivolous allegation that any of his disclosures were protected under the WPA. IAF, Tab 21 at 2, 4-13. The appellant filed a petition for review, and the Board vacated the initial decision and remanded the appeal for further adjudication of the merits. *Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295, ¶¶ 1, 26-27 (2008). The Board found that the appellant made nonfrivolous allegations that all of his disclosures, except for disclosures 5 and 6, were protected under the WPA, *id.*, ¶¶ 13-26, and that the appellant had established the remainder of the jurisdictional elements for an IRA appeal, *id.*, ¶ 13.

¶4 On remand, the administrative judge allowed the parties to engage in further discovery, *Parikh v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-08-0352-B-1, Remand File (RF 1), Tab 10, Tab 30 at 1-2; *Parikh v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-08-0352-B-2, Remand File (RF 2), Tab 2 at 2-3, and the parties submitted additional evidence and argument for the record, RF 1, Tabs 5, 6, 16, 17, 18, 31; RF 2, Tabs 3, 14, 15, 18, 19. After conducting a hearing, the administrative judge issued an initial decision, denying the appellant's request for corrective action on the merits. RF

2, Tab 22, Initial Decision (ID) at 2, 23. The administrative judge found that the appellant failed to establish that any of his disclosures were protected under the WPA because he failed to prove by preponderant evidence that he reasonably believed that the disclosures evidenced any type of wrongdoing listed under 5 U.S.C. § 2302(b)(8). ID at 5-23.

¶5 The appellant has filed a petition for review, arguing that the administrative judge committed several procedural and adjudicatory errors. *Parikh v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-08-0352-B-2, Petition for Review File (PFR File), Tab 3 at 7-26. In particular, he argues that the administrative judge erred in finding that none of his disclosures were protected. *Id*. at 8, 18-23. He also argues that, because the disclosures cited in the notice of proposed removal were protected, the agency's action was "retaliatory per se." *Id*. at 8, 23-26. The agency has filed a response, addressing the appellant's arguments on review, and arguing that the petition for review should be denied for failure to meet the Board's review criteria.[1] PFR File, Tab 6 at 6-29.

ANALYSIS

¶6 In determining whether reprisal for whistleblowing activities occurred, an inquiry must be made into whether: The appellant made a disclosure protected

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[1] The appellant has also filed a motion for leave to file a reply to the agency's response to his petition for review and to strike certain portions of the agency's response. PFR File, Tab 7 at 4-9. The agency has filed an opposition to the appellant's motion. PFR File, Tab 9 at 4-9. We find that the appellant's proffered reply to the agency's response is not based on new and material evidence but is merely an attempt to rebut the allegations and arguments in the agency's response. PFR File, Tab 7 at 4-9; *see Sherrell v. Department of the Air Force*, 47 M.S.P.R. 534, 539 (1991), *aff'd*, 956 F.2d 1174 (Fed. Cir. 1992) (Table). Once the record on review closes, the Board will not accept additional evidence or argument absent a showing that it was not readily available before the record closed. 5 C.F.R. § 1201.114(i). We find that the appellant has not demonstrated the existence of such circumstances here, and we therefore DENY the appellant's motion.

under 5 U.S.C. § 2302(b)(8); the disclosure was a contributing factor in the agency's personnel action; and the agency can prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Morgan v. Department of Energy*, 424 F.3d 1271, 1273 (Fed. Cir. 2005); *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, ¶ 10 (2010).

¶7 Although the appellant has identified a large number of allegedly protected disclosures that he claims contributed to his removal, IAF, Tab 13 at 8-13, 16-20, the notice of proposed removal itself cited only a limited number of those disclosures, IAF, Tab 1, Subtab 2 at 1-2. Nearly all of the hearing testimony was directed toward the disclosures specifically cited in the notice of proposed removal, and the parties' most salient arguments on petition for review pertain to those disclosures in particular. PFR File, Tab 3 at 23-26, Tab 6 at 23-29. We agree with the parties that the essence of this case is whether the disclosures cited in the notice of proposed removal were protected, and, for the reasons explained below, we find that this case can be resolved without a detailed analysis of each and every one of the appellant's disclosures. The Board may resolve the merits issues in an IRA appeal in any order it deems most efficient, *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 15 (2008); *see Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 20 n.9 (2002), and in this case, we find it most efficient to begin with the disclosures named in the notice of proposed removal.

¶8 The proposing official, Medical Service Chief Dr. Subhash Kukreja, charged the appellant with one count of "unauthorized release and disclosure of private and protected information," supported by six specifications. IAF, Tab 1, Subtab 2 at 1-2, 4. Each specification described personal patient information that the appellant disclosed and identified the individuals to whom he disclosed it. *Id.* at 1-2. Among the disclosures identified in the notice of proposed removal were letters dated January 6, 2007 (disclosure 8), and March 12, 2007 (disclosure 9). IAF, Tab 1, Subtab 2 at 1-2, Tab 6, Subtabs 4D, 4E.

¶9 In specification (v), the agency alleged that the appellant sent copies of disclosure 8 to Senator Barack Obama and Congressman Luis Gutierrez, and that the appellant's disclosure contained "the full names and diagnoses of three (3) patients." IAF, Tab 1, Subtab 2 at 2, Tab 6, Subtab 4E at 1-4. The agency alleged that there was nothing in disclosure 8 to show that the appellant was authorized to release the information, that the information had been properly requested of him, or that he advised the recipients of the need to keep the information confidential. IAF, Tab 1, Subtab 2 at 2.

¶10 In specification (vi), the agency alleged that the appellant sent copies of disclosure 9 to Senators Obama, Kahikina Akaka, and Larry Craig, and that the disclosure included "copies of the medical records for four (4) [Veterans Administration] patients," which "contained the last names and partial social security numbers of the patients, as well as the patients' medical history, evaluations, specific prescribed medications, specific conditions and diagnoses." IAF, Tab 1, Subtab 2 at 1-2, Tab 6, Subtab 4D. The agency alleged that there was nothing in disclosure 9 to show that the appellant was authorized to release the information, that the information had been properly requested of him, or that he advised the recipients of the need to keep the information confidential. IAF, Tab 1, Subtab 2 at 2.

¶11 The deciding official, James Jones, Director of the Jesse Brown VAMC, sustained the charge in its entirety and effected the appellant's removal. IAF, Tab 1, Subtab 2 at 5-6. The appellant admitted that disclosures 8 and 9 contained confidential patient information. Hearing Transcript (Tr.) at 11 (testimony of Dr. Jeffrey Ryan), 321, 642 (testimony of the appellant). He argued, however, that the agency was not permitted to discipline him for those disclosures because they were protected under the WPA. IAF, Tab 13 at 17-20, Tab 19 at 3-5; RF 1, Tab 6 at 8-10; PFR File, Tab 3 at 23-26.

Disclosure 8 meets the requirements of 5 U.S.C. § 2302(b)(8)(A)(ii).

¶12 In disclosure 8, the appellant alleged, among other things, that there are systematic problems within the Jesse Brown VAMC that have resulted in untimely and inadequate patient care. IAF, Tab 6, Subtab 4E at 1-3. The confidential patient information that the appellant included in his disclosures to Senator Obama and Congressman Gutierrez related to particular examples of alleged misdiagnoses and misdirection of patients within the hospital. *Id*. Specifically, the appellant alleged that a physician failed to diagnose a patient's rectal abscess and sent him home with hemorrhoidal medication rather than refer him for proper surgical treatment. *Id*. at 2. The appellant also alleged that two patients who should have been accepted in the emergency room were improperly directed to the urgent care area, resulting in unjustifiable delays in their treatment, and that one patient who should have been admitted to the intensive care unit was improperly placed on the general medical floor, resulting in the eventual deterioration of his condition to the point where he required intubation. *Id*. at 2-3. The appellant testified that he made disclosure 8 out of concern for patient health and safety. Tr. at 304-05, 327.

¶13 Besides Senator Obama and Congressman Gutierrez, the appellant also sent a copy of disclosure 8 to the agency's Office of Inspector General (IG). IAF, Tab 6, Subtab 4E at 1. The IG opened a case and referred the matter to Mr. Jones for investigation. RF 1, Tab 31, Subtab 24 at 4-7. Dr. Jeffrey Ryan, Associate Chief of Staff for Jesse Brown VAMC, investigated the appellant's allegations. Tr. at 9-10, 50, 60-61, 78 (testimony of Dr. Ryan), 788 (testimony of Mr. Jones). Dr. Ryan determined that the treatment and management of the patients were appropriate in all cases. Tr. at 59-64 (testimony of Dr. Ryan). Mr. Jones relied on Dr. Ryan's assessment and drafted a response to the IG's inquiry reflecting

Dr. Ryan's findings.[2] RF 1, Tab 31, Subtab 24 at 8-9; Tr. at 60-61, 64 (testimony of Dr. Ryan), 788 (testimony of Mr. Jones). Based on Mr. Jones's response, the IG closed the case. RF 1, Tab 31, Subtab 24 at 1-3.

¶14 In determining whether a disclosure evidenced a substantial and specific danger to public health or safety, it is relevant for the Board to consider factors such as (1) the likelihood of harm resulting from the danger, (2) the imminence of the potential harm, and (3) the nature of the potential harm. *Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008). Applying the factors set forth in *Chambers*, the administrative judge found that the appellant failed to show that he reasonably believed his disclosure evidenced a substantial and specific danger to public health or safety because the danger that the appellant identified was too "remote and speculative" to fall within the purview of the WPA. ID at 16-17, 20. The administrative judge found that the appellant's concerns amounted to disagreements about patient care. ID at 16, 20.

¶15 We disagree with the administrative judge's findings, and we find that the appellant established that he reasonably believed that disclosure 8 evidenced a substantial and specific danger to public health or safety. The nature of the harm that could result from the patient care and management issues that the appellant described in his disclosure is severe. Patients could die as a result of delayed treatment, misdiagnosis, or placement in lower levels of care with less monitoring than is appropriate for their conditions. Tr. at 314, 325 (testimony of the

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[2] The appellant's allegation regarding the patient placed on the general medical floor, rather than in the intensive care unit, was the subject of a previous disclosure by the appellant to the IG. IAF, Tab 13 at 41-42. The IG opened a case and, based on a response from the Jesse Brown VAMC stating that the patient received appropriate care, closed the case on December 28, 2006 without taking action. RF 1, Tab 31, Subtab 21 at 1-2. Having already completed the complaint and investigation process for this particular allegation by the time the appellant renewed the allegation in disclosure 8, the IG and the Jesse Brown VAMC did not revisit the issue. It is unclear whether the appellant had received the IG's December 28, 2006 letter by the time he made disclosure 8 on January 6, 2007. IAF, Tab 6, Subtab 4E; RF 1, Tab 31, Subtab 21 at 2.

appellant), 234-35 (testimony of Dr. Kukreja), 486-87 (testimony of Dr. Fred Zar). In addition, the likelihood of such harm is high. The existence of different areas in the hospital providing different levels of care and monitoring, and the existence of a triage unit designed to direct patients to the appropriate areas, are reflections of how likely the harm may be. The allegedly deficient functioning of these various areas was the general subject of the appellant's disclosure. IAF, Tab 6, Subtab 4E at 2-3; *cf. Miller v. Department of Homeland Security*, 111 M.S.P.R. 312, ¶ 19 (2009) (the procedures put in place by the Transportation Security Administration to prevent the placement of explosive devices on commercial airliners were a reflection on how likely and imminent such a threat may be). When a patient requires immediate treatment or careful monitoring, harm may result directly from delays in providing such treatment and monitoring; the occurrence of harm is not dependent upon a series of unlikely events. *Cf. Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶¶ 16-17 (2004) (a security guard's disclosure that he was permitted only to load three of four possible shells into his shotgun evidenced merely a speculative danger that might occur at some point in the future). Furthermore, the potential for harm is imminent because it could occur within a matter of hours or minutes. Again, the existence of areas in the hospital, such as the emergency room, designed to give prompt treatment to patients who require it, indicate how quickly complications could develop. *See generally Chambers*, 515 F.3d at 1369 (discussing factors to consider in determining whether an alleged danger to public health or safety is "substantial and specific"). Moreover, the fact that the perceived dangers might have been limited to patients at the Jesse Brown VAMC does not prevent the dangers from being substantial and specific dangers to public health or safety. *See Wojcicki v. Department of the Air Force*, 72 M.S.P.R. 628, 634 (1996) (a danger may be substantial and specific even though the perceived danger was to a limited number of government personnel and not to the general public at large).

¶16 There is substantial evidence in the record to show that the Jesse Brown VAMC appropriately managed and treated all of the patients that the appellant mentioned in disclosure 8, and that none of the patients actually suffered harm because of the care that they received. Tr. at 61-64, 78 (testimony of Dr. Ryan), 161, 163, 234 (testimony of Dr. Kukreja), 486-87 (testimony of Dr. Zar). There is also evidence to show that some of the examples of allegedly deficient patient care and management in disclosure 8 amounted to reasonable disagreements between the appellant and other staff about the way the patients should have been handled. Tr. at 52-53, 59-60, 62-64 (testimony of Dr. Ryan), 223 (testimony of Dr. Kukreja), 467-68, 485-87, 489 (testimony of Dr. Zar).

¶17 Although this evidence might tend to show that disclosure 8 did not actually evidence a substantial and specific danger to public health or safety, we still find that the appellant reasonably believed that disclosure 8 did evidence such a danger. *See Drake v. Agency for International Development*, 543 F.3d 1377, 1382 (Fed. Cir. 2008) (to establish that a disclosure was protected, an appellant need not show that the matter disclosed actually fell within one of the categories of 5 U.S.C. § 2302(b)(8); he need only show that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by him could have reasonably concluded that it did); *Fisher*, 108 M.S.P.R. 296, ¶ 7 (same); *see also Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). For example, the appellant wrote that he instructed other doctors that a particular patient was septic and needed to be placed in intensive care, but he later discovered that the patient was not placed in the intensive care unit until after his condition had deteriorated to the point where he had to be intubated. IAF, Tab 6, Subtab 4E at 3. To a reasonable physician in the appellant's position, it could appear that the physician who decided not to admit the patient to the intensive care unit immediately exercised poor judgment and endangered the patient's life. The fact that a subsequent investigation revealed that the physician's actions were appropriate does not detract from the reasonableness of the appellant's belief at

the time he made the disclosure that triggered the investigation.[3] *See* RF 1, Tab 31, Subtab 21. Under the standard set forth in *Lachance*, 174 F.3d at 1380-81, the question is whether the appellant had "a reasonable belief" – not whether his reasonable belief was the only one possible.

¶18 As the administrative judge noted, there is also evidence in the record to show that the appellant's motivation in disclosing the alleged misdiagnosis of the patient's rectal abscess was not his concern for patient care but rather his desire to tarnish the reputation of his coworkers. ID at 19-21. Specifically, Dr. Ryan testified that the appellant threatened to make the disclosure in response to his counseling the appellant on workflow issues within the hospital.[4] Tr. at 65-66. Based on this evidence, the administrative judge found that the appellant's claim lacked credibility. ID at 20-21. Nevertheless, we find that the appellant's motivation for making the disclosure is immaterial to whether he reasonably believed that it evidenced a substantial and specific danger to public health or safety. In *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), the administrative judge found that the appellant's disclosure was not protected because his motivation for making the disclosure was to "shift blame, create discord, and evade imminent disciplinary action," rather than to redress any wrongdoing or inform the public. The court, however, agreed with the full Board in finding that the appellant's allegedly malicious motive for making the disclosure did not deprive the disclosure of its protected status. *Horton*, 66 F.3d at 282-83. The court further found that the appellant's motive was immaterial to

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[3] The investigation into this matter was actually triggered by one of the appellant's prior disclosures, and the investigation concluded shortly before the appellant made disclosure 8. IAF, Tab 6, Subtab 4E, Subtab 4G at 1; RF 1, Tab 31, Subtab 21 at 2. Nevertheless, it is unclear whether the appellant knew that the matter had been resolved, or knew what facts the investigation uncovered, at the time he made disclosure 8. *See supra*, ¶ 13 n.2.

[4] The appellant denied Dr. Ryan's allegation. Tr. at 674-75.

the credibility of his claim that he believed that the disclosure evidenced agency wrongdoing. *Id*. at 283; *see also Williams v. Department of Defense*, 46 M.S.P.R. 549, 553 n.5 (1991) (recognizing that personal motivation for making a disclosure is irrelevant to whether the disclosure is protected). Likewise, we find here that the appellant's allegedly vindictive motive for disclosing the misdiagnosis is immaterial to whether the disclosure was protected. We therefore find the appellant reasonably believed that disclosure 8 evidenced a substantial and specific danger to public health or safety, and that the disclosure meets the criteria of 5 U.S.C. § 2302(b)(8)(A)(ii).

Disclosure 9 meets the requirements of 5 U.S.C. § 2302(b)(8)(A)(ii).

¶19 In disclosure 9, the appellant alleged, among other things, that there are systematic problems within the Jesse Brown VAMC that have resulted in untimely and inadequate patient care. IAF, Tab 6, Subtab 4D at 1-3. The confidential patient information that the appellant included in his disclosures to Senators Obama, Akaka, and Craig related to particular examples of allegedly unwarranted delays in treatment and misdirection of patients within the hospital. *Id*. at 1-3, 5-38. Specifically, the appellant alleged that a patient who should have been seen immediately for bladder catheterization spent three hours being directed between different areas of the hospital, that three patients were improperly directed to areas of the hospital where they could not receive appropriate treatment, and that one patient suffering from abdominal pain and constipation got frustrated with waiting for help and went home. *Id*. at 1-3. The appellant testified that he made disclosure 9 out of concern for patient health and safety. Tr. at 335, 338.

¶20 Besides Senators Obama, Akaka, and Craig, the appellant also sent a copy of disclosure 9 to the IG. IAF, Tab 6, Subtab 4D at 1. The IG opened a case and referred the matter to the Jesse Brown VAMC for investigation. RF 1, Tab 31, Subtab 25 at 7-9; Tr. at 67 (testimony of Dr. Ryan), 757 (testimony of Mr. Jones). Dr. Ryan investigated the appellant's allegations and determined that the

treatment and management of the patients were generally appropriate. Tr. at 67-72 (testimony of Dr. Ryan), 788 (testimony of Mr. Jones). He acknowledged that there was a delay in catheterizing one of the patients, but he found that there were no complications as a result. Tr. at 67-68, 119 (testimony of Dr. Ryan). Mr. Jones relied on Dr. Ryan's assessment and drafted a response to the IG's inquiry reflecting Dr. Ryan's findings. RF 1, Tab 31, Subtab 25 at 2-3; Tr. at 72, 120 (testimony of Dr. Ryan). Based on Mr. Jones's response, the IG closed the case. RF 1, Tab 31, Subtab 25 at 1, 4-6.

¶21 The administrative judge found that the appellant failed to show that he reasonably believed his disclosure evidenced a substantial and specific danger to public health or safety because the danger that the appellant identified was too "remote and speculative" to fall within the purview of the WPA under the standard set forth in *Chambers*. ID at 22. She found that the appellant's concerns amounted to professional disagreements with other physicians at the hospital. *Id*.

¶22 We disagree with the administrative judge's findings, and we find that the appellant established that he reasonably believed that disclosure 9 evidenced a substantial and specific danger to public health or safety. For the reasons that we explained under our analysis of disclosure 8, the nature of the harm that could result from the patient care and management issues that the appellant described in his disclosure is severe. *See supra*, ¶ 15. In addition, delay in treating a patient with fecal or urinary retention could result in the infection or death of that patient. Tr. at 120-22 (testimony of Dr. Ryan), 333-34 (testimony of the appellant). Also, for the reasons explained above, the harm that may result from unwarranted delays in treatment for patients requiring immediate treatment is both likely and imminent. *See supra*, ¶ 15. Particularly regarding the patient who reported to the hospital with constipation and abdominal pain and left without getting treatment, our finding that harm in his case was both likely and imminent is supported by Dr. Ryan's decision to have the patient transported

back to the hospital for treatment the next day. Tr. at 71, 122 (testimony of Dr. Ryan), 348 (testimony of the appellant). We further find that, even if some of the patients that the appellant identified in disclosure 9 were not themselves under the threat of severe, likely, and imminent harm, they served as pertinent examples of the appellant's broader point that the Jesse Brown VAMC was systematically failing to give its patients timely and appropriate care. IAF, Tab 6, Subtab 4D.

¶23 There is substantial evidence in the record to show that none of the patients that the appellant named in disclosure 9 suffered actual harm due to the allegedly unwarranted delays and that all of the patients ultimately received appropriate care. Tr. at 68-72, 119 (testimony of Dr. Ryan), 169 (testimony of Dr. Kukreja). However, the mere fact that actual harm did not occur in any of the examples that the appellant cited does not mean that actual harm is unlikely to occur in the future. Furthermore, we disagree with the administrative judge's finding that the concerns expressed in disclosure 9 amounted to disagreements between the appellant and other physicians about proper patient care. ID at 22. In particular, there is no evidence that anyone at the Jesse Brown VAMC believed that the delay in catheterizing the patient with urinary retention was appropriate under the circumstances. It is undisputed that after the appellant made his disclosure, the Jesse Brown VAMC issued a memorandum to its staff clarifying its catheterization procedures in order to prevent such delays from occurring in the future. RF 1, Tab 31, Subtab 25 at 2; Tr. at 123-25 (testimony of Dr. Ryan). We therefore find the appellant reasonably believed that disclosure 9 evidenced a substantial and specific danger to public health or safety, and that the disclosure meets the criteria of 5 U.S.C. § 2302(b)(8)(A)(ii).

The disclosures underlying specifications (v) and (vi) were not specifically prohibited by law.

¶24 The WPA excludes from coverage disclosures "specifically prohibited by law" or Executive order, even if the disclosures otherwise meet the criteria of 5 U.S.C. § 2302(b)(8)(A). *MacLean v. Department of Homeland Security*, 112

M.S.P.R. 4, ¶ 22 (2009). The agency argues that the appellant's disclosures are prohibited by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, which, as discussed below, generally prohibits healthcare providers from disseminating confidential patient health information. IAF, Tab 16 at 6. The appellant admits that his disclosures contained such information, but he argues that his disclosures fall under a whistleblower exception to the general rule. IAF, Tab 19 at 4; RF 1, Tab 6 at 10; RF 2, Tab 19 at 3; PFR File, Tab 3 at 15-16 & n.12. The agency argues that the appellant's disclosures do not meet HIPAA's whistleblower exception. RF 2, Tab 18 at 20-27; PFR File, Tab 6 at 10-13. Because the administrative judge found that none of the appellant's disclosures met the criteria of 5 U.S.C. § 2302(b)(8)(A)(i) or (ii), she did not reach the issue of whether his disclosures were prohibited by HIPAA. ID at 22. We must reach the issue here.

¶25 Congress has prohibited persons from violating the regulations that it authorized the Department of Health & Human Services to promulgate pursuant to Pub. L. No. 104-191 § 264 (codified at 42 U.S.C. § 1320d-2 note), and it has authorized both civil and criminal penalties for such violations. 42 U.S.C. §§ 1320d-4(b), 1320d-5, 1320d-6; 45 C.F.R. § 164.102. The regulations pertaining to the use and disclosure of protected health information[5] by covered entities[6] are found in 45 C.F.R. part 164, subpart E. Among other things, the

[5] As relevant here, "protected health information" generally includes information that is created or received by a health care provider, relates to the physical health or provision of health care to an individual, could be used to identify the individual, and is transmitted or maintained in any form or medium. 45 C.F.R. § 160.103.

[6] As a Veterans Administration hospital, the Jesse Brown VAMC is a "covered entity" under HIPAA. Tr. at 352-53, 361-62 (testimony of expert witness attorney June Sullivan), 510-11, 520 (testimony of expert witness Veterans Health Administration Privacy Officer Stephania Griffin); *see* 42 U.S.C. § 1320d-1(a)(3).

regulations provide that the disclosure of protected health information is authorized in cases of whistleblowing. 45 C.F.R. § 164.502(j)(1). Specifically, the regulations provide:

> *Disclosures by whistleblowers*. A covered entity is not considered to have violated the requirements of this subpart if a member of its workforce or a business associate discloses protected health information, provided that:
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> (i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public; and
>
> (ii) The disclosure is to:
>
> (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity or to an appropriate health care accreditation organization for the purpose of reporting the allegation of failure to meet professional standards or misconduct by the covered entity; or
>
> (B) An attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options of the workforce member or business associate with regard to the conduct described in paragraph (j)(1)(i) of this section.

Thus, the disclosures are authorized under the whistleblower provision only if two conditions are met: (1) The appellant had a good faith belief that one of the conditions in section 164.502(j)(1)(i) was satisfied; and (2) the disclosures were made to the proper parties named in section 164.502(j)(1)(ii) for the purposes identified in that section.

¶26 As explained above, the appellant reasonably believed that disclosures 8 and 9 evidenced a substantial and specific danger to public health or safety. *Supra*, ¶¶ 12-23. The appellant's disclosures can fairly be characterized as pertaining to alleged "violat[ions] of professional or clinical standards," and alleged deficiencies in "the care, services, or conditions" provided by the Jesse

Brown VAMC that could "potentially endanger[] one or more patients." IAF, Tab 6, Subtab 4D, Subtab 4E at 1-3; *see* 45 C.F.R. § 164.502(j)(1)(i). The agency argues on review that the appellant failed to prove that his belief on these matters was in "good faith" as required by 45 C.F.R. § 164.502(j)(1)(i) because that standard is more exacting than the "reasonable belief" standard of 5 U.S.C. § 2302(b)(8). PFR File, Tab 6 at 10-13, 28. We disagree. "Good faith belief" and "reasonable belief" do not pertain to different degrees of belief but rather to different qualities of belief from subjective and objective standpoints respectively. *See Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956, 960 (11th Cir. 1997) (a "good faith" belief is honest and bona fide under a subjective standard, whereas a "reasonable belief" is reasonable under an objective standard). Under the facts of this case, we find that the appellant actually believed that the dangers that he was disclosing were real. We therefore find that the appellant's disclosures pertained to matters covered under 45 C.F.R. § 164.502(j)(1)(i), and that his beliefs met the "good faith" standard of that section.

¶27 We also find that the appellant's disclosures were made to the proper parties named in 45 C.F.R. § 164.502(j)(1)(ii) for the purposes identified in that section. In specifications (v) and (vi) of the notice of proposed removal, the agency alleged that the appellant provided copies of disclosures 8 and 9 to Congressman Gutierrez and Senators Obama, Akaka, and Craig. IAF, Tab 1, Subtab 2 at 2. The parties do not dispute that these individuals were members of the Committees on Veterans' Affairs of the United States House of Representatives and United States Senate respectively at the time the appellant made these disclosures. Tr. at 319-20, 329-30 (testimony of the appellant), 510-11, 605-06, 616 (testimony of expert witness Veterans Health Administration Privacy Officer Stephania Griffin). Under Rule of the House of Representatives X(1)(s)(8) for the One Hundred Tenth Congress, the Committee on Veterans' Affairs has jurisdiction over "bills, resolutions, and other matters" relating to

"[v]eterans' hospitals, medical care, and treatment of veterans." Similarly, under Standing Rule of the United States Senate XXV(1)(p)(1), matters concerning "[v]eterans' hospitals, medical care and treatment of veterans" are referred to the Committee on Veterans' Affairs, which is authorized to report on these matters "by bill or otherwise." Based on these descriptions of the committees' authority, we find that they are "public health authorit[ies]" as that term is defined in 45 C.F.R. § 164.501. Specifically, each committee is an "authority of the United States" "that is responsible for public health matters as part of its official mandate." *See* 45 C.F.R. § 164.501. We further find that, in providing disclosures 8 and 9 to members of the committees, the appellant was providing the disclosures to public health authorities.[7] *See* 45 C.F.R. § 164.501 (agents of a public health authority are included under the definition of "public health authority"). We also find that the appellant's disclosures were for a permissible purpose under section 164.502(j)(1)(ii)(A), i.e., to report an "allegation of failure to meet professional standards" by the Jesse Brown VAMC. Tr. at 320-21, 335-38 (testimony of the appellant). Because the disclosures to the individuals named in specifications (v) and (vi) of the notice of proposed removal met both criteria of section 164.502(j)(1), we find that they are not specifically prohibited by HIPAA. *Cf.* 5 U.S.C. § 2302(b)(8)(A).

¶28 The agency also argues that the appellant's disclosures were prohibited by the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896. IAF, Tab 16 at 6; PFR File, Tab 6 at 5, 28. Among the purposes of the Privacy Act is to provide safeguards to individual privacy by ensuring that federal agencies do not misuse

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[7] There is some evidence to show that Senator Obama's office construed the appellant's disclosures as directed to the Senator in his capacity as a representative of his constituents rather than in his capacity as a member of the Committee on Veterans' Affairs. Tr. at 620-24 (testimony of Ms. Griffin). However, the impressions of Senator Obama's staff do not change that fact that the Senator was a proper party to receive the disclosure under 45 C.F.R. § 164.502(j)(1)(ii)(A).

records of identifiable personal information but disseminate such records only for necessary and lawful purposes. Pub. L. No. 93-579 § 2(b)(4). The Act generally prohibits an agency from disclosing such records, including medical records, without the written authorization of the individuals to whom the records pertain, but the Act provides twelve exceptions to this general rule. *See* 5 U.S.C. § 552a(a)(4), (b). One of the exceptions to the rule allows an agency to disclose records without prior written authorization of the individuals to whom the records pertain to a congressional committee with jurisdiction over the matters disclosed. 5 U.S.C. § 552a(b)(9). We find that the appellant's disclosures to the various individuals in their capacities as members of the congressional committees on veterans' affairs fall within this exception and are therefore not specifically prohibited by the Privacy Act.

¶29 The agency correctly argues that it removed the appellant not only for disclosing protected health information in violation of HIPAA but also for disclosing such information in violation of agency policy, i.e., VA Handbook 1605.1. PFR File, Tab 6 at 4-5, 12, 28; IAF, Tab 1, Subtab 2 at 2-3, Tab 6, Subtab 4L. The Board has found that an agency regulation can be a "law" within the meaning of 5 U.S.C. § 2302(b)(8)(A) but only if the regulation meets certain criteria set forth in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). *MacLean*, 112 M.S.P.R. 4, ¶¶ 21-33. Specifically, the regulation must be both properly promulgated and "substantive." To be substantive, the regulation must meet three requirements. "These are (1) it must be a 'substantive rule'; (2) Congress must have granted the agency authority to create such a regulation; and (3) the regulations must be promulgated in conformity with any procedural requirements imposed by Congress." *Id.*, ¶ 25 (citing *Chrysler*, 441 U.S. at 301-03).

¶30 Without deciding whether an agency handbook could ever be a "law" within the meaning of the WPA, we find that VA Handbook 1605.1 is not. Specifically, the Handbook is not a substantive rule within the meaning of *Chrysler* because it pertains to agency "procedures involving the release of

information," to ensure "compliance with the Privacy Act" and "the provisions of the Standards of Privacy of Individually-Identifiable Health Information, Title 45 Code of Federal Regulations (CFR) Parts 160 and 164," among other laws. IAF, Tab 6, Subtab 4L at 1; Tr. at 531 (testimony of Ms. Griffin); *cf. Chrysler*, 441 U.S. at 301-02 (distinguishing "substantive rules" from "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" (citing 5 U.S.C. § 553(b), (d)). In other words, the Handbook sets forth procedures for agency employees to follow in order to comply with substantive statutes and regulations. *Cf. St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 947 (6th Cir. 2000) (the agency manual was not a substantive rule because it interpreted a statute and regulation and set forth procedures for the agency to follow in carrying out a general substantive mandate). We find that the Handbook is unlike the regulation discussed in *MacLean*, which the Board found to be substantive because it affected individual rights and obligations, was expressly authorized by Congress, and was published in the Code of Federal Regulations after notice and comment rulemaking. 112 M.S.P.R. 4, ¶ 26. Rather, it is more like the handbook discussed in *Reynolds Associates v. United States*, 31 Fed. Cl. 335, 340 (1994), which the court found did not have the "status as a rule of law" because it merely set forth "rules of agency organization, procedure, or practice." *See* IAF, Tab 6, Subtab 4L. Therefore, even if the appellant's disclosures were prohibited by VA Handbook 1605.1, which does not appear to contemplate whistleblower disclosures, we still find that the disclosures were not "specifically prohibited by law" within the meaning of section 2302(b)(8)(A).

¶31 Because the appellant reasonably believed that the disclosures underlying specifications (v) and (vi) of the notice of proposed removal evidenced substantial and specific dangers to public health or safety, and the disclosures

were not specifically prohibited by law, we find that they were protected under the WPA.[8] *See* 5 U.S.C. § 2302(b)(8)(A).

The disclosures underlying specifications (i) through (iv) were specifically prohibited by law.

¶32 In specifications (i) though (iv) of the notice of proposed removal, the agency alleged that the appellant disclosed the same confidential patient information identified in specifications (v) and (vi) to other individuals.[9] Specifically, the agency alleged that the appellant disclosed the information to Dr. Fred Zar, Program Director at the University of Illinois at Chicago Internal Medicine Residency Program, Marsha Miller, Complaint Officer at the Accreditation Council for Graduate Medical Education, and the appellant's attorney, Denise Mercherson. IAF, Tab 1, Subtab 2 at 1-2. There do not appear to be any exceptions to the Privacy Act that would permit disclosure of patient medical information to these individuals.[10]

¶33 We note that the Privacy Act covers only information contained in a "system of records," i.e., "a group of any records under the control of any agency

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[8] There is no indication in the record that the disclosures were "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *Cf.* 5 U.S.C. § 2302(b)(8)(A).

[9] The agency also alleged that the appellant disclosed some medical records and patient information not mentioned in disclosure (v) or (vi). IAF, Tab 1, Subtab 2 at 1-2; Tab 6, Subtab 4E at 7-32, Subtab 4G at 3-4.

[10] Arguably, the appellant's disclosures to his attorney might be covered under the agency's Routine Use 53 for patient medical records. *See* 74 Fed. Reg. 60,040 at 60,046 (Nov. 19, 2009) (the agency may disclose records to an authorized representative of one of its employees in reasonable anticipation of litigation against that employee regarding medical care provided during the period of his employment); *see also* 5 U.S.C. § 552a(a)(7), (b)(3), (e)(4)(D) (an agency may disclose covered records for a "routine use" that the agency defines by publication in the Federal Register). However, Routine Use 53 became available only after the appellant made the disclosures at issue. IAF, Tab 6, Subtabs 4D, 4E, 4G; *see* 74 Fed. Reg. 60,040. It was not available under the routine uses recognized by the agency at the time the appellant made the disclosures. *See* 69 Fed. Reg. 18,428 at 18,431-18,434 (Apr. 7, 2004).

from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5), (b). Courts have interpreted the statute to exclude coverage of information that an employee has not actually retrieved from a system of records but has by firsthand knowledge. *E.g.*, *Olberding v. United States Department of Defense, Department of the Army*, 709 F.2d 621, 622 (8th Cir. 1983); *but see Bartel v. Federal Aviation Administration*, 725 F.2d 1403, 1410-11 (D.C. Cir. 1984) (the Privacy Act may cover information that was not actually retrieved from agency records if the employee who disclosed the information had a primary role in creating and using it). Although the appellant appears to have had firsthand knowledge of many of the incidents described in his disclosures, disclosures 8 and 9 recounted not only his memories of the incidents but also included medical records that the appellant obviously retrieved from the patients' medical files. IAF, Tab 6, Subtab 4D at 6-38, 4E at 7-32. Moreover, it would appear that the appellant obtained information from these records in writing the disclosure letters themselves. IAF, Tab 6, Subtab 4D at 1-3, 4E at 1-3, 4G at 1. Because the evidence shows that the appellant disclosed information covered under the Privacy Act without the prior written consent of the individuals to whom the information pertained, and there was no statutory exception permitting the disclosures to the individuals identified in specifications (i)-(iv), we find that the disclosures underlying those specifications were specifically prohibited by law. IAF, Tab 1, Subtab 2 at 1-2. Accordingly, those disclosures were not protected under the WPA. *See* 5 U.S.C. § 2302(b)(8)(A); *Kent v. General Services Administration*, 56 M.S.P.R. 536, 547-48 (1993).

¶34 The appellant argues that the agency violated his due process rights by informing him for the first time at the hearing that it considered his disclosures to

constitute a Privacy Act violation.[11] RF 2, Tab 19 at 5 n.2; PFR File, Tab 3 at 18 n.15. We decline to consider the appellant's argument because the instant appeal is an IRA appeal filed under 5 U.S.C. § 1221 – not an adverse action appeal filed under 5 U.S.C. § 7701. [12] As an issue separate and distinct from the whistleblower allegations, the appellant's due process argument is not within the Board's jurisdiction. *See Marren v. Department of Justice*, 51 M.S.P.R. 632, 638 (1991) ("Congress did not give the Board general jurisdiction to decide the merits of the underlying personnel action from which an IRA complaint stems except to the extent that they are relevant or material to the appellant's allegation of retaliation for whistleblowing."), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table), *and modified on other grounds by Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 323 n.13 (1994).

The appellant's protected disclosures were a contributing factor to his removal.

¶35 It is apparent from the face of both the notice of proposed removal and the removal decision that the appellant's protected disclosures were a contributing factor to his removal. IAF, Tab 1, Subtab 2 at 2, 5. Moreover, both the proposing official, Dr. Kukreja, and the deciding official, Mr. Jones, testified that they took the action, in part, because of the appellant's protected disclosures, i.e., the disclosures identified in specifications (v) and (vi) of the notice of proposed removal. Tr. at 173-78 (testimony of Dr. Kukreja), 753-54, 787 (testimony of Mr. Jones). Because specifications (v) and (vi) are grounded in the protected

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[11] The agency mentioned the Privacy Act in the notice of proposed removal IAF, Tab 1, Subtab 2 at 3, and it clearly argued that the appellant violated the Act in one of its submissions prior to the issuance of the first initial decision in this case, IAF, Tab 16 at 6.

[12] Because the agency appointed the appellant pursuant to 38 U.S.C. § 7401(1), the appellant lacks the right to appeal his removal under 5 U.S.C. § 7701. IAF, Tab 13 at 2; *see* 5 U.S.C. §§ 7511(b)(10), 7513(d); 38 U.S.C. § 7425(a)(8); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1370 (Fed. Cir. 2001).

disclosures themselves, we find that the disclosures were a contributing factor to the appellant's removal. *See Chambers v. Department of the Interior*, 602 F.3d 1370, 1380 (Fed. Cir. 2010).

The agency has not shown by clear and convincing evidence that it would have removed the appellant notwithstanding the protected disclosures.

¶36 Even if an appellant establishes that he made protected disclosures that were a contributing factor to the agency's personnel action, the Board will not order corrective action if the agency can show by clear and convincing evidence that it would have taken the action even in the absence of the protected disclosures. 5 U.S.C. § 1221(e)(2); *Jensen v. Department of Agriculture*, 104 M.S.P.R. 379, ¶ 6 (2007). 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) (noting that it is a higher standard than preponderant evidence). 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. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 17 (2007).

¶37 Both the proposing official, Dr. Kukreja, and the deciding official, Mr. Jones, testified in general terms that protecting patient confidentiality is highly important to the agency. Tr. at 145, 182-83 (testimony of Dr. Kukreja), 746-47, 763-64 (testimony of Mr. Jones). The record also shows that the appellant himself was aware of the importance of protecting confidential patient information, and the fact that he could be disciplined for not doing so, even if he did not understand all of the intricate laws, rules, and regulations governing its

disclosure. IAF, Tab 6, Subtabs 4F, 4H; RF 1, Tab 6 at 54-56; Tr. at 12-17, 105 (testimony of Dr. Ryan), 183 (testimony of Dr. Kukreja), 259-62, 299-300 (testimony of the appellant), 557-63 (testimony of Ms. Griffin), 748-49, 763-65, 771-74 (testimony of Mr. Jones). In addition, Mr. Jones testified in detail about the other aggravating factors that he considered in arriving at his removal decision, including the repetitive nature of the appellant's disclosures, the nature of the appellant's position, the appellant's disciplinary history, the agency's loss of confidence in the appellant to protect confidential patient information, and the appellant's lack of potential for rehabilitation. Tr. at 762-65, 768, 773-74; IAF, Tab 6, Subtabs 4O, 4P. This evidence tends to show that the agency would still have removed the appellant even if it were only for the unprotected disclosures underlying specifications (i) through (iv). IAF, Tab 1, Subtab 2 at 1-2.

¶38 Mr. Jones and Ms. Griffin both testified that the agency had previously taken disciplinary action against several employees, including the removal of at least one employee, as the result of an inadvertent compromise of confidential veteran information. Tr. at 564-67 (testimony of Ms. Griffin), 763, 771 (testimony of Mr. Jones). We find that this constitutes evidence that the agency takes disciplinary actions against non-whistleblowers for failing to protect confidential information with which the agency is entrusted. Nevertheless, the evidence is not especially probative as to what the agency would have done in the appellant's situation absent the protected whistleblowing. Specifically, the data compromise underlying the discipline of the comparison employees was highly publicized and involved information pertaining to "millions of veterans," Tr. at 565 (testimony of Ms. Griffin), whereas the disclosures underlying specifications (i) through (iv) in this case were not highly publicized and involved information pertaining to far fewer individuals, IAF, Tab 1, Subtab 2 at 1-2; Tr. at 784 (testimony of Mr. Jones). Moreover, the other employees were not employed at the Jesse Brown VAMC, and the record does not reflect exactly what disciplinary action was taken against how many employees, what positions those employees

encumbered, what mitigating or aggravating factors were present in their cases, or what the specific facts of their cases were.

¶39 There is also some evidence in the record to show that the agency officials involved in the removal action could have had a retaliatory motive in taking the action. The agency officials involved were Dr. Kukreja, the proposing official, Mr. Jones, the deciding official, and Dr. Ryan, who gave some input to Dr. Kukreja in drafting the notice of proposed removal. IAF, Tab 1, Subtab 2 at 4, 6; Tr. at 125-26 (testimony of Dr. Ryan), 170 (testimony of Dr. Kukreja), 785 (testimony of Mr. Jones). The appellant's protected disclosures criticized these officials and various hospital operations under their command. IAF, Tab 6, Subtab 4D at 1-4, Subtab 4E at 2-3; Tr. at 9-11, 120 (testimony of Dr. Ryan), 141-43, 240 (testimony of Dr. Kukreja), 744-46, 757-58, 794, 796 (testimony of Mr. Jones). In addition, it may have been somewhat burdensome to these officials to have to expend time and effort investigating the appellant's disclosures and justifying the Jesse Brown VAMC's operations. RF 1, Tab 31, Subtab 25 at 2-3, Subtab 24 at 4, 8-9; Tr. at 50, 60-61, 64, 67-71, 78 (testimony of Dr. Ryan), 169, 179-80, 238-40 (testimony of Dr. Kukreja), 759 (testimony of Mr. Jones). However, considering the strength of the agency's evidence discussed above, *supra*, ¶ 37, it appears, on balance, that the agency officials' primary motive for removing the appellant was their concern over his perceived breaches of confidentiality rather than any animus or ill will.

¶40 Nevertheless, the central question in this case is whether the agency would have removed the appellant based only on the unprotected disclosures identified in specifications (i) through (iv) of the notice of proposed removal, in the absence of the protected disclosures identified in specifications (v) and (vi). IAF, Tab 1, Subtab 2 at 1-2. Although some of the evidence discussed above suggests that the agency would have done so, the evidence as a whole is insufficient to leave the Board with a firm belief on the matter. *See* 5 C.F.R. § 1209.4(d). In particular, the agency's table of penalties prescribes a range of discipline

anywhere from reprimand to removal for a first offense of improperly disclosing confidential patient information.[13] IAF, Tab 6, Subtab 4N at 9; Tr. at 770 (testimony of Mr. Jones). In addition, Mr. Jones testified that the appellant's job performance was not a factor weighing in favor of his removal and that it is preferable to not remove employees when alternative corrective measures will suffice because employees are costly to replace. Tr. at 772-77. Most importantly, there is no evidence pertaining to the relative importance of the disclosures underlying the various specifications as to the agency's penalty determination, and there is no direct evidence to show that the agency would have removed the appellant if only specifications (i) through (iv) were sustained. Based on the record before the Board, we find that the agency has not shown by clear and convincing evidence that it would have removed the appellant even in the absence of his protected disclosures.

Corrective action is warranted

¶41 Because the appellant has established by preponderant evidence that his protected disclosures were a contributing factor in his removal, and the agency has not established by clear and convincing evidence that it would have removed the appellant in the absence of the protected disclosures, the Board is required to order appropriate corrective action. 5 U.S.C. § 1221(e); *see Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 25 (2010).

ORDER

¶42 We ORDER the agency to cancel the appellant's removal and restore him to his former position effective October 19, 2007. *See Kerr v. National*

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[13] Although the agency previously issued a decision suspending the appellant for improper disclosure of confidential patient information, the agency subsequently rescinded its decision without effecting the suspension. RF 1, Tab 6 at 54-56, 62-63, 65; Tr. at 101 (testimony of Dr. Ryan), 772 (testimony of Mr. Jones). The appellant's prior discipline of record was for a matter other than disclosing confidential information. IAF, Tab 6, Subtabs 4O, 4P.

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.

¶43 We also ORDER the agency to pay the appellant 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.

¶44 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).

¶45 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).

¶46 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.

¶47 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

¶48 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

¶49 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

¶50 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 the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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 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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information 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.

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.