

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 35

Docket No. SF-0752-09-0156-I-2

**Charlie Hamilton,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

March 4, 2011

Chris Attig, Esquire, Dallas, Texas, for the appellant.

Jonathan Zirkle, Esquire, Loma Linda, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that affirmed his removal. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant was employed by the agency in the GS-11 position of Nuclear Medicine Technologist at the agency's Loma Linda Medical Center in Loma Linda, California. Initial Appeal File 1 (IAF-1), Tab 1; Initial Appeal File

2 (IAF-2), Hearing CDs, Transcript at 515-17.¹ In this position, the appellant injected radioactive isotopes into patients (for diagnostic and treatment purposes), maintained the equipment, kept the department clean and orderly, and educated the patients and staff about the dangers of radioactive pharmaceuticals and other materials. Transcript at 516. The appellant believed the facility had a host of serious safety and management problems, and he sought to correct them with his supervisors. *See* IAF-1, Tab 6, Subtab 4CC; Transcript at 521-22, 724. The appellant also asserted that he became increasingly frustrated with the agency's inaction and with what he perceived as dishonesty or indifference from his supervisors. Transcript at 547-49, 572, 598, 722, 727-28, 740-42. The appellant's first-level supervisor was Krystal Chamberlin; his second-level supervisor was Andrew Hice; and his third-level supervisor was Dr. Carl Jansen. Transcript at 292-93.

¶3 The appellant ultimately raised many of his concerns (both verbally and in writing) with Dr. Moussa Raiszadeh, the facility's Radiation Safety Officer (RSO), who had ultimate authority to address radiation safety issues. Transcript at 363-64, 366-67, 372-73. In addition, the appellant brought some of his concerns (both verbally and in writing) directly to the National Health Physics Program (NHPP), the central office which oversees all medical radiation issues for the agency and serves as the agency's intermediary with the Nuclear Regulatory Commission. Transcript at 369-70, 584-87. Partially in response to the appellant's concerns, the NHPP directed the agency to investigate certain

¹ The appellant initially appealed his removal, pro se, under MSPB Docket No. SF-0752-09-0156-I-1. This record will be identified as Initial Appeal File 1 (IAF-1). After the appellant acquired counsel, the administrative judge dismissed the appeal without prejudice to allow the appellant to continue discovery aided by counsel. IAF-1, Tab 18. The appellant refiled the appeal as MSPB Docket No. SF-0752-09-0156-I-2. Cites to this record will be identified as Initial Appeal File 2 (IAF-2).

issues, including questions regarding samarium² dosage, and the agency convened an Administrative Investigative Board (AIB) to do so. IAF-1, Tab 6, Subtab 4Y; Transcript at 147; Petition for Review File (PFR File), Tab 4, Exhibit A at 2-3.

¶4 Dr. Jansen placed the appellant on administrative leave on April 4, 2008, pending management review of alleged disrespectful and disruptive conduct issues and an alleged security protocol violation. IAF-1, Tab 6, Subtab 4V. While on administrative leave, the appellant filed a complaint with the Office of Special Counsel (OSC) claiming that the agency was punishing him for making disclosures protected by the Whistleblower Protection Act (WPA). IAF-2, Tab 4, Exhibit AA.³

¶5 On May 9, 2008, the AIB issued its investigation report, which generally concluded that the appellant engaged in misconduct, management did not engage in misconduct, and that communication between management and staff was dysfunctional. IAF-1, Tab 6, Subtab 4Y. On June 3, 2008, the RSO issued his

² An ionizing radiopharmaceutical administered to patients as part of their therapy. IAF-2, Tab 4, Exhibit F at 2-3; Transcript at 367-68.

³ On August 22, 2008, OSC issued a letter notifying the appellant that he had a right to seek corrective action before the Board. IAF-1, Tab 6, Subtab 4II. On October 21, 2008, the appellant, proceeding pro se, filed an individual right of action appeal (IRA) under the WPA, MSPB Docket No. SF-1221-09-0054-W-1, in which he claimed that he was placed on administrative leave and denied a promotion as a result of his whistleblowing activities. Whistleblower Appeal File 1 (WAF-1), Tab 1. After the appellant acquired counsel, the administrative judge, who had consolidated appeals WAF-1 and IAF-1, dismissed the appeals without prejudice to allow the appellant to continue discovery with his new counsel. IAF-1, Tab 18 at 2. The IRA appeal was refiled as MSPB Docket No. SF-1221-09-0054-W-2. Whistleblower Appeal File 2 (WAF-2), Tab 1. The administrative judge held a joint hearing in appeals WAF-2 and IAF-2. See IAF-2, Hearing CDs, Transcript. The administrative judge rejected the appellant's IRA claim in an initial decision issued on August 10, 2010, concluding that the agency established, by clear and convincing evidence, that it would have placed the appellant on administrative leave even in the absence of the appellant's purported disclosures. WAF-2, Tab 14. The appellant did not seek review of this decision.

own supplemental report, which highlighted some of the appellant's disclosures, including samarium dosage issues. IAF-2, Tab 4, Exhibit F at 2-3. The NHPP ultimately conducted its own investigation of the facility (including on site inspections and interviews in June 2008 and October 2008). PFR File, Tab 4, Exhibit A at 4-5; IAF-2, Transcript at 73-74, 147, 429-33, 586-87.⁴

¶6 On October 24, 2008, Dr. Jansen proposed the appellant's removal based upon two charges: (1) Disruptive behavior and/or disrespectful conduct⁵ toward supervisors, management, and other agency staff (11 specifications); and (2) inattention in the performance of his assigned duties involving a patient's medical care and a treatment procedure (1 specification). IAF-1, Tab 6, Subtab 4AA. The appellant responded to the charges. IAF-1, Tab 6, Subtab 4CC. A hearing officer prepared a recommendation to sustain the charges and remove the appellant. IAF-1, Tab 6, Subtab 4FF. The deciding official, Acting Medical Director, Dr. Dwight Evans, issued a decision letter sustaining both charges and removing the appellant, effective December 12, 2008. IAF-1, Tab 6, Subtab 4GG.

¶7 The appellant filed a timely appeal to the Board. IAF-1, Tab 1. He raised whistleblower reprisal, retaliation for equal employment opportunity activities, and harmful procedural error as affirmative defenses, and he requested a hearing. *Id.* The administrative judge held the hearing the appellant had requested. IAF-2, Hearing CDs, Transcript. In her initial decision following the hearing, the administrative judge sustained Charge 1 (all 11 specifications), found Charge 2

⁴ The NHPP issued its own report after the record in this appeal closed, finding multiple violations of the relevant regulations pertaining to such matters as preparing proper dosage directives, discouraging employees from engaging in protected activities, and entering invalid data into the records system. *See* PFR File, Tab 4, Exhibit A.

⁵ The agency's Table of Penalties places "disrespectful conduct" in the same category as "use of insulting, abusive, or obscene language to or about other personnel, patients, or visitors." IAF-1, Tab 6, Subtab 4A; PFR File, Tab 4 at 54.

not sustained, found the appellant's affirmative defenses not established, and concluded that removal was an appropriate penalty. IAF-2, Tab 14.

¶8 The appellant has filed a petition for review. PFR File, Tab 4. The agency has filed a response in opposition to the petition for review. PFR File, Tab 10. The appellant filed a reply to the agency's response. PFR File, Tab 11.⁶

ANALYSIS

¶9 The appellant argues that the agency failed to prove the sustained charge and that the penalty is unreasonable.⁷ PFR File, Tab 4. The appellant also contends that the administrative judge improperly found that he failed to establish his whistleblower affirmative defense and that he has new evidence that definitively supports it. *Id.*⁸

The Charge

¶10 The appellant contends that the administrative judge erred in sustaining the eleven specifications underlying Charge 1. PFR File, Tab 4 at 37-78. The appellant argues that his comments and actions could not constitute misconduct because they were in the context of presenting a grievance and only particularly egregious conduct can be punished in that context. *Id.* at 38-44. The appellant further argues that the evidence for each specification does not support the administrative judge's decision. *Id.* at 44-70. The appellant also argues that his

⁶ The Board will not consider this pleading because the Board's regulations do not provide for replies to agency responses and the pleading was filed after the close of the record. *See generally Ramirez-Evans v. Department of Veterans Affairs*, [113 M.S.P.R. 297](#), ¶ 6 n.1 (2010).

⁷ The appellant does not contest that the agency established a nexus between the alleged misconduct and the efficiency of the service. In any event, it is well-settled that there is a sufficient nexus between an employee's misconduct and the efficiency of the service where the conduct occurred at work. *Miles v. Department of the Navy*, [102 M.S.P.R. 316](#), ¶ 11 (2006).

⁸ The appellant has not pursued his other affirmative defenses in his petition for review. *See* PFR File, Tab 4.

comments were justified due to his frustration with years of management indifference and/or simply statements of fact when taken in context. *See, e.g., id.* at 41, 45, 47, 51, 85. In addition, the appellant argues that the administrative judge erred in her credibility determinations in her assessment of Specifications E and I.⁹ *Id.* at 70-76.

1. Whether the Appellant's Statements Were Protected as Grievances

¶11 As to the appellant's first contention, he is correct that certain intemperate employee comments, that would otherwise support disciplinary action, will not support disciplinary action if made in certain emotional, confrontational contexts, such as the grievance process or the equal employment opportunity counseling process. *See Daigle v. Department of Veterans Affairs*, [84 M.S.P.R. 625](#), 628 (1999) (EEO counseling); *Special Counsel v. Nielson*, [71 M.S.P.R. 161](#), 175-76 (1996) (grievance process). In the absence of gross insubordination or threats of physical harm, an employee generally cannot be discharged for rude or impertinent conduct in the course of presenting grievances. *See Nielson*, [71 M.S.P.R. 161](#), 175-76. However, none of the appellant's comments that are the subject of Charge 1 were made in either of these contexts, so these cases do not apply.

¶12 Nonetheless, the Board does consider the context in which purported inappropriate remarks were made to ascertain whether they constitute misconduct. *See Daigle*, [84 M.S.P.R. 625](#), 628. In the context of whistleblowing, there may also be more leeway for employee speech, as protection under the WPA is not removed "when protected subject matter is stated in a blunt manner." *Greenspan v. Department of Veterans Affairs*, [464 F.3d 1297](#), 1299 (Fed. Cir. 2006). But this is not a general license for bad behavior - the character and nature of the disclosure can still be a legitimate basis

⁹ The appellant identifies Specification H in his petition, but it is clear from context that he is really challenging Specification I.

for discipline. *See Kalil v. Department of Agriculture*, [479 F.3d 821](#), 825 (Fed. Cir. 2007); *see also Carr v. Social Security Administration*, 185 F.3d 1318, 1326 (Fed. Cir. 1999) (the WPA is not intended to protect employees from their own misconduct).

¶13 Contrary to the appellant's assertions, the great majority of the incidents recounted in the specifications under Charge 1 did not occur in a whistleblowing context. In particular, Specification A dealt with his response to being placed on administrative leave, Specification B dealt with a request for leave, Specification C dealt with his response to his supervisor's investigation of a security issue, Specification D dealt with his inquiry about a protocol manual, Specification E dealt with his response to a letter of instruction, Specification G dealt with his request to punish another employee, and Specification I dealt with his comments to a respiratory therapist during a medical procedure. IAF-1, Tab 6, Subtab 4AA. Thus, the appellant's conduct took place in normal employment contexts, where normal standards would be expected to apply. *See Beaudoin v. Department of Veterans Affairs*, [99 M.S.P.R. 489](#), ¶ 16 (2005).

¶14 Only Specifications F, H, J, and K could relate to potential whistleblowing communications – memoranda to the RSO, to whom the appellant took many of his safety concerns. As to Specifications F and H, the relevant memoranda are essentially only requests for information regarding the hiring process for his immediate supervisor. IAF-1, Tab 6, Subtabs K, L. To the extent the memoranda can be read as challenging his supervisor's qualifications or addressing the cold kit policy,¹⁰ both documents, by their own terms, acknowledge that they merely repeat the appellant's prior comments on these subjects. *Id.* Similarly, Specification K deals with a memorandum seeking guidance on procedures if

¹⁰ This policy dealt with when certain chromatography materials had to be discarded because their chemical bonding was no longer adequate. *See, e.g.*, Transcript at 421, 459-60, 504.

supplies run out, with the stated purpose to protect the appellant from getting in trouble. IAF, Tab 6, Subtab 4G. None of these documents can be reasonably construed as whistleblowing.

¶15 As to Specification J, the memorandum can be read as disclosing waste in the handling of cold kit materials, which could potentially be a protected disclosure. IAF, Tab 6, Subtab 4H. However, in addition to the potential disclosure, the memorandum criticizes management for “this western style range war” and implies that decisions were made for reasons of power and control. *Id.* This criticism which reflects lack of respect is properly subject to punishment, even if a portion of the document is arguably protected whistleblowing. *See Kalil*, 479 F.3d at 825.¹¹

2. Evidentiary Challenges

¶16 The appellant also challenges the administrative judge’s decision to sustain all 11 specifications under Charge 1, and the administrative judge’s credibility assessments supporting her determinations. PFR File, Tab 4 at 49-70. The appellant generally claims that he conducted himself professionally at all times, the purported “disrespectful” statements were simply honest in context, the statements were prompted by extreme frustration with management’s conduct, and/or that he did not make the purported statement or a portion of the purported statement or use an inappropriate tone of voice. *Id.* These contentions are unpersuasive.

¶17 Based on the evidence of record, the specifications were supported by preponderant evidence. Five of the 11 challenged statements were in writing (Specifications F, G, H, J, K), and there was no dispute that the appellant had

¹¹ We note that even if this specification had not been sustained, the charge would have been sustained based upon the other specifications. *See Burroughs v. Department of the Army*, [918 F.2d 170](#), 172 (Fed. Cir. 1990) (where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge).

written them. The agency also presented the testimony of Chamberlin, Dr. Jansen, and the respiratory therapist in support of the specifications. *See generally* Transcript. Further, in his testimony, the appellant admitted to making the statements in Specifications A and D, and admitted to making substantial portions of the statements in Specifications B, C, and E (challenging some exact wording or whether he was shouting or speaking calmly). *See* Transcript at 593-95, 599, 602-04, 606-12, 615-20, 621-23, 701. The appellant only denied Specification I in its entirety. *Id.* at 627. But as to the disputed statements or portions of statements, the administrative judge had ample reason to credit the agency witnesses's testimony over the appellant's testimony.

¶18 To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987). The Board may not reject an administrative judge's credibility determination based, explicitly or implicitly, upon observing the witnesses demeanor without sufficiently sound reasons for doing so. *Leatherbury v. Department of the Army*, [524 F.3d 1293](#), 1304-05 (Fed. Cir. 2008).

¶19 The appellant's prior statements significantly undermined his testimony contesting certain portions of the challenged statements or his demeanor in making them. In particular, he previously stated that he would "force answers" out of people by asking the same question "over and over," that he "got loud," let out his frustrations, "used situations that frustrated me to vent my displeasure," and that his "attitude [was] in direct response to the disrespect shown me."

IAF-1, Tab 6, Subtab 4CC at 2, 6, 10, 13. The appellant also acknowledged that he was stubborn and headstrong, and that he had been told he was insensitive his whole life. IAF-1, Tab 6, Subtab 4CC at 10, Transcript at 698, 703.¹² Further, in his petition for review, he acknowledged that his statements could be construed as “impertinent” and “confrontational,” and that they reflected “understandable anger” or “necessary harshness.” PFR File, Tab 4 at 41, 45. The agency witnesses, in contrast, testified essentially in conformity with their prior statements. *See* IAF-1, Tab 6, Subtabs I, N, O, Q, R, S, U, W. The administrative judge noted this consistency, as well as their forthright manner of testifying and lack of motivation to fabricate. IAF-2, Tab 14 at 24-26, 30, 32, 34.

¶20 As to his specific contentions, the appellant denies Specification I, arguing that his comments were not disrespectful, and, to the extent they were “assertive,” they had to be to warn the individuals of danger. PFR File, Tab 4 at 74-77. As to the former, the respiratory therapist, who was participating in the nuclear scan process for the first time, asked him about possibly hazardous radiological exposure. IAF-1, Tab 6, Subtab 4AA at 3-4. His brusque “well yeah” in response to this reasonable question from a fellow medical professional could fairly be viewed as rude or insulting. *Id.* As to the latter, the appellant’s testimony made it clear that the safety of the registered nurse and respiratory therapist was not his concern when he chastised them for removing the patient’s mouthpiece and “letting the stuff [chemicals for the diagnostic scan] fly in the air.” *Id.* The appellant testified that when the respiratory therapist disconnected the patient’s mouthpiece, the room filled with chemicals which the respiratory therapist began breathing. Transcript at 634-35. Yet he not did warn her of the danger, nor did he monitor her exposure (as he acknowledged that he should have). *Id.* at 645. Further, that the respiratory therapist removed the patient’s

¹² The appellant later partially, if unpersuasively, denied being insensitive by testifying that the word had no meaning to him. Transcript at 699.

mouthpiece (despite her prior concerns about exposure) casts doubt on the appellant's testimony that he explained the procedure beforehand. *Id.* at 630. In addition, his prior statement suggested that he had been irritated with the respiratory therapist, he had been in a hurry, and he had prior conflicts with the respiratory therapist. IAF-1, Tab 6, Subtab 4CC at 15. Thus, there is ample basis for rejecting the appellant's account.

¶21 The appellant's other arguments regarding particular specifications also lack merit. For example, as to Specification E, the appellant points only to unremarkable inconsistencies between Chamberlin's testimony and her prior statement. PFR File, Tab 4 at 71-74. This argument lacks merit for at least two reasons: (1) Dr. Jansen was the primary witness for this specification, and he corroborated Chamberlin's account; and (2) the appellant acknowledged making most of the challenged statements. Transcript at 293-99, 616-20.

¶22 The appellant also raises more general arguments. He argues that his statements, in context, were simply honest and did not rise to the level of disrespectful conduct. PFR File, Tab 4 at 44-46, 48. In his testimony he suggested that calling his boss a "bigot" was not insulting because it is a simple statement of fact, like a person being "tall." Transcript at 703. This viewpoint however has been found to be disrespectful to the supervisor and disruptive to the efficient functioning of the work unit. *See generally Kirkland-Zuck v. Department of Housing & Urban Development*, [90 M.S.P.R. 12](#), ¶ 19 (2001), *aff'd*, 48 F. App'x 749 (Fed. Cir. 2002) (insolent conduct directed toward supervisors undermines management's ability to maintain employee efficiency and discipline); *see also Suggs v. Department of Veterans Affairs*, [113 M.S.P.R. 671](#), ¶ 5 (2010) (opining that one's supervisor is incompetent can support a disrespectful conduct charge). The appellant also argues that the agency failed to present witnesses to testify that certain statements were disrespectful or disruptive, and the administrative judge ignored statements by certain supervisors that they were not greatly offended by a particular statement. PFR File, Tab 4 at

45-46. However, this claim is insufficient to show that the appellant's behavior was not disrespectful. *See Edwards v. Department of the Army*, [87 M.S.P.R. 27](#), ¶ 9 (2000), *aff'd sub nom. Rodriguez v. Department of the Army*, 25 F. App'x. 848 (Fed. Cir. 2001) (a supervisor's opinions are insufficient to overcome the agency's judgment concerning the seriousness of the misconduct and the appropriateness of the agency-imposed penalty).

¶23 The appellant also claims that his statements were in the context of his frustration with management's years of inaction on issues of concern to him. PFR File, Tab 4 at 41, 45. But he does not present any legal justification for choosing to repeatedly lash out at management to make his point. Indeed, he had other options to address his concerns – such as taking them to the RSO and NHPP, both of which ultimately investigated them. *See, e.g., IAF-2*, Tab 4, Exhibit F; PFR, Tab 4, Exhibit A. The cumulative effect of his misconduct was to make him very difficult for his supervisors to manage productively. Transcript at 52, 120-21, 300.¹³

Whistleblower Protection Act Affirmative Defense

¶24 The appellant argues that the administrative judge erred in rejecting his whistleblower affirmative defense by concluding that the deciding official had no knowledge of the appellant's disclosures. PFR File, Tab 4 at 19-26. The appellant also argues that the administrative judge erred in failing to make findings for each contested element of his affirmative defense. *Id.* at 26-32. The

¹³ The appellant also argues that the administrative judge failed to properly analyze his First Amendment claim. PFR File, Tab 4 at 77-79. The appellant argues that his statements were protected disclosures of great public interest, and the administrative judge failed to properly assess the context of his statements in light of the entire record. *Id.* However, as previously discussed, the appellant was not punished for potentially protected disclosures; he was punished for disrespectful and disruptive statements. There is nothing in the record to suggest that his disparaging statements about his supervisors were matters of public concern. *See generally Johnson v. Department of Justice*, [65 M.S.P.R. 46](#), 50 (1994).

appellant further argues that he proved each element of his affirmative defense by preponderant evidence, and that the agency failed to show that it would have taken the same action in the absence of his disclosures by clear and convincing evidence. *Id.* at 32-36.

¶25 When raising whistleblower reprisal as an affirmative defense, the appellant must show by preponderant evidence that he made a protected disclosure and that the disclosure was a contributing factor in the agency's disciplinary personnel action. *See Carr*, 185 F.3d at 1322; *Gonzalez v. Department of Transportation*, [109 M.S.P.R. 250](#), ¶ 16 (2008). If the appellant makes this prima facie showing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action in the absence of any protected activity. *Id.* An employee can show that his disclosure was a contributing factor to the personnel action via the knowledge/timing test - by presenting evidence that the official taking the personnel action was aware of the disclosure, and the official took the action within a short enough period after the disclosure for a reasonable person to conclude that the disclosure was a contributing factor to the personnel action. *See Gonzalez*, [109 M.S.P.R. 250](#), ¶ 19. A protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#) is any disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See Drake v. Agency for International Development*, [543 F.3d 1377](#), 1380 (Fed. Cir. 2008). The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in [5 U.S.C. § 2302\(b\)\(8\)](#) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidenced wrongdoing as defined by the WPA. *Id.* at 1382; *see also*

Chambers v. Department of the Interior, 602 F.3d 1370, 1379 n.7 (Fed. Cir. 2010).

¶26 The administrative judge chose to resolve the WPA affirmative defense by addressing only whether the appellant met his burden of showing that the disclosures were a contributing factor to his removal. IAF-2, Tab 14 at 42. The administrative judge concluded that the disclosures could not have been a contributing factor in the removal because Dr. Evans had no knowledge of the appellant's disclosures, and the administrative judge rejected the appellant's affirmative defense on that sole basis. *Id.* at 42-44. The administrative judge concluded that Dr. Evans was unaware of the appellant's disclosures because he was not Acting Medical Director when the disclosures were made (Transcript at 161-62), he testified that he knew the NHPP was investigating an issue regarding samarium dosage but did not know the appellant raised the issue (Transcript at 153), and he denied seeing the RSO's report concerning the issue (Transcript at 154). IAF-2, Tab 14 at 43.

¶27 Generally we must give deference to an administrative judge's assessment of credibility, particularly when the assessment is explicitly or implicitly based upon demeanor; however, the Board may overturn such credibility findings if there are sufficiently sound reasons for doing so. *See Diggs v. Department of Housing & Urban Development*, [114 M.S.P.R. 464](#), ¶ 8 (2010). That is the case here.

¶28 At the outset, the administrative judge's conclusion is inconsistent with the basic, undisputed fact that Dr. Evans reviewed the charging materials and the hearing officer's recommendation, which included portions of the appellant's purported disclosures, and the appellant's response, which also referred to his disclosures. Transcript at 137-38, 144, 168. Moreover, Dr. Evans conceded that he read "every page" of the AIB report, which repeatedly refers to the appellant (by name), specifically notes his contacts with the RSO and NHPP regarding safety issues, and expressly refers to such specific matters as the appellant's

memorandum regarding samarium dosage issues. Transcript at 151; IAF-1, Tab 6, Subtab 4Y at 5-7, 9-10. Dr. Evans also specifically conceded reading about the samarium dosage issue in the AIB report, that the AIB report suggested the appellant had raised legitimate issues, and that he knew the NHPP investigation had been prompted by whistleblowing. Transcript at 147, 152-53, 203. In addition, Dr. Jansen, who undisputedly knew of the appellant's disclosures, testified that he discussed the charges with Dr. Evans. *Id.* at 351-52. While Dr. Evans denied discussing the charges with Dr. Jansen after the proposal letter was issued, he acknowledged that he discussed the appellant's conduct with Dr. Jansen on previous occasions. *Id.* at 180, 194. The administrative judge's sole basis for rejecting the appellant's affirmative defense is not supported by the record.

¶29 The appellant's challenge to the administrative judge's failure to make complete findings on all contested issues in his WPA affirmative defense also lacks merit. PFR File, Tab 4 at 26-32. The Board may generally review the issues raised in a whistleblower case in the order that will be most efficient. *See generally Fellhoelter v. Department of Agriculture*, [568 F.3d 965](#), 971 (Fed. Cir. 2009). Nonetheless, because we have concluded that the administrative judge erred in addressing the single issue she chose to resolve, we must assess whether the current record allows us to analyze the whistleblowing affirmative defense in its entirety or whether a remand for further proceedings is required.

¶30 At the outset, it is clear that the appellant made at least one protected disclosure¹⁴ – the agency's RSO testified that the errors in measuring samarium dosage reported by the appellant reflected a violation of the relevant nuclear

¹⁴ A full analysis of the appellant's potential disclosures is also problematic - the administrative judge did not identify them in specific detail in the prehearing conference summary, and the appellant's counsel has failed to do so on review. *See* IAF-2, Tab 6; PFR File, Tab 4 at 27.

safety regulations. *See* Transcript at 389-91; IAF-2, Tab 4, Exhibit F at 1-4, Exhibit K at 4, 5; Exhibit Y at 1. The appellant also made this disclosure to the NHPP, no later than June 2, 2008. PFR File, Tab 4, Exhibit A at 3.

¶31 In addition, the appellant appears to have shown that, at the very least, the samarium dosage disclosure was a contributing factor in his removal. The appellant made the disclosure to the RSO and NHPP between March 2008 and June 2008, his supervisor (who was aware of the disclosure) proposed his removal in October 2008,¹⁵ and the deciding official (who was aware of the disclosure) ordered him removed in December 2008. IAF-1, Tab 6, Subtabs 4AA, 4GG; IAF-2, Tab 4, Exhibit K at 4, 5. The fact that the appellant's disclosure and his removal were less than a year apart supports a conclusion that his disclosure was a contributing factor to his removal under the knowledge/timing test. *See Gonzalez*, [109 M.S.P.R. 250](#), ¶¶ 19-20 (the knowledge/timing test is satisfied where the appellant's disclosure and his removal were slightly over a year apart).

¶32 Therefore, the ultimate issue is whether the agency has proved that it would have taken the same action in the absence of the whistleblowing disclosure by clear and convincing evidence. *See Carr*, 185 F.3d at 1322. Because the administrative judge made no factual findings or credibility assessments regarding this issue, remand for further proceedings is required. *See Gonzalez*, [109 M.S.P.R. 250](#), ¶ 22.¹⁶

¹⁵ We also note the proposed removal was issued only a couple of weeks after the NHPP's first site visit investigating the appellant's disclosures. IAF-1, Tab 6, Subtab AA; PFR File, Tab 4, Exhibit A at 5.

¹⁶ The appellant also claims that he has new evidence that is material to his reprisal claim – the NHPP Report issued on August 18, 2008. PFR File, Tab 4, Exhibit A. The agency opines that the report is neither new nor material. PFR File, Tab 10. Contrary to the agency's claims, there can be no meaningful dispute that the report was not available before the record closed at the end of the hearing. While portions of the NHPP investigation had been completed before the hearing, the report was not issued until August 18, 2008, and all the witnesses testified that the report was still a work in progress at the time of the hearing. *See* Transcript at 82, 166, 587-88. Thus, the report

Penalty

¶33 The appellant also challenges the administrative judge's penalty analysis. PFR File, Tab 4 at 79-103. In particular, he argues that the administrative judge failed to make an independent assessment of the *Douglas* factors, and that she erred in her analysis of the individual *Douglas* factors. *Id.*

¶34 When not all of the charges are sustained, the Board will consider carefully whether the sustained charges merited the penalty imposed by the agency. *Howard v. Department of the Air Force*, [114 M.S.P.R. 482](#), ¶ 5 (2010); *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 308 (1981). In such circumstances, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999); *Howard*, [114 M.S.P.R. 482](#), ¶ 5.

¶35 Contrary to the appellant's contention, the administrative judge did make an independent and thorough assessment of the *Douglas* factors in assessing the removal penalty. IAF-2, Tab 14 at 45-48. Disrespectful conduct is a serious offense, and agencies are entitled to expect employees to conduct themselves in accordance with accepted standards. *Suggs*, [113 M.S.P.R. 671](#), ¶ 8. Indeed, insolent conduct directed toward supervisors so undermines management's ability to maintain employee efficiency and discipline that no agency should be expected to treat such conduct leniently more than once. *Id.*; *Kirkland-Zuck*, [90 M.S.P.R. 12](#), ¶ 19. As a consequence, the Board has upheld removal in circumstances much like those present here. *See Suggs*, [113 M.S.P.R. 671](#), ¶ 13 (the Board has held that removal is an appropriate penalty for a single charge of disrespectful

is "new" evidence. In light of our decision to remand, the issue of materiality can be addressed by the administrative judge in the first instance.

conduct that includes multiple specifications); *Kirkland-Zuck*, [90 M.S.P.R. 12](#), ¶ 19 (removal is appropriate where the “disrespectful conduct was intentional, repeated, and serious”).

¶36 The appellant’s various challenges, many of which are duplicative of arguments that he made to contest the specifications on the merits, are generally unpersuasive or immaterial. PFR File, Tab 4 at 79-103. For example, the appellant claims that the administrative judge improperly considered a 2007 proposed notice of reprimand as prior discipline. *Id.* at 86-88. However, the administrative judge did not consider the document as prior discipline, she instead considered the document as one of several times that the appellant was placed on notice that his conduct was unacceptable; she also expressly stated that the appellant had no prior disciplinary record and that weighed in his favor. IAF-2, Tab 14 at 46-47. The appellant also argues the administrative judge did not truly weigh his 4 years of service in her decision. PFR File, Tab 4 at 88. This is factually incorrect, IAF-2, Tab 14 at 46, and of no real consequence, *see Kirkland-Zuck*, [90 M.S.P.R. 12](#), ¶ 20 (slightly less than 8 years of service did not mitigate repeated acts of disrespectful conduct). The appellant also suggests a disparate penalty issue – based largely on the deciding official’s limited recollection of similar cases. PFR File, Tab 4 at 91-94. But to raise a disparate penalty claim, the appellant must first point to specific employees that were similarly-situated and received a more lenient penalty; the appellant has not done so here. *See Lewis v. Department of Veterans Affairs*, [113 M.S.P.R. 657](#), ¶¶ 5-6 (2010). In sum, none of the appellant’s challenges to the penalty is persuasive.

¶37 Despite our conclusions that the administrative judge did not err in assessing the charge or penalty, we must nonetheless vacate the initial decision in its entirety. Because we are remanding the case for further proceedings regarding the whistleblower affirmative defense, the administrative judge must issue a new initial decision addressing the affirmative defense and its effect, if any, on the outcome of the appeal. *See Viana v. Department of the Treasury*, [114](#)

[M.S.P.R. 659](#), ¶ 8 (2010); *Guzman v. Department of Veterans Affairs*, [114 M.S.P.R. 566](#), ¶ 9 (2010) (if the appellant prevails on his affirmative defense, the agency action cannot stand). But, if the appellant does not prevail on his affirmative defense on remand, the administrative judge may adopt her prior findings regarding the charge and penalty in her new initial decision. *See Viana*, [114 M.S.P.R. 659](#), ¶ 8.

ORDER

¶38 Accordingly, we grant the petition for review, vacate the initial decision, and remand the appeal for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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