UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 83

Docket No. SF-1221-12-0330-W-1

Alma D. Chavez,

Appellant,

v.

Department of Veterans Affairs,

Agency.

October 30, 2013

Kelly Burch, Coarsegold, California, for the appellant.

Coleen L. Welch, Esquire, Martinez, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that denied her individual right of action (IRA) appeal in which she alleged that her probationary termination was the result of whistleblowing retaliation. For the reasons set forth below, we GRANT the appellant's petition, REVERSE the initial decision, and GRANT the appellant's request for corrective action.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

BACKGROUND

¶2 On July 18, 2010, the appellant was appointed to the position of Licensed Vocational Nurse (LVN) at the agency's Community Living Center (CLC), Geriatrics and Extended Care, in Fresno, California. Initial Appeal File (IAF), Tab 9, Subtab 4p. Her supervisor was Lydia Wyatt, Nursing Manager/Head Nurse, CLC, who supervised the Registered Nurses (RNs), the LVNs, and the Certified Nursing Assistants (CNAs). Wyatt in turn reported to Suenell Tordini, RN, the Associate Chief Nurse for Geriatrics and Extended Care Services at the CLC. The appellant primarily worked on Tour 3, the evening shift, often with RN Helen Dieling and LVN Montie Everett, the appellant's preceptor/trainer. When she worked Tour 2, the day shift, she often worked with LVNs Patricia Gomez and Alice Maestas. Hearing CD (HCD) (Chavez testimony). Gomez and Maestas were friendly with Wyatt, who referred to them as "her babies." *Id*.

¶3 In October 2010, the appellant reported to Susan Kraus, RN, Charge Nurse, that the medical carts (med carts) were dirty and unstocked at shift change time. IAF, Tab 7 at 2.[2] Kraus told Wyatt, who issued an email to all staff reminding them that the carts should be cleaned and ready at the shift change. IAF, Tab 7 at 2; HCD (Chavez testimony). The appellant testified that she was told by coworkers that Wyatt had shared with the nurses that it was the appellant who had complained about the med carts. HCD (Chavez testimony).

¶4 In a conversation on October 17, 2010, Wyatt warned the appellant about being too "bossy and rude" to the day shift staff. IAF, Tab 7 at 2. The appellant asserts that on October 19, 2010, Maestas approached her and "sarcastically remarked that she mistakenly changed one patient's dressing when she should

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[2] Med carts are mobile carts with pitchers of water on top and drawers for medications used by nurses to "pass medications" to the patients/residents. HCD (Dieling testimony).

have changed another's, and then rudely stated in front of the residents" that she had advised the appellant of the mistake so that the appellant "didn't tell everyone she did not change the dressings." *Id*. When the appellant tried to talk to Wyatt about Maestas's remark, Wyatt said she would talk to Maestas, but the appellant felt Wyatt considered the appellant to be at fault. *Id*. In an October 20, 2010 email to Tordini, the appellant reported Maestas's remarks and advised Tordini that Gomez and Maestas had been "rude and mean" ever since her complaint about the med carts. IAF, Tab 7 at 28. She reported that Wyatt had accused her of being bossy and rude to the day staff and expressed her concern that Wyatt was showing favoritism towards certain day shift staff. *Id.*; HCD (Chavez testimony).

¶5 On November 2, 2010, the appellant reported to Wyatt that three patients had not had their dressings changed the previous day and that the med cart had not been restocked at shift change. IAF, Tab 7 at 3. The appellant believed that within 2 weeks, Wyatt "began to turn against [her]." *Id*. According to the appellant, Wyatt frequently reminded her that she was on probation. *Id*. In addition, the appellant asserts that Wyatt assumed she was at fault with respect to several incidents, without properly investigating first. *Id.* For example, Gomez alleged that the appellant had improperly administered a purified protein derivative (PPD) skin test to a patient, causing severe bruising on his arm. Even though the appellant did not in fact cause the bruising, Wyatt initially assumed the appellant was at fault and instructed her to stop giving that test until she was retrained. *Id*. at 30. After investigating further, Wyatt acknowledged that the appellant was not responsible for the bruising. *Id*. at 31.

¶6 On November 18, 2010, the appellant sent an email to Tordini reporting, among other things, that Wyatt had accused her of harming a resident by improperly giving him a PPD test, and she complained about Wyatt's unfair treatment of her and remarks to her that she was still on probation. IAF, Tab 7 at 30-31. Tordini met with both the appellant and Wyatt, and the appellant

advised that the patient had never blamed the appellant and that Wyatt had blamed her without knowing what happened. The appellant expressed that she had higher expectations of Wyatt. HCD (Chavez testimony). According to the appellant, Wyatt stated on more than one occasion that she would never forget that the appellant went over her head and got her into trouble. IAF, Tab 7 at 4.

¶7 In January 2011, the appellant and Everett complained to Wyatt that Phillip Gilbert, CNA, borrowed $45.00 from a resident. Wyatt responded: "[A]s long as he pays him back it is okay." HCD (Chavez testimony); IAF, Tab 7 at 25. The appellant believed Wyatt told Gilbert that it was the appellant who reported him for borrowing money from a patient, and the appellant perceived that, thereafter, Gilbert hated her and refused to assist her. *Id.*

¶8 On January 27, 2011, the appellant sent an email to Tordini complaining of staff members refusing to assist her with turning a dying patient who needed cleaning and dressing changes. IAF, Tab 7 at 3, 33. The appellant explained that, while she helped the CNAs empty urinals and change dirty diapers because she was a team player, the CNAs refused to help her and Everett. *Id.* Later on January 27, 2011, the appellant sent another email to Tordini stating that an employee had told her she was mean and bossy to CNA Suzie Saechao, which the appellant denied. IAF, Tab 10 at 58. The appellant explained to Tordini that the CNAs did not like to be asked for assistance, were not team players, that Saechao was temperamental, and that certain employees spent a lot of time on the internet but that Kraus did nothing in response to the appellant's complaints. *Id.*

¶9 On March 20, 2011, LVN Karla Dean left work during her shift after her daughter was in a car accident, leaving a cup of narcotics, pre-drawn insulin, and Heparin on the med cart. IAF, Tab 7 at 3; HCD (Chavez testimony). RN Mary Lou Jenson asked the appellant to pass to patients the medications that were in a common cup, and the appellant refused. *Id.* When Wyatt told the appellant that Dean did nothing wrong, the appellant went to Tordini, who said that what happened was "not okay." *Id.*

¶10 On March 21, 2011, the appellant discovered her patient laying in his bowel movement for hours. The CNAs were responsible for changing and cleaning the patients, but Gilbert allowed this patient to lay there without cleaning him up. HCD (Chavez testimony). The appellant states that she told Kraus three times but she did nothing about it. IAF, Tab 1 at 8.

¶11 On March 21, 2011, the appellant sent an email to Wyatt, with a copy to Tordini, in which she reported that, on March 20, Dean had refused to verify or witness the insulin that the appellant had drawn. IAF, Tab 10 at 47. The appellant asked Dean if she was refusing to witness, and Dean replied "Alma, you are messing with me." The appellant stated she believed Dean was still mad because the appellant had complained about her leaving narcotics, insulin, and Heparin on the med cart. *Id.* In the email, the appellant stated that Dean needed to take responsibility for her own misjudgments and stop being hostile towards her. In addition, the appellant stated she was tired of dealing with Gilbert's work because he did not meet the residents' needs, he left them in their day clothes, put their dentures in cups without water or cleaner, did not empty urinals, and made them wait for hours. She disclosed that Gilbert had left a patient in his bowel movement for almost the entire shift. The appellant advised that she had finally turned and cleaned the patient, and Gilbert never came around, as he was outside smoking, watching television, or socializing with Dean. *Id.* Tordini responded to the appellant's email on March 21, thanking her for the information, and instructing her that she should report any performance issues to the Charge Nurse, and, if she experienced any difficulty with the Charge Nurse, to let her know. IAF, Tab 16 at 8. The appellant responded that Kraus was aware of the issues, and, when the appellant reported issues to Kraus, she just looked at her, said nothing, and nothing changed. *Id.*

¶12 On April 20, 2011, Wyatt called the appellant into the office and said that clinically she was doing well but "don't think you're better than the others." HCD (Chavez testimony). She gave the appellant what she thought was a blank

evaluation and asked her to sign it. Later, the appellant asked for a copy of it and found that Wyatt had written on the performance appraisal that the appellant needed to improve in her interpersonal relationships and that her goals were to have no complaints from her coworkers about how she talked to them and to report any episode of poor patient care to the RN. IAF, Tab 7 at 4.

¶13 Subsequently, Wyatt recommended that the agency terminate the appellant during her probationary period, and Tordini made a final decision to effect that action. HCD (testimony of Wyatt and Tordini). By notice dated May 18, 2011, Sandra Stein, Human Resources Officer, informed the appellant of the agency's decision. IAF, Tab 9, Subtab 4b. In the notice, Stein stated that Wyatt had recommended the appellant be terminated "for failure to qualify" during her probation, "due to inappropriate behavior and unprofessional conduct." *Id.* The agency removed the appellant effective May 28, 2011. *Id.*, Subtab 4a. The appellant testified that on the day she was terminated Wyatt asked her, "Remember how I told you I would never forgive you for going over my head?" HCD (Chavez testimony).

¶14 The appellant filed a complaint with the Office of Special Counsel (OSC) alleging she was terminated in reprisal for her whistleblowing disclosures relating to patient care.[3] IAF, Tab 7 at 2-22, 34-36. In her complaint and supplemental submissions, the appellant brought the following alleged protected disclosures to OSC: (1) other nurses were not cleaning and stocking the med carts; (2) patients' dressings were not being changed as ordered; (3) Wyatt made untrue accusations regarding the appellant harming a patient; (4) Dean left a med cart with narcotics for several patients in a cup as well as pre-drawn insulin and Heparin; (5) Dean refused to witness or verify an insulin draw; (6) CNA Gilbert had borrowed money from a patient; and (7) a patient was not cleaned for over 6 hours after a

[3] The appellant also filed an equal employment opportunity (EEO) complaint, which is currently pending. IAF, Tab 10 at 7-22.

bowel movement. *Id.* at 24-26, 34-39. On December 20, 2011, OSC terminated its inquiry into her allegations and issued her a close-out letter and notice of Board appeal rights. *Id.* at 42-44.

¶15 The appellant timely filed this IRA appeal. IAF, Tab 1. Based on the parties' responses to the jurisdictional order, the administrative judge determined that the appellant had established Board jurisdiction over her appeal. IAF, Tab 13. Following a hearing, the administrative judge issued an initial decision denying the appellant's request for corrective action. IAF, Tab 24, Initial Decision. The administrative judge found that disclosures (4), (6), and (7) were protected, but not the remainder, and that the appellant had established that the protected disclosures were a contributing factor in the agency's decision to terminate her. *Id*. at 9-19. However, the administrative judge found that the agency had shown by clear and convincing evidence that it would have terminated her in the absence of her protected whistleblowing activity. *Id*. at 20-25.

¶16 On petition for review, the appellant contends that the agency failed to comply with agency policy and 5 C.F.R. part 315 in effecting her probationary termination. Petition for Review (PFR) File, Tab 1. She further asserts that it was in fact Wyatt who was responsible for the negative tenor and deteriorating relationships within the unit. *Id.* In addition, the appellant challenges the administrative judge's finding that disclosure (1) was not protected and contends that cleaning and restocking the med cart is a requirement under agency rules. *Id*. The agency has filed a response, in which it argues in general terms that the appellant's petition does not meet the criteria for review. PFR File, Tab 3.[4]

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[4] The appellant filed a reply to the agency's response the day after the close of the record on review. PFR File, Tab 4. The Board's regulations in effect at the time of that filing did not provide for submissions beyond the petition for review and response to the petition. *See Stolarczyk v. Department of Homeland Security*, 119 M.S.P.R. 343, ¶ 6 n.2 (2012). However, our current regulations do allow for a reply to a response to a petition for review. *See* 5 C.F.R. § 1201.114(a)(4). In light of the intervening change, we have considered the appellant's reply to the extent it is responsive to the agency's submission. *See McMillan v. Department of Justice*, 120 M.S.P.R. 1, ¶ 12 n.2 (2013).

ANALYSIS

¶17 In reviewing the merits of an IRA appeal, the Board must examine whether the appellant proved by preponderant evidence that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) and that such whistleblowing activity was a contributing factor in an agency personnel action; if so, the Board must order corrective action unless the agency established by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosures. *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 18 (2010); *see* 5 U.S.C. § 1221(e). Preponderant evidence is "that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue." 5 C.F.R. § 1201.56(c)(2). 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).

The appellant made protected disclosures.

¶18 A protected disclosure is a disclosure that an appellant 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. 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories of wrongdoing listed in section 2302(b)(8)(A). *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). The appellant need not prove that the matter disclosed actually established one of the types of wrongdoing listed under section 2302(b)(8)(A); rather, the appellant must show that the matter disclosed was one which a reasonable person in her

position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *Schnell*, 114 M.S.P.R. 83, ¶ 19.

¶19 With regard to disclosure (1), that med carts were not cleaned and restocked at shift change, the appellant testified below that cleaning the med carts was required by unidentified CLC regulations. HCD (Chavez testimony). While "protection under the WPA requires that an employee identify a specific law, rule, or regulation that was violated . . . this requirement does not necessitate the identification of a statutory or regulatory provision by title or number, when the employee's statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule, or regulation." *Langer v. Department of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001) (internal citations and quotation marks omitted). The evidence on record below concerning disclosure (1) falls short of that standard. *Cf. id*. (an employee's disclosure of his belief that there was "a problem with a disproportionately high number of African-Americans being prosecuted clearly implicated the question of selective prosecution and sufficiently raised possible violations of civil rights to constitute a protected disclosure"). On review, the appellant identifies a specific Department of Veterans Affairs regulation, VA 175, "Licensed Staff Medication Administration Accountabilities," which, according to the appellant, provides that "[a]t the end of every shift the med carts **must be** cleaned and stocked for the next shift." PFR File, Tab 1. However, the appellant failed to provide a copy of this regulation, and we are unable to locate it.

¶20 We find, however, that the appellant did prove she reasonably believed disclosure (1) evidenced a violation of substantial and specific danger to public health or safety. "[T]he inquiry into whether a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA is guided by several factors, among these: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences." *Chambers v. Department of the Interior*, 602 F.3d

1370, 1376 (Fed. Cir. 2010) (internal citations and quotation marks omitted). The record reflects that a nurse reporting to her shift and finding that her med cart was dirty and not properly stocked would have to take the time to clean and stock it, potentially delaying patient care for an hour or so. HCD (Dieling testimony). 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 on a series of unlikely events. *See Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 15 (2011). Furthermore, the fact that the perceived dangers may have been limited to patients at the Geriatrics and Extended Care unit does not prevent the dangers from being substantial and specific dangers to public health or safety. *See id.*

¶21 We also find disclosure (2), that nurses were not changing the dressings of patients, is protected. The appellant stated that she brought to Wyatt's attention that three patients had not had their dressings changed the previous day. IAF, Tab 7 at 3. Regardless of whether the patients in question actually suffered harm as a result, it is readily foreseeable that failure to change a patient's dressings could result in infection. Again, the potential for harm is not dependent on a series of unlikely events. *See Parikh*, 116 M.S.P.R. 197, ¶ 15. Accordingly, we conclude the appellant reasonably believed disclosure (2) evidenced a substantial and specific danger to public health or safety.

¶22 With regard to disclosure (3), that Wyatt accused the appellant of improperly performing a PPD test, we agree with the administrative judge that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could not reasonably conclude that Wyatt's actions evidenced an abuse of authority.[5] An abuse of authority occurs when there is an

[5] In addressing disclosure (3), the administrative judge cited *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001), for the proposition that discussion between employees and supervisors regarding various courses of action is normal and may help avoid potential violations. Initial Decision at 14. *Huffman* has

arbitrary and capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to herself or to other preferred persons. *Mc Corcle v. Department of Agriculture*, 98 M.S.P.R. 363, ¶ 24 (2005). Here, Wyatt merely assumed the appellant performed a PPD test improperly, investigated further, and found that the appellant was not at fault.

¶23 With regard to disclosure (4), that Dean left a med cart with narcotics for several patients in a cup as well as pre-drawn insulin and Heparin, we agree with the administrative judge that the appellant disclosed a substantial and specific danger to public health or safety. Here, Dieling testified without contradiction that, if a nurse draws medication, that nurse must administer the medication and not hand it off to a different nurse because medication could be given to the wrong patient, resulting in serious harm to the patient. HCD (Dieling testimony). Dieling's testimony is sufficient to establish a likelihood of impending harm, thus satisfying the *Chambers* standard. In addition, Everett and the appellant testified without contradiction that Dean's conduct was in violation of federal regulations. HCD (testimony of Chavez and Everett).

¶24 The administrative judge also correctly found that disclosure (5), that Dean refused to witness or verify an insulin draw, is not protected. The record shows that agency policy or practice required that a nurse verify or witness the amount of medication drawn by another nurse before the medication is administered to a patient. HCD (testimony of Chavez and Wyatt). However, as the administrative judge observed, the record contains no evidence that any law, rule, or regulation required any particular nurse to verify medications. Moreover, there was no

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since been legislatively overruled by the Whistleblower Protection Enhancement Act, which clarifies the definition of "disclosure," and the Board has recently held that the clarification of that definition should be applied in all pending appeals. *See generally Day v. Department of Homeland Security*, 119 M.S.P.R. 589 (2013). This turn of events does not alter our conclusions with respect to any of the disclosures at issue in this appeal.

apparent risk to public safety, as it is undisputed that another nurse was nearby to verify the insulin for the appellant, and there is no evidence that Dean's refusal to assist the appellant on this or other occasions resulted in substandard patient care or any harm to patients.

¶25 With regard to disclosure (6), that Gilbert borrowed money from a patient, several witnesses confirmed that borrowing money from patients is against agency rules. HCD (testimony of Chavez, Everett, Dieling, and Wyatt). Although the WPA does not define "rule," the Board has suggested it includes established or authoritative standards for conduct or behavior. *See Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶¶ 15-20 (2002). We agree that the disclosure was protected because a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that Gilbert's conduct violated an agency rule.

¶26 Finally, with regard to disclosure (7), that a patient was not cleaned for over 6 hours after a bowel movement, the administrative judge found that the appellant reasonably believed the incident evidenced a violation of a law, rule, or regulation. The appellant did not identify any specific law, rule, or regulation, however, and none is clearly implicated by the disclosure, as required under *Langer*. Nonetheless, regardless of whether the patient suffered actual harm, it is readily foreseeable that letting an ill person lay in his feces for 6 hours could result in infection. Thus, a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could conclude that the incident constituted a substantial and specific danger to public health or safety. Accordingly, we conclude that disclosure (7) is protected.

The appellant proved by preponderant evidence that her disclosures were a contributing factor in her probationary termination.

¶27 To prevail on a claim under the WPA, an appellant must prove by preponderant evidence that her protected disclosures were a contributing factor in

a personnel action. *Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 12, *aff'd*, 353 F. App'x 435 (Fed. Cir. 2009). The most common way of proving the contributing factor element is the "knowledge/timing" test. *Id.* Under that test, an appellant can prove the contributing factor element through evidence that the official taking the personnel action knew of the whistleblowing disclosure and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.* Here, the record reflects that Wyatt and Tordini knew of the appellant's whistleblowing disclosures and issued the termination notice within a period of time sufficiently short to satisfy the knowledge/timing test. *See, e.g.*, *id.*, ¶ 13 (a 6-month gap was "well within the range of time" required to meet the knowledge/timing test).

The agency did not show by clear and convincing evidence that it would have terminated the appellant absent her whistleblowing disclosures.

¶28 Where, as here, an appellant shows by preponderant evidence that she made protected disclosures and that those disclosures were a contributing factor in the decision to take a personnel action, the Board will order corrective action unless the agency shows by clear and convincing evidence that it would have taken the personnel action in the absence of the whistleblowing. *Id.*, ¶ 14. In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board generally considers the agency's evidence in support of its action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and 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).

¶29 With regard to the first *Carr* factor, we agree with the appellant that the agency's action was procedurally defective. Both agency policy and the Office of Personnel Management (OPM) regulations at 5 C.F.R. part 315 require that the information contained in a probationary termination notice "shall, at a minimum, consist of the agency's conclusions as to the inadequacies of [the probationer's] performance or conduct." 5 C.F.R. § 315.804; VA Handbook 5021/6, Part III, Chapter 2, ¶ 4. Here, the agency indicated in its termination notice that the appellant was being terminated due to "inappropriate behavior and unprofessional conduct," but it provided no detail whatsoever as to the nature of those alleged inadequacies. IAF, Tab 9. While it was permissible for the agency to state the reasons for its action in conclusory fashion, the information provided was so vague as to convey scarcely more than the bare fact that the agency was terminating the appellant for alleged unsatisfactory conduct.

¶30 Nonetheless, the agency's failure to provide a procedurally adequate termination notice does not by itself indicate that the agency lacked evidence in support of its action. In that regard, the administrative judge found that the evidence available to the agency at the time of its action was "not weak, but [was] not particularly strong." Initial Decision at 20. As the administrative judge observed, OPM regulations mandate that agencies use the probationary period "as fully as possible" to determine an employee's fitness and "terminate [a probationer's] services during this period if he fails to demonstrate fully his qualifications for continued employment." 5 C.F.R. § 315.803(a). The record reflects that the appellant had excellent nursing skills, did not take any annual or sick leave, and often worked overtime. HCD (testimony of Chavez, Everett, and Dieling). However, Wyatt testified that, while the appellant's clinical performance was good, her "personality" caused problems. HCD (Wyatt testimony). According to Wyatt, the appellant failed to be a team player and constantly found fault with others. *Id*. Wyatt testified that other employees felt intimidated by the appellant, that the team was always in an "uproar," and that,

while there was drama before and after the appellant's employment at the CLC, it increased while the appellant was there. *Id.* Tordini testified that, after consulting with the CLC Director, she felt it was necessary to terminate the appellant because the tenor of the unit and relationships among the staff were getting worse rather than improving. HCD (Tordini testimony).

¶31 To the extent the tensions cited by Wyatt and Tordini were the result of the appellant's alleged inability to work with others, we agree that, notwithstanding the appellant's excellent performance, the agency's rationale was consistent with the purpose of the probationary period as set forth in OPM's regulations. However, the administrative judge did not consider the extent to which the dysfunctional work environment at CLC was the result of the appellant's coworkers' hostile reaction to her whistleblowing and was exacerbated by Wyatt's failure to maintain confidentiality with regard to the appellant's disclosures. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1376 (Fed. Cir. 2012) (the administrative judge erred in failing to give serious consideration to the fact that the appellant's whistleblowing marked the beginning of seriously strained relationships with agency officials). We therefore conclude that the administrative judge overestimated the strength of the evidence in support of the agency's action.

¶32 With regard to the second *Carr* factor, the strength of the agency's motive to retaliate, the appellant testified that Wyatt stated that on more than one occasion that she would never forget that the appellant "went over her head" by reporting issues to Tordini and that on the day she was terminated Wyatt asked her, "Remember how I told you I would never forgive you for going over my head?" HCD (Chavez testimony). Although Wyatt denied ever making that statement and testified that the appellant's complaints to Tordini played no role in the termination decision, the administrative judge found based on Wyatt's demeanor at the hearing that her testimony on this point was not credible. Initial Decision at 23; *see Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed.

Cir. 2002) (the Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing). Nonetheless, the administrative judge found Wyatt's motivation to retaliate against the appellant was "weak" because her own conduct was not implicated in the appellant's disclosures and no corrective action was taken against her. Initial Decision at 23-24. The administrative judge further found no indication that the appellant's disclosures reached anyone higher in the chain of command than Tordini, and no evidence that the appellant's protected disclosures implicated Tordini's conduct. *Id*. at 24.

¶33 We find the administrative judge erred in taking an overly restrictive view of the second *Carr* factor. Although neither Wyatt nor Tordini were directly implicated or harmed by the disclosures, the appellant's criticisms reflected on both in their capacity as managers and employees, which is sufficient to establish a substantial retaliatory motive. *See Whitmore*, 680 F.3d at 1370-71 (the appellant's criticisms cast the agency, and by implication all of the responsible officials, in a highly critical light by calling into question the propriety and honesty of their official conduct); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 69 (2011) (finding motive to retaliate because the appellant's disclosures reflected on the responsible agency officials as representatives of the general institutional interests of the agency); *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, ¶ 23 (2010) (finding that comments generally critical of the agency's leadership would reflect poorly on officials responsible for monitoring the performance of the field staff and making sure that agency regulations are carried out correctly and consistently). Accordingly, we conclude the second *Carr* factor weighs significantly against a finding that the agency would have terminated the appellant in the absence of her whistleblowing activity.

¶34 With regard to the third *Carr* factor, the appellant contended that the agency did not take similar action against another probationary LVN who, according to the appellant, reported to work late and talked on her cell phone to the detriment of performing her duties. Our reviewing court has held that, under *Carr*, the requirement that comparator employees be "similarly situated" does not require "virtual identity" and that "[d]ifferences in kinds and degrees of conduct between otherwise similarly situated persons within an agency can and should be accounted for." *Whitmore*, 680 F.3d at 1373. This is particularly true where, as here, there is only a single person in the record for which a comparison can be made. *See id*. at 1373-74. Here, the appellant and the other LVN were similarly situated in that both were probationary LVNs supervised by Wyatt. Even in light of *Whitmore*, however, we agree with the administrative judge that the other LVN's deficiencies were not sufficiently similar to the reasons for the appellant's termination to provide persuasive evidence regarding the third *Carr* factor. *Cf. Whitmore*, 680 F.3d at 1373 (the comparator employee's hostile conduct "could well be considered the very same kind of disruptive and intimidating behavior, conduct unbecoming a supervisor, and inappropriate conduct in the workplace for which Whitmore was charged").

¶35 Based on our review of the *Carr* factors, we conclude that, contrary to the initial decision, the agency has not met its burden of showing by clear and convincing evidence that it would have terminated the appellant absent her protected disclosures. The appellant is therefore entitled to corrective action under 5 U.S.C. § 1221.

ORDER

¶36 We ORDER the agency to restore the appellant effective May 28, 2011. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶37 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.

¶38 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).

¶39 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).

¶40 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.

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

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL DAMAGES

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

NOTICE TO THE PARTIES

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

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

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

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal

Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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

DFAS CHECKLIST

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

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

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

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

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

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

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

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

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

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

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

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