CASE No.

SUPREME COURT OF THE UNITED STATES

TONYA KNOWLES,

PETITIONER,

v.

DEPARTMENT OF VETERAN AFFAIRS,
RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals Federal Circuit

Petition for a Writ of Certiorari

APPENDIX

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

TONYA KNOWLES,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2019-1987

Petition for review of the Merit Systems Protection Board in No. AT-1221-19-0047-W-1.

Decided: January 10, 2020

TONYA KNOWLES, Largo, FL, pro se.

KELLY A. KRYSTYNIAK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by JOSEPH H. HUNT, REGINALD THOMAS BLADES, JR., ROBERT EDWARD KIRSCHMAN, JR.

Before DYK, TARANTO, and CHEN, *Circuit Judges*.

PER CURIAM.

Pro se appellant Tonya Knowles appeals from a decision of the Merit Systems Protection Board (Board) denying Ms. Knowles's request for corrective action under the Whistleblower Protection Act (WPA). We *affirm*.

BACKGROUND

Ms. Knowles is currently employed by the Bay Pines Veterans Affairs Health Care System, a veterans' hospital operated by the Department of Veterans Affairs (agency) in Bay Pines, Florida. From 2016 to 2018, Ms. Knowles was subject to several personnel actions she believes were in retaliation for her protected disclosure in violation of the WPA. In 2017, Ms. Knowles filed a complaint with the Office of Special Counsel (OSC) alleging that Bay Pines employees were not properly storing patients' medical records and that she had been detailed, suspended, discriminated against, experienced a hostile work environment and received a proposed removal as reprisal for the allegation regarding the improper storage of medical records. Each personnel action is discussed below.

On December 30, 2016, the agency proposed to suspend Ms. Knowles from duty and pay for ten days based on three charges: (1) failure to safeguard confidential information, (2) negligence causing waste and delay, and (3) disruptive behavior. After Ms. Knowles gave oral and written replies, the agency's deciding official issued a final decision on March 10, 2017 sustaining the charges and mitigating the proposed ten-day suspension to seven days.

On January 10, 2017, the agency issued a memorandum stating that Ms. Knowles left protected health information and personally identifiable information concerning several patients unattended and unsecured on her desk. On February 7, 2017, the agency issued another memorandum finding that Ms. Knowles committed a privacy violation by leaving a pre-complaint form with her own name,

address, and social security number face-up in a tray by her work station.

On March 26, 2018, the agency again proposed to suspend Ms. Knowles from duty and pay, this time for fourteen days based on two charges: (1) failure to follow instructions and (2) disruptive behavior. After Ms. Knowles gave oral and written replies, the agency's deciding official issued a final decision on April 20, 2018, sustaining the charges and the proposed fourteen-day suspension.

On June 29, 2018, the agency proposed to remove Ms. Knowles from federal employment based on two charges: (1) failure to cooperate and (2) failure to safeguard confidential information. To date, the agency has not reached a decision regarding Ms. Knowles's proposed removal.

The OSC closed its inquiry as to whether the agency was improperly storing patients records on September 29, 2017 and determined that the agency had begun safeguarding documents in compliance with agency regulations. The OSC closed its inquiry into Ms. Knowles's claim of whistleblower retaliation on October 18, 2018. Ms. Knowles then filed an individual right of action with the Board on October 19, 2018, alleging that the agency's personnel actions against her violated the WPA because they were in retaliation for making a protected disclosure. Based on the testimony and evidence presented, the administrative judge found that Ms. Knowles had made at least one protected disclosure and had established that her disclosure was a contributing factor in the agency's personnel actions. But the administrative judge also found that the agency would have taken the same disciplinary actions notwithstanding Ms. Knowles's disclosure and therefore that corrective action was not warranted. The administrative judge's initial decision became the final decision of the Board. Ms. Knowles timely appealed to this court. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our standard of review is limited and requires this court to affirm a decision of the Board unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Substantial evidence is "relevant evidence" that "a reasonable mind might accept as adequate to support a conclusion." *Ingram v. Dep't of the Army*, 623 Fed. Appx. 1000, 1003 (Fed. Cir. 2015).

The WPA prohibits an agency from taking a personnel action because of any whistleblowing "disclosure" or activity. 5 U.S.C. § 2302(b)(8)–(9). An employee who believes he has been subjected to illegal retaliation must prove by a preponderance of the evidence that he made a protected disclosure that contributed to the agency's action against him. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). "If the employee establishes this *prima facie* case of reprisal for whistleblowing, 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 such disclosure.'" *Id.* at 1364 (quoting 5 U.S.C. § 1221(e)). If the agency does not show by clear and convincing evidence that it would have taken the same action absent the whistleblowing, the agency's personnel action must be set aside. *See Siler v. Envtl. Prot. Agency*, 908 F.3d 1291, 1298 (Fed. Cir. 2018).

In Ms. Knowles's case, the government does not dispute that agency officials issued personnel actions against her. The parties likewise agree that Ms. Knowles made protected disclosures. The question here is whether the Board properly found that the agency established "by clear and convincing evidence," that for each of the personnel actions taken between 2016 and 2018, "it would have taken the same personnel action in the absence of [a protected] disclosure." 5 U.S.C. § 1221(e)(2). This Court has outlined factors to consider to answer that question. *Carr v. Soc.*

Sec. Amin.,185 F.3d 1318, 1323 (Fed. Cir. 1999). Under *Carr*, the Board considers (1) "the strength of the agency's evidence in support of its personnel 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." *Id.* Here, substantial evidence supports the Board's findings with respect to the *Carr* factors and its ultimate determination that the agency would have implemented the personnel actions it did, or proposed to, even if Ms. Knowles had not made a protected disclosure.

A. MARCH 2017: SEVEN DAY SUSPENSION

In December 2016, the agency proposed a ten-day suspension, which was mitigated to a seven-day suspension in March 2017. The charges against Ms. Knowles included: (1) failure to safeguard confidential information, (2) negligence causing waste and delay, and (3) disruptive behavior. Charge one was supported by four specifications, all of which detailed instances in which Ms. Knowles mishandled or lost confidential information. Charge two was supported by three specifications all of which relate to the free credit monitoring services the agency had to provide to veterans due to Ms. Knowles's mishandling of confidential information. Charge three was supported by three specifications, all of which discussed Ms. Knowles's disruptive behavior during work, including Ms. Knowles's language and actions in front of veterans.

With respect to the first *Carr* factor, substantial evidence supports the Board's findings that the agency met its burden of proving charges one and two. J.A. 11–12. For charge one, the record contained a handwritten note from a veteran stating that while he was sitting with Ms. Knowles and she was looking for his patient information, another veteran returned it to him. J.A. 11. Additionally,

this mishandling of information was also documented in a memorandum from 2016. *Id.* For charge two, the Board noted that Ms. Knowles did not deny that her actions required the agency to bear the expense of credit monitoring for veterans whose confidential information she had misplaced. J.A. 12. The Board declined to consider charge three, because the agency provided little supporting testimony and evidence. *Id.* The Board reasonably found the evidence in supporting charges one and two sufficient to sustain those charges and justify the imposed seven-day suspension. *Id.*

With respect to the second *Carr* factor, the Board properly found no retaliatory motive by the three agency officials involved in recommending, proposing, and deciding Ms. Knowles's suspension. J.A. 12–14. Ms. Knowles argues that for all three agency officials her "criticisms reflected on both of their capacities as management officials and employees, which is sufficient to establish a substantial retaliatory motive." The Board is in the best position to assess the credibility of witnesses. *Haebe v. DOJ*, 288 F.3d 1288, 1300 (Fed. Cir. 2002). We find that the Board appropriately made credibility determinations as to each testifying official and its "find[ing of] no evidence in the record" for retaliatory motivation for these officials supported by substantial evidence. J.A. 13, 14.

With respect to the third *Carr* factor, the Board found "neither party presented meaningful evidence regarding the extent to which the agency may take similar actions against employees who did not engage in protected activity but who are otherwise similarly situated to the appellant." J.A. 14. Thus, the Board concluded that "there is no relevant comparator evidence." *Id.* Ms. Knowles argues that the agency did not take similar actions against a different whistleblower employee, Dr. Roula Baroudi, who was accused of photographing patient records. Dr. Baroudi, however, was not a similarly situated non-whistleblower, but rather an allegedly similarly situated whistleblower.

Therefore, the Board appropriately did not consider this information. *Siler v. Envtl. Prot. Agency*, 908 F.3d 1291, 1299 (Fed. Cir. 2018) ("Though the agency's treatment of other whistleblowers may illuminate any motive to retaliate under *Carr* factor 2, it does not show the agency's treatment of non-whistleblower employees accused of similar conduct, the precise inquiry considered under *Carr* factor 3."). Based on the record, substantial evidence supports the Board's decision that the agency properly established by clear and convincing evidence that it would have taken the same personnel action even absent Ms. Knowles's protected disclosure.

B. 2017 Security Violations

In 2017, Ms. Knowles was informed that she had violated agency rules related to safeguarding printed and electronic individually identifiable privacy-protected information. The agency issued two memorandums, the first from the Information Security Officer (ISO) and the second from the Assistant Chief of Health Information Management (ACHIM).

As to the first *Carr* factor, the Board found strong evidence supporting the violations, and substantial evidence supports its finding. J.A. 15, 17. The first memorandum from the agency's ISO on January 10, 2017, detailed that Ms. Knowles had left patient records unattended or unsecured on her desk. J.A. 14–15. The Board found that Ms. Knowles did not deny leaving the information unattended and unsecured on her desk. J.A. 15. The second memorandum from February 7, 2017 indicated Ms. Knowles left a pre-complaint form with Ms. Knowles's full name, address, and social security number face-up in the top tray at a work station. J.A. 16. Again, Ms. Knowles did not deny the allegation. J.A. 17.

As to the second *Carr* factor, substantial evidence supports the Board's finding that no evidence existed on the part of the two agency officials to retaliate against Ms.

Knowles. The ISO was unaware of Ms. Knowles's protected disclosure when it issued the January 2017 memorandum. J.A. 15. Nor was there any evidence in the record as to whether the ACHIM, the author of the second memorandum, knew about Ms. Knowles's protected disclosure. J.A. 17.

Neither Ms. Knowles nor the government presented evidence as to a similarly situated non-whistleblower. Therefore, the Board was free to find the personnel action lawful under *Carr* factors one and two. *Sutton v. Dep't of Justice*, 94 M.S.P.R 4, 12–13 (2003) (finding that whistleblower was lawfully removed based on the evidence under *Carr* factors one and two, where the record contained no evidence of action taken against similarly situated non-whistleblowers); *see also McCarthy v. Int'l Boundary & Water Comm.: U.S. & Mexico*, 116 M.S.P.R. 594, 626 (2011) (concluding that "the third Carr factor is not a significant factor for the Board's analysis in the instant appeal" in the absence of evidence showing that the agency took similar actions against similarly situated non-whistleblowers).[1] Thus, the Board did not err in holding that the agency properly established by clear and convincing evidence that it would have taken the same personnel action even absent Ms. Knowles's protected disclosure.

C. MARCH 2018: FOURTEEN DAY SUSPENSION

In March 2018, the agency proposed to suspend Ms. Knowles for fourteen days without pay based on two charges, "failure to follow instructions" and "disruptive behavior." With respect to the first *Carr* factor, substantial evidence supports the Board's finding that the record evidence supports the validity of the charges. J.A. 19. The

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[1] To the extent that Ms. Knowles is presenting the same evidence with respect to Dr. Baroudi, see the explanation in part A, *supra*.

record evidence contained the March 26, 2018 suspension proposal with handwritten notes by Ms. Knowles. *Id.* None of Ms. Knowles's notes denied the allegations, nor did Ms. Knowles offer testimony about the underlying conduct, as to either charge. *Id.* Moreover, as to the disruptive behavior charge, the record contained the email sent by Ms. Knowles to Ms. Royer, accusing Ms. Royer of altering an email originally drafted by Ms. Knowles. J.A. 18. Additionally, the Board properly credited Ms. Royer's testimony that she feared Ms. Knowles would damage her career and she therefore raised the allegation with her supervisor. J.A. 21.

As to the second *Carr* factor, the Board reasonably found no evidence that the proposing official or the deciding official suffered negative consequences as a result of Ms. Knowles's protected disclosure nor other evidence suggesting the disclosure motivated their decisions. J.A. 21–22. Ms. Knowles argues that the proposing officer was placed on a "Performance Improvement Plan" (Plan) that "focused on areas that the Business Office Service Leadership Team was underperforming in." To the extent Ms. Knowles argues that participation in the Plan was a negative consequence of her disclosures, there is no evidence in the record supporting this claim. And, as explained above, we find that the Board made appropriate credibility determinations in finding no evidence of a retaliatory motive.

With respect to the third *Carr* factor, we agree with the Board that neither Ms. Knowles nor the government presented evidence as to a similarly situated non-whistleblower and therefore the Board appropriately only considered *Carr* factors one and two.[2] Thus, the Board did not err in holding that the agency properly established by

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[2] To the extent that Ms. Knowles is presenting the same evidence with respect to Dr. Baroudi, see the explanation in part A, *supra*.

clear and convincing evidence that it would have taken the same personnel action even absent Ms. Knowles's protected disclosure.

D. JUNE 2018: PROPOSED REMOVAL

In June 2018, the agency proposed to remove Ms. Knowles from federal employment based on two charges. The first charge was "failure to cooperate" and was supported by two specifications which both relate to Ms. Knowles's failure to address questions and issues from the agency's Privacy Office. The second charge was "failure to safeguard confidential information." The second charge was supported by eleven specifications alleging that Ms. Knowles sent confidential veteran information to her personal email address.

With respect to the first *Carr* factor, the Board's findings of strong evidence to support both charges are amply supported by the evidence. The record contains a copy of the Privacy Office's confirmation memorandum, listing all of the steps Ms. Knowles should take with respect to the confidential information she sent to her personal email address, which Ms. Knowles did not sign. J.A. 127. The record in front of the Board also contained copies of several email messages containing the confidential information Ms. Knowles sent to her personal email account. J.A. 27. Ms. Knowles did not deny the facts alleged in the specifications. *Id.*

As to the second *Carr* factor, the Board found no evidence in the record that the officer proposing the removal suffered negative consequences as a result of Ms. Knowles's disclosure nor any other evidence suggesting that such a disclosure motivated her to issue the notice of removal. J.A. 27–28. For the reasons provided earlier, we find that the Board made appropriate credibility determinations and substantial evidence supports the Board's decision. Because Ms. Knowles's arguments and the Board's finding as to the third *Carr* factor are no different than what was

presented for the other personnel actions discussed above, we affirm the Board's findings here as well.

We have considered Ms. Knowles's remaining arguments and find them unpersuasive.

CONCLUSION

For the foregoing reasons, the decision of the Board is *affirmed*.

AFFIRMED

COSTS

No Costs.

United States Court of Appeals for the Federal Circuit

TONYA KNOWLES,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent

2019-1987

Petition for review of the Merit Systems Protection Board in No. AT-1221-19-0047-W-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

January 10, 2020

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

TONYA KNOWLES,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
AT-1221-19-0047-W-1

DATE: April 22, 2019

Tonya Knowles, Largo, Florida, pro se.

Tanya Burton, Esquire, Bay Pines, Florida, for the agency.

BEFORE
Jeffrey S. Morris
Administrative Judge

INITIAL DECISION

On October 19, 2018, the appellant filed an individual right of action (IRA) appeal alleging that the agency had twice suspended her without pay, had issued her two information security violation memorandums, and had proposed her removal for misconduct, all in retaliation for whistleblowing. Appeal File (AF), Tab 1. The Board has jurisdiction over the appeal under 5 U.S.C. §§ 1214(a)(3) and 1221(a), (e). The hearing requested by the appellant was conducted by videoconference on April 3, 2019. For the reasons set forth below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

By letter dated December 30, 2016, the agency proposed to suspend the appellant from duty and pay for ten days based on the charges of "Failure to safeguard confidential information," Negligence causing waste and delay," and "Disruptive behavior." AF, Tab 9, p. 283. After the appellant gave oral and written replies, the agency's deciding official issued a final decision letter on March 10, 2017, which sustained the charges and mitigated the proposed 10-day suspension to a 7-day suspension. *Id.*, p. 287.

Meanwhile, on January 10, 2017, the agency's Information Security Officer had issued a memorandum entitled "Violation of Rules of Behavior Observed during EOC Rounds." This memorandum concluded that the appellant left privacy-protected information concerning several patients unattended and unsecured on her desk. AF, Tab 7, p. 34 (Agency Exhibit 4). Separately, on February 7, 2017, the agency's Assistant Chief, Health Information Management, issued a memorandum entitled "Violation of Rules of Behavior – Unsecured PII/PHI – Ms. Tonya Knowles," which found that on January 17, 2017, the appellant had committed a privacy violation by leaving a pre-complaint form with her own name, address, and social security number face-up in a tray by her work station for that day. *Id.*, Tab 9, p. 71.[1]

By letter dated March 26, 2018, the agency proposed to suspend the appellant from duty and pay for fourteen days based on the charges of "Failure to Follow Instructions" and "Disruptive Behavior." AF, Tab 9, p. 273. After the appellant gave oral and written replies, the agency's deciding official issued a final decision letter on April 20, 2018, which sustained the charges and the proposed 14-day suspension. *Id.*, p. 277.

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[1] Neither memorandum described in this paragraph was cited or relied upon in the suspensions or the proposed removal which are also at issue in this appeal.

Finally, by letter dated June 29, 2018, the agency proposed to remove the appellant from federal employment based on the charges of "Failure to Cooperate," and "Failure to Safeguard Confidential Information." AF, Tab 9, p. 182. There is no dispute that the agency has not effected the appellant's removal, and that she remains employed by the agency.

The appellant subsequently filed a complaint with the Office of Special Counsel (OSC), alleging that the agency's actions described in the preceding paragraphs were motivated by retaliation for whistleblowing and/or protected activity. On October 18, 2018, OSC issued a letter which notified the appellant that it had terminated its investigation of the matter.[2] The letter also informed the appellant of her appeal rights to the Board. *Id.*, Tab 1. As noted above, the instant IRA appeal was filed on October 19, 2018.

General legal standards for IRA appeals

The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before the OSC[3] and makes non-frivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

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[2] OSC's closure letter did not identify the two information security violation memoranda referenced in the text as personnel actions taken against the appellant. However, before the hearing the appellant produced evidence which persuaded me that she had raised these matters before OSC. The closure letter did identify a temporary assignment (*i.e.*, a "detail") made by the agency as a personnel action taken against the appellant. However, the appellant did not assert this personnel action before the Board. AF, Tab AF, Tabs 13-15.

[3] Because the appellant filed this appeal with the Board within 65 days of the OSC notice, I find that she satisfied the timeliness aspect of the exhaustion requirement, and that she has exhausted administrative proceedings before OSC.

For an appellant who establishes Board jurisdiction over her IRA appeal to be entitled to corrective action over her claims, she must establish by a preponderance of the evidence[4] the following four elements: (1) the management official has the authority to take, recommend, or approve any personnel action; (2) the aggrieved employee made a disclosure protected under 5 U.S.C. § 2302(b)(8) or engaged in protected activity under 5 U.S.C. § 2302(b)(9); (3) the management official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; and (4) the protected disclosure was a contributing factor in the agency's personnel action. *See Chambers v. Department of Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010); *Lachance v. White*, 174 F.3d 1378, 1380 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). If the appellant meets that burden, the Board must order corrective action unless the agency establishes by clear and convincing evidence[5] that it would have taken the same personnel action in the absence of the disclosure. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion. *Id.* at 1368.

A "personnel action" is defined as follows: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under 5 U.S.C. chapter 43; (ix) a decision concerning pay, benefits, or awards, or

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[4] A preponderance of the evidence is that amount of relevant evidence which 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. § 1201.4(q).

[5] 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).

concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A); *Mattil v. Department of State,* 118 M.S.P.R. 662, ¶ 14 (2012).

The appellant made at least one protected disclosure under the WPA.

A protected disclosure is one that the appellant reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of 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 set out in 5 U.S.C. § 2302(b)(8)(A). *Lachance*, 174 F.3d at 1381.

In response to my Order to Show Cause (AF, Tab 13), the appellant asserted that, *inter alia*, on or about July 26, 2016 she made protected disclosures to her management chain to the effect that personally identifiable information (PII) was not safeguarded in violation of, *inter alia*, the Privacy Act and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). AF, Tab 15, p. 5. By order dated February 14, 2019, I found the appellant had non-frivolously alleged that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by her could reasonably conclude that the agency's actions evidenced wrongdoing as defined by the WPA. In other words, she non-frivolously alleged that she disclosed information that she reasonably believed evidenced a violation of any law, rule, or regulation. I further found the disclosure was raised before OSC. AF, Tab 26. The agency has

not disputed that the appellant made this protected disclosure. Therefore, I find that the appellant has shown that she made at least one protected disclosure.

The appellant established that her disclosure was a contributing factor in the agency's personnel actions.

As stated above, a "personnel action" includes an action under 5 U.S.C. Chapter 75 or other disciplinary or corrective action. *See* 5 C.F.R. § 1209.4; 5 U.S.C. § 2302(a)(2)(A). Here, it is undisputed that the agency twice suspended her (in 2017 and 2018), issued two information security violation memoranda concerning her (in January and February 2017),[6] and proposed her removal (in June 2018). I find that these actions all qualify as "personnel actions" under the WPA.

An appellant may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, also known as the "knowledge/timing test." Once the knowledge/timing test has been met, an administrative judge must find that the appellant has established that her protected whistleblowing activity was a contributing factor in the personnel action at issue, even if, after a complete analysis of all of the evidence, a reasonable fact finder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action. *See, e.g., Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 21 (2010). To satisfy the "knowledge/timing" test, the appellant need only demonstrate that the fact of, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the

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[6] I find that the two information security violation memoranda, although not addressed to the appellant directly, constituted significant changes in the appellant's working conditions for purposes of 5 U.S.C. § 2302(a)(2)(A).

personnel action in any way. *See Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 11 (2006).

There is no dispute that the proposing and deciding officials for the suspensions and the proposed removal were aware of the appellant's whistleblowing and/or protected activities by virtue of her frequent email messages and/or her statements in response to actions that were proposed. Moreover, all of the agency's actions occurred within approximately one year of her protected disclosure referenced in the preceding subsection. Consequently, I find that the appellant met her burden on the contributing factor issue.

The agency established by clear and convincing evidence that it would have taken the same actions absent the protected disclosures.

I find that the agency has shown by clear and convincing evidence that it would have taken the same personnel actions in the absence of the appellant's protected disclosure. In determining whether the agency has met its burden of clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the following factors (the "*Carr* factors") should be considered: (1) the strength of the agency's evidence in support of its personnel 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. *See Whitmore*, 680 F.3d at 1365; *Carr v. Social Security Administration*, 185 F.3d 1313, 1318 (Fed. Cir. 1999).[7]

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[7] Although the Board will consider the strength of the agency's justification for taking the challenged action as part of the clear and convincing analysis, the Board does not conduct a merits-based analysis of an agency's charge of misconduct in an IRA appeal as it would in an appeal under chapter 75. *See, e .g., Marren v. Department of Justice*, 51 M.S.P.R. 632, 638 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table), modified on other grounds by *Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 323 n .13 (1994).

In *Whitmore*, the court held that all of the pertinent evidence must be considered in evaluating whether the agency has met its burden. *See Whitmore*, 680 F.3d at 1368. The court noted:

> The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment action against a whistleblower carries its statutory burden to prove – by clear and convincing evidence – that the same adverse action would have been taken absent the whistleblowing.

Id., 680 F.3d at 1377. Therefore, in order to determine whether the agency has met its burden, all of the pertinent evidence must be considered. *Id.* at 1368.

2017 Suspension

The agency proposed a 10-day suspension for the appellant on December 30, 2016 (AF, Tab 9, p. 283), which was mitigated to a 7-day suspension by letter dated March 10, 2017 (*Id.*, p. 287). The charges read as follows:

> **Background**: As a Medical Records Technician you are responsible for appropriately responding to Release of Information (ROI) requests. You have had extensive training in the protocols governing the release of Private Health Information (PHI) and Personally Identifiable Information (PII).
>
> **CHARGE 1**: Failure to safeguard confidential information
>
> **SPECIFICATION A**: On October 13, 2016, the ROI office reported to the Privacy Office that you inappropriately and without proper authority provided Veteran A with a CD copy of Veteran B's medical records (Violation PSETS 144711). You are charged with failure to safeguard confidential information.
>
> **SPECIFICATION B**: On August 10, 2016, the Release of Information Office (ROI) notified the Privacy Office that it had performed a quality assurance review on the Medical Records Technicians. The review determined that two requests/authorizations were missing for which you were responsible. You were provided with two hours to locate the missing requests/authorizations and

failed to do so (Violation PSETS 141450). You are charged with failure to safeguard confidential information.

SPECIFICATION C: On August 4, 2016, ROI notified the Privacy Office that a release of information request for which you were responsible was missing and search efforts had been unsuccessful (Violation PSETS 141273). You are charged with failure to safeguard confidential information.

SPECIFICATION D: On July 11, 2016, ROI reported to the Privacy Office that it had performed a quality assurance review on the Medical Records Technicians. The review determined that two requests/authorizations were missing for which you were responsible. You were provided with two hours to locate the missing requests/authorizations and failed to do so (Violation PSETS 139902). On July 28, 2016, ROI reported that one of the requests had been discovered. The other was never recovered. You are charged with failure to safeguard confidential information.

CHARGE 3: Negligence causing waste and delay

SPECIFICATION A: Because you misplaced confidential information as discovered on August 10, 2016 (Violation PSETS 141273), the Agency was required to offer credit reporting to the affected Veteran. Because of your improper loss of confidential information, Agency resources had to be employed to manage and mitigate the danger this created for the Veteran. You are charged with negligence causing waste and delay.

SPECIFICATION B: Because you misplaced confidential information as discovered on August 4, 2016 (Violation PSETS 141450), the Agency was required to offer credit reporting to the affected Veteran. Because of your improper loss of confidential information, Agency resources had to be employed to manage and mitigate the danger this created for the Veteran. You are charged with negligence causing waste and delay.

SPECIFICATION C: Because you misplaced confidential information as discovered on July 11, 2016 (Violation PSETS 139902), the Agency was required to offer credit reporting to the affected Veteran. Because of your improper loss of confidential information, Agency resources had to be employed to manage and

mitigate the danger this created for the Veteran. You are charged with negligence causing waste and delay.

CHARGE 3: Disruptive behavior

SPECIFICATION A: On October 31, 2016, when you returned from your break, the Lead Medical Records Technician asked you to assist a Veteran. Rather than helping the Veteran with the disc he needed, you said to the Lead, "you're sitting there I don't know why you can't just give it to him" or words to that effect and told her the disc was in the desk where the Lead was sitting. The Lead looked in the desk but didn't find the disc; you then stated, "oh, then, he will have to wait" or words to that effect. You exhibited this rudeness and poor customer service in front of a Veteran. This conduct is a violation of VA Healthcare System Memorandum 518-12-05-053, Codes of Conduct. You are charged with disruptive behavior.

SPECIFICATION B: On October 26, 2016, the ROI supervisor spoke with a Veteran's wife about their visit to ROI on or around October 14, 2016. The Veteran's wife relayed that you were rude and disrespectful regarding the completion of a records form. She described your behavior as "very nasty and asserted that you were harsh regarding the form being incomplete, scolding and snapping at her, "I told you, I told you" or words to that effect. The Veteran and his wife were so distressed they submitted a written complaint through the "Speak to the Director" process which stated in part, "it felt like she was going out of her way to frustrate my wife." Your behavior was unacceptable and the opposite of good customer service. This conduct is a violation of VA Healthcare System Memorandum 518-12-05-053, Codes of Conduct. You are charged with disruptive behavior.

SPECIFICATION C: On July 26, 2016, you were asked to help a patient Veteran by the Lead Medical Records Technician. Rather than doing so, you became belligerent and loud with the Lead, stating that it was not his place to assign you to assist the Veteran. You exhibited this conduct both in front of a Veteran and the ROI supervisor. This conduct is a violation of VA Healthcare System Memorandum 518-12-05-053, Codes of Conduct. You are charged with disruptive behavior.

AF, Tab 9, pp. 283-285. The agency's deciding official sustained Specifications A, B, and C of Charge 1 (3 of 4 specifications); Specifications A and B of Charge 2 (2 of 3 specifications); and Specifications A, B, and C of Charge 3 (3 of 3 specifications). *Id.*, p. 287. For the reasons set forth below, I find that application of the *Carr* factors establishes by clear and convincing evidence that the agency would have suspended the appellant for misconduct in 2017 even in the absence of her protected disclosure(s).

Regarding Charge 1, "Failure to safeguard confidential information," I note first that the appellant denied none of the sustained specifications during her hearing testimony. HCD, testimony of appellant. And, specific documentation supporting the sustained specifications is contained in the record. For example, with respect to Charge 1, Specification A, a handwritten memorandum from a veteran dated October 13, 2016, which states: "I heard that another gentleman was given an envelope with my disc and information by mistake. He returned it while I was sitting with Tonya Knowles and she was looking for my info in that envelope. No problem for me. My info is still private." AF, Tab 32, p. 123 (Agency Exhibit 6). This incident was also documented in a memorandum from the agency Privacy/FOIA office, dated October 24, 2016 and entitled "Privacy Violation Memo – PSETS 144711." *Id.*, p. 25 (AJ Exhibit 2). Regarding Charge 1, Specification B, another memorandum from the Privacy/FOIA office, dated August 15, 2016 and entitled "Privacy Violation Memo – PSETS 141450," concluded that the appellant had violated agency rules for safeguarding confidential information by losing two requests/authorizations by veterans for medical records. *Id.*, p. 28. In the unrelated (but informative) context of a misconduct action under 5 U.S.C. Chapter 75, the Board has held that proof of one or more specifications supporting a charge is sufficient to sustain the charge. *See Greenough v. Department of the Army*, 73 M.S.P.R. 648, 657 (1997), *review dismissed*, 119 F.3d 14 (1997); *James v. Department of the Air Force*, 73 M.S.P.R. 300, 303 (1997). I find that, given the prohibitions against improper

access and disclosure of patient information found in statutes (*e.g.*, the Privacy Act and HIPAA) and agency regulations (*see, e.g.*, AF, Tab 9, p. 316), I find it is simply beyond question that the appellant's sustained misconduct referenced in Charge 1 was quite serious.

With respect to Charge 2, "Negligence causing waste and delay," the August 15, 2016 Privacy/FOIA Office memorandum referenced in the preceding paragraph indicates the agency's Network Security Operations Center determined that credit monitoring was required for two veterans as a result of the appellant losing their requests/authorizations for medical records. AF, Tab 32, p. 28. During her hearing testimony, the appellant did not deny that her actions had necessitated the agency's bearing the expense of credit monitoring for veterans impacted by her loss of their records. I find that the appellant's carelessness with confidential patient information resulting in expenditure of agency resources was negligent, caused "waste" as alleged in the charge, and represented serious misconduct.

The agency presented little (if any) testimony or evidence to support the allegations made in Charge 3 "Disruptive behavior." However, I find that its strong evidence in support of Charges 1 and 2 was sufficient to sustain those charges and justify the imposed 7-day suspension.

I must also examine the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision to suspend the appellant in 2017. In *Whitmore*, the court stated the following:

> Since direct evidence of a proposing or deciding official's retaliatory motive is typically unavailable (because such motive is almost always denied), federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate.

Whitmore, 680 F.3d at 1371. Here, the appellant's immediate supervisor, Rosa Sly, testified that she requested disciplinary action against the appellant based solely on the conduct described in the December 30, 2017 proposal letter. She denied that the appellant's whistleblowing activity had any role in that request.

The appellant's examination of Ms. Sly focused on performance appraisal ratings and other unrelated matters, rather than retaliation. HCD, testimony of Sly. I find no basis in the record for retaliatory motivation on Ms. Sly's part.

Donna Griffin-Hall was the agency's proposing official for the 2017 suspension of the appellant. She testified that she issued the notice of proposed suspension based on an agency fact-finding investigation concerning the appellant's alleged disruptive behavior (Charge 3). She added that the "failure to safeguard" and "negligence" issues (Charges 1 and 2) arose while the initial fact-finding investigation was in progress. Griffin-Hall further testified that Sly requested disciplinary action against the appellant, and that she (Griffin-Hall) fully coordinated the proposed suspension with the agency's human resources staff. While Griffin-Hall admitted knowledge of the appellant's protected disclosure(s), she denied they played any role in her proposing the appellant's suspension and said the same action would have been proposed in the absence of the disclosure(s). HCD, testimony of Griffin-Hall. I find no evidence in the record that Griffin-Hall suffered negative consequences as a result of the appellant's disclosure(s), nor any other evidence suggesting that the appellant's disclosure(s) motivated Griffin-Hall to issue the proposal letter.

Kristine Brown served as the agency's deciding official for the 2017 suspension of the appellant. In that capacity, she heard and considered the appellant's oral reply to the charges, and also considered the appellant's written reply. Brown testified without contradiction that, in both the oral reply and the written reply, the appellant admitted and took responsibility for the charged privacy-related misconduct. Brown said she did not sustain two specifications, and decreased the imposed penalty to seven days, due to certain mitigating factors. She further testified that she became aware of protected disclosures or activity by the appellant only during the oral/written reply process. Brown maintained her decision was based on the evidence before her concerning the

appellant's misconduct, and not on any other considerations. HCD, testimony of Brown. As with Griffin-Hall, I find no evidence in the record that Brown suffered negative consequences as a result of the appellant's disclosure(s), nor any other evidence suggesting that the disclosure(s) motivated her to sustain the appellant's proposed suspension. Indeed, had Brown harbored any retaliatory animus toward the appellant I find it highly unlikely she would have failed to sustain two specifications or mitigated the penalty from ten to seven days.

Finally, neither party presented meaningful evidence regarding the extent to which the agency may take similar actions against employees who did not engage in protected activity but who are otherwise similarly situated to the appellant. Consequently, I find that there is no relevant comparator evidence. *See Runstrom v. Department of Veterans Affairs*, 123 M.S.P.R. 169, ¶ 18 (2016) (finding that, due to lack of evidence that there were any employees similarly situated to the appellant, the third *Carr* factor was not significant for analysis). Based on the above, I find this factor is not relevant in the present case.

Thus, having considered all of the pertinent evidence, I find that the agency established by clear and convincing evidence that it would have suspended the appellant for seven calendar days in 2017, even absent her protected disclosure(s).

2017 information security violations

In a memorandum dated January 10, 2017, the agency's Information Security Officer, Gina Rhodes, stated the following:

1. On Tuesday, January 10, 2017, the Information Security Office conducted an Un-announced Environment of Care (EOC) rounds in an area under your supervision.

2. We have found a violation of the rules of behavior, or other significant security vulnerability as follows:

   Room: ROI

User: Tonya Knowles

Finding: PHI/PII left unattended/unsecured on desk with user not present. ~5-10 impacted patients records.

AF, Tab 7, p. 34 of 52 (fax page numbers) (admitted agency exhibit). The memorandum went on to cite agency rules requiring its employees to, *inter alia*, safeguard printed and electronic individually identifiable information. *Id.* Rhodes testified without contradiction that she had never met the appellant prior to the hearing, and further stated that she had issued similar memoranda concerning violations by five other individuals on that same day, January 10, 2017. She said she was unaware of any protected disclosure by the appellant prior to that date, and would have issued the same memorandum even if she knew of such a disclosure. HCD, testimony of Rhodes. During her hearing testimony, the appellant did not deny leaving PHI/PII unattended and unsecured on her desk on the date in question. In view of the foregoing, I find that the appellant's protected disclosure(s) did not constitute a contributing factor in the agency's issuance of the January 10, 2017 memorandum. Further, I find that even if the appellant's disclosure(s) had been known to Rhodes and thereby contributed to issuance of the memorandum, the agency presented strong evidence in support of the January 10, 2017 memorandum, that there is no evidence of motive to retaliate on the part of Rhodes, and that relevant comparator evidence indicates a lack of retaliatory intent by Rhodes. Therefore, applying the *Carr* factors, I would find that the agency established by clear and convincing evidence that it would have issued the January 10, 2017 information security violation memorandum even absent the appellant's protected disclosure(s) and/or activity.

Similarly, in a memorandum dated February 7, 2017, entitled "Violation of Rules of Behavior – Unsecured PII/PHI – Ms. Tonya Knowles," the agency's

Assistant Chief, Health Information Management, Devona Hollingsworth, stated the following, in pertinent part:

> 1. This memorandum is in response to the privacy violation identified on January 17, 2017, in which Ms. Tonya Knowles failed to safeguard confidential information, resulting in PHI/PII being left unsecured/unattended in the dual tray to the right of the computer station # 1 in the Release of Information (ROI) section.
>
> 2. While walking around to ensure all items have been secured throughout the ROI section, Ms. Devona Hollingsworth discovered that Ms. Knowles left a Pre-Complaint form with her (Ms. Knowles') full name, address, and social security number faced-up, in the top tray to the right of the chair of computer station # 1, where Ms. Knowles was performing duties for the day. Ms. Rosa Sly and Ms. Mary Ann Branesky were witnesses to the form that was found.
>
> 3. On January 18, 2017, Ms. Hollingsworth reminded Ms. Knowles that it is her job to protect any and all PII information, to include her own, and alerted Ms. Knowles that this was an added violation to the ISO violation she had on January 10, 2017. Ms. Hollingsworth informed Ms. Knowles she would submit a ROC to Ms. Knowles' supervisor, Ms. Rosa Sly, who would discuss any additional actions that would be developed from the incident.
>
> 4. In accordance to the ISO Office, Ms. Knowles' additional incident has warranted her account to be disabled and she must read, sign, and adhere to the Department of Veterans Affairs Information Security Rules of Behavior.

AF, Tab 7, p. 39 of 52 (fax page numbers) (admitted agency exhibit). The memorandum went on to cite the same agency rules identified in the January 10, 2017 memorandum, which require employees to, *inter alia*, safeguard printed and electronic individually identifiable information. *Id.*

Although Devona Hollingsworth did not testify at the hearing, Rosa Sly confirmed that she witnessed the relevant event as described in the February 7, 2017 memorandum. HCD, testimony of Sly. The appellant did not deny the

violation alleged therein, nor did she present evidence or argument that Hollingsworth had knowledge of her disclosure(s) or any other motive to retaliate against her based on her (appellant's) previous protected disclosure(s). *Id.*, testimony of appellant. Accordingly, I find that the appellant's protected disclosure(s) did not constitute a contributing factor in the issuance of the February 7, 2017 memorandum. Further, even if Hollingsworth knew about the appellant's protected disclosure(s), the agency presented strong evidence in support of the February 7, 2017 memorandum, that there is no evidence of motive to retaliate on the part of Hollingsworth, and no relevant comparator evidence. Thus, applying the *Carr* factors, I would find that the agency established by clear and convincing evidence that it would have issued the February 7, 2017 information security violation memorandum even absent the appellant's protected disclosure(s) and/or activity.

2018 suspension

By letter dated March 26, 2018, the agency proposed to suspend the appellant for fourteen days without pay based on the following charges:

CHARGE 1: Failure to Follow Instructions

> **SPECIFICATION A:** On October 23, 2017, your immediate supervisor instructed you to send her all of the emails that pertained to your accusation that your co-worker, Loria Royer, had altered your email message regarding a work assignment/productivity report. You told your immediate supervisor "No" and that she would need to see your attorney. You failed to provide the requested information to your supervisor as instructed.
>
> **SPECIFICATION B:** On January 18, 2018, at 9:22 AM, I sent you an email stating that I wanted to speak with you directly. In a subsequent email, you stated that you did not feel comfortable speaking with any management official alone. On January 18, 2018, at 9:33 AM, you then stated that it was against policy as a subordinate does not have to meet with a management official alone

without representation. You failed to speak with me with or without representation.

SPECIFICATION C: On January 24, 2018, at 1:03 PM, I sent an email directing you to discontinue the repeated emails related to the verbal counseling that your received from your immediate supervisor. I also directed you to set up a meeting with your immediate supervisor and AFGE to discuss this matter face-to-face. You failed to set up the meeting as instructed and you again sent an email to your supervisor and me.

CHARGE 2: Disruptive Behavior

SPECIFICATION A: On August 14, 2017, at 8:51 AM, you sent an email to the Associate Director and the Secretary of Veterans Affairs. Your email was highly critical of management officials and accused the Bay Pines VA Healthcare System of discouraging employees from filing EEO complaints. Your email was disrespectful towards the Associate Director and inappropriate. Your actions violated VAHCS Memorandum 516-12-05-053, Codes of Conduct.

SPECIFICATION B: On October 23, 2017, at 12:27 PM, you sent an email to Loria Royer and accused her of altering an email message that was sent to you. Ms. Royer denied altering this email message and notified her immediate supervisor. Your accusation against Ms. Royer was unfounded and caused disruption in the workplace. Your actions violated VAHCS Memorandum 516-12-05-053, Codes of Conduct.

AF, Tab 9, pp. 273-274. By letter dated April 20, 2018, the agency's deciding official sustained the charges, all specifications, and the proposed 14-day penalty. *Id.*, p. 277. For the reasons set forth below, I find that application of the *Carr* factors establishes by clear and convincing evidence that the agency would have suspended the appellant for misconduct in 2018 in the absence of her protected disclosure(s).

Very little hearing testimony was presented by either party regarding the charges in the 2018 suspension proposal. However, I find that record evidence supports their validity. Specifically, the agency file contains a copy of the March 26, 2018 proposal notice with handwritten annotations by the appellant. AF, Tab 9, pp. 150-151. Significantly, none of the appellant's handwritten notes deny the facts alleged in any charge or specification. Rather, beside each specification the appellant wrote: "violation of master agreement," or similar verbiage, indicating her belief that the agency had broken the union contract in directing her to take the actions described in the specifications (Charge 1) or in sanctioning her for sending certain email messages (Charge 2).[8]

However, with respect to Charge 1 ("Failure to Follow Instructions"), even a violation of the union contract would not immunize the appellant from discipline for failing to follow the instruction at issue. The "obey now grieve later" rule has long been recognized as one that is necessary to an agency's ability to effectively manage the workplace. The rule generally requires an employee to comply with an agency order, even where the employee may have substantial reason to question it, while taking steps to challenge its validity through whatever channels are appropriate. *See Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table); *Bigelow v. Department of Health & Human Services*, 750 F.2d 962, 965 (Fed. Cir. 1984). The rule reflects the fundamental management right to expect that its decisions will be obeyed and its instructions carried out. *See Nagel v. Department of Health & Human Services*, 707 F.2d 1384, 1387 (Fed. Cir. 1983) (permitting employees to refuse to perform because of disagreements with management violates the first law of the work place, namely that it is a place for doing work).

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[8] In an IRA appeal, an appellant cannot raise affirmative defenses such as claims of discrimination or harmful procedural error. *See* 5 C.F.R. § 1209.2(c).

The recognized exceptions to the requirement that agency orders be obeyed apply only in extreme or unusual circumstances. *See, e.g., New v. Department of Veterans Affairs*, 142 F.3d 1259, 1264 (Fed. Cir. 1998); *Gragg v. United States Air Force*, 13 M.S.P.R. 296, 299 (1982) (orders placing employee in dangerous situation); *Fleckenstein v. Department of the Army*, 63 M.S.P.R. 470, 474 (1994) (order to make disclosure that could cause irreparable harm). The "obey now grieve later" rule also has been rejected when an employer's order is illegal. *Garcia v. N.L.R.B.*, 785 F.2d 807, 812 (9th Cir.1986).

Here, the appellant does not credibly allege it was illegal to provide her supervisor with emails relating to her (appellant's) accusations against her co-worker, to talk to her (the supervisor) directly, or to discontinue sending repeated emails related to a verbal counseling she received, or that following those instructions placed her in a dangerous situation or caused her irreparable harm. The agency was therefore entitled to impose discipline for the appellant's undenied failure to follow instructions. In other words, I find that Charge 1 is supported by strong evidence.

Regarding Charge 2, the Board has held that, in order to prove a charge of disruptive behavior, the agency must show: (1) the appellant engaged in certain inappropriate conduct; and (2) that conduct caused a disruption. *See, e.g., Colon v. Department of the Navy*, 58 M.S.P.R. 190, 197-98 (1992). In view of this standard, Charge 2, Specification A appears problematical. The agency did not identify the referenced August 14, 2017 email message to the Secretary during the hearing, and I am unable to locate it in the record. Moreover, the specification itself indicates the email message was disrespectful and inappropriate, but no testimony or evidence demonstrates that it caused disruption. Therefore, even though the appellant did not deny sending the email in question, I find this specification is not supported by available evidence.

As for Specification 2, the appellant's handwritten notes on the proposal letter do not deny the facts alleged in the specification. In this instance, the email message in question appears in the record (AF, Tab 9, p. 217-218), and in it the appellant clearly accuses her co-worker (her lead, per hearing testimony), Loria Royer, of alteration ("Ms. Royer attempting to ALTER emails"). *Id.*; HCD, testimony of Royer. Royer testified that she changed only the subject line in the appellant's original message – from "Assignment for 10/23/2017" to "10/23/2017: productivity: 12:00p" – and did not modify any content in the body of the appellant's message. Royer further stated that the appellant's accusation upset her because she feared it would damage her career. For that reason, she said, she took up the matter with her supervisor as alleged in the specification. HCD, Testimony of Royer. I find that Royer's reaction to the appellant's accusation clearly indicates disruption in the workplace, and that Charge 1, Specification B is supported by strong evidence.

Donna Griffin-Hall was the agency's proposing official for the 2018 suspension of the appellant. As noted regarding the 2017 suspension she proposed, Griffin-Hall said her knowledge of the appellant's protected disclosure(s) played no role in her proposing the appellant's suspension in 2018, and she added that the same action would have been proposed in the absence of the disclosure(s). HCD, testimony of Griffin-Hall. I find no evidence in the record that Griffin-Hall suffered negative consequences as a result of the appellant's disclosure(s), nor any other evidence suggesting that such disclosure(s) motivated her to issue the 2018 proposal letter.

Jonathan Benoit was the agency's deciding official for the 2018 suspension. He testified that the appellant informed him of her whistleblowing activity during her oral reply to the charges. However, he maintained that this knowledge did not factor into his decision to sustain the charges and the proposed 14-day suspension. Benoit also stated that he arrived at the agency's Bay Pines facility,

where the matters at issue in this appeal transpired, only a short time before serving as deciding official for the appellant's 2018 proposed suspension. HCD, testimony of Benoit. I find that no evidence shows Benoit suffered negative consequences as a result of the appellant's previous disclosure(s), nor do I perceive any other evidence suggesting that such disclosure(s) motivated him to sustain the charges or the proposed suspension.

Neither party presented meaningful evidence regarding the extent to which the agency may take similar actions against employees who did not engage in protected activity but who are otherwise similarly situated to the appellant. Consequently, I find that there is no relevant comparator evidence. *Runstrom*, 123 M.S.P.R. 169, ¶ 18. Based on the above, I find this *Carr* factor is not relevant in the present case.

Therefore, having considered all of the pertinent evidence, I find that the agency established by clear and convincing evidence that it would have suspended the appellant for 14 calendar days in 2018, even absent her protected disclosure(s).

2018 proposed removal

By letter dated June 29, 2018, the agency proposed to remove the appellant from federal employment due to alleged misconduct. In pertinent part, the notice of proposed removal (NOPR) reads as follows:

> **BACKGROUND:** As a Medical Records Technician, you have had extensive training in the protocols governing the release of Private Health Information (PHI) and Personally Identifiable Information (PII). On April 5, 2018, it was reported to the Privacy Office that you allegedly sent a Veterans PII to your personal email account. The email contained the Veteran's full name and a partial Social Security Number. On April 5, 2018 the Data Breach Response Service (DBRS) was notified of the complaint (Privacy and Security Event Tracking System (PSETS) 171900). The Privacy Office conducted an investigation and on April 17, 2018, the DBRS was notified of these findings. On April 19, 2018, the Privacy Office

received and reviewed the emails that were sent to your personal email address and discovered that 24 unique Veterans were involved.

CHARGE 1: Failure to Cooperate

SPECIFICATION A: On May 21, 2018, you were provided an opportunity to address questions from the Privacy office in reference to PSETS 171900. The questions from the Privacy Office were presented to you with AFGE/Union representation by the Chief of the Business Office. In response to these questions, you stated, "My rights for VA Directive 0700 is [are] being violated as well as the Master Agreement – Investigations. This is an illegal act and I have alleged disparate treatment. I will not answer questions in this fashion." Your failure to cooperate regarding the questions provided by the Privacy Office violated VAHCS Memorandum 516-12-05-053, Codes of Conduct.

SPECIFICATION B: On May 21, 2018, you were issued a confirmation memo by the Privacy Office. The Privacy Office issued this memo so that you could confirm that all VA sensitive data was deleted in its entirety, that all VA sensitive data that was transmitted, transported, printed, copied or stored outside of VA owned or managed facilities without prior approval was returned to VA custody, and that no other VA sensitive data has been removed from VA custody without prior written approval. You did not sign the confirmation memo and instead wrote: "Acknowledge Receipt" in the signature block section. Your failure to cooperate with the confirmation memo provided by the Privacy Office violated VAHCS Memorandum 516-12-05-053, Codes of Conduct.

CHARGE 2: Failure to Safeguard Confidential Information

SPECIFICATION A: On April 4, 2018, at 4:27 p.m., you sent an email that contained a Veteran's full name and partial social security number to your personal email address, tknowles70@gmail.com (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION B: On March 26, 2018, you sent an email that contained an unredacted Bay Pines Police Investigative Report from your personal email address, tknowles70@gmail.com, to your VA email address (Violation PSETS 171900). The investigative report contained full names, partial social security numbers, dates of birth, home addresses and the driver's license numbers of these individuals. Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION C: On November 16, 2017, at 3:18 p.m., you sent an email to your personal email address, tknowles70@gmail.com, in which the subject line identified a Veteran by his full name and medical condition (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION D: On October 23, 2017, at 12:22 p.m., you sent an email that contained the full names and social security numbers of fifteen Veterans to your personal email address, tknowles70@gmail.com (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION E: On September 28, 2017, at 10:23 a.m., you sent an email that contained the partial name of a Bay Pines VA Employee/Veteran to your personal email address, tknowles70@gmail.com (Violation PSETS 171900). The email that you sent contained PHI about the Bay Pines VA Employee/Veteran. Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION F: On July 12, 2017, at 3:40 p.m., you sent an email that contained the full name and partial social security number of a Veteran to your personal email address, tknowles70@gmail.com (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION G: On May 16, 2017, at 2:03 p.m., you sent an email that contained the full name and telephone number of a Veteran to your personal email address, tknowles70@gmail.com

(TwaKY Knowles). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION H: On April 28, 2017, at 11:11 a.m., you sent an email that contained an attachment with the full name and telephone number of a Veteran to your personal email address, tknowles70@gmail.com (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION I: On February 3, 2017, at 5:54 p.m., you forwarded an email that contained a Veteran's full name to your personal email address, tknowles70@gmail.com (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION J: On February 3, 2017, at 7:58 a.m., you sent an email that contained the full name and telephone number of a Veteran to your personal email address, tknowles70@gmail.com (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

SPECIFICATION K: On July 16, 2016, at 1:13 p.m., you sent an email that contained an attachment with the last names of two Veterans from your personal email address, tknowles70@gmail.com, to your second-level supervisor's VA email address (Violation PSETS 171900). Your actions violated VAHCS Memorandum 516-18-00-064, Privacy Policy.

AF, Tab 9, pp. 182-184. There is no dispute the agency has not yet issued a final decision regarding its proposed removal of the appellant. For the reasons set forth below, I find that application of the *Carr* factors establishes by clear and convincing evidence that the agency would have proposed removal of the appellant for misconduct in June 2018 even in the absence of her protected disclosure(s).

Donna Griffin-Hall was the agency's proposing official for the agency's 2018 proposed removal of the appellant. She testified that she

issued the notice of proposed removal suspension based on conclusions presented to her by the agency's Privacy Office. HCD, testimony of Griffin-Hall. The record contains a memorandum, dated May 25, 2018, entitled "Privacy Violation Memo – PSETS 171900," in which Privacy Officer Deanna Baczewski concluded the following, in pertinent part:

> 2) On April 27, 2018, the Privacy Office received and reviewed emails sent to tknowles70@gmail.com and discovered that information pertaining to 24 unique Veterans was involved. The results were as follows:
>
> a) 15 full names and full SSNs
> b) 2 full names, partial SSN, dates of birth, addresses and driver's license numbers
> c) 2 full names with personal telephone numbers
> d) 1 full name and partial SSN of a deceased Veteran
> e) 1 full name
> f) 2 last names
>
> 3) On May 21, 2018, Ms. Knowles was provided the opportunity to address the Privacy Office's inquiries, which were documented in a list of questions and presented to her by the Chief, Business Office with AFGE/union representation. Ms. Knowles response to the questions presented by the Privacy Office was "My rights for VA Directive 0700 is being violated as well as the Master Agreement – Investigations. This is an illegal act and I have alleged disparate treatment. I will not answer questions in this fashion."

. . .

C. Confirmation Memo

1) On April 30, 2018, the Privacy Office guidance from the DBRS on how to proceed with resolving this event. The DBRS asked that confirmation be obtained from the employee that all VA sensitive data has been deleted from their personal email account in effort to mitigate any further risk.

2) On May 21, 2018, Ms. Knowles refused to sign the confirmation memo issued by the Privacy Office. Rather she stated "I want it to be noted that Donna Griffin-Hall and Tatishka Thomas started an

> investigation at or around 2:20 PM, not privacy where a slew of questions were asked and the questions were redundant. I feel as if this questioning is ongoing harassment and retaliation."

AF, Tab 9, pp. 190-191.[9] I find that subparagraph 2) quoted above directly support the specifications found in Charge 2 in the NOPR, that subparagraph 3) quoted above directly supports Charge 1, Specification A in the NOPR,[10] and that paragraph C quoted above directly supports Charge 1, Specification B in the NOPR.[11] I further find that the appellant did not deny the facts alleged in either of the charges or their specification. Additionally with regard to Charge 1, the "obey now grieve later" rule discussed above in the context of the 2018 suspension supports the charge. Accordingly, I find that both Charge 1 and Charge 2 in the NOPR are supported by strong evidence.

As also discussed above regarding the 2017 and 2018 suspensions she proposed, Griffin-Hall said her knowledge of the appellant's protected disclosure(s) played no role in her proposing the appellant's removal in June 2018, and she added that the same action would have been proposed in the absence of the disclosure(s). HCD, testimony of Griffin-Hall. I find no evidence in the record that Griffin-Hall suffered negative consequences as a result of the

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[9] Copies of several of the email messages containing confidential information which the appellant sent to her personal email account are found in the record at AF, Tab 9, pp. 216 (Charge 2, Specification C), 217 (Charge 2, Specification B), 220 (Charge 2, Specification E), 221 (Charge 2, Specification F), and 222 (Charge 2, Specification G). The record also contains an email message from a union official to the appellant – prior to all but one (Charge 2, Specification K) of the email messages referenced in Charge 2 which stated "Please do not send patient information to your personal emial" [sic]. AF, Tab 9, p. 262.

[10] A copy of the Privacy Office's questions which the appellant refused to sign is in the record at AF, Tab 9, p. 204.

[11] A copy of the confirmation memorandum which the appellant was charged with refusing to sign is in the record at AF, Tab 9, p. 103.

appellant's disclosure(s), nor any other evidence suggesting that such disclosure(s) motivated her to issue the June 2018 NOPR.

Neither party presented meaningful evidence regarding the extent to which the agency may take similar actions against employees who did not engage in protected activity but who are otherwise similarly situated to the appellant. Consequently, I find that there is no relevant comparator evidence. *Runstrom*, 123 M.S.P.R. 169, ¶ 18. Based on the above, I find this *Carr* factor is not relevant in the present case.

Therefore, having considered all of the pertinent evidence, I find that the agency established by clear and convincing evidence that it would have proposed the appellant's removal in June 2018, even absent her protected disclosure(s).

Conclusion

For the above reasons, I find that corrective action is not warranted. To the extent the appellant alleged that she was subjected to EEO-type discrimination, the Board has long held that disclosures that an agency engaged in discrimination and violated discrimination law are covered under 5 U.S.C. §§ 2302(b)(1) and (b)(9), and they are excluded from section 2302(b)(8). *See, e.g., Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295, ¶ 24 (2008); *see also Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300, ¶13 (2003) (disclosures limited to matters of discrimination and related retaliation claims are excluded from the coverage of the Whistleblower Protection Act); *see generally* 5 C.F.R. § 1209.2(c) (the Board will not consider discrimination claims in an IRA appeal). Furthermore, claims of discrimination and retaliation, even if exhausted before the Office of Special Counsel, are not cognizable as whistleblower claims. *See Applewhite*, 94 M.S.P.R. 300, ¶¶ 9, 10, 13.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/
Jeffrey S. Morris
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on **May 27, 2019**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will 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.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A

reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery

service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this

decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or

other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. 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** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

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TONYA KNOWLES

v.

DEPARTMENT OF VETERANS AFFAIRS

MSPB Docket No. AT-1221-19-0047-W-1

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29	7	Appellant - Appellant Reponse Prehearing Submissions	March 20, 2019
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TONYA KNOWLES

v.

DEPARTMENT OF VETERANS AFFAIRS

MSPB Docket No. AT-1221-19-0047-S-1

STAY OF PERSONNEL ACTION

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3	1	MSPB - Initial Decision	October 26, 2018
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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

TONYA KNOWLES,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER
AT-1221-19-0047-W-1

DATE: February 14, 2019

ORDER FINDING JURISDICTION OVER IRA APPEAL

On October 24, 2018, I issued an Order on Jurisdiction and Proof Requirements wherein I directed the appellant to file evidence establishing that the Board has jurisdiction over her appeal. *See* Initial Appeal File (IAF), Tab 4. The appellant filed a multi-part response on November 2 and 3, 2018 (IAF, Tabs 6, 7), and the agency filed a response on November 13, 2018 (IAF, Tab 9). On November 14, 2018, I issued an Order to Show Cause requiring the appellant to provide additional support for her jurisdictional claims. IAF, Tab 10. The appellant filed another multi-part response on December 20 and 21, 2018. IAF, Tabs 12-21. The agency filed its response to the appellant's supplemental submissions on February 13, 2019. For the following reasons, I find that the Board has jurisdiction over the appeal.

The appellant has met her burden of showing she exhausted administrative proceedings before the OSC.

In an IRA appeal, the Board may consider only those charges of whistleblowing that the appellant asserted before OSC and may not consider any subsequent recharacterization of those allegations (or any additional allegations) put forth by the appellant in her appeal to the Board. *See Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1036 (Fed. Cir. 1993); *Ward v. Merit Systems Protection Board,* 981 F.2d 521, 526 (Fed. Cir. 1992); *D'Elia v. Department of the Treasury,* 60 M.S.P.R. 226, 231 (1993). On October 18, 2018, OSC notified

the appellant that it had made a final determination to close its inquiry into her complaint. *See* IAF, Tab 1. The appellant filed this IRA appeal on October 19, 2018. *Id.* Because the appellant filed this appeal with the Board within 65 days of the OSC notice, I find that she satisfied the timeliness aspect of the exhaustion requirement, and that she has exhausted administrative proceedings before OSC.

The appellant has identified one or more personnel actions allegedly taken in retaliation for alleged whistleblowing.

Pursuant to 5 U.S.C. § 2302(a)(2)(A), a "personnel action" means: (i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of title 5 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of title 5; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions. The appellant alleged, *inter alia*, that in 2016 the agency proposed and effected a suspension without pay, and in 2018 proposed her removal. IAF, Tab 15.[1] Consequently, I find that the appellant has made a non-frivolous allegation that she suffered one or more personnel actions under 5 U.S.C. § 2302(a)(2)(A).

The appellant raised at least one protected disclosure before OSC.

1 It is unclear from the record whether the agency has effected the appellant's removal.

To show she engaged in whistleblowing activity, the appellant must nonfrivolously allege[2] that she disclosed information that she reasonably believed evidenced a violation of any law, rule, or regulation, gross mismanagement,[3] a gross waste of funds,[4] an abuse of authority,[5] or a substantial and specific danger

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2 By regulation, the Board has defined a nonfrivolous allegation as "an assertion that, if proven, could establish the matter at issue." 5 C.F.R. § 1201.4(s). The regulation further provides, "An allegation generally will be considered nonfrivolous when, under oath or penalty of perjury, an individual makes an allegation that: (1) is more than conclusory; (2) is plausible on its face; and (3) is material to the legal issues in the appeal." *Id.* Pro forma allegations are insufficient to meet the nonfrivolous standard. *Clark v. U.S. Postal Service*, 2016 M.S.P.B. 26 ¶ 6 (2016) (citing *Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006)). Once an employee has made a nonfrivolous allegation sufficient to establish jurisdiction, she is entitled to a hearing. *Brunton v. U.S. Postal Service*, 114 M.S.P.R. 365, ¶ 13 (2010).

3 The Board has defined "gross mismanagement" to mean management action or inaction that creates a substantial risk of significant adverse impact on an agency's ability to accomplish its mission. *See Nafus v. Department of the Army,* 57 M.S.P.R. 386, 393 (1993). Gross mismanagement is more than *de minimis* wrong doing or negligence. Thus, gross mismanagement does not include management decisions which are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. *See id.*

4 The Board has defined "gross waste of funds" to constitute a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *See Nafus v. Department of the Army,* 57 M.S.P.R. 386, 393 (1993).

5 An "abuse of authority" occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to a preferred other person. *See McCorcle v. Department of Agriculture,* 98 M.S.P.R. 363, ¶¶ 21-25 (2005), citing *Embree Department of Treasury,* 70 M.S.P.R. 79, 85 (1996).

to public health or safety. *See Garrison v. Department of Defense,* 101 M.S.P.R. 229, ¶ 8 (2006); *Smith* v. *Department of the Army,* 80 M.S.P.R. 311, ¶ 4 (1998).

In cases involving multiple alleged protected disclosures and/or more than one alleged personnel action, if the appellant makes a nonfrivolous allegation that at least one alleged personnel action was taken for at least one alleged protected disclosure, she has established the Board's jurisdiction over her IRA appeal. *Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 9 (2008) (citing *Horton v. Department of Veterans Affairs*, 106 M.S.P.R. 234, ¶ 14 (2007)).

To establish a reasonable belief, an appellant need not prove that the matter disclosed actually established one or more of the listed categories of wrongdoing, but she must show that the matter disclosed was one which a reasonable person in her position would believe evidenced one of the specified categories of wrongdoing. *See Garrison,* 101 M.S.P.R. 229, ¶ 8; *Applewhite v. Equal Employment Opportunity Commission,* 94 M.S.P.R. 300, ¶12 (2003).

In response to my Order to Show Cause, the appellant asserted that, on or about July 26, 2016, she made a disclosure to agency management to the effect that patient identifiable information was not safeguarded in violation of, *inter alia*, the Privacy Act and HIPAA. IAF, Ta 15, p. 5. Consequently, I find the appellant has nonfrivolously alleged that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by her could reasonably conclude that the agency's actions evidence wrongdoing as defined by the WPA.[6]

6 Regarding a disclosure involving a violation of law, rule, or regulation, the inquiry as to whether a disclosure is protected ends upon a determination that the appellant disclosed what he or she reasonably believed to be a violation of law, rule, or regulation; there is no further inquiry into the type of "fraud, waste, or abuse" involved. Ganski v. Department of the Interior, 86 M.S.P.R. 32, ¶ 11 (2000). In addition, there is no exception to that rule for a disclosure of a trivial or *de minimis* violation of a law, rule, or regulation. Grubb v. Department of the Interior, 96 M.S.P.R. 377, ¶ 26 (2004); *see also* Mogyorossy v. Department of the Air Force, 96 M.S.P.R. 652, ¶ 14 (2004).

In short, she has nonfrivolously alleged that she disclosed information that she reasonably believed evidenced, *inter alia*, a violation of law, rule, or regulation. I further find these disclosures were raised before OSC. IAF, Tab 1. Based on the appellant's submissions, I find that she has raised a nonfrivolous allegation that she had a reasonable belief that her disclosures were protected.[7]

The appellant has raised nonfrivolous allegations that her disclosures were a contributing factor.

An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, or by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking retaliatory action. *See* 5 U.S.C. § 1221(e)(1); *Scott* v. *Department of Justice,* 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996)(Table); *Greenup v. Department of Agriculture,* 106 M.S.P.R. 202 (2007). The appellant need only make a nonfrivolous allegation that the agency official who took the action had constructive knowledge of the disclosure. Constructive knowledge may be established by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *See Swinford v. Department of Transportation,* 107 M.S.P.R. 433, ¶ 9 (2007). The appellant can also show that a disclosure was a contributing factor by showing that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, *i.e.*, the so-called knowledge/timing test. *See Scott*

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7 I note that the Whistleblower Protection Enhancement Act (WPEA), enacted on December 27, 2012, provides retroactive protection for disclosures made in the course of an employee's normal duties, as well as for disclosures made to the alleged wrongdoer *See Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶ ¶ 16-19 (2013).

v. Department of Justice, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996 (Table).

In her response to my Order to Show Cause, the appellant alleged that the above-discussed disclosure to her supervisors in early 2016 was a contributing factor in the agency's proposed suspension later that year. *See* IAF, Tab 15, p. 5. I find that she has made a nonfrivolous allegation of at least constructive knowledge and that her disclosure was a contributing factor to the personnel action(s) at issue. I further find that the personnel actions to which she was subjected occurred within a period of time such that a reasonable person could conclude that the disclosures were a contributing factor in the personnel action. Based on the foregoing, I find that the appellant has made a nonfrivolous allegation such that a reasonable person could conclude that the disclosures were contributing factors in at least one personnel action at issue in this appeal.

The appellant is entitled to a hearing.

It is well-established that the right to a hearing on the merits is based upon nonfrivolous allegations. *See Applewhite v. Equal Employment Opportunity Commission,* 94 M.S.P.R. 300, 305 ¶ 9 (2003). The truth of such allegations is tested in a hearing in which the appellant must prove the allegations by preponderant evidence. *See Dick v. Veterans Administration,* 290 F.3d 1356, 1362, 1364 (Fed. Cir. 2002).

Accordingly, I find the appellant has established the Board's jurisdiction over her IRA appeal.[8] I further find that she is entitled to her requested hearing

8 An employee must prove by preponderant evidence each of the factors as to which she made a non-frivolous allegation to meet her burden of proving jurisdiction, including that the disclosure was a contributing factor in the agency's personnel decision. *See Horton v. Department of the Navy,* 66 F.3d 279, 284 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996). If the appellant meets this burden, the Board will not sustain the action unless the agency presents clear and convincing evidence that it would have taken the action in the absence of the protected disclosures. *See* 5 U.S.C. § 2302(b)(8). Clear and convincing evidence is defined by 5 C.F.R. § 1209.4(d) as 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. In determining whether an agency has shown by

and a decision on the merits. Accordingly, this matter will be set for hearing by separate order. Further, I will specify parameters regarding the personnel action(s) to be adjudicated during the hearing in subsequent orders.

FOR THE BOARD: /S/
Jeffrey S. Morris
Administrative Judge

clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (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. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999), *aff'd*, 185 F.3d 1318 (Fed. Cir. July 30, 1999); *Azbill v. Department of Homeland Security,* 105 M.S.P.R. 363 (2007).

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

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February 14, 2019
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/S/
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Paralegal Specialist

Additional material from this filing is available in the Clerk's Office.