United States Court of Appeals, Federal Circuit.

James Thomas **RYAN**, Petitioner

v.

DEPARTMENT OF DEFENSE, Respondent

2018-1524

Decided: February 13, 2019

Petition for review of the Merit Systems Protection Board in No. DC-0752-17-0673-I-1.

Attorneys and Law Firms

John Silverfield, Garden City, NY, for petitioner.

P. Davis Oliver, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by Elizabeth Marie Hosford, Robert Edward Kirschman, Jr., Joseph H. Hunt; Elizabeth Pavlick, Office of General Counsel, Washington Headquarters Services & Pentagon Force Protection Agency, United States Department of Defense, Washington, DC.

Before Lourie, Bryson, and Moore, Circuit Judges.

Opinion

Per Curiam.

James Ryan appeals from a decision of the Merit Systems Protection Board ("the Board") sustaining three charges against **Ryan** for lack of candor, conduct unbecoming a police officer, and unauthorized use of a computer, and removing him from service as a police officer in the Pentagon Force Protection Agency ("PFPA"). *See* ***Ryan*** *v. Dep't of Def.*, No. DC-0752-17-0673-I-1 (M.S.P.B. Nov. 15, 2017). **Ryan** disputes whether substantial evidence supports each of the conclusions of the Board's Administrative Judge ("AJ") with respect to these charges, and he further argues that the AJ failed to find a nexus between the adverse action and his service and that the AJ's action violated his rights under the Due Process Clause and the Whistleblower Protection Act ("WPA"). Because we conclude that substantial evidence supports the AJ's findings and that **Ryan**'s other arguments lack merit, we *affirm*.

I. BACKGROUND

Ryan was employed as a police officer with the PFPA from February 2009 until his removal on June 6, 2017. In 2015, **Ryan** filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), concerning his employment with the PFPA, which is not at issue in this appeal. In the course of that proceeding, **Ryan** was required to sign a Notice of Rights and Responsibilities for the EEOC complaint

process. By signing the notice, **Ryan** was given access to a Report of Investigation ("ROI") from the EEOC, which contained the personnel file of another police officer ("SV"). The ROI included the following warning:

> v. The ROI contains personal data and is to be treated in a confidential manner. **You may not show your copy of the ROI, in whole or in part, to a third party except your designated representative.** Violations of privacy safeguards may result in disciplinary action, a fine of up to $5,000, or both (Public Law 93-576[1]).

J.A. 148.

Ryan did not heed this warning. Instead, he sent a copy of SV's personnel file to eight members of the PFPA, as well as the PFPA Office of Professional Responsibility, as an attachment to an October 12, 2016, memorandum in which he asserted that SV received a fraudulent cash bonus of $2,050 from a sergeant "in exchange for allowing [SV's duty post] to become a location for unauthorized congregating, food delivery, and eating to take place." J.A. 417. **Ryan** had previously reported SV and others on separate occasions for such unauthorized congregating around SV's duty post.

In the memorandum, **Ryan** denigrated SV's performance based on **Ryan**'s own observations, SV's personnel file, and records of SV's incident reports stored in the PFPA's Record Management System ("RMS"), which **Ryan** had accessed. However, **Ryan** never provided any evidence of this purported *quid pro quo* beyond his complaints about SV's performance and allegedly undeserved bonus and positive evaluation from the sergeant.[2]

In response, the PFPA issued a notice of proposed removal to **Ryan** on February 7, 2017. The PFPA asserted that the removal was justified because, among other charges, **Ryan**: (1) lacked candor by making an untrue and unsupported allegation about SV and the sergeant; (2) violated the law and departmental policy by distributing SV's personnel file, which is conduct unbecoming a police officer; and (3) misused a government computer by accessing SV's police reports in the RMS system without authorization. The deciding official ("DO") sustained the charges at issue in this appeal and removed **Ryan** from service on June 6, 2017.

Ryan then appealed to the Board. The AJ credited the DO's testimony and therefore sustained the charges and **Ryan**'s removal. The AJ also rejected **Ryan**'s affirmative defense under the WPA. While **Ryan** did not present an argument that his removal violated his due process rights, the AJ credited certain statements at the hearing as raising the issue. Specifically, **Ryan** alleged at the hearing that the DO's personal knowledge that another of **Ryan**'s accusations—that two other PFPA officers abuse alcohol while off-duty—was baseless constituted *ex parte* information to which **Ryan** must be given notice. *See* Stone v. FDIC, 179 F.3d 1368, 1376–77 (Fed. Cir. 1999) (holding that a DO's consideration of an *ex parte* communication may violate an employee's right to due process where it introduces new and material evidence). The AJ rejected **Ryan**'s due process argument because the specification directly concerning this accusation was withdrawn by the PFPA and, with respect to the sustained charges, the *ex parte* information was both immaterial and cumulative to the remainder of the record.

The AJ's decision became the decision of the Board because **Ryan** did not appeal to the full Board, which at that time lacked a quorum. This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

II. DISCUSSION

The scope of our review of an appeal from a decision of the Board is limited. We must affirm the Board's decision unless we find it to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with 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). A finding is supported by substantial evidence if a reasonable mind might accept the evidence as adequate to support the finding. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). Credibility determinations are within the discretion of the Board and are "virtually unreviewable" on appeal. *King v. HHS*, 133 F.3d 1450, 1453 (Fed. Cir. 1998). The burden of establishing reversible error in a Board decision rests upon the petitioner. *See Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

We address **Ryan**'s challenges to the sufficiency of the evidence, his due process challenge, and his affirmative defense under the WPA in turn.

A.

Ryan raises many arguments that the AJ's decision to sustain all three charges was unsupported by substantial evidence. **Ryan**'s principal argument with respect to the lack of candor charge is that neither the DO nor the AJ ever made a finding

that **Ryan**intended to deceive the recipients of his memorandum, or that he knew his allegation was incorrect. Further, **Ryan** contends, our precedent confines lack of candor charges to investigations or inquiries, rather than unsupported allegations. *See, e.g.*, *Ludlum v. Dep't of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002).

The government responds that the concept of lack of candor is defined more broadly by our case law and is not restricted, as **Ryan** would have it, to statements made during investigations or inquiries. In the government's view, **Ryan** lacked candor because he knew both that he had no evidence to support his assertion of a *quid pro quo* and that he could not support his allegation that SV's evaluation was "fraudulently inflated" because he admitted that he had never read SV's Officer Performance Record.

We agree with the government because our precedent, including *Ludlum*, is clear that lack of candor is a "flexible concept whose contours and elements depend upon the particular context and conduct involved." *Id.* at 1284 (analogizing lack of candor to "the failure to state a material fact [in a securities registration statement] ... necessary to make the statements therein not misleading" actionable under the Securities Act of 1933). Hence, we reject **Ryan**'s argument that lack of candor can only be charged where an employee failed to be forthright in the course of an investigation or inquiry. In fact, *Ludlum's* holding that a lack of candor may be charged where an employee fails to state a material fact necessary to make a statement not misleading is strikingly applicable to **Ryan**'s failure to provide any evidence in support of his provocative assertion.

We further determine that **Ryan** has not shown that the AJ's finding was unsupported by substantial evidence. **Ryan** argues that neither the DO nor the AJ made the requisite finding of an intent to deceive, and in fact conceded that **Ryan** may have believed that SV received an inflated rating. But **Ryan**'s opinions about SV's performance are ultimately beside the point. **Ryan** chose to assert the existence of a *quid pro quo* between the sergeant and SV without any evidence. While **Ryan** now argues that his intuition as a police officer provides the requisite evidence, he did not so qualify his allegation in his memorandum. Instead, **Ryan** represented the alleged exchange as fact, and the AJ reasonably found that by making an allegation he knew was unsupported, **Ryan** intended to deceive the recipients of the memorandum. Thus, substantial evidence supports the AJ's finding that **Ryan** lacked candor.

Ryan also argues that the conduct unbecoming charge was unsupported by substantial evidence because disseminating SV's personnel file was not conduct unbecoming a police officer, which **Ryan** alleges is defined in PFPA's internal regulations as including "that which impairs the operation or efficiency of the department or employees." Appellant Br. 26. In addition, **Ryan** asserts that the conduct unbecoming charge cannot lie because the DO admitted that **Ryan**'s position as a police officer did not affect his analysis of the charge. Finally, **Ryan** argues that he was not aware that he was unauthorized to distribute SV's personnel file.

In response, the government argues that a conduct unbecoming charge can be proven without reference to a specific regulation and that the AJ correctly found that **Ryan**'s conduct renders him

unsuitable to remain a PFPA police officer. The government also contends that **Ryan** was aware that he was unauthorized to distribute SV's personnel file.

We find **Ryan**'s arguments unavailing. **Ryan** signed an EEOC notice which clearly warned him that distribution of SV's personnel file was a violation of the Privacy Act of 1974, and PFPA Order 1000.3 makes clear that "[v]iolation of any law, regulation or order may be grounds for disciplinary action." J.A. 552. Both the DO and the AJ were thus entitled to credit testimony that **Ryan**'s cavalier attitude toward the Privacy Act and EEOC rules rendered him a liability to the PFPA, where officers must abide by similar laws to perform their jobs. Furthermore, the record is clear that **Ryan** was aware that he was barred from sharing SV's personnel file. *See*J.A. 1290 ("[The EEO Director] said you cannot share other people's information."). Thus, **Ryan** has not shown that the AJ's finding that he committed conduct unbecoming a police officer was unsupported by substantial evidence.

With respect to the third charge, unauthorized use of a government computer, **Ryan** argues that his searching SV's police reports was authorized because he generally has access to the RMS system and allegedly was told during training that he could search the system "merely to satisfy [his] curiosity." J.A. 1365. Thus, in **Ryan**'s view, the government never showed that his use of a government computer to search SV's police reports was unauthorized.

The government responds that the AJ was entitled to credit the DO's testimony that **Ryan**'s use of the RMS system to assist his personal investigation into SV was unauthorized because it had nothing to do with his duties as a police officer. The government

further argues that the AJ had substantial evidence to find that **Ryan** was not allowed to search the system just to satisfy his curiosity.

We agree with the government and conclude that the AJ was entitled to credit the DO's testimony. As **Ryan** confirmed, the RMS system requires an officer to agree that his use of the system is authorized and **Ryan** admitted that he agreed in order to log in to the RMS system. Thus, the AJ's finding that **Ryan** misused a government computer was supported by substantial evidence.

Ryan finally argues that the DO failed to show the required nexus between these charges and **Ryan**'s ability to perform his job satisfactorily. **Ryan** contends that the DO based the finding of nexus on his perception of **Ryan**'s trustworthiness during the appeal process, rather than on the grounds themselves.

The government responds that the AJ properly credited the DO's testimony that the charges themselves, rather than **Ryan**'s conduct on appeal, showed **Ryan**'s untrustworthiness and poor judgment. The government further points to the DO's consideration of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), for the proposition that the lack of candor charge in particular implicates **Ryan**'s ability to testify in court. The government therefore argues that **Ryan**'s lack of candor charge impairs his ability to perform an essential function of his job.

We conclude that **Ryan** has failed to show that the AJ's finding of a nexus between the charges and **Ryan**'s ability to perform his job was unsupported by substantial evidence. The AJ was entitled to credit the DO's testimony, which as a whole clearly demonstrates a thoughtful rationale why the charges

against **Ryan**, not his conduct during the appeal process, prevent him from fulfilling the duties of a PFPA police officer. *See* J.A. 1431 (explaining that the DO found in his decision on **Ryan**'s removal that **Ryan** "can't be trusted with sensitive information," "has poor judgment," and "can't be trusted to testify," creating *Giglio* problems).

B.

Ryan next raises two arguments that his due process rights were violated in the course of the proceedings before the AJ: (1) he was not able to make a meaningful reply because the DO admitted that he did not consider one of the earlier disclosures **Ryan** made concerning the improper activity at SV's duty post, even though **Ryan** mentioned it in his oral reply; and (2) the DO admitted that he formed an impression of **Ryan** as dishonest because he had personal knowledge that led him to disbelieve **Ryan**'s accusation that two other officers abused alcohol off-duty. While the relevant charge was withdrawn by the agency, **Ryan** argues that the DO's personal knowledge should have been disclosed as new and material *ex parte* information before **Ryan** made his reply to the DO and that the AJ did not have substantial evidence to conclude that the information was not new and material to the charges at issue.

The government responds that the first argument was not made to the AJ and is waived. It argues that the second argument was properly rejected by the AJ because the *ex parte* information was not new and material and did not affect the DO's decision to sustain other charges against **Ryan**.

Ryan failed to make his first argument to the AJ, and it is therefore waived. *See Wallace v. Dep't of*

the Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989). With respect to the second argument, we agree with the government that substantial evidence supports the AJ's finding that the *ex parte* information considered by the DO was not new or material and therefore did not deprive **Ryan** of his due process right.

Ryan is a federal employee as defined by 5 U.S.C. §§ 7501, 7511(a)(1). He therefore has a constitutionally-protected property interest in his employment with the federal government. *See King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996). Before being deprived of this property interest, a public employee has a right under the Due Process Clause to be given "notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). We have held that an *ex parte* communication that introduces "new and material information to the [DO] will violate the due process guarantee of notice." *Stone*, 179 F.3d at 1377. In deciding whether information is new and material, we look to several factors, including: (1) whether the *ex parte* communication merely introduces "cumulative" information or new information; (2) whether the employee knew of the error and had a chance to respond to it; and (3) whether the *ex parte* communications were of the type likely to result in undue pressure upon the DO to rule in a particular manner. *Id.*

Here, the government is correct that substantial evidence supports the AJ's finding that the *ex parte* information was not new or material to the charges at issue. **Ryan** argues he was prejudiced because the DO's personal knowledge—that **Ryan**'s accusation about his coworkers' drinking habits was false—carried over into his decision on the other

specifications for **Ryan**'s lack of candor. The record does not support **Ryan**'s argument. While the DO did admit that he was unable to forget that **Ryan** had made this accusation, he twice averred in the same exchange that **Ryan**'s charged conduct alone was sufficient to sustain the charges at issue. *See* J.A. 1462 ("If we threw [**Ryan**'s accusation] away, I would have still upheld the lack of candor because of the lack of evidence, through unsubstantiated assertions. It's pretty black-and-white."). **Ryan** has not shown that the AJ erred by crediting this testimony, in conjunction with the remainder of the record, as substantial evidence that the DO's personal knowledge was not new and material *ex parte* information.

C.

Finally, **Ryan** argues that the AJ erred by rejecting his affirmative defense under the WPA. In **Ryan**'s view, his disclosure of the illegal *quid pro quo* between the sergeant and SV was a contributing factor to his removal because his memorandum was cited in the notice of proposed removal. **Ryan** argues that this showing has satisfied his burden to establish a *prima facie* case of retaliation; thus, the AJ should have then shifted the burden to the government to rebut this showing. **Ryan** further argues that his disclosures were made in good faith and that he had a reasonable belief that his disclosure evidenced a violation of a rule or regulation.

The government responds that the WPA only protects a government employee for disclosures he "reasonably believes evidence" a violation of a law, rule or regulation, gross waste, an abuse of authority, or a danger to public health or safety. 5 U.S.C. §

2302(b)(8)(A). The government further argues that substantial evidence supports the AJ's decision to credit the DO's testimony that **Ryan**'s previous disclosures were not a contributing factor to his removal.

We agree with the government that the AJ correctly held that **Ryan**'s disclosures do not qualify his actions for protection under the WPA. To receive the protection of the WPA, an employee must establish by a preponderance of the evidence that he made a protected disclosure. *See Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995). A disclosure is protected only if the employee has a reasonable belief that the disclosure reveals a type of misbehavior described in § 2302(b)(8)(A). **Ryan** argues that his memorandum is protected by virtue of its revelation of an illegal exchange between the sergeant and SV, but we conclude that the AJ reasonably found, based on the factual record and the testimony of both **Ryan** and the DO, that this accusation had no reasonable basis.

In his memorandum, **Ryan** asserted the existence of an illegal *quid pro quo*, but he has not provided any evidence of such a deal, either on appeal or previously. Therefore, he had no reasonable basis to believe that his memorandum revealed the type of misbehavior described in § 2302(b)(8)(A). *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (holding that a belief is reasonable when "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence [a violation]" and that the "purely subjective perspective of an employee is not sufficient"). The WPA does not give employees *carte blanche* to announce that their coworkers have committed serious legal violations

based purely on speculation—let alone to ignore privacy laws and abuse their access to government records in doing so. Thus, **Ryan** has not shown that the AJ's finding that his disclosure was not protected by the WPA was unsupported by substantial evidence.

We further agree with the government that substantial evidence supports the AJ's finding that **Ryan**'s previous disclosures of unauthorized congregating at SV's duty post did not contribute to his removal. Neither of these disclosures was cited in the notice of proposed removal, nor did they involve **Ryan** asserting an illegal exchange between the sergeant and SV, violating the Privacy Act, or misappropriating government records. Furthermore, the DO testified that he was unaware of one of the disclosures and welcomed the other. The AJ was entitled to credit the testimony of the DO, *see* *Hambsch v. Dep't of the Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986), and reject **Ryan**'s argument that these disclosures contributed to his removal. **Ryan** has thus not shown that the AJ's finding was unsupported by substantial evidence.

III. CONCLUSION

We have considered **Ryan**'s other arguments but find them unpersuasive. For the foregoing reasons, we *affirm* the decision of the Board.

AFFIRMED

Footnotes

1The ROI's citation of the Privacy Act of 1974 contains a minor error and should have read "Public Law 93-

579." *See*Privacy Act of 1974, Pub. L. No. 93-579, 5 U.S.C.A. § 552a (West through Pub. L. No. 115-281).

2Importantly, **Ryan** admitted he never reviewed SV's Officer Performance Rating, which was the basis for SV's performance rating and bonus.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JAMES THOMAS RYAN,
Appellant,

DOCKET NUMBER
DC-0752-17-0673-1-1

v.

DEPARTMENT OF DEFENSE,
Agency.

DATE: November 15, 2017

Lawrence Berger, Esquire, Glen Cove, New York, for the appellant.
Elizabeth E. Pavlick and Janies Vietti Esquire, Washington, D.C., for the agency.

BEFORE
Andrew M. Dunnaville
Administrative Judge

INITIAL DECISION

On July 18, 2017, the appellant filed an appeal of the agency's action removing him from his position as a Lead Police Officer, AD-0083-08 with the Pentagon Force Protection Agency (PFPA). Appeal File (AF), Tab 1. The Board has jurisdiction over the appeal pursuant to 5 U.S.C. § 7511. A hearing was held on November 6, 2017. For the reasons set forth below, the agency's removal action is SUSTAINED.

BACKGROUND

The appellant was appointed as a Police Officer, AD-0083 for PFPA on February 2, 2009. AF, Tab 26 at 9. The appellant was an "employee" as defined by 5 U.S.C. § 7511(a)(1)(A). *Id.* On February 7, 2017, PFPA Major Maritza Castro issued the appellant a Notice of Proposed Removal for Lack of Candor, Conduct Unbecoming a Police Officer, and Misuse of Government Computer. AF, Tab 7 at 16. The appellant was provided the opportunity to respond, both orally and in writing. *Id.* at 22. The appellant gave an oral reply to the proposed removal and submitted a written response on March 9, 2017. *Id.* at 4, 32-33. Following the appellant's oral and written reply, PFPA Deputy Chief William Lagasse issued the appellant a Notice of Decision on Proposed Removal, removing the appellant from Federal service on June 6, 2017. *See id.* at 4. The appellant was removed based on the following charges and specifications:

> Charge 1: Lack of Candor
>
> Specification 1: On January 1, 2016, you sent an e-mail to Sergeant Cook stating that he had been designated as a witness in a MSPB appeal. At that time Sergeant Cook had not been designated as a witness in any MSPB appeal to which you were a party, a fact you knew. Your statement to Sergeant Cook that he was a witness in a MSPB proceeding was not true, and demonstrates a lack of candor.
>
> Specification 2: On January 1, 2016, you sent an e-mail to Officer Bell that she had been designated as a witness in a MSPB

appeal. At that time Officer Bell had not been designated as a witness in any MSPB appeal to which you were a party, a fact you knew. Your statement to Officer Bell that she was a witness in an MSPB proceeding was not true and demonstrates a lack of candor.

Specification 3: On October 12, 2016, you sent a Memorandum to Chief Kusse, Assistant Chief Plummer, Major Taylor, Major Brisueno, Captain Slinn, Lieutenant Carpenter, Lieutenant Wright, Sergeant Watkins, and OPR, disparaging Sergeant Cook and Officer Vickers by alleging that Sergeant Cook provided Officer Vickers with a cash bonus as an improper incentive for allowing the N. Rotary and Fern VACP to become a location for unauthorized congregating, food delivery, and eating. You offered no evidence to support your allegation of improper incentive. Your allegation is not true and you were attempting to use untrue information to seek to have Sergeant Cook and Officer Vickers disciplined; therefore when you made this allegation, you lacked candor.

Specification 4: On October 23, 2016, you sent a Memorandum to OPR disparaging Major Taylor and Sergeant Green by alleging that they have an inappropriate off duty relationship that involves alcohol. You offered no evidence to support your allegation of an inappropriate relationship

that involves alcohol. Your allegation is not true and you were attempting to use untrue information to seek to have both Major Taylor and Sergeant Green disciplined; therefore when you made this allegation, you lacked candor.

Charge 2: Conduct Unbecoming of a Police Officer

Specification 1: On January 1, 2016, you requested that Sergeant Cook send you his PII. You had no authorized basis to request that Sergeant Cook provide you with his PII. Your attempt to get Sergeant Cook to disclose his PII to you when you had no legitimate basis to request that he provide you with his PII was unacceptable, improper, and conduct unbecoming of a PFPA police officer.

Specification 2: On January 1, 2016, you requested that Officer Bell send you her PII. You had no authorized basis to request that Officer Bell provide you with her PII. Your attempt to get Officer Bell to disclose her PII to you when you had no legitimate basis to request that she provide you with her PII was unacceptable, improper, and conduct unbecoming of a PFPA police officer.

Specification 4: On October 12, 2016, you sent a Memorandum to Chief Kusse, Assistant Chief Plummer, Major Taylor,

> Major Brisueno, Captain Slinn, Lieutenant Carpenter, Lieutenant Wright, Sergeant Watkins, and OPR, improperly referencing information you received from Officer Vickers's DD 2799 as part of your EEO Complaint. You did not have the authorization to share Office Vickers's personal information for this purpose, which is conduct unbecoming a PFP A police officer.
>
> Charge 3: Misuse of a Government Computer
>
> Specification 1: On October 12, 2016, you admitted that you searched Officer Vickers's name in RMS to research the reports he had written. You had neither authorization nor a legitimate business reason for conducting this search. Your action in conducting an unauthorized search in RMS for your own personal gain was a misuse of government resources.

Id. at 19-20.

The appellant submitted the above-captioned appeal on July 18, 2017. AF, Tab 1. A prehearing conference was held on October 31, 2017, and the hearing was conducted on November 6, 2017. *See* AF, Tab 32. The parties submitted written closing arguments on November 13, 2017. AF, Tabs 30, 31.

ANALYSIS AND FINDINGS

A. **The agency has met its burden of proof with**

regards to Charges I, II, and III.

The agency has the burden of proving each element of its misconduct charges by a preponderance of the evidence. 5 C.F.R. § 1201.56(b)(1)(ii). *See Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. *See* 5 C.F.R. § 1201.4(q). 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). If an agency proves its charges, it must show that discipline in some form is warranted to promote the efficiency of the service and that the penalty imposed is within the tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness' opportunity and capacity to observe the event or act in question; (2) the witness' character; (3) any prior inconsistent statement by the witness; (4) a witness' bias, or lack of bias; (5) the contradiction of the witness' version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness' version of events; and (7) the witness' demeanor. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

As stated above, the appellant's removal was

based on 1 charge and 4 specifications of Lack of Candor, 1 charge and 3 specifications of Conduct Unbecoming a Police Officer, and 1 charge and 1 specification of Misuse of a Government Computer. As discussed below, I have decided to sustain Specification 3 of Charge I, Specification 4 of Charge II, and Charge III. Because proof of one or more specifications supporting a charge is sufficient to sustain the charge, I find that Charges I, II, and III must be SUSTAINED.

1. Charge I - Lack of Candor

To constitute lack of candor, a misrepresentation or omission must have been made knowingly. *Fargnoli v. Department of Commerce*, 2016 MSPB 19, ¶¶ 17-18, 123 M.S.P.R. 330 (applying the standard set forth in Parkinson); *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶¶ 10-11 (2012), overruled in part on other grounds by *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015). Lack of candor and falsification are distinct charges. *See Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). Whereas falsification "involves an affirmative misrepresentation and requires intent to deceive," lack of candor, by contrast, "is a broader and more flexible concept whose contours and elements depend on the particular context and conduct involved." *Id.* For example, lack of candor need not involve an affirmative misrepresentation, but "may involve a failure to disclose something that, in the circumstances, should have been disclosed to make the statement accurate and complete." *Id.* Furthermore, while lack of candor "necessarily involves an element of deception, "intent to deceive" is not a separate element of the offense—as it is for falsification." *Id.* at 1284-85.

i. Specifications 1 and 2 - NOT SUSTAINED

Specifications 1 and 2 involve conduct based on the litigation of a previous Board appeal, *Ryan v. Department of Defense,* Docket No. DC-1221-14-0323-B-1. The specifications allege that on January 1, 2016, the appellant sent e-mails to Sgt. Scott Cook and Officer Zanda Bell which said they had been "designated" as a witness in a MSPB appeal. AF, Tab 7 at 16 - 19. The agency alleged that the appellant's emails lacked candor because at that time they were sent, Sgt. Cook and Officer Bell had not been designated as a witnesses in any MSPB appeal to which the appellant was a party, a fact the agency stated the appellant knew. *Id.* The agency stated the appellant's statements to Sergeant Cook and Officer Bell that they were witnesses in a MSPB proceeding "was not true, and demonstrates a lack of candor." *Id.* at 19.

The appellant stipulated to the fact that on January 1, 2016, he sent an e-mail correspondence to Sgt. Cook, and Officer Bell, wherein he requested that Sgt. Cook and Officer Bell provide him with their full names, dates of birth, addresses, and telephone numbers because they were witnesses in a case before the MSPB. AF, Tab 26 at 9-10. At hearing, the appellant testified that he sent out the emails because he believed that he was ordered to do so by the Administrative Judge (AJ) presiding over the proceeding. AF, Tab 32 (Testimony of Appellant). The appellant said he was "confused" by the Board's discovery process, and did not have a precise understanding of the Board's procedure. *Id.* The appellant testified that, by making the request for information, he was attempting to comply with a motion to compel submitted by the agency. *Id.* In addition, the

appellant testified that he had no idea that the Board was the sole authority to designate witnesses, and he thought he would have to provide the information to the AJ to issue a subpoena. *Id.*

I find that the specifications cannot be sustained. The appellant's testimony indicates the emails were sent in a good faith effort to engage in discovery. The appellant testified that he wanted Officer Bell and Sgt. Cook to serve as witnesses in the proceeding, but as a *pro* se litigant, he was unaware of the Board's procedures. *Id.* The appellant also testified that he did not know that the Board was the sole authority to designate witnesses, and he was confused by the process. *Id.* I find it would be inappropriate to discipline the appellant for what appeared to be confusion over the Board's discovery process.

In addition, there is no evidence to suggest that the appellant told Officer Bell and Sgt. Cook that they had been "designated" as a witness in an MSPB appeal, as charged. *See* AF, Tab 31 at 11. The emails said "you are a witness." *Id.* This is a critical distinction, as the term "designated as a witness" infers that the witnesses were designated by the Board. *See id.* By stating "you are a witness," one can infer that the appellant may have wished to identify the individuals as potential witnesses. *See id.* at 13. Accordingly, I find that while the appellant's requests for Officer Bell and Sgt. Cook's information may have been procedurally improper, the agency failed to establish that the appellant knowingly made a misrepresentation, and therefore the agency cannot sustain the specifications.

ii. **Specification 3 - SUSTAINED**

In Charge I, Specification 3, the appellant is alleged to have sent a memorandum via e-mail on

October 12, 2016 to several agency employees "disparaging" Sgt. Cook and Officer Steven Vickers by alleging that Sgt. Cook "provided Officer Vickers a cash bonus as an improper incentive for allowing the N. Rotary and Fern VACP to become a location for unauthorized congregating, food delivery, and eating." AF, Tab 7 at 19.

The appellant stipulated to sending the email and memorandum. AF, Tab 26 at 10; *see also* AF, Tab 32 (Testimony of Appellant). At hearing, the appellant stated that he sent the email because he did not believe Officer Vickers deserved a bonus, and that Officer Vickers' rating was inflated. AF, Tab 32 (Testimony of Appellant). In addition, the appellant testified that he would see officers come in with food trays "every weekend" while Sgt. Cook worked as shift supervisor, and that Sgt. Cook "participated in it." *Id.*

While the appellant may have believed that Officer Vickers received an inflated rating, there is no credible evidence in the record to support the position that Officer Vickers was provided a bonus in exchange for allowing the N. Rotary and Fern VACP to become a place for unauthorized congregating, food delivery, and eating, as the appellant claimed in the October 12, 2016 memo. *See* AF, Tab 8 at 32. In addition, the appellant was unable to explain how he received the information set forth in his claim. At hearing, the appellant testified that he had little, if any knowledge as to how bonuses were given. *Id.* Furthermore, Chief Lagasse testified that Officer Vicker's Officer Performance Rating was the basis for his performance rating and bonus - an item that the appellant admitted he never reviewed. AF, Tab 30 at 15.

Because there is no evidence to indicate that the bonus was offered *as an incentive* for the alleged

improper behavior, I find that the appellant's statement lacked candor and therefore the specification must be sustained. Accordingly, because Charge I, Specification 3 is sustained, the charge of lack of candor is sustained.

iii. **Specification 4 - NOT SUSTAINED**

Specification 4 charges the appellant with sending a Memorandum to the Office of Professional Review (OPR) on October 23, 2016, which disparaged Maj. Taylor and Sgt. Green "by alleging that they have an inappropriate off duty relationship that involves alcohol." AF, Tab 7 at 19. In its closing argument, the agency withdrew the specification, stating that it appeared as if the deciding official considered information related to the personal relationship that was only known to him. AF, Tab 30 at 15. Accordingly, the specification is not sustained.

2. **Charge 2 - Conduct Unbecoming of a Police Officer**

To prove a charge of conduct unbecoming an employee, an agency is required to demonstrate that the appellant engaged in the underlying conduct alleged in support of the broad label. *See Raco v. Social Security Administration*, 117 M.S.P.R. 1, ¶ 7 (2011). A conduct unbecoming charge may be proven by preponderant evidence that the employee engaged in the conduct as described in the charge and that such conduct was improper, unsuitable, or detracted from his or her character or reputation. *See, e.g., Social Security Admin. v. Long*, 113 M.S.P.R. 190, ¶ 42 (2010), aff'd, 635 F.3d 526 (Fed. Cir. 2011).

i. **Specifications 1 and 2 - NOT**

SUSTAINED

As with Charge I, Specifications 1 and 2, Charge II, Specifications 1 and 2 involve conduct based on the litigation of a *Ryan v. Department of Defense*, Docket No. DC-1221-14-0323-B-1. The specifications allege that on January 1, 2016, the appellant sent e-mails to Sgt. Cook and Officer Bell requesting their PII, to include their name, date of birth, address, and telephone number. AF, Tab 7 at 16-20. The agency alleged that the request constituted conduct unbecoming because the appellant "had no legitimate basis" to request this information. *Id.*

As stated above, the appellant stipulated to the fact that on January 1, 2016, he sent an e-mail correspondence to Sgt. Cook, and Officer Bell, wherein he requested that Sgt. Cook and Officer Bell provide him with their full name, date of birth, address, and telephone number because they were witnesses in a case before the MSPB. AF, Tab 26 at 9-10. The appellant testified that he sent out the email because he believed that he was ordered to do so by the AJ presiding over the proceeding, and he was unaware of the Board's discovery procedures. AF, Tab 32 (Testimony of Appellant).

As I discussed in my findings for Charge I, Specifications 1 and 2, I find the appellant gave credible testimony that he made the request out of a belief that he needed the information for discovery and to litigate his Board appeal. Accordingly, I find that the agency did not prove that the appellant "had no legitimate basis" to request the information, and therefore the specifications are not sustained.

ii. Specification 4 -SUSTAINED

Specification 4 alleges that on October 12, 2016, the appellant sent a Memorandum to Chief Kusse, Maj. Taylor, Maj. Brisueno, Capt. Slinn, Lt. Carpenter, Lt. Wright, Sgt. Watkins, and the OPR, improperly referencing information he received from Officer Vickers's DD 2799 (Employee Performance Plan and Results Report) as part of his EEO Complaint. AF, Tab 7 at 20. The specification stated that the appellant did not have the authorization to share Office Vickers's personal information for this purpose, "which is conduct unbecoming a PFPA police officer." *Id.*

The specification is based on a formal complaint of discrimination that the appellant filed with the EEOC on February 15, 2016. AF, Tab 26 at 10. *Id. See also* AF, Tab 32. An investigation of the EEOC complaint was conducted and a copy of the resulting Report of Investigation (ROI) was issued to the appellant on or about August 9, 2016. *Id.* The ROI summary was preceded by a page which states in bold writing at the top of the page: "Privacy Act Data Cover Sheet." The page also includes text stating, "DOCUMENTS ENCLOSED ARE SUBJECT TO THE PRIVACY ACT OF 1974." *Id.* A copy of Officer Steven Vickers' DD 2799 "Employee Performance Plan and Results Report" was included as a part of the ROI the appellant received. *Id.* On October 12, 2016, the appellant sent e-mail correspondence to Chief Kusse, Assistant Chief Plummer, Maj. Taylor, Maj. Brisueno, Capt. Tracy Slinn, Lt. Carpenter, Lt. Wright, Sgt. Watkins, and PFPA's OPR, with the subject heading: "See Attached." *Id.* Attached to the email was a Memorandum in which Appellant stated that Sgt. Cook "fraudulently inflated" Officer Vickers' ratings in the DD 2799. *Id.*

The appellant stipulated to the facts set forth above. *Id.* At hearing, EEO Director Pam Sullivan testified that the sole purpose that the appellant was authorized to use the DD 2799 was to present his alleged case of discrimination to a judge in an EEO matter. AF, Tab 32 (Testimony of Sullivan). The appellant testified that he was aware of the prohibition against disseminating such information, but believed that he was making the disclosure because he was trying to fulfill his duty to "report a criminal act." AF, Tab 32 (Testimony of Appellant).

I find the appellant's argument to be without merit. The ROI contained a clear prohibition against the disclosure of personal data, which the appellant testified he was aware of. *Id.* The appellant also signed a copy of a Notice of Rights and Responsibilities, which stated that "you may not show your copy of the ROI, in whole or in part, to a third party except your designated representative." AF, Tab 30 at 4. The appellant was not authorized to violate the rule. AF, Tab 32 (Testimony of Sullivan).

In addition, there was no credible evidence that the DD 2799 was related to a criminal act. Finally, even if the appellant believed that the DD 2799 contained evidence of a criminal act, because the appellant had served as a police officer for several years, he should have known the importance of adhering to agency regulations, and he should have been aware of the proper protocol for reporting alleged illegal activity. The appellant's unauthorized sharing of personal information constituted conduct unbecoming a police officer.

3. **Charge 3 - Misuse of a Government Computer - SUSTAINED**

When an agency disciplines an employee based on an "unacceptable conduct" charge, it is considered general charging language. *See LaChance v. Merit Systems Protection Board,* 147 F.3d 1367, 1371 (Fed. Cir. 1998). When such language is used by an agency "the Board must look to the specifications to determine what conduct the agency is relying on as the basis for its proposed action." *Id.* In order to prove this charge, the agency mush show that the charged conduct occurred, and the conduct was improper, unsuitable, or detracted from the appellant's character or reputation. *See Miles v. Department of the Army,* 55 M.S.P.R. 633, 637 (1992).

In this case, the appellant was charged with Misuse of a Government Computer based on an October 12, 2016 search for Officer Vickers's name in RMS to research the reports he had written. AF, Tab 7 at 20. The charge stated that the appellant had neither authorization nor a legitimate business reason for conducting this search, and that the appellant's action in conducting an unauthorized search in RMS was a misuse of government resources. *Id.*

In this case, the appellant admitted to conducting a search of reports authored by Officer Vickers in RMS on an unknown date prior to October 12, 2016. AF, Tab 30 at 5. The appellant stated at hearing that he didn't ask anyone to do the search, and did not ask for authorization. AF, Tab 32 (Testimony of Appellant). Instead, the appellant stated that he ran the search because he had information of criminal misconduct, which he testified he had a duty to report. *Id.*

I find the appellant's argument lacks merit, and the specification and charge must be sustained. Individuals who log into RMS are required to certify

proper use of the program and acknowledging the following:

> You are accessing a U.S. Government (USG) Information System (IS) that is provided for USG-authorized use only. By using this IS (which includes any device attached to this IS), you consent to the following conditions ... This IS includes security measures (e.g. authentication and access controls) to protect USG interests—not for your personal benefit or privacy.

AF, Tab 8 at 49.

While the appellant claimed that he was permitted use RMS to conduct criminal investigations, the appellant did not provide any evidence to indicate that he was authorized to conduct an investigation into Officer Vickers. *See* AF, Tab 32 (Testimony of Appellant). The appellant was not employed as a Criminal Investigator, and did not work in the OPR. *Id.* The appellant did not seek authorization from anyone to conduct a search of Officer Vickers' reports in RMS. *Id.* In addition, Chief Lagasse testified that the appellant was not authorized to use RMS for this purpose and that if an officer had a belief that another officer was committing a crime, they should go to OPR. AF, Tab 32 (Testimony of Lagasse). Chief Lagasse stated that an officer can't run searches out of their own curiosity. *Id.*

Accordingly, I find that the appellant's use of RMS was unauthorized, and therefore the agency demonstrated by a preponderance of the evidence that the appellant misused a government computer. The specification and charge are sustained.

II. The agency has established a nexus between the

appellant's misconduct and the efficiency of the service.

In addition to the requirement that the agency prove its charge against the appellant, the agency must also prove that there is a nexus, i.e., a clear and direct relationship between the articulated grounds for the adverse action and either the appellant's ability to accomplish his duties satisfactorily or some other legitimate government interest. *Ellis v. Department of Defense,* 114 M.S.P.R. 407, ¶ 8 (2010). Here, I find that a clear nexus has been established, as the appellant displayed improper conduct in the workplace, and the misconduct had an impact on the appellant's ability to conduct his duties as a police officer. *See* AF, Tab 32 (Testimony of Lagasse).

III. The penalty of removal is sustained.

In determining the reasonableness of an agency-imposed penalty, the Board will examine the penalty to determine if it is within the tolerable limits of reasonableness. *See Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981). In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. The Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised. *See Lazenby v. Department of the Air Force,* 66

M.S.P.R. 514, 520 (1995). Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the agency's judgment clearly exceeded the bounds of reasonableness. *Id. See Schoemer v. Department of the Army*, 81 M.S.P.R. 363, 366 (1999).

In this case, I sustained all 3 charges, but I did not sustain all of the specifications. When not all of the specifications are sustained, the Board will consider carefully whether the sustained charges and specifications merited the penalty imposed by the agency. *See Douglas*, 5 M.S.P.R. at 308. However, in doing so, the Board may not disconnect its penalty determination from the agency's managerial will and primary discretion in disciplining employees. *See Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

I find that the sustained charges and specifications warrant the penalty of removal. Chief Lagasse set forth his reasons to remove the appellant in the Decision to Remove, his Douglas Factors analysis, and at hearing. *See* AF Tab 7, at 4-14, 141-154. At hearing, Chief Lagasse testified that due to the misconduct, the appellant could not be trusted with sensitive information, has poor judgment, and could not adequately perform with the agency. AF, Tab 32 (Testimony of Lagasse). Chief Lagasse also stated that as a police officer he was held to a higher standard, and even if all of the charges and specifications were not sustained, he would have removed the appellant. *Id.*

Chief Lagasse also took into consideration the appellant's prior discipline. *Id.* The appellant had received a 14 day suspension for Misusing Government Property and Failing to Follow Written Suspension. AF, Tab 7 at 11. With regards to the consistency of the

penalty, Chief Lagasse stated that other police officers had been removed for sustained charges of Lack of Candor and/or Conduct Unbecoming a Police Officer. *Id.* According to the agency's table of penalty, Conduct Unbecoming a Police Officer may warrant 14 day suspension to removal, and Misuse of Government Property may warrant a 5 day suspension to removal. AF, Tab 32 (Testimony of Lagasse). These factors, Chief Lagasse testified, were used to evaluate the penalty. *Id.* Finally, Chief Lagasse stated the agency "can't rehabilitee" a lack of candor, that the appellant showed a lack of remorse, and that the appellant lacked the credibility to successfully perform his duties. *Id.*

In evaluating a penalty determination, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities including whether the offenses were intentional or were frequently repeated. *See Hernandez v. Department of Agriculture*, 83 M.S.P.R. 371, 374 (1999). Here, I find that the penalty of removal should not be mitigated. The appellant's dissemination of information obtained through the EEO process was a serious violation of privacy safeguards, made more severe by the fact that the appellant was a law enforcement officer. In addition, the appellant was found to have engaged in lack of candor, which impedes his credibility and ability to serve as a police officer. The appellant also misused RMS, despite being told that the system was for official use only. The appellant was put on notice that future misconduct would not be tolerated, and had served a 14 day suspension for similar misconduct. Accordingly, I find that the penalty of removal was within the tolerable bounds of reasonableness and the Board is without authority to mitigate it. *See Beard v. General*

Services Administration, 801 F.2d 1318, 1322 (Fed. Cir. 1986).

IV. The appellant has failed to establish that the agency committed a violation of the appellant's right to due process.

The appellant must prove an affirmative defense by a preponderance of the evidence. *See* 5 C.F.R § 1201.56(a)(2). Although the appellant initially raised only the affirmative defense of whistleblower retaliation, testimony elicited during the hearing raised a potential due process violation.

The Board's reviewing court has held a deciding official violates an employee's due process rights when he relies upon new and material ex parte information as a basis for her decision on the merits of a proposed charge or the penalty to be imposed. *Norris v. Securities & Exchange Commission*, 675 F.3d 1349, 1354 (Fed. Cir. 2012); *Ward v. United States Postal Service*, 634 F.3d 1274, 1279-80 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999). The Board has also held an employee's due process right to notice extends to both ex parte information provided to a deciding official and information known personally to the deciding official, if the information was considered in reaching the decision and not previously disclosed to the appellant. *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 7 (2012). Nevertheless, each of the above-cited cases recognize not all ex parte communications rise to the level of due process violations; rather, only those communications that introduce new and material information to the deciding official are constitutionally infirm. *Id.* at ¶ 8.

The Federal Circuit identified the following

factors to be used in determining whether ex parte information is new and material: (1) whether the ex parte information introduced cumulative, as opposed to new, information; (2) whether the employee knew of the information and had an opportunity to respond; and (3) whether the communication was of the type likely to result in undue pressure on the deciding official to rule in a particular manner. *Stone,* 179 F.3d at 1377. The dispositive question to be answered is whether the ex parte communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances. *Id.*

In this case, the appellant argued that Charge I should not be sustained because of improper ex parte communications. AF, Tab 31 at 7. With regards to Charge I, Specification 4, the appellant referenced testimony from Chief Lagasse wherein he stated he had known Maj. Taylor and Sgt. Green for years, and that he had never observed Sgt. Green consume alcohol, "except for a beer here and there." *Id.* at 7. Chief Lagasse also testified that he was aware of how important Maj. Taylor's family was to him and the substantial amount of time he spent with family, thus inferring that he and Sgt. Green could not have a relationship involving drinking. *Id.* at 8. In addition, the appellant argued that Chief Lagasse testified that "by virtue of his personal knowledge," and used his personal knowledge to conclude that the appellant was not credible. *Id.*

The agency conceded that Chief Lagasse considered personal knowledge in deciding to sustain Charge I, Specification 4, and that the appellant was not aware of it. AF, Tab 30 at 23. The agency argued that while Chief Lagasse considered ex parte

information with regards to that specification, his testimony demonstrated that he did not consider ex parte information with regard to the remainder of the proposed removal. *Id.* at 23-24. Accordingly, the agency withdrew the specification. *Id.*

After reviewing the evidence in the record and hearing transcript, I find that while Chief Lagasse's personal knowledge may have impacted Charge I, Specification 4, because the specification was withdrawn, and because the agency would have removed the appellant regardless of the specification or charge, the consideration did not constitute "new and material" information. The ex parte information was highly unlikely to impact the deciding official's overall determination to remove the appellant. *See Mathis v. Department of State*, 122 M.S.P.R. 507, ¶ 12 (2015).

The ex parte information considered by Chief Lagasse related to Chief Lagasse and Maj. Taylor's propensity to drink and engage in a relationship involving drinking. While this information was material to Charge I, Specification 4, as stated above, the specification was withdrawn by the agency. Chief Lagasse testified that he would have removed the appellant even if all of the charges and specifications were not sustained, and he provided a detailed list of reasons for the removal of the appellant in his decision and Douglas Factors analysis. AF, Tab 32 (Testimony of Lagasse). *See* AF, Tab 7 at 5-9.

As for the other charges and specifications, the ex parte consideration at best only confirmed or clarified information already contained in the record. *See Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001). For example, in Charge I, Specification 3, the appellant admitted in his response to the notice of proposed removal to making the

allegation that Sgt. Cook provided Officer Vickers with a cash bonus as an improper incentive for allowing misconduct. *See* AF, Tab 7 at 34-36. The deciding official testified that he made his decision to sustain the specification based on the fact that the appellant did not offer any proof to substantiate his claim, and the fact that cash bonuses based on ratings were not issued by sergeants. AF, Tab 32 (Testimony of Lagasse).

After reviewing Chief Lagasse's testimony and the record in the proceeding, I find that Chief Lagasse's consideration of personal information was not "so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Stone,* 179 F.3d at 1377. Accordingly, I conclude that there was not a violation of the appellant's constitutionally guaranteed due process rights.

V. The appellant has failed to establish an affirmative defense of whistleblower retaliation.

To prove a prima facie case of retaliation for whistleblowing, the appellant must prove by preponderant evidence that: (a) he made a disclosure protected by 5 U.S.C. § 2302(b)(8) or (b)(9); and (b) it was a contributing factor in the personnel action being appealed. If the appellant meets this burden, the agency must prove by clear and convincing evidence that it would have taken the same action even absent the disclosure. *See Savage,* 122 M.S.P.R. 612 ¶ 25.

In order to establish an affirmative defense of whistleblower retaliation, the appellant must identify: (a) the date, substance and recipients of the protected disclosure; (b) whether the disclosure constitutes 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; (c) whether the proposing and/or deciding official knew of the disclosure; and (d) how it constituted a contributing factor in the agency' decision in the matter appealed.

In this case, the appellant stated that he was removed because on May 30, 2016, he reported that the North Rotary and Fern VACP was being used as a location for congregation and eating and that vehicles were obstructing N. Rotary and fern VACP traffic lines. AF, Tab 20 at 14. However, Chief Lagasse testified that he was unaware that Appellant had sent the May 30, 2016 correspondence, and he further testified that it was not a contributing factor in his decision to remove appellant. AF, Tab 32 (Testimony of Lagasse). Accordingly, the claim of whistleblower retaliation must fail.

The appellant's second claim was that on October 9, 2016, he reported to Sgt. Watkins, OPR, and others, that he observed Sgt. Cook. Sgt. Green, Officer Vickers, A. Davis, and Grant eating pizza inside the N. Rotary and Fern VACP, and that he noted the locking mechanism to the door had been tampered with. AF, Tab 20 at 14. Chief Lagasse testified that he was aware that the appellant had reported this, and stated that he believed it was appropriate that appellant had reported the activity during the Army Ten Miler and that the sergeants involved were disciplined for it. AF, Tab 30 at 22. *See also* AF, Tab 32 (Testimony of Lagasse). Chief Lagasse further testified that the fact that the appellant had reported people eating and congregating during the Army Ten Miler did not contribute to his decision to remove the appellant. I find Chief Lagasse's testimony on the issue to be credible, and the appellant

failed to prove by preponderant evidence that the disclosure was a contributing factor in his removal. *See* AF, Tab 32 (Testimony of Appellant, Lagasse).

The appellant also claimed that he was removed for sending correspondence to his chain of command and OPR which stated that Sgt. Cook improperly inflated Officer Vickers' performance rating, as discussed above. *See* AF, Tab 20 at 14. Chief Lagasse testified that the appellant was disciplined not because he reported what he believed was misconduct, rather, it was that he reported this allegation with no reasonable basis to support his allegations, as well as conducting his own criminal investigation with no authorization or basis to do so. AF, Tab 30 at 23; *see also* AF, Tab 32 (Testimony of Lagasse). I find Chief Lagasse's testimony to be credible, and therefore conclude that the appellant's alleged whistleblower activity did not constitute a contributing factor in the agency's decision to remove the appellant.

In conclusion, I find that the agency has proven the charges discussed above by a preponderance of the evidence, that the penalty of removal was reasonable and supports the efficiency of the service, and that the appellant failed to establish an affirmative defense. Accordingly, the agency's decision to remove the appellant must be affirmed.

Decision

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Andrew M. Dunnaville
Administrative Judge

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

JAMES THOMAS RYAN,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

2018-1524

Petition for review of the Merit Systems Protection Board in No. DC-0752-17-0673-I-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, BRYSON[1], DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

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[1] Circuit Judge Bryson participated only in the decision on the petition for panel rehearing.

ORDER

Petitioner James Thomas Ryan filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on May 6, 2019.

FOR THE COURT

April 29, 2019
Marksteiner
Marksteiner

/s/ Peter R.
Date Peter R.

Clerk of Court

March 23, 2019

James Ryan

306 Guilford Ct.

Bel Air, Maryland 21015

Judges of the Court of Appeals for the Federal Circuit

717 Madison Place N.W.

Suite 401

Washington D.C. 20005

Dear Judges,

Attached is a combined Petition for Rehearing and Petition for Rehearing in Banc concerning the following opinion decided on February 13, 2019:

James Thomas Ryan

v.

Department of Defense

2018-1524

In the proceeding below, I was represented by:

Lawrence Berger

Garden City, New York

In the subsequent Petition for Review, I was represented by:

John Silverfield

Garden City, New York.

I am now proceeding pro se.

Please consider the due process argument and whistleblower argument from the PFR opening and reply brief as pro se because my attorney forced me to write the argument myself, and physically enter it into the brief. My attorney also refused my instructions to request a remand.

The panel decision conflicts with prior decisions of this Court because the Agency did not show my statement to be incorrect or incomplete or that an element of deception was present. *Ludlum v. Dep't of Justice*, 278 F.3d. 1280 (Fed. Cir. 2002).

The CAFC affirmed the AJ's decision to sustain **lack of candor specification 3** because (1) Ryan chose to assert the existence of a *quid pro quo* between the sergeant and SV without any evidence and represented the alleged exchange as fact, (2) by making an allegation he knew was unsupported, Ryan intended to deceive the recipients of the memorandum, (3) Ryan could not support his allegation SV's evaluation was fraudulently inflated because he admitted that he never read SV's Officer Performance Rating, and (4) Ryan failed to provide a material fact necessary to make the statement not misleading.

In *Ludlum* this Court defined lack of candor as: (1) an employee knowingly made an incorrect or incomplete statement, or (2) the employee failed to disclose something to make a given statement complete and not misleading. *Id.* The elements are flexible; but

there are definitive elements, and there must be an element of deception. *Id.*

This Court illustrated by analogizing the Federal securities laws governing securities registration statements: "... 'an untrue statement of a material fact' and **the failure 'to state a material fact** necessary to make the statements therein not misleading.'" 15 U.S.C. §77k(a). The exact language of the statute is "**omitted** to state a material fact ...." *Id.*

In my PFR, this Court held, *Ludlum* is "strikingly applicable to Ryan's failure to provide any evidence in support of his provocative assertion." This Court held, since I did not support a conclusory statement—not shown incorrect—with material facts, there was substantial evidence an element of deception present.

This Court failed to recognize the securities law analogy was an example of someone misleading by knowingly **omitting** something. 15 U.S.C. §77k(a). This Court has never found lack of candor in an employee's conclusory statement—not shown incorrect—because the employee failed to present a material fact to support it. *See Ludlum*, 278 F.3d. 1280.

My case is distinguished from prior CAFC opinions because (1) there is no evidence that I—knowingly or otherwise—made an incorrect or incomplete statement, or (2) that I—knowingly or otherwise—withheld a material fact that would make my statement more complete and not misleading. Thus, deception is not present.

First, I did not allege bribery or a quid pro quo. The proposing official's (PO) **specification 3** did not allege this, or allege deception was present. J.A. 2. The deciding official (DO) sustained **specification 3** solely "[because my allegation was so baseless, I must have known it false], but offered no evidence my statement was incorrect." Appx160. At hearing, the DO admitted my statement was in accordance with my perception. J.A. 1411. The Agency did not propose or sustain a specification because I asserted a quid pro quo without evidence. J.A. 2, J.A. 1414, Appx160.

In my opening brief (P.O.B.), I alleged sergeant committed a crime by fraudulently inflating SV's rating; that sergeant's misuse of the disciplinary and performance appraisal systems led to diminished security conditions that endangered the public; and that sergeant's conduct "evidenced theft; see 18 USC 641 Public Money, Property or records, 18 USC 654 Officer or employee of U.S. converting property of other, Virginia Code 18.2-95 Grand Larceny. The inflated rating violated 5 CFR 430.208(a)(1) A rating of record shall be based only on the evaluation of actual job performance for the designated rating period." P.O.B. p. 9 ¶1, ¶2, pp. 46 ¶3-47 ¶1.

I never alleged SV was complicit, or committed a crime. My references to criminal charges are specific to sergeant and are inconsistent with the assertion 'I alleged bribery or a quid pro quo' between sergeant and SV. In my response brief (P.R.B.), I noted I did not allege a bribe. P.R.B. p. 5 ¶2. My testimony shows I alleged theft by sergeant and his motive. Appx1366-

1367. All accusations I made are not in harmony with a quid pro quo assertion. I never asked SV questions that could implicate SV in a quid pro quo or any crime. J.A. 418. The exact statement:

> [sergeant] fraudulently inflated [SV's] DD 2799 to a level 5 exceptional level for the purpose of undermining my eeo complaint and to protect himself from disciplinary action related to my eeo complaint. [Sergeant provided [SV] with a cash bonus in exchange for allowing the post deteriorate to a location for unauthorized [activity],

does not articulate a bribe or quid pro quo. J.A. 417-419. It simply provides sergeants motives for theft. It is the opposite of 'sergeant properly rated and provided employee with a cash bonus in exchange for exceptional performance.' The Agency did not take a statement from me during its investigation of my alleged misconduct to clarify the meaning of the statement; nor did the Agency indicate they interpreted my statement as an allegation of bribery or quid pro quo prior to CAFC proceedings.

Second, the DO testified he sustained lack of candor **specification 3** based on (1) a sustained lack of candor **specification 4** which is based on ex parte personal information, *See infra* pp. 4-5, and (2) "[I could not prove SV's rating was fraudulently inflated],"

despite the proof listed in the same document. J.A. 1403-1414, J.A. 417-419.

Next, I will address the DO's lack of candor finding in **specification 4**. The DO did not find I made a false allegation that coworkers abused alcohol. I mitigated specification 4 in my response. I stated, a manager and supervisor were in a close personal relationship, and it seemed to impact disciplinary processes. The DO stated he knew the relationship did not exist from his ex parte personal knowledge, and determined I lacked candor:

> **D.O.:** Just -- he had no evidence. I mean, based on those two individuals, because I've known Maj. Taylor for many years; I've known Sgt. Green for many years. I don't think they've had any kind of relationship outside of this place since -- Maj. Taylor has had children and Todd is a bodybuilder. He doesn't drink alcohol. I've never seen Todd drink alcohol. I'm not saying he hasn't had a beer, but that's just not something he does normally.
>
> **Ms. Pavlick:** Did you take your personal knowledge into consideration when you made your decision?
>
> **D.O.:** Well, realistically, that's the only test I could have. He provided no other evidence, so

he made an assertion, and I personally know that's not the case. J.A. 1415-1416.

Cross Examination

Mr. Berger: I don't think he answered the question. He said if [lack of candor] spec 4 was not sustained, he could still sustain [lack of candor] 1, 2 and 3. I'm asking whether that information would have any effect on his decision to sustain?

D.O.: So, kind of clarifying my previous statement, it did, ... J.A. 1461-1462.

D.O. later testified: No. I mean, I was trying to explain. I mean, if I sat here and said, no, it had no effect, that's not an accurate statement. ... I'm not saying it's, you know, a foregone conclusion, ... it's a factor. J.A. 1463.

Second, the following objective facts support SV's rating was fraudulently inflated, and were included in the October 12, 2016 disclosure:

1. [Sergeant] rating of [SV] notes Officer Vickers submitted three incident reports; one for a lost article, a suspicious person, and an assist to an

arrest for synthetic drugs. [Sergeant] notes [SV] "never needs assistance with written case work or RMS reports". A review of RMS records revealed [SV] did not file any RMS reports for the entire rating period.

2. [Sergeant] also notes [SV] dealt with an individual who attempted to force entry at a vehicle gate. Again, there are no RMS records to reflect such an incident.
3. [Sergeant] commends [SV] for attending supervisor meetings. Officers are not allowed to attend these meetings and on August 27, 2016 [SV] admitted to me he has never attended a supervisor meeting.
4. [SV] also admitted to me he has not received JABS training which is another premise listed for the inflated rating.
5. [SV] allowed the locking mechanism of the N. Rotary and Fem VACP to remain tampered with in a manner that allows the door to remain unlocked. This not only causes a security issues, it prevents management from ascertaining who is going in and out of the booth because you must have a PMP CAC to access the area. J.A. 417-419.

The inflated rating is analogous to an employee who falsifies a 'Claim for Reimbursement for Expenditures on Official Business' to increase expenses, and then pockets the money; it's a conversion. Here, sergeant falsified performance information to support a $2050.00 bonus. There is no eyewitness testimony—or hearsay—to dispute it. The

DO testified he had no knowledge of SV's performance. J.A. 1410.

Additionally, the issue giving rise to lack of candor was stipulated as fact: "... [Sgt.] **'fraudulently inflated'** [SV]'s rating in the DD 2799." J.A. 1117 #10.

Next, the AJ did not find I alleged a bribery or quid pro quo; this was not a question for hearing. The AJ found I alleged a theft motive without evidence. The AJ sustained the specification because:

(1) there is no credible evidence in the record to support the position that [SV] was provided a bonus in exchange for allowing the N. Rotary and Fern VACP to become a place for unauthorized congregating, food delivery, and eating, as the appellant claimed in the October 12, 2016 memo.

(2) In addition, the appellant was unable to explain how he received the information set forth in his claim. At hearing, the appellant testified that he had little, if any knowledge as to how bonuses were given. *Id.*

(3) Furthermore, DO testified that [SV] Officer Performance Rating was the basis for his performance rating and bonus – an item that the appellant admitted he never reviewed. J.A. 6.

First, the objective facts to support SV's rating was fraudulently inflated are discussed *supra*, p. 5.

Second, the AJ did not quote the MSPB hearing transcript. The AJ quoted the Agency Attorney's closing argument which misquotes testimony. The hearing transcript is inconsistent with the Agency Attorney's assertions of testimony. J.A. 1275- 1281, J.A. 1342-1344. Thus, the AJ's decision was not based on record evidence.

Third, I made a factual inference concerning sergeant's theft motive based on my training and experience as a law enforcement officer. J.A. 1279. Sergeant was aware SV was facilitating misconduct between April 2015 through March 2016 and sergeant participated in it; sergeant fraudulently inflated SV's rating of record, triggering cash bonus. From those facts I infer sergeant converted funds and rewarded SV for misconduct. I never alleged SV's complicity or a quid pro quo.

Fourth, it is inherently improbable that I lacked candor in asserting theft motive because its moot.

Last, I requested the Agency **investigate** sergeant. J.A. 418. I did not ask the Agency to take criminal enforcement action based on my statement. I requested the

Agency conduct an independent investigation into sergeant. My request for the Agency to investigate sergeant is inconsistent with the conclusion I was deceptive. It is inherently improbable I was trying to trick anyone into believing something that is not true because I never asked them to take criminal enforcement action based on my statement. It is

implausible I would attempt to trick the Agency into believing a felony theft was a quid pro quo, and then ask them to independently investigate it.

In conclusion, I did not make an incorrect or incomplete statement, (knowingly or otherwise), or withhold a material fact that would make any statement complete and not misleading. Deception is not present. Thus, consideration by the full Court is necessary to secure and maintain uniformity of the Courts decisions. *See Ludlum, 278 F.3d. 1280*

Cumulative Evidence

The proceeding involves questions of exceptional importance because the panel failed to recognize and define cumulative evidence. This conflicts with other United States Court Opinions. *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001); *Goodrich v. The United States*, 48 Ct.Cl. 61 (1913) (*citing* Greenleaf on Evidence).

Cumulative evidence is generally defined as additional evidence of the same kind to the same point. *Goodrich*, 48 Ct.Cl. 61. "'Cumulative' means 'repetitive and if the small increment of probability it adds may not warrant the time spent in introducing it.'" *Magleby*, 241 F.3d at 1315. "'Cumulative evidence' means 'additional evidence of the same general character, to the same fact or point which was the subject of proof before'; it does not include evidence 'which brings to light some new and independent proof of a different

character, although it tends to prove the same proposition'". *Thomas v. State,* 24 A.3d 630, 655 (Conn. 2009).

First, the ex parte information is direct, eyewitness evidence, the DO used to prove I made an incorrect statement in **specification 4** and used the finding in 4 to sustain **specification 3.** *Supra* pp. 4-5.

Second, the known evidence in the DO's decision and testimony to sustain lack of candor **specification 3** is "[I made a conclusory statement]"—not shown to be incorrect— "[I could not prove]." *Supra* p. 2. This type of evidence is circumstantial and the DO used to infer I made a statement I knew was incorrect.

The ex parte evidence is a different type and was used to prove two different facts. Whether the facts support the same conclusion is not determinative. Thus, it cannot be considered cumulative. *Magleby*, 241 F.3d 1306; *Goodrich,* 48 Ct.Cl. 61 (*citing* Greenleaf); *Thomas,* 24 A.3d 630. Subsequently, it is new evidence. This Court must define cumulative evidence to protect Federal employees' right to due process.

Due Process

The panel decision conflicts with prior decisions of this Court because, the AJ used a subjective test to evaluate *Stone* factors, rather than an objective test. *Stone v. Fed. Deposit Ins. Co.,* 179 F.3d 1368 (Fed. Cir. 1999) (*citing Sullivan v. Dep't of the Navy,* 720 F.2d 1266 (Fed. Cir. 1983); *Ryder v.*

United States, 585 F.2d 482 (Ct.Cl. 1978); (*quoting Camero v. Unites States,* 375 F.2d 777 (Ct.Cl. 1967)); *Young v. Hud,* 706 F.3d 1372 (Fed. Cir. 2013).

In *Stone,* this Court mandated an **'objective'** test. *Stone,* 179 F.3d 1368. The factor's to weigh are (1) "whether the ex parte communication merely introduces 'cumulative' information or new information;□(2) whether the employee knew of the information and had a chance to respond to it; and (3) whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. *Id.* This Court held the third factor is "less relevant" when a DO admits the communication "influenced her determination." *See Young,* 706 F.3d 1372. The merits of a specification do not matter when there is a due process violation. *Stone,* 179 F.3d 1368 (*citing Sullivan,* 720 F.2d 1266).

Here, the AJ found the ex parte information confirmed or clarified information already in the record because the DO would have removed me absent the ex parte information. J.A. 6. The AJ considered the DO's testimony in determining the ex parte information was unlikely to affect the overall decision to remove me and tested lack of candor specification 3 on the merits. *Id.*

First, the ex parte information was not cumulative. *Supra* pp. 7-8.

Second, the DO did not give me notice or an opportunity to respond. J.A. 1457.

Third, the DO's testimony he would sustain lack of candor **specification 3** absent ex parte information is **subjective.** Notwithstanding, the undue pressure element is not important because the DO admitted the ex parte information was a factor to sustain lack of candor **specification 3.** *Supra* pp. 4-5; *see Young,* 706 F.3d 1372.

In conclusion, the AJ improperly categorized the ex parte evidence as cumulative, and failed to conduct and **objective** *Stone* factor analysis. The AJ applied the harmless error test and considered the specification on the merits in violation of my constitutional right to due process. Subsequently, consideration by the full Court is necessary to secure and maintain uniformity of the Courts decisions. *See Stone,* 179 F.3d 1938.

The panel decision conflicts with a decision of the United States Supreme Court, this Court, and a statute, because I was not afforded my right to due process, I was not given adequate notice of the charges against me, and the CAFC/MSPB sustained a specification not included in the proposal. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985)*; O'Keefe v. U.S. Postal Service,* 318 F.3d 1310 (Fed. Cir. 2002); 5 U.S.C § 7513(b)(1).

The Agency asserts, "[Ryan] admits that his conclusion that the bonus was a bribe is a 'factual inference based on my training and experience as a law enforcement officer.' Appx1279." Agency reply brief (ARP) p. 20. There is no such admission. J.A. 1279. The Agency asserts "the [AJ] found that Mr. Ryan ... requesting the criminal prosecution of [sergeant] for providing [SV] a cash bonus as a bribe ...." ARP p. 21.

The AJ did not make this finding. J.A. 1-14. The Agency asserts "[D.O.] found that Mr. Ryan accused [sergeant] of making a bribe without any evidentiary support. Appx373." ARP p. 40. The D.O. made no such assertion. J.A. 373. I rebutted the assertion in my response brief by noting I did not make a bribery allegation. P.R.B. p 5.

First, the Agency did not assert I alleged bribery or quid pro quo until after the record below closed. *Supra* pp. 2-4. If the AJ's decision to sustain lack of candor is interpreted as finding I asserted a quid pro quo without evidence, he sustained a specification on grounds not invoked by the Agency. *Id.*

Second, the lack of candor specification affirmed by CAFC was different then the specification proposed and sustained by the Agency. *Id.*

Thus, I was not given notice or an opportunity to respond in violation of my constitutionally protected due process rights. Subsequently, consideration by the full Court is necessary to secure and maintain uniformity of the Courts decisions.

The panel decision conflicts with a statute because the MSPB decision was unlawful. 5 U.S.C. § 7703(c).

In sustaining specifications, the AJ considered Agency Attorney pleadings as opposed to hearing testimony and transcript. J.A. 6, 8-9. The Agency Attorneys pleadings misquoted relevant testimony. The Agency Attorneys misquotes are inconsistent with

transcript testimony. Subsequently, the AJ did not rely on record evidence in his decision to sustain.

Conduct Unbecoming

The DO sustained conduct unbecoming because I released information in violation of the Rights and Responsibility form (misquoting the law rendering it unrecognizable) issued by WHS/EEOC; not for violating the privacy act.

Privacy act information is releasable by statute: **5 USC §552a(b)(1) Conditions of Disclosure,** permitting disclosure "to those officers and employees of the agency which maintains the record have a need for the record in the performance of their duties." **e-CFR Title 32 §310.22(5)** provides a blanket routine use exception for law enforcement, "where the agency maintaining the record becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation," and the individual 'system of record notice' (SORN) recognizes the blanket exception.

First, the DD 2799 I released is maintained under SORN's: OSD/JS DMDC 23 DoD, EEOC/GOVT-1, and OPM/GOVT-2. The SORNS recognize blanket routine law enforcement use.

Second, the information is objective evidence the DD 2799 was falsified. *Supra* p. 5, J.A. 417-419. The information reasonably "indicat[ed] [] a violation or potential violations of civil or criminal law or

regulation," subsequently showing employees violated General Order (GO) 1000.03. J.A. 552.

Third, I testified I reported the information to law enforcement officers designated by Agency policy to handle misconduct. J.A. 1352, Appx1354. I testified the information was releasable by privacy act exemption. J.A. 1284.

Forth, my testimony at J.A. 1290 is a conversation with Ms. Sullivan about ROI discriminatory information in March of 2017; not about the law enforcement information I disclosed in October 2016. J.A. 1471-1472, J.A. 1482-1483, J.A. 1487. Notwithstanding, Ms. Sullivan has no authority to prevent dissemination of law enforcement information.

Finally, a proper analysis shows General Order 1000.03, and Operations Instruction 27, combined with the statutes, provided authorization to disclose the DD 2799 to the persons I disclosed it too because they needed to know it "indicated a potential violation of criminal and civil law." Failing to disclose violates GO 1000.03. J.A. 552. The GO outweighed the EEO Rights and Responsibility form. The AJ erroneously limited permissible disclosures to evidence of a completed criminal act. J.A. 7-8.

Misuse of Government Computer

I testified I was authorized to conduct a preliminary criminal investigation; I was trained by the

Agency how to run a search of an individual officer's reports and activity in RMS and that I was acting in accordance with training; I **was investigating sergeant** for theft stemming from SV's inflated rating; and I reported the findings only to my chain of command. J.A. 1305, J.A. 1307, J.A. 1365, Appx. 1366-1367, J.A. 1352. **This testimony undisputed;** thus, the AJ's credibility determination is misplaced. The DO admitted officers are authorized to access RMS when "working a case." J.A. 1428.

There is no evidence to support the claim I was conducting a private investigation of SV; I did not conduct any investigation into SV. I did not obtain a benefit from the RMS search. There is no evidence the DO was aware of the RMS training I received or the RMS training curriculum. The RMS search sought confirmation sergeant falsified the DD 2799, or evidence to clear sergeant of falsification. The DO did not testify I needed authorization to search RMS during a preliminary criminal investigation, or that I needed authorization for each individual search. Criminal investigations start at reasonable suspicion at my discretion.

The 'reasonable person' would not sustain conduct unbecoming for disclosing information that evidenced an inflated rating and theft, when the Agency's GO mandated I report it. *See* J.A. 552. The 'reasonable person' would not sustain misuse of government computer based on DO's testimony "[I was not authorized to conduct a private investigation of SV]", when it is undisputed I was authorized to conduct

a preliminary criminal investigation of sergeant. The AJ should not have considered Agency Attorney's conjecture as opposed to record testimony and evidence. Thus, the AJ's decision violated 5 U.S.C. § 7703(c). Consideration by the full Court is necessary to secure and maintain uniformity of the Courts decisions.

Whistleblower Protection Act

The panel decision conflicts with prior decisions of this Court because the Agency did not show they would have taken the action absent the disclosures. Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357 (Fed. Cir. 1998); *Carr v. Social Security Administration,* 185 F.3d 1318 (Fed.Cir.1999).

The PO knew of the October 9, 2016 disclosure regarding the tampering of the Pentagon facility door lock, because she cited the disclosure in the proposal. J.A. 393 ¶4. The PO knew of the October 12, 2016 disclosure concerning the tampered Pentagon facility door lock, because the proposal included it. J.A. 418. The DO knew of both disclosures because he admitted knowledge of the October 9 disclosure and had a copy of the October 12 disclosure with the proposal. J.A. 6, J.A. 418

The October 12, 2016 disclosure is located at J.A. 417-419. In the proceedings below, I noted the disclosure at Appx739. I cited "AF tab 1 p57-60" (aka J.A. 417-419), asserting the entire document was protected. The document contains numerous objective

disclosures, reasonably evidencing modern law theft. *Supra* p. 5.

I made the October 9 & 12, 2016 disclosures to the same officials. J.A. 738-739. Whoever initiated the investigation leading to the proposal knew of both disclosures. The removal was proposed in March of 2017 and sustained in July 2017.

Knowledge and timing by the official initiating the investigation, the PO, and DO is present. Thus, it is proven the disclosures contributed to the action. *See Kewley*, 153 F.3d 1357. The AJ failed to conduct a Carr factor analysis. *See Carr*, 185 F.3d 1318.

Here, the protected disclosures show management was not performing its functions, and it led to diminished security. The normal penalty sustained by same PO for three charges such as the ones at issue, absent whistleblower activity, is a 5-day suspension with no claim of Giglio issue. *See infra* Addendum A. In a case where a Pentagon Police Officer lacked candor in furtherance of a felony theft, the same PO sustained 30-day penalty with no Giglio issue. *See id.*

Remedy

Please re-calendar the case so I can argue the AJ's decision should be vacated and remanded with instructions to determine whether I knowingly made an incomplete or incorrect statement, or knowing withheld a material fact, on the grounds invoked by the Agency;

reanalyze the remaining charges on the grounds invoked by the Agency and record evidence as opposed to attorney conjecture. Provide a definition of cumulative evidence with instructions to conduct proper *Stone* analysis, and conduct a *Carr* factor analysis, as necessary.

Sincerely,

/S/James Ryan