NOTE: This disposition is nonprecedential

United States Court of Appeals for the Federal Circuit

HAROLD E. RUTILA, IV,
Petitioner
v.
DEPARTMENT OF TRANSPORTATION,
Respondent

2019-1712

Petition for review of the Merit Systems Protection Board in No. DC-1221-18-0474-W-1.

Decided: February 10, 2020.

HAROLD EDWARD RUTILA, IV, Canton, MI, pro se.

DOMENIQUE GRACE KIRCHNER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by JOSEPH H. HUNT, ALLISON KIDD-MILLER, ROBERT EDWARD KIRSCHMAN, Jr.

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

PER CURIAM.

Harold E. Rutila IV appeals a decision from the Merit Systems Protection Board ("Board") denying his request for corrective action under the Whistleblower Protection Act. We *affirm*.

BACKGROUND

Mr. Rutila had a temporary appointment as an Air Traffic Control Specialist with the Federal Aviation Administration ("FAA"). As a condition of continued employment, he was required to take three performance evaluations that simulate real-life scenarios as part of the Initial Tower Cab Training. In May 2016, Dan Henderson administered and graded Mr. Rutila's first evaluation. Mr. Rutila challenged his score on this evaluation by filing a Technical Review ("TR"). The TR process is designed to offer trainees "an avenue to ensure points lost during a[n evaluation] are based on [relevant FAA] rules or procedures." J.A. 421. Trainee requests for TRs are evaluated by a Technical Review Panel of two supervisors.

As a result of Mr. Rutila's challenge, it was determined that Mr. Henderson erroneously deducted one point from Mr. Rutila's grade based on Mr. Rutila's failure to refer to an aircraft using specific phraseology during the simulation. Mr. Rutila regained the point and consequently passed his first evaluation. He also passed his second evaluation.

Mr. Rutila's third evaluation was administered by Michael Taylor. After completing this third evaluation, Mr. Rutila was debriefed by Mr. Taylor and Mr. Henderson, though Mr. Taylor alone ultimately graded the evaluation. Mr. Rutila received a failing score. His score on the third evaluation lowered his overall training score, which meant he could not pass the Initial Tower Cab Training. Although Mr. Rutila challenged his score on the third evaluation by filing six TRs, the TR Appeal Board denied his challenges, and his score remained unchanged. Mr. Rutila was deemed "mathematically eliminated" from the program and, according to protocol, was terminated on May 24, 2016.

Mr. Rutila timely filed a complaint with the Office of Special Counsel ("OSC"). He alleged that he had been terminated as a reprisal for filing TRs and helping other trainees file TRs. In particular, he argued that Mr. Henderson influenced Mr. Taylor's scoring of Mr. Rutila's third evaluation in retaliation for Mr. Rutila's earlier TR filing that noted Mr. Henderson's grading error on the first evaluation. On February 16, 2018, OSC terminated its inquiry.

On April 22, 2018, Mr. Rutila appealed to the Board under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)–(9) ("WPA"). The Administrative Judge ("AJ") considered Mr. Rutila's filings of TRs and analyzed them as alleged grievances under § 2302(b)(9)(A), but not as alleged protected disclosures under § 2302(b)(8). It found that the filing of TRs did not constitute protected activity under § 2302(b)(9)(A). The Board also found that even if the filings of TRs had

constituted protected activities, the agency had shown by clear and convincing evidence that Mr. Rutila would have been removed absent the TR filings.[1] The AJ also found that Mr. Rutila had not exhausted several of his other alleged protected disclosures before OSC. Mr. Rutila did not petition the Board for review of this decision. The AJ's decision became the final decision of the Board.

Mr. Rutila appeals directly to this court. We have jurisdiction under 5 U.S.C. § 7703 and 28 U.S.C. § 1295(a)(9).

DISCUSSION

I

A Board decision must be affirmed unless it is "(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). Substantial evidence is "evidence that a reasonable mind may take as sufficient to

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[1] § 2302(b)(8)(A) defines protected disclosures as those made by an employee "which the employee . . . reasonably believes evidences—any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Section 2302(b)(9)(A)(i) defines a protected activity as "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—with regard to remedying a violation of [§ 2302(b)](8)."

establish a conclusion." *Grover v. Office of Pers. Mgmt.*, 828 F.3d 1378, 1383 (Fed. Cir. 2016).

The WPA prohibits an agency from taking a personnel action in retaliation for any whistleblowing "disclosure" or activity. 5 U.S.C. § 2302(b)(8)–(9). An employee must show by a preponderance of the evidence that he made a protected disclosure or participated in a protected activity (such as an appeal) that contributed to a personnel 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)). The Board may consider whistleblowing charges only if the claimant first presented them "with reasonable clarity and precision" to OSC. *Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1577–8 (Fed. Cir. 1996); *see also* 5 U.S.C. § 1214(a)(3).

II

Mr. Rutila argues that the Board erred in finding that he had jurisdiction only under 5 U.S.C. § 2302(b)(9) and not § 2302(b)(8). He argues that, at the very least, his initial TR against Mr. Henderson constituted a protected disclosure under § 2302(b)(8)(A). That section defines protected disclosures as those made by an employee "which the employee . . . reasonably

believes evidences—any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Section 2302(b)(9)(A)(i) defines a protected activity as "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—with regard to remedying a violation of [§ 2302(b)](8)."

We need not decide whether the Board erred in finding that the filing of a TR by an employee on his own behalf is more appropriately analyzed under § 2302(b)(9) because the Board under the WPA has jurisdiction over individual rights of action under both sections, and Mr. Rutila fails to demonstrate how he was prejudiced by the Board limiting its consideration to § 2302(b)(9). Under the current version of the WPA, "an employee may file an IRA, and the Board will have jurisdiction over the appeal, if the prohibited personnel action is due to a disclosure covered by *either* § 2302(b)(8)—i.e. retaliation for whistleblowing—or § 2302(b)(9)(A)(i)—i.e. retaliation for exercising a grievance right related to whistleblowing." *Miller v. Merit Sys. Prot. Bd.*, 626 F. App'x 261, 266 (Fed. Cir. 2015).[2] We see no error in the Board's decision to

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[2] Mr. Rutila argues that the Board failed to consider his assistance to two other trainees in their submission of TRs as protected disclosures and that these activities were not covered by § 2302(b)(9). Though we do not decide whether an employee's filing of a TR on his own behalf is a protected disclosure, we see no error in the Board's failure to treat his assistance in others' TR filings as protected disclosures under 5 U.S.C. § 2302(b)(8).

proceed under § 2302(b)(8) with respect to his TR activities.

Mr. Rutila also argues that the Board erred in not finding his TRs to constitute protected activity in its analysis under 5 U.S.C. § 2302(b)(9). The Board found that Mr. Rutila's TRs did not constitute protected activity because they "contained no reference to any legal authority and could not reasonably have been interpreted as raising any concern of illegality." J.A. 6. The Board also emphasized that "the mere filing of a TR is routine in these circumstances." J.A. 9. We also need not decide if the TR appeal is a protected activity under § 2302(b)(9), because we conclude that the Board's finding that the FAA "would have terminated the appellant absent his filing of the TRs to challenge his test scores," J.A. 7, is supported by substantial evidence.

The Board concluded that the FAA had shown by clear and convincing evidence that it would have terminated Mr. Rutila even if the filings of TRs were considered to be protected under § 2302(b)(9). The Board followed the approach described in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). The first *Carr* factor is "the strength of the agency's evidence in support of its personnel action." *Id.* The Board highlighted the agency's evidence that Mr. Rutila in fact "misguided an airplane and mishandled the situation" during his third evaluation. J.A. 8–9. The Board also pointed out that failing the course normally leads to removal.

The second *Carr* factor is "the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision." *Carr*, 185 F.3d at 1323. The Board found that "no evidence of any retaliatory animus against the appellant" because "the mere filing of a TR is routine." J.A. 9. In addition, Mr. Henderson's declaration indicated that "he was unaware that the appellant had filed a TR." *Id.* Similarly, the Board found that "[t]here is no evidence that either manager [who reviewed Mr. Rutila's other six TRs subsequent to his third evaluation] intended to retaliate against the appellant by declining to award him additional points." *Id.*

The third and final *Carr* factor is "any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr*, 185 F.3d at 1323. There appears to be no evidence of similar actions against employees who are not whistleblowers. "[T]he absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis." *Whitmore*, 680 F.3d at 1374. The Board did point out that the fact that other trainees who filed TRs against Mr. Henderson passed the training, which "undercuts [Mr. Rutila's] claim that by filing TRs he was terminated from his position." J.A. 9.

We conclude that the Board's analysis of the *Carr* factors and its finding that the FAA "would have terminated the appellant absent his filing of the TRs to challenge his test scores," J.A. 7, were supported by substantial evidence.

III

Mr. Rutila argues that the Board should have considered two other protected disclosures in addition to the TRs: (1) a trainee feedback submission he submitted after this third evaluation and (2) his in person appeal to two supervisors regarding his third evaluation. The Board found that neither of these purported disclosures was exhausted before OSC. "The test of the sufficiency of an employee's charge of whistleblowing to OSC is the statement that the employee makes in the complaint to OSC . . . , not the employee's subsequent characterization of that statement in his appeal to the Board." *Serrao*, 95 F.3d at 1577.

The OSC complaint does not mention his trainee feedback form. And it mentions the in-person appeal not as a protected disclosure, but as a "decision" of the FAA not to allow him to retake the third evaluation. The Board thus did not err in declining to consider these disclosures.

IV

Mr. Rutila argues that the Board improperly denied his discovery and document subpoena motions. "Procedural matters relative to discovery and evidentiary issues fall within the sound discretion of the board and its officials." *Curtin v. Office of Pers. Mgmt.*, 846 F.2d 1373, 1378 (Fed. Cir. 1988) "If an abuse of discretion did occur with respect to the discovery and evidentiary rulings, in order for petitioner to prevail on these issues he must prove that the error caused

substantial harm or prejudice to his rights which could have affected the outcome of the case." *Id.* at 1379.

On August 27, 2018, Mr. Rutila filed a motion for a subpoena which sought documents and other evidence from Mr. Henderson. On October 24, 2018, Mr. Rutila moved to compel discovery of certain interrogatory responses and documents from the FAA. The AJ denied Mr. Rutila's discovery motions.

Mr. Rutila does not explain how a contrary ruling would have affected the outcome. The AJ found that there was no evidence that the agency had "failed or refused to provide the appellant with any relevant or material evidence." J.A. 2635–36.[3] The AJ's decision to deny these motions was thus not an abuse of discretion.

V

Mr. Rutila argues that he was deprived of his right to a hearing. On October 25, 2018, four days before the scheduled hearing with the Board, Mr. Rutila moved for a postponement on the ground that he did not have adequate time to prepare and the AJ had not yet ruled on his two discovery motions. On October 26, 2018, the AJ conducted a telephone conference, which was summarized on the record. The summary indicated that

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[3] To the extent Mr. Rutila's motion for issuance of a subpoena to Mr. Henderson can be read to be eliciting testimony in addition to documentary evidence, there was likewise no prejudice because the FAA had planned to call Mr. Henderson as a witness at the hearing.

Mr. Rutila "withdrew his request for a hearing." J.A. 2632.

Mr. Rutila argues that he "felt coerced into agreeing" to waive his hearing during the telephone conference with the AJ because, absent a postponement, he "could not reasonably prepare for a hearing" that was to take place two days after the conference, and had "not even received a decision on his motion for a subpoena or motion to compel discovery" until the telephone conference. Appellant's Br. 58–60. Mr. Rutila failed to preserve his objection to the denial of his motion to postpone by foregoing his right to a hearing.

AFFIRMED

COSTS

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV,
Appellant,

DOCKET NUMBER
DC-1221-18-0474-W-1

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DATE: December 20, 2018

Harold E. Rutila, IV, Fenton, Michigan, pro se.

Armando Armendariz, Fort worth, Texas, for the agency.

Joann Putnam, Esquire, Des Moines, Washington, for the agency.

BEFORE

Kasandra Robinson Styles
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 23, 2018, Harold E. Rutila, IV filed an individual right of action (IRA) appeal with the Board in which he alleged that the agency retaliated against him by terminating him from the FG-2152-01 position of Air Traffic Control Specialist with the Federal Aviation Administration (FAA) because he filed several Technical Reviews (TRs) challenging his test scores on exams during an Initial Tower Cab Training. *See* Appeal File (AF), Tab 1. The Board has jurisdiction over

this appeal pursuant to 5 U.S.C. §§ 1214(a)(3), 1221(a), (e) (West 2007).

Because the appellant withdrew his request for a hearing, this decision is based on the parties' written submissions. For the reasons discussed below, the appellant's request for corrective action is DENIED.

JURISDICTION

The following facts are undisputed. On February 16, 2016, the appellant was appointed to the agency as an Air Traffic Control Specialist, FG-2152-01, on a temporary appointment, not to exceed March 15, 2017 with the FAA. The appellant's official duty station was Washington, DC but he was on temporary duty at the Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma, attending Initial Tower Cab training to remain employed by the FAA.

As part of his training, the appellant was required to take a series of tests and evaluations. In May 2016, Dan Henderson administered and graded the appellant's first evaluation. On May 23, 2016, the appellant filed a technical review (TR) to challenge his score on his first evaluation. As a result of the TR, he regained one point and passed his evaluation. The appellant passed his second evaluation. Michael Taylor administered a third evaluation. The appellant received a score of 15%. That score lowered the appellant's overall training score and he ultimately could not pass the Initial Tower Cab training. The appellant challenged his third evaluation by filing six TRs. The agency denied

the TRs and terminated the appellant from his position, effective May 25, 2016. On June 30, 2016, the appellant filed a complaint with the Office of Special Counsel (OSC) in which he alleged that his termination amounted to retaliation for filing the TRs. On February 16, 2018, OSC terminated its investigation into the appellant's allegations. On April 22, 2018, the appellant filed the instant IRA with the Board.

During a preliminary status conference on June 28, 2018, I informed the parties that the appellant had established jurisdiction over this appeal and was entitled to his requested hearing because he had raised a non-frivolous allegation that he had exhausted his administrative remedies with OSC and raised a non-frivolous allegation that exercised an appeal, complaint, or grievance right, amounting to protected activity pursuant to 5 U.S.C. § 2302(b)(9)(A), when on May 23, 2016, he filed a TR of Dan Henderson's grading of his first evaluation with the FAA during Initial Cab Tower training.[1]

I also found that the appellant satisfied the knowledge and timing test as he alleged that Mr. Henderson was aware of the TR of his first evaluation, and the appellant was terminated from his position merely

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[1] In his prehearing submission, the appellant refers to making protected disclosures. However, there is no evidence that any of his purported disclosures were exhausted before OSC. The only issue he raised were the TRs. Consequently, during a telephonic status conference, I informed the parties that this IRA will be evaluated under 5 U.S.C. § 2302(b)(9)(A) and not under 5 U.S.C. § 2302(b)(8). AF, Tab 50.

two days after he filed the first TR. I further determined that the termination was properly exhausted before OSC and satisfied the definition of a covered personnel action under 5 U.S.C. § 2302(a).

ANALYSIS AND FINDINGS

The appellant is required to establish his reprisal for whistleblowing claim by preponderant evidence. He must establish that: (1) he engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *See* 5 U.S.C. § 1221(e)(1); *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015). If the appellant makes out a prima facie case, the agency is given an opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2) (West 2007); *Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 970-71 (Fed. Cir. 2009); *Webb*, 122 M.S.P.R. 248, ¶ 6.

In determining whether agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, relevant factors include strength of agency's evidence in support of its personnel action, existence and strength of any motive to retaliate on part of agency officials who were involved in the decision, and any evidence that agency takes similar actions against

employees who are not whistleblowers but who are otherwise similarly situated. 5 U.S.C.A. §§ 1221(e) (West 2007); *see Carr v. Social Security Administration*, 185 F.3d 1318, 1322 (Fed. Cir. 1999). In *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), the Court addressed the clear and convincing standard and determined that the Board may not exclude or ignore evidence necessary to adjudicate the whistleblower retaliation claim, but rather must consider all of the relevant evidence. The Court found that the Board cannot decide whether the agency has carried its burden by "clear and convincing evidence" by looking only at the evidence that supports the conclusion reached. *Id.* at 1367-68. It explained that "[e]vidence 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. The Court noted that "[i]t is error for the MSPB to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately." *Id.* In considering the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, the Board must consider evidence of other officials not directly involved but who may have influenced the decision by a retaliatory motive. *Id.* at 1370.

I note that, on his initial appeal form, the appellant raised harmful procedural error and unlawful discrimination as affirmative defenses. However, it is well settled that such claims are not within the Board's

jurisdiction in an IRA appeal as IRA appeals are limited to claims involving whistleblower retaliation. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 18 (2013). Thus, I will not adjudicate these claims in the instant action.

The appellant proved by preponderant evidence that he exhausted his administrative remedies before OSC.

Here, the record demonstrates that the appellant filed an OSC complaint on June 30, 2016 and alleged that he was removed from his position for filing several TRs. AF, Tab 1, Attachment (OSC Complaint). On January 29, 2018, OSC informed the appellant that it made a preliminary determination to close its inquiry into his allegations. AF, Tab 1, Attachment (OSC Preliminary Determination Letter). By letter dated February 16, 2018, OSC advised the appellant that it had terminated its inquiry and that he had 65 days to seek corrective action from the Board. AF, Tab 1, Attachment (OSC Closure Letter).

As noted in the Order and Summary of the Telephonic Status Conference, I found that the appellant exhausted his administrative remedies and established jurisdiction over his appeal. AF, Tab 50. Based on this record, I find the appellant has demonstrated by preponderant evidence that he exhausted his administrative remedies before OSC with regard the whistleblowing claims at issue in this appeal.

The appellant did not engage in protected activity under 5 U.S.C. § 2302(b)(9)(A)(i) by filing TRs.

The appellant must show that he engaged in protected activity over which the Board has jurisdiction. For the activity to be qualified as "protected," the appellant must show by preponderant evidence that the matter he disclosed in his "protected activity" was one which a reasonable person, in his position, would believe evidenced any of the stipulations identified in 5 U.S.C. § 2302(b)(8). *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 18 (2013). In this instance, the appellant must prove that he exercised any appeal, complaint, or grievance right that is granted by any law, rule, or regulation that seeks to remedy violations of specific acts. 5 U.S.C. § 2302(b)(9)(A)(i). *See Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 7 (2013) (the specific type of "protected activity" over which the Board has jurisdiction is limited to that activity that seeks to remedy an· alleged violation of 5 U.S.C. § 2302(b)(8)). Thus, in order for the TR to amount to "protected activity", the appellant must show that he filed his TR for the purpose of remedying a violation of law, rule, or regulation; or for remedying 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), (b)(9)(A)(i).

The appellant alleges that he engaged in protected activity by filing a TR following his first evaluation in the simulator, on May 23, 2016. In that TR, he complained that Dan Henderson, his evaluator, scored him

incorrectly when he used specific phraseology during his run in the simulator. The appellant argued that the guidance given to the trainees was that the specific phraseology he had used was permitted, and that he should therefore be credited with extra points. AF, Tab 53, Exhibit 1.

The Mike Monroney Training Academy offered all trainees instructions on filing a TR. *See* AF, Tab 38, Exhibits 1, 2. The TR process was designed to offer a trainee an avenue to dispute a grade received from an evaluator. Training evaluators were instructed to advise trainees to file a TR appeal if they were not satisfied with their evaluation grade for review. *Id.* The specific challenge to his test score in the appellant's first TR does not give rise to the conclusion that he was attempting to remedy what he reasonably regarded as a violation of a law, rule, or regulation; or what he reasonably regarded as gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. AF, Tab 53, Exhibit 1. It contained no reference to any legal authority and could not reasonably have been interpreted as raising any concern of illegality. I find that a reasonable person would find the language the appellant used in the TR inadequate to support a conclusion that he was attempting to remedy illegal actions, or remedy gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *See Mudd*, 120 M.S.P.R. 365, ¶ 7. I further note that there is no evidence that the other six TRs the appellant filed immediately

preceding his termination, contained any reference to a violation of law, rule or regulation, gross management, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. AF, Tab 38, Exhibit 5. This is supported by the letter he wrote to the Honorable Daniel Coats, his local Congressman, in which he challenged the scoring process that was utilized to terminate him from his position. The letter did not contain any references to a violation of law, rule or regulation, gross management, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. AF, Tab 53, Exhibit 3.

Consequently, absent any evidence that the TRs the appellant filed amounted to protected activity, I must find that he has failed to establish his retaliation for whistleblowing activity by a preponderance of the evidence.

The agency established by clear and convincing evidence that it would have terminated the appellant absent his filing of the TR's to challenge his test scores.

Even if the appellant had established his claim by preponderant evidence, I would still deny his request for corrective action because the agency has established by clear and convincing evidence that it would have taken the same actions absent his filing of the TRs. 5 U.S.C. § 1221(e)(2) (West 2007); *see Fellhelter v. Department of Agriculture* 568 F.3d 965, 970-71 (Fed. Cir. 2009). In determining whether an agency has

shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board 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. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The agency's evidence demonstrates that, during his training, the appellant received four exam scores of 100 that were valued only 1% of his total grade. He received a score of a 96.24 that was valued at only 5% of his total grade; another score of 85 that was valued at 15% of his total grade; two 30% valued scores, one 79 and a 15. AF, Tab 53, Exhibit 7. The appellant needed 19.36 final points to pass the entire training course and he only scored 15 points. As a result, the appellant was mathematically eliminated by 4.36 points.

The appellant's third evaluation was a life case scenario of a normal air traffic control setting that was both difficult and compounding. The appellant misguided an airplane and mishandled the situation within other airplanes in the vicinity, which led to multiple point deductions. In his Summary of Findings, Mr. Ward stated:

> I have reviewed all of our documentation regarding Mr. Rutila's second *(third)* Performance Assessment run on Local Ground. Based on the written documentation, I can say that Mr. Rutila's run was in trouble almost from the very beginning. With the very first two IFR departures, Mr. Rutila failed to provide proper IFR separation, resulting in his only sixteen (16) point error. The third IFR departure sat at the approach end for over eight minutes waiting to depart and should have resulted in a five point "Delay" error which the evaluator documented on the worksheet but not did not document on the grade form. The aircraft that Mr. Rutila claims departed the airspace and then returned was actually a VFR inbound from the southwest requesting two "touch and go's" followed by a full stop landing. Mr. Rutila worked this aircraft (N9726Z) into a pattern for runway 28L, but had to send the aircraft around to avoid another aircraft Mr. Rutila had cleared for takeoff from the same runways. I don't know what Mr. Rutila intended to do with N9726Z after that, but I do know that the computer accurately followed all of his instructions with regard to this aircraft . . .

AF, Tab 53, Exhibit 8. The appellant used the TR process to contest his grades on all of his evaluations just as hundreds of trainees had done in the past. The intent of the TR process is to offer impartiality and objectivity in the grading process. The appellant's first TR resulted in Mr. Ward awarding him one point, but there were no points justified on his subsequent TRs.

Further, the TR instructions also provide guidance on trainees who have been "mathematically

eliminated". Initial Cab Tower Training is an incredibly intense and difficult training and failing the course is a normal procedure for removal. Thus, the mere filing of a TR is routine in these circumstances and I find no evidence of any retaliatory animus against the appellant for using the TR procedure to contest his scores. Additionally, according to Mr. Henderson's sworn declaration, he was unaware that the appellant had filed a TR. *See* AF, Tab 53, Exhibit 9. The appellant has asserted that, because Mr. Henderson was in the same room monitoring another student's evaluation, he must have influenced his evaluator, Mr. Taylor. However, I find no evidence to support this claim. The evidence demonstrates that Mr. Taylor was the sole grader and there's no evidence that Mr. Taylor had any knowledge that the appellant had filed a TR against Mr. Henderson. AF, Tab 53, Exhibit 11. Moreover, the appellant filed six subsequent TRs that Mr. MacNeill and Mr. Ward reviewed and investigated. There is no evidence that either manager intended to retaliate against the appellant by declining to award him additional points.

Finally, the appellant argues that other trainees filed TRs against Mr. Henderson and passed the Initial Cab Tower Training. This claim seems to undercut his claim that by filing TRs he was terminated from his position. It appears the TR practice is routine and an accepted practice and other than the appellant's bare assertion, there is simply no evidence that the agency retaliates against trainees who file TRs.

Consequently, for all of the reasons discussed above, I find that the appellant has failed to prove by preponderant evidence that he engaged in protected activity by filing several TRs. Absent evidence of any protected activity I am unable to find that the TRs were a contributing factor in agency's termination action. Nevertheless, I find the agency has proven by clear and convincing evidence that it would have terminated the appellant even if he did not file any TRs challenging his test scores. Therefore, I find the appellant's request for corrective action must be DENIED.

Decision

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/
Kasandra Robinson Styles
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **January 24, 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

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV,
Appellant,

DOCKET NUMBER
DC-1221-18-0474-W-1

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DATE: November 14, 2018

ORDER DENYING THE APPELLANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

On November 5, 2018, the appellant filed a motion for certification of interlocutory appeal regarding my various orders and rulings. An interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during the processing of the case. 5 C.F.R. §§ 1201.91-.93 (2016). The Board's regulations at 5 C.F.R. § 1201.92 provide that an administrative judge will certify a ruling for interlocutory review only if the ruling involves an important issue of law or policy about which there is a substantial ground for difference of opinion and an immediate ruling will materially advance the completion of the proceedings, or the denial of an immediate ruling will cause undue harm to a party or the public. *McCarthy v. International Boundary and Water Commission*, 116 M.S.P.R. 594, ¶ 18 (2011); *Robinson v. Department of the Army*, 50 M.S.P.R. 412, 418 (1991). The Board will not reverse

an administrative judge's denial of request for certification absent an abuse of discretion. *Id.*

I find no basis to grant the appellant's motion based on the facts and circumstances presented by this appeal. The appellant has not demonstrated that the ruling involves an important issue of law or policy about which there is a substantial ground for difference of opinion and an immediate ruling will materially advance the completion of the proceedings, or the denial of an immediate ruling will cause undue harm to a party or the public. Moreover, I find the appellant's motion amounts to a disagreement with my interpretation of the evidence he presented, which is not a ground to grant his motion for certification of interlocutory review. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982). I therefore DENY the appellant's motion to certify interlocutory review.

FOR THE BOARD: /S/
Kasandra Robinson Styles
Administrative Judge

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

HAROLD E. RUTILA, IV,
Petitioner
v.
DEPARTMENT OF TRANSPORTATION,
Respondent

2019-1712

Petition for review of the Merit Systems Protection Board in No. DC-1221-18-0474-W-1.

ON PETITION FOR PANEL REHEARING

(Filed Jun. 5, 2020)

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

PER CURIAM.

ORDER

Petitioner Harold Edward Rutila, IV filed a petition for panel rehearing.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue on June 12, 2020.

FOR THE COURT

June 5, 2020
Date

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

19-1712

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HAROLD E. RUTILA IV,

Petitioner

v.

DEPARTMENT OF TRANSPORTATION,

Respondent

PETITION FOR REVIEW FROM THE
MERIT SYSTEMS PROTECTION BOARD
IN DC-1221-18-0474-W-1
A.J. KASANDRA ROBINSON STYLES

PETITION FOR PANEL REHEARING

OF PETITIONER

Dated: May 19, 2020

Respectfully submitted,

KALBIAN HAGERTY LLP

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Counsel for Petitioner
Harold E. Rutila, IV

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for Petitioner hereby files this Certificate of Interest as follows:

(1) The full name of the party represented in the case by the counsel is Harold E. Rutila, IV.

(2) The name of the real party in interest is Harold E. Rutila, IV.

(3) There is no need for a corporate disclosure statement because Petitioner is a natural person.

(4) No law firm appeared for Petitioner in the lower tribunal; Petitioner appeared pro se. There is no other counsel other than the undersigned who is expected to appear in this Court.

(5) There are no other cases known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

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STATUTES

[1] **ARGUMENT**

I. BECAUSE OF PRO SE PETITIONER'S PENDING MOTION TO COMPEL, HIS REQUESTED HEARING POSTPONEMENT BASED ON INADEQUATE OPPORTUNITY TO PREPARE, AND THE BOARD'S PERSISTENCE THAT HE CONSIDER SETTLEMENT, THE BOARD VIOLATED HIS RIGHTS WHEN IT PRESSURED HIM TO WAIVE HIS HEARING WITHOUT BEING FULLY INFORMED

Under 5 U.S.C. § 7701(a)(1), an appellant has a fundamental right to a hearing. *Frampton v. Dep't of Interior*, 811 F.2d 1486, 1488, 1489 (Fed. Cir. 1987). That right cannot be effectively waived unless it is unequivocal after being fully informed of adjudicatory requirements and options. *Pariseau v. Department of the Air Force*, 113 M.S.P.R. 370, 373-374 (2010).

The Board Administrative Judge ("AJ") summarily stated in her Prehearing Order that Petitioner, Harold Rutila ("Rutila"), waived his hearing right but failed to document any explanations given to

substantiate that the waiver was informed. Appx2632. If prehearing conference statements are to be relied upon to establish a hearing waiver, the conference should be documented to establish that all adjudicatory requirements and options were discussed. *See McBurney v. OPM*, 39 M.S.P.R. 126, 130–31 (1988); *Phillips v. Dept. of Air Force*, 71 M.S.P.R. 381, 383–84 (1996) (remanding case to properly explain, with reference to prehearing conference, basis for conclusion that hearing was waived). That did not happen here.

Pursuant to 5 C.F.R. § 1201.51(c), Rutila filed on October 25, 2018, a motion to postpone the hearing for good cause based on inadequate time to prepare. He [2] spent 40 hours during the previous week reviewing newly produced documents and preparing a 241-page detailed motion to compel (including exhibits) *and* prehearing submissions. Appx2569. He stated:

> I would be severely prejudiced by having a hearing on October 29th, 2018. I hold a full-time job and have no representation. The workload imposed on me to prepare for a hearing this soon in light of the information I am lacking would be, in no uncertain terms, unbearable.

Appx2571.

The Board has made clear:

> An appellant before the Board has the right to withdraw his request for a hearing. *Graves v. U.S. Postal Service*, 106 M.S.P.R. 224, P 4, 2007 M.S.P.B. 171 (2007); *Conant v. Office of*

> *Personnel Management*, 79 M.S.P.R. 148, 150 (1998). However, there is a strong policy in favor of granting an appellant a hearing on the merits of his case, and therefore withdrawal of a hearing request must come by way of clear, unequivocal, or decisive action. *Id.* Further, ***the decision to withdraw a hearing request must be informed, i.e., the appellant must be fully apprised of the relevant adjudicatory requirements and options, including the right to request a postponement or continuance of the hearing, or dismissal of the appeal without prejudice to its timely refiling***. *Id.*

Pariseau, 113 M.S.P.R. at 373-374 (emphasis added) (remanding and ordering hearing where AJ did not give pro se litigant adjudicatory options); *Graves v. U.S. Postal Service*, 102 M.S.P.R. 224, 228 (2007) (remanding based on failure to memorialize what occurred during teleconference when appellant sought to withdraw hearing request); *Pignataro v Dep't of Veterans Affairs*, 104 M.S.P.R. 563, 568 (2007) (remanding for hearing where no written waiver in the record and [3] judge's comments were so abbreviated that it was impossible to ascertain whether he "fully apprised [appellant] of the relevant adjudicatory requirements and options in her case"). The Board has considered this hearing waiver issue *sua sponte*, although the appellant had not specifically challenged the AJ's finding, and found

no hearing waiver. *Siman v. Department of Air Force*, 80 M.S.P.R. 306, P 6 (1998)[1].

In this case, given delays caused by the FAA in responding to legitimate discovery requests and open issues days before the hearing, Rutila requested a continuance on October 25 after filing his motion to compel and prehearing submissions. At the October 26 prehearing conference, the AJ denied Rutila's request for hearing postponement *prior to deciding* the motion to compel and did not follow Board precedent in offering him a continuance to prepare for the hearing. *Pariseau*, 113 M.S.P.R. at 374. Instead, he was given a Hobson's choice to either go to the hearing in three days (October 29) ill prepared, given the new documents to review which were produced days earlier and witness examinations to prepare, or accept the AJ's invitation to go into mediation to continue settlement discussions [4] and submit to a briefing schedule. The AJ advised him to "sincerely consider" the FAA's settlement offer given that "agency actions are rarely reversed in IRAs." He felt pressured and acquiesced to

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[1] The FAA argued in its Federal Circuit brief (ECF 30 at 13) that Petitioner did not challenge the Prehearing Order's accuracy, so he waived it. As a pro se litigant, how would he know what to challenge regarding the AJ's obligations to inform him of his rights and options? He objected to denial of his continuance request. Moreover, the Order gave 5 days to challenge the Order, but the hearing was in 3 days. This Court opined that Rutila waived his objection to postponement denial by waiving his hearing right. *Rutila v. Department of Transportation*, ECF 39 at 9 (February 10, 2020)(attached hereto). If waiver was not informed, then the objection was not waived either. The Court should address waiver *sua sponte*.

the AJ's admonishment to consider the FAA's settlement proposal and elected briefing. Settlement was his focus and not the ramifications of a hearing waiver.

The AJ's conference summary also does not document what she advised Rutila that made his waiver informed, just like the pro se appellant in *Pariseau*. There is no record that he was fully explained the consequences of waiving his hearing right and his options. The Board's strong policy favors granting him a hearing under these circumstances.

II. BECAUSE RUTILA WAS PREJUDICED BY THE BOARD'S SUMMARY DENIAL OF HIS MOTION TO COMPEL, REMAND IS PROPER TO COMPLETE THAT DISCOVERY

Petitioner is mindful of the Court's limited power to review a Board AJ's decision regarding discovery matters. *Curtin v. Office of Personnel Management*, 846 F.2d 1373, 1378-79 (Fed. Cir. 1988). The AJ's decision denying Rutila's motion to compel will be overturned only where an abuse of discretion is clear and harmful. *Id.* "If an abuse of discretion did occur with respect to the discovery and evidentiary rulings, in order for petitioner to prevail on these issues he must prove that the error caused substantial harm or prejudice to his rights which could have affected the outcome of the case." *Id.* at 1379.

[5] A review of Rutila's motion to compel, the AJ's summary denial with no explanation, and the evidence required in this IRA appeal confirms that the AJ's

denial caused him substantial prejudice which could have affected the outcome. The denied discovery requests were directed at the FAA's heavy burden of proof, namely that it would have taken the same action absent his protected activity.

First, the AJ failed to follow Board rules by requiring Rutila to file his motion within *six days* of receiving hundreds of pages of documents from the FAA within days of the hearing. 5 U.S.C. § 7701(a) states: "Appeals *shall* be processed in accordance with regulations prescribed by the Board." (Emphasis added.) Rules governing discovery provide that appellants shall have *10 days* to file a motion to compel. 5 C.F.R. § 1201.73(d)(3). Rutila received the FAA's final production on October 18, so his motion would be due (Monday) October 29.

Per MSPB rules, discovery shall be completed no later than the prehearing conference (October 26). 5 C.F.R. § 1201.73(d)(4). How could discovery be completed if there was a pending motion to compel that required resolution? This improper truncation of deadlines prejudiced Rutila.

The Board has overturned an AJ's decision to deny an appellant sufficient opportunity to pursue a motion to compel. *White v. Gov't Printing Office*, 108 M.S.P.R. 355, 359 (2008) (AJ abused discretion by setting more restrictive deadline to file motion to compel and by denying motion because "discovery has concluded"). [6] The appellant in *White* sought disciplinary records of comparators to support his affirmative defense of race discrimination to attack an adverse personnel action.

The Board concluded that, because the motion was calculated to lead to discovery of admissible evidence, the appellant was prejudiced in his ability to present his affirmative defense. *Id.* at 359.

Throughout Rutila's motion to compel, he stated that he had insufficient time to examine the FAA's recent document production. *See, e.g.*, Appx 1169, 1181. The FAA had months to prepare and provide responses, but he only had *days* to review and object, filing a motion under severe time pressure.

A review of Rutila's motion and his discovery requests further demonstrate that denial of the motion prejudiced his ability to establish retaliatory motive and to attack the FAA's evidence. The documents requested address the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

The AJ's denial of Rutila's motion regarding Document Request No. 10 was most harmful to his ability to marshall proof. That request sought "any records concerning . . . evaluation of Harold Rutila . . . includ[ing] transcripts and error logs from the Adacel Tower Simulation System." The request sought, among other documents, his confiscated notes from the third evaluation scenario that he failed, dozens of flight strips, and any transcript or recording of the flight simulation to corroborate the six Technical Reviews ("TRs") that he filed. Appx1171. Pointing [7] to exhibits attached to his motion, Rutila confirmed that the FAA

denied destroying those records. Yet, it did not produce them. *Id.*

Rutila filed his OSC complaint on June 30, 2016 and his EEO complaint on July 11, 2016. Consequently, the FAA was on notice to preserve evidence. FAA Academy Supervisor and Panel Reviewer Ronald Ward ("Ward") provided sworn answers to interrogatories in Rutila's companion EEO matter in July *2017*, where he stated – ***in direct contradiction to his declaration in the Board appeal*** – that his "research" disclosed that a plane abnormally made three 360-degree turns as a result of a computer malfunction![2] Appx 1174, 2726. Rutila was entitled to obtain that "research" to substantiate his claims on appeal and to attack the FAA's assertion that it would have terminated him absent his protected activity.[3] Appx 1174.

That discovery also would have impugned the credibility of alleged "independent" Panel Reviewers Ward and MacNeill, creating a strong inference of a

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[2] *See* Appx1135 (Ward's panel findings conflict with his EEO sworn interrogatory answers). Ward admitted that if the simulator equipment fails, the scenario will be restarted. Appx 1292. However, if it did fail, as stated in his EEO interrogatory answers, then why was the scenario not restarted in Rutila's case? An inference of retaliation is permissible. Was Ward hiding an abuse of discretion or protecting Rutila's FAA evaluators (Henderson and Taylor) for failing to carry out their jobs correctly after he challenged Henderson's conduct on May 23, 2016 and his overbearing interference on May 24?

[3] The FAA claimed that there were no responsive documents in 2018, despite Ward's 2017 admission that records existed. Appx1 175.

cover-up for retaliation to impose agency liability. *See* Appx1175. *See Reeves v* [8] *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"). If a "suspicion of mendacity"[4] combined with other evidence is sufficient to defeat summary judgment in a civil rights retaliation case, *actual* mendacity by Ward would certainly defeat a finding that "substantial evidence" existed under 5 U.S.C. § 7703(c) to support the AJ's decision regarding the FAA's burden of proof.

If the FAA has destroyed Ward's "research" materials, then a spoliation instruction and adverse inference would be appropriate, further undercutting "substantial evidence" to support the AJ's decision. *Sanofi-Aventis Deutschland GmbH v. Glenmark Pharms., Inc.*, 748 F.3d 1354, 1361-1362 (Fed. Cir. 2014) (upholding spoliation instruction by district court for destruction of evidence in litigation).

That the FAA has refused to produce in Rutila's Board appeal sworn interrogatory answers from agency officials with personal knowledge is also troubling. Rutila provided evidence in his motion that confirmed that many of the [9] FAA's answers were

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[4] "If 'disbelief is accompanied by a suspicion of mendacity,' . . . the likelihood of intentional discrimination is increased, permitting the factfinder to infer discrimination more readily." *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)).

inaccurate or incomplete.[5] Appx 1172, citing other parts of his motion. Obviously, FAA counsel who signed the answers cannot testify. Agency actions made the interrogatory responses effectively unreliable and non-binding and could not be used by Rutila to properly examine and potentially impeach witnesses. The AJ's denial of Rutila's motion removed one discovery device from his arsenal to pursue his appeal. Appx1172 (citing cases and MSPB Judge's Handbook, requiring that interrogatories be answered in writing under oath or affirmation). It cannot be overstated that Rutila was appealing pro se, doing his best to marshall evidence. He was stymied by *two* FAA lawyers. The AJ's failure to hold the FAA accountable to produce binding, complete evidence is no doubt prejudicial.

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[5] Most egregious was the contradictory evidence of Ward's July 2017 sworn interrogatory answers, which Rutila compared against the FAA's responses to his requests for admissions. *Compare* Appx1173-1174; Appx1288-1294; Appx2726-2728; *with* Appx1135, Appx1139 (Ward panel worksheet). Rutila was entitled to receive Ward's "research", but the FAA refused to produce it, ***and the AJ failed to compel it,*** causing Rutila prejudice. Ward's EEO interrogatory answers also conflict with his interrogatory answers in the Board appeal regarding computer malfunctioning. Appx1291. The possible effect on the outcome of Rutila's appeal is clear because Ward rejected six TRs, claiming "evaluator verses student observation." *Id.* With evidence now corroborating three 360-degree turns, Rutila's contentions are no longer unappealable "observations." The 5 TRs would have been upheld, restoring 59 points to Rutila and precluding elimination from the training program, even assuming one 16-point deduction on the grade sheet remained uncontested. He would have scored 84% and not 15% on the evaluation.

Rutila also requested documents concerning evaluations of fellow trainees where Henderson and Taylor intervened to rectify computer simulation errors that [10] arose, as well as documents regarding other trainees who were permitted to retake a scenario or were reinstated after failing their FAA training evaluations. Appx1179-1180; Appx1245 (FAA declined to answer). The FAA refused to produce that information, and the AJ agreed solely based on "the reasons provided by the agency in its motion in opposition." Appx2636. Both categories of documents are relevant and material to assess whether the FAA met its burden and how similarly situated trainees were treated (the third *Carr* factor).

Rutila requested documents pertaining to rules, policies or practices that governed how evaluators were to handle computer simulation malfunction. This is relevant because if FAA policies dictated that Rutila's evaluation scenario had to be restarted under the circumstances, *see*, *e.g.*, Appx173, but Henderson and Taylor failed to do so, it would lend credence to the inference that there was a retaliatory motive behind that failing. The Agency declined to produce anything in response, and the AJ did not compel them to do so.

The AJ's denial of Rutila's motion was prejudicial, requiring reversal.

III. ON THE MERITS, THE BOARD ERRED IN FINDING AGAINST RUTILA ON HIS PRIMA FACIE CASE AND THE AGENCY'S CASE

This Court observed that the Board made findings in denying Rutila's appeal – only two of which are pertinent here in this Petition: (1) in analyzing Rutila's TRs as alleged grievances under 5 U.S.C. § 2302(b)(9)(A), the AJ found that filing of TRs did not constitute protected activity under the WPA; and (2) even if the TRs had [11] constituted protected activity, the agency had shown by clear and convincing evidence that Rutila would have been removed absent the TR filing. *Rutila*, ECF 39 at 3. Both findings are without merit based on the evidence and rules of law governing WPA claims.

A. Rutila Met The Legal Requirements For Protected Activity Under The Whistleblower Protection Act

This Court did not address whether filing TRs is protected activity because it affirmed the Board's finding that the FAA would have made the same decision absent Rutila's protected activity, as supported by "substantial evidence." *Rutila*, ECF 39 at 6.

The May 23, 2016 TR that Rutila filed *specifically cited* FAA Order 7110.65 2-4-21 and 7110.65W 1-2-1. Appx771. The FAA stipulated that Rutila's alleged protected disclosure was based on these FAA Orders. Appx0890, Appx1068. Lastly, Henderson claimed on May 23 that Rutila's pronunciation of an aircraft was

a "rule," so it supports a protected activity finding. Appx0944. The Board has found that a "rule" covered by the WPA includes a prescribed guide for action or conduct, regulation or principle. *Rusin v. Dep't of Treasury*, 92 M.S.P.R. 298, 306 (2002) (citation omitted). Rutila has met the requirements of 5 U.S.C. § 2302(b)(9) as a matter of law because his TR was an appeal or grievance of explicit FAA rule violations. Appx421, 424 (students required to reference FAA rule violated); Rutila Opening Brief (ECF 17) at 13-14.

[12] **B. Rutila Presented Credible Evidence To Establish That Henderson, The Alleged Retaliator, Had Knowledge Of His Protected Activity Sufficient To Meet The Knowledge-Timing Test To Satisfy His Prima Facie Burden**

The Board erred in finding a lack of retaliator knowledge to support retaliatory animus (the second *Carr* factor) because there was evidence, and reasonable inferences to be drawn from that evidence, to support such knowledge. *See Rutila*, ECF 39 at 6-7.

The evidence demonstrates that, of the three (3) TRs filed on May 23, 2016, *all three* were against Henderson, the alleged retaliator, and all three were overturned against him, challenging his competence as an evaluator.[6] The following day, after Rutila's third

[6] The Court noted the AJ's finding that other trainees who filed TRs against Henderson passed the training, "which 'undercuts [Rutila's] claim that by filing TRs he was terminated from his position." *Rutila*, ECF 39 at 7. Yet, Henderson had no

performance evaluation – he successfully scored high marks on the previous two evaluations – he challenged the failing outlier score on multiple grounds, again citing FAA rule violations and rules taught in the program. That his official evaluator was Michael Taylor and not Henderson does not insulate the FAA from WPA liability. As this Court acknowledged in its opinion (*Id.* at 2) and the FAA admitted (Appx2661), Henderson insinuated himself – contrary to FAA rules that prohibit the same evaluator from evaluating a trainee more than once (Appx782) [13] – and pressed ***his*** positions in light of Taylor's apparent confusion during the debrief session to influence the conclusion that Rutila failed to perform to certain standards (Appx788). Rutila countered that he was adhering to FAA rules, and the computer malfunctioned during the evaluation.[7] Under a cat's paw theory of liability, Henderson's participation could substantiate Agency liability. *Miller v. DOJ*, 842 F.2d 1252, 1264 (Fed. Cir. 2016) (concurring), citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 424 (2011).

Furthermore, contrary to Henderson's declaration in which he states that he did not know the May 23 TR was overturned against him so he could not "retaliate" against Rutila, FAA rules require that he sign off on the previous day's TR that Rutila won prior to being placed in Rutila's official records. Appx 1244-1245. An

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opportunity to retaliate against others who filed on May 23. Appx193, 773-774. His opportunity to go after Rutila leaves open an inference of retaliation.

[7] *See* Appx780, Appx785, Appx788 (Rutila's detailed recitation of Henderson's interference on May 24).

agency is bound by its own rules and regulations. *Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004). Rutila also pointed out that he was told at the Academy that evaluators are informed when a TR is ruled in a trainee's favor to avoid the trainee filing TRs on the same matter in the future. Appx784. An inference can be drawn that Henderson was made aware of the TR.

In addition, FAA rules require that the TR Panel Reviewers interview the evaluator in deciding a TR review. Appx426; Appx421 (FAA work instructions shall [14] apply to all personnel in handling TRs). Consequently, a reasonable inference can be drawn that Ward and MacNeill interviewed Henderson on May 23.[8] Accordingly, the knowledge-timing test applies to lead to the conclusion that Rutila met his prima facie burden.

C. Rutila Presented Evidence To The FAA's Heavy Burden Of Proof That It Would Have Terminated His Employment Absent His Protected Activity

Regarding the two managers (Ward and MacNeill) who reviewed the six TRs challenging the outcome

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[8] Neither Ward nor MacNeill denied definitively that they spoke with Henderson. Their near verbatim declarations merely stated that they "did not recall" but then hedged by stating that it was their "routine" to document if they interviewed the evaluator. Appx2666, Appx2667. Given the mendacity of Ward in his EEO sworn interrogatory answers, the veracity of those declarations also is called into question. Henderson's declaration likewise states that he did not recall but offers speculation that he did not speak with Ward and MacNeill. Appx2684-2685. The factfinder is required to reject his speculation as inadmissible evidence.

(*Rutila*, ECF 39 at 7), Rutila highlighted serious credibility issues and contradictions under oath by Ward, who was the lead manager who rejected Rutila's TR appeals. *See*, *supra*, note 5. Those contradictions create an inference that they too participated in an effort to silence Rutila because he filed multiple grievances that challenged the failure of FAA evaluators to follow applicable FAA rules and practices in administering the program and problems with its computer simulation equipment. On remand, Rutila should be given the [15] opportunity to present this evidence to demonstrate that the FAA cannot meet its burden of proof to overcome WPA liability.

The third and final *Carr* factor could also militate against the FAA if Rutila was permitted to present comparator evidence and receive complete responses to his document requests, which were the subject of his denied motion to compel. He did present evidence that the FAA kept at least one other trainee in the FAA program who failed the course but who did not file TRs. Appx1179. This raises the question whether Rutila was eliminated because of his protected activity.

Combining the evidence highlighted in Rutila's opening brief to this Court (ECF 17 at 47) that computer malfunction issues are fairly commonplace, with the Ward EEO interrogatory answers that a malfunction took place on May 24, which, by Ward's own admission, should have prompted a restart of the

scenario,[9] there are serious questions whether there was "substantial evidence" to support the AJ's finding below that the FAA would have taken the same action absent protected activity.

CONCLUSION

Rutila, as a pro se litigant, should have been given the opportunity to present his best case at a hearing on the merits, but he was prevented from doing so based [16] on the compounding actions of the FAA and Board below. Based on fairness, this Petition should be granted, and the Court should reverse and remand.

PROOF OF SERVICE

I, Eric L. Siegel, hereby certify that, in accordance with Administrative Order 20-01 issued on March 20, 2020, no hard copies were filed with the Clerk of the Court.

/s/ Eric L. Siegel
Eric L. Siegel

CERTIFICATE OF SERVICE

I, Eric L. Siegel, hereby certify that on this 19th day of May, 2020, I caused to be served by hand-delivery two (2) copies of this Petition for Panel Rehearing on

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[9] There were four retakes or make-up slots available, so it would not have caused the FAA any burden to allow Rutila a re-test. Appx784.

counsel for Respondent at her home address, which was provided under condition of confidentiality.

/s/ Eric L. Siegel
Eric L. Siegel

CERTIFICATE OF COMPLIANCE – WORD COUNT

I certify that the word count for this Petition for Panel Rehearing is 3,845 words.

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA IV, **Appellant,** **v.** **DEPARTMENT OF TRANSPORTATION,** **Agency.**	**Docket No. DC-1221-18-0474-W-1** **November 5, 2018** **Assigned to the Honorable Kasandra Robinson Styles**

MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

Pursuant to 5 C.F.R. § 1201, Appellant Harold E. Rutila IV respectfully moves the Board to certify its October 26th, 2018 ruling concerning the dismissal of two motions, the first to compel discovery, and the second for a subpoena, for interlocutory review. The aforementioned ruling involves important questions of law or policy about which there is substantial ground for difference of opinion. Additionally, an immediate ruling on this matter will materially advance the completion of the proceeding. Finally, denial of an immediate ruling will cause undue harm to Appellant; it would permit a second bite at the apple for the Agency, in the event it decides to disclose additional documents or other evidence as authorized by the Order Closing the Record, Dkt. 51.

At 12:08 P.M. Eastern Time today, Plaintiff sought via email to discuss this motion with the Agency's

counsel, Mr. Armando Armendariz and Ms. JoAnn Putnam, but no response was received by the close of business in all four major U.S. time zones. Appellant received some correspondence concerning settlement, but not any correspondence in response to his request to discuss this motion.

BACKGROUND

Appellant filed a motion to compel discovery on October 24th, 2018. Dkt. 39. The next day, Appellant filed a motion for postponement of the hearing, based in part on the reasoning that Appellant had not received a complete discovery production from the Agency. *See* Dkt. 46.

On October 26th, 2018, the parties and the Board convened for a telephonic status conference, during which Appellant was informed by Judge Styles that his motion to compel discovery as well as his motion for a subpoena were denied. This ruling was documented in the Board's status conference summary. *See* Dkt. 50. Although it is not so documented, Appellant's motion for postponement of the hearing was also denied.

ARGUMENT

An interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding. The judge may permit the appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board's immediate

attention. § 1201.91. The judge will certify a ruling for review only if the record shows that: (a) the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party. § 1201.92.

Certification is appropriate for the following reasons:

1. The denial of Appellant's motions involves an important question of law or policy, about which there is substantial ground for difference of opinion.

The primary questions that arise from Appellant's motion to compel concern how federal laws and rules concerning discovery apply in the context of an MSPB appeal. Board rules refer to the Federal Rules of Civil Procedure as "instructive, but not controlling." This raises specific questions about the propriety of the Agency's discovery responses, which do not comport to any standards that are well established in the federal courts. A specific question and perhaps the most important one at this juncture, is whether the Agency should be required to submit interrogatory responses that are signed under oath or affirmation.

As detailed in Appellant's motion, the Board's Judges' Handbook states that interrogatory responses *must* be signed under oath or affirmation. The Federal

Rules of Civil Procedure, and the Federal Rules of Evidence concerning a respondents' requirement to have personal knowledge when testifying under oath, comport with the MSPB Judges' Handbook in this regard.

Conversely, the Agency argues that it is not required to conform to the aforementioned standards because Board regulations do not explicitly require them to. This is the same position that has thus far been adopted by the Board in this IRA appeal. Judge Styles ruled in favor of the Agency "for the reasons provided by the agency in its motion in opposition." Dkt. 50 at 5. Since that position contradicts the Board's own handbook and the established discovery rules of the federal court, there is good reason to believe there is substantial ground for a difference of opinion.

Appellant's motion to compel discovery contains arguments that are well-supported by the Board's own Judges' Handbook, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence. There is widespread support among the federal courts, and the Board generally, that Appellant is correct to request that the Board order the Agency to submit signed interrogatory responses.

Additionally, the Board is permitting the parties to "submit additional evidence and argument" by the dates provided in the close or record order. *See* Dkt. 50 at 5. Appellant is significantly burdened in this regard because the Agency is in the sole custody and control of nearly all of the information concerning this case. Discovery has ended in this IRA appeal. To the extent

it has not, the Agency is not expected to produce any more discovery to Appellant because all of its arguments in opposition to Appellant's motion to compel discovery were found to be acceptable.

Some information that Appellant believes would ultimately lend to the credibility of his arguments – and especially to the strength of his arguments against the Agency's burdens in this matter – has not been produced. In other cases, the information has been produced with redactions that block crucial information from those records. This is not to mention the fact that Appellant has submitted sworn affidavits from their own officials which contradict the Agency's interrogatory responses.

With respect to Appellant's motion for subpoena, Judge Styles has ruled that it was denied because "The appellant's motion to compel did not address the agency's refusal to provide him with any documents or other evidence identified in the subpoena request." However, the subject of the subpoena request was a retired Agency employee, Mr. Dan Henderson. Aside from records that the Agency could produce in discovery during Mr. Henderson's employment with the Agency, the Agency has no legal obligation (or perhaps even ability) to furnish responsive information that Mr. Henderson had in his possession *after* his employment with the Agency. Insofar as the subpoena is concerned, Mr. Henderson is treated as a third party unaffiliated with the Agency. Since the Agency claims it has received "factual" information from Mr. Henderson that it used to compile its discovery responses, and

since the Agency had called upon Mr. Henderson to attend the hearing in this IRA appeal, Appellant sought Mr. Henderson's records for review beforehand.

2. An immediate ruling will materially advance the completion of the proceeding.

An immediate ruling will materially advance the completion of these proceedings because it would resolve a key question that is affecting the parties' ability to narrow the issues in this IRA appeal. Furthermore, it would allow the issues brought forth in the IRA appeal to be resolved on the merits, based on the documentation obtained from the Agency and/or Mr. Henderson. In the event the Board agrees with Appellant, Appellant would be entitled to obtain more information, which would definitively allow for a narrowing of the issues, specifically as they pertain to Appellant's "contributing factor" test and the Agency's "clear and convincing" burden.

The Agency's requirement to submit interrogatory responses that are signed under oath or affirmation would also likely change the course of this IRA appeal. Specifically, it is expected that, if the responses are indeed required to be submitted under oath or affirmation, the content of the responses would significantly change. Such a change may cause the Agency to enhance any prospective settlement offers[1], further

[1] To date, Appellant has not received any formal settlement offers from the Agency, although one is expected on November 9, 2018.

expediting the resolution of this IRA appeal without further judicial intervention.

3. The denial of an immediate ruling will cause undue harm to Appellant.

The denial of an immediate ruling will cause undue harm to Appellant in that he will be permanently denied the opportunity to resolve disputes with the Agency's discovery productions, despite that those disputes are well founded. The same can be said about Appellant's inability to review any information in the custody of Mr. Henderson that the Agency upon which the Agency has relied to respond to Appellant's discovery requests or upon which it will rely in future briefs before the close of the record. If these matters are resolved, they would likely lead to the production of documents and other evidence which further support Appellant's claims. A denial of an immediate ruling would prevent Appellant from utilizing evidence he believes he is lawfully entitled to receive.

What the Agency produced is not sufficient in form, such as interrogatory responses that lack signatures; in substance, such as documents that contain redactions rendering them almost unusable; or in its conformity to established discovery requirements like those contained in the Federal Rules of Civil Procedure and those specified in the MSPB Judges' Handbook.

If the immediate ruling is denied, the Agency will have the complete control to introduce new evidence that it did not produce in discovery, but which may have been responsive to Appellant's discovery requests. Furthermore, the Agency's introduction of any new evidence will prejudice Appellant because the Agency would be able to hand-pick select portions of a larger batch of documents, or other evidence, that only supports their defense, while successfully concealing the rest from the discovery process and from the Board, despite that the remaining information might lend more supportive towards Appellant's claims. While Appellant will have an opportunity to respond to new evidence introduced before the close of the record, § 1201.59(c), Appellant will not be able to respond with information that the Agency did not provide to him in discovery.

If Appellant is denied the information he requested, and elects to appeal any initial decisions in this matter to the Board, this could again present the Agency with an opportunity to take a second bite at the apple, producing information it should have already produced, but did not produce, in this discovery process.

CONCLUSION

Certification is appropriate in this case. For the foregoing reasons, the Board should certify the ruling for interlocutory appeal and review the denial of Appellant's motion to compel discovery.

Respectfully submitted,

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on
November 5, 2018

s/ Harold Edward Rutila IV
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I hereby certify that I have submitted this document through the MSPB e-Appeal system and all parties of record have received a copy electronically.

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UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER DC-1221-18-0474-W-1

DATE: October 26, 2018

SUMMARY OF TELEPHONIC STATUS CONFERENCE

On October 26, 2018, I conducted a telephonic status conference with the appellant and the agency's representatives Armando Armendariz and Joann Putman. This document summarizes the significant portions of the conference. The parties are advised to carefully review this order because, absent timely notice from a party that this summary is incorrect, the appeal will be limited to the issues described herein. During the conference, the appellant withdrew his request for a hearing. I will issue a separate order with a briefing and closing of the record schedule.

Facts

The following facts are undisputed. On February 16, 2016, the appellant was appointed to the agency as an Air Traffic Control Specialist, FG-2152-01, on a temporary appointment, not to exceed March 15, 2017

with the agency's Federal Aeronautics Administration (FAA). The appellant's official duty station was Washington, DC but he was on temporary duty at the Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma, attending Initial Tower Cab training to remain employed by the FAA.

As part of his training, the appellant was required to take a series of tests and evaluations. In May 2016, Dan Henderson administered and graded the appellant's first evaluation. On May 23, 2016, the appellant filed a technical review (TR) to challenge his score on his first evaluation. As a result of the TR, he regained one point and passed his evaluation. The appellant passed his second evaluation. Michael Taylor administered a third evaluation. The appellant received a score of 15%. That score lowered the appellant's overall training score to a point that he ultimately could not pass the Initial Tower Cab training. The appellant challenged his third evaluation by filing six TRs. The agency denied the TRs and terminated the appellant from his position, effective May 25, 2016. On June 30, 2016, the appellant filed a complaint with the Office of Special Counsel (OSC) in which he alleged that his termination amounted to reprisal for filing the TRs. On February 16, 2018, OSC terminated its investigation into the appellant's allegations. On April 22, 2018, the appellant filed the instant individual right of action (IRA) with the Board.

During a preliminary status conference with the parties on June 28, 2018, I informed the parties that the appellant had established jurisdiction over this

appeal and was entitled to his requested hearing because he had raised a non-frivolous allegation that he had exhausted his administrative remedies with OSC and raised a non-frivolous allegation that exercised an appeal, complaint, or grievance right, amounting to protected activity pursuant to 5 U.S.C. § 2302(b)(9)(A), when on May 23, 2016, he filed a TR of Dan Henderson's grading of his first evaluation with the FAA during Initial Cab Tower training.[1]

I also found that the appellant satisfied the knowledge and timing test as he alleged that Mr. Henderson was aware of the TR of his first evaluation, and the appellant was terminated from his position merely two days after he filed the first TR. I further determined that the termination was properly exhausted before OSC and satisfies the definition of a covered personnel action under 5 U.S.C. § 2302(a).

Issues

At the hearing on the merits of the appellant's claim, he is required to establish his reprisal for whistleblowing claim by preponderant evidence. He must establish that: (1) he engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) protected activity was a contributing factor in

[1] In his prehearing submission, the appellant refers to making protected disclosures. However, there is no evidence that any of his purported disclosures were exhausted before OSC. The only issue he raised were the TRs. Consequently, I told the parties that this IRA will be evaluated under 5 U.S.C. § 2302(b)(9)(A) and not under 5 U.S.C. § 2302(b)(8).

the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *See* 5 U.S.C. § 1221(e)(1); *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015). If the appellant makes out a prima facie case, the agency is given an opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 970-71 (Fed. Cir. 2009); *Webb*, 122 M.S.P.R. 248, ¶ 6.

In determining whether agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, relevant factors include strength of agency's evidence in support of its personnel action, existence and strength of any motive to retaliate on part of agency officials who were involved in the decision, and any evidence that agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. 5 U.S.C.A. §§ 1221(e); *see Carr v. Social Security Administration*, 185 F.3d 1318, 1322 (Fed. Cir. 1999). In *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), the Court addressed the clear and convincing standard. It found that the Board may not exclude or ignore evidence necessary to adjudicate the whistleblower retaliation claim, but rather must consider all of the relevant evidence. The court found that the Board cannot decide whether the agency has carried its burden by "clear and convincing evidence" by looking only at the evidence that supports the conclusion reached. *Id.* at 1367-68. It explained

that "[e]vidence 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. The court noted that "[i]t is error for the MSPB to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately." *Id.* In considering the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, the Board must consider evidence of other officials not directly involved but who may have influenced the decision by a retaliatory motive. *Id.* at 1370.

I note that, on his initial appeal form, the appellant raised harmful procedural error and unlawful discrimination as affirmative defenses. However, it is well settled that such claims are not within the Board's jurisdiction in an IRA appeal as IRA appeals are limited to claims involving whistleblower retaliation. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 18 (2013). Thus, I will not adjudicate these claims in the instant action.

Motion for Subpoena/Motion to Compel

On August 27, 2018, the appellant filed a motion for a subpoena in which he was seeking documents and other evidence for Dan Henderson. On October 3, 2018, I informed the parties that I did not rule on this motion because it was unclear whether this was actually a motion to compel discovery as the agency had refused to

provide the appellant with this information. The agency indicated that the parties remained engaged in the discovery process and were attempting to resolve all ongoing discovery disputes. The appellant's motion to compel did not address the agency's refusal to provide him with any documents or other evidence identified in the subpoena request. Thus, the subpoena request is hereby denied.

On October 24, 2018, the appellant filed a motion to compel discovery. On October 25, 2018, the agency filed a motion in opposition to the appellant's motion to compel. I have reviewed both parties' respective motions. For the reasons provided by the agency in its motion in opposition, I do not find the agency has failed or refused to provide the appellant with any relevant or material evidence in this matter during the discovery process. I therefore deny the appellant's motion to compel discovery.

Settlement

If the parties settle this appeal, I will cancel the hearing. The Board may retain jurisdiction to enforce the terms of the settlement agreement if it is reduced to writing and made part of the Board's record. If not made part of the record, the Board cannot enforce the settlement agreement. *See* 5 C.F.R. § 1201.41(c)(2) (2016). If the parties send me a copy of a signed settlement agreement and I am not otherwise advised, I will assume the parties want the agreement made part of the record for enforcement purposes. In addition, if the

appeal is settled, I will assume the appellant agrees to dismiss the appeal unless I am otherwise advised. The parties have waived the prohibition against *ex parte* communications concerning settlement matters.

Corrections to this Summary

If this summary is inaccurate, a party must so notify me in writing within five (5) days from receipt of this Order. In the absence of any notice from the parties, this summary will be final and will not be modified without a showing of good cause. Because the appellant has withdrawn his request for a hearing, the parties are hereby ORDERED to comply with the deadlines outlined in the Close of Record Order by submitting additional evidence and argument by the dates provided.

FOR THE BOARD: /S/
Kasandra Robinson Styles
Administrative Judge

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA IV, **Appellant,** **v.** **DEPARTMENT OF TRANSPORTATION,** **Agency.**	**Docket No. DC-1221-18-0474-W-1** **October 25, 2018** **Assigned to the Honorable Kasandra Robinson Styles**

APPELLANT'S MOTION FOR POSTPONEMENT OF HEARING

Appellant Harold E. Rutila IV hereby moves the Board to postpone the hearing in the above-referenced case, currently scheduled for Monday, October 29th, 2018. Good cause exists in support of this Motion, shown herein. The Agency opposes this Motion.

DECLARATION

I, Harold E. Rutila IV, hereby do declare as follows:

I am moving for a postponement of the hearing date in this Appeal. The Agency opposes this Motion because it believes it is prepared for the hearing, and because, according to Agency's counsel Ms. Putnam, I should have filed my motion to compel on October 12th, 2018.

I have two outstanding motions before the Board: The first is a mot ion for a subpoena of former Agency employee Dan Henderson, who is expected to testify as a witness on behalf of the Agency. Dkt. 25. I am seeking Mr. Henderson's personal records in advance of his testimony at the hearing. As Mr. Henderson is no longer employed at the Agency, much of the information requested in the subpoena is not available through traditional discovery with the Agency. However, because Mr. Henderson is the subject of my Appeal, in the interest of justice, I should have a sufficient opportunity to review his records well prior his testimony.

The second outstanding motion is a motion to compel discovery. Dkt. 39. The Agency was served with a discovery request on July 30th, 2018. Through a series of extensions, which I did not oppose in the interest of good faith, the Agency had until October 18th, 2018 to produce discovery responses. The Agency served objections and non-responses to me as late as October 18th. The Board gave me six days to file a motion to compel, which is four days less than the regulations provide. *See* Dkt. 37, *compare with* 5 C.F.R. § 1201.73(d)(3).

When I asked the Agency for their position on this Motion, Agency's counsel Ms. Putnam claimed I should have filed a motion to compel on October 12th, 2018 – six days prior to the end of their discovery period. This position is not congruent with the events of this case. Had I done that, I would have wasted both mine and the Board's time. The Agency would have been able to

counter-argue that my motion was premature. And, they would have been right; the Agency didn't stop producing discovery until October 18th. In light of those deficient productions, I would have had to file yet another motion to compel.

I cannot reasonably be ready for a hearing on October 29th, I have spent the last six days preparing and filing a motion to compel. That motion was due on the same date as my prehearing submissions. The total expenditure of time I spent on those items combined is approximately 40 hours across 6 days. During that same period of time I also had to work. I am now left with five more days to prepare for the hearing, without even knowing what the result of my outstanding motions will be.

Furthermore, I am not the proximate cause of the need to postpone the hearing. I have stated on the record as early as August 23rd, 2018 that there were issues obtaining discovery from the Agency. Dkt. 21. The next day, Agency's counsel Mr. Armendariz experienced a family emergency, which ultimately resulted in the case being delayed until October 10th. Discovery was supposed to be finished on October 15th, but the Agency moved to extend that deadline to October 18th. That date has since passed, and there are still significant discovery issues.

I do not believe the Agency can proffer any legitimate, good-faith arguments that would support requiring us to have the hearing on October 29th. This would give the Board only two days to review and rule on the

merits of my motion to compel. During this same period of time, the Board must also rule on my motion for a subpoena. This leaves me with only the weekend to prepare my Appeal for hearing, not counting my time that will be spent travelling to the hearing location. To the extent I prevail on either of the outstanding motions, materials that may be produced as a result would need to be added to my prehearing submissions. This timeline does not account for any possibility that the Agency could fail to comply with an order to produce discovery, which would entail another series of motions.

I do not believe the Agency would be prejudiced by a postponement. As of our latest conversations, the Agency does not have any personnel travelling to the physical hearing location in Washington, D.C. As far as I am aware, I am the only one travelling there. The Agency's witnesses are from offices in Oklahoma City, OK. I have been previously advised that the Agency's witnesses and attorneys will be joining the hearing from a remote video connection in Oklahoma City. In the case of a postponement, the Agency's witnesses would not be severely inconvenienced. At most, the Agency's attorneys, who are not in Oklahoma City, will simply not travel to that location. The Agency would then have additional time to prepare their side for the hearing. I do not know how the Agency could argue it would be prejudiced by this.

I would be severely prejudiced by having a hearing on October 29th, 2018. I hold a full-time job and have no representation. The workload imposed on me to

prepare for a hearing this soon in light of the information I am lacking would be, in no uncertain terms, unbearable. For these reasons, I ask that the Board approve my request for a postponement of the hearing date.

Respectfully submitted,

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on
October 25, 2018

s/ Harold Edward Rutila IV
Harold Edward Rutila IV
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(810) 845-3497

I hereby certify that I have submitted this document through the MSPB e-Appeal system and all Parties of record have received a copy electronically.

s/ Harold Edward Rutila IV
Harold Edward Rutila IV
12498 Woodhull Lndg

UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA IV, **Appellant,** **v.** **DEPARTMENT OF TRANSPORTATION,** **Agency.**	**Docket No. DC-1221-18-0474-W-1** **October 24, 2018** **Assigned to the Honorable Kasandra Robinson Styles**

APPELLANT'S MOTION TO COMPEL DISCOVERY

Appellant Harold E. Rutila IV hereby moves to compel discovery in accordance with 5 C.F.R. § 1201.73(c). This Motion is timely filed in accordance with the Board's October 22nd, 2018 Order Rescheduling. Dkt. 37.

In accordance with 5 C.F.R. § 1201.73(c)(iii), Appellant has discussed the anticipated Motion with the Agency and has made a good faith effort to resolve these discovery disputes and narrow the areas of disagreement. Some portions of Appellant's discovery have been resolved by those discussions. As a result, not every interrogatory, request for production of documents (RPD), or request for admission is subject to this Motion.

BACKGROUND AND SUMMARY

Appellant first served the Agency with discovery requests on July 30th, 2018. *See* Exhibit 1. Consistent with 5 C.F.R. § 1201.73(d)(2), the Agency's responses were due on August 19th, 2018. Since that day is a Sunday, the deadline was moved to Monday, August 20th, 2018. 5 C.F.R. § 1201.23. The Agency did not comply with this deadline or seek an extension from the Board.

Instead, on August 21st, 2018, Agency's counsel Mr. Armando Armendariz contacted Appellant seeking to discuss a list of agreed-upon material facts. Agency's counsel insisted he had until August 30th, 2018 to respond and affirmed that Agency lines of business (LOBs) were working on the responses to Appellant's discovery requests. When asked, no date of production was offered.

The next day, August 22nd, Appellant advised the Agency that he could not agree to any facts until he reviewed the Agency's discovery production. Appellant also advised the Agency's counsel that the Agency's discovery responses were overdue. Agency's counsel suddenly changed course, stating "I will be sending all responses today." *See* Appellant's Request for Extension of Time Exhs. 1-8 (Dkt. 21). At 9:15 P.M. Eastern Time, Appellant was served with a 14-page discovery response consisting nearly entirely of objections. The document was authored by Agency's counsel. *See* Exhibit 2. It appeared to be an 11th-hour production, produced only as a result of Appellant's

prodding about the tardiness of the response, replete with non-conformity to traditional discovery rules, including the most obvious issue – a lack of signatures anywhere.

A case suspension was eventually issued, effective September 10th, 2018 through October 10th, 2018. Dkt 26. During the suspension, the Agency added another attorney, Ms. Joann Putnam, to its defense. Dkt. 29. The Agency also contacted Appellant, and the parties attempted to rectify some discovery issues. Appellant sent the Agency an overview of his issues, and the Agency responded soon thereafter. *See* Exhibits 2, 3, 4.

The Agency's general positions are (a) that it is not required to submit to Appellant interrogatories signed by officials or agents under oath or affirmation; (b) that its objections are all proper according to Board rules; and (c) that it will amend its objections to state them with more specificity. *See* Exhibit 3.

Agency's counsel Ms. Putnam advised the parties and the Board during an October 3rd, 2018 telephonic status conference that the Agency "stands by our objections." This notwithstanding, the Agency subsequently submitted amended discovery responses twice, which contained more objections and resulted in the release of some responsive records, albeit with extensive redactions. In some cases, records have significant portions cut off through as a result of improper scanning processes. *See*, *e.g.*, Exhibit 19; *compare with* Exhibit 18. Some responses were never produced.

GENERAL ARGUMENTS

1. Appellant's requests are proportional to the needs of this Appeal.

The Agency has objected several times on grounds that Appellant has made requests that are not "proportional to the needs of the case." *See* Appendix A; Exhibits 3, 4, 5, and 6. Appellant's requests are not only proportional, but the information required to respond to them is almost entirely digitally stored. Appellant has mainly requested information that is stored on government information systems: class rosters, score books, Technical Review Intake Forms, records from his evaluations, and other materials which are stored electronically. Most of the records the Agency *did* produce clearly indicate that they came from electronic storage mediums such as the Agency's KSN intranet site, to which Agency officials with information about this case have easy access. The extent to which Appellant requested handwritten notes and tangible paper documents is limited to those which he created himself (such as his notepad from his evaluation), or handwritten notes taken during his termination by the witnessing HR representative (which were never produced).

2. Appellant disputes the content of all of the Agency's interrogatory responses and objections, except 5, 16, and 24, averring that the responses still must be signed.

Appellant has very limited time to file this Motion and cannot offer an in-depth analysis of every

discovery issue, but provides support for several specific objections herein, to the best of his ability given his time frame. Appellant contends that the Agency will essentially need to re-do nearly every interrogatory response should it be compelled to have officers and/or agents sign the responses under oath. Appellant contests the Agency's responses and objections. Objections that are based around the pre-December 1, 2015 amendments to the federal rules ("not reasonably calculated to lead to the discovery of admissible evidence," etc.) are not proper.

The Agency's objections on grounds of vagueness to terms and phrases in the common parlance – including the terms "merit system principles," "validated," "mitigation strategies," and "duties," – are completely unfounded. *See* Appendix A at 3, 5, and 11.

In its response to Interrogatory 4, the Agency's distortion of the phrase "reasonable opportunity to demonstrate improvement" such that the Agency merely provides its purported position on "re-takes" makes its response incomplete. *See Id.*

The Agency has released information in discovery that essentially disproves the accuracy of its responses. In one such record, an email from Appellant's supervisor Ron Ward, Mr. Ward states that an employee named Ken Kurdziel and an office called AMA-900 "is responsible for overseeing the Adacel equipment." *See* Exhibit 16. The Agency never interviewed Mr. Kurdziel, anyone in the same capacity as Mr. Kurdziel, or anyone from AMA-900 in response to

Appellant's discovery requests. *See* Appendix A at 1. As many of the requests concern information about the Adacel simulators, the Agency's responses thereto are insufficient.

Appellant has provided a compilation of each interrogatory and the Agency's responses thereto in Appendix A. Appellant did not have time to compile a similar appendix for his requests for production of documents (RPDs) or requests for admission (RFA); however these (as well as the original interrogatories) are available in Exhibits 3, 4, 5, and 6.

3. The Agency should be compelled to answer Interrogatory 23, 24, and 25.

On August 22, 2018, the Agency released its first response to Appellant. At that time, it was never claimed that Appellant had exceeded his interrogatory limit of **25** interrogatories. At that time, the Agency "answered" or objected to all interrogatories. *See* Exhibit 2. The Agency later claimed via electronic letter that Appellant had asked **27** interrogatories, and that it no longer needed to answer Interrogatories 24 and 25. Finally, on October 9th, 2018, the Agency released an "amended" discovery response, claiming Appellant had asked **28** interrogatories, and that the Agency need not answer Interrogatories 23, 24, and 25. *See* Exhibits 4, 5, and 6.

In its so-called amended responses, the Agency claimed Interrogatory 9 and Interrogatory 10 were compound interrogatories containing two and three

subparts each, respectively; however, those interrogatories merely ask about details about the Agency's Performance Assessment (PA) and Technical Review (TR) programs, which have always existed concurrently. Appellant disputes the agency's characterization that the interrogatories exceed the number authorized. Appellant notes that the Agency asked him four compound interrogatories – 13, 17, 20, and 24 – to which he never objected. *See* Exhibit 11.

Because the Agency failed to assert this claim in its first discovery response, it waived this objection. Thus, the Board should compel the Agency to answer them.

4. The Agency should be compelled to produce information, even if it was produced under the Freedom of Information Act (FOIA).

The Agency claims it cannot, or will not, produce documents in response to RPD 10 that were allegedly released to Appellant under the FOIA. *See* Exhibits 3, 4, 5, and 6. The ground for this claim is that requiring the Agency to do so would be unnecessarily duplicative, onerous, and/or is a vexatious litigation tactic.

The Agency's argument is *not* that certain discovery requests are duplicative because responsive material already exists in in the Agency File, or that they were already provided by Appellant in response to the Agency's discovery requests. The Agency's argument is that it does not need to produce certain items in discovery because Appellant allegedly already obtained

them under FOIA; however, whether the Agency has complied with FOIA is ***not*** the case at bar.

The Agency has not pointed to a specific instance where one of Appellant's discovery requests duplicated one of his prior FOIA requests. Appellant does not believe he duplicated any FOIA requests in his requests for discovery. To the extent that there may be *overlap* between FOIA- and discovery-requested information, alleged compliance with FOIA does not absolve the agency of its duty to properly respond to discovery requests. A common legal framework is not shared between the FOIA and MSPB discovery regulations.

Appellant's discovery requests are not duplicative or onerous on the basis of Appellant having allegedly requested or received the information under FOIA. Therefore, the Board should find the Agency's objection on these grounds to be unacceptable.

5. The Board should find the Agency's invoking of "attorney/client privilege" and "attorney work product" concerning emails that do not involve any attorney evidence of discovery non-compliance.

The Agency has invoked "attorney/client privilege" and "attorney work product" on a number of records released in response to RFP 13 and RFP 14. Appellant reiterates that he does not have sufficient time to examine these productions completely; however, a cursory overview of them reveals the following significant issues.

In RFP 13, the Agency has attempted to redact an email by Laurie Karnay, evidenced by a redaction attempt that partially revealed Ms. Karnay's custom email signature. *See* Exhibits 13 and 14. Ms. Karnay is a Freedom of Information Act Management Analyst for the Agency. In other words, Ms. Karnay is not an attorney. This email is therefore not subject to any such privileges.

In another instance, the Agency claims the same privileges in full redactions of an email from Wayne Coley to Ronald Ward, Alethia Futtrell, and Jim Doskow. At that time, based on information already in the record, Mr. Coley was the staff manager of the FAA Academy. Ronald Ward was Appellant's supervisor. Alethia Futtrell was Mr. Ward's supervisor. And Jim Doskow was AMA-500, responsible for the Air Traffic Division of the FAA Academy. None of these employees are attorneys. Thus, there are no privileges which apply here. The emails must be released in full. *See* Exhibit 15.

Based on these very clear misapplications of attorney/client privilege and attorney work product privilege, which the Agency is using to prevent Appellant from gaining access to information to which he is lawfully entitled in discovery, Appellant believes it is likely that most of the emails requested in these RPDs are not subject to any privileges.

The Board should compel the Agency to release the records which have no basis for an attorney/client privilege or attorney work product privilege. In the

alternative, Appellant requests an in-camera review of those records.

6. The Board should find the Agency's invoking of "privacy-protected info" further evidence of discovery non-compliance to RFPs 3, 4, 8, 9, and 16.

The Agency has been asked to produce records that contain the names of individuals who were similarly situated as Appellant when he was employed with the Agency. Many records, such as those requested in RFP 4, 8, and 9, were authored by the similarly situated individuals themselves. *See* Exhibits 3, 4, 5, and 6. In response to those requests, the Agency produced redacted records, basing those redactions upon "privacy protected info (student identities and signatures)." The Agency did *not* invoke the Privacy Act, nor are such records Privacy Act protected. Perhaps most perplexing about this production is that the Agency redacted records authored by Appellant that they have previously released in the Agency File – again, citing "privacy."

In the case of RFP 16, the Agency redacted the names of trainees on a class scorebook. *See* Exhibit 17. The record already demonstrates that one of those trainees, Madeline Bostic, was *not* terminated despite having failed her final evaluations. The Agency contends any information about Ms. Bostic is "not helpful" to the issues in this appeal. *See* Exhibits 3, 4, 5, and 6. Whether the records are helpful or harmful to the

Agency's defense is not relevant. This discovery request is appropriately structured to obtain information expected to prove that the Agency **cannot** satisfy its burdens in this Appeal. *See* Motion at 16.

Contrast the aforementioned privacy redactions with the Agency's release of seemingly every United States citizen who applied to the Agency's 2016 Air Traffic Control Specialist hiring announcement, produced in response to RFP 16. *See*, *e.g.*, Exhibit 18. A release of this nature demonstrates that the Agency is acting arbitrarily in its compliance with Appellant's discovery requests.

In another matter, RFP 4, the Agency was asked to produce copies of feedback submissions from trainees at the FAA Academy. *See* Exhibits 3, 4, 5, and 6. The Agency produced summaries of trainees' feedback, which someone at the Agency categorized, but not the original feedback submissions themselves. This response, therefore, is incomplete.

The Board should compel the Agency to release this information.

7. The Board should find Agency's objections on the basis of irrelevance evidence of discovery non-compliance.

The Agency has objected dozens of times to Appellant's discovery requests on the basis of relevance "to the issues in this appeal." *See* Appendix A; Exhibits 3,

4, 5, and 6. The Board should find these requests to be unfounded.

In one example, RFP 10, the Agency has objected to Appellant's request for "any records concerning the . . . evaluation of Harold Rutila . . . includ[ing] transcripts and error logs from the Adacel Tower Simulation System." Appellant has personal knowledge of two types of records that the Agency has failed to produce – his writing pad, and dozens of flight strips, which are used in the Tower Simulation System by trainees to help them keep track of the aircraft in their training and evaluation scenarios. In RFA 14, the Agency denies that it destroyed these records. *See* Exhibits 3, 4, 5, and 6. Nevertheless, the Agency has failed to provide them, despite that they are clearly responsive to RFP 10.

8. The Board should compel the Agency to comply with FED. R. CIV. P. 36(A)(4) with respect to its answers to requests for admission (RFAs).

Federal Rule of Civil Procedure 36(A)(4) states the following with respect to answering RFAs: If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering

party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

The Agency has submitted several answers to RFAs which do not comport to this rule. The Agency's responses to RFAs 15 and 17 do not ascertain whether the Agency made a reasonable inquiry, or that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

AGENCY MUST BE COMPELLED TO SUBMIT DISCOVERY RESPONSES THAT CONFORM TO CONVENTIONAL DISCOVERY RULES

1. The importance of signed interrogatory responses cannot be understated.

The Agency has submitted discovery responses that are not only *unsigned*, but also which do not identify the agency official and/or agent making them, nor assert under oath or affirmation that the responses are even correct. A **substantial** amount of evidence exists that confirms many of the Agency's responses are inaccurate and incomplete. *See* Motion at 9, 10.

The Agency should be compelled to submit interrogatory answers that are signed under oath or affirmation. Federal Rule of Civil Procedure 33(b) requires that written answers to interrogatories must be made under oath and signed by the person making them. These rules represent conventional thought on

acceptable procedures. 5 C.F.R. § 1201.72(a); *see also Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 285 n.7 (1988).

Rule 602 of the Federal Rules of Evidence requires "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The Board has previously taken notice when parties failed to comply with this rule when analyzing interrogatory responses as evidence. *See, e.g., Matson v. Office of Personnel Management*, 105 M. S.P.R. 547 at 7. Furthermore, the MSPB Judges' Handbook states that interrogatories **must** be answered in writing **under oath or affirmation**. *Id.* at 35 (emphasis added).

The Agency's first discovery response admits that Agency's counsel Mr. Armendariz authored the responses based on "substantive information" from but four Agency officials. *See* Appendix A at 1. Subsequent "amended" responses from the Agency are not substantially different. However, neither Mr. Armendariz nor Ms. Putnam has personal knowledge of any of the events in Appellant's Appeal. Mr. Armendariz's recollection and recital of this "substantive information" from these officials is classic hearsay and, therefore, inadmissible. *See* FED. R. EVID. 602. *See also* FED. R. EVID. ART. VIII. This will not, however, waive Appellant's ability to use the information provided against the Agency in future proceedings before the Board.

Appellant's interrogatories require a response from an officer or agent of the Agency – not just a

summary or boilerplate objection by Agency's counsel. The interrogatories are specifically targeted to garner information relevant to the case in order that it is resolved on the merits. Responses must be provided by Agency officials who have personal knowledge of the matter. *See* FED. R. EVID. 602.

When Appellant asked the Agency to conform to these rules, the Agency's counsellors incorrectly argued that the Board's discovery rules do not require any officers or agents to sign interrogatories. This request of Appellant is neither unreasonable nor unusual. Information concerning who signed discovery responses is important, as it will allow Appellant and the Board to ascertain credibility of respondents and the information they provide. Names of respondents with their signatures will allow for a determination on response admissibility.

2. The need for signed interrogatory responses is demonstrated by examining the Agency's unsigned discovery responses against officials' prior statements under oath.

The problem of the Agency's non-conformity to normal discovery rules is evident throughout its discovery productions. In several instances, the Agency's answers to the requests contain statements that *blatantly* contradict information from other sources.

The Agency claims employee Ronald Ward provided "substantive" and "factual" information in response to Appellant's discovery requests. *See* Appendix

A at 1. It is therefore worth comparing the Agency's *unsworn* responses to RFA 10 and RFA 14 against Mr. Ward's sworn affidavit from July 7th, 2017, which he submitted in support of the Agency's defense in Appellant's concurrent EEO case. *See* Exhibits 3, 4, 5, and 6. There is perhaps no clearer evidence of the Agency's discovery inadequacies than this:

> **RFA 10:** Admit that the voice recognition system of the TSS malfunctioned during Mr. Rutila's third evaluation, which the evaluator did not take proper action to correct.
>
> **Agency's Response:** Denied.
>
> **RFA 14:** Admit that an aircraft conducted an extra 360 degree turn without permission during Mr. Rutila's third evaluation.
>
> **Agency's Response:** Denied.
>
> **Affidavit of Ronald Ward, EEO Complaint 2016-26956-FAA-05, July 7th, 2017[1]:** Research indicates that during the last couple of minutes of the scenario an aircraft . . . **did make two additional 360 degree turns after Mr. Rutila had instructed it to make one 360 turn**. As the PA documentation reflects, these extra turns caused no negative points for the employee in training, no other

[1] This declaration was made "under penalty of perjury that the foregoing statement is true, correct, and complete to the best of [Mr. Ward's] knowledge and belief." Exhibit 7. Although Appellant disputes the agency's discovery responses, Appellant reserves the right to use responses received thus far, regardless if later deemed inadequate, in support of his case and for challenging the Agency's credibility.

> aircraft were impacted, and it caused no additional workload to Mr. Rutila.
>
> Exhibit 7 at 2 (emphasis added).

Respecting RFA 10, if Appellant instructed an aircraft to make **one** 360-degree turn, and it instead made ***three*** 360-degree turns – the one Appellant instructed, plus two additional 360s – then this is a *de facto* malfunction of the Tower Simulation System (TSS). It is simply unacceptable for aircraft in this context to make random 360s at will[2]. Mr. Ward's sworn affidavit proves an aircraft in Appellant's evaluation did *just that* – two times!

Furthermore, Mr. Ward's sworn affidavit verifies the **existence of evidence** that allowed him to conduct purported "research" that displayed the actions of an aircraft in Appellant's evaluation. However, no such evidence describing the actions of any aircraft has been produced to Appellant, despite that he requested it. Any records, or the lack thereof, will impact Appellant's case. His aforementioned evaluation is a central issue to the case. Even if evidence the Agency possesses is exculpatory or adverse to the Agency, it still must be produced. With respect to the existence of

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[2] The Agency's own *Aeronautical Information Manual* describes with precision the negative consequences of unexpected 360s: "If a pilot makes a 360 degree turn after obtaining a landing sequence, the result is usually a gap in the landing interval and, **more importantly, it causes a chain reaction which may result in a conflict with following traffic and an interruption of the sequence established by the tower . . . controller.**" *Id.* at 4-3-5. (Emphasis added).

records, Mr. Ward's affidavit contradicts additional discovery responses:

> **RPD 10:**
>
> Produce any records concerning the May 24, 2016 evaluation of Harold Rutila and Andrew Koski, which was administered by Michael Taylor, Dan Henderson, Sandra Laminack, and another unidentified remote pilot operator (RPO). This request includes transcripts and error logs from the Adacel Tower Simulation System.
>
> **Excerpt of Agency's Response to RPD 10:**
>
> . . . Objection on the basis, also, that there are no such responsive documents (i.e. transcripts and error logs) because the data that the Agency produced is not a "record" and is not stored in a format that can be preserved. **The records that appellant is requesting actually do not exist in their original format** – there is no system of "records" for storing the PA Evaluations at the Academy. The simulators have data bits from the PAs, but they (sic) information begins to break down and degenerate due to so many trainees using the simulators. . . . (emphasis added)

The Agency's response is improper, because Mr. Ward's affidavit proves he accessed records about Appellant's evaluation that reflected the actions of aircraft therein. Such actions could have only been observed in-person by attentive individuals during Appellant's evaluation in the Tower Simulation System (TSS), and can only be re-observed through some sort

of recreation of that evaluation. The records the Agency has produced **do not suffice** for making the determinations Mr. Ward made, as he detailed in his sworn affidavit.

Prior to the date of this affidavit, Mr. Ward's official position respecting what happened during Appellant's evaluation was asserted on Appellant's technical review (TR) final decision worksheet, and via email to other FAA officials. They were as follows:

> After talking with the Evaluator we determined that: The evaluator was looking at the RPO's monitor and knew exactly where the aircraft in question was located.
>
> Exhibit 8.
>
> The computer processed all information correctly and moved the aircraft **exactly as Mr. Rutila directed**. Mr. Taylor informed Mr. Rutila of this fact during the debrief.
>
> Exhibit 9 (emphasis added).

Whatever information Mr. Ward used to conduct his "research" for his July 2017 sworn affidavit, approximately one year after he stated the entirely opposite belief *as a basis for terminating Appellant*, is responsive to this request.

This evidence clearly also allowed Mr. Ward to determine the *results* of those aircraft's actions on other aircraft. For example, Mr. Ward asserts "no other aircraft were impacted, and (the extra 360s) caused no additional workload to Mr. Rutila." *Id.* The documentation that the Agency has produced from Appellant's

evaluation, thus far, does not reflect, recreate, or provide a transcription of the events in that scenario.

Whether or not the Agency believes the information constitutes a record, or can be "stored in a format that can be preserved" is **materially irrelevant** to the discovery request. If Mr. Ward can conduct research on the information, as he himself swears he did, then the information is subject to discovery. The Board should **compel its release.**

The foregoing examples are but a few of the totality of the responses which the Board could expect would be drastically altered if the Agency were compelled to have Agency officials and/or agents answer Appellant's discovery requests under oath or affirmation. This notwithstanding, the Board should compel the Agency to answer Appellant's discovery requests under oath or affirmation because this is a mainstream discovery requirement.

APPELLANT'S DISCOVERY IS SPECIFICALLY TARGETED TO LEAD TO THE DISCOVERY OF ADMISSABLE EVIDENCE

1. Appellant's requests are structured to obtain relevant evidence respecting the burden of the parties in this Appeal.

The Agency has objected to Appellant's discovery requests numerous times on the basis that Appellant's requests are not specifically targeted to lead to the discovery of admissible evidence. These objections are improper. A cursory overview of the interrogatory

requests, in the context of the parties' respective burdens before the Board, reveals not only that the requests are relevant to the Appeal, but are also properly and specifically targeted to lead to the discovery of admissible evidence.

Appellant has already succeeded in asserting the Board's jurisdiction over his Appeal. At the request of the Board, the parties and the Board convened via teleconference on June 28th, 2018, where Judge Styles informed the parties that she found the Appellant to have established the Board's jurisdiction over his Appeal. One basis of Appellant's jurisdictional argument was his belief that he had made a protected disclosure as defined by 5 U.S.C. § 2302(A)(2)(D). *See* Dkt. 13 at 5.

The Board has jurisdiction over an IRA appeal if the appellant has exhausted the administrative remedies before OSC and makes nonfrivolous allegations of facts that, if proven, could show that: (1) the appellant 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, or threaten to take or fail to take, a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365 ¶ 4 (2013). The jurisdiction issues have now been resolved, and the agency did not appeal the decision.

a. The Agency has a burden to prove Appellant would have been terminated *regardless* of his filing of a protected disclosure.

To establish a *prima facie* claim of whistleblower reprisal, the agency is given an opportunity to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. Bearing this in mind, the Appellant asked the following questions of the Agency. *See* Appendix A; Exhibits 3, 4, 5, and 6.

i. Interrogatories 16 and 21

ii. Request for Production of Documents 1, 2, 3, 12, 13, 14, 15, 16, 17, 18, 19, 20, 27

iii. Requests for Admission 1, 2, 3, 4, 17

b. There are different types of "protected disclosures." Appellant has consistently argued that his evidenced a violation of an Agency rule, gross mismanagement, gross waste of funds, and an abuse of authority.

i. Gross Mismanagement

Gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994).

Appellant asked the Agency to produce information about whether FAA Academy evaluator Michael Taylor suffered from a hearing

impairment, an allegation which was originally affirmed by an Agency representative during Appellant's concurrent EEO investigation. If Mr. Taylor *did* suffer from a hearing impairment, it would explain why Appellant believes he failed to hear crucial details that affected the scoring of Appellant's evaluation. It would significantly alter the course of this case.

In seeking information about the impact of the FAA Academy's then-new evaluation programs, to which Appellant was subject while he was employed there, Appellant asked for basic background information about the Performance Assessment (PA) program and Technical Review (TR) program, including who was responsible for developing them. Appellant asked for information about whether the Agency believes it provides trainees with a reasonable opportunity to demonstrate improvement following one bad score on a PA[3]. Appellant also sought copies of complaints about the level of knowledge of FAA Academy graduates by training representatives in the field (i.e. in facilities where academy graduates work) both before and after these changes took place. Finally, Appellant asked the Agency what the PA and TR programs were intended to do that the programs the Agency used until 2014 did not do.

Furthermore, Appellant asked whether the Agency had ever validated the PA and TR

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[3] This is a relevant question because Appellant himself was terminated after a singular evaluation score, with no prior history of poor performance, and with no reasonable opportunity to recover his score.

programs. Appellant asked for a detailed explanation as to how PAs and graded, and how TRs are administered. Finally, Appellant asked for information about how FAA Academy training courses are designed and certified. All of this information conforms to the Board's standards for federal government training and evaluation programs, which is detailed in the Board's 2014 report to the president and Congress entitled "Evaluating Job Applicants: The Role of Training and Experience in Hiring." *See id.* at 57[4].

ii. Gross Waste of Funds

A gross waste of funds is defined as a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *Van Ee v. E.P.A.*, 64 M.S.P.R. 693, 698 (1994) (quoting *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 393 (1993)). In seeking information which could point to a gross waste of funds, Appellant asked the Agency to produce the names of the personnel or work group who worked to eliminate the previously-existing option for FAA Academy trainees to re-take a failed assessment prior to being outright terminated. He also requested the Agency to identify the personnel who implemented the practice of drafting and signing a termination letter for every FAA Academy trainee prior to the existence of any apparent need to terminate them. The Agency makes its tuition costs for FAA Academy classes publicly available online. At an approximate cost

[4] https://www.mspb.gov/studies/browsestudies.htm

of $30,000 per trainee in fiscal year 2013 (not counting the trainees' basic training, salary, and per diem), terminating a trainee in the circumstances like Appellant's is more than likely a gross waste of funds. *See* Exhibit 12.

iii. Abuse of Authority

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 preferred other persons. *Wheeler v. Department of Veterans Affairs*, 88 M.S.P.R. 236 ¶ 13 (2001).

With respect to an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person, Appellant asked the Agency to produce the grading criteria for performance assessments (PAs) and the review criteria for technical reviews (TRs). The Agency's Order JO 3000.22 requires the Agency to have an inter-rater agreement in order to conduct graded performance evaluations. *See* Exhibit 10. The Agency has not produced one.

With respect to the latter portion, " . . . or that results in personal gain or advantage to himself or to preferred other persons, . . . " Appellant asked the Agency to produce information about other trainees who failed their FAA Academy training but were nevertheless reinstated[5]. Appellant also

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[5] Appellant once again cites the case of Madeline Bostic, a similarly situated trainee who was in fact terminated for failing

asked for records concerning another evaluation of two of Appellant's co-trainees for whom evaluators Michael Taylor and Dan Henderson were said to have intervened to rectify simulator issues that arose in their evaluation. Finally, Appellant asked the Agency to produce information concerning quotas for FAA Academy pass and failure rates.

c. If Appellant makes a *primae facie* case of whistleblower reprisal, then the Agency bears additional burdens.

i. The Agency will be given an opportunity to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *Jenkins*, 118 M.S.P.R. 161 ¶ 16.

In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board 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 agency officials who were involved in

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a performance assessment, just like Appellant. The record demonstrates Ms. Bostic's termination, and that she was subsequently reinstated, restarting all of her FAA Academy training from October 2016 to December 2016.

the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Mattil v. Department of State*, 118 M. S.P.R. 662, 669-70, ¶¶ 11-12 (2012).

Specifically, with respect to number (3), Appellant asked the Agency to produce information about the actions taken to reinstate and retrain FAA Academy trainee Madeline Bostic after she failed to pass her first evaluation in May 2016, as well as similar actions it has taken to reinstate and retrain other individuals who worked at the FAA Academy in the same capacity as Appellant and Ms. Bostic. To demonstrate whether those individuals filed protected disclosures, Appellant asked for the (a) the feedback reports for Appellant's class as well as those classes immediately before and after his class; (b) any complaints filed against the FAA Academy evaluators for a 5-year period of time; and (c) technical reviews (TRs) filed in Ms. Bostic's class, several classes thereafter, and TRs that pertained to Appellant's evaluators Michael Taylor and Dan Henderson.

APPELLANT IS PREJUDICED BY AGENCY'S DISCOVERY NON-COMPLIANCE AND THE CURRENT SCHEDULE OF PROCEEDINGS IN THIS APPEAL

Appellant is severely prejudiced by the Agency's non-compliance with his discovery requests. As Appellant has demonstrated herein, he has submitted to the Agency discovery requests which are not only relevant to the Appeal, but are also properly structured so as to obtain information that is expected to support or disprove the parties' burdens before the Board.

Appellant must also respectfully point out that he is prejudiced by the Board's requirement that he file this Motion only a few days after the Agency submitted its final discovery productions, with the added pressure of having to file pre-hearing submissions on the same day, and prepare for a hearing that is currently scheduled five days from today. Appellant believes it is unreasonable for him to be able to thoroughly examine all of the Agency's discovery responses, to prepare this Motion, and to prepare his prehearing submissions within the same period of time. The Agency had months to prepare what it has submitted to Appellant, but Appellant had had only days to prepare his response to and issues with those productions, while simultaneously preparing for a hearing. Therefore, in the event the Board finds at a later date that this Motion does not sufficiently contest a particular Agency response or objection that Appellant believes the Agency should be compelled to answer, Appellant respectfully requests that he be provided an opportunity

to further justify those issues prior to the Board issuing a discovery ruling that disfavors him.

Appellant has made his best, good-faith effort to compile this Motion, highlighting the key issues with the Agency's discovery productions, averring that there may be other specific deficiencies that he may need to address with the Board at a later time.

Respectfully submitted,

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on
October 24, 2018

s/ Harold Edward Rutila IV
Harold Edward Rutila IV
12498 Woodhull Lndg
Fenton, MI 48430
(810) 845-3497

I hereby certify that I have submitted this document through the MSPB e-Appeal system and all Parties of record have received a copy electronically.

s/ Harold Edward Rutila IV
Harold Edward Rutila IV
12498 Woodhull Lndg
Fenton, MI 48430
(810) 845-3497

[LOGO]

MERIT SYSTEM PROTECTION BOARD

Appeal Form--Appellant and Agency Information

Please type or print legibly. OMB No. 3124-0009

1. Name (last, first, middle initial)
   Rutila IV, Harold, E.

2. Present Address (number and street, city, state, and zip code)
   Address: 12498 Woodhull LNDG
   City, State, Zip Code: Fenton, Michigan, 48430, United States of America

3. Telephone numbers (include area code) and E-Mail Address
   You must notify the Board in writing of any change in your telephone number(s) or e-mail address while your appeal is pending.
   Home: (810) 845-3497 Work:
   Fax: Cell:
   E-mail Address: h.rutila@gmail.com
   Other Phone Type:

4. Do you wish to designate an individual or organization to represent you in this proceeding before the Board? (You may designate a representative at any time. However, the processing of your appeal will not normally be delayed because of any difficulty you may have in obtaining a representative.)
   ☐ Yes ☑ No

5.	Name, address, and telephone number of the agency that took the action or made the decisions you are appealing (include bureau or division, street address, city, State and Zip code) Agency Name: Department of Transportation Bureau: Federal Aviation Administration Address: 800 Independence Ave SW City, State, Zip code: Washington, District of Columbia, 20591, United States of America Agency Phone: (866) 835-5322
6.	Your Federal employment status at the time of the decision or action you are appealing: ☑ Temporary ☐ Permanent ☐ Applicant ☐ Term ☐ Retired ☐ Seasonal ☐ None
7.	Type of appointment (if applicable) ☐ Competitive ☐ SES ☑ Excepted ☐ Postal Service ☐ Other
8.	Your occupational series, position title, grade, and duty station at the time of the decision or action you are appealing (if applicable): Occupational Series 2152 Position Title: Air Traffic Control or Cluster: Duty Station: Washington, D.C. Grade or Pay Band: FG-01
9.	Are you entitled to veterans' preference? See 5 U.S.. 2108. ☐ Yes ☑ No

10. Length of Government Service (if applicable) Years 3 Months
11. Were you serving a probationary, trial, or initial service period at the time of the action or decision you are appealing? ☑ Yes ☐ No
HEARING: You may have a right to a hearing before an administrative judge. If you elect not to have a hearing, the administrative judge will make a decision on the basis of the submissions of the parties. 12. Do you want a hearing? ☑ Yes ☐ No
E-Filing: Registration as an e-filer enables you to file any or all of your pleadings with the Board in electronic form. Registration also means you consent to accept service of all pleadings filed by other registered e-filers and all documents issued by the Board in electronic form. You will receive these as PDF documents at the e-mail address you provided the Board. If registered as an e-filer, you may file any pleading, or portion of a pleading, by non-electronic means. You can withdraw your registration as an e-filer at any time. 13. Do you wish to register as an E-Filer in this appeal? ☑ I elect to E-File ☐ I decline to E-File

14. **I certify that all of the statements made in this form and all attached forms are true, complete, and correct to 0 the best of my knowledge and belief.** **Harold E. Rutila IV, Appellant Date:**
Complete this form and attach it to MSPB Form 185-1 if you are appealing an agency personnel action or decision (other than a decision or action affecting your retirement rights or benefits) that is appealable to the Board under a law, rule, or regulation. If the personnel See 5 CFR 1201.3(a) for a list of appealable personnel actions and action or decision is appealable to the Board, you should have received a final decision letter from the agency that informs you of your right to file an appeal with the Board.

Please type or print legibly. OMB No. 3124-0009

Please submit only the attachments requested in this form at this time. You will be afforded the opportunity to submit detailed evidence in support of your appeal later in the proceeding.
Name *(last, first, middle initial)* Rutila IV, Harold, E.
1. Check the box that best describes the personnel action or decision taken by the agency you named in MSPB Form 185-1 that you are appealing. (If you are appealing more than one action or decision, check each box applies.) ☐ Veterans Administration Senior Executive Service Removal from civil service

☐ Veterans Administration Senior Executive Service Transfer to general schedule ☐ Removal (Termination after completion of probationary or initial service period) ☐ Involuntary Resignation ☐ Termination during probationary or initial service period ☐ Involuntary Retirement ☐ Reduction in grade or pay ☐ Suspension for more than 14 days ☐ Separation, demotion, or furlough for more than 30 days by reduction in force (RIF) ☐ Furlough of 30 days or less ☐ Denial of within-grade increase ☑ Failure to restore/reemploy/reinstate or improper restoration/reemployment/reinstatement ☐ Negative suitability determination ☐ Other action or decision (describe):
2. Date you received the agency's final decision letter (if any) 05/25/2026
3. Effective date (if any) of the agency action or decision (month, day, year) 05/25/2016
4. Prior to filing this appeal, did you and the agency mutually agree in writing to try to resolve the matter through an alternative dispute resolution (ADR) process? ☐ Yes ☑ No

5. Explain briefly why you think the agency was wrong in taking this action. In challenging such an action, you may choose to allege that the agency engaged in harmful procedural error, committed a prohibited personnel practice, or engaged in one of the other claims listed in Appendix A. Attach the agency's proposal letter, decision letter, and SF-50, if available. See Continuation Sheet for Response.
6. With respect to the agency personnel action or decision you are appealing, have you, or has anyone on your behalf, filed a grievance under a negotiated grievance procedure provide by a collective bargaining agreement? ☐ Yes ☑ No
7. If your answer to question 6 is "Yes," on what date was the grievance filed (month, day, year)? NOT APPLICABLE
8. If your answer to question 6 was, "yes," has a decision on the grievance been issued? NOT APPLICABLE
9. Did you file a whistleblowing complaint with the Office of Special Counsel (OSC)? ☐ Yes ☑ No If your answert to question 9 was "Yes", the date on which you filed complaint with OSC: 06/30/2016

10. Have you received written notice that the Office of Special Counsel made a decision or terminated its investigation?

☐ Yes ☑ No

If your answert to question 10 was "Yes", the date on which OSC made a decision ore terminated its investigation:

01/29/2018

11. Did you filed a complaint on this matter with the Department of Labor (DOL)?

☐ Yes ☑ No

12. Has the Department of Labor notified you that your USERRA or VEOA complaint could not be resolved?

NOT APPLICABLE

Continuation Sheet

5. Explain briefly why you think the agency was wrong in taking this action. In challenging such an action, you may choose to allege that the agency engaged in harmful procedural error, committed a prohibited personnel practice, or engaged in one of the other claims listed in Appendix A. Attach the agency's proposal letter, decision letter, and SF-50, if available.

The FAA committed harmful procedural errors, as well as a prohibited personnel practice against me in the form of retaliation for protected activity under 5 U.S.C. § 2302 (b)(9)(A)00. On May 23rd, 2016I was evaluated by FAA Academy evaluator Dan Henderson. Henderson erred in his grading of my evaluation, which I appealed via the FAA Academy Technical Review process. On May 24th, 2016, after the appeal was

decided in my favor, Henderson was permitted to have influence over my outcome at the FAA Academy when he was assigned as my evaluator again. It was here where Henderson and another evaluator issued me a score of 15%, which caused me to be terminated from the FAA. FAA supervisors failed to consider several appeals I filed in contest of the 15% score and were complicit in the behavior of its evaluators.

The FAA also committed harmful procedural errors when its evaluators failed to correct well-documented discrepancies with the simulator where my evaluation was administered. Simulation errors caused numerous problems that the evaluators used as a basis for issuing me a 15%.

Finally, the FAA committed unlawful discrimination when it failed to reinstate me following these events after it did so for a similarly-situated female trainee who underwent similar issues in May 2016.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DC-1221-18-0474-W-1

DATE: October 26, 2018

ORDER CLOSING THE RECORD

Because the appellant has withdrawn his request for a hearing, the record in this appeal will close on **November 16, 2018.** All evidence and argument must be filed by that date. Evidence and related argument filed after that date will not be accepted unless the party submitting the evidence shows that it is new and material evidence that was not available before the record closed. Notwithstanding the close of the record, however, pursuant to 5 C.F.R. § 1201.59(c), a party must be allowed to respond to new evidence or argument submitted by the other party just before the close of the record.

Initial briefs must be electronically filed by the parties by November 9, 2018.

FOR THE BOARD: /S/
Kasandra Robinson Styles
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DC-1221-18-0474-W-1

DATE: October 15, 2018

ORDER RESCHEDULING

Pursuant to the agency's unopposed request, I have RESCHEDULED the parties' prehearing submission due date to October 22, 2018, and the telephonic prehearing conference to October 24, 2018, at 1:00 p.m. To connect to the call the parties MUST dial 1-800-793-9878 and use participant code 1234107.

FOR THE BOARD: /S/
Kasandra Robinson Styles
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DC-1221-18-0474-W-1

DATE: October 10, 2018

ORDER GRANTING AGENCY'S REQUEST FOR EXTENSION OF TIME

Per written request dated October 5, 2018, the agency requested an extension of time to file prehearing submissions and it requested to reschedule the prehearing conference date. I find that good cause exists for an extension of time. Consequently, the agency's request for an extension is granted, and accordingly, the parties' prehearing submissions must be filed by **October 22, 2018.** The telephonic prehearing conference is **RESCHEDULED to October 24, 2018, at 1:00 p.m.** To connect to the call the parties MUST dial 1-800-793-9878 and use participant code 1234107.

FOR THE BOARD: /S/
Kasandra Robinson Styles
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
DC-1221-18-0474-W-1

DATE: August 27, 2018

ORDER

Pursuant to the agency's request, the hearing in the captioned appeal is **RESCHEDULED** from **September 17, 2018**, to **October 29, 2018**, at **09:00 a.m. As previously noted, some witnesses will appear via video conference, while at least one party will appear at the Board's Washington Regional Office. Additionally, the prehearing submission due date has been RESCHEDULED on October 15, 2018, and the prehearing conference has been RESCHEDULED to October 15, 2019, at 10:00 a.m., to permit the parties an opportunity to resolve outstanding discovery issues.**

FOR THE BOARD: /S/
Kasandra Robinson Styles
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HAROLD E. RUTILA, IV, APPELLANT, v. U.S. DEPARTMENT OF TRANSPORTATION, AGENCY.	Docket No. DC-1221-18-0474-W-1 Date: November 9, 2018 Honorable Judge: Kasandra Robinson Styles

AGENCY'S INITIAL BRIEF

I. INTRODUCTION

During the party's status conference on October 26, 2018, Judge Styles ruled that Appellant's IRA would be evaluated under 5 U.S.C. § 2302(b)(9)(A). In her Summary Of Telephonic Status Conference Order, issued on October 26, 2018, Judge Styles stated Appellant was required to establish, by preponderant evidence, that his termination was reprisal for his engagement in protected activity. That is, Appellant must establish that: (1) he engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); *and* the (2) protected activity was a *contributing factor* in the Agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *See* 5 U.S.C. § 1221(e)(1); *Webb v. Department of the Interior*, 122 M.S.P.R. 248, ¶ 6 (2015).

Under 5 U.S.C. § 2302(b)(9)(A)(i), it is unlawful to take any personnel action (such as termination) against an employee because of his or her exercise of any appeal,

* * *

Agency followed a standard process to remove him for failing the training course and not because the Agency acted with retaliatory animus. Appellant's continued employment as an Air Traffic Control Specialist was contingent upon "successful progression" in the National Training Program. Appellant's TR filed on May 23, 2016 was not a contributing factor in the Agency's decision to terminate his training and temporary employment.

3. EVEN IF APPELLANT ENGAGED IN A PROTECTED ACTIVITY, THE AGENCY WOULD HAVE TAKEN THE SAME PERSONNEL ACTION.

Assuming Appellant has shown, by preponderant evidence, that he engaged in a protected activity that was a contributing factor in the decision to take a personnel action, the Agency still would have terminated him even if Appellant had not filed a TR on May 23, 2016.. 5 U.S.C. § 1221(e)(1), (2); *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 (1995).

In determining whether the Agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, courts will employ a CARR factor analysis; (a) the strength of the agency's evidence in support of

its personnel action; (b) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision and (c) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

(a) The strength of the agency's evidence in support of its personnel action.

Appellant cannot accept that the Agency removed him from further consideration due to his low performance on his third evaluation. Instead, Appellant relies on a misguided concept that the Agency retaliated against him for having participated in the TR process. The record is clear regarding Appellant's low grade. *See* Exhibit 6, Appellant's Tower Cab Performance Assessment (Local Control) dated May 24, 2016. During his training, Appellant received four 100s that were valued only 1% of his total grade; a 96.24 valued at only *5%;* 85 valued at 15%; two 30% valued scores, one 79 and a 15. *See* Exhibit 7, Student Progress Report. Appellant needed 19.36 final points to pass the entire training course, but the fourth and final evaluation was worth only 15 points. Appellant then was mathematically eliminated based on 4.36 points.

Appellant's third evaluation was a life case scenario of a normal air traffic control setting that was both difficult and compounding. Appellant misguided an airplane and mishandled the situation within other airplanes in the vicinity, which led to multiple point

deductions. In his Summary Of Findings, Mr. Ward wrote the following details regarding Appellant's Assessment forms and work sheets:

> "I have reviewed all of our documentation regarding Mr. Rutila's' second (*third*) Performance Assessment run on Local Ground. Based on the written documentation, I can say that Mr. Rutila's run was in trouble almost from the very beginning. With the very first two IFR departures, Mr. Rutila failed to provide proper IFR separation, resulting in his only sixteen (16) point error. The third IFR departure sat at the approach end for over eight minutes waiting to depart and should have resulted in a five point "Delay" error which the evaluator documented on the worksheet but not did not document on the grade form. The aircraft that Mr. Rutila claims departed the airspace and then returned was actually a VFR inbound from the southwest requesting two "touch and go's" followed by a full stop landing. Mr. Rutila worked this aircraft (N9726Z) into a pattern for runway 28L, but had to send the aircraft around to avoid another aircraft Mr. Rutila had cleared for takeoff from the same runways. I don't know what Mr. Rutila intended to do with N9726Z after that, but I do know that the computer accurately followed all of his instructions with regard to this aircraft . . . " *See* Exhibit 8, Mr. Ward's Summary of Findings.

(b) The existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision.

The intent of the TR process is to offer impartiality and objectivity in the grading process. Hundreds of trainees have used this forum to contest a grade. This was the case with Appellant. He utilized a method solely intended to dispute his grade on all of his evaluations. Once references were cited on Appellant's first TR, Mr. MacNeill and Mr. Ward awarded Appellant one point, but no points were justified on his subsequent TRs. The TR instructions also provide guidance on trainees who have been "mathematically eliminated". Therefore, failing the course is a *normal procedure for removal* and there was no retaliatory animus against Appellant for using a practice that is highly supported by the Agency and utilized by hundreds of trainees. In addition, the Agency highly contends that Appellant's first evaluator, Mr. Henderson, was not aware of Appellant's TR. The TR does not indicate that Agency managers Mr. MacNeill and Mr. Ward consulted with Mr. Henderson. *See* Exhibit 9, Declaration of Dan Henderson. Nevertheless, Appellant can only assume that because he received a low grade, Mr. Henderson, who was in the same room monitoring another student's evaluation, must have influenced his evaluator, Mr. Taylor. But Appellant has presented no actual evidence to show Mr. Henderson actually performed Appellant's third evaluation or how he *influenced* Mr. Taylor. Mr. Henderson might have assisted Mr. Taylor in

discussing point deductions, but this was allowed per the grading guidelines, and the record shows Mr. Taylor was the sole grader. Appellant also claims that Mr. Henderson's interrupted "substantially" during Mr. Taylor's out-briefing during his discovery response, but in fact

* * *

19-1712

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HAROLD E. RUTILA IV,

Petitioner

v.

DEPARTMENT OF TRANSPORTATION,

Respondent

PETITION FOR REVIEW FROM THE
MERIT SYSTEMS PROTECTION BOARD IN
DC-1221-18-0474-W-1
A.J. KASANDRA ROBINSON STYLES

REPLY BRIEF OF PETITIONER HAROLD E. RUTILA IV

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Petitioner *In Pro Se*
November 15, 2019

* * *

violate these rules. AMA-505 was the office to which Rutila's evaluators belonged, and was the owner of this document. This information, therefore, was binding on the evaluators as they measured Rutila's performance in his PAs. The document's inherent cross-reference to Order 7110.65 as a "standard used to measure trainees' performance" should cause this Court to construe both the document and Order 7110.65 as agency rules. They contained expectations of trainees including their duties, standards of conduct, and behavior.

F. Rutila's purported waiver of his hearing right was not clear, unequivocal, decisive, informed, knowing, voluntary, or intelligent.

The idea that Rutila could have entered into a knowing, voluntary, and intelligent waiver of his rights to a hearing is negated by substantial evidence concerning the events immediately preceding the Board's prehearing conference.

To begin, the prehearing conference was held on Friday, October 26, 2018 at 1:00 P.M. Appx1062. The Summary of Telephonic Status Conference was issued by the AJ the same day, October 26, 2018 at 2:01 P.M. Appx2632. The hearing was scheduled for Monday, October 29, 2018 at 9:00 A.M. Appx1062.

The FAA argues that because Rutila failed to contest one sentence in the AJ's Summary of Prehearing Conference, he "cannot complain now that he involuntarily waived his right to a hearing." Response at 65.

But Rutila never waived, involuntarily or otherwise, his hearing right. In its response, FAA has not provided any evidence of a waiver. There is, however, substantial evidence that Rutila, who was a *pro se* appellant, was faced with procedural pressures during the merits stage of his appeal which can be best described as substantial and inappropriate. There is perhaps no better example of this than the content of Rutila's motion to postpone his hearing, filed October 26, 2018. Appx2569-2571. Among other things, he explained

> I cannot reasonably be ready for a hearing on October 29th. I have spent six days preparing and filing a motion to compel. That motion was due on the same date as my prehearing submissions. The total expenditure of time I spent on those items combined is approximately 40 hours across 6 days. During that same period of time I also had to work. I am now left with five more days to prepare for the hearing, without even knowing what the result of my outstanding motions will be.

Id. He further explained, "The Board gave me six days to file a motion to compel, which is four days less than the regulations provide." *Id.* (citing App'x 1062), *compare with* 5 C.F.R. § 1201.73(d)(3). The FAA's argument is that Rutila should have contested the AJ's Summary of Prehearing Conference to allow the Board to be "made aware" of Rutila's contention. This is, frankly, absurd. It is not Rutila's responsibility to inform the AJ of the Board's legal responsibilities prescribed in the judges' handbook.

An order the AJ filed concurrently with her summary provided Rutila with 14 days to file an "informal brief," the rules and standards of proof for which do not exist. Any time Rutila had in the wake of this nightmare would necessarily be spent complying with the AJ's order to produce an "informal brief." Rutila was not equipped to research the merits of the two options the AJ presented in her ultimatum, establish the bevy of case law which unequivocally supports his hearing right, file it in a brief, and pray the AJ saw it before the close of business. Therefore, FAA's position is wholly unreasonable.

The Supreme Court has addressed questions of waivers of rights using traditional common-law principles. In the case of constitutional rights, the Supreme Court has established a standard whereby a waiver is permitted where entry into it is "knowing, voluntary and intelligent." *Johnson v. Zerbst*, 304 U.S. 458, 462-69 (1938). In the case of written waivers of rights to sue the federal government, this Court has held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement." *Newton v. Rumery*, 480 U.S. 386, 392 (1987). Here, there is no waiver from Rutila on the record.

Rutila has already addressed that his purported waiver was not voluntary. *See* Formal Brief at 58. That the purported waiver was neither knowing nor intelligent is rather evident. There is no rational basis for which Rutila could have waived his right to a hearing; specifically, Rutila obtained no substantial benefit. *Cf.*

McCall v. Postal Service, 839 F.2d 644, 666 (Fed. Cir. 1988). Rutila was thrust into a briefing structure on the merits of his case which were not established by MSPB law, rule, or regulation.

Rutila acted very reasonably in the lead up to the prehearing conference. Having already noted that the hearing deadline was fast approaching without the appropriate pre-hearing matters having been completed, he moved on October 25, 2018 to extend the hearing. The FAA, in bad faith, opposed the motion, and the AJ subsequently denied it. The onus is on the FAA to demonstrate how the AJ's ultimatum was legal, and how she arrived at her conclusion that Rutila waived his hearing right. There is no evidence, signed or otherwise, which establishes that Rutila made a clear, unequivocal, decisive, and informed action to waive his hearing right. *See Campbell v. Dep't of Defense*, 102 M.S.P.R. 178, ¶ 5 (MSPB 2006). Nor is there any evidence to demonstrate the AJ "fully apprised" Rutila "of the relevant adjudicatory requirements and options in his case." *Id.*

The FAA does not refute that there was an ultimatum; it merely suggests Rutila provides no evidence that the AJ coerced "his waiver." The options presented during that Friday conference were to have a hearing on Monday, with literally *zero* business days' notice, or to elect to brief the case "on paper." Neither choice is consistent with federal law or MSPB regulations.

Put simply, as the Congress has established MSPB appellant's rights to a hearing, and the MSPB

acknowledges this in its judges' handbook, there is a clear harm to public policy when an AJ arbitrarily and coercively retracts that right on made-up grounds which themselves make no sense. This Court should consider the inherent illogic of the AJ's expectations, where she demanded Rutila file two briefs – "initial" and "formal," the procedures for which remain unknown – prior to the close of the evidentiary record. While MSPB rules do permit decisions based only "on the record," this requires the record to be complete, something the FAA also does not address in its Response. Here, the record would not even close until *seven days* after Rutila filed his "initial arguments."

G. Rutila has made a showing that the AJ's denial of his discovery and subpoena motions was clear and prejudicial.

FAA argues that Rutila "fails to demonstrate any abuse of discretion" in the board's denial of his motion to compel discovery. Response at 57 (citing *Curtin v. Office of Personnel Management*, 846 F.2d 1373, 1379 (Fed. Cir. 1988)). Rutila has already provided sufficient detail for this Court to conclude there was a significant abuse of discretion. Formal Brief at 55-57. The most pressing and relevant one is that the AJ summarily denied the motion basing it solely on "the reasons provided by the agency in its motion in opposition." Appx2636. As Rutila explained in his motion for interlocutory review, which followed the AJ's ruling:

> Since [the AJ's] position contradicts the Board's own handbook and the established discovery rules

> of the federal court, there is good reason to believe there is substantial ground for a difference of opinion.

Appx2645. Rutila also explained why the denial of his discovery and subpoena requests was prejudicial. *See id.* Next, the AJ summarily denied Rutila's subpoena request on two grounds:

> [I]t was unclear whether this was actually a motion to compel discovery. . . . The appellant's motion . . . did not address the agency's refusal to provide him with any documents or other evidence identified in the subpoena request.

Appx2635. FAA now tries to re-invent the AJ's stated reasoning by arguing:

> The board denied his motion because Mr. Rutila failed to demonstrate . . . that he had requested from the FAA the same documents and evidence that he was seeing from Mr. Henderson . . . and that the FAA had refused to provide such documents or evidence.

Response at 67. The FAA's explanation does not match the AJ's own words. Appx1007. FAA's refusal to provide documents, where the subject of a subpoena is not the FAA, is an inappropriate standard of review. Appx2645-2646.

Other matters that are not addressed are that FAA had itself requested a subpoena of Dan Henderson. Appx1008. Despite that the AJ never ruled on it, and the FAA subsequently never pursued it, Rutila nevertheless had every right to seek Henderson's

subpoena. Henderson would later be named as a witness for the agency. Appx1069. As Henderson was the subject of Rutila's IRA appeal and was now retired from the agency, he was expected to have custody and control of documents that were relevant to the case. Appx1007. Finally, Rutila explained in his motion for interlocutory review that FAA claimed to have obtained factual information used to answer Rutila's discovery requests from Henderson himself. Rutila was, therefore, entitled to review whatever information Henderson had about this case before the hearing.

Respectfully submitted,

DATED: November 15, 2019

/s/ Harold E. Rutila IV

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Course 50046 – Tower Performance Assessment (PA) Briefing

Purpose:

The purpose of the PA Briefing is to explain the logistics of the Initial Tower Cab.

Schedule:

AMA-513 has scheduled time for the Tower Cab PA Briefing on the last day of labs (Day 34). Unless otherwise coordinated, the briefing should start at approximately 1445.

Procedure:

Introduce yourself and your position. Explain that this briefing will cover the logistics of the PA days.

General Information:

Evaluator Information:

- Evaluators are members of AMA-505B or are AMA-513 instructors. They are all certified to evaluate student performance.
- Students will have a different evaluator for each scenario.

PA Logistics:

- Students will be evaluated on two local control and two ground control scenarios over the course of three days.
- The PA schedule will be posted the morning of the first PA.

- The first run usually begins at approximately 1130 on Day One, and at approximately 0745 on Days Two and Three.
- Students must be outside of their assigned lab five minutes prior to the scheduled run time.
- Failure to be available for the PA scenario will result in a score of "0" for that scenario.
- Once the lab is set-up by the evaluators and remote pilot operators, the students will be invited into the lab.
- The Students must not bring anything into the lab other than a headset and pens. Paper (blank pages, spiral bound, and tablets of paper) will be available in the lab. Additionally, if the students prefer to use a clipboard, those will be available in the lab.

Scenario Process:

- You will be asked one time to let the Evaluator know when you are ready to begin the Performance Assessment scenario.
- The scenario will start after both students state that they are ready to begin.
- Failure to be "ready" in time for the run to be completed within the scheduled time parameters will result in a score of "0" for that scenario.
- The scenario will run for 30 minutes and then be paused. The scenario must be a minimum of 30 minutes in length. Anything less is not a

valid run and must be restarted or rescheduled.

- If the lab equipment fails or other issues prevent the completion of a full 30 minute run, the scenario will be restarted or rescheduled at the discretion of FAA QA or Management personnel. In general, if the lab can be rebooted, another scenario loaded, and a 30 minute scenario completed within the scheduled time for that PA run, we will restart the run. If there is not enough time left to complete a full 30 minute run within the scheduled time slot, we will reschedule the run for a later time slot.
- After the 30 minute run, the scenario will be paused and the students will be asked to step outside of the lab while the evaluators complete the documentation for that run. Do not "clean up" the position prior to stepping out of the lab at the conclusion of the scenario. Leave the position exactly the way it is at the conclusion of the scenario. The evaluators will clean up the lab and ready it for the next run.

Debrief Process:

- Each evaluator will call the student(s) back in to the lab and debrief them on everything that was recorded on the form and ask them to sign the document. The signature does not mean that you agree with the score, only that the items documented on the form have been discussed.

- Any modification/strikethroughs must be initialed by student and evaluator.
- Evaluators may debrief students together or separately.

Evaluation Standards and Forms

- The standards used to measure performance are FAA JO7110.65, course 50046 materials and specific outcomes.
- AMAFM-50046-2 and AMAFM-50046-7 are used to record all errors.

End the briefing.

NOTE: Do not teach the students how to run the scenarios, reveal what events occur, or how many operations are contained within the scenarios. If they have specific questions on how to conduct an operation, direct them to their Class Lead.

United States Government Accountability Office

GAO Report to Congressional Committees

November 2016

WHISTLEBLOWER PROTECTION

Additional Actions Would Improve Recording and Reporting of Appeals Data

Congress relies on MSPB's annual reports on the number of appeals received and the outcome of appeals alleging violations of whistleblower protection laws to help examine WPEA's effectiveness and to identify unintended consequences of the legislation. MSPB, with improved reporting processes, has an opportunity to better assist Congress.

Subject Matter Specialists Said Granting MSPB Summary Judgment Authority Could Create Efficiencies, but Could Also Deny Employee Whistleblowers' Right to a Hearing

What is summary judgment?

Summary judgment authority is a procedural device used when there is no dispute as to the material facts of the case, and a party is entitled to judgment as a matter of law and the responsibility of the court.

Who has summary judgment authority?

Other federal adjudicatory bodies, such as the Equal Employment Opportunity Commission (EEOC) and the Federal Labor Relations Authority, have summary judgment authority. According to EEOC officials we met with, summary judgment is frequently used at EEOC as a vetting process to determine whether or not a hearing will be held after the record has been developed. They also stated that summary judgment is used as a case management tool and its advantages include eliminating the need for a hearing.

Source: GAO. | GAO-17-110

Generally, the subject matter specialists who participated in our focus groups had mixed views as to whether MSPB's authority should be expanded. Some strongly supported expanding MSPB's authority, while others strongly opposed it. Focus group participants said that granting MSPB summary judgment may be advantageous for involved agencies and MSPB because greater efficiencies may be gained (see sidebar). However, in doing so, employee whistleblowers could lose their right to a hearing, which some participants said represents a disadvantage to employee whistleblowers.

Focus group participants in favor of summary judgment for MSPB stated that it would be advantageous for involved agencies and MSPB because it would create greater efficiencies. They said that involved agencies would not have to engage in an exhaustive, extensive process when the facts do not warrant it if

MSPB had summary judgment authority. One participant stated that having summary judgment would separate valid complaints from meritless complaints that may not have any facts in dispute, such as employees who are shielding themselves from misconduct they actually committed. Another participant said that involved agencies would delay making settlement decisions until summary judgment rulings were made instead of currently settling cases agencies deemed meritless to save agency resources.

Participants also told us that MSPB could gain greater efficiencies from summary judgment because it could potentially decrease the number of appeals for which administrative judges would conduct hearings, thus allowing administrative judges to issue decisions on additional appeals, reducing potential backlogs, and resolving cases sooner. As a result, MSPB could conserve time and resources in the long term. One participant proposed a 5-year pilot to determine and measure the efficiency of summary judgment on affected parties.

On the other hand, focus group participants opposing summary judgment for MSPB said that a motion for summary judgment may not resolve whistleblower cases any faster because it would require more discovery, depositions and documents to establish the disputed facts thereby creating more prehearing litigation work.[34] In addition, they said that while MSPB's

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[34] Discovery documentation primarily includes depositions of parties and potential witnesses, written interrogatories

current caseload may decrease in the short term, MSPB may spend more time dealing with appeals of unfavorable summary judgment decisions. They explained that this could lead to prolonged litigation, thereby eliminating any potential efficiency gained by MSPB. Participants also discussed MSPB's ability to dismiss cases under its jurisdictional test, noting that this process is like a summary judgment review. However, one participant distinguished MSPB's current jurisdictional test from summary judgment because the jurisdictional test only involves the whistleblower, not the agency, and only reviews whether the whistleblower has exhausted his or her administrative remedies and can establish the jurisdictional requirements for MSPB review. Three participants pointed out the small number of appeals that are currently adjudicated on the merits as an example of MSPB's current efficiency in using its jurisdictional test. Adding summary judgment authority to MSPB, according to another participant, would not only be duplicative but would also create two barriers for a whistleblower's case to move forward.

Focus group participants not in favor of granting summary judgment to MSPB also stated that doing so could unfairly erode employee whistleblowers' right to a hearing. They explained that the procedural nature of responding to a summary judgment motion may include legal technicalities that employee whistleblowers, who choose to represent themselves without legal

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(questions and answers written under oath), written requests for admissions of fact, and requests for production of documents.

counsel, may not understand. Specifically, they stated that summary judgment may be too complicated a legal tactic to master for the average employee whistleblower, who may be confused about the burden needed to overcome a summary judgment motion. For example, employee whistleblowers may lack legal expertise to properly complete required paperwork to address the motion for summary judgment. Conversely, agency attorneys who represent the involved agencies' position in whistleblower appeals may be better positioned to draft sophisticated briefs and well-prepared affidavits to which employee whistleblowers would be unable to respond—a scenario that focus group participants believe favors involved agencies.

One participant said that involved agencies already win a majority of the appeals at MSPB, and if summary judgment were granted, the odds of employee whistleblowers prevailing against an agency's motion would be nonexistent. The participant stated that the current process is already an uneven playing field. Another participant explained that proving retaliatory intent by the agency for whistleblowing may be too difficult to achieve where the employee whistleblower must rely on submitting a brief and documents to support the employee's allegations rather than a hearing. In addition, focus group participants cited the additional costs of conducting discovery as another potential disadvantage for employee whistleblowers. Conducting discovery includes gathering documentation and conducting depositions to establish disputed

facts in order to draft motions required for summary judgment.

Subject Matter Specialists Said Granting U.S. District Courts Jurisdiction Would Increase Overall Caseload, but Would Also Aid Employee Whistleblowers

Focus group participants generally agreed that it would be beneficial for employee whistleblowers if U.S. District Courts were granted jurisdiction for whistleblower cases. They said that this would give whistleblowers access to a jury trial similar to nonfederal employee whistleblowers.[35] One participant pointed out that a double standard already exists because corporate whistleblowers can go to district court while federal employee whistleblowers are unable to do so. Another participant stated that it would be a good idea to get federal employee whistleblower cases into district court because the only option typically available to get into federal court is on appeal to the U.S. Court of Appeals for the Federal Circuit, which this participant said overwhelmingly upholds the Board's

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[35] Examples of nonfederal employee whistleblowers cited by focus group participants include private sector employees covered under Sarbanes-Oxley, as well as state and local employees who have access to jury trials for First Amendment violations. Specifically, the Sarbanes-Oxley Act of 2002 contains protections for corporate whistleblowers from retaliation for reporting alleged mail, wire, bank, or securities fraud; violations of Security and Exchange Commission rules and regulations; or violations of federal law relating to fraud against shareholders.

decisions.[36] This participant also said that it would be more feasible for federal employees to go to district court for a full review of their claims rather than to appeal to the U.S. Court of Appeals for the Federal Circuit, which has a limited scope of review.[37] Another participant explained that adding additional procedural options for employee whistleblowers, such as district court, could help strengthen the law.

[36] WPEA temporarily permitted whistleblower reprisal appeals at all U.S. Circuit Courts.

[37] The U.S. Court of Appeals for the Federal Circuit reviews the record and sets aside MSPB actions, findings or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law; or unsupported by substantial evidence. 5 U.S.C. § 7703(c).