[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-14771

Non-Argument Calendar

CHARLES E. ABRAHAMSEN,

Petitioner,

versus

UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS,

Respondent.

Petition for Review of a Decision of the
Merit Systems Protection Board
Agency No. AT-1221-17-0435-W-3

(Filed Nov. 16, 2021)

Before JORDAN, BRANCH, and BLACK, Circuit Judges.

PER CURIAM:

Charles Abrahamsen petitions for review from the decision of an administrative judge of the Merit Systems Protection Board (MSPB) denying Abrahamsen's request for corrective action in a Whistleblower Protection Act (WPA) case brought under 5 U.S.C. § 2302(b)(8)-(b)(9). Abrahamsen raises two issues in his petition: (1) the MSPB erred by ignoring Abrahamsen's disclosures of abuse of authority and substantial and specific danger related to bullying in the healthcare setting, and (2) the MSPB erred by applying the wrong legal standard to Abrahamsen's disclosures of substantial and specific danger to public health and safety. For the reasons detailed below, we deny Abrahamsen's petition.

I. BACKGROUND

On May 3, 2016, Abrahamsen filed a complaint with the Office of Special Counsel (OSC) alleging that the Department of Veterans Affairs, specifically his supervisor at Bay Pines VA Healthcare System, Dr. Patricia Baumann, retaliated against him for making six protected disclosures on various dates over a four-year period from 2013 to 2016.

In Disclosure A, Abrahamsen alleged his disclosure was "[t]hat it was [his] decision when to operate on a hip fracture on a weekend or holiday. That if [he] believed it endangered a patient's safety to wait until normal business hours, [he] would operate after hours." This disclosure took place on September 3, 2013, the day after Abrahamsen performed an operation on the

Labor Day holiday, when Baumann pulled Abrahamsen aside to tell him, "[y]ou have to stop operating on weekends. We could get dinged." This disclosure also identified another incident on September 12, 2013, where Abrahamsen and Baumann had a disagreement witnessed by other employees concerning consulting a hospitalist for a medication assistance. Abrahamsen alleged these incidents evidenced both abuse of authority and substantial and specific dangers to public health or safety.

In Disclosure B, Abrahamsen alleged his disclosure was "[t]hat there is scientific evidence that spinal anesthesia is safer than general anesthesia for total knee and hip replacements." This disclosure took place on July 10, 2014, when Abrahamsen told Dr. Dubravka Jovanovic, an anesthesiologist, that he had requested spinal anesthesia for a patient. After a disagreement, Jovanovic "stormed out of the room," and another anesthesiologist had to supervise the surgery. Abrahamsen believed Jovanovic then went to Baumann to complain about the incident. Abrahamsen alleged this incident evidenced a substantial and specific danger to public health or safety.

In Disclosure C, Abrahamsen alleged his disclosure was "[t]hat veterans receiving total knee and hip replacement surgery were all being done under general anesthesia." This disclosure took place on March 12, 2015, at a Morbidity and Mortality (M&M) Conference where Abrahamsen presented evidence that spinal anesthesia was safer than general anesthesia, with less risk of surgical site infection. Abrahamsen

presented this evidence because one of the presentations on that date was a patient of Baumann who developed a surgical site infection after a total knee replacement. Abrahamsen represented that after an investigation of that patient's case, an email was sent on April 9, 2015, confirming that "100% of the total knee and total hip replacements at Bay Pines were being done under general anesthesia." Abrahamsen alleged this incident evidenced a substantial and specific danger to public health or safety.

In Disclosure D, Abrahamsen alleged his disclosure was that he "presented scientific evidence that there is a 5-fold increased incidence of stroke when a total hip or knee replacement is performed under general anesthesia." This disclosure took place on April 14, 2016, at a M&M Conference where Abrahamsen presented this evidence in response to a case presented of a patient who died from a stroke after a total hip replacement performed by Baumann. Abrahamsen alleged this incident evidenced a substantial and specific danger to public health or safety.

In Disclosure E, Abrahamsen alleged his disclosure was his "concern of unnecessary general anesthesia being performed on a veteran." This disclosure took place on September 17, 2013, during morning rounds when Baumann was working on a consent for surgery for the reduction of a dislocated shoulder and Abrahamsen asked Baumann, "any consideration for a shoulder CT scan?" Abrahamsen's intent was to suggest more information was needed before subjecting a patient to a potentially unnecessary general anesthetic.

This caused Baumann to lose her temper and blow up at Abrahamsen, saying "[d]o you want to take over the care of this patient?" Baumann then turned her back on Abrahamsen and finished the consent for surgery. Abrahamsen alleged this incident evidenced an abuse of authority and a substantial and specific danger to public health or safety.

In Disclosure F, Abrahamsen alleged his disclosure was "his concern that chest x-rays must be ordered and performed, with the accompanying radiation exposure, on all veterans preoperatively, even when they are unnecessary." This disclosure took place on July 23, 2014, to Dr. Edward Hong, who responded "I don't think that's a battle worth fighting." Abrahamsen believes Hong's response and lack of action were related to Baumann's frequent retaliation with personal attacks and her inability to control her temper. Abrahamsen alleged this incident evidenced an abuse of authority and a substantial and specific danger to public health or safety.

Abrahamsen alleged Baumann took various actions against him in reprisal for the protected disclosures, specifically that she extended his Focused Professional Practice Evaluation period, issued written counseling statements, and changed his job duties and working conditions by precluding him from performing certain surgeries. On February 15, 2017, the OSC notified Abrahamsen that it was terminating its investigation into his complaint and provided him with appeal rights to the MSPB.

Abrahamsen then filed an individual right of action (IRA) appeal to the MSPB, citing the same six disclosures. After engaging in discovery, the MSPB held a six-day hearing with 13 witnesses. In a thorough 32-page decision issued after the hearing, the MSPB determined that Abrahamsen failed to establish a *prima facie* case for whistleblower reprisal because none of his disclosures were protected under the WPA. Rather, Abrahamsen's disclosures "constitute mere observations, questions, arguments, or disagreements with management policies, positions, or practices, without an accompanying showing that such matters constitute a report of wrongdoing of the type specified by the statute." The MSPB found Abrahamsen had not established that the disclosures were protected by disclosing a substantial and specific danger to public health and safety or by showing an abuse of authority. Abrahamsen filed a petition for review in this court on December 23, 2020.

II. STANDARD OF REVIEW

In the past, this Court had jurisdiction over petitions for review in "mixed" cases where whistleblower claims were coupled with discrimination claims. *See Kelliher v. Veneman*, 313 F.3d 1270, 1274 (11th Cir. 2002). The U.S. Court of Appeals for the Federal Circuit had exclusive jurisdiction over petitions for review of MSPB decisions that involved only whistleblower claims. *Id.*; 5 U.S.C. § 7703(b) (effective Oct. 30, 1998). This changed when Congress passed the Whistleblower Protection Enhancement Act (WPEA), Pub. L.

No. 112-199, § 108(a), 126 Stat. 1465 (2012) (codified as amended at 5 U.S.C. § 7703(b)(1)). In 2012, Congress, through the WPEA, expanded this jurisdiction to include "any court of appeals of competent jurisdiction." 5 U.S.C. § 7703(b)(1)(B). The WPEA did not amend the standard of review provided in 5 U.S.C. § 7703(c), which applies to "any case filed in the United States Court of Appeals for the Federal Circuit."

This Court previously determined that nondiscrimination claims in mixed cases should be reviewed under the same deferential statutory standard of § 7703(c). *See Kelliher*, 313 F.3d at 1275. Under § 7703(c), we review "only to ensure that the [MSPB's] determination is (1) not arbitrary or capricious, (2) [not] made without regard to law, or (3) not based on substantial evidence." *Id.* at 1276. We do not substitute our judgment for that of the MSPB, but rather only seek to ensure the decision was "reasonable and rational," and "[w]e do not re-weigh or re-examine the credibility choices made by the fact finder." *Id.* at 1276-77. We use that same § 7703(c) standard in this case and rely on caselaw from the Federal Circuit.

III. DISCUSSION

The WPA provides a federal agency cannot take "a personnel action with respect to any employee" because of the employee's disclosure of information that the employee reasonably believes evidences "an abuse of authority, or a substantial and specific danger to public health or safety," which the statute protects. 5 U.S.C. § 2302(b)(8)(A)(ii). To establish a *prima facie*

case of reprisal for whistleblowing, Abrahamsen had the burden to establish (1) the acting official had the authority to take any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take, or refuse to take, a personnel action; and (4) the protected disclosure was a contributing factor in the agency's personnel action. *Chambers v. Dep't of the Int.*, 602 F.3d 1370, 1376 (Fed. Cir. 2010) (*Chambers III*).

The MSPB determined that Abrahamsen failed to establish the second factor—that any of his six disclosures were actually protected disclosures. To prevail on a claim under the WPA, Abrahamsen must show he disclosed information he reasonably believed "evidences (i) a violation of law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *Chambers v. Dep't of the Int.*, 515 F.3d 1362, 1367 (Fed. Cir. 2008) (*Chambers II*). Abrahamsen must prove by a preponderance of the evidence that he made a protected disclosure. *Chambers III*, 602 F.3d at 1376-77. Abrahamsen asserted he reasonably believed his disclosures evidenced both an abuse of authority and a substantial and specific danger to public health or safety.

A. Whether the MSPB erred by ignoring Abrahamsen's disclosures of bullying in the healthcare setting.

Abrahamsen contends the MSPB ignored his disclosures of abuse of authority and substantial and specific danger related to bullying in the healthcare setting when it found that his weekend surgery disclosure (Disclosure A) was not statutorily protected. He asserts he detailed these disclosures in his claims before the OSC, his submissions to the MSPB, during his hearing, and in closing argument.

Specifically, Abrahamsen contends:

> Abrahamsen explained in his OSC Complaint (Discl. A, Part 4) the personnel actions started with a memo, which was the counseling with a threat. In his submissions to the OSC, Abrahamsen provided his memo to Wright, the Chief of Surgery, on September 13, 2013 detailing bullying and intimidating behavior from Baumann toward Abrahamsen and other staff. Statements and other documents provided enough clarity and precision for the OSC to recognize Abrahamsen's complaint of "bullying and intimidating behavior" as a basis for Abrahamsen's request for corrective action. As reflected in the OSC's closure letter, Abrahamsen exhausted the part of Disclosure A directed towards Baumann's abuse of authority related to bullying: "Subsequently, you filed a complaint with Chief of Surgery Dr. Terry Wright about Dr. Baumann's alleged bullying and intimidating behavior toward you and other staff members, which you also believe to have been part of a retaliatory

> hostile work environment." That same evidence showed that the bullying in the healthcare setting was a substantial and specific danger to health and safety.

Abrahamsen contends the MSPB "completely ignored" this evidence of bullying.

Abrahamsen argues the MSPB erred by failing to consider certain evidence concerning the purported bullying behavior by Baumann, including a September 13, 2013, letter that identified three specific incidents. The fact the MSPB did not recount Abrahamsen's arguments as thoroughly as Abrahamsen would have preferred does not mean the MSPB did not sufficiently consider them. *See Snyder v. Dep't of Navy*, 854 F.3d 1366, 1373 (Fed. Cir. 2017). As to Disclosure A, the MSPB determined Abrahamsen's statement to Baumann that it was his call when to operate on a hip fracture was "in the nature of a mere disagreement with his supervisor's statement that he needed to stop operating on hip fractures on the weekends." The MSPB detailed much of Abrahamsen's evidence relevant to this disclosure, concluding the disclosure could not reasonably be seen as Baumann forbidding Abrahamsen from doing emergency surgeries on the weekends. The MSPB concluded Abrahamsen did not make a protected disclosure by disagreeing with Baumann on this basis. The MSPB also determined Abrahamsen's contention of potential future harm to patients based on Disclosure A "to be purely speculative." The MSPB specifically determined Disclosure A did not constitute a substantial and specific danger to public health and

safety and did not constitute an abuse of authority by Baumann with regard to the statement. Although the MSPB did not specifically identify each incident of bullying, the MSPB's overall findings regarding the protected nature of the disclosure cover those incidents. *See id.*

The MSPB's decision as to Disclosure A was not arbitrary or capricious, was not made without regard to law, and was based on substantial evidence. Therefore, we deny Abrahamsen's petition as to this issue.

B. Whether the MSPB erred by applying the wrong legal standard to Abrahamsen's disclosures of substantial and specific danger to public health or safety and whether substantial evidence supports the MSPB's decision.

Abrahamsen contends the MSPB erred by applying the wrong legal standard of substantial and specific danger to his anesthesia-related disclosures (Disclosures B-D). However, his arguments on this issue focus on the MSPB's weighing of the evidence. The MSPB applied the "reasonable belief" test and the *Chambers* factors to Abrahamsen's disclosures of substantial and specific danger. *Lachance v. White*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999); *Chambers II*, 515 F.3d at 1369; *Chambers III*, 602 F.3d at 1376.

The MSPB "must look for evidence that it was reasonable to believe that the disclosures revealed misbehavior described by section 2302(b)(8)." *Lachance*, 174 F.3d at 1380. The test is: "could a disinterested

observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees." *Id.* at 1381.

A "variety of factors" help "determine when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA." *Chambers II*, 515 F.3d at 1369. First is the likelihood of harm resulting from the danger—"[i]f the disclosed danger could only result in harm under speculative or improbable conditions, the disclosure should not enjoy protection." *Id.* Another factor is when the alleged harm may occur—"[a] harm likely to occur in the immediate or near future should identify a protected disclosure much more than a harm likely to manifest only in the distant future." *Id.* Also important is the nature of the harm—"the potential consequences." *Chambers III*, 602 F.3d at 1376. Further, a disclosure may be protected if it disclosed harm that has already occurred. *Id.*

Abrahamsen cites the *Chambers* cases throughout his argument on appeal, and while he does not cite *Lachance*, he does not argue the "reasonable belief" test was incorrectly used. Thus, we will review the MSPB's decisions regarding Disclosures B-D to see if they are supported by substantial evidence. *See Kelliher*, 313 F.3d at 1276.

As to the anesthesia-related disclosures, the MSPB discussed various medical journal articles

submitted by Abrahamsen and testimony by Abrahamsen and other Bay Pines medical personnel. While the medical literature generally supported Abrahamsen's claim that general anesthesia is associated with an incidence of various potentially serious complications, including stroke, there was not dispute that the overall risk of such complications was "very, very low." Thus, even in a situation where a patient was about to undergo surgery with general anesthesia, there was a low "likelihood of impending harm," and the harm was not "likely to result in the reasonably foreseeable future." *See Chambers III*, 602 F.3d at 1376; *Chambers II*, 515 F.3d at 1369. Additionally, the evidence showed that Abrahamsen merely assumed other surgeons were not using spinal anesthesia when performing total knee and hip replacement surgeries at Bay Pines, when testimony proved otherwise. Thus, Abrahamsen did not have a reasonable belief that all total knee and hip replacements were being performed under general anesthesia as the facts known to or reasonably ascertainable to him showed the statement was incorrect. *See Lachance*, 174 F.3d at 1381. Further, the general statements of scientific evidence at the M&M conferences did "not constitute an allegation of wrongdoing sufficient to constitute a protected disclosure." *See Chambers III*, 602 F.3d at 1376. And, as to the specific patients discussed at the M&M conferences, there was no evidence of a causal correlation between the use of general anesthesia and the patients' negative outcomes. *See id.*

Because there was no dispute that using general anesthesia for such procedures met the accepted standard of care in the orthopedic community, the MSPB declined to find that Abrahamsen made a protected disclosure of a substantial and specific danger to public health or safety. This conclusion on Disclosures B-D was supported by substantial evidence, was not arbitrary or capricious, and applied the correct law. *See Kelliher*, 313 F.3d at 1276.

IV. CONCLUSION

The MSPB's decision was not arbitrary or capricious or made without regard to law and was based on substantial evidence. Therefore, we deny Abrahamsen's petition for review.

PETITION DENIED.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES E. ABRAHAMSEN, Appellant,
DOCKET NUMBER AT-1221-17-0435-W-3

v.

DEPARTMENT OF VETERANS AFFAIRS, Agency.

DATE: January 15, 2021

ERRATUM

In the initial decision issued in this appeal on September 21, 2020, the last sentence of the first paragraph of the decision at the top of page 2 stated, "For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction." The decision is hereby corrected to read, "For the reasons set forth below, the appellant's request for corrective action is DENIED." Likewise, the last sentence of the first full paragraph on page 28 of the decision stated, "Accordingly, the appeal must be dismissed for lack of jurisdiction." The decision is hereby corrected to read, "Accordingly, the appellant's request for corrective action must be denied." Finally, the last sentence of the decision prior to the signature line on page 28 stated, "The appeal is DISMISSED." The decision is hereby corrected to read, "The appellant's request for corrective action is DENIED."

FOR THE BOARD: /S/
Gregory S. Prophet
Administrative Judge

CERTIFICATE OF SERVICE

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

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January 15, 2021	/S/
(Date)	Gregory S. Prophet Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

CHARLES E. ABRAHAMSEN, Appellant,
DOCKET NUMBER
AT-1221-17-0435-W-3

v.

DEPARTMENT OF VETERANS AFFAIRS, Agency.

DATE: September 21, 2020

Joseph D. Magri, Tampa, Florida, for the appellant.

Andrew James Patch and Tanya Burton, Tampa, Florida, for the agency.

BEFORE
Gregory S. Prophet
Administrative Judge

INITIAL DECISION

The appellant filed this Individual Right of Action (IRA) appeal on April 21, 2017, alleging that the agency retaliated against him for making protected disclosures by taking various alleged personnel actions against him. Appeal File (AF W-1), Tab 1.[1] Because I

[1] The appeal was dismissed without prejudice on two occasions; thus, there are three appeal files for this matter with corresponding docket numbers. Accordingly, for ease of reference, these files will be referred to as follows in this decision: Docket No. AT-1221-17-0435-W-1 (AF W-1); AT-1221-17-0435-W-2 (AF W-2); AT-1221-17-0435-W-3 (AF W-3).

determined that the appellant made a nonfrivolous allegation of Board jurisdiction over his appeal, I granted his request for a hearing. The hearing was held via videoconference on April 23-25, May 3, and June 24-25, 2019. For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction.

ANALYSIS AND FINDINGS

Factual and Procedural Background

The appellant, Dr. Charles Abrahamsen, M.D., an experienced orthopedic surgeon, began working for the Bay Pines VA Healthcare System as a physician in the Orthopedic Surgery Section at the Bill Young VA Medical Center in Bay Pines, Florida (hereinafter "Bay Pines"), in the summer of 2013. Hearing Transcript (HT) Vol. 1, Testimony of Appellant at 16.[2] The appellant worked in private practice for approximately 27 years prior to coming to work at Bay Pines. *Id*. At all times relevant to this appeal, the appellant's immediate supervisor was Dr. Patricia Baumann, D.O., Chief of the Orthopedics Section at Bay Pines. *Id*.

On May 3, 2016, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency, specifically, Dr. Baumann, retaliated against

[2] The hearing transcript is contained in six volumes, one for each day of the hearing in this appeal, and is referenced as follows throughout this decision: April 23, 2019 (Vol. 1), April 24, 2019 (Vol. 2), April 25, 2019 (Vol. 3), May 3, 2019 (Vol. 4), June 24, 2019 (Vol. 5), and June 25, 2019 (Vol. 6). Volume 4 of the transcript taken on May 3, 2019, was erroneously labeled by the court reporter as April 26, 2019.

him for making six protected disclosures on various dates over a four-year period from 2013 to 2016. AF W-1, Tab 5 at 12-42. The appellant's complaint alleged that Dr. Baumann took various actions against him in reprisal for these disclosures; namely, that she extended his Focused Professional Practice Evaluation (FPPE) period, issued two written counseling statements to him, changed his job duties and working conditions, and generally subjected him to a hostile work environment. *Id*. On February 15, 2017, OSC notified the appellant via letter that it was terminating its investigation into his complaint and providing him with appeal rights to the Board. AF W-1, Tabs 1, 6 at 135. This appeal followed.

The appellant's first alleged disclosure occurred on September 3, 2013, during a conversation between he and Dr. Baumann concerning a surgery to repair a hip fracture that the appellant had performed the previous day, which was the Labor Day holiday. [Disclosure A in OSC complaint].[3] AF W-1, Tab 5 at 19. The appellant alleged in his OSC complaint that the day after the surgery, Dr. Baumann pulled him aside following their morning rounds and told him that he needed to stop operating on weekends because "we could get dinged." *Id*. The appellant testified that he responded to Dr. Baumann "that's my call" as the attending physician when to operate on a hip fracture, and that Dr. Baumann did not further challenge him on the subject. *Id*.;

[3] The alleged disclosures are initially addressed here in chronological order, although they were not listed chronologically in the appellant's OSC complaint.

HT Vol. 1 at 37. The appellant alleges that his statement that it was his decision as to when to perform a surgery was a protected disclosure of a substantial and specific danger to public health or safety and abuse of authority.[4] AF W-1, Tab 5.

The second alleged disclosure took place on September 17, 2013, again during an interaction between the appellant and Dr. Baumann, when Dr. Baumann was preparing a consent for a surgery to address a patient's dislocated shoulder [Disclosure E in OSC complaint]. AF W-1, Tab 5 at 26. The appellant stated in his OSC complaint that he had reviewed the patient's x-rays and agreed with the radiologist's report. *Id*. The appellant stated he asked Dr. Baumann, "Dr. Baumann, any consideration for a CT shoulder scan? The radiologist read the x-ray as normal," which, the appellant states, indicated there was no dislocation. *Id*. According to the appellant, Dr. Baumann lost her temper and responded, "Do you want to take over the care

[4] The appellant's OSC complaint also references, under Disclosure A, an interaction between the appellant, Dr. Baumann, and other employees on September 12, 2013, regarding the procedure for consultation with a hospitalist concerning non-orthopedic problems. However, the appellant did not address the September 12, 2013 conversation in his response to the Board's jurisdictional order or otherwise explain why the appellant's statements during that conversation were protected under the statute, and the matter was discussed only briefly in testimony at the hearing and in the appellant's posthearing brief, which did not argue that the appellant's statements on this subject constituted a protected disclosure. Thus, it appears that the appellant is not contending that his statements on September 12, 2013 regarding consultation with a hospitalist constitute a protected disclosure.

of this patient?" *Id*. The appellant alleges that his question was intended to suggest to Dr. Baumann that more information was needed before subjecting the patient to potentially unnecessary general anesthesia, and that his question was a protected disclosure of a substantial and specific danger to public health or safety and abuse of authority.

The third alleged disclosure was made on July 10, 2014, by the appellant to Dr. Dubravka Jovanovic, M.D., an anesthesiologist at Bay Pines, prior to a knee replacement surgery to be performed by the appellant for which Dr. Jovanovic was the attending anesthesiologist [Disclosure B in OSC complaint]. AF W-1, Tab 5 at 19. The appellant stated in his complaint that he entered the operating room and found that it was being prepared so as to administer general anesthesia to the patient, at which point he interrupted Dr. Jovanovic and informed her that he had requested spinal (also referred to as regional)[5] anesthesia for the procedure, and that there was evidence that spinal anesthesia was safer than general anesthesia. *Id*. He states that Dr. Jovanovic disagreed with him, responding that the patient would be fine under general anesthesia, and that when he persisted she stormed out of the room, saying that a different anesthesiologist could

[5] The record reflects that spinal anesthesia is a specific type of regional anesthesia. However, for ease of reference, while not medically precise, the terms "regional anesthesia" and "spinal anesthesia" are used interchangeably throughout this decision to refer to localized anesthesia focused on a particular region of the body as opposed to general anesthesia, in which a patient is completely put to sleep for a procedure.

supervise the case. *Id*. The appellant alleges that his statement to Dr. Jovanovic that there was evidence that spinal anesthesia was safer than general anesthesia was a protected disclosure of a substantial and specific danger to public health or safety.

The fourth alleged disclosure was an e-mail dated July 23, 2014, from the appellant to Dr. Edward Hong, the Chief of Surgery at Bay Pines and the appellant's second-level supervisor [Disclosure F in OSC complaint]. AF W-1, Tab 5 at 26-27. In the e-mail, the appellant expressed concern about a requirement by Dr. Baumann that chest x-rays be ordered and performed on all orthopedic patients prior to surgery, citing unnecessary exposure to radiation for his "young patients who don't need chest xrays [sic]." *Id*. at 26-27, 36. He states that Dr. Hong responded to his concern later in person, stating, "I don't think that's a battle worth fighting." *Id*. The appellant alleges that the statements in his e-mail constitute a protected disclosure of a substantial and specific danger to public health or safety and abuse of authority.

The fifth alleged disclosure occurred on March 12, 2015, at a morbidity and mortality (M&M) conference[6]

[6] M&M conferences are meetings traditionally held by hospital surgical staff to discuss adverse patient outcomes following surgery. The appellant testified that the purpose of the conferences is to discuss particular cases where a patient died or had to have another surgery within 30 days and to inquire whether anyone at the conference would have done something differently. HT Vol. 1, Testimony of Appellant at 149-51. Dr. Baumann described M&M conferences as a "quality improvement process" held for the purpose of determining what could be done differently so that

at which a patient who had suffered a surgical site infection following a total knee replacement surgery was discussed [Disclosure C in OSC complaint]. The appellant stated in his OSC complaint that at the conference, he disclosed that all total knee and hip replacements at Bay Pines were being done under general anesthesia and presented evidence supporting the assertion that regional (*i.e.*, spinal) anesthesia was safer than general anesthesia, with less risk of surgical site infection. *Id*. at 20. The surgery discussed at the M&M conference was performed by Dr. Baumann under general anesthesia and involved a patient who later developed a surgical site infection. The appellant alleges that the statement he made in the M&M conference constitute a protected disclosure of a substantial and specific danger to public health or safety.

The sixth and final disclosure took place on April 14, 2016, again at an M&M conference, which involved discussion of a patient who died from a stroke after a total hip replacement surgery performed under general anesthesia by Dr. Baumann [Disclosure D in OSC complaint]. AF W-1, Tab 5 at 20. In his OSC complaint, the appellant states that he "presented scientific evidence that there is a 5-fold increased incidence of stroke when a total hip or knee replacement is performed under general anesthesia (vs. spinal anesthesia)." *Id*. The appellant alleges that the statement he made in the M&M conference constitute a protected disclosure of

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negative outcomes might be mitigated or avoided. HT Vol. 5, Testimony of Patricia Baumann at 45.

a substantial and specific danger to public health or safety.

Applicable Law and Burden of Proof

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure or engaging in protected activity, and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). Specifically, the appellant must show that he brought his whistleblower complaint to the attention of OSC, and exhausted OSC's procedures. To satisfy the exhaustion requirement, the appellant must establish that he informed OSC of the precise ground of his claim of whistleblowing or protected activity and gave OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521 (Fed. Cir. 1992). The test of the sufficiency of the claim of whistleblowing to OSC is the statement made in the complaint requesting corrective action or in other submissions to OSC, not any later characterization of those statements. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993).

However, in order to establish that he is entitled to corrective action with respect to his claims, the appellant bears the burden of proving by a

preponderance of the evidence that he engaged in protected whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) and that such whistleblowing activity was a contributing factor in an agency personnel action. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.4(q). If the appellant establishes that he engaged in protected whistleblowing activity that was a contributing factor in an agency personnel action, the Board must order corrective action unless the agency can establish by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

To have made a disclosure protected under 5 U.S.C. § 2302(b)(8), an individual must have disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The term "disclosure" is defined as:

> a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences- (1) any violation of any law, rule, or regulation; or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or

> a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(a)(2)(D). The determination as to whether an employee reasonably believed that he disclosed information that evidenced any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety is to be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger. 5 U.S.C. § 2302; *see also Lachance v. White*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999). The disclosure cannot be based on a "purely subjective" belief. *Giove v. Department of Transportation*, 230 F.3d 1333, 1338 (Fed. Cir. 2000); *Lachance*, 174 F.3d at 1380-81. Rather, it must be based on a reasonable interpretation of the events available to the appellant when he made his disclosure. *Askew v. Department of the Army*, 88 M.S.P.R. 674, 678-79 (2001). The Board is required to consider all evidence presented on this issue, including that which detracts from a reasonable belief. *Haley v. Department of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). In order to be protected, a disclosure generally must relate to wrongdoing committed by a government employee or entity; however, disclosures of wrongdoing by a nongovernmental entity may constitute protected disclosures when the government's interests and good name are implicated in the alleged wrongdoing, and the

employee shows that he reasonably believed that the information he disclosed evidenced that wrongdoing. *See Miller v. Department of Homeland Security*, 99 M.S.P.R. 175, ¶ 12 (2005) (citing *Arauz v. Department of Justice*, 89 M.S.P.R. 529, ¶ 7 (2001)).

Any disclosure of a violation of law, rule, or regulation is protected if it meets the reasonable belief test. The individual is not required to cite any specific law, rule, or regulation that he believes was violated where the individual's statements and the surrounding circumstances clearly implicate an identifiable law, rule, or regulation; he is only required to make a nonfrivolous allegation that he reasonably believed his disclosure evidenced one of the types of wrongdoing listed in 5 U.S.C. § 2302(b)(8). *See, e.g.*, *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 27 (2010). Furthermore, in making a disclosure involving a violation of law, rule, or regulation, the inquiry as to whether a disclosure is protected ends upon a determination that the appellant disclosed what he reasonably believed to be a violation of law, rule, or regulation; there is no further inquiry into the type of "fraud, waste, or abuse" involved. *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 11 (2000). In addition, there is no exception to that rule for a disclosure of a trivial or *de minimis* violation of a law, rule, or regulation. *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 26 (2004); *see also Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 14 (2004).

The Board has stated, "[a]n abuse of authority occurs when there is an arbitrary and capricious exercise

of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to herself or to other preferred persons." *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 22 (2013). With respect to a disclosure of a substantial and specific danger to public health or safety, the inquiry into whether a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA is guided by several factors, including: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, *i.e.*, the potential consequences. *See, e.g.*, *Chavez*, 120 M.S.P.R. 285, ¶ 20 (quoting *Chambers v. Department of the Interior*, 602 F.3d 1370, 1376) (Fed. Cir. 2010)). In *Chambers*, the Federal Circuit explained that "the outcomes of past cases . . . have depended upon whether a substantial, specific harm was identified, and whether the allegations or evidence supported a finding that the harm had already been realized or was likely to result in the reasonably foreseeable future." *Chambers*, 602 F.3d at 1376. "[S]pecific allegations or evidence either of actual past harm or of detailed circumstances giving rise to a likelihood of impending harm" are needed to demonstrate that a disclosure evidences a substantial and specific danger to public health or safety. *Id*.

Analysis

As an initial matter, I find that the appellant raised the six disclosures at issue in this appeal with OSC [Disclosures A through F, as described above],

which closed its investigation into his allegations and provided him with appeal rights to the Board. AF W-1, Tab 1; Tab 5 at 11-42; Tab 6 at 135. Accordingly, I find that the appellant exhausted his administrative remedies with regard to these six disclosures.[7]

The appellant's disclosures are not protected under the statute

As an initial matter, I find that the appellant's alleged disclosures are not protected under the statute because none of the disclosures made by the appellant actually disclosed any alleged wrongdoing by the agency or its employees. Fundamental to the nature of a protected disclosure is that it "blows the whistle" by reporting the commission of one of the types of wrongdoing enumerated in the WPA at 5 U.S.C. § 2302(b)(8)(A). I find that the appellant's alleged disclosures, rather, constitute mere observations, questions, arguments, or disagreements with management

[7] I note that my April 18, 2019 Order and Summary of Telephonic Prehearing Conference identified only the six disclosures contained in the appellant's complaint to OSC, as detailed above, as the basis for the appellant's claim of reprisal for whistleblowing, and noted the agency's objection to the appellant's attempting to raise any additional disclosures beyond those six disclosures. AF W-3, Tab 42. Further, the appellant's representative stated on the record at the commencement of the hearing that he had no objection to the rulings and information contained in the summary. HT, Vol. 1 at 4-5. Accordingly, to the extent that the appellant has attempted to raise additional disclosures beyond those six disclosures identified in his OSC complaint and discussed above, I find that such disclosures have not been exhausted with OSC and are therefore not properly before the Board in this appeal.

policies, positions, or practices, without an accompanying showing that such matters constitute a report of wrongdoing of the type specified by the statute. This finding notwithstanding, the particular disclosures relied upon by the appellant are each analyzed below.

Disclosures B, C, and D—general versus spinal/regional anesthesia

The appellant alleges that his statement to Dr. Jovanovic in the operating room prior to a patient's surgery on July 10, 2014, and the remarks he made at the M&M conferences on March 12, 2015, and April 14, 2016, about general anesthesia versus spinal anesthesia when performing hip and knee replacement surgery constitute disclosures of a substantial and specific danger to public health and safety. In support of his assertion, the appellant relies on various articles in medical literature, including, but not limited to, a September 2010 article from The Journal of Bone and Joint Surgery entitled "Perioperative Stroke After Total Joint Arthroplasty; Prevalence, Predictors, and Outcome" and a May 2013 article from the journal Anesthesiology entitled "Perioperative Comparative Effectiveness of Anesthetic Technique in Orthopedic Patients." AF W-1, Tab 6 at 13-20, 104-116.

The appellant testified that the first article concludes that there is a fivefold increase in the risk of stroke following total knee and hip replacement surgeries when general anesthesia is used instead of regional anesthesia. HT Vol. 1 at 162-63. While the article does conclude that the use of general anesthesia

as opposed to regional anesthesia was associated with an increased incidence of stroke, a review of the article also reveals that the overall risk of stroke following these types of surgeries, regardless of which type of anesthesia is used, is very, very low. In fact, the article states that out of 18,745 patients who underwent these procedures and who were reviewed as part of the underlying study, only 36 patients (or 0.192 percent) suffered a stroke within 30 days following surgery.[8] AF W-1, Tab 6 at 15. Indeed, as the article itself states when acknowledging limitations of the study involved, "because of the rarity of this complication [stroke] in patients undergoing joint replacement, the number of cases was small, and therefore it was difficult to draw definitive conclusions." *Id*. at 19. Thus, even assuming the appellant is correct that the statistics cited in the article demonstrate that general anesthesia is associated with an increased risk of stroke for patients having these procedures versus regional anesthesia, there is no dispute that the risk of stroke is still very remote for those patients who have such surgeries done under general anesthesia.

The second article cited above involved a larger study and concludes that regional anesthesia is associated with a lower risk of mortality and post-surgery complications than general anesthesia for knee and hip replacement patients; however, the article also confirms that the overall risk of mortality or complications

[8] The study was limited to a review of those patients who had suffered a stroke during the same hospital admission as the surgery, or within 30 days following surgery.

following these types of surgeries remains very low even when general anesthesia is used. *Id*. at 104-116. The article also emphasizes a continuing debate within the medical community surrounding the issue, stating "over the last decade, intense controversy has persisted among clinicians over the potential impact of the type of anesthesia on perioperative outcomes" and noting that other studies have disputed the beneficial impact of regional anesthesia on patient outcomes. *Id*. at 104, 110. Notably, the article observes that the vast majority of the patients studied had general anesthesia for their knee and hip replacement surgeries rather than regional anesthesia, illustrating the widespread and prevalent use of general anesthesia for such procedures, as well as a possible shortcoming of the study.[9] *Id*. at 104.

Further, testimony at the hearing from the appellant, other Bay Pines orthopedic surgeons, a Bay Pines anesthesiologist, and a Bay Pines nurse anesthetist agreed that the use of general anesthesia for total knee and hip replacement surgery is widely accepted medical practice and meets the medical standard of care for such procedures. HT Vol. 2, Testimony of Appellant at 135; Vol. 4, Testimony of Dubravka Jovanovic at 27; Vol. 3, Testimony of Chen at 73; Vol. 3, Testimony of

[9] The article states that of the 382,236 patients included in the study for whom anesthesia records were available, 74.8% had their knee and hip replacement surgeries performed under general anesthesia. *Id*. at 104. Another article relied upon by the appellant by the Hospital for Special Surgery dated May 1, 2013, states that "currently, the majority of joint replacements in the United States are performed under general anesthesia." *Id*. at 91.

Bernard Fishalow at 220-21; Vol. 5, Testimony of Baumann at 201-05. The widespread use of general anesthesia for such procedures as discussed in the medical literature relied upon by the appellant confirms this conclusion. In addition, the cited articles and testimony by multiple physicians and other medical professionals at the hearing, including the appellant, confirm that many patients are apprehensive and reluctant to agree to regional anesthesia for joint replacement surgery and prefer general anesthesia for a variety of reasons.[10] AF, Tab 6; HT Vol. 1, Testimony of Appellant at 107; Vol. 2, Testimony of Appellant at 139-40; Vol. 4, Testimony of Jovanovic at 14-15, 27; Vol. 3, Testimony of Jamie Chen at 86-87; Vol. 3, Testimony of Fishalow at 221-22; Vol. 5, Testimony of Baumann at 205. Indeed, Dr. Jovanovic testified that the patient involved in the July 10, 2014 incident between her and the appellant, in an initial conversation with her prior to the surgery, was adamant that he did not want to have his surgery performed under spinal anesthesia, and her testimony is supported by a note in the patient's anesthesia record by another anesthesiologist who

[10] Testimony in the record also indicates that there are many contraindications for regional anesthesia; *i.e.*, there are many reasons why particular patients might not be good candidates for regional anesthesia. HT Vol. 2, Testimony of Appellant at 141-42; Vol. 3, Testimony of Fishalow at 221-22. Testimony also suggested that a significant percentage of the veteran patient population at Bay Pines has contraindications for regional anesthesia, such as COPD, back problems, and conditions such as post-traumatic stress disorder (PTSD) which makes such patients more apprehensive about agreeing to regional anesthesia. HT Vol. 3, Testimony of Fishalow at 221-22; Vol. 4, Testimony of Jovanovic at 14-15.

eventually took over the patient's case, which also states that the patient did not want spinal anesthesia. HT Vol. 4, Testimony of Jovanovic at 15-18, 24; AF W-3, Tab 48 at 22 (Agency Exhibit 25). The anesthesia record for the patient confirms that the patient had concerns about "awareness during the procedure," but that he ultimately agreed to spinal anesthesia, apparently following another conversation with the appellant. AF W-3, Tab 48 at 10; HT Vol. 4, Testimony of Jovanovic at 20.

In addition, the appellant notably acknowledged in his testimony, and hospital records confirm, that although he preferred to perform total knee and hip replacement surgeries under regional anesthesia, he had also performed many such surgeries under general anesthesia. HT Vol. 1, Testimony of Appellant at 106-108; HT Vol. 2, Testimony of Appellant at 135; AF W-3, Tab 43 at 7-65 (Agency Exhibit 22). He also stated that in his opinion, in those cases, the type of anesthesia that was used, whether regional or general, satisfied the standard of competent medical care. HT Vol. 2 at 135.

The appellant also conceded during his testimony that although he stated in the March 2015 M&M conference that all total knee and hip replacement surgeries at Bay Pines were being done under general anesthesia, some of these surgeries in fact had been performed under regional anesthesia.[11] The appellant

[11] In support of his argument that he made a protected disclosure when he made this statement, the appellant relies upon an e-mail from agency Surgery Service employee Donald Todd to

confirmed that he knew this because he himself had performed such surgeries under regional anesthesia at Bay Pines prior to the conference. HT Vol. 2 at 146-51. The testimony of other orthopedic surgeons confirmed that in addition to the appellant, other orthopedic surgeons also performed total knee and hip replacement surgeries at Bay Pines under regional anesthesia during 2014 and 2015. HT Vol. 3, Testimony of Fishalow at

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the orthopedic surgeons and other employees at Bay Pines dated April 9, 2015, which was sent after the March 12, 2015 M&M conference in question. Mr. Todd's e-mail, although prefaced with a statement that the information in the e-mail was not "perfectly accurate," contains a chart indicating that for 2014, the percentage of total hip and knee replacements performed at Bay Pines under regional anesthesia was 7.6 percent, which was a higher percentage than many other VA medical centers listed in the e-mail. AF W-1, Tab 6 at 98; AF W-3, Tab 49 at 4-5. The chart also lists a separate category for spinal anesthesia, which states that the percentage of total hip and knee replacements performed at Bay Pines under spinal anesthesia in 2014 was 0.0 percent. *Id*. Dr. Hong testified that it was subsequently determined that the data used in compiling the chart included procedures done under spinal anesthesia within the broader category of regional anesthesia listed in the chart, hence the data contained therein showing 0 percent of the procedures were done under spinal anesthesia was not accurate. HT Vol. 5, Testimony of Edward Hong at 52-54. This testimony was corroborated by Dr. Jovanovic's testimony about the categorization of types of anesthesia in the hospital's records. HT Vol. 4, Testimony of Jovanovic at 72-73. In addition, as noted above, the appellant acknowledged during his testimony that he was aware the 0 percent figure in the e-mail for spinal anesthesia was not accurate because he had performed total knee and hip replacement surgeries under spinal anesthesia at Bay Pines in 2014, including the surgery on the patient involved in the July 10, 2014 incident between the appellant and Dr. Jovanovic. HT Vol. 2, Testimony of Appellant at 147-51. In any event, there is no dispute that the appellant did not receive the e-mail in question until after the March 12, 2015 M&M conference.

223; HT Vol. 4, Testimony of Jovanovic at 33-34, 38-39; HT Vol. 5, Testimony of Baumann at 202-03. While the appellant asserts he did not know that other orthopedic surgeons at Bay Pines were performing such surgeries under regional anesthesia, he was obviously aware that he himself had done so and acknowledged on cross-examination that he is now aware that approximately 7 percent of such surgeries at Bay Pines were done under regional anesthesia in 2014, a rate comparable to other VA medical centers in the same Veterans Integrated Service Network (VISN) as Bay Pines. HT Vol. 6, Testimony of Appellant at 103-04. I find that the appellant merely assumed, incorrectly and apparently without any attempt to further research or verify, that no other orthopedic surgeons at Bay Pines were using regional anesthesia for total joint replacement surgeries prior to his making the statement in question at the March 2015 M&M conference. Accordingly, I find that the appellant did not have a reasonable belief that all total knee and hip replacement surgeries at Bay Pines were being performed under general anesthesia as he stated during the March 2015 M&M conference, as the facts known to or reasonably ascertainable to the appellant at the time indicated this statement was incorrect. *See Lachance*, 174 F.3d at 1381; *Haley*, 977 F.2d at 557.

In sum, when viewing the three alleged disclosures made by the appellant on this subject in light of the relevant factors discussed in *Chambers*, I find that the appellant's disclosures are not protected as they do not constitute disclosures of a substantial and specific

danger to public health or safety. As discussed above, while the medical literature cited by the appellant generally supports his assertion that general anesthesia, as compared to regional anesthesia, has been observed to be associated with an increased incidence of various potentially serious complications, including stroke, there is no dispute that the overall risk of such complications remains very, very low even when general anesthesia is utilized. AF W-1, Tab 6 at 13-20, 104-116. Thus, even in a situation where a patient is about to undergo joint replacement surgery under general anesthesia, as was the case in the July 10, 2014 incident involving Dr. Jovanovic, there was a very low "likelihood of impending harm," nor was harm "likely to result in the reasonably foreseeable future" given the low rate of occurrence of stroke or other serious complications from general anesthesia as illustrated by the medical literature cited by the appellant. *See Chambers*, 602 F.3d at 1376; *see also Chambers*, 515 F.3d at 1369 ("If the disclosed danger could only result in harm under speculative or improbable conditions, the disclosure should not enjoy protection"). In the situation involving Dr. Jovanovic, there is no evidence in the record that the patient involved had risk factors that would have made him more susceptible to potential complications from general anesthesia or otherwise an unsuitable candidate for such anesthesia.[12] Further, by the appellant's own testimony, he merely told Dr. Jankovic that he had scheduled spinal anesthesia for

[12] In addition, as noted above, there is no dispute that the patient's surgery was ultimately done under spinal anesthesia. AF W-1, Tab 5 at 29; HT Vol. 4, Testimony of Jovanovic at 20.

the patient and when she responded stating that she believed the patient would be fine under general anesthesia, he stated that there was evidence in the orthopedic literature that it was "safer" than general anesthesia, without reference to any particular risk factor based upon that patient's condition or history. HT Vol. 1, Testimony of Appellant at 106. Thus, I find no "detailed circumstances giving rise to a likelihood of impending harm" were present. *See Chambers*, 602 F.3d at 1376.

The same conclusions apply to the appellant's disclosures at the two M&M conferences discussing Dr. Baumann's patients.[13] As discussed generally above, I find that the appellant's statements about scientific evidence at these conferences made no allegation of wrongdoing. In fact, the appellant testified that at the March 12, 2015 conference, "I disclosed scientific information, science articles, and—stated that spinal anesthesia was safer for total hips and total knees than general anesthesia, specifically to lessen rates of infection" and that at the April 14, 2016 conference, he

[13] The agency objected during the adjudication of this appeal to the introduction of testimony and evidence regarding what occurred at the M&M conferences in question on the basis of the peer review privilege, also known as the quality assurance privilege, relying in part on 38 U.S.C. § 5705, which prohibits disclosure of quality assurance records and documents with certain exceptions. HT Vol. 1 at 146-47; 38 U.S.C. § 5705. While I reserved a ruling on the agency's objection at the hearing and allowed the introduction of testimony and evidence about what occurred at the M&M conferences, I find it unnecessary to rule upon the matter as I have found the disclosures at issue to not be protected even after considering such evidence.

similarly disclosed there was scientific evidence that the risk of stroke with general anesthesia was five times greater than spinal anesthesia for such procedures. HT Vol. 1, Testimony of Appellant at 148; Vol. 2, Testimony of Appellant at 46-47. The appellant further testified that he made no allegation that Dr. Baumann did anything wrong, nor did he question or criticize the quality of care she had provided with regard to the two patients discussed at the conferences; he states he merely presented scientific evidence about the relative risks of using general versus regional anesthesia. HT Vol. 6, Testimony of Appellant at 125-31. Accordingly, as an initial matter I find such general statements about scientific evidence do not constitute an allegation of wrongdoing sufficient to constitute a protected disclosure.

Turning to the issue of whether the disclosures evidenced examples of past harm or the likelihood of future harm, the patient being discussed at the April 14, 2016 conference had unfortunately died following the surgery in question and prior to the M&M conference; thus, there was no likelihood of impending future harm as to that patient. Nor is there any indication in the record that the patient discussed at the March 12, 2015 conference, who suffered a surgical site infection following surgery and had a subsequent surgery as a result, faced another future surgery and thus there was no likelihood of future harm for that patient. As to evidence of past harm, although the appellant has suggested that these patients may have suffered the prior complications following surgery in question due to the

use of general anesthesia as opposed to regional anesthesia, he conceded that he did not actually know whether the use of general anesthesia had contributed to the complications they suffered.[14] The appellant testified that "I never said if you used spinal there would have been a better outcome. I just said there's evidence and it was discussed . . . I presented evidence that the patient would have less chance of infection. Not the cause. I could not present cause and effect. I don't know the cause." HT Vol. 6, Testimony of Appellant at 126. Dr. Hong also testified that it was "impossible" to reach a conclusion that general anesthesia had caused the second patient's stroke. HT Vol. 5, Testimony of Hong at 55. Indeed, there is no evidence in the record of a causal link between the use of general anesthesia and the complications suffered by these particular patients. Thus, the effect, if any, of the use of general anesthesia on these particular patients instead of regional anesthesia is unknown. Accordingly, I find that there are insufficient "specific allegations or evidence . . . of actual past harm" as described in *Chambers* to

[14] However, the appellant did testify that the patient involved in the April 14, 2016 conference had a prior history of stroke and that based on the medical literature, such a history increased her chance of stroke. HT Vol. 2 at 46-47. I note that while the appellant's testimony appears to suggest that he discussed the patient's history of stroke during the M&M conference, his complaint to OSC states only that he "presented scientific evidence that there is a 5-fold increased incidence of stroke when a total hip or knee replacement is performed under general anesthesia (vs. spinal anesthesia). The case presented was a patient who died from a stroke after a total hip replacement." AF W-1, Tab 5 at 20. In any event, this information does not alter my analysis.

support a finding that the disclosures were protected as there is no evidence in these particular cases of a causal correlation between the use of general anesthesia and the patients' negative outcomes. *See Chambers*, 602 F.3d at 1376. To the extent that the appellant alleges that his disclosure was focused on the risks of using general anesthesia for future joint replacement surgery patients, for the reasons previously stated above with regard to the very low likelihood of harm in such situations, I find his disclosure is likewise not protected on this basis.[15] *See Chambers*, 515 F.3d at 1369 ("[R]evelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing, is not protected," citing *Sazinski v. Dep't of Housing & Urban Development*, 73 M.S.P.R. 682, 686 (1997)).

Again, as noted above, this conclusion is strongly supported by the fact that there is no dispute that using general anesthesia for these surgeries meets the accepted medical standard of care in the orthopedic

[15] While stroke is a rare complication following these surgeries, the literature cited by the appellant states that risk of surgical site infection is a common complication following any type of surgery. AF W-1, Tab 6 at 117-19. With regard to infection, I note that the article relied upon by the appellant in support of his assertion that the use of general anesthesia instead of regional anesthesia increases a patient's risk of surgical site infection, "Neuraxial Anesthesia and Surgical Site Infection" in the August 2010 issue of the journal Anesthesiology, contains multiple references to potential limitations of the study upon which it is based. For example, the article states that key information about the patients' underlying infection risk based upon other factors including smoking, steroid use, and alcohol abuse was unavailable to the authors of the study. *Id*. at 118.

community, as illustrated by the widespread use of general anesthesia for such procedures and testimony at the hearing. AF W-1, Tab 6 at 104; HT Vol. 2, Testimony of Appellant at 135; Vol. 4, Testimony of Jovanovic at 27; Vol. 3, Testimony of Chen at 73; Vol. 3, Testimony of Bernard Fishalow at 220-21; Vol. 5, Testimony of Baumann at 201-05. I therefore decline to find that the appellant made a protected disclosure of a substantial and specific danger to public health or safety by disclosing that knee and hip replacement surgeries were being performed at Bay Pines using an anesthesia method that, by all accounts, met the current standard of medical care for such procedures.

Disclosure A – performing surgeries on weekends or holidays

The appellant alleges that his statement to Dr. Baumann on September 3, 2013, that it was his call when to operate on a hip fracture was a protected disclosure of a substantial and specific danger to public health or safety and abuse of authority. AF W-1, Tab 5. Again, it is unclear what wrongdoing the appellant asserts he was reporting through this statement, which I find to be in the nature of a mere disagreement with his supervisor's statement that he needed to stop operating on hip fractures on the weekends.

Turning to the *Chambers* factors, the appellant's statement that it was "his call" when to operate obviously did not report any evidence of past harm to his hip fracture patient, as there is no dispute that patient's surgery had already been successfully

performed on the Labor Day holiday earlier that week. HT Vol. 2, Testimony of Appellant at 91; *see Chambers*, 602 F.3d at 1376. I also find that the appellant failed to present evidence suggesting that he reported the risk of any likely future harm to other patients, in spite of his allegation that there was such danger. The appellant alleged on cross-examination that future patients were endangered, stating "if I was not allowed to operate on weekends when I thought it was safest for the patient . . . that would endanger the patient. It was my call on an individual basis when it's proper to operate on a hip fracture." HT Vol. 2, Testimony of Appellant at 91. However, that is not what the appellant actually stated to Dr. Baumann on the date in question, as he merely stated that it was "his call" when to operate and has not asserted that he raised any such concerns about patient endangerment to her at the time. The appellant testified that the patient whose surgery triggered this discussion came to the hospital on Friday, August 30, 2013, and that he saw the patient that same day, diagnosing him with a closed hip fracture requiring surgery. *Id*. at 68-70. Additionally, the appellant characterized the hip fracture surgery in question as an "urgent" surgery that needed to be done within a few days because of the patient's likely pain and discomfort, as opposed to an "emergency" surgery that must be done right away.[16] *Id*. at 69-70. However, the appellant testified that he chose to perform the surgery the following Monday, September 2, the Labor

[16] The appellant also testified that he had "never seen a hip fracture that was an emergency case. They're all – they've always been urgent." *Id*. at 84.

Day holiday, rather than on Saturday, August 31, or Sunday, September 1. *Id*. at 70. Additionally, he testified that he would have been willing to wait to do the surgery as late as Tuesday, September 4, a regular work day, if he received assurance that there would be an open time slot for the surgery.[17] *Id*. at 71-73.

On these facts, it is clear that the surgery in question was not an emergency surgery; thus, I find that to the extent the appellant asserts he was objecting to Dr. Baumann preventing him from doing emergency surgeries, such an assertion is not based upon a reasonable belief in light of the above facts. Indeed, the appellant admitted during his testimony that Dr. Baumann "did not tell me I couldn't do emergent cases" and did not tell him he couldn't perform medically necessary surgeries on the weekend. *Id*. at 81, 85. The appellant also testified that Dr. Baumann did not respond or contradict him after he said it was his call when to operate, and he agreed that other orthopedic surgeons at Bay Pines routinely performed emergency surgeries on weekends. *Id*. at 62, 85-86. Thus, I find that a disinterested observer a with knowledge of the essential facts known to and readily ascertainable by the appellant could not reasonably conclude that Dr. Baumann had forbidden the appellant from doing emergency surgeries on the weekends or that he made a protected disclosure by disagreeing with her on that basis.

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[17] The appellant also testified that he noted in his August 30, 2013 patient notes that the surgery needed to be scheduled for either September 2 or September 3, 2013. *Id*. at 70.

Moreover, there is no evidence whatsoever that any future harm resulted as the appellant admitted that during his time at Bay Pines, including a time period of approximately six years between the surgery in question and the hearing in this appeal, other than this patient's surgery on September 2, 2013, he has never performed any emergency surgery on a holiday, has never been prevented from doing any emergency surgery on a holiday, has never performed any emergency surgery on a weekend, and has never been prevented from doing any emergency surgery on a weekend.[18] *Id*. at 85-86. He also testified that he was unaware of any other surgeon at Bay Pines who had been prevented from doing an emergency surgery on a holiday or weekend and that there is no policy at Bay Pines or in the orthopedic section which prohibits the performance of emergency surgeries on the weekend. *Id*. at 68, 86. He also acknowledged, and other witnesses confirmed, that other orthopedic surgeons at Bay Pines, including Dr. Baumann, occasionally performed emergency surgeries on the weekends, which indicates there was no prohibition on the performance of such surgeries. *Id*. at 62, 85-86; Vol. 5, Testimony of Baumann at 155. Accordingly, I find the appellant's contention of potential future harm to patients to be purely speculative in light of the appellant's testimony

[18] Thus, according to the appellant's testimony, the surgery in question on September 2, 2013, is the only surgery the appellant has ever performed or requested to perform at Bay Pines on a weekend or holiday.

and the lack of evidence of any likelihood of future harm to patients. *See Chambers*, 602 F.3d at 1376.

In addition, the appellant acknowledged that there were several reasons to avoid doing non-emergency surgeries on weekends or holidays, including the hospital being generally short-staffed, the operating room not being fully staffed, having to bring in operating room staff who are on call, avoiding "abusing" the after-hours and weekend staff by calling them in, saving the operating room and staff for emergency surgeries that took priority, and patients generally having better outcomes when the hospital is fully staffed. *Id*. at 65-67, 75-77, 87-89. Other employees confirmed these reasons in their testimony at the hearing, including Dr. Baumann. HT Vol. 5, Testimony of Baumann at 155-58; HT Vol. 2, Testimony of William Stein at 292, 315. Accordingly, for these reasons I find that the appellant's statement that it was his call when to operate on a hip fracture did not constitute a disclosure of a substantial and specific danger to public health and safety.

Likewise, in light of the testimony and evidence the agency provided in support of its practice of avoiding non-emergency surgeries on the weekends and holidays, I find that the appellant has not demonstrated that he disclosed an abuse of authority by Dr. Baumann with regard to this statement. The appellant does not dispute the agency's rationale for avoiding such weekend and holiday surgeries, as noted above, and thus he has not shown that his statement disclosed an "arbitrary and capricious exercise of power" by Dr. Baumann "that adversely affects the rights of

any person or results in personal gain or advantage to herself or to other preferred persons" as required. *See Chavez*, 120 M.S.P.R. at ¶ 22.

Disclosure E – shoulder CT scan

The appellant alleges that his question to Dr. Baumann on September 17, 2013 as to whether she had given any consideration to performing a shoulder CT scan on a patient prior to surgery was a protected disclosure of a substantial and specific danger to public health or safety and abuse of authority. AF W-1, Tab 5 at 26. Again, as a preliminary matter, I find that the appellant did not actually make a report of any wrongdoing through his question to Dr. Baumann; rather, he merely asked a question about treatment of the patient. As the appellant testified, "I just suggested – because the X-rays were read by the radiologist as no dislocation and I read them as no dislocation, I suggested that maybe we get a CAT scan. I didn't question or say, you're wrong." HT Vol. 1, Testimony of Appellant at 53. Accordingly, I find that this was a mere disagreement by the appellant with another physician about the appropriate course of treatment for a patient, which falls short of meeting the threshold for a protected disclosure of a substantial and specific danger to public health or safety.

Further, while the appellant testified that he read the radiologist's report and that it concluded, as did he, that the patient did not have a dislocated shoulder, he admitted in his testimony that the patient in question was not his patient, but Dr. Baumann's patient, and

that he had not done a physical examination of the patient.[19] HT Vol. 2 at 122-23. He acknowledged that he and Dr. Baumann had a difference in medical judgment about the proper course of treatment for the patient, that Dr. Baumann was the patient's attending physician, and that he was "just making a suggestion." *Id*. at 127. He also acknowledged that he did not take any action to prevent the surgery in question from going forward without a CT scan and there is no indication in the record that he filed a patient safety report concerning the incident. *Id*. at 127-28.

Additionally, the only potential danger or harm cited by the appellant in his testimony with regard to this situation was the patient being placed under general anesthesia and the normal risks associated with such anesthesia. However, he never actually communicated to Dr. Baumann his concern about the patient being placed under general anesthesia. Further, there is no indication that the appellant knew of or considered any particular risk factors specific to the patient in question which would weigh against the use of general anesthesia.[20] Therefore, I find that there were no "specific allegations or evidence either of actual past harm or of detailed circumstances giving rise to a likelihood of impending harm," *see Chambers*, 602 F.3d at 1376, because while general anesthesia does

[19] The appellant did testify that he had observed the patient on rounds and that he "probably" would have been able to tell if his shoulder was dislocated. HT Vol. 2 at 122-23.

[20] The appellant testified that general anesthesia was standard procedure for surgery to repair a dislocated shoulder. HT Vol. 2 at 128.

have associated risks, it is generally considered to be safe and conforms with widely accepted medical practice for orthopedic surgeries, as discussed above. For all of the above reasons, I find that the appellant did not have a reasonable belief that this patient faced any impending harm, as his conclusion was based solely on his reading of the patient's x-ray and there were no risk factors present for this patient which would have made general anesthesia particularly dangerous.

Turning to the appellant's allegation that his questioning of Dr. Baumann disclosed an abuse of authority by Dr. Baumann, I likewise find the appellant has not proven this claim as I find it was simply a disagreement about the proper course of treatment for the patient as discussed above. As such, I find that the appellant has not demonstrated that he disclosed an "arbitrary and capricious exercise of power" by Dr. Baumann "that adversely affects the rights of any person or results in personal gain or advantage to herself or to other preferred persons" as required. *See Chavez*, 120 M.S.P.R. at ¶ 22.

Disclosure F – pre-operative chest x-rays

The appellant alleges that his July 23, 2014 e-mail to Dr. Hong expressing concern about a requirement by Dr. Baumann that chest x-rays were to be ordered and performed on all patients prior to surgery, citing unnecessary exposure to radiation, constituted a disclosure of a substantial and specific danger to public health and safety, as well as an abuse of authority by Dr. Baumann. In his e-mail, the appellant cited a VA

policy memorandum as supporting his concern, stating that Dr. Baumann's directive was inconsistent with the policy. However, I find that the VA policy memorandum cited by the appellant (VAHCS Memorandum 516-09-112-003, September 2009) to Dr. Hong arguably does not support his position as it is not inconsistent with the requirements articulated by Dr. Baumann. While the policy memorandum does not require chest x-rays for all patients having surgery, it does state that "Patients with a history of chronic cardiac disease, chronic pulmonary disease, active history of tobacco use, and/or patients scheduled for thoracic operation, should have a chest x-ray within 6 months of scheduled surgery date" [emphasis in original]. AF W-1, Tab 5 at 38. It does not recommend that chest x-rays *not* be performed on patients without such conditions. Indeed, multiple Bay Pines physicians including the appellant testified at the hearing that the veteran patient population at Bay Pines has a high incidence of these underlying conditions and other risk factors such as exposure to asbestos or Agent Orange, and that there had been instances where previously unknown cancer was detected by such pre-operative chest x-rays. HT Vol. 2, Testimony of Appellant at 170-75; Vol. 3, Testimony of Fishalow at 224; Vol. 5, Testimony of Baumann at 212-15. Dr. Hong, the Chief of Surgery at Bay Pines during the relevant time period, testified that "serious and life-threatening cardiopulmonary and other problems can be diagnosed on chest x-ray that would make . . . the surgery itself potentially unsafe and potentially malpractice . . . and it can help diagnose, as I see on a regular basis, other potentially life-threatening

conditions that actually require attention first, such as lung cancer." HT, Vol. 5, Testimony of Hong at 58-59. Dr. Hong testified that he has very regularly seen orthopedic patients that have lung cancer that was first detected on a chest x-ray and that multiple lives had been saved as a result.[21] *Id*. at 59. Dr. Hong testified that he believed the appellant's apparent suggestion that the policy requiring chest x-rays be changed or eliminated was "completely wrong," "absurd," "ludicrous," and "ridiculous" and noted that the amount of radiation from a single chest x-ray was minimal. *Id*. at 59-60. Dr. Hong also testified that every hospital he had ever worked at had such a policy for the safety of patients. *Id*. at 58. The appellant also testified that sometimes information on a chest x-ray reveals previously unknown medical problems and demonstrates that the patient should not have the scheduled surgery. HT Vol. 2, Testimony of Appellant at 171-72.

In light of this evidence, I find that the risk of allegedly unnecessary radiation exposure from such x-rays does not rise to the threshold of a substantial and specific danger to public health or safety and that the appellant did not have a reasonable belief that it

[21] Notably, the appellant himself testified on cross-examination that a lawsuit was recently filed by one of his patients which alleged that in November 2015, the patient, who was scheduled for shoulder surgery, underwent multiple pre-operative chest x-rays ordered by the appellant which showed an abnormal mass in the patient's lung, but that the appellant negligently failed to inform the patient of the mass or order follow up, and that the patient did not learn about the mass until he was later diagnosed with Stage IV lung cancer. HT Vol. 2, Testimony of Appellant at 172-75.

did. The alleged risk identified by the appellant applies to what is likely a small subset of young patients scheduled for surgery who do not suffer from the underlying health conditions (*e.g.*, cardiovascular disease) or have other risk factors (*e.g.*, tobacco use) as evidenced by the testimony of the appellant and the other physicians discussed above about the prevalence of such factors in the Bay Pines patient population. Also, I find that the appellant has not demonstrated that the radiation exposure from a single chest x-ray is anything other than minimal and he has not offered persuasive evidence to the contrary that would show a "likelihood of impending harm" as required. *See Chambers*, 602 F.3d at 1376. I find that the testimony offered by the agency in this case regarding the likely benefits of such pre-operative x-rays, which are performed to rule out potential complicating factors prior to surgery, outweigh the minimal radiation exposure which likely results from a single, one-time x-ray for each patient. For these reasons, I find that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant, particularly concerning the risk factors prevalent in the patient population at Bay Pines, could not reasonably conclude that the risks associated with unnecessary radiation exposure from preoperative chest x-rays constituted a substantial and specific danger to public health or safety; thus, I find the appellant's belief was not reasonable. *See Lachance*, 174 F.3d at 1381.

Likewise, in light of the testimony and evidence the agency provided in support of the policy, I find that

the appellant has not demonstrated that he disclosed an abuse of authority by Dr. Baumann with regard to requiring these x-rays. I find the appellant has not shown that requiring the x-rays constituted an "arbitrary and capricious exercise of power" by Dr. Baumann "that adversely affects the rights of any person or results in personal gain or advantage to herself or to other preferred persons" as required, as the agency articulated clear and persuasive reasons for the policy. *See Chavez*, 120 M.S.P.R. at ¶ 22. Contrary to the appellant's assertions, as discussed above, the testimony indicated that the policy was borne out of a desire to avoid surgical complications in an abundance of caution for patient safety

In conclusion, I find that the appellant has not established by a preponderance of the evidence that any of the six disclosures in question were protected as disclosures of a substantial and specific danger to public health and safety or abuse of authority under the statute. Thus, it is unnecessary to conduct further analysis concerning the appellant's claims of reprisal based on such disclosures. Accordingly, the appeal must be dismissed for lack of jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /S/
Gregory S. Prophet
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 26, 2020**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

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

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by

references to applicable laws, regulations, and the record. You must file it with:

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

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

NOTICE OF LACK OF QUORUM

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

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

Criteria for Granting a Petition or Cross Petition for Review

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

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

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

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum

limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

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

you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE OF APPEAL RIGHTS

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

applicable time limit may result in the dismissal of your case by your chosen forum.

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

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

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ___, 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

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

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

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

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

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

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of

reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information

regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

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

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