No. ____

In the Supreme Court of the United States

AYYAKKANNU MANIVANNAN,

Petitioner,

v.

DEPARTMENT OF ENERGY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN J. POWELL

MONTGOMERY MCCRACKEN WALKER & RHOADS LLP
1735 Market Street
Philadelphia, PA 19103
(215) 772-1500
jpowell@mmwr.com

Counsel for Petitioner

April 11, 2022

QUESTIONS PRESENTED

1. Whether a court of appeals must provide an opinion explaining its reasoning in an appeal that involves a complex and unsettled area of the law and in which a written opinion would likely provide the appellant with a viable basis for seeking rehearing, rehearing *en banc*, or certiorari.

2. Whether federal agency employees who disclose gross waste, mismanagement, or violations of laws, rules, or regulations are protected from agency retaliation only when they later can prove the disclosed misconduct in the Merit Systems Protection Board, where they have been denied any discovery and, "[a]s a practical matter, the agency has far greater access to and control over evidence." *Whitmore v. Department of Labor*, 680 F.3d 1353, 1375 (Fed. Cir. 2012).

PARTIES TO THE PROCEEDING

Petitioner is Ayyakkannu Manivannan, petitioner-appellant in the court below.

Respondent is the U.S. Department of Energy, respondent-appellee in the court below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
TABLE OF APPENDICES viii

PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RULE PROVISION INVOLVED 2
INTRODUCTION 3

STATEMENT OF THE CASE 6
A. Manivannan's Whistleblower Disclosures 6
B. Proceedings Below 8
1. Merit Systems Protection Board 8
2. The Federal Circuit's Rule 36 Judgment 10

REASONS FOR GRANTING THE PETITION 11
I. This Court Should Grant Certiorari to Determine Under What Circumstances, If Any, a Court of Appeals Must Issue a Reasoned Opinion. 11
A. The discretion of federal courts of appeals in deciding whether to write opinions is unquestionably important. 12

B. This Court should exercise its supervisory authority to require a court of appeals to provide a reasoned opinion in the narrow circumstances of this case. 16

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Anderson v. Dep't of Transp., F.A.A.,
735 F.2d 537 (Fed. Cir. 1984) 5

Balt. & Annapolis R. Co. v. Wash. Metro. Area Transit Comm'n,
642 F.2d 1365 (D.C. Cir. 1980) 14

Carlisle v. United States,
517 U.S. 416 (1996) 13

Crampton v. Kroger Co.,
709 F. App'x 807 (6th Cir. 2017) 24

Chambers v. Department of the Interior,
602 F.3d 1370 (Fed. Cir. 2010) 18

Dickerson v. United States,
530 U.S. 428 (2000) 17

Drake v. Agency for Int'l Devel.,
543 F.3d 1377 (Fed. Cir. 2008) 5, 18, 19

Elkassir v. Gen. Servs. Admin.,
325 F. App'x 909 (Fed. Cir. 2009) 18

Lachance v. White,
174 F.3d 1378 (Fed. Cir. 1999) 5, 20

Linder v. Department of Justice,
122 M.S.P.R. 14 (2014) 18, 42

Marano v. Dep't of Justice,
2 F.3d 1137 (Fed. Cir. 1993) 5, 21, 22

Momo Enters., LLC v. Popular Bank,
738 F. App'x 886 (7th Cir. 2018) 12

Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.,
528 F.3d 508 (7th Cir. 2008) 23

Rogers v. Am. Fed'n of Gov't Emps.,
777 F. App'x 459 (11th Cir. 2019) 12

Smith v. Gen. Servs. Admin.,
930 F.3d 1359 (Fed. Cir. 2019) 5

Taxpayers Watchdog, Inc. v. Stanley,
819 F.2d 294 (D.C. Cir. 1987) 12, 15, 16

Taylor v. McKeithen,
407 U.S. 191 (1972) 3, 11

Whitmore v. Department of Labor,
680 F.3d 1353 (Fed. Cir. 2012) 5, 8

Statutes and Other Authority

5 U.S.C. § 2302(b)(8) 6, 18

28 U.S.C. § 1254(1) 1, 25

David Johnson, *You Can'tHandle the Truth!—Appellate Courts' Authority To Dispose of Cases Without Written Opinions*,
22 App. Advoc. 419 (2010) 13

Eileen McDermott, *Chief Judge Paul Michel: Patent Reform Progress is Likely, But We Must Stay Focused On the Big Picture*, IP Watchdog, https://www.ipwatchdog.com/2019/09/15/chief-judge-paul-michel-patent-reform-progresslikely-must-stay-focused-big-picure/id=113326/
(Sept. 15, 2019) 3

Gene Quinn and Steve Brachmann, No End in Sight for Rule 36 Racket at Federal Circuit,"

https://www.ipwatchdog.com/2019/01/29/no-end-sight -rule-36-racket-cafd /id105696/ 16, 22

Harold Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 UCLA L. Rev. 432 (1976) 14

Mathilde Cohen, *When Judges Have Reasons Not To Give Reasons: A Comparative Law Approach*, 72 Wash. & Lee L. Rev. 483 (2015) 15

Matthew J. Dowd, *Rule 36 Decisions at the Federal Circuit: Statutory Authority*, 21 Vand. J. Ent. & Tech. L. 857 (2019) 4

Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge*, 42 Univ. of Md. L. Rev. 766 (1983) 14

Peter Harter and Gene Quinn, *Rule 36: Unprecedented Abuse at the Federal Circuit*, https://www.ipwatchdog.com/2017/01/12/rule-36-abuse-federal circuit/id=6971 15

William Reynolds & William Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978) 14

TABLE OF APPENDICES

Appendix A – Denial of Rehearing *En Banc* of the United States Court of Appeals for the Federal Circuit in *Manivannan v. Energy* (No. 20-1804, Jan. 11, 2022).....1a

Appendix B – Opinion of the United States Court of Appeals for the Federal Circuit in *Manivannan v. Energy* (No. 20-1804, Oct. 12, 2021) 3a

Appendix C – Decision of the Merit Systems Protection Board (Mar. 4, 2020) 5a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ayyakkannu Manivannan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in appeal No. 20-1804.

OPINIONS BELOW

The order and Rule 36 judgment of the Federal Circuit summarily affirming the Merit Systems Protection Board is unreported but appears at 2021 WL 4735304 (Fed. Cir. Oct. 12, 2021). The opinion and order of the Merit Systems Protection Board is unreported but appears at 2020 WL 1130149 (M.S.P.B. Mar. 4, 2020).

JURISDICTION

The judgment of the Federal Circuit was issued on October 12, 2021. A timely petition for rehearing *en banc* was denied on January 11, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE PROVISION INVOLVED

Federal Rule of Civil Procedure 36 provides in pertinent part:

> Rule 36. Entry of Judgment; Notice
>
> (a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:
>
> * * *
>
> (2) if a judgment is rendered without an opinion, as the court instructs.

Federal Circuit Rule 36 provides in pertinent part:

> Entry of Judgment—Judgment of Affirmance Without Opinion
>
> The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:
>
> * * *
>
> (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
>
> (e) a judgment or decision has been entered without an error of law.

INTRODUCTION

Dr. Manivannan acknowledges that courts of appeals "should have wide latitude in their decisions of whether or how to write opinions." *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972). But beyond this passing mention, this Court has never addressed whether or when courts of appeals must issue reasoned opinions.

This Court should grant certiorari to settle an open issue that arises frequently: Is the latitude of courts of appeals as to whether to write opinions limitless? Or are there any circumstances—such as those of this case—in which courts of appeals must issue reasoned opinions?

Practices vary among the courts of appeals, but the Federal Circuit frequently affirms without opinions under Federal Circuit Rule 36. The Federal Circuit's use of its Rule 36 has been widely criticized. For example, former Federal Circuit Chief Judge Paul Michel has characterized the court's failure "to explain [its] reasoning" as "a dereliction of duty." Eileen McDermott, *Chief Judge Paul Michel: Patent Reform Progress is Likely, But We Must Stay Focused On the Big Picture*, IP Watchdog, https://www.ipwatchdog.com/2019/09/15/chief-judge-paul-michel-patent-reform-progresslikely-must-stay-focused-big-picture/id=113326/ (Sept. 15, 2019).

Not only does the practice of affirmance without opinion deprive the legal system of further development of the law, but it also deprives parties—such as Dr. Manivannan—of the opportunity to seek further review of the merits through rehearing, rehearing *en banc*, or a petition for certiorari.

Although this Court has denied petitions raising constitutional and statutory challenges to the practice of affirming without opinion, Matthew J. Dowd, *Rule 36 Decisions at the Federal Circuit: Statutory Authority*, 21 Vand. J. Ent. & Tech. L. 857, 875, n.90 (2019) (listing petitions concerning the Federal Circuit's Rule 36 in the October 1991–October 2010 Terms), this petition raises a far more modest question. Dr. Manivannan does not invoke a constitutional or statutory entitlement to a reasoned opinion. Nor does Dr. Manivannan generally challenge the practice of affirming without opinion.

Instead, Dr. Manivannan requests that this Court exercise its supervisory authority to provide guidance for the lower courts and ensure that decisions involving complex and unsettled areas of the law are explained—thereby providing the appellant with a viable basis for seeking rehearing, rehearing *en banc*, or certiorari.

The regular public commentary and the number of petitions this Court receives on the issue demonstrate its importance. Even if this Court declines to adopt the rule urged by Dr. Manivannan —and instead holds that courts of appeals have unbounded discretion to affirm without opinion—a decision on the merits of this petition would provide important clarity on an unresolved and frequently recurring issue of procedure.

Dr. Manivannan further seeks certiorari because the Federal Circuit affirmed without opinion the Merit Systems Protection Board's gravely erroneous conclusion that Dr. Manivannan failed to show a protected disclosure contributed to adverse personnel actions against him and that the Department of Energy did not retaliate against Dr. Manivannan for protected whistleblowing disclosures. That result conflicts with the Federal Circuit's precedent in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *Drake v. Agency for Int'l Devel.*, 543 F.3d 1377 (Fed. Cir. 2008), *Smith v. Gen. Servs. Admin.*, 930 F.3d 1359 (Fed. Cir. 2019), *Anderson v. Dep't of Transp., F.A.A.*, 735 F.2d 537, 541 (Fed. Cir. 1984), and *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

If allowed to stand, the Federal Circuit's decision would undermine Congress's clear intent to protect whistleblowers—even perceived whistleblowers—whose employers later take personnel actions in retaliation for protected disclosures.

Certiorari is warranted.

STATEMENT OF THE CASE

A. Manivannan's Whistleblower Disclosures

For many federal employees, the Whistleblower Protection Act makes it a "prohibited personnel practice" to take action in retaliation for whistleblowing. *See* 5 U.S.C. § 2302(b)(8). Aggrieved employees subject to this provision may file complaints with the Office of Special Counsel, and, if necessary, obtain review from the Merit Systems Protection Board ("MSPB"). *Id.* §§ 1214, 1221. The MSPB is tasked with determining whether (i) the employee made a protected disclosure; (ii) the agency improperly took action in retaliation for whistleblowing. If the first two elements are met, the burden shifts to the agency, which must demonstrate that it would have taken the same action even had the protected disclosure not been made.

In the MSPB, uncontroverted agency testimony and contemporaneous documents established that Dr. Manivannan disclosed to his supervisor, Dr. Randall Gemmen, that Manivannan believed he had been deprived of authorship credit on a paper, in violation of DOE guidelines on authorship attribution. Days

later, Gemmen screamed at Manivannan, and drafted a proposed reprimand that explicitly articulates Gemmen's desire to punish Manivannan. Gemmen then discussed his "issues" regarding Manivannan with David Alman, who promptly requested Manivannan's transfer, as established by a contemporaneous agency record of the transfer.

As such, under the Federal Circuit's well-established precedent, there can be no serious dispute that Manivannan satisfied his burden to demonstrate the first two elements of a whistleblower reprisal claim. Indeed, at oral argument, two members of the Panel noted the "odd" change in the agency's treatment of Manivannan after he disclosed the authorship issue in later 2011. *See* Audio recording of Oct. 6, 2021 Argument, available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=20- 1804_10062021.mp3 (hereinafter, "Argument Audio"), at 21:55-22:41; 23:50-24:06.

Similarly, uncontroverted contemporaneous documents and agency testimony established that Dr. Manivannan disclosed to agency management what he believed to be waste and mismanagement in the early termination of a research project for the Office of Energy Efficiency and Renewable Energy ("EERE"). Once again, the agency promptly transferred Manivannan—a personnel action which Gemmen described at the time as "a present" to Mary Anne Alvin, another agency employee who "clearly disliked" Manivannan.

Uncontroverted agency testimony and documents also show that Gemmen and Alvin subjected Manivannan to onerous and arbitrary requirements not imposed on others, and to conduct that both Manivannan and other agency employees regarded as hostile and unlike anything they had ever seen at the agency. See Opening Brief at 21, 31 (citing testimony of Manivannan supervisor Larry Shadle, agency scientist David Tucker, and other supporting evidence).

Thus, under the Federal Circuit's well-established precedent, Manivannan successfully met his burden of proof to demonstrate agency retaliation taken soon-in-time after his disclosures, by officials with knowledge of these disclosures.

Yet, the Federal Circuit's Rule 36 judgment conclusorily affirmed the MSPB, which did not correctly apply these burdens of proof. This judgment is clearly in conflict with *Whitmore*, *Lachance*, and other precedential Federal Circuit decisions that ruled in favor of employees with similar factual allegations.

B. Proceedings Below

1. Merit Systems Protection Board

On March 15, 2018, Manivannan, representing himself pro se, filed an appeal alleging whistleblower retaliation. Manivannan remained a pro se litigant for all proceedings in this matter until May 28, 2019.

The Agency designated Mark T. Hunzeker as its representative. On March 26, 2018, Manivannan timely moved pro se to disqualify Mr. Hunzeker on the grounds that Hunzeker was substantially involved in many of the actions Manivannan was challenging in his appeal. On March 27, 2018, the AJ entered a General Order denying, without explanation, Manivannan's motion to disqualify Mr. Hunzeker, thus allowing the Agency to move forward with Mr. Hunzeker as its counsel.

On August 15, 2018, the AJ held a prehearing conference hearing and scheduled a hearing for August 22, 2018. Among other things, the AJ's prehearing order "ruled that the agency's cooperation with the state criminal investigation and prosecution was NOT a personnel action." The prehearing order also ruled on the admission or exclusion of witnesses. The AJ allowed 4 joint witnesses: Gemmen; Alvin, Alman, and Heather Moody. The prehearing order also identified Manivannan as a witness. The AJ allowed the Agency to call Gerdes. The AJ rejected the Agency's proposal to call the deciding official in Manivannan's removal proceedings, Bryan Morreale (the Executive Director of Dr. Manivannan's agency, the National Energy Technology Laboratory), who the AJ deemed "unnecessary."

The AJ allowed Manivannan to call only 2 additional witnesses, Tucker and Shadle. The AJ rejected 8 of Manivannan's proposed witnesses as "irrelevant" or "duplicative." The AJ also excluded as

"irrelevant," without further explanation, two of Manivannan's proposed exhibits, including a collection of Manivannan's personnel records, and a voicemail Alman left on Manivannan's answering machine on April 7, 2016 ordering Manivannan to appear at NETL without his lawyer on the morning of April 8, 2016 and stating that Manivannan would be subject to discipline if he refused to comply.

The AJ conducted a hearing on December 12 and 13, 2019 and January 9, 2020.

The AJ issued an initial decision on March 4, 2020, holding that (1) Manivannan failed to prove his protected disclosures by a preponderance of the evidence; (2) Manivannan did not show the disclosures were contributing factors to his challenged personnel actions; and (3) the Agency established, by clear and convincing evidence, that it would have taken the same personnel actions in the absence of Manivannan's protected disclosures. The decision became final on April 8, 2020.

2. The Federal Circuit's Rule 36 Judgment

Dr. Manivannan appealed from the MSPB's decision, arguing that it was based in legal error and was unsupported by substantial evidence. Dr. Manivannan further argued that the MSPB's administrative judge abused his discretion by refusing to allow Manivannan discovery, by excluding

important witnesses and evidence, and by ignoring relevant evidence of record.

The Federal Circuit held oral argument on October 6, 2021. On October 12, 2021, the Federal Circuit issued a one-line Rule 36 Judgment stating that the MSPB's decision was "Affirmed."

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari to Determine Under What Circumstances, If Any, a Court of Appeals Must Issue a Reasoned Opinion.

Although the Federal Rules of Appellate Procedure contemplate that the courts of appeals may issue judgments without opinion, Fed. R. App. P. 36(a)(2), the Rules do not set forth any standards for doing so. Nor has this Court ever provided meaningful guidance to the lower courts.

The only discussion of the issue is footnote 4 of the per curiam opinion in *Taylor v. McKeithen*:

> We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. See Rule 21, Court of Appeals for the Fifth Circuit. But here the lower court summarily reversed without any opinion on a point that had been considered at

> length by the District Judge. Under the special circumstances of this case, we are loath to impute to the Court of Appeals reasoning that would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance.

407 U.S. 191, 194 n.4 (1972).

This Court has never identified what, if any, limits exist to this latitude. This Court should grant certiorari and clarify under what circumstances, if any, a court of appeals must issue a reasoned opinion.

A. The discretion of federal courts of appeals in deciding whether to write opinions is unquestionably important.

In the absence of guidance from the Federal Rules or from this Court, the courts of appeals have adopted different local rules and different practices regarding summary affirmances. See 1st Cir. R. 27.0(c), 36.0(a); 2d Cir. IOP 32.1.1(a); 3d Cir. IOP 10.6; 4th Cir. IOP 36.3; 5th Cir. R. 47.6; 6th Cir. R. 36; 8th Cir. R. 47B; 9th Cir. R. 36-1; 10th Cir. R. 36.1; Fed. Cir. R. 36; *see also Momo Enters., LLC v. Popular Bank*, 738 F. App'x 886, 887 (7th Cir. 2018) (stating when "[s]ummary affirmance may be in order"); *Rogers v. Am. Fed'n of Gov't Emps.*, 777 F. App'x 459, 460 (11th Cir. 2019) (per curiam) (detailing when "[s]ummary disposition is appropriate"); *Taxpayers Watchdog, Inc. v. Stanley*,

819 F.2d 294, 297-98 (D.C. Cir. 1987) (per curiam) (stating when "summary affirm[ance]" is permitted).

Although the courts of appeals may enjoy "wide latitude" in their decisions of whether and how to write opinions, there is an open question as to whether the courts of appeals' discretion is unbounded. Are courts of appeals free to issue one-word opinions in all cases, a majority of all cases, or even in a majority of a particular type of case? Regardless of the correct answer, the courts of appeals (and litigants) would benefit from guidance from this Court.

If there are circumstances in which a court of appeals must (or should) issue a written opinion, they should be uniform across the country and explained by this Court. If not, this Court should make clear to all courts of appeals that they are free to create their own procedures and have no obligation to issue a reasoned opinion in any case.

The issue arises frequently. At least in theory, every appeal requires the appellate panel to consider whether to write a reasoned opinion. In particular, the propriety of Rule 36 one-word affirmances by the Federal Circuit is a recurring issue. The number of certiorari petitions this Court receives on the issue confirms the interest of the bar. The practice has also attracted public commentary and academic interest. *See, e.g.,* David Johnson, *You Can'tHandle the Truth!—Appellate Courts' Authority To Dispose of Cases Without Written Opinions*, 22 App. Advoc. 419 (2010). Decades ago, an article in the Columbia Law

Review described the practice of issuing decisions without opinions as "uniformly condemned":

> A key characteristic of decisions without opinions is their failure to provide the parties or the court below with any hint as to the court's reasoning. Accordingly, the practice under these rules has been uniformly condemned by commentators, lawyers, and judges.

William Reynolds & William Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1174 (1978).

Others who have criticized the practice have also noted the benefits to the decision maker of requiring reasoned opinions. "[T]here is accountability in the giving of reasons." Harold Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 UCLA L. Rev. 432, 438 (1976). "The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal or reversal does not." Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 Univ. of Md. L. Rev. 766, 782 (1983). *See also Balt. & Annapolis R. Co. v. Wash. Metro. Area Transit Comm'n*, 642 F.2d 1365, 1370 (D.C. Cir. 1980) ("[T]he requirement of reasons imposes a measure of discipline * * * , discouraging

arbitrary or capricious action by demanding a rational and considered discussion."); Mathilde Cohen, *When Judges Have Reasons Not To Give Reasons: A Comparative Law Approach*, 72 Wash. & Lee L. Rev. 483, 496- 513 (2015) ("Reasons for Reason-Giving").

While the harsh criticism of Federal Circuit Rule 36 often arises in the patent context, it applies with equal force to the Federal Circuit's review of the Merit Systems Protection Board. By analogy to the patent context, two close observers of the Federal Circuit said in January 2017 that "close to half of all cases" brought to the Federal Circuit were being decided with a one-word affirmance under Rule 36. See Peter Harter and Gene Quinn, *Rule 36: Unprecedented Abuse at the Federal Circuit*, https://www.ipwatchdog.com/2017/01/12/rule-36-abuse-federal circuit/id=6971. They cited 12 appeals from district court decisions in patent cases in the seven months between May 9, 2016, and December 9, 2016, that were decided with a one-word affirmance under Local Rule 36.

Their January 2017 comment concluded that "it is only going to be a matter of time for someone to appeal this issue to the U.S. Supreme Court, and possibly also for questions about the long-term viability of the Federal Circuit to start to be seriously discussed on Capitol Hill." *See* Harter and Quinn, *Rule 36: Unprecedented Abuse at the Federal Circuit,* supra. A January 2019 comment by one of the same commentators concluded, "Obviously, the Federal

Circuit is not going to stop using Rule 36 as a vehicle to manage its docket on its own. Meanwhile, patent owners will lose patent rights *without any real explanation by the only Article III federal court they have access to in an appeal from the PTAB*." *See* Gene Quinn and Steve Brachmann, No End in Sight for Rule 36 Racket at Federal Circuit," https://www.ipwatchdog.com/2019/01/29/no-end-sight-rule-36-racket-cafd/id105696/ (emphasis added).

That same concern arises in appeals from the Merit Systems Protection Board. The Federal Circuit was the only Article III federal court to which Dr. Manivannan was permitted to present his whistleblower claims. Yet, that court dismissed his claims without a single word of reasoned explanation.

Providing the requested guidance would harmonize the practice among the circuits, benefit both litigants and the judiciary, and reduce the number of certiorari petitions this Court receives on this issue.

B. This Court should exercise its supervisory authority to require a court of appeals to provide a reasoned opinion in the narrow circumstances of this case.

This Court should exercise its supervisory authority to provide guidance on the practice of affirming without an opinion. "This Court has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of evidence

and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *Carlisle v. United States*, 517 U.S. 416, 426 (1996)).

By deciding the issue as a matter of supervisory authority, this Court would avoid constitutional questions often presented by petitioners challenging an affirmance without opinion, often under the First, Fifth, and/or Fourteenth Amendments. *See, e.g.,* Pet., *SPIP Litig. Grp. v. Apple, Inc.*, No. 19-253, cert. denied, 2019 WL 6107778, at *1 (2019) (arguing the Federal Circuit's Rule 36 practice violates the Fifth Amendment); Pet., *Chestnut Hill Sound, Inc. v. Apple*, 19-591, cert. denied, 2020 WL 129624 (Jan. 13, 2020) (arguing the Federal Circuit's Rule 36 practice violates the First Amendment's right of access to the courts and the due process and equal protection clauses).

Dr. Manivannan does not contend that opinions are required in all cases. Nor does he contend that the Federal Circuit's use of Rule 36 is always—or even often—inappropriate. Dr. Manivannan argues only that where the law is uncertain but issues of national importance like the protection of government whistleblowers, and the reasoning behind the affirmance entirely opaque, a reasoned opinion should be required so that a litigant may exercise the right to seek rehearing, rehearing *en banc*, or certiorari.

In this case, The Whistleblower Protection Act prohibited the Department of Energy from taking any

personnel action against Dr. Manivannan "for disclosing information that the employee reasonably believes evidences violation of law, rule, or regulation; gross mismanagement; a gross waste of funds;" or "an abuse of authority." *Chambers v. Department of the Interior*, 602 F.3d 1370, 1375-76 (Fed. Cir. 2010) (citing 5 U.S.C. § 2302(b)(8)). To prevail on his claims, Manivannan "need not 'label' the disclosure correctly." *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 11 (2014). Rather, Manivannan merely must show by a preponderance of the evidence that he made a protected disclosure that was a contributing factor in any personnel action taken against him. Id.

To show a protected disclosure, "the proper test is this: 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 [or waste or a violation or abuse of authority]?" *Elkassir v. Gen. Servs. Admin.*, 325 F. App'x 909, 912 (Fed. Cir. 2009) (citing *Lachance*, 174 F.3d at 1381, and *Drake*, 543 F.3d at 1380). To satisfy this test, Manivannan need not demonstrate "that an actual violation occurred." *Drake*, 543 F.3d at 1382.

By affirming the MSPB with no written opinion, the Federal Circuit directly contravened the precedential standards set forth above. The MSPB held that Manivannan did not make protected disclosures because "there appears to have been no reasonable basis for believing he was ever listed as an

author on the disputed paper, and the second disclosure did not involve a matter substantial enough to constitute gross waste/gross mismanagement." The Federal Circuit affirmed this holding with no opinion, essentially adopting it whole cloth, but this Rule 36 judgment is incompatible with *Lachance* and *Drake*.

In *Drake*, a foreign service investigator attended two parties at the U.S. Embassy where he worked in Budapest and, after the parties concluded, sent an email to management stating that he witnessed the intoxication of several higher-ups within his agency. *Drake*, 543 F.3d at 1378-79. The investigator was subsequently transferred out of Budapest and to Washington, D.C. *Id.* at 1379. Drake brought a whistleblower reprisal claim to the MSPB which held, *inter alia*, that Drake did not demonstrate a reasonable belief that the officials he witnessed were actually intoxicated. *Id.* at 1380.

In a precedential decision, the Federal Circuit reversed and held that, "By requiring Mr. Drake to prove that the agency personnel were intoxicated, the AJ erroneously required Mr. Drake to prove that an actual violation occurred." *Id.* at 1382. The Federal Circuit further noted that "This is in direct conflict with the standard set forth in *Lachance*." *Id.*

By affirming the MSPB in a Rule 36 judgment, the Federal Circuit made the same mistake as the MSPB in *Drake*. Dr. Manivannan demonstrated by uncontroverted evidence that he disclosed what he believed was an improper foray by his supervisors

into an agency scientist's attribution of authorship credit, and those same supervisors testified before the MSPB that agency rules prohibited such conduct. By contrast, the MSPB—and now the Federal Circuit—required Manivannan to prove that his supervisors *actually engaged* in this improper conduct and violated the agency policy. This is the exact same misapplication of *Lachance* that the Federal Circuit cautioned against in *Drake*. "The test is not whether Mr. Drake was able to prove intoxication, but rather could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by Mr. Drake [could] reasonably conclude that agency personnel were intoxicated and that a violation did occur." *Id.*

The same is true for Manivannan's disclosure of gross waste in the early termination of EERE funding. The MSPB—and now a panel of the Federal Circuit—required Manivannan to demonstrate that his disclosure of the early cancellation of funding *actually amounted to gross waste*. This is not the test under *Drake*. Instead, Manivannan merely needed to demonstrate that a "disinterested observer with knowledge of the essential facts *known to and readily ascertainable* by" Manivannan could "reasonably conclude" that gross waste occurred. On the record below, this is indisputable.

Finally, by adopting the MSPB's decision in full, the Federal Circuit's Rule 36 judgment erroneously held that the agency's transfers of Manivannan in

2011 and 2014 were not adverse personnel actions, a holding that directly conflicts with the Federal Circuit's precedential decision in *Marano*. Under the WPA, a disclosure is "a contributing factor" to a personnel action if the Agency gave "any" weight to the disclosure "either alone or even in combination with other factors." *Marano*, 2 F.3d at 1140. Manivannan established in his briefs and at oral argument that the agency's own witnesses admit they initiated transfers of Manivannan. Given *Marano*'s directive that an agency's giving "any" weight to a disclosure is sufficient to show a causal link between the disclosure and a personnel action, the Federal Circuit's decision is patently erroneous. Contemporaneous notes by Manivannan's union representative strongly suggest that the agency, not Manivannan, was "driving" the 2011 transfer. Indeed, the official record of that personnel action shows that Manivannan's supervisor, David Alman requested that transfer on May 4, 2011, and the record also shows that Gemmen spoke to Alman with about his "issues" regarding Manivannan. Gemmen himself described the 2011 transfer as prompted by Manivannan had a "strained" relationship with Gemmen and Gerdes. Accordingly, the disclosures were a contributing factor—and, indeed, the most significant factor—in the Agency's 2011 transfer of Manivannan. *Marano*, 2 F.3d at 1140.

The same is true with respect to the 2014 transfer. The MSPB—and now the Federal Circuit—found that

the decision to transfer Manivannan in June 2014, which took place less than a month after Manivannan's EERE disclosure in an e-mail dated May 7, 2014, was not an adverse personnel action because Manivannan sought the transfer. The record does not support this. Gemmen attributed the transfer to a request by Mary Ann Alvin, characterized the transfer at the time as a "present" to Alvin, and described the transfer as a solution that management came up with, not something Manivannan requested, and both Gemmen and Alvin knew long before Manivannan that he would be transferred. This is more than enough to satisfy the standard from this Court's precedential decision in *Marano*, and the Federal Circuit's Rule 36 judgment stands in direct conflict with that decision.

But without a reasoned opinion from the panel, Dr. Manivannan had very little realistic basis on which to seek further review of the merits. *Cf. Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986) (granting certiorari request, vacating the judgment, and remanding the case to the Federal Circuit where this Court "lack[ed] an adequate explanation of the basis for the Court of Appeals' judgment: most importantly, we lack the benefit of the Federal Circuit's informed opinion on the complex issue of the degree to which the obviousness determination is one of fact"); *see also* Quinn & Brachmann, supra ("This growing usage of one-word decisions from the Federal Circuit raises rather serious concerns, which justify many questions,

including whether the Federal Circuit is simply using Rule 36 to avoid difficult subject matter, or to prevent meaningful review by a Supreme Court that has seemed keenly interested in second guessing so many important decisions reached by the Court in recent years."). There is a particular concern with the use of Rule 36 affirmances in administrative appeals, in which a court of appeals cannot affirm on alternative grounds. *E.g., Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Dr. Manivannan thus urges that this Court should, exercising its supervisory authority, direct the courts of appeals to issue reasoned opinions in cases involving fact-intensive areas of the law, where issuance of a reasoned opinion would provide the losing party with reasonable grounds for seeking rehearing, rehearing en banc, or certiorari.

The burdens imposed on the courts of appeals by such a rule would not be onerous. Nor would any opinion need to be particularly long, merely sufficient to enable litigants and any reviewing court to understand the panel's reasoning.

And even in those cases potentially affected by this rule, courts of appeals would not necessarily need to write new opinions on their own. A court of appeals can, of course, adopt the decision below as its own opinion. *See, e.g., Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508, 510 (7th Cir. 2008) ("Because the district court issued a thorough and

well-reasoned opinion and order that does not contain any error, we adopt the district court's opinion and order dated November 5, 2007, as our own."). In this case, if the Federal Circuit panel believes that the MSPB's analysis was fully correct and is willing to adopt its decision as an opinion of the Federal Circuit, it can do so. Or it can adopt only portions of the MSPB's decision and briefly write on other issues. *E.g., Crampton v. Kroger Co.*, 709 F. App'x 807, 810 (6th Cir. 2017) ("Accordingly, concluding that a full-length opinion reiterating the same analysis would be duplicative, we adopt the district court's opinion as our own and affirm its judgment on the basis of the reasoning in its opinion, as augmented above.").

Unlike a Rule 36 affirmance, adopting the MSPB's decision makes the reasoning of the court of appeals clear. *Cf. Rates Tech., Inc. v. Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012) ("[The judgment] does not endorse or reject any specific part of the trial court's reasoning.").

This Court should exercise its supervisory authority to adopt such a rule. Such an approach would avoid difficult statutory and constitutional questions. *Bond v. United States*, 572 U.S. 844, 855 (2014) ("it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case" (citation omitted)).

Additionally, there is an open question as to whether the existence of Federal Circuit Rule 35, permitting rehearing, and 28 U.S.C. § 1254(1), permitting requests for certiorari, may imply some entitlement to a written opinion. Pet., Cloud Satchel, LLC v. Barnes & Noble, Inc., No. 15-116, *cert. denied*, 136 S. Ct. 1723 (2016). Or the fact that some litigants receive opinions, while others do not, may give rise to equal protection concerns. Chestnut Hill, *supra*. Exercising supervisory authority to determine when courts of appeals must issue opinions avoids difficult constitutional questions and provides important guidance for litigants and the lower courts.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

JOHN J. POWELL

MONTGOMERY MCCRACKEN
WALKER & RHOADS LLP
1735 Market Street
Philadelphia, PA 19103
(215) 772-1500
mmadden@mmwr.com

Counsel for Petitioner

April 11, 2022

APPENDIX

[Intentionally Left Blank]

Appendix A - Denial of Rehearing En Banc of the United States Court of Appeals for the Federal Circuit in Manivannan v. Energy (No. 20-1804, Jan. 11, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AYYAKKANNU MANIVANNAN,

Petitioner

v.

DEPARTMENT OF ENERGY,

Respondent

2020-1804

Petition for review of the Merit Systems Protection Board in No. PH-1221-18-0230-W-3.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, TARANTO,

CHEN, HUGHES, STOLL, and CUNNINGHAM,
Circuit Judges.

PER CURIAM.

O R D E R

Ayyakkannu Manivannan filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on January 18, 2022.

January 11, 2022	*/s/* Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

Appendix B – Opinion of the United States Court of Appeals for the Federal Circuit in *Manivannan v. Energy* (No. 20-1804, Oct. 12, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

AYYAKKANNU MANIVANNAN,

Petitioner

v.

DEPARTMENT OF ENERGY,

Respondent

2020-1804

Petition for review of the Merit Systems Protection Board in No. PH-1221-18-0230-W-3.

JUDGMENT

JOHN J. POWELL, Montgomery McCracken Walker & Rhoads LLP, Philadelphia, PA, argued for petitioner.

ROBERT R. KIEPURA, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BRIAN M. BOYNTON, DOUGLAS GLENN EDELSCHICK, MARTIN F. HOCKEY, JR., ELIZABETH MARIE HOSFORD; MONEKIA GAUSE FRANKLIN, Office of General Counsel, United States Department of Energy, Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (LOURIE, DYK, and O'MALLEY, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

October 12, 2021	*/s/* Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

Appendix C – Decision of the Merit Systems Protection Board (Mar. 4, 2020)

Merit Systems Protection Board - Initial Decisions

PH.D, MANIVANNAN, AYYAKKANNU
V.
DEPARTMENT OF ENERGY
No. PH-1221-18-0230-W-3
March 4, 2020

Before: SYSKA, MARK, AJ

AYYAKKANNU MANIVANNAN, PH.D,
Appellant,
v.

DEPARTMENT OF ENERGY,
Agency.

John Powell, Esquire, Philadelphia, Pennsylvania, for the appellant.

Kimberly L. Sachs, Esquire, Philadelphia, Pennsylvania, for the appellant.

Kari Skovira, Esquire, Middletown, New York, for the agency.

Mark T. Hunzeker, Pittsburgh, Pennsylvania, for the agency.

BEFORE

Mark Syska
Administrative Judge

INITIAL DECISION

The appellant filed this individual right of action (IRA) appeal under the Whistleblower Protection Act (WPA)/Whistleblower Protection Enhancement Act (WPEA). *See* Appeal File, (AF), Tab 1.[1] The Board has jurisdiction under 5 U.S.C. §§ 1221, 2302; 5 C.F.R. §§ 1201.3(b)(2); 1209.1 *et seq*. For the reasons that follow, the appellant's request for corrective action is DENIED.

Background

Dr. Manivannan, who has PhD's in engineering and physical science, has served as a physical scientist at

---

[1] This is the third iteration of the appellant's case; the two prior versions were dismissed without prejudice to allow for the completion of the appellant's criminal case. The first case contains the bulk of the record, as the case was not dismissed without prejudice until the eve of trial. Citations to the record in the first appeal-MSPB Docket No. PH-1221-18-0230-W-1-will be in the form "Appeal File (AF), Tab X." Citations to the record in the second case-MSPB Docket No. PH-1221-18-0230-W-2-will be in the form "Refiled Appeal (RA), Tab X." Citations to the current case's record will be in the form "Final Appeal File (FAF), Tab X."

the Department of Energy's (DOE's) National Energy Technology Laboratory (NETL), Office of Research & Development (ORD)[2], since approximately 2005 in Morgantown, West Virginia. In June 2015, the Pennsylvania State University (PSU) Affirmative Action Office contacted NETL manager Maryanne Alvin and told her that a former NETL intern (FB) wanted to talk about her internship with the appellant. In sum, FB reported that she and the appellant had an affair for years, and he had stalked her (including hacking her cell phone) and physically and psychologically abused her when she ended the relationship. This report ultimately led to a criminal prosecution and an internal agency investigation that resulted in a proposal to remove the appellant. *Seegenerally* AF, Tab 23 at 5; Tab 25 at 107, *et seq*. During the internal investigation, the appellant was placed on administrative leave. *See* AF, Tab 50 at 26.

On April 8, 2016, the agency issued a proposed notice of removal to the appellant:

Charge I: Improper Conduct

The Management Directed Inquiry (MDI) documents the nature of your relationship with [FB]. In her sworn statement [FB] described a long-term personal and sexual relationship with you that began in the summer of 2012, shortly after she began working at NETL as your intern. In your interview for the MDI

---

[2] Later renamed the Research & Innovation Center.

you denied having a personal or sexual relationship with [FB]. In formulating this charge I considered all of the evidence in the MDI and conducted my own credibility assessment of the evidence, including, but not limited to, your individual sworn statements to the investigator, the emails and text messages between you and [FB], as well as the photographs of you and [FB] together in a variety of settings. I also considered the clarity, consistency, and details provided by each of you in your sworn statements and the motives each of you may have had to exaggerate or fabricate. Given the length of your relationship, the amount of contact between you and [FB], and the general nature of some of your communications, I do not find it credible that your relationship was purely professional or that you did not have a personal or a sexual relationship with [FB].

Specification 1: Beginning in or around June 2012 through in or around December 2013, you were engaged in a sexual relationship with your intern, [FB], a student you were assigned through the ORISE program to officially mentor as part of your official duties.

Specification 2: On multiple occasions, beginning in or about June 2012 through in or about August 2012, you engaged in sexual intercourse with [FB], in your government office located at NETL in Morgantown, West Virginia.

Specification 3: You intimidated [FB], in or around December 2013, after she had returned to Morgantown over the PSU semester break to work at NETL. You did this by placing [FB] in reasonable fear of what you might do, including, but not limited to, terminating her internship, through the following actions:

1. By becoming angry when she told you that she only wanted a professional relationship with you by "not seeing you anymore" or words to that effect; and/or,

2. By calling [FB] a "fucking bitch" and "whore," or words to that effect; and/or,

3. Refusing to leave the apartment at which [FB] was staying in or around Morgantown, West Virginia, when [FB] had to meet with her therapist for a previously arranged Skype appointment. Instead, you demanded to stay in the room to monitor and direct what she said to her therapist by texting her responses.

Specification 4: [FB] sent you an email on or about January 31, 2014 in which she told you that her mother was ready to report your behavior towards her to someone at Human Resources at DOE and ready to contact a labor lawyer. You threatened [FB], on or about February 25, 2014 by telling her that her January 31, 2014 email to you was "with our legal people," or words to that effect, and that she might

not be able to continue her internship in the summer 2014.

Specification 5: You intimidated [FB] in or about March 2013 by calling security in her presence to report she was at the NETL site in Morgantown without a badge and subsequently, as she attempted to leave NETL, you attempted to prevent her from leaving by following her from the building and blocking the exit so she could not drive her car offsite, causing her fear and/or confusion.

Specification 6: You obtained access to [FB]'s personal email account without her authorization or consent from on or about June 22, 2014, through on or about July 18, 2014.

Specification 7: You went to PSU to try to talk to [FB], on or about January 24, 2014. [FB] went to Hershey, Pennsylvania, for the day to avoid seeing you. She returned at approximately 12:30 AM, and went to speak to Mr. Mishra in the vicinity of his apartment. While [FB] and Mr. Mishra talked in her car, you found them, drove slowly through the permit-only parking lot in which they were parked and parked your vehicle behind the car in which she and Mr. Mishra were talking. [FB] became alarmed and drove away and you followed her for approximately 10 minutes while trying to call her on her telephone. [FB] drove to a police station and pulled over to the side of the road near the police station. You parked your vehicle behind [FB]. [FB] got out of her car and confronted you and you left.

Specification 8: You slapped [FB] on the face, and kicked her after she fell to the floor, in or around December 2013, at an apartment where she was staying in or around Morgantown, West Virginia,

CHARGE II: MISUSE OF POSITION

You are a Research General Engineer, GS-801-13 employed by NETL. A portion of your duties include serving as a mentor to students under the ORISE program. As such, your official duties included scientific and engineering research and mentoring and participating in the educational experience of a student intern. The MDI documents that you were assigned as [FB]'s mentor and that you had frequent interaction with her personally, in and out of the lab, and by email, text, and telephone conversations. In her sworn statement [FB] described a long-term personal and sexual relationship with you that began in the summer of 2012, shortly after she began working at NETL as your intern and continuing until, at least, December 2013. In your interview for the MDI you denied having a personal or sexual relationship with [FB]. You both agree that there existed a professional relationship between you that began because [FB] was assigned as your intern as a part of your official duties. [FB], however, discussed a number of occasions upon which your interactions with her were inappropriate in your role as a federal employee and/or ORISE mentor. In formulating this charge I considered all of the evidence in the MDI and conducted my own credibility assessment of the

evidence, including, but not limited to, your individual sworn statements to the investigator, the emails and text messages between you and [FB], as well as photographs of you and [FB] together in a variety of settings. I also considered the clarity, consistency, and details provided by each of you in your sworn statements and the motives each of you may have had to exaggerate or fabricate. Given the length of your relationship, the amount of contact between you, and the general nature of some of your communications, I do not find it credible that your relationship was only professional or that you did not have a sexual relationship with [FB].

Specification 1: You misused your position as a Research General Engineer and/or an ORISE mentor at NETL, beginning in or around June 2012 through in or around December 2013, when you had a sexual relationship with your intern and thereby used your position to gain a benefit for yourself.

Specification 2: You misused your position as a Research General Engineer and/or ORISE mentor at NEIL, in or around December 2013, by compelling [FB] to perform actions that were beyond your authority as her mentor and unrelated to her internship, including, but not limited to:

1. unlocking her personal mobile telephone so that you could read her emails and other personal information contained on the telephone; and/or,

2. deleting contact information from her personal telephone pertaining to Mr. Mishra.

Specification 3: You misused your position as a Research General Engineer and/or ORISE an Mentor at NETL, in or around February and/or March 2014 by inducing Professor Donghai Wang, a person with whom you had a professional relationship due in part to your employment at NETL, to facilitate contact with [FB]. [FB] was working in Dr. Wang's lab and you used your prior association with Dr. Wang to make contact with her. You did this by, including, but not limited to:

1. borrowing Professor Wang's cellular telephone to place a call to [FB] so

that she would answer because the number that was calling her would be displayed on [FB]'s telephone would be that of Professor Wang rather than your number; and/or

2. using your association with Professor Wang as an excuse to visit his laboratory in order to see [FB].

Specification 4: You misused your position as a Research General Engineer and/or an ORISE Mentor at NETL during a course of conduct from in or around May 2012 through in or around July 2014 by communicating with [FB] by telephone, email and text messages, often multiple times a day and/or late at night, about subjects not related to your role as

her mentor and that, on some occasions, she found bothersome, inconvenient, and/or stressful.

Specification 5: You misused your position as a Research General Engineer and/or an ORISE Mentor at NETL by requesting that Mr. Daniel Haynes, a NETL employee and your colleague, speak with [FB]to discourage her from pursuing a relationship with Mr. Parth Mishra by telling her that Mr. Mishra was using her and had no interest in marrying her. Mr. Haynes subsequently did have a conversation with [FB] to this general effect.

CHARGE III: FAILURE TO FOLLOW PROCEDURES

The MDI contains a letter to the Citizenship and Immigrations Services on what appears to be NETL letterhead and signed by you. The MDI also contains the provisions of NETL Procedure 142.1-00.0*l*E, pertaining, in part, to use of letterhead in correspondence about foreign nationals. In formulating this charge I considered this evidence as well as your sworn testimony to Ms. Williams about this issue.

Specification 1: You violated written NETL procedures, on or about September 6, 2014, by signing and sending a letter on what appeared to be official NETL letterhead to the Citizenship and Immigrations Services (USCIS) Division of the U.S. Department of Homeland Security. In the letter you offered support for a petition for immigration

submitted to USCIS by a foreign national scientist. You violated the provisions of NETL Procedure 142.3-00.0 IE requiring you to inform management of any correspondence drafted on letterhead related to any foreign national.

CHARGE IV: LACK OF CANDOR

The MDI documents numerous emails and text messages between you and [FB], as well as photographs of you and [FB] together in a variety of settings. This evidence of your relationship covers a period of time from approximately mid-2012 through approximately mid-2014. In formulating this charge I considered all of the evidence in the MDI and conducted my own credibility assessment of the evidence, including, but not limited to, your individual sworn statements to the investigator, the emails and text messages between you and [FB], as well as photographs of you and [FB] together in a variety of settings. I also considered the clarity, consistency, and details provided by each of you in your sworn statements and the motives each of you may have had to exaggerate or fabricate. Given the length of your relationship, the amount of contact between you, and the general nature of some of your communications, I do not find many of your statements credible, including, but not limited to, that your relationship was purely professional or that you did not have a personal or a sexual relationship with [FB].

Specification 1: In your sworn declaration taken on or about September 9, 2015, attached to the MDI, you lacked candor when answering the investigator's questions when you stated that your relationship with [FB] was only professional, or words to that effect.

Specification 2: In your sworn declaration you lacked candor when answering the investigator's questions when you stated that you never had a sexual relationship with [FB]. [FB]'s sworn declaration attached to the MDI stated that she engaged in a sexual relationship with you. Her statement is corroborated by text messages between you and [FB] and photographs of you and [FB] together that are suggestive of an intimate relationship.

Specification 3: In your sworn declaration you lacked candor when answering the investigator's questions when you stated that you did not make any arrangements for, or set up [FB]'s trip to Japan to attend the Green Energy Conference with you, in or around August 2013. When confronted with an itinerary for [FB] to fly to Japan that you had paid for with your credit card, you changed your statement to say that you helped [FB] with the arrangements because it was her first time leaving the country.

Specification 4: In your sworn declaration you lacked candor when answering the investigator's questions when you stated that you never used Dr. Wang's telephone to call [FB]. When informed that Dr. Wang

said that you had borrowed his phone, you acknowledged that is was possible that you had borrowed his phone. When told that you had borrowed his phone more than once you unequivocally denied that you had used his phone more than once, explaining that you and Dr. Wang were in a meeting and Dr. Wang handed the phone to you on an occasion when he was speaking with [FB]. You also acknowledged that you may have borrowed his phone to call [FB] if your phone 'died.'

Specification 5: In your sworn declaration you lacked candor when answering the investigator's questions when you stated that you worked with many students in Dr. Wang's laboratory, including a student named Mikhail Gordin. When informed that Mr. Gordin said that you did not work on a project together you acknowledged that you had not worked on a project together and you admitted that you called him on the telephone and tried to talk about [FB] with him.

See AF, Tab 51 at 18-22.

On April 19, 2016, the appellant was convicted by a jury on six charges. This conviction prompted the agency to issue a Notice of Supplemental Information Supporting the Proposed Removal. *See* AF, Tab 53 at 4-6. The appellant provided a response to the proposal. *Id*. at 5-22.

But before a decision issued, the appellant voluntarily resigned from the agency on June 16,

2016 (effective the following day).[3] *See* AF, Tab 54 at 12. Thereafter, the appellant pursued both an appeal of his criminal charges, and he filed a complaint (with two supplements) to the Office of Special Counsel (OSC). *See* AF, Tab 13.

On March 15, 2018, the appellant filed this IRA appeal. *See* AF, Tab 1. In due course, the case was set for hearing. *See* AF, Tab 28, Tab 57. But on May 4, 2018, the Superior Court of Pennsylvania vacated the judgment and remanded for a new trial on the charges. *See* AF, Tab 58. The Court concluded, *inter alia*, that certain evidence linking the appellant to FB's hacked phone/email was improperly admitted. *Id*. Given the appellant was facing a new trial, he asked for and received a dismissal without prejudice. *See* AF, Tab 62, Tab 63; *see also* RAF, Tab 6. Ultimately, the prosecutor elected not to go forward with the new trial, and this refiled appeal could proceed. *See* FAF, Tab 8, Tab 10.

I held the appellant's requested hearing over a three-day period, and eight witnesses testified: (1) Ayyakkannu Manivannan; (2) David Tucker, former co-worker and friend; (3) Lawrence Shadle, former supervisor; (4) David Alman, former supervisor and proposing official; (5) Maryanne Alvin, former

---

[3] The appellant also complained about changes to his SF-50 that were made after he left the agency. Hearing CDs. While outside the scope of this IRA, such a complaint may be covered under 5 U.S.C. § 3322.

supervisor; (6) Randall Gemmen, former first and second line supervisor; (7) Heather Moody, Employee & Labor Relations Specialist; and (8) Kirk Gerdes, former co-worker. *See* FAF, Tabs 24, 25, 28 (Hearing CDs).

Legal Standards

The WPA prohibits an agency from taking a personnel action against an employee for disclosing information that the employee reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *See Chambers v. Department of the Interior*, 602 F.3d 1370, 1375-76 (Fed. Cir. 2010) (citing 5 U.S.C. § 2302(b)(8)); *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ; 5 (2013); *see also Linder v. Department of Justice*, 122 M.S.P.R. 14, ; 11 (2014) (the employee need not "label" the disclosure correctly). The disclosure must be specific and detailed, not just vague allegations of wrongdoing. *See Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ; 6 (2016). Notably, an appellant in an IRA appeal cannot raise other affirmative defenses, such as discrimination, or harmful procedural error. *See*5 C.F.R. § 1209.2(c).

To be entitled to a merits hearing in a whistleblower appeal, the appellant must set forth nonfrivolous jurisdictional allegations that he engaged in whistleblowing activity by making a protected disclosure and that the disclosure was a contributing

factor in the agency's decision to take an action against him. *See Kerrigan v. Department of Labor*, 833 F.3d 1349, 1354 (Fed. Cir. 2015); *see also Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1371-1372 (Fed. Cir. 2001); *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ; 7 (2011).

The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct described in 5 U.S.C. § 2302(b)(8) is 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 evidenced wrongdoing as defined by the WPA. *See Chambers*, 602 F.3d at 1382; *Mithen*, 119 M.S.P.R. 215, ; 13. An appellant's involvement with and understanding of the subject matter at issue can be considered in determining if the appellant had a reasonable belief that he had made a disclosure. *SeeWebb v. Department of Interior*, 122 M.S.P.R. 248, ; 12 n. 5 (2015). Not all disagreements between supervisors and their employees yield "disclosures." *See Reid v. Merit Systems Protection Board*, 508 F.3d 674, 678 (2007) (discussion between employees and supervisors regarding various courses of action is normal, and such communications can help avoid potential violations); *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (the WPA is not a weapon in arguments over policy or a shield for insubordinate conduct); *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, ; 7 (2016) (general

philosophical or policy disagreements do not constitute protected disclosures).

A very broad range of personnel actions fall within the Board's jurisdiction under the WPA, including a significant change in the appellant's duties. *See Herman*, 115 M.S.P.R. 386, ; 7; *see also Savage v. Department of the Army*, 122 M.S.P.R. 612, ; 23 (2015) (the creation of a hostile work environment is a personnel action under the WPA); *Ingram v. Department of the Army*, 116 M.S.P.R. 525, ; 4 (2011) (the terms significant change in duties or working conditions should be construed broadly); *see generally* 5 U.S.C. § 2302(a)(2)(A). The employee must also prove the disclosure was a contributing factor to the personnel action; a "contributing factor" means the disclosure affected the agency's decision to threaten, propose, take, or not take the personnel action regarding the appellant. *See Mudd*, 120 M.S.P.R. 365, ; 10.

An employee can show that his disclosure was a contributing factor to the personnel action via the knowledge/timing test---by presenting evidence that the official taking the personnel action was aware of the disclosure, and the official took the action within a short enough period after the disclosure for a reasonable person to conclude that the disclosure was a contributing factor to the personnel action. *SeeGonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ; 19 (2008); *see also Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ; 21 (2013) (a disclosure made 1 to 2 years before an adverse

action can suffice under the knowledge-timing test). But timing alone does not suffice---the knowledge component is required and can be determinative to the question of the Board's jurisdiction. *See Kerrigan*, 833 F.3d at 1354. An employee can also prove the disclosure was a contributing factor by showing an official had "constructive knowledge" of the disclosure---that another official with knowledge of the disclosure influenced the official who actually took the retaliatory action — the "cat's paw" theory. *See Bradley v. Department of Homeland Security*, 123 M.S.P.R. 547, ; 15 (2016); *Aquino*, 121 M.S.P.R. 35, ; 19.

At a hearing, the appellant must prove his IRA claim by preponderant evidence. *See Scoggins*, 123 M.S.P.R. 532, ; 5. If the appellant proves that he made a disclosure and the disclosure was a contributing factor in an adverse personnel action, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action in the absence of the disclosure. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). Clear and convincing is a high evidentiary standard — the evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, including the evidence that detracts from the conclusion. *Id.* at 1368. Relevant factors under this legal test include: (1) The strength of the evidence in support of the agency's action; (2) the existence and strength of any motive to retaliate on the part of the agency officials involved in the

decision; and (3) any evidence the agency takes similar actions in similar circumstances against non-whistleblowers (the *Carr* factors). *Id.*; *Mithen,* 119 M.S.P.R. 215, ; 17. The agency does not have an affirmative burden to produce evidence as to each *Carr* factor, nor must each factor weigh in the agency's favor. *SeeMiller v. Department of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016).

ANALYSIS & FINDINGS

The appellant failed to prove his two purported disclosures by a preponderance of the evidence. As to the first, there appears to have been no reasonable basis for believing he was ever listed as an author on the disputed paper, and the second disclosure did not involve a matter substantial enough to constitute gross waste/gross mismanagement. Moreover, even had I found the appellant had made protected disclosures, his challenged personnel actions would fail. The actions were generally initiated by the appellant, the "disclosures" were not contributing factors, or the agency showed it would have taken the same action in the absence of the disclosure by clear and convincing evidence.

The Purported Disclosures

Disclosure 1

The appellant asserts that he disclosed that Gemmen/Gerdes abused their authority by having his name improperly removed from a scholarly paper

(deprived of authorship credit) and their own names added to the paper in 2010/2011. The appellant asserts that he made this disclosure for the first time in summer 2010, and repeatedly thereafter.

An abuse of authority occurs when there is an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or preferred other persons. *Herman*, 115 M.S.P.R. 386, ; 11. There is no de minimis exception for an abuse of authority as a basis for a protected disclosure under the WPA. *Id*.

The appellant was the most prolific publisher at NETL, and he published over 400 articles (as author or co-author) during his tenure. The appellant testified that he had worked on several papers with Dr. Wu and PhD student Zhi. Hearing CDs. In 2010, the appellant asserted that he participated in a paper regarding nano-technology with Wu and Zhi,[4] and his contributions were more than adequate to warrant a co-authorship credit. *Id*. Indeed, the appellant asserts that he saw his name on a draft of the paper during the summer of 2010. *Id*. However, later the appellant discovered he had not been credited as a co-author on the paper. *Id*.

---

[4] Zhi was the nominal first author, but Wu, as his professor and mentor, had final say over various aspects of the paper including awarding authorship credit (the normal province of the first author). Hearing CDs (Gemmen/Gerdes).

In his OSC complaint, and initial testimony, the appellant further asserted that he confronted Wu, who told him that Gemmen and Gerdes and ordered Wu to take the appellant's name off the paper and have their own names added to the paper. Hearing CDs, *see also* AF, Tab 13. The appellant also testified that he went to Gemmen to complain that *Gerdes* had told Wu to take his name off the paper in the summer of 2010, and Gemmen instructed him to work it out with Wu and Gerdes. *Id*. When there was no resolution, the appellant went to Gemmen again in early 2011 (after the paper was published) to again complain that his name had been improperly removed from a paper in violation of agency policy. *Id*. Thereafter, he again brought the matter to Gemmen with the assistance of the union, again without success. Notably, in his later testimony, the appellant changed his account to specifically allege that only Gerdes got the appellant's name removed from the paper, and he asserted that his reference to Gemmen in his OSC complaint was "an error." *Id*. The appellant also denied ever asking Gerdes to intervene with Wu, and he opines that Wu's emails are evasive or vague. *Id*.

Both Gemmen and Gerdes testified that they did not tell Wu to take the appellant's name off the paper, would not profit from having the appellant's name removed from the paper, earned their co-authorship credits on the paper, and never saw the appellant's name on any drafts of the paper. Hearing CDs. Gemmen further testified he never witnessed the

appellant involved in the work associated with the paper, and the appellant never reported to him that he was working on the paper. *Id*. Gemmen added that the appellant first brought the authorship issue to him in November 2010 (after the paper had been electronically published), and both Gemmen and Gerdes testified about subsequent encounters in early 2011. *Id*. Moreover, they both contacted Wu to see if he believed the appellant was entitled to credit on the paper, and Wu told both of them that the appellant was not entitled to any authorship credit and that his name had never been on the paper. *Id*. These statements are fully consistent with their prior declarations. *See* AF, Tab 23 at 34-41, 54-60. Furthermore, this testimony is fully corroborated by the contemporaneous emails in the record, including those from Wu. *See id*. at 42-48, 61-62. Notably Wu's emails stated that "the author list reflects the author's contribution to the paper" and "there is no question about the authorship of the paper." *Id*. at 44, 47. I find Gerdes and Gemmen's consistent and corroborated accounts credible.

The appellant's account is not believable. First off, he ultimately contradicted the fundamental proposition in his OSC complaint and initial testimony with his later testimony that Gemmen was not involved in removing him from the paper and the inclusion of Gemmen's name in the OSC complaint (and presumably his initial testimony) was an error. Hearing CDs. Second, he concedes that he never gave Gemmen any materials documenting his alleged work on the paper. *Id*. Third, his claim that

he never asked Gerdes to intervene with Wu was contradicted by Gerdes and the written record (contemporaneous emails). *Id.* Fourth, his claim that he saw his name on an early draft of the paper is uncorroborated (and unlikely on this record). Fifth, his claim that he brought the issue to Gemmen before publication (in summer 2010) is contradicted by Gerdes, Gemmen, the contemporaneous emails, and the appellant's own testimony on cross - where he concedes he first brought the matter to Gemmen in November. *Id.* Moreover, his claim about bringing the matter to Gemmen in summer makes little sense, if he actually saw his name on early drafts.[5] Sixth, his claim that Wu's emails are vague or evasive is disingenuous and ignores Gemmen and Gerdes' testimony that Wu specifically told them the appellant was not entitled to authorship credit. Hearing CDs. Seventh, and most significantly, the appellant did not tender any corroborating statements from Wu or Zhi nor did he attempt to call them as witnesses to support his account. Lastly, the appellant appeared to confess error near the end of the process, when he asked that the matter not be brought to Wu again. *See* AF, Tab 23 at 45.

At best, the appellant was merely confused, as he published several papers with Wu and Zhi that year. But a reasonable person would check the publication

---

[5] A summer disclosure date also undermines his claim of retaliatory animus, as Gemmen gave him a cash award in July 2010. Hearing CDs.

records - a readily ascertainable fact - before making a baseless accusation. *See Chambers*, 602 F.3d at 1382. At worst, the appellant was expecting a "gift authorship" based upon his prior publications with Wu and Zhi, and his enviable publication record, an ethically dubious position. Hearing CDs. I must conclude that the appellant has not proven that he made a disclosure by a preponderance of the evidence.

Disclosure 2

The appellant's second disclosure pertains to the Energy Efficiency & Renewable Energy (EERE)[6] Project. The appellant asserts that the agency managers (Alvin, Gemmen, and Director Powell) improperly terminated the project in FY-2014, which resulted in NETL being required to return $200,000.00 in project funding. Hearing CDs. The appellant asserts that this return of funds evidences gross waste/mismanagement. *Id*. The appellant claims that he made the disclosure in an email in May 2014, and repeated regularly thereafter. *Id*., *see also* AF, Tab 32 at 152-154.

"Gross mismanagement" means more than minor wrongdoing or negligence; the management action (or inaction) must create a substantial risk of an adverse impact on the agency's ability to accomplish

---

[6] This project focused on rechargeable batteries (such as for automobiles). Hearing CDs.

its mission. *See Swanson v. General Services Administration*, 110 M.S.P.R. 278, ; 11 (2008); *Ivey v. Department of the Treasury*, 94 M.S.P.R. 224, ; 10 (2003). "Gross waste" is a more than debatable expenditure, it must be significantly out of proportion to the benefit expected to accrue to the government. *See MaGowan v. Environmental Protection Agency*, 119 M.S.P.R. 9, ; 7 (2012).

The appellant's alleged dollar figures have been fluid during the proceeding. In his OSC complaint, he asserted that EERE was a three million dollar project, while in his testimony, he asserted it was a two million dollar project. Hearing CDs; *see also* AF, Tab 13 at 17. The actual figure was approximately 1.5 million dollars. Hearing CDs (Alvin). He also claimed $200,000 was returned, when the actual funding received for FY-2014 was only approximately $150,000. Hearing CDs (appellant, Alvin); *see also* AF, Tab 32 at 186. In his "disclosure" email the appellant also asserted a de facto loss of half a million in specialized lab equipment, but he abandoned this assertion in his testimony, instead claiming the loss was years of research/discoveries. Hearing CDs; *see also* AF, Tab 32 at 150-154. I note that in closing arguments, the appellant quoted the agency's estimate of $75,000 returned as "waste." Hearing CDs. The agency witnesses generally suggested the amount was $50,000 or $75,000, but some documentation suggested the amount could be much less. Hearing CDs; *see also* AF, Tab 32 at 50. Given the appellant was removed from the management of the project, it is an open question as

to how he would/could reasonably know how much money was returned in the end. Hearing CDs; *see also* AF, Tab 32 at 52-54, Tab 56 at 64-65.

Using the appellant's exaggerated numbers - a loss of two hundred thousand dollars on the on a three million dollar project amounts to less than 7%. Using the agency's numbers, approximately fifty thousand and one and a half million, respectively, yields a figure of a little over 3%. Neither of these figures suggests gross waste/mismanagement in themselves. Moreover, the appellant faces bigger hurdles.

Firstly, the project was not "terminated." The EERE project was originally set to terminate at the end of FY-2014, and management simply elected not to extend it as the appellant requested in his email. Hearing CDs. Second, the appellant conceded that it was his duty to obligate the funds, and the agency provided testimony and documents regarding managements' attempts to help him do so. Hearing CDs (appellant, Alvin, Gemmen), *see also* AF Tab 9 at 62-63, Tab 31 at 158-65; Tab 33 at 40-47. Third, the money was apparently returned to the EERE Project, which the appellant testified was a subcomponent of DOE. Hearing CDs. This does not appear to constitute "waste," as the funds could be put to other uses in the agency. *See* AF, Tab 32 at 150. Fourth, the appellant appeared to be largely complaining that the agency was wasting his and his assistants' efforts in assigning them to other work, but broad policy disputes about agency resources do not amount to disclosures. *See* generally *LaChance,*

174 F.3d at 1381.[7] Lastly, the project was a small one by NETL standards. Hearing CDs. Significantly, the entire NETL budge for projects in a typical year was about 700 million dollars. Hearing CDs (Gemmen). Thus, there was no realistic way the returned funds could compromise NETL's ability to accomplish its mission.

Moreover, the appellant's terse and conclusory testimony that the termination of the project had a cost in lost discoveries/knowledge is devoid of specifics and utterly speculative. Hearing CDs. Further, as noted by Alvin, most of the major experiments had concluded by the time the appellant received notice the project would not be renewed, and the primary remaining task would be to write them up. *Id*.

The appellant was coy about his knowledge of NETL's funding for projects, testifying that it was "a lot," but he did not even attempt to challenge the agency witnesses' testimony that the returned EERE funds were a drop in the proverbial bucket. Hearing CDs. The appellant is also a sophisticated individual with two doctorates. Further, he has years of experience at NETL, which included working on projects large and small, and obtaining funding for both internal and external projects. *Id*. Based upon

---

[7] Management was apparently concerned that the EERE project was the source of the appellant's claimed stress. *See* AF, Tab 32 at 154.

his knowledge and extensive experience, I must conclude he was well-aware that returning a portion of the funding for a small project could not impair NETL's ability to carry out its mission or constitute gross waste. *See generallyChambers*, 602 F.3d at 1382, *Webb*, 123 M.S.P.R. 248, ; 12.

The Purported Personnel Actions

The appellant claims that he was subjected to six personnel actions: (1) His transfer in 2011, (2) the initiation of a management directed inquiry (MDI); (3) his transfer in 2014; (4) the changes in his duties after the EERE project was terminated; (5) his proposed removal; and (6) the creation of a hostile work environment.[8] *See* AF, Tab 57 at 2. Even had I found the appellant made one or more disclosures, these purported personnel actions would fail for a several reasons: (1) They were not personnel actions because the appellant initiated them; (2) the alleged disclosures were not a contributing factor to the action; and/or (3) the agency showed it would have taken the same action by clear and convincing evidence.

---

[8] I did not deem the agency's cooperation with the prosecutor's office a personnel action. The appellant appears to be challenging this cooperation in another forum. Hearing CDs.

The Transfers

The appellant challenges his 2011 ad 2014 transfers[9] as adverse personnel actions. Hearing CDs. He notes the May 2011 transfer came shortly after his authorship disclosure and two months after a meeting in which Gemmen "yelled" at him. *Id*. The appellant asserts that his October 2014 transfer came shortly after his EERE disclosure. *Id*. Neither of these claims is persuasive.

At the outset, the appellant attempts to distance himself from the union's actions on his behalf. Notably, he concedes that he may have told the union he was being harassed and made miserable where he was, but that does not mean that he wanted to transfer (even if the union interpreted it

---

[9] The agency suggests that the appellant failed to exhaust his OSC remedies with regard to the transfers, as he did not clearly allege they were adverse personnel actions. Hearing CDs. An appellant has only exhausted his administrative remedies with OSC after OSC has sent him a letter stating that it was terminating its investigation into his allegations or 120 days have passed since the appellant first sought OSC action. *See Simnitt v. Department of Veterans Affairs*, 113 M.S.P.R. 313, ; 8 (2010). To fully satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *See Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). Given the appellant discussed the transfers in his OSC complaints, I will give him the benefit of the doubt.

that way). Hearing CDs. This assertion is simply not credible, as it is refuted by the other evidence and the appellant's own statements.

At the outset, the appellant's own OSC complaint undermines his claims. As to 2011, the appellant states that he met with the union to "get assigned to another division," and after the transfer "all was right with the world." *See* AF, Tab 13 at 9. This is consistent with the agency's evidence. Notably, Alman testified that the appellant and the union affirmatively asked that he be the appellant's new supervisor in 2011. Hearing CDs. Indeed, the transfer appeared to take Gemmen by surprise. Gemmen had been writing a reprimand for the appellant (for falsely claiming that Gerdes had the appellant's name removed from the Wu paper), but the transfer rendered the reprimand moot and it never issued. Hearing CDs, *see also* AF, Tab 9 at 45-46.

The circumstances for the 2014 transfer were similar. In his OSC materials, the appellant asserts that he went to the Director for help, and Shadle agreed to take him into Shadle's division. *See* AF, Tab 13 at 9. In his OSC supplement, the appellant said much the same — kindly Scott Klara (senior management) positively intervened to send me to a new better supervisor (Shadle). *Id.* at 17. This again matches the agency's evidence. Notably Alvin testified that the appellant had requested a transfer, and Shadle testified that he agreed to take him. Hearing CDs (Alvin, Shadle); *see also* AF, Tab 33 at

44. The appellant was so enthusiastic about the transfer when learned of it in summer 2014 that he asked if it could be immediate (rather than waiting for fiscal year end). Hearing CDs (Alvin/Gemmen). The transfer also helped him to (again) avoid corrective action - Alvin had intended to give him a needs improvement (NI) rating on his performance appraisal and place him on a performance assistant plan (pap). Hearing CDs. These actions were, in part, rendered academic by the transfer and never took place. *See, e.g.*, AF, Tab 31 at 173.

The appellant tries to overcome his OSC admissions and agency evidence by pointing to the strained relationship he had with Gemmen (in 2011) and especially with Alvin (in 2014). There is no doubt Gemmen was frustrated by the appellant. Hearing CDs. Alvin and the appellant clearly disliked one another, and Alvin went so far as to ask to be replaced as the appellant's supervisor. Hearing CDs, *see* AF, Tab 33 at 40-47.[10] But that does not change the fact the appellant sought the transfers. Moreover, the appellant testified that the transfers resulted in him going to a better supervisor, and that both transfers were in his best interest. Hearing CDs.

---

[10] The appellant's own witness testified that the appellant had a bad reputation generally in the agency as "trouble" (meaning difficult). Hearing CDs (Shadle).

The MDI

The appellant testified that he believed Gemmen and Alvin initiated the MDI in retaliation for his disclosures. Hearing CDs. He further asserts that FB's baseless complaint did not warrant an MDI or a referral to EEO.[11] *Id*. He also seems to suggest that, if anything, FB's claim should have been handled solely as an EEO matter. *Id*. The appellant's claim is refuted by the other evidence and is generally incredible.

Gemmen and Alvin both testified that they did not initiate the MIDI, had no authority to initiate an MDI, and had no influence on the MDI - assertions that were corroborated by Moody. Hearing CDs. Indeed, both Moody and Gemmen were clear and consistent about who did initiate the MDI - the chief operating officer for the agency (Monahan). *Id*. The appellant presents nothing suggesting Monahan or Moody was aware of his disclosures, and Moody affirmatively testified that she was unaware of them. *Id*. Thus, they could not be contributing factors to Monahan's decision.

The assertion that FB's complaint should have been treated as a simple EEO matter (if at all) is unpersuasive. Hearing CDs. FB's allegations were so serious that they generated a criminal prosecution.

---

[11] Alvin initially directed the matter to the EEO office, as she was directed. Hearing CDs.

Further, in addition to FB, one of the agency's university partners was involved (PSU). Moody also suggested that the EEO process was not intended for non-employees like FB or such serious matters. Hearing CDs. There is no dispute senior management was extremely concerned about FB's allegations, and initiating a comprehensive investigation of the claims appears obviously in the agency's best interest. *Id*. (Gemmen).

The appellant also seems to argue that Gemmen discriminated against him for referring the matter to EEO in the first place. Hearing CD. For the reasons above, this is not persuasive. Indeed, referring a PSU sexual harassment complaint to the agency's EEO officer appears to be an entirely reasonable first step.

Changes in Duties

This claim was something of a moving target during the appellant's testimony. Ultimately, the appellant asserted that his big change in duties began in June 2015, with the loss of his assistants and assignment to doing scientific literature review, when he was "quarantined and harassed." Hearing CDs. This claim ultimately ignores the bigger issues driving management's decisions.

The appellant testified at length how the changes in working conditions and assignments, particularly literature review, were completely inappropriate for someone of his credentials. Hearing CDs. His then-current supervisor, Shadle concurred, and he

testified that he complained about the appellant's "mistreatment" and even asked to be removed as supervisor in light of the "injustices" being done. Hearing CDs; *see also* AF, Tab 32 at 57, Tab 55 at 9-10, 22-24, 28-30. Indeed, from the appellant and Shadle's perspective, management's (Gemmen's) actions appeared unwarranted and nearly inexplicable.

What neither the appellant or Shadle knew at the time, was that senior management was reacting to FB's complaint and in the process of beginning the MDI. Until the appellant was ultimately placed on administrative leave, senior management (Monahan) directed Gemmen to take way his research assistants and limit his potential contacts with other interns/research assistants and agency employees (presumably the "quarantine"). Hearing CDs (Gemmen). Further, Monahan directed Gemmen not to tell the appellant or Shadle about the investigation at that point. *Id*. Given the changes in duties were dictated by senior managers unaware of the appellant's disclosures, they were not retaliatory.

The Proposed Removal

The appellant also argues the proposed removal was retaliatory. He asserts that various charges were baseless, the agency never responded to his response refuting the charges, the agency appears to have begun to draft the removal decision before he responded, and the proposing official ordered him to

appear with or without his attorney. Hearing CDs. None of these contentions are persuasive.

At the outset, due to yet another restructuring at the agency, the proposing official was Alman, who was again designated as the appellant's supervisor. Hearing CDs. Alman testified that, based solely upon the evidentiary record he was provided, he concluded that removal was the appropriate action. *Id*. He affirmed that no one - including Gemmen and Alvin — attempted to influence his decision. *Id*. Notably, Alman is a supervisor the appellant requested for his first transfer, and with whom the appellant testified that he had a good relationship and received good performance reviews. *Id*. Alman also testified that he was unaware of the appellant's disclosures. *Id*. This testimony is consistent with his prior declaration. *See* AF, Tab 23 at 29-33.

As he did throughout the proceeding, the appellant minimizes or disregards the elephant in the room - the criminal prosecution. The appellant had been indicted on a finding of probable cause and later convicted by a jury, which required a finding of guilt beyond a reasonable doubt. These were the facts that existed when the appellant's removal was proposed.[12] Moreover, the MDI resulted in a 1500 + page investigation, which included extensive interviews

---

[12] That the appellant was ultimately successful on appeal does not change the facts that existed when the agency took action.

with both FB and the appellant. Hearing CDs; *see also* AF, Tab 25 at 107, *et seq*. On this record, the appellant's conclusory claim that charges one and two are baseless does not undermine the agency's case in the slightest.

The appellant also argues that charge four (lack of candor) is baseless because his answers were not under oath. Hearing CDs. This claim is completely refuted by the law and facts. There is no privilege to lie in response to the questions of one's employer. *See Porter v. Department of Justice*, 119 M.S.P.R. 365, ; 16 (2013) (an agency has a right to expect its employees to be honest and trustworthy). Moreover, the appellant did swear to tell the truth before beginning his interview. *See* AF, Tab 30 at 5. As this document has been in the record for an extended period, the appellant's insistence on repeatedly making a baseless contrary assertion reflects poorly on his credibility.

The appellant also argues that charge 3 - the failure to follow proper procedures regarding the use of letterhead - is unsupported because he received no training on this issue and a notice that use of letterhead was improper did not issue until after the charged conduct. Hearing CDs; *see also* AF, Tab 56 at 57. This assertion is ultimately academic.

At the outset, charge 3 feels much like a make weight needlessly added to the far more serious charges in the proposal. Indeed, it is, by far, the most trivial charge in the proposed removal. I also note

the agency did not submit any real evidence to challenge the appellant's denial. But, even if the charge was eliminated as unsupported, it would not affect the agency's overall justification for issuing the proposed removal

The appellant also argues that the proposing official showed bad faith by ordering him to come in "with or without his lawyer" to receive the proposed removal on April 8, 2016. Hearing CDs, *see* AF, Tab 52 at 18-20. This seems to be a tempest in a tea cup. The proposing official testified that all he wished to do was serve the proposed removal on the appellant as soon as possible, as he was directed. Hearing CDs. This purely ministerial act, which could have been accomplished via courier or express mail, does not seem fraught with peril for the unrepresented. Further, the appellant did not bow to the pressure, and he did not choose to actually go to receive the proposal until April 11, 2016. *See* AF, Tab 51 at 28.

The appellant also asserts that the agency never formally addressed his response. Hearing CDs. The answer here is simply that there was no need to. The appellant's resignation effectively ended the removal process, so a removal decision (which would have addressed his response) never issued.

Lastly, the appellant points to a purported draft of a removal decision that was begun before the close of the response period. Hearing CDs; *see also* AF, Tab 52 at 46. That the agency may have begun a draft of the proposed removal before the deadline for a

response is not consequential, as such actions are actually commonplace. Moody testified without contradiction that it is entirely normal to be proactive and begin a working draft of the removal, but she noted that the drafter runs the risk that the deciding official may disagree. Hearing CDs.

At bottom, in light of the extensive findings of the MDI, which appeared corroborated by the results in the criminal case, it defies credulity to suggest that the agency would not have proposed the appellant's removal in these circumstances in the absence of his purported "disclosures." Indeed, the designated deciding official stated that, had not the appellant resigned, he would have removed the appellant on the strength of the overwhelming evidence. *See* AF, Tab 23 at 25-28. The deciding official also averred that he had no knowledge of the appellant's disclosures. *Id*.

Hostile Environment

The appellant also claims that the agency - notably Gemmen and Alvin - created a hostile environment after his disclosures. Hearing CDs. This claim, which generally lacks specifics, is also unpersuasive.

By analogy to Title VII, a hostile environment is determined by examining all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with the employee's job

performance. *See Gregory v. Department of the Army*, 114 M.S.P.R. 607, ; 31 (2010). Isolated incidents, unless extremely serious, will not amount to a hostile environment. *Id*.

The appellant's testimony primarily focused on trivial isolated incidents. Notably, he points to a couple of times that Gemmen yelled at him. Hearing CDs. These incidents are inconsequential on their face. Moreover, in the first incident (in March 2011) senior management intervened on his behalf and told Gemmen "to back off." *See* AF, Tab 9 at 41. Also falling into this category is the appellant's claim that Gemmen denied him his preferred office. Hearing CDs. In actual fact, Gemmen had started a seniority-based office assignment system, and he had merely directed Shadle to have the appellant move into a single office - as he was currently occupying two on different floors. Hearing CDs; *see also* AF, Tab 55 at 34-37.

The appellant also suggests that Alvin's insistence that he complete a performance management plan (pmp) for the EERE project was harassment. Hearing CDs. As proof, the appellant points to a Gemmen email stating that the EERE administrators never asked for it, and Gemmen never sent it. *See* AF, Tab 32 at 117. The appellant disregards the testimony that the pmp was too late and too flawed to forward to EERE. Hearing CDs (Alvin/Gemmen). The appellant also did not meaningfully dispute the testimony that all projects require a pmp, and that most project managers

complete them with little difficulty. *Id*. Indeed, the agency witnesses took the view that the appellant, who excelled at scholarship, was at best a disinterested manager/administrator. *Id., see also* AF, Tab 9 at 62-63, Tab 32 at 158-165, Tab 33 at 4-5.

I note that - rather than a hostile environment - the appellant appeared to get what he wanted and/or received the benefit of the doubt (at least before the MDI). As to the latter, Powell intervened when Alvin wished to give him a NI rating and place him on a pap. Hearing CDs. Powell believed the appellant was too "beaten down" by the loss of EERE, and, given his standing as a scholar; she had no desire to harm him professionally.[13] *See* AF, Tab 9 at 58, Tab 31 at 170-172, Tab 32 at 57-58. In addition, the appellant rather consistently won cash awards and other accolades from early in his tenure through his time with Shadle. *See* Tab 49 at 16-31, 50, 59, Tab 50 at 23. This does not suggest management was lurking in the background looking for an opportunity to retaliate against him.

DECISION

---

[13] The two actions were related - a grade of needs improvement automatically triggered a PAP. Hearing CDs. Another reason for not taking these action was that a PAP would require the appellant to stay with the same supervisor (Alvin) and he was about to be transferred to Shadle. *Id*.

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

_____

Mark Syska
Administrative Judge