A. Enjoin the DOJ, ATF, NFC and the USDA from withholding and refusing to produce the documents responsive to the 2017 Request, 2021 Request and others that document ATF's attempt to cover-up their false filings concerning the alleged $122,581.06 payment with the previously listed court venues.

B. Order that the DOJ, ATF, NFC and the USDA must promptly comply with the Request and produce all the requested unredacted documents; and

C. Award Mr. Delgado his attorney's fees for consultations on this matter and costs pursuant to 5 U.S.C. 552(a)(4)(E)(i).

Respectfully Submitted,

/s/ Adam Delgado
Adam Delgado, Pro Se
PO Box 145
Ft. Meade, MD
773-992-7632
Adam.delgado@ii-services.net

CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of January, 2023, I caused to be served electronically to all parties by operation of the Court's electronic filing system and by placing a copy in the US Mail,
a copy of the foregoing document.

/s/ Adam Delgado
Adam Delgado

EXHIBIT 1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

---x
ADAM DELGADO,

Appellant,

v.

DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Agency.
---x

DOCKET NUMBER
NY-1221-09-0299-W-2

Administrative Judge
Joann M. Ruggiero

SETTLEMENT AGREEMENT

The Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives ("Agency" or "ATF") and Adam Delgado ("Appellant"), do fully resolve all issues and claims in the above-captioned appeal and hereby agree as follows:

1. Appellant agrees to be subject to and pass a background investigation, polygraph examination, medical examination, and drug test. The Agency agrees that such investigation, examinations and test, which are required for those who seek reinstatement with the Agency as Special Agents, GS-1811, shall be administered in compliance with the Agency's internal regulations and procedures. Upon his successful completion

of these prerequisites, the Agency agrees to cancel Appellant's April 4, 2006 resignation placing him in the position of

Initials: AD

Special Agent, GS-1811-13, Step 1 in ATF's Chicago Field Office with credit for time at Step 1 for the period September 18, 2005 until his April 4, 2006 resignation. Appellant's resignation will be cancelled the day he reports for work, however for any delay in the period of time from when ATF first designates as his date of return to work until Appellant actually returns to work, he will be carried in a Leave Without Pay status. The Agency agrees to pay the employer's and employee's share of Federal Employee Retirement System contributions from the date of resignation until the effective date of cancellation of the resignation.

2. Appellant waives any claims of back pay or any other damages of any kind whatsoever. The Agency will not pay any benefits to which Appellant may have been entitled if he had been an employee from the time of his April 4, 2006 resignation until his reinstatement other than that specifically set out in paragraph 1 of this agreement.

3. The Agency agrees to issue to Mark L. Cohen, Esq., a check for the single, lump sum amount of Twenty Thousand Dollars ($20,000) in full compensation for any and all attorneys' fees and costs in NY-1221-09-0299-W-2, MSPB Docket No. NY-0752-10-3130-1-1, and Adam Delgado v. Albert Gonzales, United States District Court, District of Columbia, Civil Action No.

07-00256 (CKK). The parties agree that the Agency has no responsibility for disbursement or ownership of the attorneys' fees. The Agency will not withhold any taxes, however, the Agency will file a Form 1099 with the Internal Revenue Service ("IRS"). The determination of tax liability, if any, is a matter solely between Appellant's attorney, the IRS and state and local tax authorities. The $20,000 will be deposited via Direct Deposit to Illinois IOLTA Trust Accounts, Mark L. Cohen, Attorney At Law (Client Trust Account) within sixty (60) days of the of the last signature on this agreement.

Initials: AD

4. Subject to the provisions of paragraph 1, Appellant agrees to attend Special Agent training courses at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. The Agency has sole authority to decide which courses will meet its needs to make certain that Appellant will have the requisite knowledge and training to be a Special Agent. Appellant will not be required to pass any physical requirements at FLETC although the Appellant agrees that he will participate in any physical training required of him. Appellant must pass firearms qualification/certification.

5. Appellant agrees to file a Withdrawal with Prejudice in Adam Delgado v. Dept of Justice, MSPB Docket No. NY-0752-10-313-1-1 simultaneously with his execution of this agreement.

6. Appellant agrees to execute a Stipulation of Dismissal with Prejudice in the pending case of Adam Delgado v. Alberto Gonzales, United States District Court, District of Columbia, Civil Action No. 07-00256 (CKK) simultaneously with the execution of this Agreement.

7. By entering into this agreement, the Agency, its officers, agents and employees in no way admit to any wrongdoing, liability to or discrimination against the Appellant. The Appellant agrees that this agreement shall not be construed as an admission of wrongdoing, liability or discrimination by the Agency, its officers, its agents or its employees in this or any other proceeding or litigation that is in any way related to MSPB Docket No. NY-1221-09-0299-W-2, MSPB Docket No. NY-0752-10-0313-1-1, and Adam Delgado v. Alberto Gonzales, United States District Court, District of Columbia, Civil Action No. 07-00256 (CKK),

8. Appellant releases and discharges both the United States Department of Justice (DOJ)

Initials: AD

and ATF, as well as their employees, agents and officials, both in their individual and official capacities from any and all liability, claims, causes of action, etc. resulting from or relating to, in any way whatsoever, the subject matter of this Agreement, or otherwise concerning Appellant's employment with ATF up to and including the date this Agreement is signed, including all underlying actions and claims in any forum.

9. The parties agree that this settlement agreement shall be made part of the record of the above-referenced appeal and is enforceable by the Merit Systems Protection Board.

10. The Agreement may not be used as a basis by any party, any individual, or any representative or organization seeking or justifying similar terms in any subsequent case.

11. Appellant agrees that he will not refer to this Agreement or the underlying alleged claims which serve as the basis for this litigation in any media including but not limited to the internet, print, radio or television.

12. This agreement constitutes the entire agreement between the parties and supercedes all prior and contemporaneous discussions, agreements and understanding between the parties, whether oral or written.

13. This Agreement may be executed in multiple copies and it is effective on the date of the last signature below. A copy or facsimile of this agreement that is signed and initialed is as valid and effective as the original for all purposes.

14. The undersigned parties have read and understand the terms and conditions of this agreement and intend to be bound by its contents. The parties acknowledge that they have

Initials: AD

consulted with counsel about the terms of this agreement prior to signing.

FOR THE APPELLANT:

/s/ Adam Delgado ____________ Date 14 JAN 11
Adam Delgado
Appellant

____________ Date ____________
Mark L. Cohen, Esq.
Attorney for Appellant

FOR THE AGENCY:

____________ Date ____________
William J. Hoover
Acting deputy Director

____________ Date ____________
Valarie Bacon, Esq.
Designated Agency
Representative/
Agency Attorney

EXHIBIT 2

1. PO BOX [redacted] 9 July 2017
2. [redacted]

National Finance Center
Human Resource Management Staff
FOIA Officer
P.O. Box 60000
New Orleans, LA 70160
Telephone: 504-426-0327
Fax: 504-426-9706

3. My name is Adam Delgado and I am an employee of the Bureau of Alcohol, Tobacco, Firearms and Explosives. I am making this request under the FOIA. I am requesting that you review the attached response from ATF Counsel requesting a 4th extension from the Merit System Protection Board (MSPB) to provide proof of ATF's compliance with the attached settlement agreement.

4. A) I am respectfully requesting that a NFC person knowledgeable of the events described within the extension request, to validate all claims made by ATF counsel and ATF finance personnel.

   B) In addition, it is requested that the person write a sworn affidavit to confirm ATF claims or refute any false, misleading, incomplete, inaccurate, or other statements made within the request. I am respectfully requesting that this affidavit be provided to me by July 24th 2017 so that I can

incorporate the NFC affidavit into my response to the MSPB.

As you can see for yourself, it appears ATF is blaming their non-compliance on alleged NFC errors for lack of a better term. I do believe that the NFC acted properly and has no ill intent against me. ATF made the employee contributions to my pension fund as I have seen proof of the payment in my Leave and Earnings Statement. ATF has not been able to produce any legitimate document to prove they made the employers contribution to my pension account to be in compliance with the attached settlement document from January 2011.

C) I am requesting all e-mails, notes. messages, computer data, spreadsheets, voice mails, SPPS screenshots. SPPS messages, and other items to or from ATF or DOJ employees concerning Adam Delgado or his pension contributions from January 10, 2011 to present.

D) Please explain how the NFC or OPM would have made up for any shortages in Adam Delgado's future pension payments.

E) Please explain how many times NFC has experienced a similar situation where an agency has claimed to have made the employer's pension contribution and it was not paid as the agency claimed. Please identify the

agency if possible and how many times it has happened in the last 15 years.

F) Please quote the federal regulation that states I should be at the COLA rate for Puerto Rico as the SF 50 transferring me to Chicago did get generated until 2011.

G) Please identify any other issues that I may not have identified.

5. I am willing to pay fees associated with processing the request. Thank you for your time.

6. I certify under penalty of perjury that I am Adam Delgado, last four [redacted]. I can be reached at 773-992-7632 or adam.delgado@ii-services.net if you have any questions.

Respectfully,

/s/ Adam Delgado
Adam Delgado

[LOGO] United States Department of Agriculture | Office of the General Counsel 1400 Independence Ave. SW Washington, DC 20250-1400

February 5, 2021

Delivered via Electronic Mail
Adam Delgado
P.O. Box 145
Fort Meade, MD 20755
Email: Adam.delgado@ii-services.net

Re: Freedom of Information Act (FOIA) Request No. 2021-NFC-00036-FP Final Response

Dear Mr. Delgado:

This is the U.S. Department of Agriculture (USDA), Office of Information Affairs (OIA), FOIA Division (OIA-FOIA) final response to the above-referenced FOIA request, which sought:

> [P]roof of the employer and employee pension contributions made since I first joined ATF in September 2002 to the present time.

As of October 1, 2019, the OIA-FOIA, formerly known as the Departmental FOIA Office, was realigned under USDA's Office of the General Counsel (OGC) and operates the FOIA programs for all USDA staff offices, to include the National Finance Center (NFC).

Your request has been processed under the FOIA, 5 U.S.C. § 552.

The NFC conducted a search for records responsive to your request. The NFC is a shared service provider for

financial management services and human resources management services. It assists the USDA in achieving cost-effective, standardized, and interoperable solutions that provide functionality to support the agency's strategic financial management and human resource management direction.

The NFC search did not locate any records corresponding to the description in your request. For this reason, I am unable to provide any records that are responsive to your FOIA request.

You may appeal this response by email at USDA FOIA@usda.gov. Your appeal must be in writing, and it must be received electronically no later than 90 calendar days from the date of this letter. The OGC will not consider appeals received after the 90 calendar-day limit. Appeals received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number, a copy of the original request, the OIA's response to your original request, and a statement explaining the basis of your appeal. For quickest possible handling, the subject line of your email and the appeal letter should be marked "Freedom of Information Act Appeal" and reference FOIA No. 2021-NFC-00036-FP.

You may seek dispute resolution services from the OIA-FOIA's FOIA Public Liaison, Ms. Camille Aponte. Ms. Aponte may be contacted by telephone at (202) 505-0271, or electronically at Camille.Aponte@usda.gov or USDAFOIA@usda.gov.

You also have the option to seek assistance from the Office of Government Information Services (OGIS). Please visit https://www.archives.gov/ogis/mediation-program/reouest-assistance for information about how to request OGIS assistance in relation to a FOIA request.

Provisions of the FOIA allow us to recover part of the cost of processing your request. In this instance, no fees will be charged.

If you have any questions regarding the processing of this request, please contact Mr. Steven Gitelman electronically at steven.gitelman@usda.gov or USDAFOIA@usda.gov.

For additional information regarding USDA FOIA regulations and processes, please refer to the information available online at www.dm.usda.gov/foia.

The OIA-FOIA appreciates the opportunity to assist you with this matter.

Sincerely,

/s/ Alexis R. Graves

Alexis R. Graves
Departmental FOIA Officer
Office of Information Affairs

EXHIBIT 3

U.S. Department of Justice

[SEAL]

Bureau of Alcohol, Tobacco,
Firearms and Explosives

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www.attgov

May 10, 2021

REFER TO: 2021-0501 (ATF)
2021-NFC-00036-FP (USDA)

Mr. Adam Delgado
PO Box [redacted]
Fort Meade, MD 20755-0145

Dear Mr. Delgado:

This is to acknowledge receipt of your Freedom of Information Act (FOIA)/Privacy Act request. While processing your FOIA/Privacy Act request dated April 5, 2021, for records concerning yourself, the U.S. Department of Agriculture ("USDA"), Office of Information Affairs ("OIA") referred 191 pages of records to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for processing and direct response to you. The documents were received by ATF on April 5, 2021, and this referral was assigned number 2021-0501. Please refer to this number in any future correspondence with this Office. For your reference, the USDA's file number associated with this request is 2021-NFC-00036-FP.

For your information, this office assigns incoming requests to one of three tracks: simple, complex, or expedited. Each request is then handled on a first-in,

first-out basis in relation to other requests in the same track. Simple requests usually receive a response in approximately one month, whereas complex requests necessarily take longer. At this time, your request has been assigned to the simple track. You may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options.

We have determined that you are a non-media, non-commercial requester pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(III). As a non-media, non-commercial requester, you are entitled to two free hours of search time and up to one hundred pages of duplication without charge. See 28 C.F.R. § 16.10(d)(4)). You may review the Department of Justice regulations, which establish the fees charged for processing FOIA requests at http://www.gpo.gov/fdsys/granule/FR-2015-0403/2015-07772. If you disagree with this determination, you are welcome to provide any additional information that would demonstrate that you should not be considered an "other" requester. If you would like to discuss either the track or the fees associated with your request, please contact our FOIA Public Liaisons, Darryl Webb or Zina Kornegay, at

(202) 648-7390. You may also discuss any aspect of your request with our FOIA Public Liaisons.

Sincerely,

/s/ Adam C. Siple
Adam C. Siple
Chief
Information and Privacy Governance Division

EXHIBIT 4

Delgado, Adam

From: adam.delgado@ii-services,net
Sent: Tuesday, December 15, 2020 8:55 PM
To: terry.peoples@usda.gov; doj.team@usda.gov
Cc: Delgado, Adam
Subject: Telephone call on 12-14-20

Thank you for the follow up call yesterday from 202-812-7046. Per our conversation, please send me any supporting documentation that you mentioned concerning my pension as you stated it did not matter if ATF sent the $122,000 for the employer portion/ contribution to my pension fund. I would still like any documentation showing what the payments were made during 2011-12 concerning the payment per my settlement agreement with ATF. I will be retiring in 22 months and I do not want to wait until then to find out that my account is short any funds. I understand that you said it is just one big pot of money not specifically marked for my account but I doubt the government can accurately maintain a fund based on inconsistent deposits.

Respectfully,

Adam Delgado
312-350-5111

[SEAL] **U.S. Department of Justice** [SEAL]

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of the Director

OCT 24 2022 www.atf.gov

Mr. Adam Delgado
Post Office Box 145
Fort Meade, Maryland 20755

Dear Mr. Delgado:

On behalf of your many friends and colleagues throughout the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), congratulations on your retirement and thank you for more than 26 years of distinguished Government service.

After beginning your ATF career in 2002, as a Special Agent in the Miami Field Division's San Juan Field Office in Puerto Rico, you spent several years building a strong investigative skillset Your abilities supported the successful resolution of multiple cases, including a series of gun store burglaries that concluded with numerous convictions and the recovery of many firearms. Your commitment to public service was clear during this first tour of duty, as you deployed to Mississippi in 2005, where you carried out security and recovery operations after Hurricane Katrina devastated the Gulf Coast.

Later, while serving in the Chicago Field Division, you were instrumental in the apprehension of a serial armed robber, who took a plea agreement of 30 years

in prison rather than go to trial and face the strong prosecution you helped build. You also assisted in identifying a potential bomb manufacturer while serving as an ATF representative to the Federal Bureau of Investigation's Joint Terrorism Task Force. Your courage was clear in these and many other investigations, as well as in your willingness to deploy to Pennsylvania for the 2012 Philadelphia Surge.

In 2017, you reported to ATF Headquarters as a Project Officer in the Joint Support and Operations Center. During your two-year tenure, you smoothly coordinated with field elements during the apprehension of fugitives, including a potential mass shooter and a pipe bomb manufacturer. You also courageously responded to the 2018 mass shooting at the Capital Gazette, where Jarrod Ramos killed five people. In addition to supporting these operational missions, you also found time to develop several recommendations on how to improve the Bureau, including one that was approved by the Operation World Class Suggestion Program.

In your final years with ATF, you spent time as a Senior Special Agent in the Baltimore Field Division and then as the Tobacco Audit and Inspection Coordinator with the Field Management Staff (FMS). While in Baltimore, you assisted in disrupting a conspiracy of military members trafficking firearms in Maryland and responded to demonstrations and rioting following the murder of George Floyd, as well as the violent attack on the Capitol in January 2021. After returning to Headquarters to serve with the FMS, you worked with

ATF's legal, forensic science, and industry experts to bring in high value settlement agreements from tobacco violation offenders.

You accomplished much in a Federal law enforcement career of nearly three decades, and you should be proud of all you achieved. As you begin this next chapter in life, we wish you great health and happiness in retirement. Good luck in your future endeavors and thank you once again for the many years of devoted service you have given to the Bureau and the Nation.

Sincerely yours,

/s/ Steven M. Dettelbach
Steven M. Dettelbach
Director

[Congratulations on an incredible career at ATF. For so many years and in so many roles you have answered the call of public service. This Nation is better because of it.

Thanks,

/s/ Steven M. Dettelbach]

ADAM DELGADO v. DEPARTMENT OF JUSTICE
Docket # NY-1221-09-0299-X-1
STATUS UPDATE Other Non-PFR Pleading
Summary Page

(Filed Nov. 8, 2020)

Case Title : ADAM DELGADO v. DEPARTMENT OF JUSTICE

Docket Number : NY-1221-09-0299-X-1

Pleading Title : STATUS UPDATE Other Non-PFR Pleading

Filer's Name : Adam Delgado

Filer's Pleading Role : Appellant

Details about the supporting documentation

# Title/ Description	Mode of Delivery
1 7TH CIRCUIT AMENDED OPINION	Uploaded

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ADAM DELGADO v. DEPARTMENT OF JUSTICE
Docket # NY-1221-09-0299-X-1
STATUS UPDATE Other Non-PFR Pleading
Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

---

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

---

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

UNITED STATES OF AMERICA
MERIT SYSTEM PROTECTION BOARD
New York Field Office

Adam Delgado
Petitioner
Vs
Department of Justice
ATF
Respondent

NY 1221-09-0299-X-1

Date: Nov 8, 2020
Administrative Judge
Joann M. Ruggiero

PETITIONER MOTION FOR STATUS UPDATE AND RENEWED REQUEST FOR A MOTION FOR SUMMARY JUDGEMENT

Comes now, Adam Delgado, Petitioner, pro se, respectfully submits this request on the status of the matter pending before Administrative Judge (AJ) Ruggiero on her ruling concerning Delgado's Petition to Enforce filed in 2016. Delgado and the Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) signed an agreement in January 2011 which required ATF to pay both the employee's pension contributions and the employer's contributions to Delgado's pension. Delgado has confirmed the employee's portion was paid by ATF in 2011. ATF paid Delgado's former attorney Mark Cohen $20,000. Delgado only received $13,000 of the $20,000. This amount is far below what Delgado paid out to his civil case attorney, David Shaffer. Delgado has taken steps, without success, to verify that ATF made the required payments to Delgado's pension and ATF has not provided definitive proof of the payment. A spreadsheet completed by ATF employee Christopher Kopeck and some e-mails to the National Finance Center are suspect at best. ATF has not provided a screenshot of the payment processing system as proof of payment as they did for the employee portion. It is reasonable to believe that any business or individual would keep proof of a payment of a six-figure amount. ATF has not done so. Delgado is 23 months from his mandatory retirement date and he would like to have all matters resolved prior to that date. Delgado recently prevailed

against ATF in separate whistleblower retaliation cases in the 7th Circuit Court of Appeals #CH-1221-14-0737-M-1 and #CH-1221-18-0149-W-2. These cases further demonstrate ATF's Modus Operendi to retaliate against ethical employees for complying with ATF policy to report alleged misconduct as well as the US Code. Delgado has suffered losses in area of $1 million when lost wages and benefits are calculated, moving costs, legal fees, attorney fees, losses on his home in Puerto Rico, taxes in Puerto Rico, association fees, closing costs in both Puerto Rico and Chicago and other losses. This does not include the loss of annual leave, sick leave, military leave, home leave, Thrift Savings Plan contributions and interest. Delgado has experienced personal stress from being referred to a "RAT" in Chicago from an ATF supervisor, alienated for telling the truth about an alleged unauthorized shooting by an ATF agent and his subsequent alleged perjury during a federal trial which resulted in the above captioned cases. Delgado was denied approximately 130 GS-14 job opportunities and he is awaiting ATF to comply with the 7th Circuit mandates on a retro promotion and pay from March 2014 for Delgado.

BACKGROUND

Delgado alleged that in August 2005, Resident Agent in Charge (RAC) Orlando Felix told a female agent, SA Celinez Nunez, that, "we have something in common" Nunez replied what is that? RAC Felix stated, "We both like pussy." Delgado further alleged that RAC Felix told Delgado that "The only thing you

could have done worse than calling Miami, is calling IAD, and if you did that you would be dead." The Puerto Rico offices fall under the Miami Field Division and IAD is the Internal Affairs Division. Delgado filed these claims and others under the Whistle Blower Protection Act, 5 U.S.C section 2302 (b)(8)(A)(i), which protects "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation . . . " In his deposition, RAC Felix admitted to calling Delgado, "Maricon" which is the Spanish slang word for FAGGOT. In her deposition, Nunez unconvincingly denied the event happened and she expressed her ambition to be promoted. Since then she has had a series of promotions and one of them was as the SAC of the Chicago Field Division from 2016-18. During this period, the Chicago Field Division experienced two agents being shot, a series of alleged sex scandals, a domestic battery of a female agent by a married male agent, the same male agent was arrested for domestic battery according to the public access web page of the Chicago Police Department and other unprofessional conduct. These incidents and others demonstrate a double standard within ATF and an alleged pattern of covering up misconduct. Nunez was then promoted to an ATF Headquarters position within the top 7 executives. Nunez is the Assistant Director of the Office of Professional Responsibility and Security Operations (OPRSO).

In 2005, Delgado was denied the opportunity to move out of Puerto Rico at government expense as well

as the opportunity to move to Chicago at his own expense. Delgado was denied other opportunities and benefits. Delgado has losses near one million dollars as a result of ATF's alleged illegal actions. Delgado only entered into the agreement because he believed that ATF would fulfill the agreement in good faith. Subsequently, the agreement requirement that ATF assign Delgado to the ATF Chicago office did occur. In MSPB case, CH-1221-14-0737-W-1, Delgado learned in the discovery process that SA Christopher Labno, a Chicago based agent, had communicated with ATF SA Ari Shapira, a Puerto Rico based agent, in 2011 about SA Delgado. SA Labno denied any negative comments were made about Delgado's whistleblower activities.

Upon reporting to Chicago in 2011, Delgado was referred to as a "RAT" and other acts of retribution which were part of the original complaint to the Office of the Special Counsel and to the Chicago field office of the MSPB in CH-1221-14-0737-M-1 case. SA Delgado would like to request that he be allowed to introduce the misconduct from CH-1221-14-0737-M-1 and the subsequent findings of the 7th Circuit Court of Appeals case 19-2239 ruling since this matter, NY 1221-09-0299-X-1, has been pending from basically January 2011 as a result of ATF failing to provide proof of compliance.

In January 2012, SA Delgado observed SA Labno during an undercover drug deal that went bad. SA Labno then exited his vehicle and fired his ATF weapon at two men fleeing the scene. Delgado wrote a Report of Investigation concerning the events and was subsequently retaliated against for reporting possible

perjury on the part of SA Labno. SA Delgado had been denied 130 GS-14 promotions from 2013-2020. On July 16, 2020 the 7th Circuit Court of Appeals ruled in favor of Delgado in case 19-2239 and awarded him a retroactive promotion to GS-14 and backpay from March 4, 2014.

ATF has repeatedly demonstrated their contempt for the law and the Whistleblower Protection Act. SA Delgado has 23 months until mandatory retirement and aspires to have this case resolved as soon as possible. SA Delgado believes ATF has breached the contract by not making the payment and as such, ATF has allowed this case to continue and the 7th Circuit Case events and rulings should be allowed to be introduced into this record.

On 5/9/17, SA Delgado uploaded a request in the MSPB case filing system for summary judgement in case NY 1221-09-0299-X-1 in the form of a 263 page document and attachments. In that document, Delgado provided a detailed explanation of the losses and justification for restitution of all losses, expenses and benefits sought.

RESTITUTION SOUGHT

Delgado has endured a hostile work environment due to ATF's proclivity to retaliate against whistleblowers since 2005, 15 years of his honorable career. Delgado requests a fast track decision be made on this case since four years has elapsed since he first file his Petition to Enforce. Respectfully, if denied, Delgado

will seek a review from the 2nd Circuit Court of Appeals, in an attempt to get this case resolved around the time that he is due to retire. Delgado is one of the few members of ATF employees who have demonstrated ethical conduct, compliance with policy and the law, moral courage and tenacity in their efforts to make ATF a better organization. Delgado has repeatedly been denied numerous leadership opportunities in an agency in dire need of leaders. The majority of the work has been previously completed in this case such as discovery and other phases, so there is no reason why a summary judgement cannot be made or a hearing held. Delgado has repeatedly attempted negotiations ATF and ATF has rebuffed these efforts. Delgado seeks the pay, benefits, seniority, pension contributions, TSP contributions, interest, home buy back benefits, restitution for housing costs, and other items previously listed in an effort to make him and his family partially whole as no amount of money can ever begin to make him completely whole. Delgado prays that your honor will hold ATF accountable and review the attached opinion from the 7th Circuit which should be incorporated in your decision making process since the 2011 settlement agreement was never fulfilled by ATF.

Respectfully,

//s//

Adam Delgado, Pro Se
PO BOX 145
Ft. Meade, MD 20755
773-992-7632

CERTIFICATE OF SERVICE

On 11/8/20, I, Adam Delgado, pro-se, certify that I filed this document with the 7TH Circuit Court of Appeals attachment in the U.S. MSPB web site and sent a copy by e-mail to the below parties.

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

Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue NW, Washington DC 20226

US Department of Justice, Office of the Attorney General, 950 Pennsylvania Avenue NW, Washington, DC 20530

//s//

Adam Delgado, pro-se
PO Box 1455
Ft Meade, MD 20755
(773) 992-7632

In the
United States Court of Appeals
For the Seventh Circuit

No. 19-2239

Adam Delgado,

Petitioner,

v.

United States Department of Justice,
Bureau of Alcohol, Tobacco, Firearms, and Explosives,

Respondent.

Petition for Review from the
Merit Systems Protection Board in
Docket No. CH-1221-14-0737-M-1
Docket No. CH-1221-18-0149-W-2

Argued April 7, 2020—Decided July 16, 2020

Amended on Petition for Rehearing, October 29, 2020

Before ROVNER and HAMILTON, *Circuit Judges*.*

Hamilton, *Circuit Judge*. Petitioner Adam Delgado is a special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Since 2014, he has

* Then-Circuit Judge Barrett was a member of the original panel but did not participate in consideration of the petition for rehearing, which is being decided by a quorum of the panel under 28 U.S.C. § 46(d).

sought relief under the federal Whistleblower Protection Act for retaliation he believes he suffered after reporting his suspicions that another ATF agent may have committed perjury during a federal criminal trial. See 5 U.S.C. §§ 1214(a)(1)(A), 2302(b)(8).

This is Delgado's second trip to this court. Two years ago, we held that the Merit Systems Protection Board had acted arbitrarily and capriciously in dismissing his administrative appeal under the Act. *Delgado v. Merit Systems Protection Bd.*, 880 F.3d 913 (7th Cir. 2018) ("*Delgado I*"). We held that Delgado had properly alleged "a protected disclosure" and had exhausted his administrative remedies so that the Board had jurisdiction to evaluate the merits of his claim. See *id.* at 916, 920. We remanded the case to the Board for further proceedings consistent with our opinion.

On remand, the Board denied relief. (The Board acted only through an Administrative Judge; since early 2017 the Board itself has lacked a quorum.) Delgado again seeks judicial review. Again, we must find the Board has acted arbitrarily, capriciously, and contrary to law. The Administrative Judge (or AJ) paid only lip-service to our decision, ignoring critical holdings and reasoning. Delgado proved that he made a disclosure that was in fact protected under the Act. He also proved retaliation for his protected disclosure, which affected decisions to deny him several promotions. "After concluding that an administrative decision is flawed, a court of appeals normally must remand to the agency." *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1036 (7th Cir. 2020), citing *Negusie v. Holder*, 555

U.S. 511 (2009), *Gonzales v. Thomas*, 547 U.S. 183 (2006), and *INS v. Orlando Ventura*, 537 U.S. 12 (2002). As in *Baez-Sanchez*, however, "we have already remanded, only to be met by obduracy." *Id.*

We remand once more, but only on the extent of relief for Delgado. The government had the opportunity to offer evidence to support its affirmative defense, that it would have made the same decisions anyway. The government's showing on its defense fails as a matter of law, at least as to one March 2014 promotion denial and another in 2016 where Delgado was the only candidate on the "best qualified" list. Delgado is entitled at least to pay and benefits as if he had been promoted to GS-14 effective March 4, 2014. Possible further relief will need to be considered on remand.

I. *The Whistleblower Protection Act*

We first provide an overview of the Whistleblower Protection Act and how it frames the issues on this petition for judicial review. Covering most federal civil servants, the Act offers relief for employees who have suffered adverse personnel actions as a result of making protected disclosures of wrongdoing within their agencies. See 5 U.S.C. § 2302(a)(2)(B) and (b)(8). The disclosure at issue in this appeal falls under § 2302(b)(8)(A)(i), which protects "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation. . . ."

The Act establishes a procedural obstacle course for employees who invoke its protections. A covered employee who believes he has suffered a prohibited personnel practice under the Act must first "seek corrective action from the Special Counsel before seeking corrective action from the [Merit Systems Protection] Board." § 1214(a)(3). The Special Counsel must investigate any allegation received "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." § 1214(a)(1)(A). If the Special Counsel "determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the [Merit Systems Protection] Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President." § 1214(b)(2)(B).

After the Office of Special Counsel has finished with the case, an employee may seek corrective action from the Merit Systems Protection Board. § 1221(a). The Board must order appropriate corrective action if the employee demonstrates that a protected disclosure "was a contributing factor in the personnel action which was taken or is to be taken against such employee. . . ." § 1221(e)(1). The employee may do so by means of "circumstantial evidence, such as evidence that—(A) the official taking the personnel action knew

of the disclosure or protected activity; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action." *Id.* (This "knowledge/timing test" plays a key role in this case. See, e.g., *Powers v. Dep't of the Navy*, 97 M.S.P.R. 554, 561 (2004); *Grubb v. Dep't of the Interior*, 96 M.S.P.R. 377, 395 (2004); *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, 634–35 (2001).) If the employee shows that a protected disclosure was a contributing factor in the personnel action, the agency may still avoid relief to the whistleblower by "demonstrat[ing] by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2).[1]

These statutes frame four key issues here. First, did Delgado properly exhaust remedies available with the Office of Special Counsel? We held in *Delgado I* that he did. 880 F.3d at 920–21. The Administrative Judge was not happy with that holding, but because she did not base her new decisions on this issue, we say no more about it.

Second, did Delgado make a protected disclosure within the meaning of the statute? We held in *Delgado I* that he alleged a protected disclosure in 2014, *id.* at

[1] The procedural obstacle course also includes a number of deadly pitfalls, at least as the statutes are interpreted and applied by the administering agencies. See generally *Delgado I*, 880 F.3d at 920–21, 923–27 (describing procedural rules and precedents used to reject Delgado's original complaint and appeal).

921–22, and the evidence at the hearing shows that he in fact made a protected disclosure. We explained that the AJ and Board had applied the wrong standard in their original decision. *Id.* Our same reasoning applies to Delgado's later disclosures on the same subject in 2015 and 2016. To our amazement, though, after our remand the AJ rejected our reasoning and holding and found, for the second time, that none of Delgado's disclosures were protected. Her theory was that Delgado had not reported an objectively reasonable belief of wrongdoing because his account did not foreclose the possibility of an innocent explanation for the differences in testimony, and the circumstances were such that his colleague Chris Labno had probably been telling the truth. That was arbitrary, capricious, and contrary to law.

Third, did Delgado demonstrate that his disclosure was a contributing factor in his failure to be promoted on numerous occasions? The AJ found on remand that he did, at least for two promotions denied in 2014. And fourth, has the agency shown by clear and convincing evidence that it would not have promoted Delgado regardless of these disclosures? The AJ took evidence on this question but did not answer it. We find that the agency had the opportunity to make its case and failed to do so; there is no need for a further hearing on it.

II. *Delgado's Protected Disclosures*

The first contested issue is whether Delgado made a protected disclosure. We held in *Delgado I* that he had properly *alleged* a protected disclosure in his filings with the Office of Special Counsel and before the Board. Delgado alleged that he met with two supervisors on February 4, 2014 and reported to them his belief that a fellow agent (Labno) had committed perjury in a federal criminal trial where Delgado, Labno, and other agents had testified. The testimony concerned an attempted undercover drug buy in which Labno was robbed by the suspected drug dealers. Labno fired shots at the fleeing robbers, and whether his shots were justified was disputed in the trial of one suspected (then convicted) dealer. The Administrative Judge and Board had held that Delgado had not alleged a protected disclosure because he had not told his supervisors that he definitely believed Labno had acted with the mens rea necessary for perjury, and his disclosure left open the possibility that Labno had been honestly mistaken on some key details in his testimony relevant to whether the shooting was justified. 880 F.3d at 921.

As we explained in *Delgado I*, the relevant language of the Act does not require a disclosure to assert a violation of law as definitively as the Board had required of Delgado. The Act protects a disclosure that the employee "reasonably believes evidences" a violation of the law. 5 U.S.C. § 2302(b)(8). Our decision squarely rejected the Board's rationale for finding that Delgado's disclosure was not protected. Under

paragraph (b)(8), a whistleblower need not assert that he has definitive proof of a violation of law, such that he is confident that all innocent explanations can be refuted. 880 F.3d at 922.

Under the federal Act, whistleblowers are protected even if their disclosures fall short of a complete investigative report that leaves no room for disagreement or rebuttal. They are protected even if a more complete investigation or hearing ultimately shows that their suspicions were not correct. The Act leaves federal managers and supervisors with the power and responsibility to choose whether to investigate and ultimately to decide whether reported suspicions were correct. What the Act prohibits is retaliation—punishment—for employees who speak up about their reasonable suspicions of wrongdoing.

After all, managers in federal agencies are supposed to react to and investigate relevant information about their agencies even if—especially if—important facts are not yet known. The Office of Special Counsel itself is supposed to be in the business of conducting investigations. It should not merely wait for intrepid employees to conduct their own investigations, to prepare complete and definitive investigative reports, delivered to the Office tied up in ribbons. In *Delgado I*, we concluded: "Delgado's submission to the Board makes clear that he informed his ATF supervisors that Labno might well have committed perjury and that an investigation was called for. That is sufficient for the disclosure to be protected under 5 U.S.C. § 2302(b)(8)." 880 F.3d at 922–23; accord, e.g., *Drake v. Agency for*

International Development, 543 F.3d 1377, 1382 (Fed. Cir. 2008) (reversing Board's finding that employee's disclosure was not protected because it did not definitively show violation of law).

In holding that, contrary to the Board's view, Delgado had sufficiently alleged a protected disclosure in his administrative filings, we did not and could not find that he had proven it. That was a question for the evidentiary hearing after our remand. One can imagine, after all, that the ATF supervisors might have testified credibly that Delgado made no such disclosure. That is not what happened. Delgado's supervisors agreed in substance with his account of his disclosure. They took his report seriously enough that they relayed it to the ATF's Special Agent in Charge in Chicago and to the United States Attorney's Office. There was no factual dispute material to whether his February 4, 2014 disclosure was protected.

One would think, therefore, that the question of protected disclosure would not have been difficult on remand. To our amazement, however, the Administrative Judge ignored our analysis and decision on this issue in *Delgado I*. She repeated at considerable length her earlier analysis, which the Board had adopted and which we had reversed, asserting that the disclosure was not protected because Delgado had not claimed definitively that Labno had committed perjury. She also conducted a detailed (but oddly mistaken) evaluation of the details of the unsuccessful controlled buy in Chicago and the shooting to decide whether Labno had actually committed perjury or whether the discrepancies

between his testimony and other agents' were more likely the result of honest differences in memory and perspective. See Short App. 44–48. (We say oddly mistaken because the AJ said *four times* in her opinion that the events occurred at night, a fact she used to discount Delgado's observations and to add to the risk of honest mistakes. Everyone else agrees that the events occurred in the middle of the day.) The Administrative Judge's treatment of this issue was an obvious, unexplained, and astonishing example of administrative obduracy.

Under the Act itself, and under our decision in *Delgado I*, the role of the Administrative Judge was not to decide years after the event whether she was dealing with perjury or honest mistakes. The possibility of honest mistakes was well known to everyone involved. They were all experienced law enforcement officers, and the difference between deliberate lies and honest mistakes is always an issue when perjury is possible. That possibility did not bar protection for Delgado's report. (And for what it's worth, Delgado had a clear view of the relevant events, in broad daylight, and Labno's version of events was contradicted by other agents as well as by Delgado, and served to justify Labno's shooting of his firearm in controversial circumstances. The facts known to Delgado did not definitively prove perjury, but they provided reasonable evidence to believe that it occurred and that further investigation would have been warranted.)

In finding that Delgado's disclosure was not protected, the Administrative Judge also relied in part on

the fact that there had been a history of friction between Delgado and Labno, and she wrote that the Whistleblower Protection Act was not intended as a vehicle for resolving such conflicts. That portion of the AJ's decision reflected another legal error. The Act provides specifically: "A disclosure shall not be excluded from subsection (b)(8) because of the employee's or applicant's motive for making the disclosure." 5 U.S.C. § 2302(f)(1)(C). Again, the central issue under the Act is not the motive for a disclosure or friction between employees, but whether managers retaliated against an employee for making a protected disclosure.

In *Baez-Sanchez v. Barr*, we summarized the basic rules here: Under the rule of law, an agency that is unhappy with a court's decision on judicial review may appeal further or perhaps seek legislation to change the applicable law for future cases. The agency may not pretend the court did not make its decision. See 947 F.3d at 1036.

In more doctrinal terms, the agency here disregarded the law of the case, which "prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances." *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014), quoting *United States v. Polland*, 56 F.3d 776, 779 (7th Cir. 1995). The law-of-the-case doctrine applies to judicial review of administrative decisions. *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998), citing *Chicago & Nw. Transp. Co. v. United States*, 574 F.2d 926, 929– 30 (7th Cir. 1978), citing in turn *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529,

532–33 (7th Cir. 1953). The law-of-the-case doctrine is a corollary of the mandate rule, which "requires a lower court"—here, an administrative tribunal—"to adhere to the commands of a higher court on remand." *Adams*, 746 F.3d at 744; accord, *Baez-Sanchez*, 947 F.3d at 1036.

The law-of-the-case doctrine and mandate rule are not inflexible. They may bend in "sufficiently compelling circumstances," such as "subsequent factual discoveries or changes in the law." *Carmody v. Bd. of Trustees*, 893 F.3d 397, 407–08 (7th Cir. 2018), citing *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005). The Administrative Judge did not, however, rely on any new evidence or intervening changes in law. Instead, she repeated her earlier and erroneous analysis, as if we had not ruled. We did not remand so that the AJ could flout our order. Delgado's February 4, 2014 disclosure that he suspected perjury by Labno was a protected disclosure under § 2302(b)(8).

We must note here a procedural complication. The AJ actually decided not one but two cases involving Delgado, which the parties call the 2014 Case and the 2018 Case. The 2014 Case is the same one that we remanded before, stemming from Delgado's 2014 complaint to the Office of Special Counsel. While his first petition for judicial review was pending, Delgado filed a new complaint with the Office of Special Counsel that has become the 2018 Case. In the 2018 Case, Delgado asserted that he had been retaliated against again when he was denied promotions he sought in 2016. The AJ issued separate written decisions on the

two cases on successive days, and Delgado's current petition for judicial review challenges both.

The treatment of the protected disclosure issue was not any better with Delgado's 2018 Case. The Administrative Judge's separate order on the 2018 Case repeated her adherence to the reasoning we had reversed in *Delgado I*. She held that Delgado had made no protected disclosure. The AJ refused to follow the law of the case, making her 2018 Case decision arbitrary, capricious, and contrary to law for the reasons that also apply to the 2014 Case.

There are a couple of additional wrinkles to the 2018 Case. The Administrative Judge focused on Delgado's email on November 13, 2016 to Attorney General Lynch, the Office of Inspector General, and several members of Congress. Delgado sent that email after the key alleged acts of retaliation he alleged: denial of promotions for which Delgado interviewed in August and October 2016. The AJ found that the timing prevented this later disclosure from being a protected disclosure under the statute. Short App. 38.

That reliance on sequence is usually reasonable in evaluating retaliation claims. The problem here is that Administrative Judge erred in thinking that Delgado's 2018 Case was limited to the November 13, 2016 email. Throughout 2014, 2015, and 2016, Delgado had been emailing and speaking with various ASACs (assistant special agents in charge) and SACs (special agents in charge) before his November 13, 2016 email. Those earlier disclosures were protected under the Act just like

his original disclosure on February 4, 2014. The decision-makers in the 2016 promotion denials knew about the larger history of Delgado's earlier disclosures. To the extent the AJ held otherwise, that holding was also arbitrary and capricious. It failed to come to grips with Delgado's actual allegations and evidence.[2]

III. *Causation of Denied Promotions*

The most significant issue for remand was causation: could Delgado show that his protected disclosure was a factor in any adverse employment decisions, and in particular in any decisions not to promote him to positions for which he was qualified? The Administrative Judge did her job properly on this issue, at least with respect to the 2014 Case, hearing testimony and making the necessary findings. Those findings favored Delgado.

After his original disclosure to the ASACs, Delgado sought promotions from his GS-13 position. He applied for several GS-14 jobs beginning in March 2014, just a month after his first protected disclosure. Such a promotion would have come with a pay increase and placed Delgado in a supervisory capacity over groups of ATF special agents. (The details vary, of course, based on the specific positions.) From 2014 to

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[2] Delgado's November 2016 email and his administrative complaints also alleged some additional, more recent incidents of suspected wrongdoing within the agency. The AJ found that those disclosures were not protected, and Delgado has not pursued those matters before us.

the time of his hearing in 2018, Delgado continued to apply for dozens of GS-14 positions. He was not selected for any of them despite, he argues, having all of the required qualifications.

We focus on two promotions that Delgado did not receive in early 2014. Before those specifics, though, a word about the rather formal interview and promotion process at ATF. Interviews are conducted by a Merit Promotion Board comprised of four people, one of whom must be the "receiving manager" for the position, meaning the supervisor who will manage the selected applicant. Each candidate is asked a predetermined set of questions, and each interviewer scores each candidate's answers. After all interviews are complete, the panel meets formally and deliberates on the record. The receiving manager speaks last so as not to bias the others' views. Despite these formal procedures, the panel may discuss each candidate immediately following the interview. Those discussions are off the record, and panel members may change their scores during this time.

In March 2014 Delgado interviewed but was not selected for two GS-14 Group Supervisor positions (in the intelligence group and the joint terrorism task force, respectively) in ATF's Chicago Field Division. ASAC Durastanti, to whom Delgado made his first protected disclosure on February 4, 2014, served as the receiving manager on the Merit Promotion Board evaluating Delgado for both positions. Delgado argues that ASAC Durastanti decided not to promote him to

these positions because of his protected disclosure about Labno.

The Administrative Judge found that Delgado's non-selections for both of the GS-14 promotions in early 2014 were caused by his disclosure:

> Applying the knowledge/timing test, ASAC Durastanti was a member of the selection panel for both vacancies, and was aware of the alleged protected disclosure because it was made to him. The non-selections took place within six weeks after the appellant made the alleged protected disclosure, satisfying the requirement that personnel actions occur "within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action."

Short App. 7, citing *Carey v. Department of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 11 (2003), and *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶ 19 (2014).

If the Administrative Judge had ruled correctly that Delgado's disclosure was protected, her ruling on that point coupled with her finding that his disclosure was a contributing factor in his non-selections would have been enough, as a matter of law, to find that Delgado had carried his burden with respect to the March 2014 denials of promotions. All that should have been left for the AJ to do was to allow the agency to present its rebuttal case and then render a full decision on the merits.

While Delgado's 2014 formal complaint was pending, he continued to apply for promotions, leading to the 2018 Case. His more recent claims before the Administrative Judge and here on judicial review focus primarily on his 2016 applications to serve as the resident agent-in-charge of the Rockford, Illinois office, and for another group supervisor position in the Chicago Field Division. By 2016, the leadership of the Chicago Field Division office had been replaced: the SAC and two ASACs were all new to the office. Yet all three new managers were aware of the January 2012 incident and Delgado's disclosures about Labno. In September 2016, the new SAC had even talked with Delgado's former supervisor, Nicholas Starcevic (who by 2016 had transferred to ATF headquarters in Washington), about the possibility of promoting Delgado. The new SAC said he could not promote Delgado because "[i]t would kill the morale of the Division."

Delgado interviewed for the Rockford position on August 26, 2016 and for the Chicago position on October 24, 2016. ASAC Lauder was the receiving manager on the first panel, and ASAC Fragoso was the receiving manager on the other. Delgado was not chosen for either—*even though he was the only candidate on the Best Qualified List for the Chicago position.*

The agency did not dispute evidence that showed that the officials on the interview panel for the GS-14 positions in 2016 knew about Delgado's history of disclosures pertaining to Labno's testimony at the dealer's trial. Those officials, the SAC and both ASACs, talked with Delgado about those disclosures only a few

months before making decisions not to promote him. Contrary to the AJ's ruling, that's all that Delgado needed to show to satisfy the knowledge/timing test and to carry his burden of proof as to whether his protected disclosures were a contributing factor in the adverse personnel actions taken against him. The AJ's decision on this point was also arbitrary and capricious.

IV. *The Agency's Right of Rebuttal*

Cutting through the Administrative Judge's failures to comply with our remand order, we find that the combination of our prior decision, Delgado's evidence at the hearing, and the AJ's findings on causation in the 2014 Case establish together that Delgado carried his burden of proof for both the 2014 and 2018 Cases. He made protected disclosures, he suffered adverse actions, he exhausted his remedies before the Office of Special Counsel, and he has shown via the knowledge/timing test that his protected disclosure was a contributing factor in his not being promoted to GS-14 in 2014 and again in 2016. Accordingly, he is entitled to corrective action unless "the agency demonstrate[d] by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2).

The Administrative Judge did not make findings on whether the agency carried its rebuttal burden because she found, arbitrarily, capriciously, and in defiance of our remand order, that Delgado had not even

made any protected disclosures. The government argues that if we find that the AJ's decisions under review cannot be affirmed, we should remand yet again so that the AJ can make findings on the agency's rebuttal case. We are mindful of the agency's statutory right, but we find such a remand unnecessary. The agency's evidence and arguments have already been heard. Its evidence fell short of satisfying the defense, both as to the March 2014 promotions and especially as to the 2016 promotion Delgado was denied despite being the only qualified candidate.

The Administrative Judge held a three-day evidentiary hearing with numerous witnesses. Neither party argues here that the record is incomplete. The AJ made clear that she expected the parties to offer their evidence on all the issues, including the agency's affirmative defense.[3] The AJ ended the evidentiary hearing by ordering the parties to submit their closing arguments in the form of written briefs, due nearly three months after the hearing. In its written closing argument, the agency argued: "The undisputed evidence of record also shows that the Agency

[3] For example, at one point in the hearing the agency objected to Delgado's testimony regarding his opinion of another applicant for one of the GS-14 positions. The AJ allowed that testimony, saying, "Okay, I'm going to have to allow this because, you know, if the Appellant meets all of his burden, as we've discussed and is in the pre-hearing conference order, then the Agency has to show, by clear and convincing evidence, that it would have taken the same actions anyway. So, I think the Appellant's opinion here is relevant to that. So, I'm going to allow some leeway."

demonstrated by clear and convincing evidence that it would have taken the same personnel actions—non-selecting Appellant for the three positions—regardless of the Appellant's protected disclosure." The agency's brief then marshaled its best arguments in favor of its rebuttal burden.

In short, the agency's rebuttal was on the record and was fully before the Administrative Judge. She did not reach that issue only because of the errors in her analysis of Delgado's prima facie case. On review, however, it is apparent that the agency's evidence and rebuttal arguments fall well short of a "clear and convincing" showing required by statute. The agency's closing brief of February 2019 made three primary arguments. The agency argued that the November 13, 2016 email that Delgado sent to then-Attorney General Lynch and others could not have influenced his non-selection for the 2016 GS-14 vacancies because members of the interview panel were unaware of this email. This is a rehash of the knowledge/timing analysis that we rejected above. The decision-makers were not aware of that particular email, but they were certainly aware of Delgado's history of protected disclosures on exactly the same issue.

The agency then touted the qualifications of the other agents who were selected for those positions. We might need to remand for further findings as to some of the promotions if the case depended on them. We are convinced, however, that such a remand is not appropriate at this stage of this longterm litigation siege.

First, we cannot overlook the Board's inexplicable refusal to comply with our previous remand order, nor the ATF's successful efforts to persuade the Board to flout the law of this case on whether Delgado engaged in protected activity.

Second, our review of the record persuades us that the agency's evidence cannot meet the high bar of "clear and convincing evidence" needed to establish the affirmative defense. See *Miller v. Dep't of Justice*, 842 F.3d 1252, 1257–58 (Fed. Cir. 2016) (reversing Board finding that agency had proven this defense, which was not supported by substantial evidence), quoting *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (vacating Board finding that agency had proven this defense; Board erroneously excluded or ignored critical evidence). The Federal Circuit, which hears most federal whistle-blower cases, has explained:

> Whether evidence is sufficiently clear and convincing to carry this burden of proof cannot be evaluated by looking only at the evidence that supports the conclusion reached. Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.

Whitmore, 680 F.3d at 1368.

Reviewing the record as a whole, we find that one of the most striking points is Delgado's status as the

only candidate on the Best Qualified List for the October 2016 promotion. This fact did not, by itself, entitle Delgado to the promotion, but there was more. Delgado had previously led the Chicago group in an acting position. And the receiving manager on the promotion panel was one of the assistant special agents in charge in Chicago, who reported to the special agent in charge. This is relevant because Delgado offered an undisputed affidavit from a senior ATF official stating that a month or two before the 2016 decision not to promote Delgado, the special agent in charge of the Chicago office told him, "I can't promote this guy. It would kill the morale of the Division." Pet'r's App. 208–09. (By the time of the hearing, the special agent in charge had retired. He refused to testify voluntarily; neither side subpoenaed him.)

The Administrative Judge discounted this testimony without a more explicit link between this comment and the actions of the assistant special agent in charge on the promotion panel. With respect, since the special agent in charge had such strong feelings on the subject as to volunteer his views to a colleague at ATF headquarters, we find it hard to imagine that the special agent in charge had not made those views about Delgado known to his assistant special agent in charge.[4]

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[4] Other portions of the official's affidavit provided substantial evidence that hostility to Delgado in the Chicago office was widespread in the wake of the Labno incident. When the official started in Chicago, "numerous personnel" advised him to stay away from Delgado, and key supervisors refused to support

The evidence from that 2016 promotion board indicates that the assistant special agent in charge played a decisive role in convincing the panel not to promote Delgado. Two of the other three members of the panel actually scratched out and lowered their scores for Delgado's answers after the assistant special assistant in charge explained his views to them. See Pet'r's App. 120–21, 338–43, 373–75. Moreover, the testimony of the assistant special agent in charge explaining his reasons for not promoting Delgado was so inconsistent with the record that it could support a finding of pretext. Considering the record as a whole, the ATF's evidence regarding the 2016 denial could not reasonably be deemed to clear the high bar of "clear and convincing evidence" needed to establish the affirmative defense.

Regarding the March 2014 decisions not to promote Delgado, the then-assistant special agent in charge, who had been angry about Delgado's protected disclosure regarding Labno, was on the promotion panel. Evidence from both Delgado and the panel showed that the assistant special agent in charge set ground rules for Delgado's interview that prevented him from answering questions based on his extensive experience with the United States Air Force. That put Delgado at a significant disadvantage. Pet'r's App. 221–22 & 232. One of the two selected candidates had less, and less relevant, experience. And the panel members described the other as "a bit rough around the

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Delgado's investigations. The hostility stemmed from the Labno shooting incident. Pet'r's App. 208.

edges." Administrative R. 188, ECF No. 51-4. Overall, the agency's highly subjective explanations for not promoting the qualified and more experienced Delgado just weeks after his whistleblowing also cannot clear the high bar of "clear and convincing evidence."

Finally, the sheer number of promotions Delgado was qualified for but denied in the wake of his protected disclosure weighs against the affirmative defense. Perhaps one or two might be explained away. But there is ample evidence here of widespread resentment of Delgado's protected disclosure and too many denials to accept all of the agency's explanations as clear and convincing. After his protected disclosure, Delgado's career was going nowhere. Reviewing the record as a whole, we conclude that a remand on the agency's affirmative defense would waste both judicial and the parties' resources. Moreover, based on the response to our first remand, we must say with regret that we are not confident that such an order would be faithfully implemented.

Accordingly, we VACATE the decision of the Merit Systems Protection Board in both cases under review. We REMAND only for calculation of damages based on salary and benefits as if Delgado had been promoted, as he should have been, to GS-14 as of March 4, 2014, and for a decision on the merits as to whether he is entitled to any additional relief, including whether he would have received any subsequent promotion to GS-15. If we were remanding to a U.S. district court, we would ensure that a different judge would preside. See Cir. R. 36. Here that choice is left to the Board's